

**FURTHER AMENDED COMMERCIAL LIST RESPONSE OF THE
FOURTH DEFENDANT**

(Filed pursuant to the Orders made by Justice Hammerschlag on 10 December 2020
~~August 2018~~)

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Equity
List	Commercial
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
Number of defendants (if more than two)	11

PREPARATION DETAILS

Prepared for	<u>Robert Watson and Erica Gay, as the legal personal representatives for the estate of the late John Eugene Gay</u>Eugene Gay, the Fourth Defendant
Filed in relation to	Plaintiff's Claim
Legal representative	Richard Mereine HWL Ebsworth Lawyers
Legal representative reference	RM:NP:881154
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A NATURE OF DISPUTE

- 1 The Fourth Defendant agrees with the general description of the Plaintiffs' statement of the nature of the dispute in the Further Amended Commercial List Statement filed on 21 August 2020~~2018~~ (**Further Amended Commercial List Statement**).

B ISSUES LIKELY TO ARISE

- 1 The Fourth Defendant agrees generally that insofar as they concern the late John Eugene Gay (Mr Gay) him the issues identified by the Plaintiffs in the Further Amended Commercial List Statement are likely to arise in the proceeding.
- 2 Further, the Fourth Defendant says that the following additional issues are also likely to arise in the proceeding:
 - (a) Whether ~~the Fourth Defendant~~ Mr Gay owed the alleged duties to the Plaintiffs.
 - (b) Whether the proceeding is statute barred as not having been commenced within the time prescribed by:
 - (i) section 1317K of the *Corporations Act 2001* (Cth) (**Act**);
 - (ii) section 601MA(2) of the Act;
 - (iii) section 1325(4) of the Act; and/or
 - (iv) section 24(2) of the *Limitation Act 1974* (TAS), further or alternatively section 48 of the *Limitation Act 1969* (NSW).
 - (c) Whether the Plaintiffs' are barred by laches and acquiescence.
 - (d) Whether ~~the Fourth Defendant~~ Mr Gay should be excused pursuant to sections 1317S(2) and/or 1318 of the Act.
 - (e) Whether the claim against the Fourth Defendant is an apportionable claim within the meaning of section 43A(1) of the *Civil Liability Act*

2002 (TAS), alternatively section 34(1) of the *Civil Liability Act 2002* (NSW).

C FOURTH DEFENDANT'S RESPONSES TO PLAINTIFFS' CONTENTIONS

C1 GPL, GUNNS LTD AND THE DEFENDANTS

GPL

- 1 The Fourth Defendant admits each of the allegations in paragraph 1 of the Plaintiffs' Contentions in the Further Amended Commercial List Statement (**Plaintiffs' Contentions**).

Gunns Ltd

- 2 The Fourth Defendant admits each of the allegations in paragraph 2 of the Plaintiffs' Contentions.
- 3 The Fourth Defendant admits each of the allegations in paragraph 3 of the Plaintiffs' Contentions.

Directors and Officers of Gunns Ltd and GPL

- 4 As to paragraph 4 of the Plaintiffs' Contentions, the Fourth Defendant:
 - (a) says that the Third Defendant was the company secretary of GPL and Gunns Ltd while Mr Gay he was a director of GPL and Gunns Ltd;
 - (b) refers to paragraph 82(e) below; and
 - (c) otherwise does not admit each of the allegations in paragraph 4 of the Plaintiffs' Contentions.
- 5 The Fourth Defendant admits each of the allegations in paragraph 5 of the Plaintiffs' Contentions.
- 6 As to paragraph 6 of the Plaintiffs' Contentions, the Fourth Defendant:
 - (a) says that the Fifth Defendant was a director of GPL while Mr Gay he was a director of GPL;

- (b) refers to and repeats paragraph 82(f) below; and
- (c) otherwise does not admit each of the allegations in paragraph 6 of the Plaintiffs' Contentions.

7 As to paragraph 7 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that the Sixth Defendant was a director of GPL while Mr Gay was a director of GPL;
- (b) refers to paragraph 82(d) below; and
- (c) otherwise does not admit each of the allegations in paragraph 7 of the Plaintiffs' Contentions.

8 As to paragraph 8 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that the Seventh Defendant was a director of GPL while Mr Gay was a director of GPL;
- (b) refers to and repeats paragraph 82(g) below; and
- (c) otherwise does not admit each of the allegations in paragraph 8 of the Plaintiffs' Contentions.

9 As to paragraph 9 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that the Eighth Defendant was a director of GPL while Mr Gay was a director of GPL;
- (b) says that the Eighth Defendant was a director of Gunns Ltd from 29 August 1996 to 5 May 2010; and
- (c) otherwise does not admit each of the allegations in paragraph 9 of the Plaintiffs' Contentions.

10 As to paragraph 10 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that the Ninth Defendant was a director of Gunns Ltd from 27 March 2008 to 20 July 2012; and
- (b) otherwise does not admit each of the allegations in paragraph 10 of the Plaintiffs' Contentions.

- 11 As to paragraph 11 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) says that Mr Gayhe was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions; and
 - (b) otherwise does not admit each of the allegations in paragraph 11 of the Plaintiffs' Contentions.

~~Tenth and Eleventh Defendants~~ KPMG

- 12 As to paragraph 12 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) admits that while Mr Gayhe was a director of GPL and Gunns Ltd **(Relevant Period)**:
 - (i) the accounting firm known as KPMG was the auditor for Gunns Ltd and GPL;
 - (ii) the accounting firm known as KPMG was the compliance plan auditor for each of the Gunns Woodlot Schemes;
 - (iii) the Tenth Defendant was responsible for the conduct of the compliance plan audits for the financial years ending 30 June 2005 to 30 June 2009 in respect of the relevant Original Compliance Plans (as defined in paragraph 54 of the Plaintiffs' Contentions); and
 - (iv) the Eleventh Defendant was responsible for the conduct of the compliance plan audit for the financial year ending 30 June 2003 in respect of the relevant Original Compliance Plans (as defined in paragraph 54 of the Plaintiffs' Contentions);
 - (b) says that during the Relevant Period:
 - (i) Mr M H Cooke of KPMG was responsible for the conduct of the financial audits of Gunns Ltd and GPL for the financial years ending 30 June 2002 and 30 June 2003;
 - (ii) the Eleventh Defendant was responsible for the conduct of the financial audits of Gunns Ltd and GPL for the financial years

ending 30 June 2004, 30 June 2005, 30 June 2006 and 30 June 2007;

(iii) the Eleventh Defendant was responsible for the conduct of the financial audit of Gunns Ltd for the financial year ending 30 June 2008;

(iv) Mr David Howie of KPMG was responsible for the conduct of the financial audit of GPL for the financial year ending 30 June 2008;

(v) Mr Leigh Franklin of KPMG was responsible for the conduct of the financial audits of Gunns Ltd and GPL for the financial year ending 30 June 2009; and,

(c) otherwise does not admit each of the allegations in paragraph 12 of the Plaintiffs' Contentions.

13 The Fourth Defendant does not admit each of the allegations in paragraph 13 of the Plaintiffs' Contentions.

CATLIN

13A Subject to the full terms and effect of the Investment Management Insurance issued to GPL which will be relied on at trial, the Fourth Defendant admits paragraph 13A of the Plaintiffs' Contentions.

CHUBB

13B Subject to the full terms and effect of the Chubb Policy which will be relied on at trial, the Fourth Defendant admits paragraph 13B of the Plaintiffs' Contentions.

C.2 OPERATION OF THE GUNNS WOODLOT SCHEMES

Background of Woodlot Schemes

14 The Fourth Defendant admits each of the allegations in paragraph 14 of the Plaintiffs' Contentions insofar as the particular Gunns Woodlot Scheme was established or operated during the Relevant Period.

- 15 The Fourth Defendant admits each of the allegations in paragraph 15 of the Plaintiffs' Contentions insofar as the particular Gunns Woodlot Scheme was established or operated during the Relevant Period.
- 16 The Fourth Defendant admits each of the allegations in paragraph 16 of the Plaintiffs' Contentions.
- 17 As to paragraph 17 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) says that during the Relevant Period the 2002, 2003 and 2005 Gunns Woodlot Schemes were governed by a:
 - (i) Constitution;
 - (ii) Management Agreement;
 - (iii) Maintenance Services Sub-contracting Agreement;
 - (iv) Forestry Right Deed;
 - (v) Forestry Right Lease Deed; and
 - (vi) Compliance Plan,(together, the **2002, 2003 and 2005 Scheme Documents**);
 - (b) says that the during the Relevant Period the 2006, 2008 and 2009 Gunns Woodlot Schemes were governed by a:
 - (i) Constitution;
 - (ii) Management Agreement;
 - (iii) Maintenance Services Sub-contracting Agreement;
 - (iv) Forestry Right Deed;
 - (v) Sub-Forestry Right Deed; and
 - (vi) Compliance Plan,(together, the **2006, 2008 and 2009 Scheme Documents**);

and,

- (c) otherwise does not admit each of the allegations in paragraph 17 of the Plaintiffs' Contentions.

18 As to paragraph 18 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) does not admit that each of the Plaintiffs and Group Members complied with the conditions of the 2002, 2003 and 2005 Scheme Documents or the 2006, 2008 and 2009 Scheme Documents so as to become Members and Growers under those documents;
- (b) admits each of the allegations in paragraphs 18.2(a) to 18.2(e) of the Plaintiffs' Contentions;
- (c) admits that GPL was the responsible entity under the Original Compliance Plans (as defined in paragraph 54 of the Plaintiffs' Contentions);
- (d) admits that Gunns Ltd was the Custodian for the purposes of the Constitutions, denies that Gunns Ltd was appointed under the Management Agreements and says that Gunns Ltd was solely a party to the Management Agreements for the purposes of clause 12; and

Particulars

- A. Clause 26.10 of the Management Agreement for the 2002 Gunns Woodlot Scheme.
- B. Clause 25.10 of the Management Agreements for the 2003 to 2008 and 2009 Gunns Woodlot Schemes.
- (e) otherwise does not admit each of the allegations in paragraph 18 of the Plaintiffs' Contentions.

19 As to paragraph 19 of the Plaintiffs' Contentions, in respect of each Gunns Woodlot Scheme established or operated during the Relevant Period, the Fourth Defendant:

- (a) denies that the Gunns Woodlot Schemes were offered solely on the basis alleged in paragraph 19 of the Plaintiffs' Contentions;
- (b) says that at trial ~~they~~he will rely on the full terms and effect of the 2002, 2003 and 2005 Scheme Documents, the 2006, 2008 and 2009 Scheme Documents and the Product Disclosure Statements for each of the Gunns Woodlot Schemes;
- (c) says that in respect of the 2002, 2003 and 2005 Gunns Woodlot Schemes Growers were offered the opportunity to lease a Forestry Right over Woodlots of approximately one hectare in the Project for a one-off Application Fee per Woodlot;
- (d) says that in respect of the 2006, 2008 and 2009 Gunns Woodlot Schemes Growers were offered the opportunity to acquire a Forestry Right over Woodlots of approximately one hectare in the Project for a one-off Application Fee per Woodlot;
- (e) says that other than pruning fees, Growers were not required to make payments for planting or ongoing rental or maintenance as those fees would be deducted from the Wood Sale Proceeds;
- (f) says that the Application Fee and the pruning fees were 100% tax deductible in the tax year in which they were paid; and
- (g) otherwise does not admit each of the allegations in paragraph 19 of the Plaintiffs' Contentions.

20 As to paragraph 20 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) admits that during the Relevant Period Gunns Ltd owned some of the land on which the plantations were located; and
- (b) otherwise does not admit each of the allegations in paragraph 20 of the Plaintiffs' Contentions.

- 21 As to paragraph 21 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) admits that for the purpose of each Gunns Woodlot Scheme which was established or operated during the Relevant Period, GPL entered into Forestry Right Deeds with landowners; and
 - (b) otherwise does not admit each of the allegations in paragraph 21 of the Plaintiffs' Contentions.
- 22 As to paragraph 22 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) subject to the full terms and effect of the Forestry Right Deeds which will be relied on at trial, admits the allegations in paragraph 22 of the Plaintiffs' Contentions to the extent that they relate to the Gunns Woodlot Schemes which were established or operated during the Relevant Period;
 - (b) says that the Forestry Right Fees were payable in arrears; and
 - (c) otherwise does not admit each of the allegations in paragraph 22 of the Plaintiffs' Contentions.
- 23 As to paragraph 23 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) subject to the full terms and effect of the Forestry Right Deeds which will be relied on at trial, and only insofar as the allegations relate to the Gunns Woodlot Schemes that were established or operated during the Relevant Period, admits that the landowners granted the Forestry Rights alleged in paragraphs 23.1 to 23.4 of the Plaintiffs' Contentions;
 - (b) denies that a landowner granted the rights in clause 3.1 of the Forestry Right Deed (**Forestry Rights**) to GPL upon payment of the Forestry Right Fee;
 - (c) says that a landowner granted the Forestry Rights to GPL upon execution of the Forestry Right Deed;
 - (d) says that GPL was required to pay the Forestry Right Fee to the landowner in arrears; and

- (e) otherwise does not admit each of the allegations in paragraph 23 of the Plaintiffs' Contentions.

Particulars

Clauses 3.1, 3.2 and 6.1 of the Forestry
Right Deeds.

- 24 As to paragraph 24 of the Plaintiffs' Contentions, the Fourth Defendant:
 - (a) subject to the full terms and effect of the Forestry Right Deeds which will be relied on at trial, and only insofar as the allegations relate to the Gunns Woodlot Schemes that were established or operated during the Relevant Period, admits the allegations in paragraph 24 of the Plaintiffs' Contentions; and
 - (b) otherwise does not admit each of the allegations in paragraph 24 of the Plaintiffs' Contentions.

- 25 As to paragraph 25 of the Plaintiffs' Contentions, the Fourth Defendant:
 - (a) subject to the full terms and effect of the Forestry Right Deeds which will be relied on at trial, and only insofar as the allegations relate to the 2002, 2003 and 2005 Gunns Woodlot Schemes that were established or operated during the Relevant Period, admits the allegations in paragraph 25 of the Plaintiffs' Contentions;
 - (b) says that in respect of the 2006, 2008 and 2009 Gunns Woodlot Schemes GPL was permitted to licence or grant some or all of the rights granted to it under the Forestry Right Deeds to a third party; and
 - (c) otherwise does not admit each of the allegations in paragraph 25 of the Plaintiffs' Contentions.

Particulars

Clause 9.2 of the Forestry Right Deeds
for the 2006, 2008 and 2009 Gunns
Woodlot Schemes.

- 26 As to paragraph 26 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) subject to the full terms and effect of the Forestry Right Deeds and Forestry Right Lease Deeds which will be relied on at trial, admits in respect of the 2002, 2003 and 2005 Gunns Woodlot Schemes that were established or operated during the Relevant Period, GPL leased the 'Forestry Rights' under the Forestry Right Lease Deed to Growers only insofar as the allegations relate to the 2002, 2003 and 2005 Gunns Woodlot Schemes that were established or operated during the Relevant Period, admits the allegations in paragraph 26 of the Plaintiffs' Contentions;
 - (b) subject to the full terms and effect of the Forestry Right Deeds and Sub-Forestry Right Deeds which will be relied on at trial, admits says that in respect of the 2006, 2008 and 2009 Gunns Woodlot Schemes, GPL granted to the Grower the rights granted to GPL in respect of the Woodlot under clause 3 of the Sub-Forestry Right Deed; and
 - (c) otherwise does not admit each of the allegations in paragraph 26 of the Plaintiffs' Contentions.

Particulars

Clause 3 of the Sub-Forestry Right Deeds
for the 2006, 2008 and 2009 Gunns Woodlot
Schemes.

- 27 As to paragraph 27 of the Plaintiffs' Contentions, the Fourth Defendant subject to the full terms and effect of the Forestry Right Lease Deeds and Sub-Forestry Right Deeds which will be relied on at trial, admits the allegations in paragraph 27.:
- (a) ~~subject to the full terms and effect of the Forestry Right Deeds which will be relied on at trial, and only insofar as the allegations relate to the 2002, 2003 and 2005 Gunns Woodlot Schemes that were established or operated during the Relevant Period, admits the allegations in paragraph 27 of the Plaintiffs' Contentions;~~

- (b) ~~says that in respect of the 2006, 2008 and 2009 Gunns Woodlot Schemes the Sub-Forestry Right Deeds terminated if the Forestry Right Deeds terminated for any reason; and~~
- (c) ~~otherwise does not admit each of the allegations in paragraph 27 of the Plaintiffs' Contentions.~~

Particulars

~~Clause 5.3 of the Sub-Forestry Right Deeds for the 2006, 2008 and 2009 Gunns Woodlot Schemes.~~

Establishment and Management of the Woodlots

- 28 As to paragraph 28 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) subject to the full terms and effect of the Management Agreements which will be relied on at trial, and only to the extent that Management Agreements were in effect during the Relevant Period, admits that GPL was required to provide the services alleged in paragraphs 28.1 and 28.2 of the Plaintiffs' Contentions; and
- (b) otherwise does not admit each of the allegations in paragraph 28 of the Plaintiffs' Contentions.
- 29 As to paragraph 29 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) subject to the full terms and effect of the Management Agreements which will be relied on at trial, and only to the extent that Management Agreements were in effect during the Relevant Period, admits that the matters alleged in paragraph 29 of the Plaintiffs' Contentions were included within the Establishment and Planting Services (as defined in paragraph 28.1 of the Plaintiffs' Contentions) to be provided under the Management Agreements; and
- (b) otherwise does not admit each of the allegations in paragraph 29 of the Plaintiffs' Contentions.
- 30 As to paragraph 30 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that in respect of the 2002 Gunns Woodlot Scheme the Management Agreement provided that:
- (i) GPL was required to use its best endeavours to complete the Establishment Services (as defined in the Management Agreement) by 30 June in the year the application was made;
 - (ii) GPL was required to use its best endeavours to complete the Planting Services (as defined in the Management Agreement) before 30 June 2003 for applications made before 30 June 2002 and 30 June 2004 for applications made after 30 June 2002; and
 - (iii) GPL was not liable to the Grower for any loss or damage caused to the Grower by GPL failing to perform services by the relevant time;

Particulars

Clauses 4.1(b), 4.2(b) and 4.2(c) of the Management Agreements for the 2002 Gunns Woodlot Schemes.

- (b) says that in respect of the 2003 Gunns Woodlot Scheme the Management Agreement provided that:
- (i) GPL was required to use its best endeavours to complete the Establishment Services (as defined in the Management Agreement) and the Planting Services (as defined in the Management Agreement) before the earlier of the time alleged by the Plaintiffs and 30 June of the financial year immediately following in which the Establishment Fee was paid; and
 - (ii) GPL was not liable to the Grower for any loss or damage caused to the Grower by GPL for any failure to complete those services by the relevant time;

Particulars

Clauses 4.1(b), 4.1(c), 4.2(b) and 4.2(c) of the Management Agreement for the 2003 Gunns Woodlot Scheme.

- (c) says that in respect of the 2005, 2006 and 2008 Gunns Woodlot Schemes the Management Agreements provided that:
- (i) GPL was required to use its best endeavours to complete the Establishment Services (as defined in the Management Agreements) before the earlier of the time alleged by the Plaintiffs and 30 June of the financial year immediately following the financial year in which the Establishment Fee was paid; and
 - (ii) GPL was not liable to the Grower for any loss or damage caused to the Grower by GPL for any failure to complete those services by the relevant time;

Particulars

Clauses 4(c) and 4(d) of the Management Agreements for the 2005, 2006 and 2008 Gunns Woodlot Schemes.

- (d) says that in respect of the 2009 Gunns Woodlot Scheme the Management Agreement provided that:
- (i) GPL was required to use its best endeavours to complete the Establishment Services within 18 months of the end of the financial year in which the Establishment Fee was paid; and
 - (ii) GPL was not liable to the Grower for any loss or damage caused to the Grower by GPL failing to perform services by the relevant time;

Particulars

Clauses 4(c) and 4(d) of the Management Agreement for the 2009 Gunns Woodlot Schemes.

and,

- (e) otherwise ~~denies~~ does not admit each of the allegations in paragraph 30 of the Plaintiffs' Contentions.

31 There is no paragraph 31.

32 As to paragraph 32 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says there is no paragraph 32.1
- (b) refers to and repeats paragraphs 22(b) and 23(d) above; and
- (c) otherwise does not admit each of the allegations in paragraph 32 of the Plaintiffs' Contentions.

Particulars

Clauses 6.1 and 7(f) of the Forestry Right
Deeds.

33 As to paragraph 33 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that in respect of the 2002 and 2003 Gunns Woodlot Schemes during the Relevant Period:
 - (i) GPL appointed Gunns Ltd as its sub-contractor to perform the Maintenance Services and Planting Services under the Management Agreements on the terms contained in the Maintenance and Planting Services Sub-contracting Agreements which were in effect during the Relevant Period; and
 - (ii) the consideration payable by GPL for the performance of the Maintenance Services and Planting Services under the Management Agreements was an amount equal to the Maintenance Fee, Planting Fee and Sales Commission payable to GPL under each of the Management Agreements and the Rental Fee payable under each of the Forestry Right Lease Deeds;
- (b) says that in respect of the 2005 Gunns Woodlot Scheme during the Relevant Period:

- (i) GPL appointed Gunns Ltd as its sub-contractor to perform the Maintenance Services under the Management Agreements on the terms contained in the Maintenance Services Sub-contracting Agreements which were in effect during the Relevant Period; and
 - (ii) the consideration payable by GPL for the performance of the Maintenance Services under the Management Agreements was an amount equal to the Maintenance Fee and Sales Commission payable to GPL under each of the Management Agreements and the Rental Fee payable under each of the Forestry Right Lease Deeds;
- (c) says that in respect of the 2006 and 2008 Gunns Woodlot Schemes during the Relevant Period:
 - (i) GPL appointed Gunns Ltd as its sub-contractor to perform the Maintenance Services under the Management Agreements on the terms contained in the Maintenance Services Sub-contracting Agreements which were in effect during the Relevant Period; and
 - (ii) the consideration payable by GPL for the performance of the Maintenance Services under the Management Agreements was an amount equal to the Maintenance Fee and Sales Commission payable to GPL under each of the Management Agreements and the Rental Fee payable under each of the Sub-Forestry Right Deeds;
- (d) says that in respect of the 2009 Gunns Woodlot Scheme during the Relevant Period:
 - (i) GPL appointed Gunns Ltd as its sub-contractor to perform the Maintenance Services and Pruning Services under the Management Agreements on the terms contained in the Maintenance Services Sub-contracting Agreements which were in effect during the Relevant Period; and

- (ii) the consideration payable by GPL for the performance of the Maintenance Services under the Management Agreements was an amount equal to the Baseline Pruning Fee, Maintenance Fee and Sales Commission payable to GPL under each of the Management Agreements and the Rental Fee payable under each of the Sub-Forestry Right Deeds;

and,

- (e) otherwise does not admit each of the allegations in paragraph 33 of the Plaintiffs' Contentions.

Particulars

- A. Clauses 3.1 and 4.1 of the Maintenance and Planting Services Sub-contracting Agreements for the 2002 and 2003 Gunns Woodlot Schemes.
- B. Clauses 3.1 and 4.1 of the Maintenance Services Sub-contracting Agreement for the 2005 Gunns Woodlot Scheme.
- C. Clauses 3.1 and 4.1 of the Maintenance Services Sub-contracting Agreements for the 2006 and 2008 Gunns Woodlot Schemes.
- D. Clauses 3.1 and 4.1 of the Maintenance Services Sub-contracting Agreement for the 2009 Gunns Woodlot Scheme.

34 As to paragraph 34 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) admits the allegations in respect of the Maintenance Services Sub-contracting Agreements that were in effect during the Relevant Period; and
- (b) otherwise does not admit each of the allegations in paragraph 34 of the Plaintiffs' Contentions.

- 35 As to paragraph 35 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) says that Mr Gayhe was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions; and
 - (b) otherwise does not admit each of the allegations in paragraph 35 of the Plaintiffs' Contentions.
- 36 As to paragraph 36 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) refers to and repeats paragraph 35(a) above; and
 - (b) otherwise does not admit each of the allegations in paragraph 36 of the Plaintiffs' Contentions.

RE Remuneration under the Schemes

- 37 As to paragraph 37 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) in respect of the 2002 Gunns Woodlot Scheme:
 - (i) says that GPL was not appointed as the agent of an Electing Grower for the sale of wood harvested from trees in the Woodlots;
 - (ii) subject to the full terms and effect of the Management Agreements and only to the extent that the Management Agreements were in effect during the Relevant Period, admits that GPL was appointed as the agent of:
 - A. the remaining Growers (being the non-electing Growers) to sell the Wood on substantially similar terms and conditions as those set out in the Draft Wood Sale Agreement and otherwise in accordance with the terms and conditions of the Management Agreement; and
 - B. all Growers to market, enter into negotiations and commercially exploit the Carbon Rights on such terms and conditions as GPL thought fit;

- (b) in respect of the 2003, 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes, subject to the full terms and effect of the Management Agreements and only to the extent that the Management Agreements were in effect during the Relevant Period, admits that GPL was appointed as the agent of the Growers:
 - (i) to sell the Wood on substantially similar terms and conditions as those set out in the Draft Wood Sale Agreement and otherwise in accordance with the terms and conditions of the Management Agreement; and
 - (ii) to market, enter into negotiations and commercially exploit the Carbon Rights on such terms and conditions as GPL thought fit;
 and,
- (c) otherwise does not admit each of the allegations in paragraph 37 of the Plaintiffs' Contentions.

Particulars

- A. Clauses 11.1 and 11.2 of the Management Agreements for the 2002 Gunns Woodlot Scheme.
- B. Clauses 11.1 and 11.2 of the Management Agreements for the 2003, 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes.

38 As to paragraph 38 of the Plaintiffs' Contentions, in respect of each Gunns Woodlot Scheme established or in operation during the Relevant Period, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 38.1 of the Plaintiffs' Contentions;
- (b) says that in respect of the 2002, 2003 and 2005 Gunns Woodlot Schemes:

- (i) upon being satisfied of the matters specified in clause 7 of the Constitution and being in possession of a duly completed and executed Forestry Right Lease Deed and Management Agreement, GPL was entitled to release, or instruct the Custodian to release, the Application Moneys in payment of the Woodlot Establishment Expenses, being the costs and expenses of performing the duties and obligations of GPL under clause 4 of the Management Agreement;
- (ii) the Application Money (as defined in clauses 1.1 and 4.1 of the Constitution) was equal to the Application Fee (referred to in clause 4.1 of the Constitution and defined in clause 1.1 of the Management Agreement); and
- (iii) payment of the Application Fee constituted full payment of the Establishment Fee, being the fee payable by the Grower to GPL in consideration for the services provided by GPL to the Grower specified in clause 4.1 of the Management Agreement;

Particulars

- A. Clauses 1.1, 4.1, 7 and 8 of the Constitutions in respect of the 2002, 2003 and 2005 Gunns Woodlot Schemes.
- B. Clauses 1.1, 4 and 10.1 of the Management Agreements in respect of the 2002, 2003 and 2005 Gunns Woodlot Schemes.
- C. Sections 3, 5.3, 7, 12, 17.1 and 17.2 of the 2002 Gunns Woodlot Scheme Product Disclosure Statement.
- D. Sections 3, 5.2, 13, 17 and 18.6 of the 2003 Gunns Woodlot Scheme Product Disclosure Statement.

E. Sections 3, 4.1, 5, 8, 14, 18.1 and 18.2 of the 2005 Gunns Woodlot Scheme Product Disclosure Statement.

- (c) says that in respect of the 2006 and 2008 Gunns Woodlot Schemes:
- (i) upon being satisfied of the matters specified in clause 7 of the Constitution and being in possession of a duly completed and executed Sub-Forestry Right Deed and Management Agreement, GPL was entitled to release, or instruct the Custodian to release, the Application Moneys in payment of the Woodlot Establishment Expenses, being the costs and expenses of performing the duties and obligations of GPL under clause 4 of the Management Agreement;
 - (ii) the Application Money (as defined in clauses 1.1 and 4.1 of the Constitution) was equal to the Application Fee (referred to in clause 4.1 of the Constitution and defined in clause 1.1 of the Management Agreement); and
 - (iii) payment of the Application Fee constituted full payment of the Establishment Fee, being the fee payable by the Grower to GPL in consideration for the services provided by GPL to the Grower specified in clause 4.1 of the Management Agreement;

Particulars

- A. Clauses 1.1, 4.1, 7 and 8 of the Constitutions in respect of the 2006 and 2008 Gunns Woodlot Schemes.
- B. Clauses 1.1, 4 and 10.1 of the Management Agreements in respect of the 2006 and 2008 Gunns Woodlot Schemes.
- C. Sections 3, 4.1, 5, 8, 14, 18.1 and 18.2 of the 2006 Gunns Woodlot Scheme Product Disclosure Statement.

D. Sections 3, 4.1, 8, 14, 18.1 and 18.2 of the 2008 Gunns Woodlot Scheme Product Disclosure Statement.

- (d) says that in respect of the 2009 Gunns Woodlot Scheme:
- (i) upon being satisfied of the matters specified in clause 7 of the Constitution and being in possession of a duly completed and executed Sub-Forestry Right Deed and Management Agreement, GPL was entitled to release, or instruct the Custodian to release, the Application Fees in payment of the Woodlot Establishment Expenses, being the costs and expenses of performing the duties and obligations of GPL under clause 4 of the Management Agreement; and
 - (ii) payment of the Application Fee constituted full payment of the Establishment Fee, being the fee payable by the Grower to GPL in consideration for the services provided by GPL to the Grower specified in clause 4 of the Management Agreement;

Particulars

- A. Clauses 1.1, 4.1, 7 and 8 of the Constitution in respect of the 2009 Gunns Woodlot Scheme.
 - B. Clauses 1.1, 4 and 10.1 of the Management Agreement in respect of the 2009 Gunns Woodlot Scheme.
 - C. Sections 12 and 22.7 of the 2009 Gunns Woodlot Scheme Product Disclosure Statement.
- (e) subject to the full terms and effect of the Constitutions which will be relied on at trial, admits that GPL was entitled to the income earned from the Application Portion of the Fund, being the interest on sums paid into a trust Bank account and otherwise does not admit each of the allegations in paragraph 38.2 of the Plaintiffs' Contentions;

Particulars

- A. Clauses 3.4(b), 5.1, 9 and 12.1 of the Constitutions in respect of the 2002, 2003, 2005, 2006 and 2008 Gunns Woodlot Schemes.
 - B. Clauses 3.4(b), 5, 9 and 12.1 of the Constitution in respect of the 2009 Gunns Woodlot Scheme.
- (f) subject to the full terms and effect of the Constitutions which will be relied on at trial, admits that GPL was entitled to be reimbursed by each Grower in the circumstances specified in clause 11.1 of the Constitutions in respect of the 2002, 2003, 2005, 2006 and 2008 to 2009 Gunns Woodlot Schemes and otherwise does not admit each of the allegations in paragraph 38.3 of the Plaintiffs' Contentions;
- (g) says that:
- (i) in respect of the 2002 and 2003 Gunns Woodlot Schemes, GPL was entitled to be paid:
 - A. a Planting Fee, being 1.25% plus GST of the Grower's entitlement to the Wood Sale Proceeds;
 - B. a Maintenance Fee, being 2.25% plus GST of the Grower's entitlement to the Wood Sale Proceeds;
 - C. Sales Commission, being 2% plus GST of the Grower's entitlement to the Wood Sale Proceeds;
 - D. a Rental Fee, being 6.5% plus GST of the Grower's entitlement to the Wood Sale Proceeds; and
 - E. a Baseline Pruning Fee adjusted for CPI;

Particulars

- A. Clauses 1.1, 10.2, 10.3, 10.4, 10.5 and 22.1 of the Management

Agreement in respect of the 2002
Gunns Woodlot Scheme.

- B. Clauses 1.1, 10.2, 10.3, 10.4, 10.5
and 21.1 of the Management
Agreement in respect of the 2003
Gunns Woodlot Scheme.
- C. Clauses 1.1 and 29.4 of the
Constitutions for the 2002 and 2003
Gunns Woodlot Scheme.
- D. Clauses 1.1, 6 and 10.1 of the
Forestry Right Lease Deeds in
respect of the 2002 and 2003 Gunns
Woodlot Schemes.
- E. The 2002 and 2003 Gunns Woodlot
Scheme Product Disclosure
Statements.

(ii) in respect of the 2005, 2006 and 2008 Gunns Woodlot
Schemes, GPL was entitled to be paid:

- A. a Maintenance Fee, being 2% plus GST of the Grower's
entitlement to the Wood Sale Proceeds;
- B. Sales Commission, being 2% plus GST of the Grower's
entitlement to the Wood Sale Proceeds;
- C. a Rental Fee being 5% plus GST of the Grower's
entitlement to the Wood Sale Proceeds; and
- D. a Baseline Pruning Fee adjusted for CPI;

Particulars

- A. Clauses 1.1, 10.2, 10.3, 10.4 and
21.1 of the Management Agreements

in respect of the 2005, 2006 and 2008 Gunns Woodlot Schemes.

- B. Clauses 1.1, 6 and 10.1 of the Forestry Right Lease Deeds in respect of the 2005 and 2006 Gunns Woodlot Schemes.
- C. Clauses 1.1, 6 and 10.1 of the Sub-Forestry Right Deeds in respect of the 2008 Gunns Woodlot Scheme.
- D. The 2005, 2006 and 2008 Gunns Woodlot Scheme Product Disclosure Statements.
- E. Clauses 1.1 and 29.4 of the Constitutions for the 2005, 2006 and 2008 Gunns Woodlot Scheme.

(iii) in respect of the 2009 Gunns Woodlot Scheme, GPL was entitled to:

- A. a Maintenance Fee, being 8% plus GST of the Grower's entitlement to the Wood Sale Proceeds;
- B. Sales Commission, being 2% plus GST of the Grower's entitlement to the Wood Sale Proceeds;
- C. a Rental Fee, being 5% plus GST of the Wood Sale Proceeds; and
- D. a Baseline Pruning Fee adjusted for CPI.

Particulars

- A. Clauses 1.1, 10.2, 10.3, 10.4 and 21.1 of the Management Agreement.

- B. Clauses 1.1, 6 and 10.1 of the Sub-Forestry Right Deed.
 - C. Clauses 1.1 and 29.4 of the Constitution for the 2009 Gunns Woodlot Scheme.
- (h) otherwise does not admit each of the allegations in paragraph 38.4 of the Plaintiffs' Contentions;
- (i) says that GPL was entitled to 50% of the Carbon Rights Proceeds and otherwise does not admit each of the allegations in paragraph 38.5 of the Plaintiffs' Contentions;

Particulars

- A. Clauses 1.1 and 29.4 of the Constitutions in respect of each Gunns Woodlot Scheme.
 - B. Clause 11.2 of the Management Agreements in respect of each Gunns Woodlot Scheme.
- (j) admits each of the allegations in paragraph 38.6 of the Plaintiffs' Contentions; and
- (k) says that at trial he will rely on the full terms and effect of the 2002, 2003 and 2005 Scheme Documents and the 2006, 2008 and 2009 Scheme Documents in respect of the revenue and payments to which GPL was entitled in respect of each Gunns Woodlot Scheme.

Growers' Interests in the Gunns Woodlot Schemes

39 As to paragraph 39 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) subject to the full terms and effect of the 2002, 2003 and 2005 Scheme Documents and the 2006, 2008 and 2009 Scheme Documents which will be relied on at trial, admits the allegations to the extent that the

Gunns Woodlot Schemes were in operation during the Relevant Period;

- (b) says that pursuant to the 2002, 2003 and 2005 Scheme Documents and the scheme documents in respect of the 2006 and 2008 Gunns Woodlot Schemes referred to in paragraph 17(b) above, the Grower's financial contributions were not limited to the Grower's Application Money;
- (c) says that pursuant to the scheme documents in respect of the 2009 Gunns Woodlot Scheme referred to in paragraph 17(b) above, the Grower's financial contributions were not limited to the Grower's Application Fee;
- (d) says that GPL was entitled to be paid amounts pursuant to:
 - (i) clauses 24, 28.2, 29.4 and 30 of the Constitutions for each Gunns Woodlot Scheme,
 - (ii) clauses 10 and 18.2 of the Management Agreements for each Gunns Woodlot Scheme;
 - (iii) clause 6 of the Forestry Right Lease Deeds for the 2002, 2003 and 2005 Gunns Woodlot Schemes; and
 - (iv) clause 6 of the Sub-Forestry Right Deeds for the 2006, 2008 and 2009 Gunns Woodlot Schemes; and
- (e) otherwise does not admit each of the allegations in paragraph 39 of the Plaintiffs' Contentions.

40 As to paragraph 40 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) admits that the amount of the Application Fee per Woodlot was provided for under the Management Agreements for each Gunns Woodlot Scheme to the extent that such Gunns Woodlot Schemes were in operation during the Relevant Period;
- (b) says that to the extent that each Gunns Woodlot Scheme was in operation during the Relevant Period the amount of the Application

Fee was also provided for in the Constitutions and Product Disclosure Statements for each Gunns Woodlot Scheme;

- (c) refers to and repeats paragraph 38(b), 38(c) and 38(d) above; and
- (d) otherwise does not admit each of the allegations in paragraph 40 of the Plaintiffs' Contentions.

41 As to paragraph 41 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) does not admit each of the allegations in paragraph 41 of the Plaintiffs' Contentions; and
- (b) says further that to the extent the First Plaintiff invested the amounts alleged in each of the specific Gunns Woodlot Schemes:
 - (i) in accordance with Product Rulings issued by the Australian Taxation Office, the cost of that investment, being the Application Fee paid for each scheme, was fully deductible in the year in which the amount was paid by it; and
 - (ii) for the purposes of its tax affairs for each year referred to in paragraph 41 of the Plaintiffs' Contentions, the First Plaintiff claimed a tax deduction equal to the amount paid by it by way of Application Fee.

Particulars

Particulars of the amounts claimed by the First Plaintiff as tax deductions in respect of the Application Fees which it paid will be provided following discovery.

42 As to paragraph 42 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) does not admit each of the allegations in paragraph 42 of the Plaintiffs' Contentions; and
- (b) says further that to the extent the Second Plaintiff invested the amounts alleged in each of the specific Gunns Woodlot Schemes:

- (i) in accordance with Product Rulings issued by the Australian Taxation Office, the cost of that investment, being the Application Fee paid for each scheme, was fully deductible in the year in which the amount was paid by him; and
- (ii) for the purposes of his tax affairs for each year referred to in paragraph 42 of the Plaintiffs' Contentions, the Second Plaintiff claimed a tax deduction equal to the amount paid by him by way of Application Fee.

Particulars

Particulars of the amounts claimed by the Second Plaintiff as tax deductions in respect of the Application Fees paid by him will be provided following discovery.

- 43 As to paragraph 43 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) subject to the full terms and effect of the 2002, 2003 and 2005 Scheme Documents and the 2006, 2008 and 2009 Scheme Documents which will be relied on at trial, and only to the extent that GPL was a trustee for the Applicants and Growers during the Relevant Period, admits that:
 - (i) the assets of the Fund were held by GPL on trust for the Applicants and Growers; and
 - (ii) to create an Application Portion of the Fund for the 2002, 2003, 2005, 2006 and 2008 Gunns Woodlot Schemes GPL was to lodge, or cause to be lodged, in a trust Bank account the Application Money received by the Custodian or GPL to be held on trust;
 - (b) says that to create an Application Portion of the Fund for the 2009 Gunns Woodlot Schemes GPL was to lodge, or cause to be lodged, in a trust Bank account the Application Fee received by the Custodian or GPL to be held on trust;

- (c) says that during the Relevant Period, in respect of the 2002, 2003 and 2005 Gunns Woodlot Schemes, upon being satisfied of the matters specified in clause 7 of the Constitution and being in possession of a duly completed and executed Forestry Right Lease Deed and Management Agreement, GPL was entitled to release or instruct the Custodian to release the Application Money and the Application Money was no longer held on trust for the Grower;
- (d) says that during the Relevant Period, in respect of the 2006 and 2008 Gunns Woodlot Schemes, upon being satisfied of the matters specified in clause 7 of the Constitution and being in possession of a duly completed and executed Sub-Forestry Right Deed and Management Agreement, GPL was entitled to release or instruct the Custodian to release the Application Money and the Application Money was no longer held on trust for the Grower; and
- (e) says that during the Relevant Period, in respect of the 2009 Gunns Woodlot Scheme, upon being satisfied of the matters specified in clause 7 of the Constitution and being in possession of a duly completed and executed Sub-Forestry Right Deed and Management Agreement, GPL was entitled to release or instruct the Custodian to release the Application Fee and the Application Fee was no longer held on trust for the Grower; and
- (f) otherwise does not admit each of the allegations in paragraph 43 of the Plaintiffs' Contentions.

Particulars

- A. Clauses 3.2, 3.4, 7 and 8 of the Constitutions in respect of each Gunns Woodlot Scheme.
- B. Clause 10.1 of the Management Agreement in respect of each Gunns Woodlot Scheme.

44 As to paragraph 44 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) subject to the full terms and effect of the 2002, 2003 and 2005 Scheme Documents and the scheme documents in respect of the 2006 and 2008 Gunns Woodlot Schemes referred to in paragraph 17(b) above which will be relied on at trial, admits each of the allegations insofar as Application Money was received by GPL or the Custodian during the Relevant Period;
- (b) says that in respect of the 2009 Gunns Woodlot Scheme GPL was to place, or ensure that the Custodian placed, the Application Fee in the Application Portion until it could be released in accordance with clause 8 of the Constitution for the 2009 Gunns Woodlot Scheme; and
- (c) otherwise does not admit each of the allegations in paragraph 44 of the Plaintiffs' Contentions.

45 As to paragraph 45 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) admits that each Plaintiff had an interest in the Application Portion equal to their Proportional Interest but says that they did not have an interest in any particular part of the Application Portion or any Investment;
- (b) in respect of the 2002, 2003, 2005, 2006 and 2008 Gunns Woodlot Schemes says that:
 - (i) the Plaintiffs no longer had an interest in the Application Portion equal to their Proportional Interest once GPL was entitled to release, or instruct the Custodian to release, the Application Money pursuant to clause 8 of the Constitutions;
 - (ii) once the Application Money was released pursuant to clause 8 of the Constitutions, that money:
 - A. constituted full payment of the Establishment Fee to GPL;
 - B. became the beneficial property of GPL for it to deal with in accordance with the terms and conditions of the 2002, 2003 and 2005 Scheme Documents and the scheme

documents in respect of the 2006 and 2008 Gunns Woodlot Schemes referred to in paragraph 17(b) above; and

- C. was either held by the Custodian on behalf of GPL or paid to GPL;

Particulars

- A. Clauses 3.6 and 8 of the Constitutions for the 2002 to 2006 and 2008 Gunns Woodlot Schemes.
- B. Clause 10.1 of the Management Agreements for the 2002 to 2006 and 2008 Gunns Woodlot Schemes.

- (c) in respect of the 2009 Gunns Woodlot Scheme says that:
- (i) the Plaintiffs no longer had an interest in the Application Portion equal to their Proportional Interest once GPL was entitled to release, or instruct the Custodian to release, the Application Fee pursuant to clause 8 of the Constitution;
- (ii) once the Application Fee was released pursuant to clause 8 of the Constitution, that money:
- A. constituted full payment of the Establishment Fee to GPL;
- B. became the beneficial property of GPL for it to deal with in accordance with the terms and conditions of the scheme documents in respect of 2009 Gunns Woodlot Scheme referred to in paragraph 17(b) above; and
- C. was either held by the Custodian on behalf of GPL or paid to GPL;

and,

- (d) otherwise does not admit each of the allegations in paragraph 45 of the Plaintiffs' Contentions.

Particulars

Clause 3.6 of the Constitution for the 2009
Gunns Woodlot Scheme.

Clause 10.1 of the Management Agreements
for the 2009 Gunns Woodlot Scheme.

- 46 As to paragraph 46 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) denies each of the allegations in paragraph 46 of the Plaintiffs' Contentions;
- (b) says that at trial ~~they~~he will rely on the full terms and effect of the 2002, 2003 and 2005 Scheme Documents and the 2006, 2008 and 2009 Scheme Documents which were in effect during the Relevant Period;
- (c) says that the Plaintiffs were obliged to pay the Establishment Fee, being an amount equal to the Application Fee;

Particulars

Clause 10.1 of the Management Agreements.

- (d) says that upon satisfaction of the requirements in clauses 7 and 8 of the Constitution, GPL was entitled to the full amount of the Application Fee, which was paid to GPL so that it could satisfy the obligation of the Plaintiffs to pay the Establishment Fee pursuant to clause 10 of the Management Agreement; and
- (e) otherwise refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e) and 45 above.
- 47 As to paragraph 47 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 47 of the Plaintiffs' Contentions;
- (b) says that at trial theyhe will rely on the full terms and effect of the 2002, 2003 and 2005 Scheme Documents and the 2006, 2008 and 2009 Scheme Documents which were in effect during the Relevant Period; and
- (c) otherwise refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c) and 46(d) above.

48 As to paragraph 48 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 48 of the Plaintiffs' Contentions;
- (b) says that the payment of the Application Fee constituted full payment of the Establishment Fee and that the Application Fee was an amount equal to the Establishment Fee; and
- (c) otherwise refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c) and 46(d) above.

Particulars

Management Agreement clause 10.1.

Growers' Trust Funds

49 As to paragraph 49 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 49 of the Plaintiffs' Contentions;
- (b) says that at trial theyhe will rely on the full terms and effect of the 2002, 2003 and 2005 Scheme Documents and the 2006, 2008 and 2009 Scheme Documents which were in effect during the Relevant Period; and
- (c) otherwise refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d), and 48(b) above.

- 50 As to paragraph 50 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) denies each of the allegations in paragraph 50 of the Plaintiffs' Contentions;
 - (b) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e) 45, 46(c), 46(d), and 48(b) above;
 - (c) says that there were no "Growers' Express Trust Funds" as that term is defined in paragraph 49 of the Plaintiffs' Contentions; and
 - (d) says that GPL was permitted, but not required, to invest or arrange for the Custodian to invest all or part of the Application Portion in an interest bearing account with a Bank nominated by GPL.

Particulars

Clause 12.1 of the Constitutions for each
Gunns Woodlot Scheme

- 51 As to paragraph 51 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) relies on the full terms and effect of clauses 34.1(b) and 34.5 of the Constitution of each Gunns Woodlot Scheme;
 - (b) says that GPL was not required to terminate the Project during the Relevant Period; and
 - (c) otherwise does not admit each of the allegations in paragraph 51 of the Plaintiffs' Contentions.
- 52 As to paragraph 52 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) relies on the full terms and effect of clauses 29.1 and 29.4 of the Constitution for each Gunns Woodlot Scheme; and
 - (b) otherwise does not admit the allegations in paragraph 52 of the Plaintiffs' Contentions.

52A As to paragraph 52A the Fourth Defendant:

- (a) refers to and repeats paragraph 49-52 above; and

- (b) otherwise denies each of the allegations in paragraph 52A of the Plaintiffs' Contentions.

52B As to paragraph 52B, the Fourth Defendant:

- (a) refers to and repeats paragraph 50(c) and 52A above; and
- (b) otherwise does not plead to paragraph 52B which does not contain any allegation of fact.

GPL Unauthorised Retention of Growers' Trust Funds

52C As to paragraph 52C, the Fourth Defendant:

- (a) refers to and repeats paragraphs 49 to 52A above; and
- (b) otherwise denies each of the allegations in paragraph 52C of the Plaintiffs' Contentions.

Auditor oversight and Compliance Plans

53 As to paragraph 53 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 12(a) and 12(b) above;
- (b) says Mr Gay believed that during the Relevant Period the Original Compliance Plans were being audited by the accounting firm KPMG, including the Tenth Defendant and the Eleventh Defendant;
- (c) says Mr Gay believed that during the Relevant Period the accounting firm KPMG was auditing the Annual Financial Reports of GPL for the financial years ending 30 June 2002 to 30 June 2009; and
- (d) otherwise does not admit each of the allegations in paragraph 53 of the Plaintiffs' Contentions;

54 As to paragraph 54 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) admits that GPL had the Original Compliance Plans during the Relevant Period;

- (b) says that Mr Gay was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions; and
- (c) otherwise denies each of the allegations in paragraph 54 of the Plaintiffs' Contentions.

55 As to paragraph 55 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that Mr Gay was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions; and
- (b) otherwise does not admit each of the allegations in paragraph 55 of the Plaintiffs' Contentions.

External Administration and Distributions

55A As to paragraph 55A of the Plaintiffs' Contentions, the Fourth Defendant does not admit the allegations in paragraph 55A of the Plaintiffs' Contentions.

55B As to paragraph 55B of the Plaintiffs' Contentions, the Fourth Defendant does not admit the allegations in paragraph 55B of the Plaintiffs' Contentions.

55C As to paragraph 55C of the Plaintiffs' Contentions, the Fourth Defendant does not admit the allegations in paragraph 55C of the Plaintiffs' Contentions.

55D As to paragraph 55D of the Plaintiffs' Contentions, the Fourth Defendant does not admit the allegations in paragraph 55D of the Plaintiffs' Contentions.

55E As to paragraphs 55E to 55H of the Plaintiffs' Contentions, the Fourth Defendant says:

- (a) that Mr Gay was not a director of Gunns Ltd after 27 May 2010 as alleged in paragraph 5 in the Plaintiffs Contentions;
- (b) otherwise does not admit each of the allegations in paragraphs 55E to 55H of the Plaintiffs' Contentions.

55I The Fourth Defendant does not plead to the allegations in paragraph 55I of the Plaintiffs' Contentions which does not contain any allegation of fact.

55J As to paragraph 55J of the Plaintiffs' Contentions, the Fourth Defendant denies each of the allegations in paragraph 55J of the Plaintiffs' Contentions.

56 As to paragraph 56 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that Mr Gay was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (b) says that Mr Gay was not a director of Gunns after 27 May 2010, as alleged in paragraph 5 of the Plaintiffs' Contentions; and
- (c) otherwise does not admit each of the allegations in paragraph 56 of the Plaintiffs' Contentions.

57 As to paragraph 57 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 56(a) and 56(b) above; and
- (b) otherwise does not admit each of the allegations in paragraph 57 of the Plaintiffs' Contentions.

58 As to paragraph 58 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 56(a) and 56(b) above; and
- (b) otherwise does not admit each of the allegations in paragraph 58 of the Plaintiffs' Contentions.

58A As to paragraph 58A of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) says that Mr Gay was not a director of Gunns after 27 May 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions; and
- (b) otherwise does not admit each of the allegations in paragraph 58A of the Plaintiffs' Contentions.

59 As to paragraph 59 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 56(a) and 56(b) above; and
- (b) otherwise does not admit each of the allegations in paragraph 59 of the Plaintiffs' Contentions.

- 60 As to paragraph 60 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) refers to and repeats paragraphs 56(a) and 56(b) above; and
 - (b) otherwise does not admit each of the allegations in paragraph 60 of the Plaintiffs' Contentions.
- 61 As to paragraph 61 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) refers to and repeats paragraphs 56(a) and 56(b) above; and
 - (b) otherwise does not admit each of the allegations in paragraph 61 of the Plaintiffs' Contentions.
- 62 As to paragraph 62 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) refers to and repeats paragraphs 56(a) and 56(b) above; and
 - (b) otherwise does not admit each of the allegations in paragraph 62 of the Plaintiffs' Contentions.
- 63 As to paragraph 63 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) refers to and repeats paragraphs 56(a) and 56(b) above; and
 - (b) otherwise does not admit each of the allegations in paragraph 63 of the Plaintiffs' Contentions.
- 64 As to paragraph 64 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) refers to and repeats paragraphs 56(a) and 56(b) above; and
 - (b) otherwise does not admit each of the allegations in paragraph 64 of the Plaintiffs' Contentions.

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

GPL

- 65 As to paragraph 65.1 of the Plaintiffs' Contentions, subject to the full terms and effect of each of the 2002, 2003 and 2005 Scheme Documents and the

2006, 2008 and 2009 Scheme Documents and only in respect of the Relevant Period, the Fourth Defendant:

- (a) admits that GPL was required by clause 13.4(b)(2)(B) of the Constitutions for the 2002, 2003 and 2005 Gunns Woodlot Schemes to do the things alleged in paragraph 65.1 of the Plaintiffs Contentions;
- (b) says that GPL was required by clause 13.4(b)(2)(B) of the Constitutions for the 2006, 2008 and 2009 Gunns Woodlot Schemes to ensure that any goods or services which were required to be provided or performed under the terms of a Sub-Forestry Right Deed and Management Agreement were provided or performed in accordance with the relevant material agreement and the Constitution;
- (c) admits that GPL was required by clause 5(a) of the Management Agreements for each Gunns Woodlot Scheme to do the things alleged in paragraph 65.2(a) of the Plaintiffs' Contentions;
- (d) there is no paragraph 65.2(b);
- (e) admits each of the allegations in paragraph 65.2(c) of the Plaintiffs' Contentions;
- (f) insofar as the allegations in paragraph 65.3 of the Plaintiffs' Contentions relate to the 2002, 2003 and 2005 Gunns Woodlot Schemes, admits each of the allegations in paragraph 65.3 of the Plaintiffs' Contentions;
- (g) says that there were no Forestry Right Lease Deeds for the 2006, 2008 and 2009 Gunns Woodlot Schemes;
- (h) admits that GPL was required by clause 6.1 of the Forestry Right Deeds to do the things alleged in paragraph 65.4(a) of the Plaintiffs' Contentions;
- (i) there is no paragraph 65.4(b);
- (j) denies that GPL owed any of the duties alleged in paragraph 65.4 to the Plaintiffs;

- (k) says that the obligations of GPL pursuant to the Forestry Right Deeds were contractual obligations owed by GPL to the relevant landowner, including Gunns Ltd, and not to any of the Plaintiffs;
- (l) denies each of the allegations in paragraph 65.5 of the Plaintiffs' Contentions;
- (m) denies each of the allegations in paragraph 65.6 of the Plaintiffs' Contentions and says further that Mr Gayhe was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (n) says that:
 - (i) during the Relevant Period GPL was required to comply with the Original Compliance Plans in the period when the relevant Original Compliance Plan was in operation; and
 - (ii) says that the purpose of the Original Compliance Plans was to describe how GPL would ensure that it complied with the Act and Constitution of each Gunns Woodlot Scheme and did not give rise to any duties owed to the Plaintiffs or anyone else;

Particulars

Clause 5.1 and 5.2 of the Original Compliance Plans.

- (o) says in respect of the 2002, 2003 and 2005 Gunns Woodlot Schemes that:
 - (i) by 31 October in each year, for each of the Gunns Woodlot Schemes, GPL was required to procure a written report from an Independent Forester which contained:
 - A. a review of the operations relating to the Project since the previous Forester's Report and the results of those operations;

- B. particulars of any significant change in GPL's policy as outlined in the previous Forester's Report relating to silvicultural activities; and
- C. details as to whether or not GPL had during the period since the last Forester's Report carried out the services to be performed under the Forestry Right Lease Deeds and Maintenance Agreements in a proper and efficient manner;

and,

- (ii) send a copy of the Forester's Report to each Grower and the Custodian within 30 days of receiving it;

Particulars

Clause 16 of the Constitutions for the 2002,
2003 and 2005 Gunns Woodlot Schemes.

- (p) says in respect of the 2006, 2008 and 2009 Gunns Woodlot Schemes that:
 - (i) by 31 October in each year, for each of the Gunns Woodlot Schemes, GPL was required to procure a written report from an Independent Forester which contained:
 - A. a review of the operations relating to the Project since the previous Forester's Report and the results of those operations;
 - B. particulars of any significant change in GPL's policy as outlined in the previous Forester's Report relating to silvicultural activities; and
 - C. details as to whether or not GPL had during the period since the last Forester's Report carried out the services to be performed under the Sub-Forestry Right Deeds and Maintenance Agreements in a proper and efficient manner;

and,

- (ii) send a copy of the Forester's Report to each grower and the Custodian within 30 days of receiving it;

Particulars

Clause 16 of the Constitutions for the 2006,
2008 and 2009 Gunns Woodlot Schemes.

and,

- (q) otherwise does not admit each of the allegations in paragraph 65 of the Plaintiffs' Contentions.

66 As to paragraph 66 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) admits that during the Relevant Period GPL owed the duties alleged in paragraph 66 of the Plaintiffs' Contentions; and
- (b) otherwise does not admit each of the allegations in paragraph 66 of the Plaintiffs' Contentions.

GPL Trust Fund Duties

67 As to paragraph 67 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d) and 48(b) above;
- (b) says that there were no "Growers' Trust Funds" as that term is defined in paragraph 52B49 of the Plaintiffs' Contentions;
- (c) refers to and repeats paragraph 65(n) above; and
- (d) otherwise denies each of the allegations in paragraph 67 of the Plaintiffs' Contentions.

GPL duties arising from its position as RE

67A As to paragraph 67A of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in 67A.1 of the Plaintiffs' Contentions;
and
- (b) admits each of the allegations in paragraph 67A.2 of the Plaintiffs'
Contentions.

Gunns Ltd

68 As to paragraph 68, the Fourth Defendant:

- (a) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d) and 48(b) above;
- (b) says that there were no "Growers' Trust Funds" as that term is defined in paragraph ~~52B49~~ of the Plaintiffs' Contentions;
- (c) says that during the Relevant Period Gunns Ltd, in its capacity as Custodian, had a duty to hold the Application Money (being the Application Fee) which Gunns Ltd received until it was instructed by GPL to release the money;
- (d) says that during the Relevant Period, after the Application Money (being the Application Fee) was released Gunns Ltd either held that money on behalf of GPL or paid it to GPL; and
- (e) otherwise denies each of the allegations in paragraph 68 of the Plaintiffs' Contentions.

The GPL Directors

69 As to paragraph 69 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) admits that during the Relevant Period Mr Gay owed the duties alleged in paragraphs 69.1 to 69.3 of the Plaintiffs' Contentions;
- (b) says that during the Relevant Period section 601FD(1)(f) of the Act required him to take all steps that a reasonable person would take in his position to ensure that GPL as the Responsible Entity complied with the Act, any conditions imposed on GPL's AFSL, the Constitutions and the Original Compliance Plans;

- (c) does not admit that any of the duties alleged in paragraphs 69.1 to 69.4 were owed to the Plaintiffs;
- (d) denies that under the common law he owed a duty to the Plaintiffs to act with due care and diligence that a reasonable person would exercise in his position as a director of GPL;
- (e) does not admit each of the allegations in paragraph 69.6 of the Plaintiffs' Contentions; and
- (f) otherwise denies each of the allegations in paragraph 69 of the Plaintiffs' Contentions.

KPMG

- 70 As to paragraph 70 of the Plaintiffs' Contentions, the Fourth Defendant refers to and repeats paragraphs 53 to 55, 65 and 67 above.
- 71 As to paragraph 71 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) refers to and repeats paragraphs 12(a) and 12(b) above;
 - (b) admits each of the allegations in paragraph 71 of the Plaintiffs' Contentions only insofar as:
 - (i) they relate to the Relevant Period;
 - (ii) during that time the Tenth Defendant was responsible for the conduct of the compliance plan audits for the Original Compliance Plans (as defined in paragraph 54 of the Plaintiffs' Contentions); and
 - (iii) during that time the Eleventh Defendant was responsible for the conduct of the compliance plan audits for the Original Compliance Plans (as defined in paragraph 54 of the Plaintiffs' Contentions);
 - (c) does not admit that any of the duties alleged in paragraph 71 of the Plaintiffs' Contentions was owed to the Plaintiffs; and

- (d) otherwise denies each of the allegations in paragraph 71 of the Plaintiffs' Contentions.

72 As paragraph 72 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 12(a) and 12(b) above;
- (b) insofar as the Tenth Defendant and/or the Eleventh Defendant was during the Relevant Period responsible for the conduct of the compliance plan audits for the Original Compliance Plans (as defined in paragraph 54 of the Plaintiffs' Contentions):
 - (i) admits each of the allegations in paragraph 72.1 of the Plaintiffs' Contentions;
 - (ii) admits each of the allegations in paragraph 72.2 of the Plaintiffs' Contentions;
 - (iii) admits each of the allegations in paragraph 72.3 of the Plaintiffs' Contentions;
 - (iv) admits each of the allegations in paragraph 72.4 of the Plaintiffs' Contentions;
 - (v) admits that they were obliged to conduct the audits of the Original Compliance Plans in accordance with the relevant professional auditing principles and practices, including Accounting Professional & Ethical Standard (**APES**) 3100 and APES 013;
- (c) does not admit that any of the duties and obligations alleged in paragraph 72 of the Plaintiffs' Contentions against the Tenth Defendant and the Eleventh Defendant were owed to the Plaintiffs; and
- (d) otherwise does not admit each of the allegations in paragraph 72 of the Plaintiffs' Contentions.

C4. CONDUCT OF GPL, GUNNS LTD AND KPMG

Payments of Growers' Trust Funds to Gunns Ltd

- 73 As to paragraph 73 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) denies each of the allegations in paragraph 73 of the Plaintiffs' Contentions;
 - (b) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d) and 48(b) above;
 - (c) says that there were no "Growers' Trust Funds" as that term is defined in paragraph ~~52B49~~ of the Plaintiffs' Contentions; and
 - (d) says that in circumstances where the Plaintiffs have refused without any proper basis to provide the further and better particulars requested on 16 May 2018, Mr Gayhe does not know:
 - (i) what amount is alleged to have been wrongly claimed as income or profit and how each amount is calculated;
 - (ii) the date or dates on which it is alleged each amount was wrongly claimed as income or profit in the annual report of GPL;
 - (iii) the facts by reason of which it is alleged that in each of the annual reports of GPL the amount was wrongly claimed as income or profit;
 - (iv) in respect of each "Scheme Year" how the "Percentage" is calculated and made up; and
 - (v) whether it is alleged that Mr Gayhe knew that in each GPL annual report amounts were wrongly claimed as income or profits and, if so, the facts by reason of which it is alleged.

Particulars

- A. Paragraph 7 of the letter dated 16 May 2018 from HWL Ebsworth Lawyers to Piper Alderman.

B. Paragraph 8 of the letter dated 1 June 2018 from Piper Alderman to HWL Ebsworth Lawyers.

- 74 As to paragraph 74 of the Plaintiffs' Contentions, the Fourth Defendant:
- (a) denies each of the allegations in paragraph 74 of the Plaintiffs' Contentions;
 - (b) says that there were no "Growers' Trust Funds" as that term is defined in paragraph ~~52B49~~ of the Plaintiffs' Contentions;
 - (c) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d) and 48(b) above;
 - (d) says that:
 - (i) there was a single loan account between GPL and Gunns Ltd which was disclosed in the Annual Financial Reports of GPL for the financial years ending 30 June 2002 to 30 June 2009;
 - (ii) the amount of the loan, as disclosed in those Annual Financial Reports, reflected the closing balance of the loan account at the end of each financial year;
 - (iii) the closing balances of the single loan account cannot be aggregated for the period from 30 June 2002 to 30 June 2009 as the Plaintiffs have purported to do;
 - (iv) the amounts pleaded by the Plaintiffs do not accord with the closing balance of the single loan account as disclosed by GPL in the Annual Financial Reports for the financial years ending 30 June 2002 to 30 June 2009;
 - (v) as at 30 June 2007 an amount of \$462,565 was payable by GPL to Gunns Ltd; and
 - (vi) Mr Gayhe was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions.

Particulars

- A. Notes 6 and 20 to the Annual Financial Report of GPL for the financial years ending 30 June 2003, 30 June 2004 and 30 June 2005.
 - B. Notes 6 and 21 to the Annual Financial Report of GPL for the financial years ending 30 June 2006, 30 June 2007 and 30 June 2008.
 - C. Notes 6 and 22 to the Annual Financial Report of GPL for the financial years ending 30 June 2002 and 30 June 2009.
- (e) says that during each financial year GPL charged Gunns Ltd interest on the outstanding balance of the loan owing by Gunns Ltd to GPL;
and

Particulars

- A. Note 20 to the Annual Financial Report of GPL for the financial years ending 30 June 2003, 30 June 2004 and 30 June 2005.
 - B. Note 21 to the Annual Financial Report of GPL for the financial years ending 30 June 2006, 30 June 2007 and 30 June 2008.
 - C. Note 22 to the Annual Financial Report of GPL for the financial years ending 30 June 2002 and 30 June 2009.
- (f) says that any loan made, or dividend paid, by GPL to Gunns Ltd was made, or paid, from money which GPL was legally and beneficially entitled to and was not held for the benefit of the Plaintiffs or any other Grower.

74A As to paragraph 74A of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 73 and 74 above;
- (b) denies each of the allegations in paragraph 74A of the Plaintiffs' Contentions.

74B As to paragraph 74B of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 73 and 74 above;
- (b) denies each of the allegations in paragraph 74B of the Plaintiffs' Contentions.

Forestry Right Fees and Insurances

75 As to paragraph 75 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 75 of the Plaintiffs' Contentions; and
- (b) says that Mr Gayne was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions.

76 There is no paragraph 76

KPMG Compliance plan audit reports

77 As to paragraph 77 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) insofar as the Tenth Defendant and the Eleventh Defendant was during the Relevant Period responsible for the conduct of the compliance plan audits for the Original Compliance Plans (as defined in paragraph 54 of the Plaintiffs' Contentions), admits each of the allegations in paragraph 77 of the Plaintiffs' Contentions;
- (b) otherwise does not admit each of the allegations in paragraph 77 of the Plaintiffs' Contentions; and

- (c) says that Mr Gayne was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions.

78 As to paragraph 78 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) insofar as the Tenth Defendant and the Eleventh Defendant was during the Relevant Period responsible for the conduct of the compliance plan audits for the Original Compliance Plans (as defined in paragraph 54 of the Plaintiffs' Contentions), admits each of the allegations in paragraph 78 of the Plaintiffs' Contentions insofar as they relate to the Relevant Period;
- (b) otherwise does not admit each of the allegations in paragraph 78 of the Plaintiffs' Contentions;
- (c) says that Mr Gayne was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (d) says that during the Relevant Period Mr Gayne had no knowledge of any circumstance which should have caused the Tenth Defendant or the Eleventh Defendant to make any such notification; and
- (e) in the alternative to paragraph 78(d) above, if in order to discharge any obligation to do so the Tenth Defendant and Eleventh Defendant were obliged to make any such report as alleged by the Plaintiffs, Mr Gayne relied on them to discharge that obligation.

C.5 BREACHES OF DUTY ~~BY THE DEFENDANTS~~

GPL

79 As to paragraph 79 of the Plaintiffs' Contentions, the Fourth Defendant

- (a) denies that GPL breached any of the duties alleged in paragraph 79 of the Plaintiffs' Contentions insofar as they relate to the Relevant Period;
- (b) otherwise does not admit each of the allegations in paragraph 79 of the Plaintiffs' Contentions;

- (c) says that Mr Gay was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (d) says that based on paragraph 35 of the Plaintiffs' Contentions the GPL Bank Guarantee (as defined in paragraph 35 of the Plaintiffs' Contentions) was issued after 3 June 2010;
- (e) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d) and 48(b) above;
- (f) says that there were no "Growers' Trust Funds" as that term is defined in paragraph ~~52B49~~ of the Plaintiffs' Contentions; and
- (g) says that there were no "~~GPL Growers' Trust Fund Advances~~" as that term is defined in paragraph (a) of the particulars to paragraph 74 of the Plaintiffs' Contentions.

GPL Trust Fund Duties

80 As to paragraph 80 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies that GPL breached any of the duties alleged in paragraph 80 of the Plaintiffs' Contentions insofar as they relate to the Relevant Period;
- (b) otherwise does not admit each of the allegations in paragraph 80 of the Plaintiffs' Contentions;
- (c) says that Mr Gay ~~he~~ was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (d) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d) and 48(b) above;
- (e) says that there were no "Growers' Trust Funds" as that term is defined in paragraph ~~52B49~~ of the Plaintiffs' Contentions; and
- (f) says that there were no "~~GPL Growers' Trust Fund Advances~~" as that term is defined in paragraph (a) of the particulars to paragraph 74 of the Plaintiffs' Contentions.

GPL duties arising from its position as RE

80A As to paragraph 80A of the Plaintiffs' Contention, the Fourth Defendant:

- (a) refers to and repeats paragraph 67A.1 above;
- (b) denies each of the allegations in paragraph 80A.1 of the Plaintiffs' Contentions; and
- (c) denies each of the allegations in paragraph 80A.2 of the Plaintiffs' Contentions.

Gunns Ltd

81 There is no paragraph 81.

The GPL Directors

82 As to paragraph 82 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 82 of the Plaintiffs' Contentions;
- (b) refers to and repeats paragraphs 69, 79 and 80 above;
- (c) says that during the Relevant Period Mr Ian Blanden:
 - (i) held a Bachelor of Science (Forestry) and a Certificate in Forest Engineering;
 - (ii) had considerable managerial experience operating managed investment schemes in both forestry and viticulture;
 - (iii) had managerial experience as a tree farm manager, nursery manager and forester in Tasmania;
 - (iv) was a principal executive of GPL who held the position of Manager;
 - (v) was responsible for the day-to-day operations of GPL and the Gunns Woodlot Schemes; and

- (vi) reported to the Sixth Defendant, Mr Leslie Baker;
- (d) says that during the Relevant Period the Sixth Defendant, Mr Leslie Baker:
- (i) held a Bachelor of Science (Forestry);
 - (ii) was an executive director of GPL;
 - (iii) was responsible for the day-to-day operations and management of GPL; and
 - (iv) was responsible for overseeing the development of the Gunns Woodlot Schemes;
- (e) says that during the Relevant Period the Third Defendant, Mr Wayne Chapman:
- (i) was the company secretary of GPL and Gunns Ltd;
 - (ii) was a member of the Institute of Chartered Accountants in Australia;
 - (iii) controlled the finances of GPL and Gunns Ltd; and
 - (iv) maintained the books and records for GPL and Gunns Ltd;
- (f) says that during the Relevant Period the Fifth Defendant, Mr Rodney Loone, was a:
- (i) prominent accountant in Launceston;
 - (ii) Fellow of the Institute of Chartered Accountants; and
 - (iii) principal of a chartered accounting firm in Launceston known as Garrotts.
- (g) says that during the Relevant Period the Seventh Defendant, Mr Robert Graham was an experienced businessman in the building industry, the timber industry and in agricultural managed investment schemes;

- (h) says that during the Relevant Period:
- (i) he personally invested in the Gunns Woodlot Schemes;
 - (ii) by reason of the matters set out in paragraphs 82(c) and 82(d) above, he relied on each of Mr Blanden and Mr Baker to ensure that the Maintenance Services were performed and that GPL was otherwise complying with its obligations under the Management Agreements, Forestry Right Deeds, Forestry Right Lease Deeds and Sub-Forestry Right Deeds;
 - (iii) he was not a member of a compliance plan committee;
 - (iv) he received Forester Reports in respect of the Gunns Woodlot Schemes;
 - (v) he relied on the Forester Reports to ensure that Mr Blanden and Mr Baker were correctly operating the Gunns Woodlot Schemes and, in particular, that the Maintenance Services were being performed under the Management Agreements;
 - (vi) he received compliance plan audit letters from the Tenth Defendant and the Eleventh Defendant in relation to each of the Original Compliance Plans (**Compliance Plan Audit Letters**);
 - (vii) he relied on the Compliance Plan Audit Letters to ensure that GPL was complying with each of the Original Compliance Plans and that each of the Original Compliance Plans continued to meet the requirements of the Act;
 - (viii) by reason of the matters set out in paragraph 82(e) above, he relied on Mr Chapman to ensure that GPL had funds to cover its liabilities, GPL was able to make loans to Gunns Ltd using money which was not held on trust for any Grower, GPL was able to pay dividends to Gunns Ltd using money which was not held on trust for any Grower and that all of the requisite payments were made, including the Forestry Right Fees and public liability insurance premiums;

- (ix) he received audit letters from KPMG in relation to the consolidated financial reports of Gunns Ltd and its subsidiaries, including GPL (**Consolidated Audit Letters**);
- (x) he received audit letters from KPMG in relation to the annual financial reports of GPL (**GPL Audit Letters**);
- (xi) he relied on the Consolidated Audit Letters and the GPL Audit Letters to ensure that Mr Chapman was correctly controlling the finances of Gunns Ltd and GPL, that the financial reports of Gunns Ltd gave a true and fair view of the financial position of Gunns Ltd and that the financial reports of GPL gave a true and fair view of the financial position of GPL;
- (xii) by reason of the matters set out in paragraph 82(f) above, he relied on Mr Loone to raise concerns if he had any in relation to the financial accounts and financial statements of GPL;
- (xiii) by reason of the matters set out in paragraph 82(g) above, he relied on Mr Graham to raise concerns if he had any in relation to the operation of GPL's managed investments schemes; and
- (xiv) relying on Mr Blanden, Mr Baker, Mr Chapman, Mr Loone, Mr Graham, the Forester Reports, the Compliance Plan Audit Letters, the Consolidated Audit Letters and the GPL Audit Letters, he believed that GPL was complying with the Original Compliance Plans, the Original Compliance Plans continued to meet the requirements of the Act, GPL had funds to cover its liabilities, the Maintenance Services were being performed, the Forestry Right Fees and public liability insurance premiums were being paid, GPL was able to make loans to Gunns Ltd using money which was not held on trust for any Grower, GPL was able to pay dividends to Gunns Ltd using money which was not held on trust for any Grower and GPL was otherwise complying with its obligations under the Management Agreements, Forestry Right Deeds, Forestry Right Lease Deeds, Sub-Forestry Right Deeds and the Act; and

- (i) says further that
 - (i) Mr Gay~~he~~ was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
 - (ii) based on paragraph 35 of the Plaintiffs' Contention the GPL Bank Guarantee (as defined in paragraph 35 of the Plaintiffs' Contentions) was issued after 3 June 2010; and
 - (iii) to the extent that any of the allegations against Mr Gay~~him~~ occurred after 3 June 2010, he had no obligation, power or authority to cause GPL to do the things that the Plaintiffs allege ought to have been done by GPL.

83 As to paragraph 83 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 83 of the Plaintiffs' Contentions;
- (b) refers to and repeats paragraphs 69, 79, 80 and 82(c) to 82(h) above; and
- (c) says that:
 - (i) he was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
 - (ii) to the extent that any of the allegations against Mr Gay~~him~~ occurred after 3 June 2010 he had no obligation, power or authority to cause GPL to do the things that the Plaintiffs allege ought to have been done by GPL;
 - (iii) says that there were no "Growers' Trust Funds" as that term is defined in paragraph ~~52B49~~ of the Plaintiffs' Contentions; and
 - (iv) says that there were no "GPL Growers' Trust Fund Advances" as that term is defined in paragraph (a) of the particulars to paragraph 74 of the Plaintiffs' Contentions.

83A As to paragraph 83A, the Fourth Defendant:

- (a) refers to and repeats paragraph 83 above;
- (b) denies each of the allegations in paragraph 83A of the Plaintiffs' Contentions.

83B As to paragraph 83B, the Fourth Defendant:

- (a) refers to and repeats paragraph 83 above;
- (b) denies each of the allegations in paragraph 83B of the Plaintiffs' Contentions.

84 As to paragraph 84 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 84 of the Plaintiffs' Contentions;
- (b) says that Mr Gayne was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (c) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d), 48(b), 81 and 82(c) to 82(i) above;
- (d) says that in the circumstances no such liability arises under section 197(1) of the Act.

85 There is no paragraph 85.

KPMG

86 As to paragraph 86 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) does not admit each of the allegations in paragraph 86 of the Plaintiffs' Contentions; and
- (b) says that Mr Gayne had no knowledge of any breach of duty by the Tenth Defendant or the Eleventh Defendant, whether in the manner alleged or otherwise.

C6. CAUSATION AND LOSS

GPL

86A As to paragraph 86A of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies of the allegations in paragraph 86A of the Plaintiffs' Contentions;
- (b) further says that to the extent that the Plaintiffs have suffered loss and damage (which is denied), it was not caused by the matters alleged in paragraph 86A of the Plaintiffs' Contentions.

87 As to paragraph 87 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 87 of the Plaintiffs' Contentions;
- (b) says that pursuant to Standstill Agreements made on 5 April 2013 and 19 June 2014:
 - (i) Gunns Ltd agreed not to terminate any of the Forestry Right Deeds entered into between Gunns Ltd and GPL;
 - (ii) Gunns Forest Products Pty Ltd (Receivers and Managers appointed) (Liquidators appointed) agreed to maintain, inter alia, the Scheme Assets held on trust by GPL which were located on land in Tasmania owned by Gunns Ltd; and
 - (iii) notwithstanding the alleged defaults under the Forestry Right Deeds entered into between Gunns Ltd and GPL, Gunns Ltd and the Receivers and Managers of Gunns Ltd agreed that upon a sale of the Gunns Tasmanian Forestry Estate (as defined in the letter dated 5 April 2013) in accordance with the Standstill Agreements, GPL was entitled to retain for the benefit of scheme members the market value of the Scheme Assets subject to any validly asserted lien with respect to those assets;

Particulars

- A. Clauses 7 and 10 of the Standstill Agreement made on 5 April 2013 constituted by a letter dated 5 April 2013 sent by Mr Ross McClymont of Ashurst to Ms Jane Sheridan of Arnold Bloch Leibler and a letter dated 5 April 2013 from Ms Sheridan to Mr McClymont. Copies of these letters are in the possession of the solicitors acting for the Fourth Defendant and may be inspected by appointment during business hours.
 - B. Standstill Agreement made on 19 June 2014 constituted by a letter dated 19 June 2014 sent by Mr McClymont of Ashurst to Ms Sheridan of Arnold Bloch Leibler and a letter dated 19 June 2014 from Ms Sheridan to Mr McClymont. Copies of these letters are in the possession of the solicitors acting for the Fourth Defendant and may be inspected by appointment during business hours.
- (c) says that on 31 May 2013 and 6 June 2013, the Supreme Court of Victoria ordered that the liquidators were justified in procuring GPL to amend the Constitutions of the 2000-2006 and 2008-2009 Gunns Woodlot Schemes so as to empower GPL to terminate, relinquish or surrender the leases, subleases, forestry right deeds, maintenance and management agreements and any other project documents between GPL and the members of those Schemes and any rights of the Growers arising from or in connection with those documents or Schemes;
- (d) says that by Deed Polls made on 21 August 2013 GPL amended the Constitutions of the 2000-2006 and 2008-2009 Gunns Woodlot Schemes so as to irrevocably empower GPL as the agent, representative and attorney of the Growers to, subject to first obtaining approval of either the Supreme Court of Victoria or the Federal Court of Australia:

“...terminate, relinquish or surrender any Lease Agreements, Management Agreements or other Project documents between GPL and the Growers and to terminate, relinquish or surrender any rights of the Growers in the Wood or arising from, under, or in connection with the Lease Agreements, Management Agreements, any other Project documents or the Project.”

Particulars

The Deeds Polls are in writing, executed by Mr Daniel Mathew Bryant in his capacity as liquidator of GPL. A copy of the Deed Polls is in the possession of the solicitors acting for the Fourth Defendant and may be inspected by appointment during business hours.

- (e) says that by a Deed to Surrender and Release Growers Rights made on 14 July 2014:
 - (i) the liquidators of GPL agreed (subject to an order, direction or declaration from either the Supreme Court of Victoria or the Federal Court of Australia) to procure GPL to enter into a Surrender Deed in consideration for the payment of \$40,565,922 less \$1,014,148;
 - (ii) Gunns Ltd agreed that it would not make:
 - A. a claim for indemnity from the Scheme Assets for any rent or other amounts paid by Gunns Ltd on behalf of, or owing by, GPL with respect to the Gunns Woodlot Schemes prior to the appointment of the receivers;
 - B. any claim for any unpaid rent or other amounts relating to the Forestry Right Deeds, accrued before, during or after the appointment of the receivers; or

C. any claim for any unpaid maintenance charges relating to management or maintenance of the Scheme Assets during any period prior to the appointment of the receivers;

and,

(iii) the receivers of GPL agreed that they would not make any claim against the Scheme Assets on behalf of GPL for any unpaid fees relating in anyway to the Schemes or Scheme Assets including any fees payable to GPL as responsible entity of the Schemes;

Particulars

Clauses 1, 3.1 and 7 of the Deed to Surrender and Release Grower Rights. A copy of the Deed is in the possession of the solicitors acting for the Fourth Defendant and may be inspected by appointment during business hours.

- (f) says that in the Supreme Court of Victoria (Proceeding Number SCI 2013 2095) the Growers opposed the sale and alleged that the liquidators had breached their duties under sections 601FC(1) and 601FD(1) of the Act;
- (g) says that on 11 August 2014 the Supreme Court of Victoria found that the liquidators had not breached their duties and directed that the liquidators were justified in procuring GPL to terminate, relinquish or surrender all rights of the Growers in the Gunns Woodlot Schemes to the extent necessary to allow the completion of the sale;

Particulars

Re Gunns Plantations Limited (In Liquidation)
(Receivers & Managers Appointed) (No 4)
 [2014] VSC 369.

- (h) says that exercising the power granted to it under the Constitutions of the 2002, 2003, 2004, 2005, 2006, 2008 and 2009 Gunns Woodlot Schemes, GPL surrendered, relinquished and terminated all of the right, title and interest of the Growers in, arising from, or in connection with, all or part of the land on which those Schemes were conducted; and

Particulars

Clause 2.2 of the Surrender Deed. An unexecuted copy of the Surrender Deed is attached to the Deed to Surrender and Release Grower Rights. Further particulars may be provided after discovery and prior to trial.

- (i) in the circumstances set out above, says that to the extent the Plaintiffs have suffered loss or damage (which is denied), it was not caused by the matters alleged in paragraph 87 of the Plaintiffs' Contentions.

88 As to paragraph 88 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 88 of the Plaintiffs' Contentions;
- (b) says that Mr Gayne was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (c) says that based on paragraph 35 of the Plaintiffs' Contention the GPL Bank Guarantee was issued by GPL after 3 June 2010;
- (d) refers to and repeats paragraphs 87(b) to 87(h) above; and
- (e) says that to the extent the Plaintiffs have suffered loss or damage (which is denied), it was not caused by the matters alleged in paragraph 88 of the Plaintiffs' Contentions.

89 As to paragraph 89 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 89 of the Plaintiffs' Contentions;

- (b) refers to and repeats paragraphs 87(b) to 87(h) above; and
- (c) says that to the extent the Plaintiffs have suffered loss or damage (which is denied), it was not caused by the matters alleged in paragraph 89 of the Plaintiffs' Contentions.

90 As to paragraph 90 of the Plaintiffs' Contentions, the Fourth Defendant

- (a) denies each of the allegations in paragraph 90 of the Plaintiffs' Contentions;
- (b) refers to and repeats paragraphs 38(b), 38(c), 38(d), 43(c), 43(d), 43(e), 45, 46(c), 46(d) and 48(b) above;
- (c) says that the term "GPL Trust Duties" is not defined in the Plaintiffs' Contentions; and
- (d) says that there were no "Growers' Trust Funds" as that term is defined in paragraph 52B49 of the Plaintiffs' Contentions.

90A As to paragraph 90A of the Plaintiffs Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraph 90 above;
- (b) denies each of the allegations in paragraph 90A of the Plaintiffs' Contentions.

GPL Directors

90B As to paragraph 90B of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies of the allegations in paragraph 90B of the Plaintiffs' Contentions;
- (b) further says that to the extent that the Plaintiffs have suffered loss and damage (which is denied), it was not caused by the matters alleged in paragraph 90B of the Plaintiffs' Contentions.

91 As to paragraph 91 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 91 of the Plaintiffs' Contentions;
- (b) refers to and repeats paragraphs 69, 82, 83 and 87(b) to 87(h) above; and
- (c) says that to the extent the Plaintiffs have suffered loss or damage (which is denied), it was not caused by the matters alleged in paragraph 91 of the Plaintiffs' Contentions.

92 As to paragraph 92 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 92 of the Plaintiffs' Contentions;
- (b) says that Mr Gayhe was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (c) says that based on paragraph 35 of the Plaintiffs' Contentions the GPL Bank Guarantee was issued after 3 June 2010 and Mr Gayhe therefore had no obligation, power or authority to cause GPL to do the things that the Plaintiffs allege ought to have been done by GPL;
- (d) refers to and repeats paragraphs 69, 82, 83 and 87(b) to 87(h) above; and
- (e) says that to the extent the Plaintiffs have suffered loss or damage (which is denied), it was not caused by the matters alleged in paragraph 92 of the Plaintiffs' Contentions.

93 As to paragraph 93 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 93 of the Plaintiffs' Contentions; and
- (b) refers to and repeats paragraphs 69, 82, 83 and 87(b) to 87(h) above; and

- (c) says that to the extent the Plaintiffs have suffered loss or damage (which is denied), it was not caused by the matters alleged in paragraph 93 of the Plaintiffs' Contentions.

94 As to paragraph 94 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 94 of the Plaintiffs' Contentions; and
- (b) refers to and repeats paragraphs 69, 82, 83 and 87(b) to 87(h) above; and
- (c) says that to the extent the Plaintiffs have suffered loss or damage (which is denied), it was not caused by the matters alleged in paragraph 94 of the Plaintiffs' Contentions.

94A As to paragraph 94A, the Fourth Defendant:

- (a) refers to and repeats paragraphs 83A (there is no 88B) to 90 above;
- (b) denies each of the allegations in paragraph 94A.

Gunns Ltd

95 There is no paragraph 95.

96 There is no paragraph 96.

97 There is no paragraph 97

KPMG

98 As to paragraph 98 of the Plaintiffs' Contentions, to the extent that allegations are made against Mr Gay as one of the GPL Directors, the Fourth Defendant:

- (a) refers to and repeats paragraphs 53, 71, 72 and 86 above; and
- (b) otherwise denies each of the allegations in paragraph 98 above.

99 The Fourth Defendant does not admit each of the allegations in paragraph 99 of the Plaintiffs' Contentions.

100 As to paragraph 100, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 100 of the Plaintiffs' Contentions;
- (b) refers to and repeats paragraphs 87(b) to 87(h); and
- (c) says that to the extent the Plaintiffs have suffered loss or damage (which is denied), it was not caused by the matters alleged in paragraph 100 of the Plaintiffs' Contentions.

101 The Fourth Defendant denies the allegations in paragraph 101 of the Plaintiffs' Contentions.

The Plaintiffs' Loss

102 The Fourth Defendant denies each of the allegations in paragraph 102 of the Plaintiffs' Contentions.

103 As to paragraph 103 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) refers to and repeats paragraphs 90, 94, 98 and 99 above; and
- (b) otherwise denies each of the allegations in paragraph 103 of the Plaintiffs' Contentions.

104 As to paragraph 104 of the Plaintiffs' Contentions, the Fourth Defendant:

- (a) denies each of the allegations in paragraph 104 of the Plaintiffs' Contentions;
- (b) says that the First Plaintiff could suffer no damage in respect of the 2003, 2006 and 2009 Gunns Woodlot Schemes as it did not invest in those particular schemes; and
- (c) refers to and repeats paragraphs 87(b) to 87(h) above.

105 Further, in response to the Plaintiffs' Contentions and claims for relief, the Fourth Defendant relies on the matters in paragraphs 106 to 136 below.

Relief from liability – Sections 1317S(2) and 1318 of the Act

- 106 If the Fourth Defendant is liable to the Plaintiffs as alleged in the Plaintiffs' Contentions (which is denied):
- (a) the Plaintiffs allege that ~~the Fourth Defendant~~ Mr Gay contravened civil penalty provisions, being sections 601FD(1)(b), 601FD(1)(c), 601FD(1)(e) and 601FD(1)(f) of the Act;
 - (b) at all material times ~~the Fourth Defendant~~ Mr Gay acted honestly; and
 - (c) having regard to all the circumstances of the case, including that Mr Gay ~~he~~ was not a director of Gunns after 27 May 2010, Mr Gay ~~he~~ was not a director of GPL after 3 June 2010 and the matters pleaded in paragraph 82 above, Mr Gay and/or the Fourth Defendant ought fairly to be excused for the contraventions (which are denied) pursuant to section 1317S(2) of the Act.
- 107 Further of alternatively to paragraph 105 above, if the Fourth Defendant is liable to the Plaintiffs as alleged in the Plaintiffs' Contentions (which is denied):
- (a) the Plaintiffs allege that ~~the Fourth Defendant~~ Mr Gay was negligent, defaulted and/or breached his duties;
 - (b) at all material times ~~the Fourth Defendant~~ Mr Gay acted honestly; and
 - (c) having regard to all the circumstances of the case, including that Mr Gay ~~he~~ was not a director of Gunns after 27 May 2010, Mr Gay ~~he~~ was not a director of GPL after 3 June 2010 and the matters pleaded in paragraph 82 above, the Fourth Defendant and/or Mr Gay ought fairly to be excused for the negligence, default or breaches (which are denied) pursuant to section 1318 of the Act.

Apportionment

- 108 If the Fourth Defendant is liable to the Plaintiffs as alleged in the Plaintiffs' Contentions (which is denied), then:
- (a) the Plaintiffs' claim (or each of its claims) against the Fourth Defendant is for economic loss in an action to recover damages arising from a

failure to take reasonable care within the meaning of section 43A(1) of the *Civil Liability Act 2002* (TAS), alternatively section 34(1) of the *Civil Liability Act 2002* (NSW), and is an apportionable claim;

- (b) by reason of the matters in paragraphs 65 to 67, 73 to 76, 79, 80 and 87 to 90 of the Plaintiffs' Contentions, GPL is a person whose acts or omissions (or act or omission) caused, independently of each other or jointly, the loss or damage the subject of the claim and is a concurrent wrongdoer within the meaning of section 43A(2) of the *Civil Liability Act 2002* (TAS), alternatively section 34(2) of the *Civil Liability Act 2002* (NSW); and
- (c) in the premises, the liability of the Fourth Defendant (if any) in relation to the Plaintiffs' claim (or each of its claims) should be reduced to reflect the proportion of the loss and damage that the Court considers just having regard to the extent of Mr Gay and/or Fourth Defendant's his responsibility for the loss and damage pursuant to Part 9A of the *Civil Liability Act 2002* (TAS), alternatively Part 4 of the *Civil Liability Act 2002* (NSW).

109 Further, if the Fourth Defendant is liable to the Plaintiffs as alleged in the Plaintiffs' Contentions (which is denied), then:

- (a) the Plaintiffs' claim (or each of its claims) against the Fourth Defendant is for economic loss in an action to recover damages arising from a failure to take reasonable care within the meaning of section 43A(1) of the *Civil Liability Act 2002* (TAS), alternatively section 34(1) of the *Civil Liability Act 2002* (NSW), and is an apportionable claim;
- (b) by reason of the matters in paragraphs 68, 81, 95 and 96 of the Plaintiffs' Contentions, Gunns Ltd is a person whose acts or omissions (or act or omission) caused, independently of each other or jointly, the loss or damage the subject of the claim and is a concurrent wrongdoer within the meaning of section 43A(2) of the *Civil Liability Act 2002* (TAS), alternatively section 34(2) of the *Civil Liability Act 2002* (NSW); and
- (c) in the premises, the liability of the Fourth Defendant (if any) in relation to the Plaintiffs' claim (or each of its claims) should be reduced to reflect

the proportion of the loss and damage that the Court considers just having regard to the extent of the Fourth Defendant and/or Mr Gay his responsibility for the loss and damage pursuant to Part 9A of the *Civil Liability Act 2002* (TAS), alternatively Part 4 of the *Civil Liability Act 2002* (NSW).

- 110 Further, if the Fourth Defendant is liable to the Plaintiffs as alleged in the Plaintiffs' Contentions (which is denied), then:
- (a) the Plaintiffs' claim (or each of its claims) against the Fourth Defendant is for economic loss in an action to recover damages arising from a failure to take reasonable care within the meaning of section 43A(1) of the *Civil Liability Act 2002* (TAS), alternatively section 34(1) of the *Civil Liability Act 2002* (NSW), and is an apportionable claim;
 - (b) by reason of the matters in paragraphs 4, 6 to 10, 69, 82 to 84 and 91 to 94 of the Plaintiffs' Contentions, the Third, Fifth, Sixth, Seventh, Eighth and Ninth Defendants are persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the loss or damage the subject of the claim and are concurrent wrongdoers within the meaning of section 43A(2) of the *Civil Liability Act 2002* (TAS), alternatively section 34(2) of the *Civil Liability Act 2002* (NSW); and
 - (c) in the premises, the liability of the Fourth Defendant (if any) in relation to the Plaintiffs' claim (or each of its claims) should be reduced to reflect the proportion of the loss and damage that the Court considers just having regard to the extent of the Fourth Defendant and/or Mr Gay his responsibility for the loss and damage pursuant to Part 9A of the *Civil Liability Act 2002* (TAS), alternatively Part 4 of the *Civil Liability Act 2002* (NSW).

- 111 Further if the Fourth Defendant is liable to the Plaintiffs as alleged in the Plaintiffs' Contentions (which is denied), then:
- (a) the Plaintiffs' claim (or each of its claims) against the Fourth Defendant is for economic loss in an action to recover damages arising from a failure to take reasonable care within the meaning of section 43A(1) of the *Civil Liability Act 2002* (TAS), alternatively section 34(1) of the *Civil Liability Act 2002* (NSW), and is an apportionable claim;
 - (b) by reason of the matters in paragraphs 12, 53 to 55, 70 to 72, 77 to 78, 86 and 97 of the Plaintiffs' Contentions, the Tenth Defendant, the Eleventh Defendant and the accounting firm KPMG are persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the loss or damage the subject of the claim and are concurrent wrongdoers within the meaning of section 43A(2) of the *Civil Liability Act 2002* (TAS), alternatively section 34(2) of the *Civil Liability Act 2002* (NSW); and
 - (c) in the premises, the liability of the Fourth Defendant (if any) in relation to the Plaintiffs' claim (or each of its claims) should be reduced to reflect the proportion of the loss and damage that the Court considers just having regard to the extent of the Fourth Defendant and/or Mr Gay's responsibility for the loss and damage pursuant to Part 9A of the *Civil Liability Act 2002* (TAS), alternatively Part 4 of the *Civil Liability Act 2002* (NSW).

Claim for declarations against ~~the Fourth Defendant~~ Mr Gay is statute barred

- 112 The Plaintiffs seek declarations that ~~the Fourth Defendant~~ Mr Gay contravened sections 601FD(1)(b), 601FD(1)(c), 601FD(1)(e) and 601FD(1)(f) of the Act (**Alleged Contraventions**).
- 113 Pursuant to section 1317K of the Act, proceedings for a declaration of contravention of the Act may be started no later than 6 years after the contravention.
- 114 ~~The Fourth Defendant~~ Mr Gay was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions.

115 This proceeding was commenced on 8 March 2018.

116 In the circumstances:

- (a) all of the Alleged Contraventions (which are denied) would have occurred prior to 3 June 2010;
- (b) all of the Alleged Contraventions (which are denied) would therefore have occurred more than 6 years prior to the Plaintiffs commencing this proceeding; and
- (c) the right to claim the declarations that ~~the Fourth Defendant~~ Mr Gay contravened sections 601FD(1)(b), 601FD(1)(c), 601FD(1)(e) and 601FD(1)(f) of the Act is barred by section 1317K of the Act.

Claim under section 601MA of the Act is statute barred

117 The Plaintiffs seek orders against ~~the Fourth Defendant~~ Mr Gay pursuant to section 1325(5) of the Act.

118 To the extent that those orders are sought in reliance on sections 601MA(1) and 1325(1) of the Act, pursuant to section 601MA(2) of the Act an application under section 601MA(1) of the Act must be begun within 6 years after the cause of action arose.

119 ~~The Fourth Defendant~~ Mr Gay was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions.

120 This proceeding was commenced on 8 March 2018.

121 In the circumstances:

- (a) the contraventions alleged against GPL (which are denied) while ~~the Fourth Defendant~~ Mr Gay was a director of GPL occurred prior to 3 June 2010;
- (b) the cause of action against GPL in respect of those contraventions would therefore have arisen more than 6 years prior to the Plaintiffs commencing this proceeding; and

- (c) the right to make the application under section 601MA(1) of the Act in respect of those contraventions which occurred prior to 3 June 2010, upon which the orders are sought against ~~the Fourth Defendant~~ Mr Gay pursuant to section 1325(1) and 1325(5) of the Act, is barred by section 601MA(2) of the Act.

Claim for orders under section 1325(2) and 1325(5) is statute barred

- 122 Further or alternatively to paragraphs 116 to 120 above, the Plaintiffs have made an application under section 1325(2) of the Act for orders against the Fourth Defendant and Mr Gay on the basis that Mr Gay engaged in the Alleged Contraventions (which are denied).
- 123 Pursuant to section 1325(4) of the Act, an application under section 1325(2) of the Act may be made within 6 years after the day on which the cause of action arose.
- 124 ~~The Fourth Defendant~~ Mr Gay was not a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions.
- 125 This proceeding was commenced on 8 March 2018.
- 126 In the circumstances:
- (a) all of the contraventions alleged against GPL (which are denied) while ~~the Fourth Defendant~~ Mr Gay was a director of GPL and all of the Alleged Contraventions (which are denied) would have occurred prior to 3 June 2010;
- (b) the cause of action would therefore have arisen more than 6 years prior to the Plaintiffs commencing this proceeding; and
- (c) the right to make the application under section 1325(2) is barred by section 1325(4) of the Act.

Claim for equitable compensation is barred

- 127 The Plaintiffs seek orders that the Fourth Defendant and Mr Gay pay equitable compensation in respect of alleged breaches of trust by GPL and Gunns Ltd

(which allegation is embarrassing as no equitable cause of action is alleged against the Fourth Defendant and Mr Gay and is otherwise denied).

- 128 Each alleged breach of trust occurred in Tasmania.
- 129 The alleged cause of action accrued from the date of commission of each alleged breach of trust.
- 130 ~~The Fourth Defendant~~ Mr Gay was not:
- (a) a director of Gunns Ltd after 24 May 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions; or
 - (b) a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions.
- 131 This proceeding was commenced on 8 March 2018.
- 132 Section 24(2) of the *Limitation Act 1974* (TAS) provides that an action by a beneficiary in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of the *Limitation Act 1974* (TAS), shall not be brought after the expiration of 6 years from the date on which the right of action accrued.
- 133 In the circumstances:
- (a) insofar as:
 - (i) Gunns Ltd acted in breach of trust prior to 24 May 2010 (which is denied); and/or
 - (ii) GPL acted in breach of trust prior to 3 June 2010 (which is denied),
- and the Fourth Defendant and Mr Gay is alleged to be liable to pay to the Plaintiffs equitable compensation in respect of those alleged breaches of trust (which allegation is embarrassing as no equitable cause of action is alleged against the Fourth Defendant and Mr Gay and is otherwise denied);

- (b) the alleged breaches of trust (which are denied) occurred more than 6 years prior to the Plaintiffs commencing this proceeding; and
- (c) the Plaintiffs' right to claim for breach of trust is barred by section 24(2) of the *Limitation Act 1974* (TAS).

134 Further or alternatively to paragraphs 126 to 132 above, if section 48 of the *Limitation Act 1969* (NSW) applies notwithstanding that the alleged breaches of trust (which is denied) occurred in Tasmania:

- (a) the alleged cause of action accrued from the date of commission of each alleged breach of trust;
- (b) ~~the Fourth Defendant~~ Mr Gay was not:
 - (i) a director of Gunns Ltd after 24 May 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions; or
 - (ii) a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions.
- (c) this proceeding was commenced on 8 March 2018; and
- (d) in the circumstances:
 - (i) insofar as:
 - A. Gunns Ltd acted in breach of trust prior to 24 May 2010 (which is denied); and/or
 - B. GPL acted in breach of trust prior to 3 June 2010 (which is denied),

and the Fourth Defendant and Mr Gay is alleged to be liable to pay to the Plaintiffs equitable compensation in respect of those alleged breaches of trust (which allegation is embarrassing as no equitable cause of action is alleged against the Fourth Defendant and Mr Gay and is otherwise denied);

- (ii) the alleged breaches of trust (which are denied) occurred more than 6 years prior to the Plaintiffs commencing this proceeding; and
- (iii) the Plaintiffs' right to claim for breach of trust is barred by section 48 of the *Limitation Act 1969* (NSW).

135 Further or alternatively to paragraphs 126 to 133 above, if the Fourth Defendant and Mr Gay is otherwise alleged to be liable to pay to the Plaintiffs equitable compensation (which allegation is embarrassing as no equitable cause of action is alleged against the Fourth Defendant and Mr Gay and is otherwise denied):

- (a) the cause of action would have accrued while ~~the Fourth Defendant~~ Mr Gay was a director of Gunns Ltd and/or GPL;
- (b) ~~the Fourth Defendant~~ Mr Gay was not:
 - (i) a director of Gunns Ltd after 24 May 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions; or
 - (ii) a director of GPL after 3 June 2010 as alleged in paragraph 5 of the Plaintiffs' Contentions;
- (c) this proceeding was commenced on 8 March 2018; and
- (d) by reason of these matters, the Plaintiffs are barred from bringing any such action after 6 years by operation of equitable analogy with the law.

Laches

136 Further or alternatively to paragraphs 126 to 134 above, if it is alleged that the Fourth Defendant:

- (a) is liable to pay to the Plaintiffs equitable compensation in respect of breaches of trust by Gunns Ltd prior to 24 May 2010 and/or GPL prior to 3 June 2010 (which allegation is embarrassing as no equitable cause of action is alleged against the Fourth Defendant and is otherwise denied); and/or

- (b) is otherwise liable to pay to the Plaintiffs equitable compensation (which allegation is embarrassing as no equitable cause of action is alleged against the Fourth Defendant and is otherwise denied),

then:

- (c) by reason of the matters in paragraphs 73 and 74 of the Plaintiffs' Contentions, the Plaintiffs were, or must have been, at all material times fully aware of the facts relied on in support of the alleged breaches of trust (which are denied);
- (d) notwithstanding that the Plaintiffs were, or must have been, at all material times fully aware of the facts relied on in support of the alleged breaches of trust they:
- (i) were nevertheless guilty of prolonged, inordinate and inexcusable delay in bringing this action and seeking equitable compensation; and

- (ii) acquiesced in the matters complained of,

and they thereby caused or permitted ~~the Fourth Defendant~~ Mr Gay to believe, as in fact he did, that the Plaintiffs did not intend to make the alleged claims for breach of trust (which are denied) and seek equitable compensation from him, such that the Fourth Defendant would now be prejudiced; and

Particulars

The Plaintiffs delay in commencing this proceeding ~~will~~ has caused prejudice to the Fourth Defendant and will ~~may~~ confer an unjust advantage on the Plaintiffs. During the period of delay Mr Gay's cancer ~~has~~ deteriorated and his ability to defend this proceeding ~~was~~ has been, and ~~will continue to be~~, impaired. Further, Mr Gay died on 11 April 2019. Further particulars may be provided prior to trial.

- (e) in the premises, the Plaintiffs are barred by laches or acquiescence from claiming the alleged or any relief against the Fourth Defendant and/or it is inequitable and unjust to grant the Plaintiffs the alleged or any relief.

CLAIMS AGAINST CATLIN AND CHUBB

Primary IMI Policy

- 137 As to paragraph 105 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Primary IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 105 of the Plaintiffs' Contentions.
- 138 As to paragraph 106 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Primary IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 106 of the Plaintiffs' Contentions.
- 139 As to paragraph 107 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Primary IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 107 of the Plaintiffs' Contentions.
- 140 As to paragraph 108 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Primary IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 108 of the Plaintiffs' Contentions.
- 141 As to paragraph 109 of the Plaintiffs' Contentions, the Fourth Defendant say that to the extent that paragraph 109 of the Plaintiffs' Contentions makes an allegation against Mr Gay, the Fourth Defendant denies each allegation in paragraph 109.

First Excess IMI Policy

- 142 As to paragraph 110 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the First Excess IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 110 of the Plaintiffs' Contentions.
- 143 As to paragraph 111 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the First Excess IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 111 of the Plaintiffs' Contentions.
- 144 As to paragraph 112 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the First Excess IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 112 of the Plaintiffs' Contentions.
- 145 As to paragraph 113 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the First Excess IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 113 of the Plaintiffs' Contentions.
- 146 As to paragraph 114 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the First Excess IMI Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 114 of the Plaintiffs' Contentions.
- 147 As to paragraph 115 of the Plaintiffs' Contentions, the Fourth Defendant say that to the extent that paragraph 115 of the Plaintiffs' Contentions makes an allegation against Mr Gay, the Fourth Defendant denies each allegation in paragraph 115.

The Chubb Policy

- 148 As to paragraph 116 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Chubb Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 116 of the Plaintiffs' Contentions.

- 149 As to paragraph 117 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Chubb Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 117 of the Plaintiffs' Contentions.
- 150 As to paragraph 118 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Chubb Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 118 of the Plaintiffs' Contentions.
- 151 As to paragraph 119 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Chubb Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 119 of the Plaintiffs' Contentions.
- 152 As to paragraph 120 of the Plaintiffs' Contentions the Fourth Defendant says subject to the production of the Chubb Policy and reference to its full terms and effect at trial, they admit the allegations in paragraph 120 of the Plaintiffs' Contentions.
- 153 As to paragraph 121 of the Plaintiffs' Contentions, the Fourth Defendant say that to the extent that paragraph 121 of the Plaintiffs' Contentions makes an allegation against Mr Gay, the Fourth Defendant denies each allegation in paragraph 121.

Leave to proceed against GPL and the indemnity position

- 154 As to paragraph 122 of the Plaintiffs' Contentions, the Fourth Defendant does not plead to paragraph 122 of the Plaintiffs' Contentions which does not contain any allegation of fact against them.
- 155 As to paragraph 123 of the Plaintiffs' Contentions, the Fourth Defendant does not plead to paragraph 123 of the Plaintiffs' Contentions which does not contain any allegation of fact against them.
- 156 To the extent that paragraph 124 of the Plaintiffs' Contentions makes any allegation against the Fourth Defendant and/or Mr Gay, the Fourth Defendant, subject to the production the letters dated 3 May 2018 and 7 December 2018

and reference to their full terms and effect at trial, the Fourth Defendant admits the allegations in paragraph 124.

157 To the extent that paragraph 125 of the Plaintiffs' Contentions makes any allegation against the Fourth Defendant and/or Mr Gay, the Fourth Defendant, subject to the production letter dated 14 February 2019 and reference to its full terms and effect at trial, the Fourth Defendant admits the allegations in paragraph 125.

158 To the extent that paragraph 126 of the Plaintiffs' Contentions makes any allegation against the Fourth Defendant and/or Mr Gay, the Fourth Defendant, subject to the production letter dated 29 May 2019 and reference to its full terms and effect at trial, the Fourth Defendant admits the allegations in paragraph 126.

159 As to paragraph 127 of the Plaintiffs' Contentions, the Fourth Defendant admits the allegations contained in paragraph 127 of the Plaintiffs' Contentions.

160 As to paragraph 128, the Fourth Defendant does not plead to paragraph 128 of the Plaintiffs' Contentions which does not contain any allegation of fact against them.

161 To the extent that paragraph 129 of the Plaintiffs' Contentions makes any allegation against the Fourth Defendant and/or Mr Gay, the Fourth Defendant admits the allegations in paragraph 129 of the Plaintiffs' Contentions.

162 To the extent that paragraph 130 of the Plaintiffs' Contentions makes any allegation against the Fourth Defendant and/or Mr Gay, the Fourth Defendant denies the allegations in paragraph 130 of the Plaintiffs' Contentions.

163 As to paragraph 131 of the Plaintiffs Contentions, the Fourth Defendant:

(a) refers to and repeats paragraph 162 above; and

(b) otherwise does not plead to paragraph 131 of the Plaintiffs Contentions as it makes no allegation of fact against them.

SIGNATURE

Signature of legal representative

A handwritten signature in black ink, appearing to be 'R. Mereine', written over a light grey horizontal bar.

Capacity

Richard Mereine, Solicitor

Date of signature

26 February 2021 ~~28 August 2018~~

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

Thirteenth Defendant