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Details of Filing

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PLAINTIFFS' OUTLINE OF SUBMISSIONS IN SUPPORT OF THE AMENDED ORIGINATING PROCESS PURSUANT TO SECTION 424 OF THE CORPORATIONS ACT 2001 (CTH)

WAD 103 of 2018

Federal Court of Australia

District Registry: Western Australia

Division: General

IN THE MATTER OF SANDALWOOD PROPERTIES LTD (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED)

ACN 093 330 977

Jason Preston, Shaun Robert Fraser and Robert Conry Brauer as receivers and managers of Sandalwood Properties Ltd (Administrators Appointed) (Receivers and Managers Appointed) (ACN 093 330 977)

Plaintiffs

1 By amended originating process filed 27 March 2018, the plaintiff receivers seek directions pursuant to s 424 of the *Corporations Act 2001* (Cth) concerning the ongoing role of Sandalwood Properties Ltd (Administrators Appointed) (Receivers and Managers Appointed) ACN 093 330 977 (***SPL***) in relation to two managed investment schemes over sandalwood growing projects.

2 The receivers seek directions that they may ignore two "Notices of Removal of Manager", each issued by a scheme member, Mr Graeme Scott, purportedly under a Lease and Management Agreement (***LMA***) to which he was a party, and certain

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resolutions purportedly passed by scheme members to appoint Sandalwood Growers Co-Op Ltd (***SGC***) as the new Manager of each project.

3 The receivers also seek directions that they may continue to cause SPL to perform the role of Manager under the LMAs.

4 For the purposes of this application, the relevant schemes are the TFS Sandalwood Project 2002 (***2002 Project***) and the TFS Sandalwood Project 2003 (***2003 Project***). There is no difference material for present purposes between the LMA for the 2002 Project and the LMA for the 2003 Project, and the terms that are most important for present purposes, namely cll 24 and 27 and the definition of "Agreement" in cl 1.1, are exactly the same. Therefore these submissions will refer only to the LMA for 2002, which is found at pp 280-329 of Exhibit SRF1 to the affidavit of Shaun Robert Fraser affirmed 22 March 2018.

Issues raised and receivers' position

5 The first issue raised by the directions sought is what the notices of removal convey, on their proper construction in the context of the relevant LMAs. Do they convey an intention to remove SPL as Manager, a role under the LMAs, or do they convey an intention to terminate some part of each LMA? The receivers submit that the notices are ambiguous on this point, and for that reason alone they have no effect under the LMAs.

6 The next issue is what effect the notices of removal have under the LMAs, if any. The receivers submit that regardless of the outcome of the first issue, the notices have no effect. If they purport to terminate SPL as Manager, that is not something the LMAs authorise Mr Scott to do in these circumstances. If, instead, they purport to terminate some part of the LMAs, that also is not something it is possible to do.

7 The third issue is whether, even if the notices of removal are effective, that effect extends beyond the LMA between SPL and Mr Scott in respect of each project, to somehow remove SPL as Manager under all the LMAs for each member of the relevant scheme. The receivers submit that it does not.

8 The fourth issue is whether the resolutions passed at the meetings of 12 March 2018 were effective to appoint SGC as Manager of the Projects for the purposes of the LMAs. The receivers submit that if any of the questions above are answered in the way the receivers submit that they should be answered, the resolutions have no effect.

Background

9 The background is set out at paragraphs 1-25 of the affidavit of Shaun Robert Fraser affirmed on 22 March 2018 (***March Fraser Affidavit***). The plaintiffs also rely on the affidavit of Shaun Robert Fraser affirmed on 9 April 2018 (***April Fraser Affidavit***).

10 In overview, SPL is a subsidiary of Quintis Ltd (Administrators Appointed) (Receivers and Managers Appointed) ACN 092 200 854 (formerly TFS Corporation Ltd). The business of the Quintis Group involves forestry managed investment schemes governed by Chapter 5C of the *Corporations Act*.

11 Quintis Ltd, SPL and other subsidiaries of Quintis Ltd went into voluntary administration on 20 January 2018. On 23 January 2018, Mr Fraser and the other plaintiffs (partners of McGrathNicol) were appointed as receivers and managers of Quintis Ltd, SPL and other subsidiaries. BTA Institutional Services Ltd was the appointor.

12 For each of the relevant projects:

(a) SPL acts as the responsible entity for the purposes of Part 5C.2 of the *Corporations Act*;

(b) sandalwood plantations were established on land of which SPL is the registered proprietor, and SPL leases the land to Quintis Leasing Pty Ltd (Administrators Appointed) (Receivers and Managers Appointed) (***Quintis Leasing***);

(c) each investor (known as a ***Grower***) submitted an application form containing a power of attorney in favour of SPL as responsible entity to enable various contracts to be signed on their behalf, including the LMAs;

(d) the Grower sub-leases from Quintis Leasing a specific area of the land on which the plantation is established;

(e) each Grower appointed SPL as Manager of the plantation under the LMAs to plant, develop and manage the Grower's leased area;

(f) in order to comply with its obligations under the scheme documents, SPL in turn sub-contracted that management role to Quintis Forestry Ltd (Administrators Appointed (Receivers and Managers Appointed); and

(g) each Grower has agreed to pay SPL that Grower's proportion of certain costs associated with the establishment, management and ultimate harvest of the plantation.

The Notices to Remove Manager and the meetings

13 Prior to the appointment of external administrators, a meeting of Growers of the 2002 Project was convened to consider resolutions for the removal of SPL as Responsible Entity of the 2002 Project, and for the appointment of SGC in its place (pp 520-526 of Exhibit SRF1).

14 SGC did not meet the statutory requirements to act as responsible entity, nor did the alternate entity that it put forward hold the requisite authorisations from ASIC (pp 533-534 of Exhibit SRF1). The resolution was never passed and the meeting lapsed pursuant to section 252K of the *Corporations Act*.

15 SGC has now sought to have itself appointed as "the new manager" of each of the relevant projects (pp 479-489, 490-499 of Exhibit SRF1). Similar steps have been taken in relation to other projects: paragraph 40 of the March Fraser Affidavit; paragraph 9 of the April Fraser Affidavit annexure "SRF3"; paragraphs 22-24 of the affidavit of Teague Damian Czislowski affirmed 3 April 2018.

16 Apparently as a preliminary step to that, Mr Scott served on SPL and on Quintis Leasing a notice headed "Notice to Remove Manager" in relation to each of the 2002 Project and the 2003 Project.

17 On 12 March 2018, meetings were held of the Growers in the relevant projects at which the Growers purportedly passed extraordinary resolutions appointing SGC as the new Manager of the projects.

Directions pursuant to s 424 of the Act

18 This is an appropriate matter for the Court to give directions under s 424 of the *Corporations Act*.

19 The power to make directions under s 424 is a broad one intended to facilitate the work of receivers and should be interpreted liberally: *Deputy Commissioner of Taxation v Best & Less (Wollongong) Pty Ltd* (1992) 7 ACSR 245 at 247 (Lockhart J); *Korda v Silkchime Pty Ltd* (2010) 243 FLR 269; [2010] WASC 155 at 276 [30] (Le Miere J).

20 The directions sought here are in relation to matters arising in connection with the performance and exercise of the receivers' functions and powers as receivers: s 424(1).

They concern whether the receivers should exercise those functions and powers to cause SPL to continue operating as Manager of the two projects.

21 Section 424 cannot be resorted to for the purpose of seeking the intervention of the court to make a commercial decision for the controller: *Re One.Tel Network Holdings* (2001) 40 ACSR 83; [2001] NSWSC 1065 at [30]. The directions sought here do not do that. Rather, they relate to legal issues of substance: see *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409; [2002] FCA 90 at 428, [65] (Goldberg J) (a case concerning an analogous provision, s 447D).

22 The receivers seek, in effect, directions that they may lawfully take a particular course, namely continue to cause SPL to act as Manager of the relevant projects under the LMAs: see e.g. *Re North City Developments Pty Ltd: Ex Parte Walker* (1990) 20 NSWLR 286; at 290F.

23 The directions will not bind third parties in relation to substantive issues, even when they have taken part in the application for directions. Rather, they will protect the receivers against liability for any alleged breach of duty, provided that they have made full and fair disclosure of material facts: *Re Ansett Australia Ltd (No 3)* (2002) 115 FCR 409; [2002] FCA 90 at 421, [44]; *Korda v Silkchime Pty Ltd* (2010) 243 FLR 269; [2010] WASC 155 at 276 [30].

24 The directions are necessary because the Manager of the Projects has obligations under the LMAs to provide services as outlined in paragraph 16(b) of the March Fraser Affidavit. It is therefore important for the receivers to confirm that they are justified continuing SPL's performance as Manager of the projects, and incurring the costs of doing so. Such confirmation is required urgently as the end of the wet season in northern Australia means steps must be taken by the Manager to control weeds and other pests: paragraph 20 of the March Fraser Affidavit.

25 SGC has taken steps as though it were the Manager and has held itself out as the Manager of the projects to Growers and the market generally since the date of the Meetings: pp 543-544 of Exhibit SRF1; annexure SRF3 to the April Fraser Affidavit, pp 9-11.

Proper construction of the Notices to Remove Manager

26 The receivers' first submission about the notices is that they are so uncertain as to be invalid, alternatively they are invalid because they purport to do something the LMAs do not authorise the Grower to do.

27 When a unilateral contractual notice is said to be uncertain, the test to be applied is whether a reasonable recipient, who is credited with knowledge of the terms of the agreement, and taking into account the surrounding circumstances, would have doubt as to the meaning of the notice or have regarded it as equivocal. If so, the notice will be found to be invalid: see *Finishing Services Pty Ltd v Lactos Fresh Pty Ltd* [2006] FCAFC 177 at [18] and [28] (Kiefel, Sundberg and Edmonds JJ, applying *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749).

28 The notices here are at pp 476 and 477 of Exhibit SRF1. They are each addressed to SPL as "Manager" and Quintis Leasing as "Lessor". They are each headed "Notice to Remove Manager". Underneath that the notice for the 2002 Project says:

> I/We the undersigned being a Grower/s in the TFS Sandalwood Project ARSN 099 022 170 ("the Project") and being a party to the Lease and Management Agreement ("the Agreement") hereby give notice under clause 24.1(b) of Part III of the Agreement to terminate Sandalwood Properties Ltd as Manager with effect from the date the Grower's [sic] in the Project pass an ordinary resolution to appoint the Sandalwood Growers Co-op Ltd as the new Manager under clause 27.1(a) of the Agreement.

29 The notice for the 2003 Project is the same, save for minor typographical variations and changes attributable to the fact that it relates to a different project.

30 The notices state their effect as the removal or termination of SPL "as Manager". That is said to take effect only on the passing of an ordinary resolution to appoint SGC as the new Manager under cl 27.1(a) of the LMA. The notices therefore seem to proceed on the basis that the LMA will continue and only SPL's role as Manager under the LMA will come to an end.

31 The immediate difficulty with understanding this is that there is no provision of the LMA authorising the removal or the termination of SPL as Manager in the present circumstances, other than as a result of the termination of the LMA as a whole.

No provision authorising removal of Manager

32 The provision under which the notice is said to have been given, cl 24.1(b), does not authorise the removal of SPL as Manager while leaving the LMA intact. Clause 24.1 relevantly provides that at any time after any of the events listed in the clause, including those in cl 24.1(b), "by written notice to the Manager and the Lessor, the Grower may terminate this Agreement" (pp 308-309 of Exhibit SRF1). "Agreement" is defined to mean "this Lease and Management Agreement" (cl 1.1, p 284 of Exhibit SRF1). Therefore, what cl 24.1 permits the Grower to do is to terminate the LMA as a whole. It does not contain any procedure for the removal or termination of the Manager while leaving the LMA operative.

33 Nor does cl 27.1 authorise the removal of the Manager. It permits the appointment of a new Manager by ordinary resolution of the Growers, but it only operates if the Manager "is removed pursuant to **clause 24.1**" (bold in the original) or if the Manager retires under cl 26.

34 Thus any removal must occur before any resolution to appoint a new Manager can have effect. Removal is not something that cl 27.1 empowers the Grower to effect.

35 It is true that the language of cl 27.1(a) is inapt, because it could be taken to suggest that removal of the Manager can take place "pursuant to clause 24.1". But that cannot alter the meaning of cl 24.1 itself, which authorises not removal of the Manager, but termination of "the Agreement".

36 The only reference to removal in cl 24.1 is at cl 24.1(c), which permits the Grower to terminate the LMA after the event of "the Manager being removed as responsible entity under the Constitution". Clauses 24.1 and 27 may be read together harmoniously by reading cl 27.1(a) as a reference to such a removal.

37 That reading is supported by cl 27.2, which shows that the parties intended that the role of responsible entity and the role of Manager go hand in hand. The provision requires the new manager to "execute a deed whereby it undertakes to the Growers all obligations of the retiring Manager pursuant to this Agreement and the Constitution". The Constitution means the constitution of the managed investment scheme: cl 1.1 definitions of "Constitution" and "Project", pp 285 and 289 of Exhibit SRF1.

38 The Constitution likewise proceeds on the basis that the responsible entity and the manager will be the same entity: see cl 16.2, p 92 of Exhibit SRF1. As documents

forming part of the same transaction which refer to each other, the Constitution and the LMA should be read together: *McVeigh v National Australia Bank Ltd* (2000) 278 ALR 429; [2000] FCA 187 at 438-440 [30]-[34] (Finkelstein J) and 447-451 [68]-[77] (Kenny J); *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* (2012) 45 WAR 29; [2012] WASCA 216 at 51 [81] (McLure P).

39 The new manager will then "exercise all the powers and enjoy all the rights and will be subject to all the duties and obligations of the Manager under this Agreement as fully as though such new manager had been originally named as a party to this Agreement and the Constitution". This provision, like the rest of clause 27, is consistent with the statutory scheme for responsible entities under the *Corporations Act*; in this case see s 601FT.

40 Clause 27 cannot have effect in this way unless the new Manager under the LMA is also the new responsible entity of the managed investment scheme.

41 The Constitution, similarly, requires the responsible entity to perform "the obligations that are imposed on it in the Lease and Management Agreements": see clause 16.2 of the Constitution at page 92 of Exhibit SRF1. Since the LMAs impose no obligation on the responsible entity as such, the Constitution too contemplates that the responsible entity and the Manager will be the same.

42 The statutory context of the LMA provides good reason for this. Section 601FB(1) of the *Corporations Act* requires the responsible entity for a managed investment scheme to operate the scheme. Section 601FB(2) permits delegation to an agent, and SPL has entered into a Management Agreement with Quintis Forestry Limited: paragraph 14(g) of the March Fraser Affidavit. But the result of appointing a new Manager under the LMA who is not the responsible entity for the scheme would be that much of the operation of the scheme would be in the hands of an entity (such as SGC) with which the responsible entity has no contractual relationship and which it has no power to control (see p 403 of Exhibit SRF1, for the types of controls that SPL has in relation to Quintis Forestry Limited's performance). The operation of the scheme would then depend entirely on SGC, a party that is not capable of being a responsible entity: see s 601FA of the *Corporations Act*.

Notices ambiguous and of no effect

43 The notices must be interpreted in a commercially sensible way, without dissection of their terms in order to prove ambiguity, and perfect precision and absolute absence of

ambiguity is not the standard required: see *Finishing Services Pty Ltd v Lactos Fresh Pty Ltd* [2006] FCAFC 177 at [25]. The inquiry is into how a reasonable recipient, with the terms of the LMA in the forefront of his or her mind, would have understood the notices: ibid.

44 In the present case, that recipient would have understood the notices as terminating the appointment of SPL as Manager under the LMA while leaving the LMAs otherwise intact. But having the terms of cl 24.1 in mind, that recipient would at the same time have understood the LMAs not to empower the Grower to take that step unless SPL has been removed as responsible entity. That contradiction raises, at least, a reasonable doubt as to what the sender of the notices is seeking to achieve. The notices are therefore invalid.

45 Alternatively, in the absence of that reasonable doubt, the reasonable recipient would understand the notices as purporting to do something which the LMAs do not authorise or contemplate, namely termination of SPL as Manager when it is still the responsible entity and without termination of the LMAs as a whole. Either way, the notices are ineffective.

Other possible ways of understanding the Notices to Remove Manager

46 There is another way in which the notices could conceivably be understood. That is that they were not terminating SPL's role as Manager, while leaving the LMAs otherwise intact, but rather were terminating the "Management Agreement" part of the LMA.

47 SGC did not embrace this interpretation of the notices when the receivers' solicitors raised it (in order to negative it) in correspondence: Exhibit SRF1 pp 502, 507 (para 5), 509-510 (paras 8-9). So it is not clear to what extent SGC will rely on it. Nevertheless, for completeness the following four points are made.

48 First, for the reasons given, the receivers submit that a reasonable recipient of the notices would not understand them to be terminating any part of the LMAs.

49 Second, if this alternative way of understanding the notices is reasonably open, then the need to choose between that and the construction for which the receivers contend, as set out above, itself creates a degree of ambiguity in the notices sufficient to render them invalid.

50 Third, this alternative reading of the notice does not involve correcting a slip, such as a mistaken date, where there could be no real doubt about what the sender of the notice

means. That was what the members of the majority in *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 did (see especially at 769A, 774H-775A, 782H-783A). It would, rather, involve reading the notices as doing something different to what they say they are doing, namely terminate SPL as Manager without terminating any part of the LMA.

51 Fourth, even if the notices are read that way, that is still not something the LMAs authorise the Grower to do. As has been said, cl 24.1 permits the Grower to terminate the Agreement, which is defined to mean the "Lease and Management Agreement", not some part of it.

52 While that definition applies "unless the contrary intention appears" (cl 1.1, p 284 of Exhibit SRF1), here no such intention does appear. Rather, several textual indications support a construction of cl 24.1 to the effect that if it is validly invoked, the result will be a termination of the LMA as a whole. These include the following:

(a) The leasing aspects of the LMA and the management aspects of the LMA are part of one instrument, styled a "Lease and Management Agreement", singular. If the parties had intended each aspect to be terminable independently of each other, they could be expected to have made them in separate instruments.

(b) Where the parties intended to refer to one aspect only of the Agreement, they did so explicitly. In the LMA that is only done in relation to "the Lease", which is defined to mean "the sub-lease of the Leased Area granted by the Lessor to the Grower under **Part II of this Agreement**" (bold in original). Similarly the Constitution separately defines the terms "Lease" and "Management Agreement", although the term "Management Agreement" is not used elsewhere in the document: pp 75 and 76 of Exhibit SRF1.

(c) Clause 24.1 requires that written notice be given "*to the Manager and the Lessor*", suggesting that any termination would be of both the lease and the management arrangements.

(d) Clauses 24.1(a) and 24.1(b) operate on breach by, or insolvency of, the Manager or the Lessor. It would make no sense to confine "the Agreement" in cl 24.1 to the management aspects of the LMA, when the clause expressly permits termination for default by the Lessor alone. When the documents were executed, both the Manager and the Lessor were part of the same corporate group. The

parties should be taken to have intended that a default by either of them could lead to the termination of the LMA as a whole.

(e) Clause 24.2 provides that the termination right arises even if the default is committed only by the Manager or only by the Lessor. This confirms that the right conferred by cl 24.1 is a right to terminate the LMA as a whole.

53 The presence of cl 24 in the part of the Agreement headed "*PART III: MANAGEMENT AGREEMENT*" cannot be relied on as evidence of the "contrary intention" required to displace the definition in cl 1.1, because the LMA provides that headings must not be taken into account in interpreting its provisions (cl 1.2(c), p 290 of Exhibit SRF1). In any event, there is no term comparable to cl 24.1 in Part II of the LMA concerning the Lease, further suggesting that cl 24.1 is intended to effect a termination of the LMA insofar as it deals with the rights and obligations of the Grower, of Quintis Leasing as Lessor and of SPL as Manager.

54 Nor, despite the headings, is there any neat delineation between the section headed "*PART II: SUB-LEASE OF LEASED AREA*" and the section headed "*PART III: MANAGEMENT AGREEMENT*". By clause 5.12, a covenant under the Lease, the Grower granted carbon credits to the Manager. That term would not have any work to do if the aspects of the LMA that concern the role of the Manager were somehow terminated. On the other hand, cl 22.6(c), which is in Part III of the LMA, concerns an obligation between the Lessor and the Grower. There is no mechanism to carve that term out of any termination that somehow only affects Part III of the LMA.

The Notices to Remove Manager are ineffective

55 On the basis of the above, the receivers submit that the notices are ineffective, either because they are ambiguous or because they purport to do something the LMAs do not authorise or contemplate. The first and second issues identified at the outset should be resolved accordingly.

Mr Scott is not entitled to terminate the LMA on behalf of all Growers

56 The only Notices to Terminate Manager of the relevant projects which SPL has received are those executed by Mr Scott. Therefore SGC appears to be proceeding on the basis that Mr Scott is entitled to terminate the LMA on behalf of all Growers in each of the two relevant projects.

57 It is difficult to see how that can be correct. There is an LMA between SPL and each Grower. There is no provision in the LMA that allows a single Grower to terminate on behalf of all Growers. To the contrary, cl 28 provides that each Grower is a several venturer and no Grower is agent of or joint venturer with any other Grower: pp 310-311 of Exhibit SRF1. It would be surprising if any single grower was empowered to either remove the Manager (assuming that this power otherwise existed) or terminate the LMAs on behalf of all the Growers, regardless of the wishes of the other Growers in the project.

58 Findings on this point are only necessary if the first and second issues are resolved contrary to the receivers' submissions. If so, the outcome of third issue should be that even if the notices were effective, they were only effective for the purposes of the LMAs between SPL, Quintis Leasing and Mr Scott.

Resolutions ineffective

59 The Notices of Meeting provide that the resolutions to be considered and voted on at the Meetings are for the appointment of SGC as the new manager of the Projects in accordance with the LMAs: pp 479 and 490 of Exhibit SRF1. However as has been submitted, the right to appoint a new manager in accordance with clause 27.1 is only enlivened in circumstances where the Manager (SPL) is removed or has retired.

60 On that basis cl 27.1 is simply inapplicable.

61 As a consequence, the resolutions are ineffective under the terms of the LMAs. The fourth issue identified at the outset should be resolved consistently with the receivers' position on it.

Receivers may continue to cause SPL to act as Manager

62 It follows from the above that there has been no valid removal or other termination of SPL as Manager under the LMAs with Mr Scott. Nor could there have been any removal in respect of the LMAs with the other Growers. Thus the power to replace SPL under cl 27 of the LMAs has not been enlivened. SGC has not been validly appointed as Manager. SPL remains Manager under the LMAs and the receivers may lawfully continue to cause it to act in that capacity.

Directions sought

63 The receivers seek directions in the form set out in the Amended Originating Process dated 27 March 2018.

Darren Jackson

9 April 2018