

AT MELBOURNE

COMMERCIAL COURT

S ECI 2014 000128

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

Plaintiff

v

VERNON HAROLD VIVIAN

Defendant

JUDGE: DERHAM AsJ
WHERE HELD: Melbourne
DATE OF HEARING: 29 July 2015 (written submission completed on 29 September 2015)
DATE OF JUDGMENT: 20 June 2016
CASE MAY BE CITED AS: Timbercorp Finance Pty Ltd (in liq) v Vivian
MEDIUM NEUTRAL CITATION: [2016] VSC 338 First Revision 2 November 2016

CORPORATIONS – Application for leave to proceed against corporations in liquidation – Applicable test – Whether test satisfied – Leave to proceed with counterclaim against plaintiff granted – Leave to proceed with third party claim against Timbercorp Securities Ltd (In Liq) refused as no insurance available – *Corporations Act 2001* (Cth) s 500(2) – *Re Sydney Formworks Pty Ltd (In Liquidation)* [1965] NSW 646; *Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314; *Vagrand Pty Ltd (In Liq) v Fielding* (1993) 41 FCR 550; *King v Yurisch* [2006] FCA 1369; *Swaby v Lift Capital Partners Pty Ltd* [2009] FCA 749; *Altinova Nominees Pty Ltd v Leveraged Capital Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (No 2)* [2009] FCA 42; *Snelgrove v Great Southern Managers Australia Ltd (In Liq)(Receivers and Managers Appointed)* [2010] WASC 51.

CONSUMER CREDIT – Whether linked credit provider provision applicable – Whether plaintiff jointly liable with Timbercorp Securities as a linked credit provider – Solid foundation for substantial question to be tried that linked credit provider provisions applicable – *Trade Practices Act 1974* (Cth) s 73(1)(b) – *New Holland Credit Aust Pty Ltd v Vaudeleur*, [2006] SADC 57; *SE Vineyard Finance Pty Ltd (R & M App) v Casey* [2011] VSC 403; *Australian Securities and Investments Commission v Bank of Queensland Ltd* [2011] FCA 1361; (2011) 86 ACSR 258; *Technology Leasing Ltd v Lenmar Pty Ltd*, [2012] FCA 709; *Enterprise Finance Solutions Pty Ltd v Austec Pty Ltd* [2013] FCA 491.

INSURANCE – Whether notification of claim in 2009 constitutes a notification of circumstances giving rise to claim against Timbercorp Securities Ltd in proposed third party notice – The facts notified in 2009 are not the basis of the claim that the defendant now seeks to be brought within the cover – *Insurance Contracts Act 1984* s 40(3).

LIMITATION OF ACTIONS – Whether claims sought to be raised pursuant to leave to proceed are statute barred – Contract claims barred – Whether other claims statute barred appropriate questions for trial – *Wardley Australia Ltd v Western Australia*, [1992] HCA 55; (1992) 175 CLR 514; *Re Great Southern Finance Pty Ltd (In Liq)*; *Shellie v Great Southern Finance Pty Ltd (In Liq)* [2013] VSC 351.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr M P Costello	Mills Oakley Lawyers
For the Defendant	Mr S M Gerber	SBA Law
For Timbercorp Securities Ltd	Dr O Bigos	Arnold Bloch Leibler

TABLE OF CONTENTS

HIS HONOUR:

Introduction

1 The defendant seeks:

(a) leave nunc pro tunc to institute proceedings, by way of counterclaim against the plaintiff ('Timbercorp Finance'). Leave to proceed is sought under s 471B or 500(2) (as appropriate) of the [Corporations Act 2001 \(Cth\)](#)('the [Corporations Act](#)');[1]

(b) leave pursuant to r 11.05(2)(b) of the Supreme Court (General Civil Procedure) Rules 2015 ('the Rules') to serve a third party notice on Timbercorp Securities Limited (in liq) (ACN 092 311 469) ('Timbercorp Securities') out of time, leave to proceed with the third party notice pursuant to s 471B or 500(2) (as appropriate) of the [Corporations Act](#), and that the defendant or their agent be authorised to inspect its books under s 247A of the [Corporations Act](#).[2]

2 Timbercorp Finance claims against the defendant moneys due under two loan agreements entered into in June 2006 and June 2007 to fund his initial costs of investing in managed investment schemes ('Schemes') operated by Timbercorp Securities. The defendant failed to make the instalment repayments after 1 July 2009. Timbercorp Finance seeks to recover the monies due under the loan agreements, together with interest and costs.

3 The defendant denies that he is in default of the loan agreements because the debts he owes Timbercorp Finance have been 'extinguished or minimised' by reason of the matters pleaded in his counterclaim. He seeks to set-off against the moneys due under the loan agreements his loss (which includes his liability under the loan agreements) alleging that his financial adviser was an agent of Timbercorp Securities who encouraged him to make these investments by making misrepresentations, and Timbercorp Finance is jointly liable (with Timbercorp Securities) as a linked credit provider under s 73 of the [Trade Practices Act 1974](#) ('TPA').

4 On 19 November 2010, the defendant gave a 'Notice of Opting out by Group Member' pursuant to s 33J(2) of the [Supreme Court Act 1986](#) in the Supreme Court of Victoria group proceeding *Allen Rodney Woodcroft-Brown v Timbercorp Securities & Ors*.[3]

Background

5 On 30 June 2006, the defendant entered into a loan agreement with Timbercorp Finance ('the First Loan Agreement'), in order to fund part of the cost of his initial investment in a Timberlot Project, being a Scheme operated by Timbercorp Securities. Timbercorp Finance lent the defendant the sum of \$63,756.00.

6 On 30 June 2007, the defendant entered into a further loan agreement ('the Second Loan Agreement') with Timbercorp Finance, for the purposes of funding part of the cost of his initial investment in a number of Almond

and Olive Lot Projects, further Schemes operated by Timbercorp Securities. Under the Second Loan Agreement, Timbercorp Finance lent the defendant the sum of \$73,960.00.

7 On 23 April 2009, Mr Mark Anthony Korda and Mr Craig Peter Shepard were appointed as Administrators of Timbercorp Finance.^[4] On 29 June 2009, at a meeting of creditors of Timbercorp Finance,^[5] it was resolved that Timbercorp Finance would be wound up pursuant to s 439C(c) of the [Corporations Act](#).

8 On 1 July 2009, the defendant defaulted under the First Loan Agreement and Second Loan Agreement ('the Loan Agreements') by failing to pay the instalments when they were due and payable.

9 On 19 March 2010, Timbercorp Finance issued a demand to the defendant for the total amount owing under the Loan Agreements as at 2 March 2010. On 2 May 2014, Timbercorp Finance's solicitors sent a letter detailing Timbercorp Finance's intention to sue to the defendant, advising him once more of the default and demanding payment of the balance of both loan agreements by 16 May 2014.

10 On 30 September 2014, Timbercorp Finance commenced the present proceedings claiming repayment of \$211,228.33, the amount owed under the Loan Agreements, plus interests and costs. On 26 November 2014, the defendant purported to file a defence and counterclaim.

11 In his defence, the defendant admits that he entered into the Loan Agreements with Timbercorp Finance and that he failed to make any instalment payments since about 1 July 2009, but says that a financial planner, a Mr Regis Bezencon, who was an authorised representative of Timbercorp Securities, recommended that he invest in the two Schemes. In reliance on Mr Bezencon's various representations, the defendant says he invested in the schemes operated by Timbercorp Securities and financed the investments with Timbercorp Finance.

12 The matter came on before Judd J on 6 March 2015. His Honour made orders, including for the defendant to make applications by for leave to proceed with his counterclaim against Timbercorp Finance and for leave to commence third party proceedings against Timbercorp Securities. The summonses to which I have referred above were filed and served supported by affidavits of Mr Julian McNamara dated 16 February 2015 and an affidavit of the defendant, Mr Vernon Vivian, dated 7 April 2015.

13 The defendant's affidavit gives an account of the circumstances in which he was induced to invest in the schemes and borrow the investment from Timbercorp Finance, so as to provide a factual basis for the allegations in the defence and counterclaim, and, as it turned out, the amended defence and counterclaim, to which I refer below.

14 The affidavit also referred to and exhibited letters of complaint dated 21 July 2009 sent by the defendant's then solicitors, McPherson & Kelley, to the liquidators of Timbercorp Finance and Timbercorp Securities.^[6] The letter to Timbercorp Finance primarily concerned a claim that the defendant and the trustee of his Superannuation Fund (which was said to be a joint venturer with the defendant in the Second Loan Agreement in respect of the almond and olive projects), were not liable to pay invoices rendered in October 2008 in respect of the loans from Timbercorp Finance by reason of offsetting claims. I will refer to the substance of the complaints when dealing with the question of whether the policy of insurance available to Timbercorp Securities responds to the claims proposed to be made against it by the defendant in the proposed third party notice.

15 Outlines of Submissions were then filed and the applications came on for hearing on 29 July 2015. On that day, after considering the parties written and oral submissions, I made orders as follows:

(a) Timbercorp Securities has leave to file and serve a copy of all insurance policies which may respond to the defendant's claims arising from his investment in Timbercorp Projects and borrowing to do so, as a confidential exhibit, and any evidence on which Timbercorp Securities wishes to rely in relation to whether any such policy responds to the defendant's claims, by 26 August 2015;

(b) the defendant has leave to file and serve a proposed amended defence and counterclaim against Timbercorp Finance and a proposed amended third party notice against Timbercorp Securities, and any

further submissions on the amendments to the claims and the insurance position of Timbercorp Securities, by 9 September 2015;

(c) each of Timbercorp Finance and Timbercorp Securities shall file and serve any reply to the defendant's further submissions by 16 September 2015;

(d) the defendant shall file and serve submissions in reply to the submissions of the plaintiff and Timbercorp Securities by 23 September 2015; and

(e) the defendant's summonses dated 17 February and 7 April 2015 be reserved for determination on the papers.

16 These orders were made after it had emerged from submissions made by counsel for the parties that:

(a) there was an insurance policy that was believed not to respond to the claims proposed to be made by the defendant against Timbercorp Securities;

(b) the production of this policy rendered the application under s 274 of the [Corporations Act](#) unnecessary and enabled the Court to avoid placing conditions on any grant of leave to proceed against Timbercorp Securities of the kind imposed in *Altinova Nominees Pty Ltd v Leveraged Capital Pty Ltd (R & M Aptd) (In Liq)(No 2)*^[7] and *Snelgrove v Great Southern Managers Australia Ltd (In Liq)(Receivers and Managers Appointed)*;^[8]

(c) this step was in accordance with the overarching obligations under the [Civil Procedure Act 2010](#), namely; the just, efficient, cost effective and timely resolution of the application, because it avoided multiple hearings in relation to the leave to proceed question;

(d) the formulation of the counterclaim was defective in some respects and the defendant wished to put forward an amended version; and

(e) in this way, the Court would be in a position to consider all the material relevant to the question whether leave to proceed should be granted to the defendant to proceed with its counterclaim against Timbercorp Finance and to commence third party proceedings against Timbercorp Securities.

17 The oral and written submissions expose several major issues. In relation to:

(a) the application for leave to proceed against Timbercorp Finance, they were:

(i) whether Timbercorp Finance was liable with Timbercorp Securities as a linked credit provider under s 73 of the TPA; and

(ii) whether the application of the general discretionary factors support or negative the grant of leave;

(b) application for leave to proceed against Timbercorp Securities, they were:

(i) whether the claims against Timbercorp Securities are statute barred;

(ii) whether Timbercorp Securities is insured in respect of the claims; and

(iii) whether the application of the general discretionary factors support or negative the grant of leave.

18 I will first set out the law applicable to applications for leave to proceed generally, then deal with the application against Timbercorp Finance and then the application against Timbercorp Securities.

Applicable Law

Leave to proceed^[9]

19 The provision pursuant to which the defendant requires leave to proceed with his counterclaim or to commence third party proceedings against Timbercorp Securities is determined by the nature of the liquidation to which

Timbercorp Finance and Timbercorp Securities are subject. If it is a Court ordered winding up, the applicable provision is s 471B of the [Corporations Act](#). The applicable provision for a creditors' voluntary winding up is s 500(2) of the [Corporations Act](#). It is common ground that both Timbercorp Finance and Timbercorp Securities are subject to a creditor's voluntary winding up, so s 500(2) applies. So far as relevant, it provides:

500 Execution and civil proceedings

(2) After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

20 The authorities concerning the purpose of, and the considerations relevant to granting leave under, s 471B of the [Corporations Act](#), are relevant to the purpose of, and the considerations relevant to granting leave under s 500(2).[10]

21 Although s 500 of the [Corporations Act](#) is silent as to the principles under which leave to proceed will be granted, there are many authorities that establish a range of principles and factors relevant to the exercise of the discretion to grant leave, as follows:

(a) the prohibition on proceedings without the grant of leave is intended to give effect to the statutory policy of ensuring that the assets are distributed rateably amongst all creditors so that no creditor will obtain an advantage over another;[11]

(b) the purpose of the provision is to prevent a company in liquidation being potentially unnecessarily subjected to actions that are expensive and, therefore, carried on at the expense of the company creditors;[12]

(c) the liquidator's attention and resources should not be diverted into expending substantial funds on defending proceedings by those with claims against the company when there is a simpler procedure available, namely, calling for and adjudicating upon creditors' proofs of debt, with a right of appeal under s 1321 of the [Corporations Act](#);[13]

(d) there is, in effect, a presumption in favour of leaving those with claims against companies in liquidation to the ordinary proof of debt procedure which is, generally speaking, a cheaper and more efficient way of resolving their claims;[14]

(e) the starting point is that a claimant must lodge a proof of debt unless that person can demonstrate there is good reason to depart from that procedure;[15]

(f) in determining whether leave should be granted, the Court considers whether the balance of convenience lies in allowing the applicant to proceed by way of action to judgment, or whether the applicant should be left to pursue their claim by lodging a proof of debt with the liquidator. This is a discretionary matter and the onus is on the applicant to demonstrate why it is more appropriate, to proceed by way of action;[16]

(g) there must be a serious or substantial question to be tried and the claim must not be futile.[17] This has been expressed in different ways as 'that the claim has a solid foundation and gives rise to a serious dispute', and as akin to the test used in considering whether interlocutory relief should be granted 'a serious question to be tried'.**[18]** There must be evidence establishing the basis for the existence of a serious question to be tried.**[19]** Mere assertion, which is unsupported by a solid foundation, will not suffice.**[20]** However, an applicant is not required to adduce evidence of every element of its claim because to impose that burden would be to shut out many meritorious claims;**[21]**

(h) claims for unliquidated damages for misleading or deceptive conduct, for breach of contract or for tort are admissible to proof in a liquidation;[22] and

(i) it is impossible to state exhaustively the circumstances in which the Court should exercise its discretion to grant leave to proceed. However, in determining whether leave to proceed should be granted, generally relevant factors will include:[23]

(i) the amount, nature and seriousness of the claim;

(ii) the degree of complexity of the legal and factual issues involved;

(iii) whether the relief is not otherwise available to the applicant except by application to the Court;

(iv) the stage to which the proceedings, if already commenced, may have progressed;

(v) in the case of a counterclaim (or cross-claim), whether it arises out of the same factual matrix as the claims made in the primary proceedings;

(vi) whether there is a risk that the same issues would be re-litigated if the claims were to be the subject of a proof of debt;

(vii) whether the proceedings will result in prejudice to the creditors;

(viii) whether the company has a policy of insurance from which any judgment will be paid;

(ix) whether the claim is in the nature of a test case for the interest of a large class of potential claimants;

(x) whether the grant of leave will unleash an ‘avalanche of litigation’;

(xi) whether the cost of the hearing will be disproportionate to the company’s resources;

(xii) delay; and

(xiii) whether pre-trial procedures, such as discovery and interrogatories, are likely to be required or be beneficial.

22 Where there is an insurance company standing behind the company to pay any judgment which the claimant may obtain, that is a factor strongly favouring the grant of leave. In such circumstances, the proceedings will generally cause no prejudice, either procedural or substantive, to the other creditors.[24]

Application for Leave to Proceed-Timbercorp Finance

23 The defendant’s proposed amended defence and counterclaim,[25] is an extensive pleading of the background circumstances leading to the entry into the two loan agreements and pleads a variety of misrepresentations made by Mr Bezencon, and his wife, about the security and quality of the investments in the Schemes. It sets out, sometimes in a conclusory way, the various provisions of the [Corporations Act](#) and the Australian Securities and Investments Act 2001 (Cth) (‘ASIC Act’) that are said to give rise to the liability of Timbercorp Finance and Timbercorp Securities for the conduct of Mr Bezencon. It is sufficient to give a summary, as follows:

(a) Mr Bezencon was the authorised representative of Timbercorp Securities[26] and the agent of Timbercorp Finance at the relevant times and his financial adviser who encouraged him to invest in the schemes;

(b) during the period from 2006 to 2009, Mr Bezencon provided financial and investment advice to the defendant including advising him to invest in Timbercorp Securities’ Schemes;

(c) the defendant has limited knowledge of financial planning and sought financial advice from Mr Bezencon as he was concerned that his savings would not be sufficient to retire at a reasonable age;

(d) at the defendant’s first meeting with Mr Bezencon, the defendant expressed his desire to invest in conservative, low risk investments;

- (e) Timbercorp Securities was responsible for the financial services provided by Mr Bezencon in addition to being the responsible entity for the Timberlot Project and Almond and Olive Project;
- (f) Mr Bezencon and/or Timbercorp Securities breached implied contractual warranties of care and skill and fitness for purpose (implied by s 12ED of the ASIC Act);
- (g) Timbercorp Securities, by the conduct of its authorised representative, engaged in misleading and deceptive conduct,[27] was negligent, failed to provide a product disclosure statement,[28] failed to give a statement of advice;[29]
- (h) Timbercorp Finance is vicariously liable for the negligence of Bezencon for three reasons. First, he was the agent of Timbercorp Finance in arranging the loans. Second, Bezencon was the authorised representative of Timbercorp Securities which is liable for his conduct. Third, because of the structure of the Timbercorp Group of companies, the common directorships and the manner in which Timbercorp Finance promoted its financial services and made loans to investors to invest in projects operated by Timbercorp Securities;
- (i) recovery pursuant to s 953B of the Corporations Act of damages or compensation for breach of s 945A of that Act (requirement to have a reasonable basis for advice); and
- (j) pursuant s 73 of the TPA, Timbercorp Finance was a linked credit provider of Timbercorp Securities[30] and is liable to the defendant for the loss and damage suffered by him as a result of the breaches by Bezencon and Timbercorp Securities of the contractual warranties arising from s 12ED of the ASIC Act, their misleading or deceptive conduct, negligence, negligent misstatement, contravention of s 945A, and failures to give a product disclosure statement and statement of advice.

24 The defendant's proposed amended defence and counterclaim removed allegations of breach by Mr Bezencon of fiduciary duties and allegations that Timbercorp Securities was knowingly involved in those breaches, in effect acknowledging that those claims were unsustainable as a matter of fact and law.

Linked Credit Provider

25 Central to the claims is the allegation that Timbercorp Finance was, in relation to Timbercorp Securities, a linked credit provider within the meaning of s 73(1)(b) of the TPA.[31] Timbercorp Securities was a supplier and the defendant was a consumer within the meaning of s 73 of the TPA. The particulars of the proposed pleading rely on a number of the circumstances which are submitted to bring the defendant's claims within the definition of 'linked credit provider', as follows, that:

- (a) Timbercorp Finance had an understanding with Timbercorp Securities relating to the supply to the defendant of financial services in which Timbercorp Securities dealt;
- (b) Timbercorp Finance was, by arrangement, regularly referred to persons by Timbercorp Securities for the purpose of obtaining/providing credit; and/or
- (c) Timbercorp Finance had an arrangement with Timbercorp Securities whereby the Timbercorp Finance's forms of contract or forms of application or offers of credit were made available to persons by Timbercorp Securities.[32]

26 If Timbercorp Finance is a linked credit provider as alleged, then s 73(1)(b) of the TPA provides that where a consumer:

- (a) enters into a contract with a linked credit provider of a supplier for the provision of credit in respect of the supply by the supplier of goods or services, or goods and services, to the consumer; and
- (b) the consumer suffers loss or damage as a result of a misrepresentation, breach of the contract, or a failure of consideration in relation to the contract, or as a result of breach of a warranty that is implied in the contract by virtue of section 12ED of the ASIC Act –

(i) then the supplier and the linked credit provider are (subject to other provisions of the section) jointly and severally liable to the consumer for the amount of the loss or damage, and the consumer may recover that amount by action in a court of competent jurisdiction.

27 Section 73 of the TPA provides relief to the defendant provided he is a 'consumer'. Section 4B of the TPA^[33] defines that term at some length. Section 4B(1)(b)(i) states that a person shall be taken to have acquired particular services as a consumer if, and only if the price of the services did not exceed the prescribed amount (which was \$40,000.00) or where that price exceeded the prescribed amount, the services were of a kind ordinarily acquired for personal, domestic or household use or consumption. Sub-section 4B(3) provides that where in a proceeding it is alleged that a person was a 'consumer' they shall be presumed to be so unless the contrary is established.

28 The defendant submitted that despite the services acquired exceeding the prescribed amount, the services were acquired by him for personal use. He invested in the schemes primarily to provide for his retirement.^[34] He was therefore a consumer within the meaning of the section because of the approach taken by the Victorian Court of Appeal in *Violet Home Loans Pty Ltd v Schmidt*.^[35]

29 Timbercorp Finance accepts that the question of whether the defendant was a 'consumer' is a question for trial;. That is, it is presently arguable that he was a consumer at the relevant time that he obtained finance for investment in the schemes.

30 The defendant submitted that Timbercorp Finance is a linked credit provider and is directly liable to the defendant pursuant to s 73(6) of the TPA because Timbercorp Securities is in liquidation. The defendant has a claim or set-off equal to the whole of the amount claimed against him by Timbercorp Finance. The defendant does not claim damages or compensation beyond its set-off as he is unable to do so by the operation of s 73(7) of the TPA.

31 Timbercorp Finance submits that the claim based upon it being liable as a linked credit provider is misconceived. It submits:

(a) the claim depends upon the applicability of s 73(1)(b) of the TPA. That provision provides that three necessary facts must exist in order for the provision to apply:

(i) the person must be a consumer;

(ii) there must be a credit contract with a linked credit provider of the supplier; and

(iii) there must be a supply by the supplier of goods or services;

(b) it is then that the closing words of the section come into play. They give rise to a joint liability of the supplier and the linked credit provider. That turns on the consumer suffering loss or damage as a result of unlawful conduct (misrepresentation, breach of contract or a failure of consideration) in relation to 'the contract'. By reason of the reference in s 73(1)(b) to 'a consumer enters into a contract with a linked credit provider', and the later reference to 'the contract' in the closing words of the sub-section, the provision means that the conduct complained of must be in relation to 'the credit contract' with Timbercorp Finance. That is the only contract mentioned in the sub-section and is, of course, the only contract between the consumer and the credit provider. There is no mention of any contract with the supplier in the section;

(c) the position under s 73(1)(a) of the TPA regarding the supply of goods is materially different. In transactions covered by that section, the supplier supplies the goods to the linked credit provider and the consumer enters into a contract with that credit provider for the provision of credit with respect to that supply. Thus, the credit provider supplies both the credit and the goods. The reference to 'the contract' in the closing words of the sub-section relates to both the credit and supply of the goods. That is not the position with respect to s 73(1)(b); and

(d) Timbercorp Finance submitted that it followed from this analysis that it was not liable under the section for the conduct of Timbercorp Securities that related to the participation of the defendant in the

schemes as they related to the contract between the defendant and Timbercorp Securities.

32 In the result, there is no relevant unlawful conduct engaged in by Timbercorp Finance. Timbercorp Finance is not alleged to have made any misrepresentations or to have been negligent or to have engaged in misleading or deceptive conduct in relation to the entry in to the First Loan Agreement or the Second Loan Agreement. All the allegedly contravening conduct has been engaged in by Mr Bezencon as an authorised representative of Timbercorp Securities and not as an agent of Timbercorp Finance.

33 The defendant submitted that the construction of s 73(1)(b) of the TPA advanced by Timbercorp Finance is wrong and unsupported by any authority. Counsel for the defendant referred to two relevant authorities, *New Holland Credit Aust Pty Ltd v Vaudeleur*[36] and *SE Vineyard Finance Pty Ltd (R & M App) v Casey*.[37]

34 *New Holland* concerned the adequacy of pleadings and all that was really decided was that the matters sought to be pleaded were arguable under s 73 of the TPA. In that case, Smith J of the District Court of South Australia said in relation to s 73(1)(b):[38]

The meaning of the above provision is obvious. It imposes a statutory joint and several liability on a linked credit provider for breaches by the supplier of goods or services. The section does not require, as a precondition to the liability of the credit provider, that there be a breach of the credit contract. Rather, the breaches which enliven the joint and several liability are breaches of the contract for the supply of goods or services. The joint and several liability of the credit provider is imposed by the statute. The purpose and object of s 73 is clear. It is a perfectly straightforward and intelligible consumer measure, which protects the purchaser in a case where the supplier of goods or services is associated with the provider of finance. It prevents a financier who is associated, in the requisite way, with the goods supplier, sheltering behind the principle of privity of contract and enforcing the terms of the credit contract when there is a problem with the goods, the purchase of which, he has financed.

35 His Honour went on to consider the support for this construction from the plain meaning of the words, in the context of the section and the TPA as a whole, the explanatory memorandum, the case law and academic commentary. I will not stay to re-consider that material. It generally supports the construction his Honour adopted. [39]

36 The decision in *New Holland* was relied on by Habersberger J in *SE Vineyard*,[40] which was an appeal from the Magistrates' Court. His Honour quoted the passage set out above from *New Holland* and said:[41]

I agree with the submission by counsel for the respondents that, properly construed, s 73 applied whenever a consumer suffered loss as a result of a misrepresentation, whether or not the contract referred to was for the provision of credit or for the supply of goods and services.

37 Timbercorp Finance then submitted that even if the construction of s 73(1)(b) of the TPA advanced by Timbercorp Finance, and referred to above is wrong, and s 73 of the TPA provides a basis for a counterclaim against it, much of the conduct alleged in the proposed amended defence and counterclaim is not captured by s 73 of the TPA. Section 73 applies only to loss or damage arising from particular types of conduct. None of the following breaches fall within its ambit:

(a) the negligence of Mr Benzencon and/or Timbercorp Securities arising from the provision of financial advice to the defendant;[42]

(b) the negligent misstatement by Mr Benzencon and/or Timbercorp Securities which is also said to arise from Mr Benzencon's provision of financial advice to the defendant;[43]

(c) the contravention by Mr Benzencon and/or Timbercorp Securities of s 945A of the Corporations Act; [44]

(d) the contravention by Mr Benzencon and/or Timbercorp Securities of s 1012A of the Corporations Act; [45] and

(e) the contravention by Mr Benzencon and/or Timbercorp Securities of s 946A of the Corporations Act. [46]

38 The defendant answered this submission by referring to what Foster J said about the operation of s 73 of the TPA in *Australian Securities and Investments Commission v Bank of Queensland Ltd.*[47] At issue was whether s 51AF of the TPA excluded s 73 from operating in the matter with which he was concerned, which relied on the 'financial services' provisions of Division 2 of Part 2 of the ASIC Act'. He said:[48]

In my judgment, the submissions of ASIC constitute the preferred interpretation of s 73 when read with s 51AF of the TPA. The initial fundamental engagement of the section is brought about by a consumer suffering loss or damage "*... as a result of misrepresentation, breach of contract, or failure of consideration in relation to the contract, or as a result of a breach of a condition that is implied in the contract by virtue of [certain specified sections of the TPA] or section 12ED of [the ASIC Act] ...*" The section does not confine the source of that description of primary liability on the part of the supplier to contraventions of Pt V of the TPA. The description of the primary contravening conduct is very broad and is apt, in my view, to cover common law and statutory contraventions as well as breaches of contract.

The only Pt V provisions which are excluded by s 51AF(1) from operation in respect of financial services are those which impose what I have called "*primary liability*" upon persons. In this case, the statutory liability of Storm directly to the Doyles for misleading and deceptive conduct would have to be anchored in a provision in the *Corporations Act* and could not have been litigated pursuant to s 52 of the TPA. An applicant is not prevented by s 51AF(1) of the TPA from suing a linked credit provider in respect of conduct of the relevant supplier which is not alleged to be a contravention of Pt V of the TPA. If the liability of the supplier is founded upon general law or statutory rights otherwise covered by the text of s 73(1) which I have extracted at [46] above, s 73 will be available as a means of rendering liable the linked credit provider.

39 The Full Court of the Federal Court in *Quickfund (Australia) Pty Ltd v Airmark Consolidators Pty Ltd*[49] confirmed the approach of Foster J to the construction of s 73 of the TPA, insofar as it concerned the effect of s 51AF of the TPA on its operation.

Consideration – Linked Credit Provider

40 It seems to me that insofar as the claims turn on Timbercorp Finance being a linked credit provider, the counterclaim has a solid foundation in fact and law. I have not dealt at any length with the facts as it was not seriously in dispute that if the 'linked credit provider' provision applied then there was a cause of action capable of giving rise to the relief sought by the defendant. In coming to this conclusion, I am conscious that the defendant, as the applicant for leave, must satisfy me that the claim has a solid foundation and gives rise to a serious dispute, [50] or that there is a substantial question to be tried.[51]

41 In my view, based on the analysis set out in the judgment of Smith J in *New Holland*, as applied by Habersberger J in *SE Vineyard*.[52] it is sufficiently arguable that s 73(1)(b) of the TPA extends to permit a counterclaim in this case against Timbercorp Finance as a linked credit provider in respect of the 'misrepresentations' alleged to have been made by Mr Bezencon on behalf of Timbercorp Securities and possibly the breaches of the implied contractual terms, the negligence and other statutory breaches alleged.

42 I am also satisfied that there is a solid foundation for, and a serious question to be tried, that the other relief sought by the defendant in paragraph 97 of the proposed amended defence and counterclaim is available, based on the observations of Foster J in *Australian Securities and Investments Commission v Bank of Queensland Ltd*, [53] which have been followed in *Technology Leasing Ltd v Lenmar Pty Ltd*[54] and *Enterprise Finance Solutions Pty Ltd v Austec Pty Ltd*. [55]

General Discretionary Matters

43 The defendant submitted that the following matters strongly supported the grant of leave to proceed against Timbercorp Finance:

- (a) the complexity of the legal and factual disputes evident from the proposed defence and counterclaim and the affidavits in support means that litigation would be a more convenient way to resolve the claims rather than the proof of debt procedure;**
- (b) this is a case where the plaintiff has already commenced proceedings against the defendant and is actively prosecuting the proceedings. It is therefore appropriate to distinguish this case from those cases where leave is sought to commence a claim against a company in liquidation which would require the liquidators of the company actively to defend the claim and divert them from their tasks as liquidators;**
- (c) the defence to the claim raises the same facts, or related facts, as are alleged in the counterclaim. It is obviously convenient to resolve all issues, including those raised by the counterclaim, at the one time. [56] If leave is not granted then there may be two sets of proceedings: a proceeding against the defendant for recovery of the loans and a proof of debt with the possibility of an appeal;**
- (d) if an appeal from a disputed debt eventuated, then the same issues will arise in that appeal as are being litigated in this proceeding. There is therefore good reason to grant leave to proceed to avoid a multiplicity of proceedings; [57]**
- (e) the primary relief sought by the defendant is to set-off the entire amount of Timbercorp Finance's claim against him, and to this extent it would be manifestly unfair and unjust to prevent the defendant from properly defending the claim by preventing him from relying on all the claims and remedies available to him;**
- (f) initially it was submitted that if the defendant succeeds on the counterclaim in an amount in excess of the claim against him, he would not be able to enforce judgment against Timbercorp Finance without the Court's leave. The consequence would be that he would be left to prove in the liquidation for the difference. [58] In a later submission, the defendant conceded that it could not claim or set-off a sum greater than his liability to Timbercorp Finance because of the terms of s 73(7) of the TPA;**
- (g) the matters pleaded in the proposed counterclaim are incorporated in the defence by way of a set-off. The matters pleaded in the defence and proposed counterclaim arise out of the same factual matrix and are inextricably linked. This nexus supports the grant of leave to proceed; [59]**
- (h) a number of the claims raised by the defendant in the proposed counterclaim are likely to require an assessment of the witnesses' credit. These claims are, in particular, the claims of misleading or deceptive conduct, negligence and negligent misstatement and the issue of whether the plaintiff is a linked credit provider. The presence of issues of credit renders it more appropriate for the Court to deal with the claims than for them to be dealt with in a proof of debt proceeding; [60] and**
- (i) it is likely that there will be expert evidence in relation to a number of aspects of the defendant's proposed claims (such as what a reasonable financial adviser should or would have done in the circumstances) and an assessment of that evidence is more appropriately dealt with by this Court.**

44 Timbercorp Finance submitted that it would be inappropriate to grant leave to proceed. It pointed to various factors and general considerations of relevance including that:

(a) a company in liquidation is not harassed unnecessarily by litigation;

(b) the Court must balance the right to proceed against whether the applicant should pursue the claim by lodging a proof of debt with the liquidator;

(c) a serious question to be tried is not sufficiently supported and that the defendant does not have a genuine claim, and any claim raised is futile;

(d) all other causes of action raised by the defendants arise out of Mr Bezencon's conduct. If leave to proceed was granted in circumstances where Mr Bezencon was not a party, Timbercorp Finance would be put in the invidious position of having to defend a proceeding where no primary wrong is alleged against it; and

(e) if the Court were minded to grant leave to proceed, this would have the effect of harassing and unnecessarily wasting Timbercorp Finance's resources. The denial of leave to proceed does not preclude the defendant from relying on the matters raised in his defence. Nor does this preclude him from any causes of action against Mr Bezencon.

45 Mr Costello of counsel, who appeared for Timbercorp Finance, adopted the submissions made by Dr Bigos as to the application of the limitation periods to the defendant's proposed claims.

Consideration – General Discretionary Matters

46 In my view, the factors which have been identified by the defendant weigh heavily in favour of the grant of leave to proceed for the defendant to file and serve the proposed counterclaim. There is now no question of the former allegations that Mr Bezencon breached fiduciary duties. That claim has been abandoned so far as Timbercorp Finance is concerned. Despite the fact that Mr Bezencon is not a party to the proposed counterclaim, and that there is no explanation given by the defendant for not joining him to the counterclaim, I consider that the following factors show that it is appropriate to grant leave to proceed:

(a) the complexity of the defence and proposed counterclaim;

(b) the close nexus between the defence and proposed counterclaim;

(c) the fact that Timbercorp Finance is already suing the defendant for repayment of the loans, and the risk of a multiplicity of proceedings if leave to proceed is refused;

(d) the fact that the defendant cannot claim or set-off a sum greater than his liability to Timbercorp Finance because of the terms of s 73(7) of the TPA;

(e) the likelihood that there will be expert evidence necessary to support the defence and counterclaim; and

(f) the issues of credit of witnesses being involved in the determination of the defence and proposed counterclaim.

47 It seems to be clear that the limitation period applicable to the defendant's claim for breach of the implied contractual warranties is statute barred. The grant of leave to proceed against Timbercorp Finance will be conditional upon that claim being removed from the defence and proposed counterclaim. In other respects, I refer to my consideration of the limitation of actions issue in respect of the application for leave to proceed against Timbercorp Securities.

Application for Leave to Proceed – Timbercorp Securities

48 The defendant sought leave to file and serve a third party notice on Timbercorp Securities,^[61] leave to proceed with the third party notice against Timbercorp Securities^[62] and authority to inspect its books.^[63] The application to inspect the books was confined, by submission, to inspecting any applicable insurance policy. In some cases the court has considered the leave application and, if leave is granted, reserved liberty to the company to apply to

stay the third party claim if the claim against the company is uninsured.[64] I determined that in this case it was more appropriate to order that Timbercorp Securities file an affidavit exhibiting any applicable policy of insurance. That was because, as I have said, in the course of submissions, counsel for Timbercorp Securities asserted that there was such an insurance policy and that in the circumstances it did not respond to the proposed claims and so as to avoid multiple hearings in relation to the leave to proceed question.

49 On 25 August 2015, Timbercorp Securities filed an affidavit of Ms Kimberley MacKay. This affidavit exhibited, among other things, a confidential copy of the insurance policy that was held by Timbercorp Securities. On 31 August 2015, on the application of Timbercorp Securities, I made orders that the affidavit of Ms MacKay and the exhibits to it remain confidential (pursuant to r 28.05 of the Rules) so as to restrict the ability of persons other than the parties from having access to the policy of insurance and the evidence given in relation to it.

50 On 8 September 2015, the defendant filed his proposed amended third party notice against Timbercorp Securities. That third party notice pleads the background and the liability of Timbercorp Securities in much the same way as the claims are pleaded in the proposed amended defence and counterclaim against Timbercorp Finance. It removes a previous pleading against Timbercorp Securities of an allegation of breach of fiduciary duty based on a breach of such a duty by Mr Bezencon, but continues to plead such a claim against Mr Bezencon despite the fact that he is not sought to be made a defendant to the claim.[65] It claims damages for negligence, breach of contract, damages or compensation under s 12GF of the ASIC Act,[66] damages or compensation under ss 953B, 1022B and 1041I of the Corporations Act, plus interest and costs.

51 The defendant submits that he should have leave to proceed with his third party claim against Timbercorp Securities for the following reasons:

- (a) its proposed claims against Timbercorp Securities have a solid foundation and give rise to a serious dispute;**
- (b) litigation, rather than the proof of debt procedure, would be the most convenient way to resolve the claims raised;**
- (c) the grant of leave to proceed would reduce the risk of a multiplicity of proceedings. If leave was refused, there will likely be two sets of proceedings, first, an action against Timbercorp Finance and, second, a proof of debt procedure. In addition, there may be an appeal in relation to Timbercorp Securities by the defendant;**
- (d) the defendant's claims of misleading and deceptive conduct, negligence and negligent misstatement are most appropriately determined by a Court where witnesses can be examined and their credibility assessed rather than these being matters of consideration for the Liquidators; and**
- (e) because Timbercorp Securities, as a financial service licensee, is required by s 912B of the Corporations Act and reg 7.6.02AA of the Corporations Regulations 2001 (Cth) to have professional indemnity insurance to compensate persons such as the defendant, including breaches of the Corporations Act by their representatives, there is likely to be an insurance policy.**

52 The defendant conceded at the hearing, however, that in the event that there is no insurance cover for his claim, there is not much point in him proceeding with his claim.[67]

Insurance

53 The insurance policy produced by Timbercorp Securities[68] is an investment management liability policy, and a 'claims made' policy. The insuring clause provides that the insurer indemnifies the insured for loss which arises out of a 'claim'[69] first made during the policy period for a 'wrongful professional act'[70] and notified to the insurer as soon as practicable during the policy period. The policy period was 31 August 2008 to 31 August 2009. Although the term 'claim' is widely defined, the policy responds only to a claim made during the policy period and

to that claim alone, not any other. More detail as to the meaning of the defined terms of the policy are set out in the account given of the defendant's submissions.

54 I referred above to two letters of complaint dated 21 July 2009 sent by the defendant's then solicitors, McPherson & Kelley, to the liquidators of Timbercorp Finance and Timbercorp Securities. A summary of the complaints made is set out below.

55 In the letter to Timbercorp Finance it was alleged that:

(a) the clients are the defendant, Mr Vivian, his wife, Ms Janice Vivian, and Ozim Pty Ltd as trustee for the VJCS Super Fund ('clients'), who are investors in the 2007 Timbercorp Almond Early and 2007 Olive Early Projects;

(b) by reason of the offsetting claims, the clients are not required to make any further payments in respect of loans taken out from Timbercorp Finance to fund the invoices rendered in 2008 (and possibly 2007 as well) in respect of any of the projects invested in by the clients;

(c) Timbercorp Finance is a related entity of Timbercorp Securities and both are subsidiaries of Timbercorp Limited. The connection between the companies was close and finance was offered to growers in the projects at the time invoices of 12 October 2007 and 1 October 2008 were rendered by Timbercorp Securities;

(d) at the time that the relevant invoices from Timbercorp Securities were rendered, Timbercorp Finance knew that its parent, Timbercorp Limited, was under such financial strain that there were very real risks that:

(i) Timbercorp Ltd was insolvent or would soon become insolvent;

(ii) Timbercorp Securities was in the same position;

(iii) the client's horticultural crops may be in jeopardy of not being able to be harvested on a timely basis, if at all;

(iv) future years may consequently produce significantly lower yields, if the projects were continued;

(v) the projects may no longer run their contemplated long term duration and, even if they did the returns would be severely diminished; and

(vi) it was not in the best interests of the clients to remain growers in the projects and to make fresh financial commitments;

(e) in those circumstances, it was said that s 75B of the TPA deemed Timbercorp Finance to be involved in misleading or deceptive conduct of Timbercorp Securities, and that Timbercorp Securities had contravened s 52 of the TPA by virtue of which the defendant was able to pursue remedies against Timbercorp Finance for damages under s 82, and for other orders under s 87 of the TPA (including the loan agreements being declared void);

(f) that Timbercorp Finance was a person involved in the misleading or deceptive conduct of Timbercorp Securities pursuant to s 79 of the Corporations Act;

(g) that the defendant had suffered or was likely to suffer loss and damage by reason of having entered into loan contracts with Timbercorp Finance in reliance on representations made by Timbercorp Securities which contravened the TPA and in which Timbercorp Finance was involved;

(h) further particulars of additional claims will be provided in due course, but to the extent that it was presently able to be determined the claims of the defendant extended to the whole amount paid to Timbercorp Securities as the responsible entity under all invoices issued on 1 October 2008 for any of the projects, together with interest and other payments, and legal costs; and

(i) importantly for present purposes, it was suggested that in light of the claims made Timbercorp Finance should refer the matter to its insurer.

56 In the letter to Timbercorp Securities it was alleged that:

(a) the clients were joint venturers in the 2007 Timbercorp Almond Early and 2007 Olive Early Projects with Timbercorp Securities as the responsible entity and another Timbercorp subsidiary as the land owner;

(b) among the responsibilities of Timbercorp Securities arising from the joint venture was an obligation to keep the clients informed of matters which may have materially affected the conduct and viability of each project;

(c) at the time that Timbercorp Securities invoiced the clients on 1 October 2008 (and possibly earlier), by reason of the financial strain felt by Timbercorp Limited there was a very real risk that:

(i) Timbercorp Limited was insolvent;

(ii) Timbercorp Securities likewise was insolvent or would soon become so;

(iii) the clients' horticultural crops may be in jeopardy of not being able to be harvested on a timely basis, if at all;

(iv) future years may consequently produce significantly lower yields, if the projects were continued;

(v) the projects may no longer run their contemplated long term duration and, even if they did the returns would be severely diminished; and

(vi) it was not in the best interests of the clients to remain growers in the projects and to make fresh financial commitments;

(d) the financial strain felt by Timbercorp Ltd is evident from the Annual Report for the year ended 30 September 2008, the day before the invoices to the clients were issued;

(e) despite the viability of the projects being under serious threat at the time of the rendering of invoices on 1 October 2008, Timbercorp Securities did not disclose the imminent risks;

(f) the failure to disclose the true financial position of the company as at October 2008 constituted a breach of fiduciary duty;

(g) there was a real question whether Timbercorp Securities' breaches of fiduciary duty extended back to 2007 as well. Further information was requested;

(h) by reason of the company's breaches of fiduciary duties, the defendant is entitled to equitable compensation and to be excused from meeting any obligations under the October 2008 invoices;

(i) there was an alternative claim based on misleading or deceptive conduct arising out of Timbercorp Securities having represented to investors that it was financially sound and the projects would continue to be viable. It was said that when the representations were made (and no date is given) they were false. The claims arose under [ss 52, 82 and 87](#) of the TPA as well as the relevant provision of the [Corporations Act](#) and the ASIC Act;

(j) Timbercorp Securities breached its duties arising under [s 601FC](#) of the [Corporations Act](#), which impose upon the responsible entity of a managed investment scheme duties to act honestly and in the best interests of the members and, if there is a conflict between the best interests of the members and the interests of the company, then priority must be given to the interests of the members. It was said that Timbercorp Securities had breached these duties in failing to act in the best interests of the defendant by reason of the failure to disclose what was alleged to be its precarious financial position; and

(k) it also was requested that Timbercorp Securities refer the letter to their insurer.

57 A copy of the letter to Timbercorp Finance was sent to Timbercorp Securities, and vice versa. In the letter to Timbercorp Securities it was said that:

If Timbercorp Finance ignores our suggestion and seeks to recover arrears and default charges, our clients' instructions are to vigorously defend. Further, our clients would join Timbercorp Securities ... as a third party to any Court proceedings brought by Timbercorp Finance ... so the court could rule that ultimate responsibility for losses occasioned in this situation should fully or partly rest with Timbercorp Securities...

58 In relation to the insurance cover, Timbercorp Securities submitted the application for leave to proceed should be dismissed because:

(a) the letters of complaint sent by McPherson & Kelley on 21 July 2009 notifying of a claim by the defendant concerned a failure by TSL at the time it invoiced the defendant on 1 October 2008 to inform him of the true financial position of the company and the risks to its survival and the viability of the schemes. It is said that had the defendant known the true position he would not have paid the invoices for his investment in the schemes;

(b) in the letter to Timbercorp Securities, the liquidator was asked to notify the insurer of the claim, and the liquidator did so;

(c) the claim which the defendant seeks to advance against Timbercorp Securities in the proposed amended third party notice is radically different from the claim notified on 21 July 2009. It is an entirely separate and distinct claim from those which the defendant now seeks to propound;

(d) thus the claims now sought to be made do not fall within the cover under the insurance policy. There can be no utility in the commencement of the third party proceeding where the insurance policy does not respond;

(e) the insurer has denied indemnity under the policy;^[71]

(f) the denial of indemnity was a correct denial and any argument about the policy responding is devoid of merit. The decision in *Altinova Nominees Pty Ltd v Leveraged Capital Pty Ltd (R&M Apptd)(No 2)*^[72] is distinguishable because in that case, the insurer had not yet confirmed or denied indemnity. Jacobsen J found that it was sufficiently arguable that the insurer was obliged to provide indemnity;

(g) the defendant's application for leave to proceed against Timbercorp Securities is substantially based upon the insurance policy responding; and

(h) the Court cannot be satisfied that there is a serious or substantial question to be tried or that the balance of convenience favours the grant of leave proposed against Timbercorp Securities.

59 The defendant submits that it is arguable that the notification of the claim made by MacPherson & Kelley in 2009 constitutes a notification under the policy that enables the claims made in the proposed third party proceeding to be the subject of indemnity under the policy. It makes the following submissions in support:

(a) the term 'claim' is defined in the policy to mean, so far as relevant, a written demand seeking compensation for a specified wrongful professional act and further provides that any claim arising out of, based upon or attributable to continuous, repeated or related wrongful professional acts shall be considered a single claim;

(b) the phrase 'wrongful professional act' is defined, so far as relevant, to mean any actual or alleged act, error, omission in the performance of or failure to perform investment advisory services^[73] by any insured or any other person for whom an insured entity^[74] is legally liable;

(c) the 'insured' means an insured entity or any insured person. In this case, the defendant contends that the extensive definition of 'insured' person necessarily includes Mr Bezencon, because it was a person for

whom Timbercorp Securities (an insured) was liable under ss 769B, 910A, 917A and 917B of the Corporations Act;

(d) the phrase 'investment advisory services' is defined, so far as relevant, to mean the investment advisory services declared in the 'Submission' performed by or on behalf of an insured entity pursuant to an agreement with a third party for compensation or in conjunction with services for compensation;

(e) the term 'Submission' is defined to mean each and every signed proposal form of an insured entity submitted to the insurer and all other information submitted to the insurer or incorporated in the proposal form by reference;

(f) Timbercorp Securities has not disclosed any Submission to enable the convoluted definition to enable the 'claim' to be resolved; and

(g) as the proposed amended third party proceeding is between the same parties, relates to the same investments, relies on the same causes of action, seeks to recover the same damages as are referred to in the MacPherson & Kelley letter, it must be considered a part of a single claim notification of which was given in 2009 in consequence of that letter.

Consideration – Insurance

60 The parties did not address applicable insurance law principles in making submissions as to whether the claim notified in the letters of 21 July 2009 were capable of constituting notification of the claims now made, as a matter of construction of the policy having regard to the applicable law. Nor were submissions made as to the application of the Insurance Contracts Act 1984 (Cth) ('Insurance Contracts Act'), particularly s 40 of that Act.

61 The policy includes a 'notification of circumstances' provision pursuant to which, during the policy period the insured may notify the insurer of any circumstances reasonably expected to give rise to a claim. The notice must include reasons for anticipating that claim and full particulars as to dates, acts and persons involved.^[75] Whether such a provision is included in the policy or not, s 40(3) of the Insurance Contracts Act will enable notification of such circumstances and, in effect, extend the policy to cover a later claim falling within those circumstances.

62 The notice of a possible claim that is given must, however, relate to the later claim for which cover is sought. The facts notified must be the basis of the claim that is to be brought within the cover, 'for there is a plain identity between the claim to which the facts to be notified are related and the claim for which the insurer is not relieved from liability'.^[76] Thus, the claim for which indemnity is later sought must arise out of the circumstances notified, not just by reference to the subject matter, but by a chain of causation.^[77] The particular notification of circumstances need not indicate that a claim will follow. A mere possibility is enough,^[78] but the facts must be causally related to the potential claim.

63 The notification of the claim made on behalf of the defendant arising out of the letters of 21 July 2009 is quite different from the claims the subject of this proceeding. The fact that they each give rise to claims for misleading or deceptive conduct under some of the same provisions of the Corporations Act does not lead to the conclusion that the latter falls within the former.

64 The claim made in the 21 July 2009 letter has as its focus the failure to disclose the true financial position of Timbercorp Securities, or Timbercorp Limited, and the risks to the viability and survival of the projects which, had the defendant and his wife and trustee company known, would have led them to refuse to make the payments for the invoices for October 2008 for the 2007 Timbercorp Almond Early and 2007 Olive Early Projects (and no mention is made of the earlier 2006 Timberlot project).

65 By contrast, the claims in the proposed third party statement of claim have as their focus the conduct of Mr Bezencon in inducing the investments by misleading or deceptive conduct, negligence and breach of statutory duties. Essentially, the investments recommended by Mr Bezencon as an authorised representative of Timbercorp Securities, were unsuitable for the defendant's risk profile, as well as being false in other respects. The claims

raised against Timbercorp Securities in the proposed third party statement of claim in no way resemble the claims raised and notified in 2009.

66 Even without the proposal form which identifies the relevant investment advisory services the subject of the cover, on the assumption that the personal advice^[79] given by Mr Bezencon (as is alleged) fell within the investment advisory services, and so did the conduct the subject of the 2009 letters, the claims now articulated are incapable of being within the scope of the complaints in the 2009 letters. The facts notified in 2009 are not the basis of the claim that the defendant now seeks to be brought within the cover.

67 I therefore conclude that there is no insurance available to Timbercorp Securities in respect of the claims made by the defendant in the proposed third party notice.

Limitation Periods

68 The limitation period applicable to the several claims made by the defendant against Timbercorp Securities is 6 years:

(a) section 12ED of the ASIC Act and s 82 of the TPA: breach of the implied contractual warranties;

(b) section 12GF(2) of the ASIC Act and s 1041I(2) of the Corporations Act: misleading or deceptive conduct by Mr Bezencon/Timbercorp Securities;

(c) section 5(1) of the Limitation of Actions Act 1958 (Vic): negligence of, and negligent misstatement by, Mr Bezencon/Timbercorp Securities;

(d) section 953B(5) of the Corporations Act: contravention by Mr Bezencon/ Timbercorp Securities of s 945A of the Corporations Act; and

(e) section 953B(5) of the Corporations Act: failure of Mr Bezencon/Timbercorp Securities to give a product disclosure statement and a statement of advice.

69 Timbercorp Securities contended that the claim for damages for breach of contract arose more than six years before the application for leave to proceed was made. There is no dispute that the limitation period applicable is six years from the date upon which the cause of action accrued. In relation to the contract claim, it is also common ground that damage is not the gist of the action and that the time commences to run, for the purposes of the calculation of the limitation period, from the time when the alleged breaches occurred. This is when the alleged misrepresentations were made that are the subject of the breach of the implied terms. That was clearly more than six years before the application was made.

70 In respect of the other claims, negligence and breaches of various statutory provisions under the ASIC Act and the Corporations Act, the defendant puts his claims in the proposed third party notice on 'no investment' basis. That is, but for the conduct of Mr Bezencon, he would never had borrowed the funds to invest in the schemes. Thus, he claims the amount of his entire borrowing plus interest. The proper characterisation of this claim is that it accrued at the time that he borrowed to invest. That was clearly more than six years before the application was made.

71 The defendant submits in relation to the limitation period issue, that the defendant's cause of action accrued not when the borrowing was made for his initial investment but when the value of his investment became worthless. He relied upon *Tomasetti v Brailey*^[80] and *Wardley Australia Ltd v Western Australia*^[81] where the High Court observed:

Where a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, detriment in

this general sense has not universally been equated with the legal concept of 'loss or damage'. And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when its impact upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or ascertainable would be unjust. Moreover, it would increase the possibility that the courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events.^[82]

72 The defendant referred to the decision of Robson J in *Re Great Southern Finance Pty Ltd (In Liq); Shellie v Great Southern Finance Pty Ltd (In Liq)*,^[83] where it was contended that the plaintiff had not demonstrated that her claim had a solid foundation nor did it give rise to a serious dispute as her proceeding was not commenced within six years after the day on which the cause of action accrued within the meaning of s 1022B(6) of the *Corporations Act*.

73 Robson J undertook an extensive review of the cases preceding *Wardley* which dealt with the accrual of causes of action. He concluded that the loss and damage the plaintiff alleged she suffered did not occur when she first made her investment. In this regard, his observations are apt to the present case:^[84]

Wardley makes clear that the mere fact that an investment lacks the represented qualities does not establish that the plaintiff has suffered loss and damage on acquiring the investment. As the plurality said, although the investment lacked the represented qualities it may have been worth no less than the consideration provided by the applicant. This proposition was clearly set out in *UBAF Ltd*^[85] that was cited with approval by the plurality.

74 His Honour therefore allowed the counterclaim to proceed, holding that the loss and damage only arose when the loss was ascertained or ascertainable and, following the decision in *Wardley* and the decision in *Magman International Pty Ltd v Westpac*^[86] held that the day upon which the plaintiff's loss was to be ascertained was a matter for evidence at trial.

75 Timbercorp Securities responds to these submissions by contending that even if they are correct, the loss was ascertained or ascertainable when the investments became worthless and that was over six years ago. The Timbercorp Group (including Timbercorp Securities and Timbercorp Finance) went into administration on 23 April 2009 and into liquidation on 29 June 2009. Further, the suspension of the limitation period by s 33ZE of the *Supreme Court Act 1986* cannot assist the defendant as it only applies to the claim of the group member to which the proceeding concerned relates. The group proceeding in *Woodcroft-Brown v Timbercorp Securities*^[87] concerns claims quite unrelated to the claims made in the proposed amended third party notice.

Consideration – Limitation Periods

76 There is little doubt, in my view, that for the purpose of determining whether to grant leave to proceed with the proposed third party notice against Timbercorp Securities, that the identification of the date of accrual of the several causes of action (other than the claims for breach of the implied contractual warranties) involves questions that are fact dependent. The loss and damage allegedly suffered by the defendant may not have been ascertained or ascertainable until the administrator was appointed, or the liquidators were appointed, or some other date within the limitation period when the schemes became unworkable and lost their viability. Even if it is the date of the administration (23 April 2009), the application for leave to commence the third party claim was made with 6 years (17 February 2015).

77 There are insufficient facts before me to enable a confident conclusion as to the circumstances in which damage was sustained by the defendant, or he became entitled to compensation, to justify an answer to the

question when the several causes of action accrued. This is a case where the cautionary words of the plurality in the High Court apply:

We should, however, state in the plainest of terms that we regard it as undesirable that limitation questions of the kind under consideration should be decided in interlocutory proceedings in advance of the hearing of the action, except in the clearest of cases. Generally speaking, in such proceedings, insufficient is known of the damage sustained by the plaintiff and of the circumstances in which it was sustained to justify a confident answer to the question. *Magman International* illustrates the problems which can arise, particularly in a case involving foreign loans.^[88]

Conclusion

78 The result of the above analysis is that the defendant:

(a) should have leave to proceed with his counterclaim against Timbercorp Finance, subject to the claim being amended to exclude the claim for damages for breaches of the implied contractual warranties;

(b) should be refused leave to proceed with his proposed third party proceeding against Timbercorp Securities on the basis that there is no insurance available to meet the claims.

79 I will ask the parties to confer and put forward minutes of orders to give effect to these reasons and to address the appropriate orders as to costs.

SCHEDULE

Trade Practices Act 1974

Section 73

Liability for loss or damage from breach of certain contracts

(1) Where:

(a) a corporation (in this section referred to as the **supplier**) supplies goods, or causes goods to be supplied, to a linked credit provider of the supplier and a consumer enters into a contract with the linked credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hirepurchase of the goods to the consumer; or

(b) a consumer enters into a contract with a linked credit provider of a corporation (in this section also referred to as the **supplier**) for the provision of credit in respect of the supply by the supplier of goods or services, or goods and services, to the consumer;

and the consumer suffers loss or damage as a result of misrepresentation, breach of contract, or failure of consideration in relation to the contract, or as a result of a breach of a condition that is implied in the contract by virtue of [section 70](#), [71](#) or [72](#) or of a warranty that is implied in the contract by virtue of [section 74](#) of this Act or [section 12ED](#) of the *Australian Securities and Investments Commission Act 2001*, the supplier and the linked credit provider are, subject to this section, jointly and severally liable to the consumer for the amount of the loss or damage, and the consumer may recover that amount by action in accordance with this section in a court of competent jurisdiction.

(2) Where:

(a) a corporation (in this section also referred to as the **supplier**) supplies goods, or causes goods to be supplied, to a credit provider who is not a linked credit provider of the supplier;

(b) a consumer enters into a contract with the credit provider for the provision of credit in respect of the supply by way of sale, lease, hire or hirepurchase of the goods to the consumer;

(c) antecedent negotiations in relation to the contract were conducted with the consumer by or on behalf of the supplier; and

(d) the credit provider did not take physical possession of the goods before they were delivered to the consumer;

or where a consumer enters into a contract with a credit provider for the provision of credit in respect of the supply of services to the consumer by a corporation (in this section also referred to as the **supplier**) of which the credit provider is not a linked credit provider, and the consumer suffers loss or damage as a result of a breach of a condition that is implied in the contract by virtue of [section 70](#), [71](#) or [72](#) or of a warranty that is implied in the contract by virtue of [section 74](#) of this Act or [section 12ED](#) of the *Australian Securities and Investments Commission Act 2001*, the credit provider is not under any liability to the consumer for the amount of the loss or damage, but the consumer may recover that amount by action in a court of competent jurisdiction against the supplier.

(3) A linked credit provider of a particular supplier is not liable to a consumer by virtue of subsection (1) in proceedings arising under that subsection if the credit provider establishes:

(a) that the credit provided by the credit provider to the consumer was the result of an approach made to the credit provider by the consumer that was not induced by the supplier;

(b) where the proceedings relate to the supply by way of lease, hire or hirepurchase of goods by the linked credit provider to the consumer, that:

(i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and

(ii) after becoming a linked credit provider of the supplier, the credit provider had not had cause to suspect that:

(A) the consumer might be entitled to recover an amount of loss or damage suffered as a result of misrepresentation or breach of a condition or warranty referred to in subsection (1); and

(B) the supplier might be unable to meet the supplier's liabilities as and when they fall due;

(c) where the proceedings relate to a contract of sale with respect to which a tied loan contract applies, that:

(i) after due inquiry before becoming a linked credit provider of the supplier, the credit provider was satisfied that the reputation of the supplier in respect of the supplier's financial standing and business conduct was good; and

(ii) after becoming a linked credit provider of the supplier, but before the tied loan contract was entered into, the linked credit provider had not had cause to suspect that:

(A) the consumer might, if the contract was entered into, be entitled to recover an amount of loss or damage suffered as a result of misrepresentation, breach of contract or failure of consideration in relation to the contract or as a result of a breach of a condition or warranty referred to in subsection (1); and

(B) the supplier might be unable to meet the supplier's liabilities as and when they fall due; or

(d) where the proceedings relate to a contract of sale with respect to which a tied continuing credit contract entered into by the linked credit provider applies, that, having regard to:

(i) the nature and volume of business carried on by the linked credit provider; and

(ii) such other matters as appear to be relevant in the circumstances of the case;

the linked credit provider, before becoming aware of the contract of sale or of proposals for the making of the contract of sale (whichever the linked credit provider first became aware of), had not had cause to suspect that a person entering into such a contract with the supplier might be entitled to claim damages against, or recover a sum of money from, the supplier for misrepresentation, breach of contract, failure of consideration, breach of a condition or breach of a warranty as referred to in subsection (1).

(4) Subject to subsection (5), in any proceedings in relation to a contract referred to in paragraph (1)(a) or (b) in which a credit provider claims damages or an amount of money from a consumer, the consumer may set up the liability of the credit provider under subsection (1) in diminution or extinction of the consumer's liability.

(5) Subject to subsection (6), a consumer may not, in respect of a liability for which, by reason of this section, a supplier and a linked credit provider are jointly and severally liable:

(a) bring proceedings to recover an amount of loss or damage from the credit provider; or

(b) where proceedings are brought against the consumer by the credit provider, make a counterclaim or exercise the right conferred by subsection (4) against the credit provider;

unless the consumer brings the action against the supplier and the credit provider jointly or, in the case of a counterclaim or right conferred by subsection (4), claims in the proceedings against the supplier in respect of the liability by thirdparty proceedings or otherwise.

(6) Subsection (5) and paragraphs (8)(a) and (9)(a) do not apply in relation to proceedings where:

(a) the supplier has been dissolved or is commenced to be wound up; or

(b) in the opinion of the court in which the proceedings are taken, it is not reasonably likely that a judgment obtained against the supplier would be satisfied and the court has, on the application of the consumer, declared that subsection (5) and paragraphs (8)(a) and (9)(a) do not apply in relation to the proceedings.

(7) The liability of a linked credit provider to a consumer for damages or a sum of money in respect of a contract referred to in subsection (1) does not exceed the sum of:

(a) the amount financed under the tied loan contract, tied continuing credit contract, lease contract, contract of hire or contract of hirepurchase;

(b) the amount of interest (if any) or damages in the nature of interest allowed or awarded against the linked credit provider by the court; and

(c) the amount of costs (if any) awarded by the court against the linked credit provider or supplier or both.

(8) Where in proceedings arising under subsection (1), judgment is given against a supplier and a linked credit provider, the judgment:

(a) shall not be enforced against the linked credit provider unless a written demand made on the supplier for satisfaction of the judgment has remained unsatisfied for not less than 30 days; and

(b) may be enforced against the linked credit provider only to the extent of:

(i) the amount calculated in accordance with subsection (7); or

(ii) so much of the judgment debt as has not been satisfied by the supplier;

whichever is the lesser.

(9) Where in proceedings arising under subsection (1), a right conferred by subsection (4) is established against a linked credit provider, the consumer:

(a) shall not receive the benefit of the right unless judgment has been given against the supplier and linked credit provider, a written demand has been made on the supplier for satisfaction of the judgment and the demand has remained unsatisfied for not less than 30 days; and

(b) may receive the benefit only to the extent of:

(i) the amount calculated in accordance with subsection (7); or

(ii) so much of the judgment debt as has not been satisfied by the supplier;

whichever is the lesser.

(10) Unless the linked credit provider and supplier otherwise agree, the supplier is liable to the linked credit provider for the amount of a loss suffered by the linked credit provider, being an amount not exceeding the maximum amount of the linked credit provider's liability under subsection (7) and, unless the court otherwise determines, the amount of costs (if any) reasonably incurred by the linked credit provider in defending the proceedings by reason of which the liability was incurred.

(11) Notwithstanding any other law, where, in proceedings arising under subsection (1), judgment is given against a supplier and a linked credit provider or against a linked credit provider for an amount of loss or damage, the court in which the proceedings are taken shall, on the application of the consumer, unless good cause is shown to the contrary, award interest to the consumer against the supplier and credit provider or against the credit provider, as the case may be, upon the whole or a part of the amount, from the time when the consumer became entitled to recover the amount until the date on which the judgment is given, at whichever of the following rates is the greater:

(a) where the amount payable by the consumer to the credit provider for the obtaining of credit in connection with the goods or services to which the proceedings relate may be calculated at a percentage rate per annum—that rate or, if more than one such rate may be calculated, the lower or lowest of those rates;

(b) 8% or such other rate as is prescribed.

(12) In determining whether good cause is shown against awarding interest under subsection (11) on the whole or part of an amount of loss or damage, the court shall take into account any payment made into court by the supplier or credit provider.

(13) Where a judgment given in proceedings arising under subsection (1) is enforced against a linked credit provider of a particular supplier, the credit provider is subrogated to the extent of the judgment so enforced to any rights that the consumer would have had but for the judgment against the supplier or any other person.

(14) In this section:

credit provider means a corporation providing, or proposing to provide, in the course of a business carried on by the corporation, credit to consumers in relation to the acquisition of goods or services.

linked credit provider, in relation to a supplier, means a credit provider:

(a) with whom the supplier has a contract, arrangement or understanding relating to:

(i) the supply to the supplier of goods in which the supplier deals;

(ii) the business carried on by the supplier of supplying goods or services; or

(iii) the provision to persons to whom goods or services are supplied by the supplier of credit in respect of payment for those goods or services;

(b) to whom the supplier, by arrangement with the credit provider, regularly refers persons for the purpose of obtaining credit;

(c) whose forms of contract or forms of application or offers for credit are, by arrangement with the credit provider, made available to persons by the supplier; or

(d) with whom the supplier has a contract, arrangement or understanding under which contracts or applications or offers for credit from the credit provider may be signed by persons at premises of the supplier.

Trade Practices Act 1974

Section 4 Interpretation

(1) In this Act, unless the contrary intention appears:

services includes any rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce, and without limiting the generality of the foregoing, includes the rights, benefits, privileges or facilities that are, or are to be, provided, granted or conferred under:

(a) a contract for or in relation to:

- (i) the performance of work (including work of a professional nature), whether with or without the supply of goods;
- (ii) the provision of, or the use or enjoyment of facilities for, amusement, entertainment, recreation or instruction; or
- (iii) the conferring of rights, benefits or privileges for which remuneration is payable in the form of a royalty, tribute, levy or similar exaction;

(b) a contract of insurance;

(c) a contract between a banker and a customer of the banker entered into in the course of the carrying on by the banker of the business of banking; or

(d) any contract for or in relation to the lending of moneys;

but does not include rights or benefits being the supply of goods or the performance of work under a contract of service.

Trade Practices Act 1974

Section 4B Consumers

(1) For the purposes of this Act, unless the contrary intention appears:

(a) a person shall be taken to have acquired particular goods as a consumer if, and only if:

- (i) the price of the goods did not exceed the prescribed amount; or
- (ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption or the goods consisted of a commercial road vehicle;

and the person did not acquire the goods, or hold himself or herself out as acquiring the goods, for the purpose of resupply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and

(b) a person shall be taken to have acquired particular services as a consumer if, and only if:

- (i) the price of the services did not exceed the prescribed amount; or
- (ii) where that price exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

(2) For the purposes of subsection (1):

(a) the prescribed amount is \$40,000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount;

(b) subject to paragraph (c), the price of goods or services purchased by a person shall be taken to have been the amount paid or payable by the person for the goods or services;

(c) where a person purchased goods or services together with other property or services, or with both other property and services, and a specified price was not allocated to the goods or services in the contract under which they were purchased, the price of the goods or services shall be taken to have been:

(i) the price at which, at the time of the acquisition, the person could have purchased from the supplier the goods or services without the other property or services;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier except together with the other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier without other property or services—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if, at the time of the acquisition, goods or services of the kind acquired were not available for purchase from any supplier except together with other property or services—the value of the goods or services at that time;

(d) where a person acquired goods or services otherwise than by way of purchase, the price of the goods or services shall be taken to have been:

(i) the price at which, at the time of the acquisition, the person could have purchased the goods or services from the supplier;

(ii) if, at the time of the acquisition, the goods or services were not available for purchase from the supplier or were so available only together with other property or services but, at that time, goods or services of the kind acquired were available for purchase from another supplier—the lowest price at which the person could, at that time, reasonably have purchased goods or services of that kind from another supplier; or

(iii) if goods or services of the kind acquired were not available, at the time of the acquisition, for purchase from any supplier or were not so available except together with other property or services—the value of the goods or services at that time; and

(e) without limiting by implication the meaning of the expression **services** in subsection 4(1), the obtaining of credit by a person in connection with the acquisition of goods or services by him or her shall be deemed to be the acquisition by him or her of a service and any amount by which the amount paid or payable by him or her for the goods or services is increased by reason of his or her so obtaining credit shall be deemed to be paid or payable by him or her for that service.

(3) Where it is alleged in any proceeding under this Act or in any other proceeding in respect of a matter arising under this Act that a person was a consumer in relation to particular goods or services, it shall be presumed, unless the contrary is established, that the person was a consumer in relation to those goods or services.

(4) In this section, commercial road vehicle means a vehicle or trailer acquired for use principally in the transport of goods on public roads.

[1] By summons dated 17 February 2015.

[2] By summons dated 7 April 2015.

[3] S CI 2009 09807.

[4] The Board of Directors of Timbercorp Finance resolved to appoint Administrators pursuant to s 436 of the [Corporations Act](#).

[5] Convened pursuant to s 439A of the [Corporations Act](#).

[6] Exhibit VHV-7 to the affidavit of Vernon Harold Vivian sworn 7 April 2015.

[7] (2009) FCA 42.

[8] [2010] WASC 51 ('*Snelgrove*').

[9] The applicable principles were the subject of the following summary in my decision in *Gunns Finance Pty Ltd (In Liq) v Correy* [2015] VSC 385.

[10] *Snelgrove*.

[11] *Re Sydney Formworks Pty Ltd (In Liquidation)* [1965] NSW 646 at 650; *Altinova Nominees Pty Ltd v Leveraged Capital Pty Ltd (Receivers and Managers Appointed) (In Liquidation) (No 2)* [2009] FCA 42 at [18]; But doubted by McPherson J in *Re Gordon Grant and Grant Pty Ltd* [1983] 2 Qd R 314 at 316 ('**Gordon Grant**').

[12] *Fielding v Vagrang Pty Ltd (In Liquidation)* [1992] FCA 617; (1993) 11 ACLC 172 at 174; *Ogilvie Grant v East* (1983) 2 Qd R 314 at 316; *Maher v Taylor* (1984) 8 ACLR 931 at 934; *Re A J Benjamin Ltd (In Liquidation)* (1969) 90 WN (Pt 1) (NSW) 107 at 110.

[13] *King v Yurisch* [2006] FCA 1369 at [13]; *Gordon Grant* at [316].

[14] *King v Yurisch* [2006] FCA 1369 at [13]; *Gordon Grant* at [317].

[15] *Swaby v Lift Capital Partners Pty Ltd* [2009] FCA 749; (2009) 72 ACSR 627 ('**Swaby**') at [26].

[16] *Executive Director of the Department of Conservation and Land Management v Ringfab Environmental Structures Pty Ltd* [1997] FCA 1484 at 2, citing *Fielding v Vagrang Pty Ltd (In Liquidation)* [1992] FCA 617; (1993) 11 ACLC 172 at [174] (affirmed on appeal in *Vagrang Pty Ltd (In Liq) v Fielding* (1993) 41 FCR 550 at [555]).

[17] Per Lee J in *Executive Director of the Department of Conservation and Land Management v Ringfab Environmental Structures Pty Ltd* [1997] FCA 1484.

[18] *Vagrang Pty Ltd (In Liq) v Fielding* (1993) 41 FCR 550 at 555; But see now *Australian Broadcasting Commission v O'Neill* [2006] HCA 46; (2006) 227 CLR 57, 82 at [65] (Gummow and Hayne JJ); see also 68 at [19] (Gleeson CJ, Crennan J).

[19] *Nu Life Air Conditioning Pty Ltd v Reef Building Contractors Pty Ltd* [2006] NSWSC 1245 at [7].

[20] *Tolhurst Druce & Emmerson (a firm) v Maryvell Investments Pty Ltd (in liq)* [2007] VSC 271 at [164].

[21] *Vagrang Pty Ltd (In Liq) v Fielding* (1993) 41 FCR 550 at 553.

[22] *Meehan v Stockmans Australian Café (Holdings) Pty Ltd* (1996) 22 ACSR 123 at [128].

[23] *Gordon Grant* at [317]; *Swaby* at [29]; *Commonwealth v Davis Samuel Pty Ltd* at [30], [32]; *Lawless v McKendrick (No 2)* [2008] WASC 15 at [35]; *Altinova Nominees Pty Ltd v Leveraged Capital Pty Ltd (Receivers and Managers Appointed) (in liq) (No 2)* [2009] FCA 42; *Ingot Capital Investments Pty Ltd and Ors v Macquarie Equity Capital Markets Pty Ltd and Ors* [2004] NSWSC 406.

[24] *Re AJ Benjamin Ltd* [1969] 2 NSW 374; *Re Sydney Formworks Pty Ltd* [1965] NSW 646; *Re Coastal Constructions Pty Ltd* (1994) 13 ACSR 329; *Lawless v McKendrick (No 2)* [2008] WASC 15 at [37].

[25] Dated 8 September 2015 and filed pursuant to orders made on 29 July 2015.

[26] See s 916A of the Corporations Act.

[27] In contravention of s 12DA of the ASIC Act and s 1041H of the Corporations Act.

[28] ss 764A, 1012B and 1013D of the Corporations Act.

[29] Section s 946A of the Corporations Act.

[30] Within the meaning of s 73(14) of the TPA.

- [31] The text of s 73 and of various definitions, as in force in 2006, are set out in the Schedule to these reasons.
32. [32] Proposed Amended Defence and Counterclaim dated 8 September 2015, paragraph 93.
- [33] Section 4B of the TPA is set out in the Schedule to these reasons.
- [34] See the affidavit of Mr Vivian at para [16].
- [35] [2013] VSCA 56; see also *Bunnings Group Ltd v Laminex Group Ltd* [2006] FCA 682; (2006) 153 FCR 479; *Tonto Home Loans Australia Pty Ltd v Tavares* [2011] NSWCA 389.
- [36] [2006] SADC 57 ('*New Holland*').
- [37] [2011] VSC 403 ('*SE Vineyard*').
- [38] *New Holland* at [17]-[18].
- [39] *New Holland* at [19]-[43].
- [40] *SE Vineyard* at [53].
- [41] *SE Vineyard* at [55].
- [42] The proposed counterclaim, para 97(d).
- [43] The proposed counterclaim, para 97(e).
- [44] The proposed counterclaim, Para 97(f). Section 945A of the Corporations Act mandates that an entity providing financial advice must have a reasonable basis for the advice.
- [45] The proposed counterclaim, para 97(g). Section 1012A of the Corporations Act obliges a person giving financial advice to provide a product disclosure statement in certain circumstances.
- [46] The proposed counterclaim, para 97(h). Section 946A of the Corporations Act obliges persons giving financial advice to provide their client a statement of advice.
- [47] [2011] FCA 1361 ('*ASIC v BOQ*').
- [48] *ASIC v BOQ* at [46]-[47]; Followed in *Technology Leasing Ltd v Lenmar Pty Ltd* [2012] FCA 709 at [195]- [197] and *Enterprise Finance Solutions Pty Ltd v Austec Pty Ltd* [2013] FCA 491 at [81]; See also *Quickfund (Aust) Pty Ltd v Prosperity Group International Pty Ltd (In Liq)* [2013] FCAFC 5; (2013) 295 ALR 472 at [96] and [128].
- [49] (2014) 312 ALR 254, at [99]-[100].
- [50] *Vagrind Pty Ltd (in liquidation) v Fielding* (1993) 41 FCR 550 at [21]-[22] per Wilcox, Burchett and Beazley JJ; *Re Great Southern Finance Pty Ltd (In Liq)*; *Shellie v Great Southern Finance Pty Ltd (In Liq)*, [2013] VSC 351 per Robson J at [67]).
- [51] *Oceanic Life Ltd v Insurance & Retirement Planning Services Pty Ltd (In Liq)* (1993) 11 ACSR 516 at [520]; Op. Cit. *Re Great Southern Finance Pty Ltd (In Liq)*; *Shellie v Great Southern Finance Pty Ltd (In Liq)*, [2013] VSC 351 per Robson J at [68].
- [52] [2011] VSC 403 at [53].
- [53] [2011] FCA 1361; (2011) 86 ACSR 258.
- [54] [2012] FCA 709 at [195]- [197].

[55] [2013] FCA 491 at [81].

[56] See *Snelgrove* at [45].

[57] *Capita Financial Group Ltd v Rothwells* (1989) 15 ACLR 348; *BHG Nominees Pty Ltd v Ellis Young Investments Pty Ltd* (1998) ACLC 1539.

[58] *Mitry v Wily* [2010] NSWSC 84 at [21].

[59] *Ibid* at [18].

[60] *Ibid* at [17].

[61] Rule 11.05(2)(b) of the Rules.

[62] Section 471B of the Corporations Act.

[63] Section 247A of the Corporations Act.

[64] See for example *Snelgrove* at [69].

[65] In the Outline of Submissions dated 9 September 2015, the defendant submitted that its alteration of the proposed third party notice continued to pursue the breach of fiduciary duty claim against Timbercorp Securities on the basis pleaded in paragraphs 3 and 16 of the proposed third party statement of claim. However, I consider that as a matter of pleading that is not clear.

[66] Which appears not to be applicable to the claims.

[67] Transcript, 29 July 2015, p 11, lines 13-16.

[68] Exhibit KCM-1 to the confidential affidavit of Kimberly Chantelle MacKay dated 25 August 2015.

[69] As defined.

[70] As defined.

[71] See exhibit KCM-3 to the affidavit of Kimberly Chantelle MacKay dated 25 August 2015.

[72] [2009] FCA 42.

[73] A defined term.

[74] As defined.

[75] Exhibit KCM-1 to the confidential affidavit of Kimberly Chantelle MacKay dated 25 August 2015, page 20, 'Circumstances Notification'.

[76] Derrington & Ashton, *The Law of Liability Insurance*, 3rd Ed, paragraph 8-230.

[77] Derrington & Ashton, *The Law of Liability Insurance*, 3rd Ed, paragraph 8-241, citing *GIO (NSW) v RJ Green* [1966] HCA 6; (1966) 114 CLR 437 at [445] per Menzies J; *Dickinson v Motor Vehicle Insurance Trust* [1987] HCA 49; (1987) 163 CLR 500 at [505]; *Permanent Trustee Aust Ltd v FAI General Insurance Co Ltd* (1998) 10 ANZIC 61.408.

[78] see *Junemill Ltd v FAI General Insurance Co Ltd* (1996) 9 ANZIC 61.315.

[79] Within the meaning of s 766B(3) of the Corporations Act.

[80] [2012] NSWCA 399 at [115].

[81] [1992] HCA 55; (1992) 175 CLR 514 (*'Wardley'*).

[82] *Ibid* at [527].

[83] [2013] VSC 351 (*'Shellie v Great Southern'*).

[84] *Shellie v Great Southern* at [125].

[85] A reference to *UBAF Ltd v European American Banking Corporation* [1984] QB 713.

[86] [1991] FCA 41; (1991) 32 FCR 1.

[87] [2011] VSC 526; (2011) 85 ACSR 354.

[88] *Wardley* at 533.