

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT
CORPORATIONS LIST

S CI 2011
List

IN THE MATTER OF **TASMANIAN PLANTATION PTY LTD** ACN 009 560 463 (subject to deed of company arrangement) (controllers acting), **FOREST ENTERPRISES AUSTRALIA LIMITED** ACN 009 553 548 (subject to deed of company arrangement) (receivers and managers appointed) and **FEA CARBON PTY LTD** ACN 009 505 195 (subject to deed of company arrangement) (receivers and managers appointed)

BETWEEN

TASMANIAN PLANTATION PTY LTD ACN 009 560 463 (subject to deed of company arrangement) (controllers acting) and others

Plaintiffs

AND

FEA PLANTATIONS LIMITED ACN 055 969 429 (subject to deed of company arrangement) (receivers appointed)

Defendant

AFFIDAVIT OF IAN MICHAEL JOHNS

Date sworn: 30 September 2011
Filed on behalf of: The Plaintiffs
Prepared by:
Maddocks
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Ref: IMJ:5674554.023
Attention: Michael Johns
E-mail Address: michael.johns@maddocks.com.au

On 30 September 2011, I, Ian Michael Johns of 140 William Street, Melbourne, Victoria, solicitor, make oath and say as follows:

1. I am a partner of the firm Maddocks, the solicitors for the Plaintiffs. I am authorised by the Plaintiffs to make this affidavit on their behalf. Except where otherwise stated, I make this affidavit from my own knowledge. Where I depose to matters from information or belief, I believe those matters to be true.



Documents Affidavit

2. On 13 July 2010, the Fourth Plaintiff, Timothy Bryce Norman, made an affidavit (**Documents Affidavit**) in the External Lease Application (as described below). Except as otherwise indicated in this affidavit, capitalised terms in the Documents Affidavit have the same meaning when used in this affidavit.
3. Now produced and shown to me marked 'IMJ-1' is a CD containing a copy of the Documents Affidavit (including exhibits).
4. In the Documents Affidavit, Mr Norman described, inter alia:
 - (a) an overview of the corporate structure of the following:
 - (i) the First Plaintiff, Tasmanian Plantation Pty Ltd (**Tasmanian Plantation**);
 - (ii) the Second Plaintiff, Forest Enterprises Australia Ltd (**FEA**);
 - (iii) the Third Plaintiff, FEA Carbon Pty Ltd (**FEA Carbon**); and
 - (iv) the Defendant, FEA Plantations Limited (**FEAP**);(collectively, the **FEA Group**);
 - (b) the circumstances of the appointments of the Fourth and Fifth Plaintiffs, Mr Norman and Mr Algeri (**Receivers**), as receivers and managers of FEA and FEA Carbon and as controllers of Tasmanian Plantation;
 - (c) the debt owed to ANZ Fiduciary by members of the FEA Group;
 - (d) the 19 managed investment schemes operated by the FEA Group in the forestry sector (I describe the forestry schemes between 1993 and 1999 (inclusive) as the



Earlier Schemes, and the forestry schemes between 2000 and 2009 (inclusive) as the **Later Schemes**);

- (e) the Plantation Land used in connection with the managed investment schemes;
- (f) the internal lease arrangements between Tasmanian Plantation and either FEA or FEAP in respect of the Plantation Land owned by Tasmanian Plantation;
- (g) the external lease arrangements between certain members of the FEA Group and external landowners in respect of the Plantation Land owned by external landowners; and
- (h) the section 443B applications by the Administrators, in which they sought orders including, inter alia, that the period within which the Administrators could give notice under section 443B of the Act be extended.

DOCAs

5. Since Mr Norman made the Documents Affidavit, a number of events occurred in relation to the status of the FEA Group companies:
- (a) on 10 August 2010, each of Tasmanian Plantation and FEA Carbon entered into a 'holding' deed of company arrangement (**DOCA**), the intention of which was to preserve (so far as practical) the 'status quo' in relation to the affairs of those companies as they existed at that date;
 - (b) on 14 December 2010, each of FEA and FEAP entered into a 'holding' DOCA, the intention of which was to preserve (so far as practical) the 'status quo' in relation to the affairs of those companies as they existed at that date;
 - (c) on 31 March 2011, the creditors of FEA resolved to amend the DOCA in respect of FEA, so that the period of operation as a holding DOCA was extended until 30



September 2011 (subject to certain events which could bring the DOCA to an end on an earlier date);

- (d) on 27 September 2011, the creditors of FEA resolved to amend the DOCA in respect of FEA, so that the period of operation as a holding DOCA was further extended until 30 September 2012 (subject to certain events which could bring the DOCA to an end on an earlier date);
- (e) on 12 May 2011, the creditors of FEAP resolved to amend the DOCA in respect of FEAP, so that the period of operation as a holding DOCA was extended until 30 September 2011 (subject to certain events which could bring the DOCA to an end on an earlier date); and
- (f) on 27 September 2011, the creditors of FEAP resolved to amend the DOCA in respect of FEAP, so that the period of operation as a holding DOCA was further extended until 30 September 2012 (subject to certain events which could bring the DOCA to an end on an earlier date).

- 6. Now produced and shown to me marked '**IMJ-2**' is a bundle of historical company extracts in respect of Tasmanian Plantation, FEA, FEA Carbon and FEAP, respectively, dated 29 September 2011.
- 7. In this affidavit, references to the **Deed Administrators** are references to Brian Raymond Silvia and Peter Krejci, being the administrators of the deed of company arrangement of each of FEA and FEAP respectively.

Third FCA Norman Affidavit

- 8. On 17 September 2010, Mr Norman made an affidavit (**Third FCA Norman Affidavit**) in the Internal Lease Application (as described below).



9. Now produced and shown to me marked 'IMJ-3' is a copy of the Third FCA Norman Affidavit (including exhibits).
10. In the Third FCA Norman Affidavit, Mr Norman described, inter alia:
- (a) the dealer's licences and Australian Financial Services licences held by FEAP from time to time;
 - (b) a deed of charge and encumbrance dated 30 June 2000 between Tasmanian Plantation and FEAP (**Charge**);
 - (c) various dealings registered on the titles of properties owned by Tasmanian Plantation, FEA or FEA Carbon, including caveats, forestry rights and profits a prendre.

I refer to the Charge and those caveats, forestry rights and profits a prendre collectively as the **Ancillary Interests**.

Previous proceedings in relation to FEA Group

11. Since the FEA Group went into external administration, there have been a number of proceedings commenced in relation to the affairs of the FEA Group, including:
- (a) the Administrators commenced proceeding no. VID283 of 2010 in the Victorian District Registry of the Federal Court of Australia, being the 443B Applications referred to in paragraphs 66 to 74 of the Documents Affidavit;
 - (b) the Administrators commenced proceeding no. VID 349 of 2010 in the Victorian District Registry of the Federal Court of Australia, seeking an extension of the convening period in respect of the administrations of FEA and FEAP;



- (c) the Receivers and FEA commenced proceeding no. 555 of 2010 in the Victorian District Registry of the Federal Court of Australia, seeking directions in relation to leases of land held by FEA from external land owners (**External Lease Application**);
- (d) the Receivers, FEA, Tasmanian Plantation and FEA Carbon commenced proceeding no. 692 of 2010 in the Victorian District Registry of the Federal Court of Australia, seeking declarations and directions in relation to leases, sub-leases and other grants between one of Tasmanian Plantation, FEA or FEA Carbon (together **Lessor Companies**) as grantor and FEAP as grantee in respect of certain of the land owned by the Lessor Companies (**Internal Lease Application**). The Receivers, FEA, Tasmanian Plantation and FEA Carbon appealed from the judgment of Finkelstein J to the Full Court of the Federal Court of Australia in proceeding no. VID1179 of 2010 issued out of the Victorian District Registry of the Federal Court of Australia (**Appeal**). FEAP has applied for special leave to appeal, from the judgment of the Full Court of the Federal Court, to the High Court of Australia in proceeding no. M123 of 2011 issued out of the Melbourne Registry of the High Court;
- (e) the Receivers commenced proceeding no. VID781 of 2010 in the Victoria District Registry of the Federal Court of Australia, seeking certain orders against the Administrators pursuant to sections 430 and 1324 of the Corporations Act;
- (f) FEAP commenced proceeding no. VID 451 of 2011 in the Victoria District Registry of the Federal Court of Australia, seeking certain declarations and other orders against FEA and Tasmanian Plantation in relation to the execution of Forest Practices Plans.



Internal Land and Internal Leases

12. This proceeding relates to the Plantation Land which is owned by Tasmanian Plantation, FEA and FEA Carbon and, for the purposes of this affidavit, I describe such land as **Internal Land**. I describe the leases, sub-leases or other grants in respect of the Internal Land to parties within the FEA Group as **Internal Leases**.

Internal Lease Application and Appeal

13. The Internal Lease Application and the Appeal related to the Internal Leases in relation to those parts of the Internal Land used in the Later Schemes.
14. Now produced and shown to me marked '**IMJ-4**' is a copy of the amended originating process dated 17 September 2010 filed in the Internal Lease Application.
15. Now produced and shown to me marked '**IMJ-5**' is a copy of the orders made by Finklestein J on 9 September 2010 in the Internal Lease Application.
16. On 21 December 2010, Finkelstein J of the Federal Court of Australia delivered judgment in the Internal Lease Application in *Norman, in the matter of Forest Enterprises Australia Limited (Administrators Appointed) (Receivers & Managers Appointed) v FEA Plantations Ltd (Administrators Appointed) (Receivers Appointed)* [2010] FCA 1444.
17. Now produced and shown to me marked '**IMJ-6**' is a copy of the notice of appeal dated 24 December 2010 in respect of the Appeal.
18. On 9 August 2011, the Full Court of the Federal Court of Australia delivered judgment in the Appeal in *Norman; in the matter of Forest Enterprises Ltd v FEA Plantation Ltd* [2011] FCAFC 99.



19. Now produced and shown to me marked 'IMJ-7' is a copy of the application for special leave to appeal to the High Court of Australia dated 8 September 2011, as referred to in paragraph 11(d) above.

Structure and terms of Internal Leases

Receivers' View

20. Paragraphs 42 to 61 of the Documents Affidavit and paragraphs 41 to 47 of the Third FCA Norman Affidavit set out the Receivers' understanding of the Plantation Land, the Internal Land and the Internal Leases.

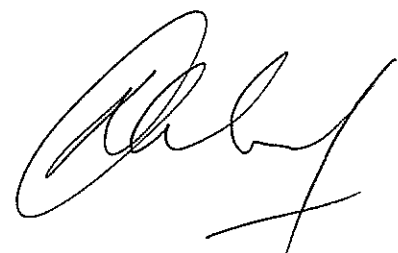
21. Based on those paragraphs and discussions with the Receivers, and the judgment of Finkelstein J in the Internal Leases Application, I believe that the Receivers' understanding of the structure of the Internal Leases is as follows:

(a) Internal Land owned by Tasmanian Plantation was:

- (i) leased to FEA, and then sub-leased by FEA to Growers in the Earlier Schemes;
- (ii) leased to FEA, and then sub-leased by FEA to FEAP, and then FEAP granted Grower Leases to Growers in the Later Schemes;

(b) Internal Land owned by FEA was:

- (i) leased by FEA to Growers in the Earlier Schemes;
- (ii) leased by FEA to FEAP, and then FEAP granted Grower Leases to Growers in the Later Schemes;



- (c) Internal Land owned by FEA Carbon was leased to FEA, and then sub-leased by FEA to FEAP, and then FEAP granted Grower Leases to Growers in the Later Schemes.

22. Now produced and shown to me marked 'IMJ-8' are diagrams setting out the Receivers' understanding of the leasing relationships in relation to the Internal Land owned by each of:

- (a) Tasmanian Plantation;
- (b) FEA; and
- (c) FEA Carbon.

23. I believe that the Receivers' view is that the terms of the above leasing arrangements were as follows:

- (a) The leasing arrangement between Tasmanian Plantation and FEA:
 - (i) which related to Internal Land owned by Tasmanian Plantation which was used in the Earlier Schemes was on the same terms as those contained in the 2003 Master Head Lease (this is Exhibit TBN-13 to the Documents Affidavit), as amended by the Deed of Variation (this is Exhibit TBN-14 to the Documents Affidavit);
 - (ii) which related to Internal Land owned by Tasmanian Plantation which was used in the Later Schemes was governed by the 2003 Master Head Lease as amended by the Deed of Variation;
- (b) The leasing arrangement between FEA and FEAP which related to Internal Land owned by FEA which was used in the Later Schemes was on the same terms as those contained in the 2003 Master Head Lease, as amended by the Deed of

Variation (there was no lease of land from FEA to FEAP in relation to the Earlier Schemes, where FEA was the lessor to the Growers).

- (c) The leasing arrangement between FEA Carbon and FEA which related to the Internal Land owned by FEA Carbon which was used in the Later Schemes was on the same terms as those contained in the 2003 Master Head Lease, as amended by the Deed of Variation.
 - (d) The leasing arrangement between FEA and each Grower was governed by the Grower Leases in the form set out in the prospectus or product disclosure statement which related to the relevant scheme, being an Earlier Scheme (the prospectuses and product disclosure statements are Exhibit TBN-9 to the Documents Affidavit).
 - (e) The arrangement between FEAP and each Grower was governed by the Grower Leases in the form set out in the prospectus or product disclosure statement which relates to the relevant scheme, being a Later Scheme (except the 2009 scheme, as there were no Grower Leases in that Scheme).
24. The Grower Leases were more fully described in paragraph 33 of the Documents Affidavit.
25. Now produced and shown to me marked 'IMJ-9' are samples of an executed Grower Lease between FEA (then known as 'Forest Enterprises Tasmania Pty Ltd') and a Grower in each of the 1995 to 1999 Schemes inclusive. Each of those copies has been redacted so as to obscure the personal details of the Grower concerned.
26. Now produced and shown to me marked 'IMJ-10' are samples of an executed Grower Lease between FEAP and a Grower in the 2000 Scheme and in the 2004 Scheme. Each



of those copies has been redacted so as to obscure the personal details of the Grower concerned.

Deed Administrators' View

27. The Deed Administrators have made various assertions about the structure of the Internal Leases. The assertions have changed over time. Based on the most recent correspondence between:

- (a) the Receivers and the Deed Administrators; and
- (b) my firm, Maddocks, and DLA Piper, the solicitors for the Deed Administrators,

I understand that the Deed Administrators have a different view, to that of the Receivers, regarding the leasing arrangements in respect of the Internal Land.

28. In particular, I understand that the Deed Administrators assert that:

- (a) the terms set out in the 2003 Master Head Lease, as varied by the Deed of Variation, applied only to the Internal Land used in the Schemes from 2003 onwards; and
- (b) the terms set out in the Standard Head Lease dated 30 June 2000 between Tasmanian Plantation as lessor and FEAP as lessee (**2000 Standard Head Lease**) applied to the Internal Land used in Schemes from 2000 to 2002.

29. Further, I understand the Deed Administrators assert that, since 30 June 2000, the Internal Land owned by Tasmanian Plantation or FEA which was used in the Earlier Schemes had been:

- (a) leased by Tasmanian Plantation or FEA (as the case may be) to FEAP on the terms set out in the 2000 Standard Head Lease; and



(b) subleased by FEAP to the Growers, presumably on the same terms as referred to in paragraph 23(d) above.

30. Now produced and shown to me marked 'IMJ-11' are diagrams setting out my understanding of the Deed Administrators' most recent view of the leasing relationships in respect of Internal Land.

Default notices served on FEAP and FEA

31. I am informed by Richard Keley, an account director with Deloitte Touche Tohmatsu and a member of the Receivers' staff, and believe that:

- (a) the monthly rent payable by FEAP in respect of the Internal Land owned by Tasmanian Plantation and used in the Later Schemes (**TP 00-09 Land**) was approximately \$820,000;
- (b) on or about 16 August 2010, FEA received from FEAP a payment of \$13,209 in respect of rent;
- (c) on or about 31 August 2010, FEA received from FEAP a payment of \$3,302.18 in respect of rent;
- (d) no other funds have been received by any of the Lessor Companies from FEAP in respect of rent since the appointments of the Administrators and Receivers on 14 April 2010.
- (e) since the appointments of the Administrators and the Receivers on 14 April 2010, no amount has been received by Tasmanian Plantation or FEA Carbon from FEA for rent in respect of the Internal Land owned by Tasmanian Plantation or FEA Carbon and leased to FEA.



32. Until December 2010 there was uncertainty as to whether the TP 00-09 Land was leased directly from Tasmanian Plantation to FEAP, or from Tasmanian Plantation to FEA to FEAP. This issue (whether FEA was involved in the leasing chain in respect of the TP 00-09 Land) was one of the matters decided in the Internal Leases Application, in which Finkelstein J delivered judgment in December 2010 (see paragraphs [21], [22], [26], [53] and [54]).

33. In the meantime, between August 2010 and December 2010, I caused notices of default to be served on FEAP by Tasmanian Plantation and FEA jointly (therefore covering both possibilities):

- (a) requiring FEAP to pay the rent in respect of each month from May 2010 to November 2010 for the TP 00-09 Land; and
- (b) making it clear that payment of that rent into a solicitor's trust account would be accepted by each of Tasmanian Plantation and FEA as discharge of FEAP's obligations in respect of that rent.

34. I refer to the 2003 Master Head Lease, which is exhibit 'TBN-13' to the Documents Affidavit. Clause 2(d) of that lease provides as follows:

2. Lessee's Obligations

The Lessee hereby covenants and agrees with the Lessor as follows:

...

- (d) **To Comply with all Relevant Laws and Regulations and Orders made under them.**

That the Lessee shall observe and comply with all regulations, notices, orders and directions given by any statutory or public authority, in this



municipal council or other authority relating to the use of the Land and shall carry out the requirements thereof at its own expense.

Clause 2(e) of the 2000 Standard Head Lease is in the same terms. I refer to the obligations under either of those provisions as the **Maintenance Obligations**.

35. I am informed by Mr Keley and believe that:

- (a) FEAP failed to comply with certain Corrective Action Requests served in respect of parts of the Internal Land in respect of which FEAP was the lessee or sub-lessee; and
- (b) FEAP failed to maintain roads and crossings on, and safe access to, parts of the Internal Land in respect of which FEAP was the lessee or sub-lessee.

36. The Receivers instructed me to serve notices of default on FEAP for non payment of rent and other breaches of the leases, and on FEA for non payment of rent:

- (a) based on the Receivers' view of the leasing relationships as referred to in paragraphs 20 to 23 above; and
- (b) having regard to the position if the view of the Deed Administrators, as referred to in paragraph 27 to 30 above, were held to be correct (on the basis that such notices were without prejudice to any other notice).

37. Now produced and shown to me marked 'IMJ12' are copies of the following notices and covering letters, each of which I caused to be served (together with a covering letter) on the addressee at its registered office and care of the Administrators or the Deed Administrators (as applicable):



- (a) notices of default dated 16 August 2010 from Tasmanian Plantation and FEA to FEAP in respect of rent for each of the months of May 2010, June 2010 and July 2010 in respect of the TP 00-09 Land;
- (b) notices of default dated 16 August 2010 from FEA to FEAP in respect of rent for each of the months of May 2010, June 2010 and July 2010 in respect of the Internal Land owned by FEA which was used in the Later Schemes (**FEA 00-09 Land**);
- (c) notices of default dated 16 August 2010 from FEA Carbon to FEAP in respect of rent for each of the months of May 2010, June 2010 and July 2010 in respect of the property owned by FEA Carbon;
- (d) the letters under cover of which the notices referred to in paragraphs (a) to (c) above were served;
- (e) notice of default dated 3 September 2010 from Tasmanian Plantation and FEA to FEAP in respect of rent for the month of August 2010 in respect of the TP 00-09 Land;
- (f) notice of default dated 3 September 2010 from FEA to FEAP in respect of rent for the month of August 2010 in respect of the FEA 00-09 Land;
- (g) notice of default dated 3 September 2010 from FEA Carbon to FEAP in respect of rent for the month of August 2010 in respect of the property owned by FEA Carbon;
- (h) the letters under cover of which the notices referred to in paragraphs (e), (f) and (g) were served;

A handwritten signature in black ink, appearing to be 'D. Long', is located at the bottom right of the page.

- (i) notices of default dated 9 November 2010 from Tasmanian Plantation and FEA to FEAP in respect of rent for each of the months of September 2010 and October 2010 in respect of the TP 00-09 Land;
- (j) notices of default dated 9 November 2010 from FEA to FEAP in respect of rent for each of the months of September 2010 and October 2010 in respect of the FEA 00-09 Land;
- (k) notices of default dated 9 November 2010 from FEA Carbon to FEAP in respect of rent for each of the months of September 2010 and October 2010 in respect of the property owned by FEA Carbon;
- (l) the letters under cover of which the notices referred to in paragraphs (i), (j) and (k) were served;
- (m) notice of default dated 10 December 2010 from Tasmanian Plantation and FEA to FEAP in respect of rent for the month of November 2010 in respect of the TP 00-09 Land;
- (n) notice of default dated 10 December 2010 from FEA to FEAP in respect of rent for the month of November 2010 in respect of the FEA 00-09 Land;
- (o) notice of default dated 10 December 2010 from FEA Carbon to FEAP in respect of rent for the month of November 2010 in respect of the property owned by FEA Carbon;
- (p) the letters under cover of which the notices referred to in paragraphs (m), (n) and (o) were served;
- (q) notice of default dated 24 December 2010 from Tasmanian Plantation to FEA in respect of rent for the period from 1 May 2010 to 30 November 2010 in respect of



the TP 00-09 Land, together with the letters under cover of which that notice was served;

- (r) notice of default dated 30 June 2011 from FEA to FEAP in respect of rent for the month of June 2011 in respect of the TP 00-09 Land, together with the letters under cover of which that notice was served;
- (s) notice of default dated 5 August 2011 from FEA to FEAP in respect of FEAP's failure to comply with the Maintenance Obligations in respect of the TP 00-09 Land, including in relation to actions required pursuant to Corrective Action Requests (**CARs Notice**), together with the letters under cover of which that notice was served;
- (t) notice of default dated 8 August 2011 from FEA to FEAP in respect of rent for the month of July 2011 in respect of the TP 00-09 Land, together with the letters under cover of which that notice was served;
- (u) notice of default dated 8 August 2011 from FEA Carbon to FEA in respect of rent for the period from 1 May 2010 to 31 July 2011 in respect of the property owned by FEA Carbon, together with the letters under cover of which that notice was served;
- (v) notice of default dated 8 August 2011 from FEA to FEAP in respect of rent for the period from 1 June 2011 to 31 July 2011 in respect of the property owned by FEA Carbon, together with the letters under cover of which that notice was served;
- (w) notice of default dated 8 August 2011 from Tasmanian Plantation to FEA in respect of rent for the month of July 2011 in respect of the Internal Land owned by Tasmanian Plantation which was used in the 1995 to 2009 Schemes, together with the letters under cover of which that notice was served;

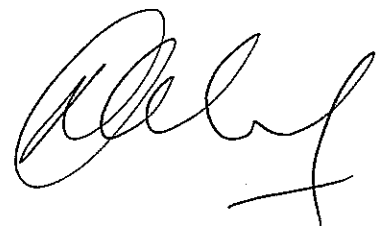


- (x) notice of default dated 8 August 2011 from FEA to FEAP in respect of rent for the period from 1 June 2011 to 31 July 2011 in respect of the FEA 00-09 Land, together with the letters under cover of which that notice was served;
- (y) notice of default dated 12 August 2011 from Tasmanian Plantation and FEA to FEAP in respect of FEAP's failure to comply with its Maintenance Obligations in relation to the Internal Land owned by Tasmanian Plantation which was used in the Schemes from 1995 to 2009 (in relation to the same defaults referred to in the CARs Notice), together with the letters under cover of which that notice was served;
- (z) notice of entitlement to terminate dated 12 August 2011 from Tasmanian Plantation to FEAP in respect of each lease of the Internal Land owned by Tasmanian Plantation and leased to FEAP, together with the letters under cover of which that notice was served;
- (aa) notice of default dated 12 August 2011 from Tasmanian Plantation and FEA to FEAP in respect of the failure by FEAP to comply with Maintenance Obligations in relation to such of the Internal Land owned by Tasmanian Plantation which was used in the 1995 to 2009 Schemes and leased by Tasmanian Plantation to FEAP or sub-leased by FEA to FEAP, together with the letters under cover of which that notice was served;
- (bb) notice of default dated 19 August 2011 from Tasmanian Plantation to FEAP in respect of rent for the period from 1 May 2010 to 31 July 2011 in respect of such of the Internal Land owned by Tasmanian Plantation which was used in the Schemes from 1995 to 1999 and leased by Tasmanian Plantation to FEAP, together with the letters under cover of which that notice was served.



Notices of Termination

38. I am informed by Mr Keley and believe that none of the notices of default referred to in paragraph 37 above were complied with.
39. Now produced and shown to me marked 'IMJ13' are copies of the following notices of termination, each of which I caused to be served (together with a covering letter) on the addressee at its registered office and care of the Deed Administrators:
- (a) notice of termination from Tasmanian Plantation to each of FEA and FEAP terminating each lease or grant to either of them in respect of the TP 00-09 Land which I caused to be served on 12 August 2011, together with the letters under cover of which that notice was served;
 - (b) notice of termination from FEA to FEAP terminating each lease or grant in respect of TP 00-09 Land from FEA to FEAP which I caused to be served on 12 August 2011, together with the letters under cover of which that notice was served;
 - (c) notice of termination dated 30 September 2011 from Tasmanian Plantation to each of FEA and FEAP terminating each lease or grant to either of them in respect of Internal Land owned by Tasmanian Plantation which was used in the Schemes from 1995 to 2009, together with the letters under cover of which that notice was served;
 - (d) notice of termination dated 30 September 2011 from FEA Carbon to each of FEA and FEAP terminating each lease or grant to either of them in respect of the property owned by FEA Carbon, together with the letters under cover of which that notice was served;



- (e) notice of termination dated 30 September 2011 from FEA to FEAP terminating each lease or grant to FEAP in respect of the property owned by FEA Carbon, together with the letters under cover of which that notice was served;
- (f) notice of termination dated 30 September 2011 from FEA to FEAP terminating each lease or grant to FEAP in respect of the FEA 00-09 Land, together with the letters under cover of which that notice was served.

40. I am informed by the Receivers and believe that:

- (a) all of the leasing relationships identified in paragraphs 20 to 30 (including those that would have existed if the Deed Administrators' view of the leasing relationships were correct) have been terminated; and
- (b) any Grower Lease which remained on foot after the termination of certain of the Grower Leases as referred to in paragraphs 68 to 70 below have come to an end.

End of Grower Leases – 1993 and 1994 Schemes

41. I am informed by Mr Keley and believe that, based on his review of the books and records of the FEA Group and his personal knowledge:

- (a) prior to the appointment of the Administrators and Receivers on 14 April 2010, clear fall had occurred in respect of the trees planted on all of the Internal Land used in the 1993 Scheme and part of the Internal Land used in the 1994 Scheme;
- (b) by September 2011, clear fall had occurred in respect of the trees planted on the rest of the Internal Land used in the 1994 Scheme;



- (c) as a result, the term of each Grower Lease in relation to the 1993 and 1994 Schemes has concluded, and each such Grower Lease is therefore at an end.

Defaults under Grower Leases – 1995 to 1999 Schemes

42. In each of the 1995 to 1999 Schemes, Growers had an option to pay their rent annually or to pre-pay their rent for the entire term of the Grower Lease.
43. I am informed by Mr Keley that certain Growers in each of those Schemes pre-paid their rent for the entire term of their Grower Lease.
44. Now produced and shown to me marked 'Confidential Exhibit **'IMJ-14'** is a list of Growers in the 1995 to 1999 Schemes who prepaid their rent at the commencement of their Grower Lease. The Plaintiffs request that this exhibit (and each other exhibit referred to in the affidavit as a "Confidential Exhibit") be kept confidential to the parties to this proceeding.
45. I refer to those Growers in the Earlier Schemes (other than the 1993 and 1994 Schemes):
- (a) who had pre-paid their rent as **Pre-paid Growers**; and
 - (b) who had not pre-paid their rent (of which there are approximately 1,400) as **Relevant Growers**.
46. Although FEA was the lessor under the Grower Leases which relate to the Earlier Schemes, in or about August 2010, the Deed Administrators purported to cause FEAP to render invoices to Relevant Growers which included an amount in respect of rent payable under the Grower Lease.
47. The Receivers objected to that occurring and advised the Deed Administrators that they had no authority to invoice for that rent. Further, the Receivers advised the Deed Administrators that the Deed Administrators were not entitled to use or otherwise deal with



those funds and that, if they took a different view, they should apply to the Court for directions. The Deed Administrators have not done so. Now produced and shown to me marked 'IMJ-15' is a sample of the extensive correspondence in relation to this issue which has passed between the Receivers, the Deed Administrators and their respective solicitors.

48. I am informed by Mr Keley and believe that:

- (a) the review of the records of the companies in the FEA Group by the Receivers and their staff indicates that, prior to the appointment of the Administrators and the Receivers, the Relevant Growers were invoiced on an annual basis with rent payable on 30 June each year;
- (b) accordingly rent payable under the Grower Leases of each of the Relevant Growers became payable to FEA on 30 June 2010 and again on 30 June 2011.

49. As FEA had not received payment of rent that fell due on 30 June 2010 and 30 June 2011, on 8 August 2011, the Receivers prepared a letter to Relevant Growers (**8 August Letter**) outlining:

- (a) FEA's entitlement to the rent;
- (b) FEA's advice to FEAP and its Deed Administrators that they were not entitled to invoice, receive or deal with that rent;
- (c) noting that the non-payment of rent constituted a breach under the Grower Lease;
- (d) requesting that the Grower remedy the breach within 21 days.

50. I am informed by Mr Keley and believe that, due to the volume of the letters involved, the dispatch of the 8 August Letter was performed by an external mailing contractor.

51. Now produced and shown to me marked 'IMJ-16' is a copy of the proforma of the 8 August Letter used by the mailing contractor in dispatching those letters on 8 August 2011.
52. Now produced and shown to me marked 'Confidential Exhibit 'IMJ-17' is a list of the Relevant Growers to whom that letter was sent on 8 August 2011. I am informed by Mr Keley and believe that the details for each Grower contained in that list are extracted from the data file that was provided to the mailing contractor for the purposes of producing the letters based on the proforma document referred to in the previous paragraph.
53. I have received copies of the 8 August Letter as received by certain Relevant Growers, as part of correspondence to me from the solicitors for the Deed Administrators and the solicitors for the FEA Growers Group Inc (FEAGG).
54. Now produced and shown to me marked 'IMJ-18' are samples of those letters (with the personal details of the Relevant Grower redacted).
55. I am informed by Mr Keley and believe that, after the 8 August Letter was sent:
- (a) he became aware that certain Relevant Growers had not been included on the original mailing list and had not therefore received the 8 August Letter;
 - (b) he caused a letter in the same form as the 8 August Letter to be sent to those Relevant Growers, some of which letters were sent on 15 September 2011 and some of which were sent on 21 September 2011;
 - (c) he became aware that the details contained in the 8 August Letter sent to certain Relevant Growers were not correct, in that the amount of rent specified was overstated or the relevant property referred to in the letter was incomplete;



(d) he caused a replacement letter to be sent to those Relevant Growers, some of which letters were sent on 20 September 2011 and some of which were sent on 21 September 2011, advising them to ignore the 8 August Letter they had received, providing the correct details and requesting them to remedy the default within 21 days from the date of the letter.

56. Now produced and shown to me marked '**IMJ-19**' is a sample of a letter (redacted to obscure the personal details of the Grower) which was sent on 15 September 2011 to certain of the Relevant Growers referred to in paragraph 55(a) above.

57. Now produced and shown to me marked 'Confidential Exhibit '**IMJ-20**' is a list of the Relevant Growers to whom a letter in substantially the form of Exhibit 'IMJ-19' was sent. I am informed by Mr Keley and believe that the details for each Grower contained in that list are the details used to produce the letter addressed to that Grower..

58. Now produced and shown to me marked '**IMJ-21**' is a sample of a letter (redacted to obscure the personal details of the Grower) which was sent on 21 September 2011 to the remaining Relevant Growers referred to in paragraph 55(a) above.

59. Now produced and shown to me marked Confidential Exhibit '**IMJ-22**' is a list of the Relevant Growers to whom a letter in substantially the form of Exhibit 'IMJ-21' was sent. I am informed by Mr Keley and believe that the details for each Grower contained in that list are the details used to produce the letter addressed to that Grower.

60. Now produced and shown to me marked '**IMJ-23**' is a sample of a letter (redacted to obscure the personal details of the Grower) which was sent on 20 September 2011 to certain of the Relevant Growers referred to in paragraph 55(c) above.

61. Now produced and shown to me marked 'Confidential Exhibit '**IMJ-24**' is a list of the Relevant Growers to whom a letter in substantially the form of Exhibit 'IMJ-23' was sent. I



am informed by Mr Keley and believe that the details for each Grower contained in that list are the details used to produce the letter addressed to that Grower.

62. Now produced and shown to me marked '**IMJ-25**' is a sample of a letter (redacted to obscure the personal details of the Grower) which was sent on 21 September 2011 to certain of the Relevant Growers referred to in paragraph 55(c) above.
63. Now produced and shown to me marked 'Confidential Exhibit '**IMJ-26**' is a list of the Relevant Growers to whom a letter in substantially the form of Exhibit 'IMJ-25' was sent. I am informed by Mr Keley and believe that the details for each Grower contained in that list are the details used to produce the letter addressed to that Grower.
64. Now produced and shown to me marked '**IMJ-27**' is a sample of a letter (redacted to obscure the personal details of the Grower) which was sent on 21 September 2011 to the remaining Relevant Growers referred to in paragraph 55(c) above.
65. Now produced and shown to me marked 'Confidential Exhibit '**IMJ-28**' is a list of the Relevant Growers to whom a letter in substantially the form of Exhibit 'IMJ-27' was sent. I am informed by Mr Keley and believe that the details for each Grower contained in that list are the details used to produce the letter addressed to that Grower.
66. I am informed by Mr Keley and believe that, as at 27 September 2011, 40 of the Relevant Growers had remedied the default under their Grower Lease by paying to FEA the amount of the rent outstanding under their Grower Lease.
67. Now produced and shown to me marked 'Confidential Exhibit '**IMJ-29**' is a list of those Relevant Growers who had remedied the default under their Grower Lease as at 27 September 2011.
68. I am informed by Mr Keley and believe that:

A handwritten signature in black ink, appearing to be 'D. Keley', is written over the bottom right portion of the page.

- (a) on 27 September 2011, the Receivers sent to those Relevant Growers to whom the 8 August Letter was sent and who had not remedied the default a notice of termination in respect of their Grower Lease (**Termination Letter**);
- (b) the dispatch of the Termination Letter was in part performed by the Receivers' staff and in part performed by an external mail service.

69. Now produced and shown to me marked 'IMJ-30' is a proforma version of the Termination Letter dispatched as referred to above.

70. Now produced and shown to me marked 'Confidential Exhibit IMJ-31' is a list of the Relevant Growers to whom that letter was dispatched on 27 September 2011. I am informed by Mr Keley and believe that the details for each Grower contained in that list are extracted from the data file that was provided to the mailing contractor for the purposes of producing the letters based on the pro forma document referred to in the previous paragraph.

Proposed sale of Internal Land

71. I am informed by the Receivers and believe that they wish to cause Tasmanian Plantation, FEA and FEA Carbon to sell the Internal Land unencumbered by any of the leases or other interests described above (that is, the Internal Leases, the Grower Leases held by Growers and the Ancillary Interests).

SWORN at Melbourne in Victoria
on 30 September 2011

Before me:

Signature of person taking affidavit

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Signature of deponent

NED JOHN MAHONY
140 William St Melbourne 3000
An Australian Legal Practitioner
within the meaning of the
Legal Profession Act 2004.