

---

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**CITATION** : GREAT SOUTHERN MANAGERS AUSTRALIA  
LTD (IN LIQ) IN ITS CAPACITY AS  
RESPONSIBLE ENTITY OF THE MANAGED  
INVESTMENT SCHEMES LISTED IN  
SCHEDULE 1 -v- THACKRAY [2010] WASC 138

**CORAM** : LE MIERE J

**HEARD** : 12 & 21 MAY 2010

**DELIVERED** : 25 MAY 2010

**FILE NO/S** : COR 35 of 2010

**MATTER** : Great Southern Managers Australia Limited (ACN 083  
825 405) (In Liq)

**BETWEEN** : GREAT SOUTHERN MANAGERS AUSTRALIA  
LTD (IN LIQ) IN ITS CAPACITY AS  
RESPONSIBLE ENTITY OF THE MANAGED  
INVESTMENT SCHEMES LISTED IN  
SCHEDULE 1  
First Plaintiff

GREAT SOUTHERN OLIVES COMPANY LTD  
(IN LIQ)  
Second Plaintiff

GREAT SOUTHERN OLIVE HOLDINGS PTY LTD  
(IN LIQ)  
Third Plaintiff

ANDREW JOHN SAKER  
Fourth Plaintiff

MARTIN BRUCE JONES  
Fifth Plaintiff

DARREN GORDON WEAVER  
Sixth Plaintiff

JAMES HENRY STEWART  
Seventh Plaintiff

AND

JAMES GERARD THACKRAY  
First Defendant

ANTHONY GREGORY MCGRATH  
Second Defendant

COLIN MCINTOSH NICOL  
SIMON ANDREW READ  
Third Defendants

THE GROWERS LISTED IN SCHEDULE 8 OF THE  
APPLICATION  
BENDIGO AND ADELAIDE BANK  
Fourth Defendants

---

*Catchwords:*

Corporations - Application by liquidators for directions - Managed investment scheme - Responsible entity in liquidation - Termination of head lease - Sale of scheme assets comprising of olive properties - Grower members each holding proprietary interest in olive properties - Whether justified in terminating lease - Unconscionability of exercising right to terminate lease - Issues unable to be determined at preliminary hearing - Orders made for asset sale agreements to proceed and for sale proceeds to be held on trust pending determination of rights proceedings - Orders made for conduct of rights proceeding

*Legislation:*

*Corporations Act 2001* (Cth), s 477(2B), s 511, s 601ND(1), S 601NF(2)

*Result:*

Orders made for sale agreements to proceed and for sale proceeds to be held on trust pending determination of rights proceeding  
Orders made for conduct of rights proceeding

*Category:* B

**Representation:**

*Counsel:*

First Plaintiff	:	Mr R W Douglas
Second Plaintiff	:	Mr R W Douglas
Third Plaintiff	:	Mr R W Douglas
Fourth Plaintiff	:	Mr R W Douglas
Fifth Plaintiff	:	Mr R W Douglas
Sixth Plaintiff	:	Mr R W Douglas
Seventh Plaintiff	:	Mr R W Douglas
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendants	:	No appearance
Fourth Defendants	:	Mr G Bigmore SC & Mr S Hopper & Mr D Marsh
Fourth Defendants	:	Mr P D Cruthfield SC & Mr J A Thomson

*Solicitors:*

First Plaintiff	:	Middletons
Second Plaintiff	:	Middletons
Third Plaintiff	:	Middletons
Fourth Plaintiff	:	Middletons
Fifth Plaintiff	:	Middletons
Sixth Plaintiff	:	Middletons
Seventh Plaintiff	:	Middletons
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendants	:	No appearance
Fourth Defendants	:	Clarendon Lawyers
Fourth Defendants	:	Allens Arthur Robinson

**Case(s) referred to in judgment(s):**

Humphris (as Administrator of Hazelton Air Charter Pty Ltd) v Mentha [2002]  
FCA 529

Re Timbercorp Securities Ltd (in liq) (No 3) [2009] VSC 510; (2009) 74 ACSR  
626

1 **LE MIERE J:** This is an edited version of the reasons for decision which  
I delivered on 25 May 2010. I have added an introduction to identify the  
parties and the context of the application.

### **Introduction**

2 The first plaintiff, GSMAL, is the responsible entity of five olive  
schemes which are registered managed investment schemes (MIS) under  
ch 5C of the Corporations Act 2001 (Cth) (the Act). The purpose of the  
olive schemes was the commercial cultivation and sale of olives for and  
on behalf of the scheme members, who are known as growers. There are  
approximately 4,065 registered growers in the olive schemes.

3 For the purpose of these proceedings the olive schemes were  
operated on properties in Western Australia which are legally owned by  
the second plaintiff (GSOC) and the third plaintiff (GSOH).

4 Each olive scheme, including the powers of GSMAL, is governed by  
a constitution. The constitutions of each of the olive schemes are in  
substantially the same terms.

5 Under the Head Leases GSMAL leased portions of the olive  
properties from GSOH or GSOC respectively for a non-commercial cash  
rent together with a variable proportion of the olive harvest. The Head  
Leases are all in similar terms. All but one Head Lease has a term of  
20 years.

6 GSMAL subleased to the growers of each olive scheme one or more  
parcels of land known as grovelots, each being 0.1 ha on the olive  
properties, pursuant to Lease and Management Agreements (each a  
Sublease). In general, growers executed one Sublease per olive scheme,  
which specified the number of grovelots they leased.

7 GSMAL also utilises an olive processing plant located on the  
Dandaragan olive property that is legally owned by Great Southern Olive  
Processing Pty Ltd (GSOP).

8 There is evidence that GSMAL is hopelessly insolvent and has been  
unable to meet its obligations under the Head Leases or otherwise  
continue to manage the olive schemes. GSOC, GSOH and GSOP are also  
each hopelessly insolvent and are unable to meet their financial  
obligations. On 16 May 2009 the fourth to seventh plaintiffs, who I will  
refer to as the Liquidators, were appointed as joint and several voluntary  
administrators of GSMAL, GSOC, GSOH and GSOP. On 18 May 2009

Simon Read and the first to third defendants (who I will refer to as the Receivers and Managers) were appointed by a syndicate of secured lenders as the receivers and managers of the assets and undertakings of GSMAL.

9 On 19 November 2009 the creditors of GSMAL, GSOC, GSOH and on 3 December 2009, the creditors of GSOP, resolved that GSMAL, GSOC, GSOH and GSOP be wound up and that the Liquidators be appointed as joint and several liquidators.

10 On 11 December 2009 the Receivers and Managers issued winding up notices to the growers of each olive scheme under s 601NC of the Act as the purpose of the schemes could no longer be accomplished. The Receivers and Managers have not wound up the olive schemes.

11 Since shortly after the commencement of the voluntary administration of GSMAL, GSOC, GSOH and GSOP, and subsequently after the commencement of the liquidation, the Liquidators along with the Receivers and Managers, developed a strategy for an orderly realisation or recapitalisation of the olive schemes. This did not succeed in identifying any offer of a replacement responsible entity for the olive schemes. The process did however identify several parties interested in acquiring the olive properties and the olive processing plant on an unencumbered basis. The Liquidators have negotiated asset sale agreements with Kailis Organic Olive Groves Ltd and Sumich EVOO Australia Pty Ltd for the sale of the olive properties on an unencumbered basis.

### **The application**

12 The Liquidators applied to the court for, amongst other things, directions and approvals that they are justified in causing:

1. GSOC and GSOH to terminate the Head Leases;
2. GSMAL to wind up the olive schemes; and
3. GSMAL to grant vacant possession of the olive properties to GSOC and GSOH respectively

on the grounds that GSMAL has defaulted under the Head Leases, and the defaults are incapable of cure and the properties cannot be maintained; and

4. that they are justified in completing the asset sale agreements with Kailis Organic Olive Groves Ltd and Sumich EVOO Australia Pty Ltd.

13 The termination of the Head Leases and the schemes would bring to an end the interests of the growers in the olive properties. Those steps if successfully completed have as their goal the sale of the olive properties to Kailis and Sumich free of encumbrances. The asset sale agreements with Kailis and Sumich are conditional upon court approval.

14 The growers are the fourth defendants. Some of them have entered an appearance. I will refer to those fourth defendants as the represented fourth defendants. The represented fourth defendants filed an interlocutory application which sought an order, amongst other things, that the Liquidators are not justified in terminating the Head Leases.

15 The Liquidators and the represented fourth defendants' applications came on for hearing on 12 May 2010 as a matter of urgency because the asset sale agreements with Kailis and Sumich will expire if court approval is not granted shortly.

16 At the hearing of the application on 12 May 2010 the Bendigo and Adelaide Bank Ltd (the Bank), which is in essence the holder of security interests over interests of some of the growers in the olive schemes, was joined as a fourth defendant.

### **12 May 2010 hearing**

17 At the hearing on 12 May 2010 counsel for the Liquidators summarised the relief being sought as follows:

1. directions to GSOC and GSOH that they are justified in terminating the Head Leases to the tenant, GSMAL;
2. directions to GSMAL that it not seek relief against forfeiture or oppose the termination of the Head Leases; and
3. a declaration pursuant to s 511 of the Act that after the termination of the Head Leases the growers have no rights or interest in the olive properties.

18 The represented growers and the Bank submitted, in effect, that it was not possible to hear and determine the Liquidators' application and the represented growers' application because that would require evidence to address factual conflicts and the opportunity to cross-examine all of the

witnesses. Counsel for the Liquidators accepted that contention and proposed that the court should determine, as a preliminary question, an issue concerning the proper construction of the lease agreement. Submissions were made concerning that proposal. It emerged that the proposed preliminary hearing would involve two issues. The first concerns the right of GSOC and GSOH as head lessor to terminate the Head Leases for breach. The second issue concerned the question of the unconscionability of exercising such a right. I determined that it was not possible to properly hear and determine either of those issues. The issue of whether or not GSOC and GSOH had the right to terminate the Head Leases for breach involved determining whether or not there had been a breach and whether or not there was an immediate right to terminate. Those questions, and the question of the unconscionability of exercising such a right, depended on the resolution of factual issues which the court was unable to determine at the hearing.

- 19 All of the parties represented desired the asset sale agreements to proceed and proposed that orders should be made to permit that to occur and for the sale proceeds to be held on trust pending the hearing and determination by the court of a proceeding to determine which person or persons have any rights to all or any of the sale proceeds, after the payment of certain expenses and deductions, and the extent of such entitlements.

### **The orders to be made**

- 20 The parties subsequently conferred in relation to the appropriate orders to be made. The parties have agreed on most of the orders to be made but there is disagreement on several of the orders. The proposed orders are contained in a minute of proposed orders dated 21 May 2010 prepared by the Liquidators' solicitors (the Minute). The Minute is annexed to these reasons for decision.

- 21 The represented growers and the Bank agree with the form of the proposed orders except that they submit that there should be some changes to [6] and [7] of the Minute and [8(e)] should be deleted. I will refer to those differences shortly.

- 22 I am satisfied that the court should make the directions set out in [1], [2] and [4] of the Minute. The court should make the order set out in [3]. The court should grant the approval set out in [5]. Subject to resolving the differences between the parties concerning the wording of orders 6, 7 and 8 I am satisfied that the court should make the orders set out in [6], [7] and [8] of the Minute. I am satisfied the court should make the orders set

out in [9] - [15] of the Minute. I am satisfied the court should give the directions set out in [16] and make the orders set out in [17] - [21] subject to the amendments to [18] and [19] agreed by the parties at the further hearing on 21 May 2010.

23 Those orders enable the Liquidators to proceed with the asset sale agreements and provide for the proceeds to be held on trust pending the determination of the claims or rights to those proceeds. It is the liquidators' view that it is appropriate to extinguish the growers' rights because the sale agreement cannot proceed without it and the assets are wasting. The material before me satisfies me that it is in the interests of all parties that the sale agreements should proceed and that course was supported by all the parties.

24 I turn then to consider the differences between the parties concerning the form of the orders contained in [6], [7] and [8] of the Minute.

25 The represented growers submitted that the words 'including the Rights Proceedings' should be omitted from [6(b)(ii)]. The represented growers submit that the Liquidators should not deduct from the net proceeds of the sales under the asset sale agreements their costs and expenses of conducting the Rights Proceedings. Those costs and expenses will consist of the legal costs and expenses of conducting the Rights Proceedings. The represented growers submit that the entitlement of the Liquidators to those costs should await the outcome of those proceedings. However, the Liquidators have no funds from which to meet those costs. Counsel for the Bank submitted that the words 'subject to any further order of the Court' should be added to [6(b)(ii)]. In my view the represented growers' concerns will be adequately met by including the words 'including the Rights Proceedings' in [6(b)(ii)] but adding at the end of that subparagraph the words 'subject to any further order of the court'.

26 The represented growers submit that the words 'including the Rights Proceeding' should be deleted from [7] of the Minute for similar reasons. Paragraph 7 is concerned with the liquidators own remuneration. For the same reasons the disputed words should remain in [7(b)] but the words 'subject to any further order of the court' should be added. The parties also consent to deletion of the words 'remuneration referable to' in [7(b)].

27 The represented growers and the Bank submitted that the words 'on account of their legal or equitable rights in rem with respect to any Sale Asset' should be deleted from [6] of the Minute. They submit that the inclusion of those words are unnecessary and may inadvertently restrict

the rights in respect of which a claimant may make a claim against the Fund. I accept that submission. Those words should be deleted.

28           The represented growers and the Bank submit that subpar (e) should be deleted from [8]of the Minute. The intention of the orders is to permit the sales under the asset sale agreements to proceed and to preserve the claims and rights of all parties by turning their rights and interests in the assets to rights and interests in the Fund. That is the intention of order 6 which provides that upon completion of the sales and after deduction of relevant costs and expenses the net proceeds are to be held on trust pending the hearing and determination by the court of the Rights Proceeding to determine which person or persons have any and if so what rights to any part of the Fund. The formulation of this order is based upon the orders made by Robson J in *Re Timbercorp Securities Ltd (in liq) (No 3)* [2009] VSC 510; (2009) 74 ACSR 626. The orders made by Robson J in turn owed much to the analysis of Goldberg J in *Humphris (as Administrator of Hazelton Air Charter Pty Ltd) v Mentha* [2002] FCA 529.

29           In *Re Timbercorp Securities* Robson J, in circumstances having some similarity to the present case, made an order allowing a sale to proceed but the proceeds to be held in trust until the proprietary rights of the growers who were members of the relevant managed investment schemes to those sale proceeds were established. Robson J said that at the time he made the orders there was uncertainty as to precisely what property rights of the growers were to be transferred or surrendered as part of the consideration for the payment of the sale price. Having referred to the judgment of Goldberg J in *Re Hazelton* Robson J said that there are well recognised legal principles for determining the rights of several property owners whose property is lost or converted into a common fund. The fund, his Honour said, is to be divided by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund. That is the intention of the orders to be made in this case.

30           The Liquidators submit that [(e)] should be included in [8] of the Minute to ensure that the court may have regard to any step which any claimant or GSMAL was willing and able to take with respect to any rights to the sale assets between 12 May and 30 June 2010 or some other later date whether or not taken.

31           In the course of argument reference was made to steps which might be taken by the Liquidators or the growers if this application was not

resolved and the sale of the assets had not proceeded. For example, there is a dispute between the Liquidators, the represented growers and the Bank about whether the notices of default given to GSMAL under the Head Leases were effective and GSOC and GSOH have an immediate right to terminate the Head Leases. The Liquidators may wish to argue that if the notices of default were ineffective for some reason then they could have given a further notice of default and subsequently terminated the leases pursuant to those notices. Such an argument will be available to the Liquidators whether or not [(e)] is added to [8]. In determining the various parties' claims to the Fund the court will have to consider not only the rights of the various parties given up or lost as a result of the orders to be made and the things done pursuant to the orders but also the value of those rights. The value of those rights will be affected by their liability or vulnerability to be terminated or defeated.

32 Another example referred to in the course of argument is the right of the growers to apply for relief against forfeiture if their subleases or the Head Leases were otherwise liable to be terminated. In determining the rights of the parties and the value of those rights, the court may have regard to the prospects of GSMAL or the growers applying for relief against forfeiture and the prospects of such an application succeeding. In considering those prospects the court may have regard to the likelihood of the applicant for relief against forfeiture being willing and able to cure any defaults or any other relevant matter.

33 I do not consider that [8(e)] is necessary or appropriate. There is a danger that the inclusion of the paragraph will cause the court to have regard to matters which it might otherwise not have regard to or to exclude from its consideration matters which it might otherwise have regard to in the course of determining the Rights Proceedings in accordance with the principles for determining the rights of several property owners whose property is lost or converted into a common fund as referred to by Robson J in *Re Timbercorp* and Goldberg J in *Re Hazelton*. That risk is accentuated by the introduction of an arbitrary time period commencing on 12 May 2010. Paragraph 8(e) of the Minute will be deleted from the orders made.

Annexure

IN THE SUPREME COURT OF WESTERN AUSTRALIA COR 35 OF 2010

IN THE MATTER OF GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (ACN 083 825 405) (IN LIQUIDATION)

**GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (ACN 083 825 405) (IN LIQUIDATION)  
IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE MANAGED INVESTMENT SCHEMES  
LISTED IN SCHEDULE 2 TO THE AMENDED ORIGINATING PROCESS** First Plaintiff

**GREAT SOUTHERN OLIVES COMPANY LIMITED (ACN 121 381 208) (IN LIQUIDATION)** Second Plaintiff

**GREAT SOUTHERN OLIVE HOLDINGS PTY LIMITED (ACN 111 092 374) (IN LIQUIDATION)** Third Plaintiff

**ANDREW JOHN SAKER** Fourth Plaintiff

**MARTIN BRUCE JONES** Fifth Plaintiff

**DARREN GORDON WEAVER** Sixth Plaintiff

**JAMES HENRY STEWART** Seventh Plaintiff

**JAMES GERARD THACKRAY** First Defendant

**ANTHONY GREGORY MCGRATH** Second Defendant

**COLIN MCINTOSH NICOL AND SIMON ANDREW READ** Third Defendants

**THE GROWERS LISTED IN SCHEDULE 8 OF THE AMENDED  
ORIGINATING PROCESS** Fourth Defendants

---

**MINUTE OF PROPOSED ORDERS**

---

Date of Document: 20 May 2010  
Date of Filing: 21 May 2010  
Filed on behalf of: The plaintiffs

Prepared by  
**Middletons**  
Level 2  
6 Kings Park Road  
WEST PERTH WA 6005

Tel: (08) 9216 0900  
Fax: (08) 9216 0901  
Ref: JMH:20090355.356865  
[james.healy@middletons.com](mailto:james.healy@middletons.com)

ii

**Dealing with the Subleases**

1. The fourth, fifth, sixth and seventh plaintiffs (**Liquidators**) (in their capacity as liquidators of the first plaintiff) are justified in causing the first plaintiff as responsible entity of the managed investment schemes listed in Schedule 2 to the Amended Originating Process (**Schemes**) to:
  - (a) amend the constitution of each Scheme pursuant to section 601GC(1)(b) of the Corporations Act 2001 (Cth) (**Act**) by executing a deed in the form contained in schedule 1 to this Order for each constitution; and
  - (b) cause each fourth defendant's sublease listed in schedule 9 of the Amended Originating Process (**Subleases**) to be assigned, terminated, surrendered or otherwise dealt with in return for a right of each fourth defendant (each a **Grower**) to assert a claim under the applicable Scheme against the fund provided for in Order 6.

**Dealing with the Head Leases**

2. The Liquidators (in their capacity as liquidators of the first plaintiff) are justified in causing the first plaintiff including in its capacity as responsible entity of the Schemes to:
  - (a) assign, terminate, surrender or otherwise deal with the leases listed in Schedule 5 to the Amended Originating Process (**Head Leases**) in return for a right of the first plaintiff including under any Scheme to assert a claim against the fund provided for in Order 6; and
  - (b) upon any termination of, assignment of, surrender of, or dealing with the Head Leases by the second or third plaintiff, give vacant possession of those properties listed in Schedule 3 Parts 2 and 3 and Schedule 3 Part 1 of the Amended Originating Process to the second plaintiff and the third plaintiff respectively.

**Approval of Sale of Olive Properties**

3. Great Southern Olive Processing Pty Ltd (in liquidation) ACN 128 547 437 be joined to these proceedings as an eighth plaintiff.
4. The Liquidators (in their capacities as liquidators of the second, third and eighth plaintiffs) are justified in entering into and performing:
  - (a) the Kailis Asset Sale Agreement between the Liquidators, the second, third and eighth plaintiffs and Kailis Organic Olive Groves Pty Ltd ACN 095 927 969 (**Kailis**), in terms which are substantially the same as the agreement set out in Annexure AJS-83 to the second confidential affidavit of Andrew John Saker sworn 7 April 2010; and
  - (b) the Sumich Asset Sale Agreement between the Liquidators, the second plaintiff, Cranmount Investments Pty Ltd ACN 115 500 304, Sumich EVOO Australia Pty Ltd

ACN 123 114 492 and Olive West Management Pty Ltd ACN 123 114 527, in terms which are substantially the same as the agreement set out in Annexure AJS-84 to the second confidential affidavit of Andrew John Saker sworn 7 April 2010; and

- (c) all other agreements which are reasonably necessary to give effect to the sale of any asset:
  - (a) the subject of Asset Sale Agreements; or
  - (b) set out in Schedule 4 of the Amended Originating Process;  
(Sale Assets);

(together, the Asset Sale Agreements).

- 5. The entry into the Asset Sale Agreements are approved pursuant section 477(2B) of the Act.

#### Application of proceeds of Asset Sale Agreements

- 6. Upon any completion of any sale provided for in Order 4, the net proceeds of the Asset Sale Agreements after the deduction by the Liquidators at any time of:
  - (a) selling costs and expenses, and retentions (if any);
  - (b) the reasonable costs and expenses of the Liquidators referable to the operation, preservation or realisation of any Sale Asset:
    - (i) excluding the Liquidators' and administrators' remuneration;
    - (ii) including the reasonable costs and expenses of conducting these proceedings including the Rights Proceeding; and
    - (iii) including the reasonable costs and expenses referable to the discharge of the statutory duties of the administrators or the Liquidators in relation to the first, second, third and eighth plaintiff); and
  - (c) the costs, expenses and remuneration of the Receivers and Managers of the first plaintiff referable to the preservation and realisation of any Sale Asset,

(Net Proceeds) be held by the Liquidators in an interest bearing account with an Australian bank (as defined in section 9 of the Act) pending the hearing and determination by the Court of a proceeding (Rights Proceeding) to determine which person or persons have any, and if so, what rights to all or any part of the Net Proceeds (Claimants) on account of their legal or equitable rights *in rem* with respect to any Sale Asset, and to be held on trust for the Claimants until further order of the Court (Fund).

- 7. The Liquidators in their capacities as administrators or liquidators of the first, second, third or eighth plaintiff may pay from the Fund their remuneration but only to the extent it both:

- (a) relates to the administration, liquidation or winding up of the first, second, third or eighth plaintiff; and
- (b) is referable to the operation, preservation or realisation of any Sale Asset including the remuneration referable to conducting these proceedings including the Rights Proceeding and including the remuneration referable to the discharge of the statutory duties of the administrators or the Liquidators,

subject to approval from the committee of inspection or the creditors of the first, second, third, or eighth plaintiff in respect of which that remuneration was incurred, or upon approval of the Court, pursuant to s.449E or s.473 of the Act as applicable.

#### **Conduct of Rights Proceeding**

8. For the purposes of the claims of any Claimant to be paid all or any part of the Net Proceeds on account of that Claimant's rights:
  - (a) insofar as the fourth defendants or the first plaintiff have any rights to the Sale Assets or rights under the Subleases or the Head Leases which are assigned, terminated, surrendered or otherwise dealt with pursuant to these Orders, nothing in these Orders nor any action taken thereunder by any plaintiff will prejudice or diminish those rights;
  - (b) insofar as the second or third plaintiff has any rights to assign, terminate, surrender or otherwise deal with any Head Lease or any Sublease nothing in these Orders nor any action taken thereunder by any plaintiff or any defendant will prejudice or diminish those rights;
  - (c) insofar as any plaintiff has any rights to the Sale Assets, including the right to defend any claim capable of being brought by the fourth defendants in relation to the Subleases or the Head Lease, nothing in these Orders nor any action taken thereunder by any plaintiff or any defendant will prejudice or diminish the second or third plaintiff's rights to assert any such claims and defences;
  - (d) insofar as any other Claimant has rights to the Sale Assets, nothing in these Orders nor any action taken thereunder by any plaintiff will prejudice or diminish those rights; and
  - (e) regard may be had to any step which any Claimant was willing and able to take with respect to any such right between 12 May 2010 and 30 June 2010, whether or not taken.
9. The Rights Proceeding be conducted in these proceedings and be entered forthwith in the Commercial and Managed Cases list.
10. Within 3 working days of an interlocutory dispute arising, the solicitors for the relevant parties shall confer in person and attempt to resolve it.

11. If the dispute has not been resolved after the parties' solicitors have conferred in an attempt to resolve it and a directions hearing is scheduled to take place within 7 days then the party seeking the interlocutory relief shall file and serve a minute of the relief sought by that party and the dispute shall be heard at the next directions hearing
12. If the dispute has not been resolved after the parties' solicitors have conferred in an attempt to resolve it and a directions hearing is not scheduled to take place within 7 days then the party seeking the interlocutory relief may forthwith exercise his right to seek the re-listing of the matter for the purpose of applying for interlocutory relief.
13. The party applying for interlocutory relief at a directions hearing shall, not later than the day before the directions hearing, file and serve a minute of the orders sought by that party by way of interlocutory relief.
14. The next directions hearing in the Rights Proceeding shall be at [time] hrs on [date].
15. 7 days prior to the directions hearing, the first, second and third plaintiffs will circulate a minute of proposed directions for the conduct of the Rights Hearing.

**Other**

16. The Liquidators of the second, third and eighth plaintiff, are justified in entering and performing, and grants approval under section 477(2B) to enter and perform, the amended letter agreement with Kailis which forms Annexure AJS-75 to the Second Supplementary Affidavit of Andrew John Saker Affidavit sworn 7 April 2010 and filed in these proceedings
17. The plaintiffs' application for:
  - (a) directions under sections 511 and 601NF(2) of the Act to wind up each of the Schemes in accordance with their respective constitutions; and
  - (b) an order under section 601ND(1)(a) of the Act that each of the Schemes be wound up on the grounds that it is just and equitable to do so;is adjourned to a date to be fixed.
18. Interlocutory Processes not yet granted are otherwise dismissed.
19. Within 2 working days of their receipt, the first, second and third plaintiffs do post to the websites of the Great Southern Group and of Ferrier Hodgson, a copy of:
  - (a) each document filed (and which is not ordered to be kept confidential); and
  - (b) each order made in;the Rights Proceeding
20. Costs of this proceeding be reserved.
21. There be liberty to apply on 3 working days' notice.

IN THE SUPREME COURT OF WESTERN AUSTRALIA

COR 35 OF 2010

IN THE MATTER OF GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (ACN 083 825 405) (IN LIQUIDATION)

GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (ACN 083 825 405) (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2 OF THE AMENDED ORIGINATING PROCESS

First Plaintiff

GREAT SOUTHERN OLIVES COMPANY LIMITED (ACN 121 381 208) (IN LIQUIDATION)

Second Plaintiff

GREAT SOUTHERN OLIVE HOLDINGS PTY LIMITED (ACN 111 092 374) (IN LIQUIDATION)

Third Plaintiff

ANDREW JOHN SAKER

Fourth Plaintiff

MARTIN BRUCE JONES

Fifth Plaintiff

DARREN GORDON WEAVER

Sixth Plaintiff

JAMES HENRY STEWART

Seventh Plaintiff

JAMES GERARD THACKRAY

First Defendant

ANTHONY GREGORY MCGRATH

Second Defendant

COLIN McINTOSH NICOL AND SIMON ANDREW READ

Third Defendants

THE GROWERS LISTED IN SCHEDULE 8 OF THE AMENDED ORIGINATING PROCESS

Fourth Defendants

---

SCHEDULE 1

---

THIS DEED POLL is made on

2010

**PARTIES**

GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (IN LIQUIDATION) ACN 083 825 405 of C/- Ferrier Hodgson, Level 26, 108 St Georges Terrace, Perth, Western Australia, 6000 (GSMAL)

**BACKGROUND**

- A. GSMAL was appointed the responsible entity of the *[insert name of Scheme]* (ARSN *[insert]*) pursuant to the Constitution.
- B. GSMAL is desirous of disposing of its assets including various leases granted by third parties.
- C. In order to give clear and free title to the assignee of any lease, any sublease/licence and joint venture agreement of the leased land may be surrendered.

Minute of proposed orders 21 May 2010

- D. GSMAL considers it appropriate that it be granted the power to surrender each sublease/licence and joint venture agreement on behalf of the Growers.
- E. On # 2010, the Honourable Justice # of the Supreme Court of Western Australia directed GSMAL and the liquidators of GSMAL that the liquidators of GSMAL would be justified in executing or procuring GSMAL to execute a deed amending the Constitution, pursuant to section 601GC(1)(b) of the *Corporations Act*, in the form of this deed
- F. In accordance with section 601GC of the *Corporations Act* and the directions of the Court, GSMAL has executed this deed to modify the Constitution in the manner set out in this deed.

#### AGREED TERMS

#### 1 DEFINITIONS AND INTERPRETATION

##### 1.1 Definitions

In this deed, unless the context requires otherwise, terms that are defined in the Constitution have the same meaning and:

"**Constitution**" means the constitution dated *[insert date]* (as amended).

"**Effective Date**" means the date this deed is lodged with the Australian Securities and Investments Commission.

##### 1.2 Interpretation

Clause 42 of the Constitution applies to the interpretation of this deed

#### 2 AMENDMENT

The Constitution is amended with effect on and from the Effective Date by inserting at the end of clause 12.2 the following words:

*"and the power to assign, terminate, surrender or otherwise deal with any lease or sublease of a Grovelot on behalf of a Grower."*

##### 2.1 Remains in effect

Except as specifically amended by this document, all terms and conditions of the Constitution remain in full force and effect.

##### 2.2 Read as a single document

With effect on and from the Effective Date:

- (a) the Growers are bound by the Constitution as amended by this deed; and
- (b) the Constitution is to be read as a single integrated document incorporating those amendments.

**3 GENERAL**

**3.1 Paramountcy of document**

If this deed conflicts with any other document, agreement or arrangement, this document prevails to the extent of the inconsistency.

**3.2 Attorneys**

Each person who executes this deed on behalf of a party under a power of attorney warrants that he or she has no notice of the revocation of that power or of any fact or circumstance that might affect his or her authority to execute this document under that power.

**3.3 Governing law and jurisdiction**

This deed will be governed by and construed in accordance with the laws in force in the State of Western Australia and each party submits to the non-exclusive jurisdiction of the courts of that State.

**EXECUTED as a Deed**

**EXECUTED by GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (IN LIQUIDATION)** by being signed in its name and on its behalf by **ANDREW JOHN SAKER** in his capacity as liquidator in the presence of:

\_\_\_\_\_  
Signature of witness

\_\_\_\_\_  
Signature of liquidator

\_\_\_\_\_  
Name of witness *(please print)*

