

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 1**

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

Third Defendant

THE GROWERS LISTED IN SCHEDULE 8 OF THE APPLICATION

Fourth Defendants

**AFFIDAVIT OF ANTHONY GREGORY MCGRATH
SWORN: 23 APRIL 2010**

Date of filing:

April 2009

Date of document:

April 2009

Filed on behalf of:

First to Third Defendants

Anthony Gregory McGrath
[Signature]

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I, **ANTHONY GREGORY MCGRATH** of Level 31, 60 Margaret Street Sydney in the State of New South Wales, Chartered Accountant and Registered Liquidator, make oath and say:

1. Introduction

- 1.1 I am the second defendant in this proceeding. I am authorised by the first and third defendants to make this affidavit on their behalf.
- 1.2 Except where I otherwise indicate, I make this affidavit from my own knowledge.



- 1.3 I make this affidavit in support of the plaintiffs' application, made by interlocutory process for relief dated 7 April 2010.
- 1.4 I refer to the affidavit of Andrew Saker dated 10 March 2010 filed in this proceeding (**Saker Affidavit**) which contains certain defined terms and I adopt those terms in this affidavit.

2. Appointment of Receivers and Managers

- 2.1 On 18 February 2009, McGrathNicol was engaged by Australia New Zealand Banking Group Ltd, Commonwealth Bank of Australia, Mizuho Corporate Bank Limited and Bank of Western Australia Limited (collectively, Club Banks) to undertake a strategic and financial review of the Great Southern group of companies (Great Southern Group)
- 2.2 On 18 May 2009, ANZ Fiduciary Services Pty Ltd as trustee for the Club Banks appointed Messrs Simon Andrew Read, Colin McIntosh Nicol, James Gerard Thackray and I as joint and several receivers and managers of 10 companies within the Great Southern Group, including Great Southern Managers Australia Limited ('GSMAL'), and as receivers of Great Southern Property Managers Limited in its own capacity and in its capacity as trustee of the Great Southern Property Trust.

3. Assessment of GSMAL solvency and scheme viability

GSMAL solvency

- 3.1 Further to the investigations made by McGrathNicol referred to in paragraph 2.1 above, the Receivers and Managers conducted an extensive review of the books and records of GSMAL upon their appointment.
- 3.2 As at 18 May 2009, GSMAL had a total of \$1.9 million in bank accounts of which \$6,000 was held on trust for Growers. The balance of the monies held (approximately \$1.894m)

Andrew Saker


was charged to the Club Banks and not available for operational use within GSMAL schemes.

- 3.3 Other than cash, GSMAL did not have other significant assets that could promptly be converted into cash.
- 3.4 As part of the Great Southern group, GSMAL is joint and severally liable to the Club Banks in the sum of approximately \$341,000,000 together with interest and costs which continue to accrue. The entirety of that amount is immediately payable.
- 3.5 Based on the above matters and my review of the financial information prepared by McGrathNicol staff under the supervision of the Receivers and Managers, I believe that GSMAL is, and has been since at least the date of our appointment, hopelessly insolvent.

Viability of Olive Schemes

- 3.6 The Receivers and Managers prepared viability and solvency reports based on cash flow forecasts prepared by Great Southern management. The assumptions behind those forecasts were reviewed and adjusted by an independent olive industry expert, Paul Miller and Associates (**Paul Miller**), who was retained by the Receivers and Managers following our appointment.
- 3.7 A circular to investors for each Olive Scheme dated 11 December 2009 was prepared and forwarded to investors on or around 15 December 2009 (attachment 'AJS-22' to the Saker Affidavit). The circular contained a summary of the solvency and viability reports. These reports, and the expert reports of Paul Miller, were made available on the investor portal at <http://investors.great-southern.com.au> which is a website accessible to Growers with a password. Now produced and shown to me and marked 'AGM-1', are copies of the viability and solvency reports for the Olive Schemes made available on the investor portal.

Griffiths
[Signature]

3.8 The circular referred to at paragraph 3.7 above advised investors that the expected cash flows to Growers were not achievable as no Responsible Entity would be willing to spend the amounts required to achieve the expected return.

4. Maintenance of olive schemes

- 4.1 I am informed by McGrathNicol director Wayne Turley, who, under the supervision of the Receivers and Managers, was responsible for all operational matters associated with the Olive Schemes, and believe that at the time of the Receivers and Managers' appointment the 2009 crop was due to be harvested.
- 4.2 The Receivers and Managers of GSMAL promptly took steps to procure the preservation of the olive groves for the benefit of investors. The Receivers and Managers caused GSMAL to enter into an asset sale agreement with Kailis and Sumich for the sale of the 2009 harvest under which Kailis and Sumich were obliged to assume all care and management obligations at the West Australian groves until 15 June 2009, which Mr Turley informs me was the anticipated end date for the harvest.
- 4.3 I am informed by Mr Turley and believe that after completion of the 2009 harvest, Kailis and Sumich continued to manage the groves in Western Australia during August and September on a 'caretaker' basis, at an agreed monthly rate of \$28,600 per month (Kailis) and \$6,500 per month (Sumich). Limited funding was provided by the Club Banks for this purpose. Now produced and shown to me and marked 'AGM-2' are invoices dated between 28 July and 11 September 2009 for works done at the WA groves to the end of September 2009.
- 4.4 The Receivers and Managers advised investors in a circular dated 7 September 2009 that the funds provided by the Club Banks for critical care and maintenance could not be guaranteed after 30 September. The circular noted there was an immediate need to spend approximately \$1,000,000 to perform essential works and upgrade the irrigation system across the Olive

A handwritten signature in black ink, appearing to read "ANTHONY" with a stylized flourish below it.

Schemes. Now produced and shown to me and marked 'AGM-3' is a copy of the circular dated 7 September 2009.

- 4.5 The Receivers and Managers further advised investors by circular dated 18 September 2009 (exhibit 'AJS-27' to the Saker Affidavit) that funding of the schemes would cease on 30 September 2009 and there would be no monies available for regular maintenance from that date. The circular urged investors to contact the Receivers if they had any proposals for continued funding of the maintenance of the schemes. I am informed by McGrathNicol director Ross Smith, who under the supervision of the Receivers and Managers was responsible for co-ordinating the preparation and issue of the circulars referred to above, and believe that there was no response from investors to this recommendation. I am further informed by Mr Turley that to his knowledge the essential works and upgrades to the irrigation system referred to in paragraph 4.4 were not carried out.

5. Expression of Interest process

- 5.1 I refer to paragraph 38 of the Saker affidavit concerning the Receivers and Managers' involvement in advertising and co-ordinating the initial expressions of interest for realising and recapitalising the Olive Schemes.
- 5.2 The GSOC and GSOH Liquidators have control of the Olive Scheme land and are responsible for negotiating and concluding any sale of that land.
- 5.3 Between September and November 2009, the Receivers and Managers co-ordinated a process to attract parties interested in :
- (a) acquiring the underlying property assets used to operate the managed scheme of which GSMAL was the responsible entity, including land leased to GSMAL to operate the Olive Schemes; and/or



- (b) replacing GSMAL as responsible entity (RE) of some or all of the schemes, including the Olive Schemes,

(EOI Process).

- 5.4 On 8 September 2009, the Receivers and Managers placed national newspaper advertisements calling for expressions of interest. The Receivers and Managers set up an electronic data room containing detailed financial and scheme data which interested parties could access, via a password, to carry out due diligence. Expressions of interest closed on 23 September 2009.
- 5.5 I am informed by Mr Turley and believe that as a result of the EOI Process, no offers were received from any potential replacement RE for any of the Olive Schemes.
- 5.6 There were 6 offers received under the EOI Process for the acquisition of assets used to enable GSMAL to operate the Olive Schemes. One of these offers was from Kailis/Sumich to acquire land on an encumbered basis and a conversion of investors' lease interests in all Olive Schemes into shares in a new vehicle. I refer to attachment 'AJS-28' to the Saker Affidavit which is a letter from the Receivers and Managers of GSMAL to Mr Saker advising that the Kailis/ Sumich offer did not appear to be in the best interests of Growers and was therefore not capable of being put to Growers. The Receivers and Managers advised investors in the circular referred to at 3.7 above that Kailis and Sumich withdrew this offer on 24 November 2009.
- 5.7 The remaining 5 offers, including a revised offer from Kailis/Sumich dated 5 October 2009, were to acquire land on an unencumbered basis. I am informed by Mr Turley and believe that the revised asset sale offer by Kailis/Sumich was the only one for all six of the West Australian properties used to operate the Olive Schemes.

Handwritten signature and initials, possibly 'JTT' and 'er', with a large flourish.

5.8 I am further informed by Mr Turley and believe that the Kailis/Sumich offer was an 'all or nothing' bid, in that Kailis/Sumich was not interested in submitting offers for individual properties. By contrast, while there were some offers from other parties (for example an offer for the Dandaragan and Twin Brooks properties only) which carried a higher individual price for a specific grove, these potential purchasers had no interest in acquiring the balance of the properties used to operate the Olive Scheme.

5.9 Following initial discussions between Mr Turley and Kailis and Sumich, the offers by Kailis and Sumich were progressed by the Liquidator of GSOC and GSOH.

6. Winding up – grower responses

6.1 I refer to paragraph 31 of the Saker Affidavit concerning notices issued under section 601NC of the *Corporations Act* to Growers in each Olive Scheme and to the sample notice attached as 'AJS-22.'

6.2 I am informed by Claire Williams, a manager of McGrathNicol, who under the supervision of the Receivers and Managers, assisted in co-ordinating the mail-out to Growers, and believe that on or around 15 December 2009, the Receivers and Managers caused GSMAL to post the following documents to Olive Scheme Growers at the address listed on the scheme register for each Grower:

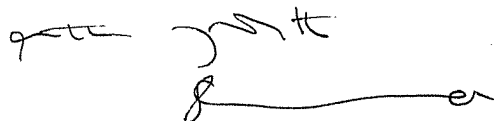
- (a) a section 601NC notice; and
- (b) a circular to investors summarising the financial and operational position of the scheme or schemes in which they had an interest. ('AJS-22' of the Saker Affidavit)

As noted at paragraph 3.7 above, a solvency and viability report was also made available to investors online.

Now produced and shown to me and marked 'AGM-4' is a list of all Growers in the Olive Schemes who were sent section 601NC notices.

- 6.3 The notices advised Growers that they had 28 days to call a meeting of scheme members to consider and vote on the proposed winding up. The circular invited investors with a viable alternative to winding up to contact the Receivers and Managers within the 28 day notice period.
- 6.4 I am informed by Mr Smith, who under the supervision of the Receivers and Managers was responsible for co-ordinating the preparation and issue of the section 601NC notices, and I believe, that there was no meeting called in response to the section 601NC notice before the notices expired, or any alternative to winding up put to the Receivers and Managers by any Grower in response to the notice and circular for any of the Olive Schemes.
- 6.5 On 22 January 2010, the Receivers and Managers wrote to ASIC advising that following expiry of the s601NC notices, GSMAL proposed to commence the winding up of the Olive Schemes. Now produced and shown to me and marked 'AGM-5' is a copy of the letter sent to ASIC.
- 6.6 I refer to attachment 'AJS-23' of the Saker Affidavit which is a copy of the circular to investors issued by the Receivers and Managers on 25 January 2010 confirming the winding up of the Olive Schemes had commenced.
- 6.7 On 1 February 2010, the Receivers and Managers caused GSMAL to file with ASIC the necessary forms for the Olive Schemes confirming the winding up had commenced on 25 January 2010. Now produced and shown to me and marked 'AGM-6' is a copy of the form 5138 filed for the 2006 Organic Olives scheme. Identical forms were filed for each of the other Olive Schemes.

7. Defaults under Head Leases and retirement from office of RE

A handwritten signature in black ink, appearing to be 'J. Smith', written over a horizontal line.

- 7.1 I refer to paragraph 56 of the Saker affidavit in relation to the notices of default under the Head Leases issued to GSMAL on 25 February 2010. At the date of receipt of these notices, the Receivers and Managers were in the process of finalising the variation to the scope of their appointment to GSMAL to exclude the office and business of RE of the GSMAL schemes, including the Olive Schemes the subject of this application. Under the circumstances, and in light of the absence of funding, the Receivers and Managers did not consider it appropriate to engage with the issue of the validity or otherwise of the default notices, whether the relevant defaults could be cured, and whether it was in the interests of investors for external funding to be provided for the defaults to be cured.
- 7.2 The Receivers and Managers promptly advised Growers of the receipt of the default notices in a circular to investors dated 26 February 2010 (attachment 'AJS-24' to the Saker Affidavit) which foreshadowed that the GSMAL Liquidators would be communicating with Growers regarding the implications of the notices of default..

SWORN by the deponent at Sydney in the)
 State of New South Wales this 23rd day of)
 April 2010 before me:)




Legal practitioner who is entitled to witness affidavits in the State of New South Wales and who holds a current practice certificate/Justice of the Peace.

Print Name of Legal Practitioner:

Cenevieve Vaccaro
 Minter Ellison
 88 Phillip Street
 Sydney NSW