

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

EX PARTE

GREAT SOUTHERN MANAGERS AUSTRALIA LTD (ACN 083 825 405) (IN LIQUIDATION) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 1 OF THE PLAINTIFF'S APPLICATION

First Plaintiff

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

Second Plaintiff

GREAT SOUTHERN OLIVE HOLDINGS PTY LTD (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 THACKRAY

First Defendant

TONY McGRATH

Second Defendant

COLIN NICOL

Third Defendant

THE GROWERS LISTED IN SCHEDULE 8 OF THE APPLICATION

Fourth Defendants

SUBMISSIONS OF BENDIGO AND ADELAIDE BANK

Date of document: 6 May 2010

Filed on behalf of: Bendigo and Adelaide Bank

Date of filing: 6 May 2010

Address for service and prepared by:

Allens Arthur Robinson

Lawyers
Level 37 QV.1
250 St Georges Terrace
Perth WA 6000

DX 156 Perth
Tel 9488 3700
Fax 9488 3701
Ref KRRS/MVPS 606114130

Background

1. Great Southern Ltd is a publicly listed company. It is presently in liquidation. See Saker's affidavit, dated 10 March 2010, annexure AJS1.
2. The second and third plaintiffs are Great Southern Olives Company Ltd ("OliveCo") and Great Southern Olive Holdings Pty Ltd ("OliveHoldings"), which are wholly owned subsidiaries of Great Southern Ltd. The first plaintiff, Great Southern Managers Australia Ltd ("ManagementCo"), is also a wholly owned subsidiary of Great Southern Limited.
3. Bendigo and Adelaide Bank Limited or certain of its subsidiaries (the "Bank") is a secured creditor of various Growers, in relation to the Growers' investment in the schemes. It has security over any proprietary rights of the Growers which arise out of the schemes. It therefore has a material interest in the outcome of these proceedings, and seeks leave to be heard in the proceeding on that basis.¹
4. ManagementCo is the responsible entity of five managed investment schemes which grow olives. ManagementCo leases the land upon which the olives are grown from OliveCo and OliveHoldings.
5. ManagementCo has purported to enter into sub-leases of the land which it has leased from OliveCo and OliveHoldings. The sub-leases are with various investors in the management investment schemes, known as Growers.
6. OliveCo and OliveHoldings have issued notices of default to ManagementCo, in respect of the head leases. These notices of default are based upon non-payment of an annual rent of \$10.00, the failure of ManagementCo to properly cultivate and look after the olive groves, and the failure of ManagementCo to take out appropriate insurance policies. See Saker's affidavit, dated 10 March 2010, paragraph 56, Gumley's affidavit, dated 19 April 2010, annexures JCG5-10.
7. The default notices were issued at a time when ManagementCo was under the control of receivers and managers, McGrath Nicol. See McGrath's affidavit, dated 23 April 2010, paragraph 7.1. However, the scope of the appointment of the receivers and managers was later varied, leaving the control of ManagementCo in the hands of its liquidators. The liquidators of ManagementCo are the fourth to seventh plaintiffs, who are partners of the firm Ferrier Hodgson. They are also the liquidators of OliveCo and OliveHoldings.

¹ The Bank has been given leave to be heard in relation to other applications made by GSMAL and its receivers and managers for directions in the Supreme Court of Victoria: see *Re Great Southern Managers Australia Ltd (receivers and managers appointed) (in liquidation)* [2009] VSC 557; *Re Great Southern Managers Australia Ltd (receivers and managers appointed) (in liquidation)* [2009] VSC 627.

8. ManagementCo, OliveCo, OliveHoldings and their liquidators have all applied for various directions. Broadly, these directions are designed to obtain the Court's approval to the termination of the head leases, the winding up of the schemes, and to obtain a declaration that the Growers have no rights which prevent OliveCo and OliveHoldings from dealing with the leased land. Various directions are also sought concerning the distribution of the proceeds of the sale of the leased land by OliveCo and OliveHoldings.
9. The ability of OliveCo and OliveHoldings to deal with the leased land is significant, because OliveCo and OliveHoldings have entered into agreements to sell the leased land free of encumbrances to other parties for a substantial sum. It is a condition precedent to these sale agreements proceeding that directions to the effect described be obtained from the Court. See Saker's second confidential affidavit, dated 7 April 2010, annexures AJS83 and AJS84.
10. Prior to financial difficulties, ManagementCo contracted with third party service providers to ensure that the olive groves were properly maintained and cultivated, in accordance with the terms of the head leases.
11. However, since about the middle of 2009, this has not been possible due to the financial restrictions that have applied to ManagementCo. While ManagementCo was under the control of receivers and managers, the olive orchards were cultivated on a care and maintenance basis only. That has also been the case since the receivers and managers retired, and the liquidators have controlled ManagementCo. See generally Gumley's affidavit, dated 19 April 2010.

Head Leases

12. The terms of the head leases in the different schemes are materially identical. Saker refers to the head lease for the Moore River Olive Property, which is part of the Great Southern 2008 Diversified Olives Income Project, by way of example in his first affidavit, dated 10 March 2010: see annexure AJS6. (The terms of the other head leases are contained in annexures AJS46-55 of Saker's supplementary affidavit sworn on 16 March 2010.) The Moore River head lease extends for a term between 1 May 2008 and 1 July 2028.
13. Relevantly, the head lease requires ManagementCo to pay a rent, which is prescribed as \$10.00 per annum: see clause 4 and item 3 of the schedule.
14. The head lease requires OliveCo, which is the lessor in this particular case, to initially construct the olive groves: clauses 6.1 - 6.2. The olive trees and the olive grove infrastructure remain the property of OliveCo: clause 6.3.

15. However, by clause 6.4, the olive produce and any rights, benefits and credits arising from carbon sequestration on the leased land:

"are and will remain the property of [ManagementCo] or where applicable, the property of a Grower, in accordance with the terms of a Lease and Management Agreement [ie a sublease to the Grower], and may be sold or otherwise dealt with by the Lessee or those Growers".

16. ManagementCo is required to "manage, cultivate and work the Olive Grove so as to maintain and develop the Olive Grove Land for the purpose of long term commercial cultivation of olives in a proper and skilful manner and according to approved methods": clause 7.1.
17. Further, ManagementCo must at all times during the term "keep the Olive Trees and the Olive Grove Infrastructure in good and substantial repair order and condition, fair wear and tear and damage by insured risks excepted (except to the extent that any insurance monies are irrecoverable as a result of any act or omission of the Lessee)": clause 7.2.
18. Clause 10.1 provides that ManagementCo must use its reasonable endeavours to arrange insurance of the olive grove, in the names of itself and OliveCo, against the risk of fire, hail, frost and other usual risks, in accordance with good industry practices for the commercial cultivation of olives. Clause 10.2 requires ManagementCo, at its own cost, to insure the leased land against public risk for an amount of not less than \$10 million, in the names of ManagementCo and OliveCo for their respective rights and interest.
19. Clause 14 provides that OliveCo will be entitled to terminate the lease if ManagementCo is in default of any of its obligations under the lease, and such default has remained unrectified for a period of one month, or in the case of a non-money default for such longer period as is reasonable having regard to the relevant agricultural, environmental and climatic considerations. Any termination of the rights of either party pursuant to clause 14 will be without prejudice to any rights acquired by either party pursuant to the lease prior to termination: clause 14.3.
20. Clause 17.4 expressly preserves the right for ManagementCo to sub-lease the leased land in whole or in part, without the prior consent of OliveCo. However, that right is subject to the proviso "that the grant of any sub-lease or license will not in any way relieve or be deemed to relieve [ManagementCo] from [ManagementCo's] obligations to [OliveCo] under this Lease to observe and perform [ManagementCo's] Obligations."

Subleases

21. The sub-leases between ManagementCo and the various growers are contained in instruments described as "Lease and Management Agreements" and are in materially identical form. By way of example Saker uses the lease and management agreement for the Great Southern Organic Olives 2005 Project. This sub-lease is attached as annexure AJS7 to Saker's first affidavit, dated 10 March 2010. (The standard terms of sub-leases for other schemes are annexed to the Scheme constitutions, which are contained in annexures AJS57-72 of Saker's supplementary affidavit, sworn on 16 March 2010.)
22. The sub-lease provides that Management Co grants a Grower a lease of a Grovelot, together with all improvements on the Grovelot (including but not limited to the Olive Trees and the Olive Grove Infrastructure), for the Term: see clause 2.1
23. The term of the sub-lease is the period from the commencement date until the earlier of 20 years from 30 June 2005, the date on which the Project is terminated pursuant to the provisions of the Scheme constitution and the date of a final payment to the Grower (see definitions of "Term", "Termination Date", and "Initial Management Period" in cl 1.1).
24. The sub-lease provides for a rent to be paid by each Grower to ManagementCo in respect of a leased Grovelot. However, subject to the Grower paying a prescribed management fee to ManagementCo, the rent payable to ManagementCo by the Grower pursuant to the sub-lease must be paid by ManagementCo on behalf of the Grower out of the net proceeds of sale received by ManagementCo on behalf of the Grower upon the sale of olives: see clause 3.
25. Clause 5.1 of the sub-lease relevantly provides that the Grower must not use or permit to be used the Grovelot for any purpose other than the cultivation of olives.
26. Clause 5.2 of the sub-lease provides that the Grower must at all times during the term manage, cultivate and work the Grovelot, so as to maintain and develop the Grovelot for the purpose of the long term commercial cultivation of olives in a proper and skilful manner and according to approved methods.
27. Clause 5.3 of the sub-lease provides that the Grower must at all times during the term keep the Grovelot reasonably free of noxious weeds, and keep the olive trees and the olive grove infrastructure in good and substantial repair, order and condition, and at the expiration or sooner determination of the Lease, yield up to ManagementCo the Grovelot, the olive trees and the olive grove infrastructure.
28. Clause 9(a) of the sub-lease provides that if the Grower breaches any of the Grower's covenants, and if the breach is capable of remedy but the Grower fails to remedy the breach within 21 days of being given written notice of such breach by

ManagementCo, ManagementCo may terminate the deed and take possession of the Grovelot, the olive trees and the olive grove infrastructure. Upon the termination of the sub-lease, all the right, title and interest of the Grower in the seedlings, shrubs, plants and trees situated upon the Grovelot will be deemed to be assigned and transferred to ManagementCo: clause 9(c)

29. Clause 11.3 provides that the Grower will at all times have full right, title and interest in the Olive Produce and the right to have the Olive Produce sold for the benefit of the Grower. Clause 11.2 provides that a Grower may not lodge a caveat in respect of the sub-lease unless it is only a subject to dealing caveat.
30. Clause 12 requires ManagementCo, on behalf of the Grower, to use reasonable endeavours to arrange insurance of the Grovelot.
31. Clause 14.1 of the sub-lease provides that the Grower appoints ManagementCo to manage the grower's olive business of the commercial cultivation of olives by performing management services as prescribed in the sub-lease on the terms and conditions contained in the sub-lease. The fee for doing so is a small fixed sum for the first three years and 90% of the net proceeds of sale for olive produce, if any. In the fourth year, the management fee is simply 90% of the net proceeds of sale for olive produce. In the fifth year and following the management fee is 35% of the net proceeds of sale for olive produce. When the fee is taken in conjunction with the annual rent, which is set at 10% of the net proceeds of sale for olive produce (if any), it follows that the Growers pay all of the net proceeds of sale for olive produce, if any, to ManagementCo in the first four years of the scheme. See clause 22 and item 7 of the schedule in respect of the management fee, and see clause 3 and item 6 of the schedule in respect of the rent.
32. Clause 27 of the sub-lease provides:

“Except for the payment of rent and insurance premiums [ManagementCo] agrees to duly and punctually observe and perform all and every one of the covenants, duties and obligations contained in the [sub-lease] to be observed and performed by the Grower, and without prejudice to the foregoing, [ManagementCo] agreed to indemnify and keep indemnified the Grower against and in respect of all consequences of any failure by it to observe and perform any of the said covenants, duties and obligations.”

Significant features of the operation of the head leases and sub-leases

33. There are a number of important features of the arrangements described above.

34. First, in effect ManagementCo is to perform all of the obligations relating to care and maintenance of the Grovelots, the Olive Trees and the Olive Infrastructure. This is by reason of cl 27 of the sub-lease.
35. The only obligations which the Growers must perform are the payment of rent and insurance premiums.
36. However, even in respect of the obligation to pay rent, ManagementCo is to pay the rent and management fees out of the proceeds of the sale of the olive produce on a non-recourse basis: see cll 3 and 14.1 of the sub-lease. The reason why such payments are properly described as being on a non-recourse basis is because of the way in which the quantum of such payments is defined. The extent of payments due is measured as a percentage of the proceeds available from the sale of olive produce.
37. As a result, annual payment of the insurance premiums is the only true separate obligation for Growers (cl 5.4 of the sub-leases), apart from the payment of a small fixed sum as part of the management fee in the first four years of a scheme.
38. It follows that Growers will not be in default of the sub-leases unless they have failed to pay insurance premiums, and failed to make this default good within 21 days on being given notice to rectify this breach pursuant to cl 9(a) of each sub-lease.
39. Thirdly, property in the olive produce remains vested in the Growers by reason of cl 11.3 of the sub-lease, subject only to termination by reason of Grower's breaches of any of the Grower's Covenants contained in the sub-lease. The effect of that arrangement is acknowledged by cl 6.4 of the head lease, where the head lessor acknowledges that the olive produce is and will remain the property of ManagementCo or, where applicable, the property of the Grower, in accordance with the terms of a sub-lease with the Grower.
40. The acknowledgement in cl 6.4 of the head lease is given in a context where the prospect of sub-leases with Growers is obviously contemplated by the head lease. That is evident from the definition of Lease and Management Agreement, which means a Lease and Management Agreement containing a sub-lease entered into by ManagementCo with a Grower in respect of any part of the Leased Land. Further, see Clause 17.4 which expressly contemplates ManagementCo entering into sub-leases.
41. Fourthly, the rent payable by ManagementCo and the head lease is the nominal sum of \$10 only, whereas the rent payable by the Growers is commercially significant. This is consistent with the fact that the head lessors and ManagementCo are related companies, and the Growers are independent investors in a managed investment scheme.

Scheme Constitutions

42. Each of the five managed investment schemes have scheme constitutions, which are in materially identical terms. Saker refers to the relevant terms of the constitution for the Great Southern Organic Olives 2007 Project by way of example, in his first affidavit, sworn 10 March 2010: see annexure AJS4.
43. ManagementCo is appointed as the responsible entity for the scheme: see cl 3.1 of the Scheme Constitution.
44. ManagementCo is obliged to prepare a sub-lease agreement with each Grower, upon acceptance of the Grower's application to become part of the managed investment scheme: see cl 6.1 of the Scheme Constitution.
45. ManagementCo is obliged to lodge the head leases for registration. ManagementCo also acknowledges that the interests of Growers who hold sub-leases over land which is the subject of a head lease flow from that head lease, and that registration of the head lease protects the interests of the Growers: see cl 6.4 of the Scheme Constitution.
46. It is a specific function of ManagementCo that it shall manage the business, investments and affairs of the scheme project and the arrangements that relate to the project: see cl 12.4(a) of the Scheme Constitution.
47. ManagementCo is entitled to appoint any person to perform any task it thinks fit, but ManagementCo is taken to have done or failed to do anything that such a person does or fails to do because of the appointment: see cl 16 of the Scheme Constitution.

Issues

48. The Bank does not oppose the sale of the leased land by OliveCo and OliveHoldings. It does not make submissions that the sale should be prevented in order to see whether a better price can be obtained.
49. However, there are serious issues as to whether or not the head lessor is entitled to deprive the Growers of their proprietary rights to olive produce, in circumstances where the Growers have not committed any default of the sub-leases, or at the least no default notice has been given, but there is a default of ManagementCo in performance of the head lease. This issue concerns the effect of the head lessor's acknowledgment in the various head leases that the olive produce will remain the property of the Grower in accordance with the terms of a sub-lease.

50. Secondly, there are serious issues as to whether or not the head lessors may rely upon their rights to terminate the head lease where the Growers are not in default of the sub-leases and the whole purpose of the head lease was to induce Growers to invest in the schemes and to enter sub-leases.
51. Thirdly, there are serious issues arising out of the manner in which the sale transaction has been structured, only to benefit the head lessors and their creditors.
52. In such circumstances, the Bank says that the sale proceeds should be held in trust until the issues raised by it and the Growers are resolved in an orderly and proper manner. That is a course adopted in other cases, which will be mentioned below.

The first issue: clause 6.4 of the head lease

53. As mentioned, each of the head leases contains a term by which the head lessor and ManagementCo agree and acknowledge that the "Olive Produce" (ie the olives grown on the Olive Trees) are and will remain the property of Management Co or, where applicable, the property of a Grower in accordance with the terms of a lease and management agreement (which contains the sub-leases), and that produce may be sold or otherwise dealt with by ManagementCo or the Growers. For convenience, this is referred to below as the "**property clause**". (All of the head leases are contained in Saker's supplementary affidavit, dated 16 March 2010, annexures AJS46-55.)
54. This acknowledgement is given in a context where the head lessors and ManagementCo are both part of the Great Southern group, and were marketing the scheme to independent investors. Further, as referred to above, each of the scheme constitutions contain an express provision that ManagementCo acknowledges that the interests of Growers flow from the head lease.
55. In these circumstances, a question of proper construction arises as to the meaning of the property clause. On one view, the acknowledgement may be limited to the situation where the head lease remains on foot.
56. On another view, the property clause may be an acknowledgement that property in the Olive Produce remains vested in the Grower where there has been no default by the Growers under the sub-lease, whatever may be the position under the head lease. In other words, the acknowledgement may provide comfort to a Grower that his or her rights in the Olive Produce have been acknowledged by the head lessor, and will not be affected by whether ManagementCo has defaulted under the head lease.
57. It would be important for a Grower to have the comfort which the second view provides. It is for ManagementCo, which is part of the Great Southern group, to carry out the Grower's obligations under the sub-lease. Given that the head lease is with

another member of the Great Southern group for a nominal sum, the Grower may wish to have protection against collusion between members of the same group agreeing to terminate the head lease and consequentially destroying all of the Grower's rights under the sub-lease.

58. The wording of the property clause favours the second construction. The Olive Produce is stated to remain the property of the Grower in accordance with the terms of a Lease and Management Agreement. The first feature of this wording is that it acknowledges that the Olive Produce starts out as the property of the Grower. The second feature of the clause is that it remains as the Grower's property in accordance with the terms of the instrument containing the sub-lease, not in accordance with the terms of that instrument and the head lease.
59. Further, given the relationship between the head lessors and ManagementCo, it should not be inferred that the commercial purpose of the acknowledgement was that it was only ever intended to have effect during the life of the head lease. That might be inferred if the head lessors were independent commercial parties. However, for the reasons outlined above, it was in the commercial interests of all members of the Great Southern group to provide an assurance of title to Olive Produce for investors in the schemes, as long as they were not in default of the sub-leases.
60. If the second construction of the property clause is accepted, can that intention be given legal effect?
61. In *PW & Co v Milton Gate Investments* [2004] Ch 142 the head lease contained a clause by which the head lessor and head lessee agreed that the head lessee could give a break notice "subject to any permitted underleases", and if the head lessee gave such a notice at a time when less than 75% of the premises was sublet, the head lessee would be liable to pay a penalty. The head lessee gave a break notice, and the head lessor argued that, notwithstanding the contractual provision, the determination of the head lease determined all of the sub-leases.
62. Neuberger J upheld that claim on the basis that a head lessor and head lessee could not contract out of the effects of determining a head lease, because this impermissibly altered the incidents of leasehold tenure. In particular, Neuberger J was influenced by the fact that if the head lease was determined, there would be no covenant by the sublessee to pay rent to the head lessor, and it would be unfair to allow to the head lessor to allow the sublessee to stay in possession without paying rent: see at 160-167, [58]-[85], particularly at 167, [85].
63. However, Neuberger J acknowledged that the argument in favour of the opposite conclusion, which depended upon freedom to frame contractual arrangements as the parties desired, was an "impressive" one: at 163, [71].

64. It was a significant factor in this case that, ultimately, the subtenants did not wish to stay in possession of the premises: see at 156, [37], 209-210, [275]-[277]. Hence, no argument was presented by them that they were the third party beneficiaries of a contractual promise between the head lessor and head lessee.
65. Had the subtenants wished to enforce the promise between the head lessor and head lessee as a third party beneficiary, it would have been open to argue that the promise by the head lessor to accept the termination of the head lease, subject to any permitted underleases, was in effect a promise by the head lessor to accept the position of the sublessor vis-a-vis the subtenants under the sublease. If the third party subtenants wished to enforce such a promise, they would have to accept the promise according to its terms, viz, that the head lessor promised to continue the sublease on terms that the head lessor stood in the shoes of the head lessee/sublessor. On that basis, the concerns of Neuberger J concerning tenure and a rental covenant would be overcome.
66. The reason for focusing on the position of a third party beneficiary of a contractual promise in the above discussion is due to the statutory provision applicable in Western Australia in s.11(2) of the *Property Law Act 1969* (WA), which enables a third party beneficiary of a contractual promise to enforce the promise in certain circumstances. There is express provision in the head leases and the sub-leases that they are governed by the law of Western Australia.
67. The conditions which must be satisfied in order for s.11(2) to apply are that the contract must expressly in its terms confer a benefit directly on a person who is not named as a party to the contract. Those conditions would be satisfied in the present case if the second construction of the property clause discussed above were to be accepted.
68. On this basis, and assuming that the *PW* case is distinguished or not followed for the reasons described above, the Growers would be entitled to enforce the property clause directly against the head lessors.
69. Further, as the payment of insurance premiums is the only truly independent obligation which applies to Growers under the sub-leases (apart from the payment of a small fixed sum for the first four years of a scheme's operation), the head lessor would not be entitled to terminate the sub-leases except for default in the payment of the insurance premiums.
70. For at least these reasons, there are good arguments that the head lessors are not entitled to act upon the existing notices of default given to ManagementCo in order to deprive the Growers who invested in any of the schemes of their rights to Olive Produce.

The second issue: inequitable to terminate head lease?

71. The head lessors must have known of the provisions of the subleases. The terms of the head leases expressly refer to the lease and management agreements (which contain the sub-leases) with the Growers.
72. As well, the recitals in the head leases refer to ManagementCo as responsible entity of the relevant managed investment schemes, thereby demonstrating that the terms of the schemes (which included the standard form lease and management agreements) were available to the head lessors.
73. Further, the head lessors consented to sub-leases being granted in circumstances where the whole purpose of the schemes was to facilitate the granting of the sub-leases by the Great Southern group to independent Growers.
74. Subject to arguments of the type advanced in the last section, logically, determination of a head lessee's estate means that a sub-lessee's lesser estate is also determined. The sub-lessee's estate is carved out of the head lessee's estate. See the *PW* case at 164, [73] and the cases cited there.
75. There is an exception where the head-lessee surrenders the lease to the head lessor. In such a case, the consensual surrender arrangement between the head lessor and head lessee cannot affect the rights of the sub-lessee. The sub-lease is effective as between the head lessor and sub-lessee: *PW* at 164-165, [74]-[76].
76. The rule, and the exception, may be explained as follows: the sub-lessee accepts the risk of a head lessor terminating the lease, but does not accept the risk of the head lessor and head lessee/sub-lessor agreeing to act contrary to the terms of the sub-lease and to destroy the sub-lessee's proprietary rights.
77. In the present case, the sub-lease was created in circumstances where it was a part of an overall transaction which was required by a scheme. The scheme contemplated a head lease, and a sub-lease, for the purpose of inducing or encouraging investors to invest in the Great Southern group of companies. The rent payable for the head lease was only a nominal sum, and the transaction was not at arms-length. The head lessors expressly acknowledged the rights of the Growers to Olive Produce, which is a consequence of the Growers' subleases. In that context, the head lessors must be taken not only to have consented to the sub-lease, but to have actively encouraged and induced it for the benefit of the Great Southern group and to have effectively acknowledged the rights of the Growers.
78. In such circumstances, it would now be inequitable and unconscionable for the head lessors to rely upon the termination rights to destroy the proprietary interests of Growers, when the Growers are not in default of the terms of the sub-lease. The head lessors should be restrained from so acting. It is inequitable for a registered

proprietor not to give effect to the equitable rights of a third party in a transaction which it encouraged, induced and effectively acknowledged: eg *Bahr v Nicolay (No 2)* 164 CLR 604, *Snowlong Pty Ltd v Choe* (1991) 23 NSWLR 198.

The third issue: structure of the transaction and conflicts of interest

79. If the directions sought are made, the effect will be to terminate the Grower's rights and allow the head lessors to sell the leased land. The proceeds will be then used for the benefit of the head lessor's creditors.
80. This result is surprisingly inequitable when viewed in the context that Growers have been the most substantial financial contributor to the development of the olive groves. The recollection of one employee of the Great Southern group is that Growers have contributed \$160 million (from fees and sale of Olive Produce) to the olive groves, compared to \$40 million contributed by the head lessors. See Capacchiano's affidavit, sworn on 5 May 2010, paragraph 14.²
81. However, there is no reason why the transaction could not have been structured so that there was a joint sale by the head lessors, ManagementCo and the Growers of their respective rights and interests as they presently exist. In such a situation, each of the head lessors, ManagementCo and the Growers would be apportioned an amount for their respective rights and interests.
82. The existing rights and interests which the Growers possess cannot be characterised as nugatory or worthless.

² The Kailis Prospectus (exhibit MPK-37 to the Kailis affidavit sworn on 16 April 2010 p6) recognises that the establishment and operational costs incurred on the Great Southern Olive Assets by the Great Southern Group total at least \$103 million and states:

Kailis Organic has entered into the Great Southern Asset Sale Agreement to acquire the Great Southern Olive Assets (refer to section 16 of this Prospectus) for approximately 19.7 million (including stamp duty). It is estimated that establishment and operational costs incurred on the Great Southern Olive Assets by the Great Southern Group total at least \$103 million.

On completion of the Great Southern Asset Sale Agreement, Kailis Organic will have 100% ownership of the land, olive trees, associated infrastructure, and water licences at an approximate 82% discount to the sunk costs incurred by the Great Southern Group on the Great Southern Olive Assets. This will make Kailis Organic a significant, fully integrated organic olive group.

83. Legally, at least until termination of the head leases, the Growers have a proprietary interest as sub-lessees, and a proprietary interest in the Olive Produce. Further, if the submissions made above as to the first and second issues are correct, each of these rights may endure even post-termination of the head leases.
84. Moreover, commercially, if it is assumed that the value of the leased land is approximately the same as the substantial sum which represents the prices in the contracts which have been entered, this amount is effectively being paid for the Olive Trees, the future value of the Olive Produce and the Olive Infrastructure. A portion of the future value of the Olive Produce belongs to the Growers if the argument about the property clause is accepted.
85. The value of the Olive Produce which belongs to the Growers on the construction of the property clause referred to above is the net value of the Olive Produce in years 5 to 20 of each scheme.
86. The expert report of Stephen Lynch, which the Bank has jointly commissioned with the organisation representing Growers (Save My Trees), on the preliminary basis of the information currently available, places the net present value of the Olive Produce at between approximately \$15.7 - \$18.3 million over the remaining life of the relevant schemes.
87. The manner in which the liquidators of the head lessors have chosen to structure the sale transaction is for the benefit of the head lessors and their creditors only. However, the very same persons are the liquidators of ManagementCo. Further, ManagementCo holds scheme property on trust for the Growers, by reason of s.601FC(2) of the *Corporations Act*.
88. Consequently, if the sale transactions had been structured in a different way, the Growers would likely have received a very significant payment for their proprietary rights and would also have benefited from the consideration paid for ManagementCo's rights.
89. The fact that the liquidators of the head lessors and ManagementCo are the same persons gives rise to a significant issue as to whether they have entered the sale transactions in breach of their duties to avoid conflicts of interest, and must now account for the benefits thereby received.
90. In *Re Greight Pty Ltd* (2006) 56 ACSR 334 at [14]:

“If there are, or are likely to be, disputes between companies in liquidation that are under the control of one liquidator, then as a general rule different persons should be appointed as liquidator to each company This is not to say that it is inappropriate to appoint one person as liquidator of a group of companies that are closely connected But once the likelihood of conflict becomes apparent, it is necessary to take action.”

See also *Re Nickel Mines Ltd* (1978) 3 ACLR 686.

Creation of a Fund

91. The approach of identifying, and then valuing, the Growers' rights which have been given for the purposes of determining the extent of the Growers' claims to the sale proceeds, is consistent with the approach of Robson J in *Re Timbercorp Securities Ltd (in liq)* [2009] VSC 510 at [71]-[80], applying *Re Hazelton Air Charter Pty Ltd* (2002) 41 ACSR 472 at [30]-[35], [47].
92. This approach dictates that, in the absence of agreement between the head lessors, ManagementCo and the Growers, the sale of the leased land should be allowed to occur, but directions made for the determination of the existence and value of the rights claimed by Growers in respect of the fund generated by the sale: see *Re Timbercorp Securities* at [87] and order 7.

P D Crutchfield SC

J A Thomson