

1. The fourth defendants' submit that a statement that "liquidators [are] doing nothing and simply allowing the head lease to be forfeited" is *indistinguishable* from contending that the Court should not accept "the propriety of the [...] liquidators" because they had engaged in a "very strange manufacture of a basis for getting rid of the tenure underlying the growers' rights" which was "very much contrived": *Tr.* 12 May 2010 at pp. 94, 100.
2. In the *first* case, the allegation is uncontested. The Liquidators were not curing the breaches. The Liquidators' position was and remains that, having regard to the (i) financial circumstances of GSMAL, and (ii) duties to creditors, it was neither possible nor proper to apply resources to cure the defaults by GSMAL. Evidence was furnished and submissions were made on each of those issues.¹ It is instructive to note that the applicants gave no particulars at the time and, nearly 4 months after the hearing, they have pleaded a suite of bare non-admissions to the relevant allegations.² Were the applicants to succeed (and there is no pleaded foundation for this), the Liquidators' inaction would be a nonfeasance (with, on that hypothesis, serious and unjust consequence for the growers).
3. In the *second* case, the applicants allege malfeasance. The gravamen is clear: the Liquidators improperly engineered unnecessary breaches in order to deprive the justly entitled growers of their rights, in order to benefit certain banks who were not so entitled. It is difficult to imagine a more serious allegation to lay against an insolvency professional. Those allegations were first raised in oral submissions at the hearing. The applicants' supplementary submissions only underscore the novelty of the allegation of malfeasance in oral submissions. As the transcript shows, the Liquidators accepted that such serious allegations could not be dealt with summarily.
4. Those allegations have not been repeated in the applicants' defence. Indeed, far from alleging that a default was contrived, the applicant defendants (i) do not admit any default of the Head Leases occurred,³ and (ii) plead breaches of duty which do not condescend to explaining how the Liquidators could take any of the steps said to be required by the duty.⁴

¹ In particular, *Timbercorp Securities Limited (in liq) v WA Chip & Pulp Co Pty Ltd* [2009] FCA 901 at [11] was referred to (Finkelstein J).

² Statement of Claim and defence paragraphs: 16 to 20 (terms of head lease), 69 to 75 and 78 (financial circumstances of GSMAL).

³ Statement of Claim and defence paragraph 46.

⁴ Defence at paragraph 102. Further, the applicants plead that the Liquidators incurred the Liquidator Maintenance Expenditure on behalf of GSMAL in complete satisfaction of the

5. That is, difference between the *first* and *second* allegations is obvious and material.
6. The lateness and novelty of allegations of malfeasance on 12 May 2010 remains adversely relevant to the special costs order sought. The allegations of nonfeasance and malfeasance remain untested. Those merits are relevant to the special costs order sought.
7. Prior to their determination, an application for indemnity costs was wholly unfounded.

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Maintenance Requirements: defence at paragraph 48. This alleged complete satisfaction of the Head Lease is, of course, irreconcilable with the non-admission and non-pleading of any term of the Head Lease. It is incompatible with the allegations of contrivance and manufacture. If made out, it would indicate that the Liquidators discharged their duty *in accordance with the applicants' allegations*, and then made an application for directions which was unnecessary and misconceived.