

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

**GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (ACN 083 825 405)
(IN LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED)
INCLUDING IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE
MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2 TO THE
FURTHER 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

**GREAT SOUTHERN OLIVE PROCESSING PTY LTD
(ACN 128 547 437) (IN LIQUIDATION)**

Eighth 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
FURTHER AMENDED ORIGINATING PROCESS**

Fourth Defendants

DEFENCE AND COUNTERCLAIM

Case Manager
Date of Document:
Date of Filing:
Filed on behalf of:

Le Miere J
30 August 2010
31 August 2010
The fourth defendants named in the appearances dated 12 April and
12 May 2010

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To the allegations in the plaintiffs' statement of claim, the fourth defendants named in the appearance dated 12 April and 12 May 2010 (**Grower Defendants**) say:

PARTIES

1. They admit the allegations in paragraph 1.
2. They admit the allegations in paragraph 2.
3. They admit the allegations in paragraph 3.
4. They admit the allegations in paragraph 4.
5. They admit the allegations in paragraph 5.
6. They admit the allegations in paragraph 6.
7. They admit the allegations in paragraph 7.
8. They admit the allegations in paragraph 8.
9. They do not admit the allegations in paragraph 9.
10. They admit the allegations in paragraph 10.
11. They do not plead to paragraph 11 as it contains no allegations against them.

THE OLIVE PROPERTIES

12. They admit the allegations in paragraph 12.
13. They admit the allegations in paragraph 13.
14. They admit the allegations in paragraph 14.

HEAD LEASES

15. They admit the allegations in paragraph 15.
16. They do not admit the allegations in paragraph 16.
17. They do not admit the allegations in paragraph 17.
18. They do not admit the allegations in paragraph 18.
19. They do not admit the allegations in paragraph 19.

20. They do not admit the allegations in paragraph 20.

OLIVE SCHEMES

21. They admit the allegations in paragraph 21.

22. They admit the allegations in paragraph 22.

23. They admit the allegations in paragraph 23.

24. They admit the allegations in paragraph 24.

25. They admit the allegations in paragraph 25.

26. They admit the allegations in paragraph 26.

SUB-LEASES

27. Subject to the provision of the Particulars referred to in that paragraph, they admit the allegations in paragraph 27.

28. They deny the allegations in paragraph 28 and say further that under clause 3.1 and item 6 of Schedule 1 to the Sub-Leases (as defined in paragraph 27 of the statement of claim) the rent payable from:

- (a) the Commencement Date to 30 June 2005 was nil; and
- (b) for each Financial Year to the Termination Date is 10% of the Net Proceeds of Sale (if any) for Olive Produce harvested that Financial Year;

(as the various capitalised terms are defined in the 2005 Grower Sub-Lease).

PARTICULARS

A copy of the Lease and Management Agreement Great Southern Olives 2005 Project is exhibited and marked AJS-7 to the affidavit of Andrew John Saker made 10 March 2010 in proceeding COR 35 of 2010 in this honourable Court.

Particulars of further Sub-Leases will be provided after provision by the plaintiffs of the foreshadowed particulars to paragraph 27.

CIRCUMSTANCES OF GSMAL

External Administration

29. They admit the allegations in paragraph 29.

30. They do not admit the allegations in paragraph 30.
31. They admit the allegations in paragraph 31.
32. They do not admit the allegation in paragraph 32.
33. They admit the allegations in paragraph 33.
34. They do not plead to paragraph 34 as it contains no allegation against them.
35. They do not admit the allegations in paragraph 35.
36. They do not admit the allegations in paragraph 36.

Replacement responsible entity and winding up of Olive Schemes

37. They do not admit the allegations in paragraph 37.
38. They do not admit the allegations in paragraph 38.
39. They do not admit the allegations in paragraph 39.
40. They do not admit the allegations in paragraph 40.
41. They do not admit the allegations in paragraph 41.
42. They do not admit the allegations in paragraph 42.
43. They admit the allegations in paragraph 43.
44. They do not admit the allegations in paragraph 44.
45. They do not admit the allegations in paragraph 45.

GSMAL DEFAULT UNDER HEAD LEASES

Failure to perform Maintenance Requirements

46. They do not admit the allegations in paragraph 46.
47. They do not admit the allegations in paragraph 47.

Incurred Maintenance Expenditure

48. With respect to paragraph 48:

- (a) the Liquidator Maintenance Expenditure (as defined in paragraph 48 of the statement of claim) was incurred by and on behalf of first plaintiff and not GSOC and GSOH respectively;
- (b) the Incurred Expenditure (as defined in paragraph 49) represents complete satisfaction of the Maintenance Requirements (as defined in paragraph 47 of the statement of claim);
- (c) all costs incurred by the Liquidators to maintain the Olive Properties (as defined in paragraph 9 of the statement of claim) have been dealt with by paragraph 7 of the 27 May Order (as defined in sub-paragraph 90(c) of the statement of claim); and
- (d) they otherwise deny the allegations in that paragraph.

49. With respect to paragraph 49:

- (a) the Incurred Expenditure represents complete satisfaction of the Maintenance Requirements;
- (b) all cost incurred by the Receivers and Managers to maintain the Olive Properties have been dealt with by paragraph 6(b)(iii) of the 27 May Order; and
- (c) they otherwise deny the allegations in that paragraph.

Required Maintenance Expenditure

50. They do not admit the allegations in paragraph 50.

51. They deny the allegations in paragraph 51 and say further that:

- (a) to the extent that the Incurred Expenditure was incurred by the Liquidators (as defined in paragraph 8 of the statement of claim) and the Receivers and Managers respectively (which is not admitted), the first plaintiff was not required to incur those expenses in order to comply with the Head Leases; and
- (b) they refer to and repeat the allegations in paragraphs 99 to 105 below.

52. With respect to the allegations in paragraph 52:

- (a) that paragraph is irrelevant and embarrassing and should be struck out;
- (b) they refer to and repeat the allegations in paragraph 51(a) above;
- (c) they refer to and repeat the allegations in paragraphs 99 to 105 below;

- (d) they say further and alternatively to (a), that the allegations in sub-paragraph (d) are embarrassing and should be struck out; and
- (e) they otherwise deny the allegations in that paragraph.

53. They do not admit the allegations in paragraph 53.

GSMAL in default of Head Leases

54. With respect to paragraph 54:

- (a) the defaults pleaded in paragraph 47 of the statement of claim (which are not admitted) were cured by payment of the Incurred Expenditure;
- (b) any failure of the first plaintiff to pay the Incurred Expenditure was not a default under the Head Leases;
- (c) they refer to and repeat the allegations in paragraphs 99 to 105 below; and
- (d) they otherwise deny the allegations in that paragraph.

DEFAULT NOTICES

Default notices under certain Head Leases

55. They do not admit the allegations in paragraph 55.

56. They do not admit the allegations in paragraph 56.

57. They do not admit the allegations in paragraph 57.

58. With respect to paragraph 58:

- (a) the Liquidators and the Receivers and Managers had paid their respective shares of the Incurred Expenditure and cured the defaults alleged in paragraph 47 of the statement of claim (which are not admitted) by the time the alleged notices were served (which is not admitted);
- (b) the alleged notices state that the defaults alleged in paragraph 47 of the statement of claim could be remedied by paying an amount representing the Liquidator Maintenance Expenditure which is not an amount owing under the Head Leases;
- (c) they refer to and repeat the allegations in paragraphs 99 to 105 below; and
- (d) they otherwise deny the allegations in that paragraph.

59. With respect to the allegations in paragraph 59 they:

- (a) refer to and repeat the allegations in paragraph 58 above and say further that the alleged breaches of the Maintenance Requirements (which are not admitted) were not continuing breaches;
- (b) refer to and repeat the allegations in paragraphs 99 to 105 below; and
- (c) otherwise deny the allegations in that paragraph.

60. With respect to paragraph 60:

- (a) GSOC, GSOH and the Liquidators cannot rely on the 25 February Notices (as defined in paragraph 55 of the statement of claim) to terminate the Head Leases for any breach that arose after service of those notices (which is not admitted);
- (b) they refer to and repeat the allegations in paragraphs 99 to 105 below; and
- (c) they otherwise do not admit the allegations in that paragraph.

Defaults under the Waterville Lease

61. They do not admit the allegations in paragraph 61.

62. They do not admit the allegations in paragraph 62.

63. They deny the allegations in paragraph 63 and refer to and repeat the allegations in paragraph 58 above.

64. With respect to the allegations in paragraph 64 they:

- (a) refer to and repeat the allegations in paragraph 58 above and say further that the alleged breaches of the Maintenance Requirements (which are not admitted) were not continuing breaches;
- (b) refer to and repeat the allegations in paragraphs 99 to 105 below; and
- (c) otherwise deny the allegations in that paragraph.

65. They do not admit the allegations in paragraph 65 and say further that:

- (a) GSOC, GSOH and the Liquidators cannot rely on the 3 June Notices (as defined in paragraph 61 of the statement of claim) to terminate the Head Leases for any breach that arose after service of those notices (which is not admitted); and
- (b) they refer to and repeat the allegations in paragraphs 99 to 105 below.

Further default notices

66. With respect to paragraph 66 they:
- (a) refer to and repeat the allegations in paragraph 54 above;
 - (b) say that the defaults alleged in paragraph 47 of the statement of claim were not continuing;
 - (c) refer to and repeat the allegations in paragraph 99 to 105 below;
 - (d) say that no further notices were served prior to settlement of the sales referred to in paragraphs 90(b) of the statement of claim and creation of the Fund (as defined in paragraph 6 of the 27 May 2010 Order);
 - (e) say that further default notices cannot now be served; and
 - (f) otherwise deny the allegations in that paragraph.

INABILITY TO REMEDY DEFAULT UNDER THE HEAD LEASES

Financial Circumstances of GSMAL

67. Save to admit that the first plaintiff was the responsible entity of some other managed investments schemes, they do not admit the allegations in paragraph 67 as insufficient particulars have been provided.
68. Save to admit that scheme property as defined in s 9 of the *Corporations Act* was held on trust in the manner alleged, it does not admit the allegations in paragraph 68.
69. They do not admit the allegations in paragraph 69.
70. They do not admit the allegations in paragraph 70.
71. They do not admit the allegations in paragraph 71.
72. They do not admit the allegations in paragraph 72.
73. They do not admit the allegations in paragraph 73.
74. They do not admit the allegations in paragraph 74.
75. They do not admit the allegations in paragraph 75.

Grower inability or unwillingness to cure GSMAL defaults

76. They do not admit to the allegations in paragraph 76 and refer to and repeat the allegations in paragraphs 51(a) above and 99 to 105 below.
77. They do not admit to the allegations in paragraph 77 and refer to and repeat the allegations in paragraphs 51(a) above and 99 to 105 below.

GSMAL inability to meet Maintenance Requirements

78. They do not admit the allegations in paragraph 78 and refer to and repeat the allegations in paragraph 51(a) above and 99 to 105 below.
79. With respect to paragraph 79:
- (a) each of the Olive Schemes was viable and could have been operated profitably to its conclusion;
 - (b) they refer to and repeat the allegations in paragraphs 99 to 105 below;
 - (c) sub-paragraph (d)(ii) is embarrassing and should be struck out; and
 - (d) they otherwise deny the allegations in that paragraph.

Relief against forfeiture

80. They do not admit the allegations in paragraph 80.
81. They do not admit the allegations in paragraph 81.
82. They deny the allegations in paragraph 82.
83. They deny the allegations in paragraph 83 and refer to and repeat paragraphs 99 to 105 below.
84. They deny the allegations in paragraph 84 and refer to and repeat paragraphs 99 to 105 below.
85. They deny the allegations in paragraph 85 and refer to and repeat paragraphs 99 to 105 below.
86. They deny the allegations in paragraph 86 and refer to and repeat paragraphs 99 to 105 below.

TERMINATION OF HEAD LEASES

87. With respect to paragraph 87 they:
- (a) refer to and repeat the allegations in paragraph 54 above;
 - (b) refer to and repeat the allegations in paragraph 58 and 63 above;

- (c) say that the Liquidators were only justified in assigning, terminating, surrendering or otherwise dealing with the Head Leases on the conditions set out in the 27 May Order;
- (d) say that this honourable Court is now *functus officio* with respect to any application under s 511 of the *Corporations Act* for an order that the Liquidators are or were justified in terminating the Head Leases;
- (e) accordingly, say that paragraph 87 is embarrassing and should be struck out; and
- (f) otherwise deny the allegations in paragraph 87.

88. With respect to paragraph 88 they:

- (a) refer to and repeat each of paragraphs 54, 59, 60, 64 to 66, 77 to 79 and 86 above;
- (b) refer to and repeat *mutatis mutandis* the allegations in sub-paragraphs 87(c) to (e) above; and
- (c) otherwise deny the allegations in that paragraph.

89. They do not admit the allegations in paragraph 89.

CLAIMS OF GSOC, GSOH AND GSOP AGAINST THE NET PROCEEDS

90. They do not admit the allegations in paragraph 90.

91. Save that they do not admit there was Unleased Property, they admit the allegations in paragraph 91.

92. With respect to the allegations in paragraph 92 they:

- (a) refer to and repeat the allegations in paragraphs 87 to 89 above;
- (b) refer to and repeat the allegations in paragraphs 99 to 105 below;
- (c) refer to their interlocutory process dated 28 July 2010 and say that the Grower Defendants are entitled to payment of their cost of this proceeding from the Fund on an indemnity basis prior to payment to any claimant; and
- (d) otherwise deny the allegations in that paragraph 92.

93. They do not admit the allegations in paragraph 93.

CLAIMS OF GSMAL AGAINST THE NET PROCEEDS

94. They admit the allegations in paragraph 94.

95. They admit the allegations in paragraph 95.
96. With respect to paragraph 96:
- (a) for the reasons pleaded in paragraphs 99 to 105 below, had the Liquidators complied with their duties to the Growers, a replacement responsible entity or entities would have been located to conduct the Olive Schemes and the Head Leases would have been assigned to the replacement responsible entity under ss 601FS and 601FT of the *Corporations Act*; and
 - (b) they otherwise deny the allegations in that paragraph.
97. With respect to paragraph 97:
- (a) they refer to and repeat the allegations in paragraph 96 above; and
 - (b) they otherwise deny the allegations in that paragraph.
98. With respect to the allegations in paragraph 98 they:
- (a) say that the Head Leases are scheme property as defined in section 9 of the *Corporations Act* and are held on trust for the Growers pursuant to section 601FC(2) of the *Corporations Act* and that any distribution from the Fund on account of their value should be paid to Growers;
 - (b) refer to and repeat the allegations in sub-paragraph 92(c) above;
 - (c) say that if, after payment of the costs alleged in sub-paragraph 92(c) above, there is insufficient money in the Fund to pay all claims then the balance of the Fund:
 - i. should be divided *pro rata* between the claims over the Unleased Property (if any) and the balance of the land sold ('**Leased Land**'); and
 - ii. any amounts payable to the Growers with respect to the Leased Land should be paid from that part of the Fund attributable to the Leased Land in priority to other claims;
 - (d) say that if, after payment of the costs alleged in sub-paragraph 92(c) above, there is an excess after payment of each claim on the Fund, then the excess should be distributed on a *pro rata* basis between the successful claimants;
 - (e) refer to and repeat the allegations in paragraphs 96 and 97 and deny that the first plaintiff is entitled to a portion of the Fund;

- (f) deny that the respective claims should be discounted to their value as at 12 May 2010 and say further that the claims should be discounted to the date that best accords with the law and established valuation principles;
- (g) deny that the discount rate in each case should be determined by reference to the cost of capital applicable to agricultural enterprises and say further that the discount rate should be determined in accordance with the law and established valuation principles; and
- (h) otherwise deny the allegations in that paragraph.

LIQUIDATORS' BREACH OF DUTY

99. By reason of the matters alleged in paragraphs 21 to 28 of the statement of claim, the first plaintiff owes and at all material times owed to the Growers duties to:

- (a) act in the best interests of the Growers and, if there is a conflict between the Growers' interests and its own interests, give priority to the Growers' interests;

PARTICULARS

Section 601FC(1)(c) of the *Corporations Act*.

and

- (b) act in a responsible way with respect to Head Leases (as defined in paragraph 15 of the statement of claim).

100. By reason of the matters alleged in paragraphs 99 above and paragraphs 29, 31 and 33 of the statement of claim, the Liquidators owe and at all material times owed to the Growers duties to:

- (a) act in the best interests of the Growers and, if there is a conflict between the Growers' interests and their own interests, give priority to the Growers' interests;

PARTICULARS

Section 601FD(1)(c) of the *Corporations Act*.

and

- (b) act in a responsible way with respect to Head Leases.

101. The Head Leases are and were at all material times:

- (a) scheme property as defined in s 9 of the *Corporations Act*; and/or

- (b) held on trust for the Growers.

PARTICULARS

Section 601FC(2) of the *Corporations Act*.

102. In breach of the above duties, the first plaintiff and the Liquidators:
- (a) failed or refused to take any or any adequate steps to preserve the Olive Schemes (as defined in paragraph 21 of the statement of claim);
 - (b) to the extent that there was a failure to perform the Maintenance Requirements by the first plaintiff (which is denied), failed to take any or any adequate steps to remedy those breaches;
 - (c) failed or refused to take any or any adequate steps to prevent the winding up of the Olive Schemes as alleged in paragraph 45 of the statement of claim (which is not admitted);
 - (d) failed to take any or any adequate steps to attract a replacement responsible entity;
 - (e) advertised, or permitted to be advertised, for sale the Olive Properties (as defined in paragraph 14 of the statement of claim) free of the Head Leases and any of the Growers' interests at the same time as the position of replacement responsible entity was advertised;
 - (f) failed to make any or any adequate disclosure to prospective replacement responsible entities;
 - (g) failed to consider or adequately consider any expressions of interest from any prospective replacement responsible entities;
 - (h) failed to make any or any adequate disclosure to Growers invited to contribute funds towards the maintenance of the Olive Properties;
 - (i) failed to consider or adequately consider whether the purposes of the Olive Schemes could not be accomplished for the purposes of s 601NC(1)(b) of the *Corporations Act*;
 - (j) failed to procure the calling of a meeting of Growers to consider the proposed winding up of the Olive Schemes for the purposes of s 601NC(2) of the *Corporations Act*;
 - (k) failed to take any or any adequate steps to ensure that the Receivers and Managers undertook or undertook adequately the tasks alleged in sub-paragraphs (a) to (i) above;

- (l) will not be acting in the best interests of the Growers or responsibly with respect to the Head Leases by terminating the Head Leases in order to reduce the amount payable to the Growers from the Net Proceeds (as defined in the particulars to paragraph 90 of the statement of claim); and
 - (m) failed to seek the appointment of a special purpose liquidator to address their conflict of duties and in particular to take steps to procure a replacement responsible entity.
103. Had the Liquidators complied with the duties as alleged above, a replacement responsible entity could have been located, any necessary or appropriate amendments made to the constitution and other scheme documents and the Olive Schemes would have been completed in the ordinary course.
104. Accordingly:
- (a) the Liquidators could not terminate the Head Leases until a replacement responsible entity was located and any alleged termination is invalid; and
 - (b) as the Olive Schemes have allegedly been wound up (which is not admitted) and the assets have now been sold, a replacement responsible entity cannot now be located and the Head Leases cannot now be terminated.

RELIEF FROM FORFEITURE

105. Further or alternatively, if the Liquidators are or were acting properly in terminating the Head Leases (which is denied) and had acted in accordance with their duties as alleged above, a replacement responsible entity could have been located, cured any alleged breaches and made any required application for relief from forfeiture.

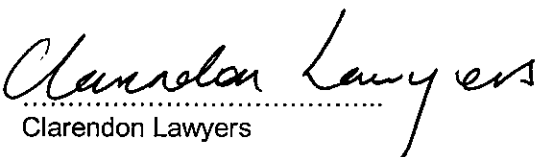
COUNTERCLAIM

106. The Grower Defendants refer to and repeat the allegations above by way of counterclaim.

PRAYER FOR RELIEF

- A. The Liquidators as trustees of the Fund pay to the Growers such amount of the Fund as is attributable to the Growers.
- B. An order for the payment of the Grower Defendants' costs of this proceeding from the Fund.
- C. Such further or other orders as the Court sees fit.

Garry Bigmore and Sam Hopper


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Clarendon Lawyers