

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

BETWEEN:

**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

- and -

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

Second Plaintiff

- and -

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

Third Plaintiff

- and -

**ANDREW JOHN SAKER**

Fourth Plaintiff

- and -

**MARTIN BRUCE JONES**

Fifth Plaintiff

- and -

**DARREN GORDON WEAVER**

Sixth Plaintiff

- and -

**JAMES HENRY STEWART**

Seventh Plaintiff

- and -

**JAMES THACKRAY**

First Defendant

- and -

**TONY MCGRATH**

Second Defendant

- and -

**COLIN NICOL**

Third Defendant

- and -

**THE GROWERS LISTED IN SCHEDULE 8 OF THE APPLICATION**

Fourth Defendants

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**GROWERS' WRITTEN OUTLINE OF SUBMISSIONS  
IN SUPPORT OF INTERLOCUTORY PROCESS DATED 12 APRIL 2010**

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Date of Document: April 2010

Filed on behalf of: Those of the fourth defendants listed in Schedule A  
to the Notices of Appearance filed on 12 April 2010 and 23 April 2010

Date of Filing: April 2010

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**Background**

1. On 7 April 2010 the plaintiffs filed an interlocutory process by which they applied for relief pursuant to ss.477(2B), 511 and 661 ND of the *Corporations Act 2001* (the "Relief Application").
2. On 8 April 2010 Acting Master Chapman made orders that, inter alia, joined the persons listed in Schedule 8 to the plaintiffs' interlocutory process dated 7 April 2010 as fourth defendants to the action. Acting Master Chapman's orders also provided for a representative body of the fourth defendants, Save My Trees, to make any application in relation to its standing to appear and the costs of the application to be heard on Wednesday, 14 April 2010 and for any person affected by the orders to have liberty to apply on three business days' notice.
3. The fourth defendants who have appeared (the "Growers") have applied:
  - 3.1. disclosure of further relevant documents; and
  - 3.2. orders for Robert Burns to have access to the confidential affidavits that have been

filed by the plaintiffs in these proceedings.

4. The receivers and now the liquidators are in a clear position of conflict because the interests of the creditors are diametrically opposed to that of the Growers.
5. The Growers are not mere creditors. They hold valuable property rights, including the sub-leases and the harvested fruit.
6. The Growers do not want the head lease to be terminated as that would destroy their interests, namely the subleases as well as their interest in the harvest.
7. The Growers have a right of relief against forfeiture in equity: *Webber v Smith* (1689) 2 Vern 103. This right would allow participating Growers to remedy all breaches of the head lease and seek contribution from growers who do not participate.
8. The creditors want the head lease terminated so that the land can be sold unencumbered without the need to pay consideration for the reversion of the head lease and the sub-leases.
9. In structuring the transaction so that the head lease is terminated, the liquidators have ensured the maximum return of the creditors and the minimum return for the growers.
10. There is no evidence before the court that the liquidators could not have borrowed from the Sumich's and Kailis's on behalf of GSMAL to prevent GSMAL from going into default under the head lease. There are number of factors that strongly suggest that this option was open, namely:
  - 10.1. The head leases are 20 year leases with over 15 years remaining with rent as little as \$10 per annum on some of those leases, this is of significant value;
  - 10.2. The Kailis's lent the money without security; and
  - 10.3. There is no evidence that the Sumich's would not have accepted the head lease as security;
  - 10.4. There is no evidence that another source of borrowing was sought, such as Bendigo Bank.

**Disclosure to Robert Burns**

11. The growers are disparate group with limited ability and time to consider the proposed sale. Mr Burns has the necessary experience and expertise to advise the growers whom he represents. Further:
  - 11.1. Mr Burns has acted for growers in other schemes;
  - 11.2. The liquidators have allowed Bendigo Bank to review the documents and to provide the documents to its expert for advice. Bendigo is merely the predominant lender to the growers.
12. The Court and the liquidators would be better served with the greater certainty achieved with any transaction if at least some of the growers gave it their imprimatur.
13. It may be that, if properly appraised of the circumstances of the transaction, the Growers will be able to reach an agreement with the liquidators as to if and how the Schemes ought to be wound-up.
14. Some of the key confidential information is now in the public domain by virtue of the release of the Kailis prospectus. (Affidavit of Mark Peter Kailis sworn 16 April 2010).

**Disclosure of Further documents**

15. The further documents sought ought to be provided as a matter of fairness because:
  - 15.1. they are referred to in affidavit material before the Court and are therefore subject to Order 26 Rule (2) in any event; and

15.2. they may be important to assist the growers reach a view as to the commerciality of the proposed transaction.

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DJ Marsh

Counsel