

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)

EX PARTE

**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 THACKRAY

First Defendant

TONY MCGRATH

Second Defendant

COLIN NICOL

Third Defendant

THE GROWERS LISTED IN SCHEDULE 8 OF THE APPLICATION

Fourth Defendants

**MEMORANDUM OF CONFERRAL
RE: THE DEFENDANTS' AMENDED INTERLOCUTORY PROCESS
DATED 28 APRIL 2010**

Date of document:
Filed on behalf of:
Prepared by:
Clarendon Lawyers
Level 17, Rialto North Tower
525 Collins Street
MELBOURNE VIC 3000

April 2010
Fourth Defendants

Tel: 03 8681 4400
Fax: 03 8681 4499
Solicitors Code: 101294
Ref: MAB:100171

Email: mark.bland@clarendonlawyers.com.au

I refer to the fourth defendants' amended interlocutory process dated 23 April 2010 for orders that the plaintiffs serve confidential affidavits and certify that—

1. **CONFERRAL**

The parties have conferred to try to resolve the matters giving rise to this application as follows:

- 1.1 The parties have exchanged letters.
- 1.2 By letter dated 8 April 2010 to James Healy, Middletons Lawyers, Clarendon Lawyers requested communication regarding:
 - (a) the drafting of a costs agreement with Mr Burns;
 - (b) the issue of standing; and
 - (c) confidential exhibits.

Attached to this notice and marked "**MB-1**" is a copy of the letter from Clarendon Lawyers to Middletons Lawyers dated 8 April 2010.

- 1.3 By email dated 13 April 2010, Clarendon Lawyers requested access to confidential documents for Mr. Robert Burns and others. By return email on 13 April 2010, Middletons refused that request and invited submissions on which the liquidators may reconsider their position.

Attached to this notice and marked "**MB-2**" is a copy of the email correspondence between Clarendon Lawyers and Middletons dated 13 April 2010.

- 1.4 By letter dated 15 April 2010, Clarendon Lawyers provided grounds for the Liquidators to provide access to Mr. Burns as agent and adviser to Mr. Capicciano, a Grower.

Attached to this notice and marked "**MB-3**" is a copy of the letter from Clarendon Lawyers dated 15 April 2010.

- 1.5 By letter dated 16 April 2010, Clarendon Lawyers referred to the orders made on 8 April 2010 regarding affidavits and submissions, and repeated the request for disclosure of confidential affidavits.

Attached to this notice and marked "**MB-4**" is a copy of the letter from Clarendon Lawyers to Middletons Lawyers dated 16 April 2010.

- 1.6 By letter dated 19 April 2010, Middletons refused the request and sought information about Mr. Burns interest and details of the agency and adviser relationship with Growers.

Attached to this notice and marked "MB-5" is a copy of the letter from Middletons to Clarendon Lawyers dated 19 April 2010.

- 1.7 By letter dated 19 April 2010, Clarendon Lawyers repeated its request and provided a copy of a letter from Mr. Capicciano demonstrating his appointment of Mr. Burns as agent and adviser.

Attached to this notice and marked "MB-6" is a copy of the letter from Clarendon Lawyers to Middleton Lawyers dated 19 April 2010.

- 1.8 By letter dated 23 April 2010, Middletons again refused the request and requested further details without referring to details provided in Mr. Capicciano's letter

Attached to this notice and marked "MB-7" is a copy of the letter from Middletons to Clarendon Lawyers dated 23 April.

- 1.9 By letter dated 27 April 2010, Clarendon Lawyers served affidavits of Michael Joseph Fernon dated 22 April 2010 and Robert Allen Burns dated 23 April 2010.

Attached to this notice and marked "MB-8" is a copy of the letter from Clarendon Lawyers to Middleton Lawyers dated 27 April 2010.

- 1.10 By letter dated 27 April 2010, Middletons again refused the request and asserting that insufficient information about the agency relationship had been provided.

Attached to this notice and marked "MB-9" is a copy of the letter from Middletons to Clarendon Lawyers dated 23 April.

- 1.11 By letter dated 28 April 2010, Clarendon Lawyers responded to statements in the letter marked MB-9 and provided a sample copy of a letter

Attached to this notice and marked "MB-10" is a copy of the letter from Clarendon Lawyers to Middleton Lawyers dated 28 April 2010.

2. MATTERS IN DISPUTE

All the matters the subject of this application remain in dispute.

(Signed) 
Solicitor for the Defendant [signed personally]

(Dated) 28 April 2010



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8 April 2010

Our Ref: MAB:0900568

James Healy
Middletons
PO Box 1175,
WEST PERTH WA 6872

Dear Sir

Great Southern Olive Projects - COR 35 of 2010

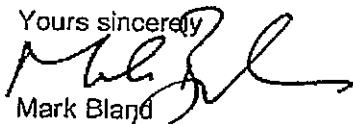
We refer to our letter earlier today to Acting Master Chapman of the Supreme Court of Western Australia in relation to these proceedings and note that Ms Skye Miller provided us with an update on what transpired at the hearing this morning.

In particular we refer to our request that the Master direct your client to, within 5 business days, enter into a costs agreement with Mr. Burns requiring payment of reasonable legal costs and expenses of an incidental to the proceedings on an indemnity basis on 30 day terms. We acknowledge that the matter of costs has been listed for hearing on Wednesday 14 April 2010, however we request that your client consider such an arrangement prior to the hearing and communicate to us its response and an alternative proposal if it has one.

We also seek your clients' view prior to the hearing as to the issue of our client's standing.

Further to the above, we request that you provide our client with copies of the confidential exhibits in this matter. We propose to raise this issue in court next Wednesday if it is not resolved beforehand.

Yours sincerely



Mark Bland
Director

Direct Tel: 03 8681 4415
Email: mark.bland@clarendonlawyers.com.au

Mark Bland

From: Skye Miller [skye.miller@middletons.com]
Sent: Tuesday, 13 April 2010 1:52 PM
To: Mark Bland
Cc: James Healy; David Marsh; Chris Williams; Natalie Collins
Subject: RE: Great Southern Managers Australia (in liquidation) - COR 35 of 2010 - Confidentiality Undertaking

Mark

Thank you for your email.

Our clients are only willing to allow Clarendon Lawyers, Solomon Brothers and experts including Mr Stephen Lynch to access to the confidential affidavits and other confidential documents in relation to the above proceedings. This is on the proviso that each person who wishes to access the documents individually signs the confidentiality undertaking.

Given the confidential nature of the information contained in the affidavits and other documents to be disclosed, the liquidators wish to constrain the number of parties who can access them and are not willing to provide them to the growers. However the liquidators are willing to reconsider their position if you can put forth substantive grounds upon which you believe that growers should access these documents.

Further, please clarify the capacity upon which Mr Mark Teale is acting and we will take instructions as to whether he can be provided with access to the confidential affidavits and other confidential documents.

Regards

Skye Miller | Lawyer | Middletons

Level 2, 6 Kings Park Road, West Perth WA 6005, Australia

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From: Mark Bland [mailto:Mark.Bland@clarendonlawyers.com.au]
Sent: Tuesday, 13 April 2010 10:21 AM
To: Skye Miller
Cc: James Healy; David Marsh; Chris Williams
Subject: RE: Great Southern Managers Australia (in liquidation) - COR 35 of 2010 - Confidentiality Undertaking
Importance: High

Dear Skye

As discussed, we would propose that the following sign the attached Confidentiality proposed by the Liquidator undertaking in addition to myself for Clarendon Lawyers and David Marsh for Solomon Brothers:

1. ROBERT BURNS, Save My Trees,
2. STEPHEN LYNCH, Independent Expert, Linvest Australia
3. PHILLIP CAPICCHIANO, Save My Trees
4. MARK TEALE, Research Manager, Professional Investment Services

Please confirm your client's response and whether individuals signing on behalf of law firms is also satisfactory.

Please also copy in David Marsh and Chris Williams in further correspondence today as I am likely to be in a plane soon.

Regards

Mark Bland | Director

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From: Skye Miller [mailto:skye.miller@middletons.com]
Sent: Monday, 12 April 2010 7:39 PM
To: Mark Bland
Cc: James Healy
Subject: Great Southern Managers Australia (in liquidation) - COR 35 of 2010 - Confidentiality Undertaking

Mark

Further to our conversation this afternoon please find attached our proposed confidentiality undertaking in relation to the above matter.

Our clients are still waiting on a release from one of the purchasers and expect to have this by tomorrow morning. Once this, and an executed copy of the confidentiality undertaking, has been received we will begin making arrangements to provide you with access to the confidential affidavits sworn in support of the proceedings.

Kind Regards

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15 April 2010

Our Ref: MAB:KFD:1000171

James Healy
Middletons Lawyers
Level 2
6 Kings Park Road
West Perth WA 6005

Dear James

**GS Olive proceedings – Confidential documents
Supreme Court Proceeding No. COR 35 of 2010**

We refer to confidential documents in the above proceeding and the email from Skye Miller of your office on 14 April 2010 which stated:

“the liquidators wish to constrain the number of parties who can access them and are not willing to provide them to the growers. However the liquidators are willing to reconsider their position if you can put forth substantive grounds upon which you believe that growers should access these documents.”

We have requested that the Liquidators agree to appoint Mr. Rob Burns, in his capacity as Chairman of Save My Trees, a representative party to represent the interest of Growers. Mr. Burns is pursuing this request directly with Mr. Jones.

In the alternative and in the meantime, we request that you grant Mr. Capicchiano access to the documents as a party to the proceedings and also Mr. Burns as his agent and adviser and Mr. Teale as his adviser.

Mr. Capicchiano is the very same person as that listed on our Interlocutory Process dated 12 April 2010.

We note that while the materials your client has filed and served represent the interests of the second and third plaintiffs (which are the Great Southern land owning company) there appears to be no attempt to represent the interests of the responsible entity which owes its duty to act in the best interests of Growers.

We refer you in this regard to the following description of a legal principle made by Brooking J in *Young and Ors v Murphy and Anor; Swinbank and Anor v Murphy and Anor* [1996] 1 VR 279 based on a long line of authorities cited by his honour:

“But, while the trustee in general sufficiently represents the beneficiaries’ interests for the purposes of proceedings to redress a breach of trust, they should be made parties if their interests may not be properly represented by the trustee. If it can be said that for any reason the trustee should not be regarded as a party who will properly represent the interests of all beneficiaries, then he should not be regarded as able to sue without joining any beneficiary.”

While your clients have joined the Growers as fourth defendants, by denying the Growers the confidential exhibits, your clients are preventing the Growers’ interests from being represented.

We strongly consider that granting access to one Grower (Mr. Capicchiano) would facilitate the representation of Growers’ interests while mitigating the risk of breach of confidence.

On our understanding, this would not be dissimilar to the arrangement your client has agreed to in relation to Bendigo & Adelaide Bank which, in contrast to Mr Capicchiano, is merely an interested party. Accordingly we consider it would be unreasonable to refuse this request.



In light of the timeframes that the Liquidators have set in this matter, we request an urgent response and at least by **3pm WST** time today.

Yours sincerely

Mark Bland
Director

Enc

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16 April 2010

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Our Ref: MAB:CJA:1000171
Your Ref:

James Healy
Middletons Lawyers
Level 2
6 Kings Park Road
West Perth WA 6005

Dear James

**GS Olive proceedings
Supreme Court Proceeding No. COR 35 of 2010**

We refer to our letter to you of yesterday sent by email at 10.02am EST which requested your urgent response by 3pm WST that day.

We also refer to the orders made in this proceeding on 8 April 2010 (**Orders**).

As at the time of writing this letter, we have not received any response from you to our letter.

Paragraph 6 of the Orders requires that our clients file any affidavits or submissions in support of any objection by Friday, 23 April 2010, less than 7 days from the time you will receive this letter. Without Mr Capicchiano and his advisers having access to the confidential affidavits, we are unable to seek meaningful instructions from him as to what his objections to your clients' application may be.

Additionally, in order for Mr Capicchiano to provide us with appropriate instructions, he requests that you provide him, and his advisers, with the documents that show that the liquidators engaged in a robust sale process such as property and scheme valuations, expert opinions, financial analyses and projections, assessments of growers' interests and comparisons with other sale proposals. Mr Capicchiano is willing to treat such information as confidential and to give any reasonable undertakings to that effect required by your client.

We are expecting notification on Monday morning as to a time at which our interlocutory process of 12 April 2010 is to be heard. In the absence of your clients' prompt and satisfactory response to the above requests, we propose to amend our application to include a request that the Court make orders granting Mr Capicchiano and his advisers access to the confidential affidavits and the abovementioned additional documents.

We look forward to your timely response.

Yours sincerely

Mark Bland
Director

Enc

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middletons

Melbourne | Perth | Sydney

19 April 2010

Our reference
NCC.JMH.20090355

By Email: mark.bland@clarendonlawyers.com.au

Your reference
MAB:KFD:100171

Mr M Bland
Director
Clarendon Lawyers
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525 Collins Street
MELBOURNE VIC 3000

Dear Mark

In the matter of Great Southern Managers Limited (In liquidation) COR 35 of 2010

We refer to your letters dated 15 April 2010 and 16 April 2010 requesting that access to confidential documents filed in the above proceedings be provided Mr Capicchiano as a party to the proceedings and to Mr Burns and Mr Teale as his advisers.

Our client will agree to provide the confidential documents that have been filed in this matter to Mr Capicchiano as a party to these proceedings subject to Mr Capicchiano agreeing to the confidentiality regime in place in these proceedings and signing the relevant undertaking. A copy of that confidentiality undertaking is enclosed for Mr Capicchiano's review.

However, our clients do not agree to providing copies of those documents filed in the above proceedings to Mr Burns or Mr Teale, who:

- (a) have not filed a notice of appearance in these proceedings; and
- (b) are not listed as growers in schedule 8 to the plaintiff's application dated 7 April 2010,

until our clients have been provided with an adequate explanation as to what interest Mr Burns and Mr Teale have in these proceedings, on who's behalf they act as agents and advisers (and in what capacity), what authority they have from any person that they allege to represent and why they would have standing to appear in these proceedings.

We further take issue with your comment, "*this would not be dissimilar to the arrangement your client has agreed to in relation to the Bendigo and Adelaide Bank*", who you have recognised is merely an interested party who has not filed a notice of appearance and remind you that you

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James Healy
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Contact
Natalie Collins
telephone: +61 8 9216 0906
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have undertaken to keep the Information confidential, and in discussing such matters with the Bendigo and Adelaide Bank Limited and its legal representatives, you may be in breach of that undertaking.

Yours sincerely
Middletons


James Healy

Confidentiality Undertaking

I, _____, of _____ hereby undertake to the Court and to the Plaintiffs in relation to the following documents produced by the Plaintiffs in these proceedings, comprising:

- (a) the confidential affidavit of Mark Peter Kailis sworn on 9 March 2010;
- (b) the confidential affidavit of Jerome Clement Gumley sworn on 9 March 2010;
- (c) the confidential affidavit of Andrew John Saker sworn on 10 March 2010;
- (d) the second confidential affidavit of Jerome Clement Gumley sworn on 15 March 2010;
- (e) the second confidential affidavit of Andrew John Saker sworn on 7 April 2010; and
- (f) any other affidavit or document which is ordered by the Court in this proceedings to be held confidential,

(collectively the "**Information**"), that until such time as this undertaking should be varied, amended or otherwise discharged, if at all, by order of the Court:

1. I will keep the Information confidential at all times.
2. I will use the Information only for the purpose of proceedings number COR 35 of 2010 between Great Southern Managers Australia Limited (in Liquidation) as First Plaintiff, Great Southern Olives Company Limited (in Liquidation) as Second Plaintiff, Great Southern Olive Holdings Pty Ltd as Third Plaintiff, Andrew John Saker as Fourth Plaintiff, Martin Bruce Jones as Fifth Plaintiff, Darren Gordon Weaver as Sixth Plaintiff, James Henry Stewart as Seventh Plaintiff, James Thackray as First Defendant, Tony McGrath as Second Defendant, Colin Nicol as Third Defendant and the growers listed in schedule 8 of the application lodged on 7 April 2010 as the Fourth Defendant ("**Proceedings**").
3. I will keep the Information or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me incorporating or referred to or derived directly or indirectly from the Information, in a manner which will preserve their confidentiality at all times.
4. I will not disclose the Information or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me incorporating or referring to or derived directly or indirectly from the Information to any person:
 - 4.1. unless authorisation has been obtained from Middletons (Perth) Pty Ltd (**Middletons**) and that person has first signed and provided to Middletons a Confidentiality Undertaking in the same form as this Confidentiality Undertaking; or
 - 4.2. other than to the Court;

and, if I am required to disclose the Information pursuant to 4.2, I will take all reasonable steps to preserve the confidentiality of the Information being disclosed.

5. I shall keep both a record of receipt of the Information and a record of all copies of the Information which I cause to be made and on completion of the Proceedings shall provide to Middletons a record of all copies received or further copies made and shall return both original copies and all subsequent copies which I caused to be made for purposes of the Proceedings to Middletons.
6. Upon completion of the Proceedings I shall further destroy or deliver up to Middletons any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me incorporating or referring to or derived directly or indirectly from the Information, provided that, subject to contrary order, this paragraph 6 shall not extend to pleadings, submissions, briefs to experts, expert reports, evidence read or tendered, affidavits filed and read in the proceedings or transcripts.
7. I will promptly notify Middletons if I become aware of any unauthorised use or disclosure of the Information or any notes, records, memoranda or other documents (including but not limited to any electronic versions thereof) created by me incorporating or referring to or derived directly or indirectly from the Information.
8. Subject to clause 6 above, upon completion of the Proceedings I will keep any notes, records, memoranda or other documents (including not limited to any electronic versions thereof) created by me incorporating or referring to or derived directly or indirectly from the Information in a manner which will preserve their confidentiality for a period of 7 years and then cause those documents to be destroyed.
9. Nothing in this Confidentiality Undertaking:
 - 9.1. prevents the signatory from permitting clerical staff employed by his or her office from handling the Information within his or her offices, provided that such staff are advised of the obligations under this Confidentiality Undertaking;
 - 9.2. prevents the signatory from discussing, or otherwise communicating with the legal representatives of a party to the Proceeding in respect of the Information.

Signed by

in the presence of:

 Witness Signature

 Signature

 Print Name



19 April 2010

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Our Ref: MAB:MJF:1000171

James Healy
Middletons
Level 25, Rialto South Tower
525 Collins Street
MELBOURNE VIC 3000

Dear Mr Healy

**GS Olive proceedings
Supreme Court Proceeding No. COR 35 of 2010**

As at the time of writing, we act for 119 growers in relation to this proceeding. This number is increasing on a daily basis. These clients are supported by the Save My Trees group which comprises over 7000 members, of whom over 500 are olive growers

On 12 April 2010 we filed and served a notice of appearance in respect of GP Levvey Pty Ltd and Mr Phillip Capicchiano. We will be filing and serving notices of appearance in respect of additional growers in due course.

Access to confidential information

All of the growers for whom we act have appointed Mr Rob Burns as their agent in this proceeding. Accordingly it is essential that Mr Burns be given access to the confidential information so that he can properly instruct us. Enclosed is a letter from Mr Cappicchiano confirming his appointment of Mr Burns. We trust this is sufficient and look forward to your clients agreeing to release the information to Mr Burns. If they continue to refuse access, our clients will have no alternative but to seek an adjournment of the 29 April hearing date until the information is provided and Mr Burns has had a reasonable opportunity to consider it and give us his instructions.

Our clients' concerns

Our clients are concerned about three matters concerning your clients' application – whether the sale process has been conducted with appropriate rigour, the procedure they propose to adopt to pass to the purchasers clear title to the olive assets by destroying growers' rights, and your clients' conflicts of interest.

Sale process

We have reviewed the material filed on behalf of your clients and they do not provide sufficient evidence to form a view whether the sale process was rigorous. Our clients are reviewing their position on this and, as we indicated above and in our letter of 16 April 2010, our clients require the confidential information to be made available to Mr Burns in order to give us instructions.

Growers Rights

Our clients have subleases over their lots, including the olive trees and the infrastructure, for the unexpired portion of 20 years. These subleases are proprietary rights which cannot be ignored by your clients or by the landlords. Similar rights held by the Timbercorp growers were described by Mr Justice Robson in the Victorian Supreme Court as having substantial value.

The landowners take their rights subject to the growers' rights under the schemes because:

- (a) the growers are tenants in possession of the land;
- (b) the subleases, in addition to the land include "*the Olive Trees and the Olive Grove infrastructure*", and confer rights to water;



- (c) if the sublease are terminated, our clients have rights to seek an order for relief against forfeiture under s.81(4) of the *Property Law Act 1969* (WA);
- (d) the subleases will survive the surrender or merger of the head leases into the freehold under s.75 of the *Property Law Act 1969* (WA);
- (e) if the Liquidator were to disclaim the head leases, then the head leases will merge into the freehold and our clients subleases survive the disclaimer under s.75 of the *Property Law Act 1969* (WA) (see *NAB v NSW* [2009] FCA 1066 per Rares J, esp at 26)

Winding up

The winding up of the scheme may lead to the automatic termination of our clients' subleases. Pursuant to the terms of the sublease agreements, the growers' subleases terminate earlier than the 20 year term if a project is terminated pursuant to the provisions of the scheme constitutions. As the constitutions contemplate that the schemes may terminate in accordance with the Corporations Act, your clients' current application could result in the subleases being terminated with consequent loss by the growers of their proprietary rights. GSML should not be applying to wind up the schemes in a manner that denies the scheme members any ability to be compensated for the loss of their valuable proprietary rights.

Conflicts

Your clients, as officers of GSML as the responsible entity, are obliged to act in the best interests of scheme members and should be taking all steps to protect the growers' valuable rights.

There is a fundamental and irreconcilable conflict in your clients acting as liquidators for both the landlords and the responsible entity as tenant in negotiating for the termination of the head leases.

The proposal put forward by your client is advantageous to the creditors and shareholders of the landlord companies but disadvantageous for the members of the schemes. There is no basis for your client to ignore the valuable rights of the scheme members in favour of the creditors and shareholders of the other entities. Your clients must act to protect the interests of all parties and as a responsible entity, where there is a conflict, give preference to the rights of members (secs 601FC(1)(c) and 601FD(1)(c) of the Corporations Act)

Proper process

In our opinion, the proper process is to adopt the procedures considered appropriate by the Victorian Supreme Court namely:

1. adjourn the winding up application,
2. the responsible entity seeks approval from the court that it is justified in amending the scheme constitutions under s.601FC to give itself the power to surrender growers' leases for valuable consideration,
3. all rights of the parties are preserved,
4. the sale proceeds, once received, are deposited into an account held by the liquidators, and
5. the growers and the liquidators of the landowners either agree upon an appropriate apportionment or the apportionment is determined by a legal proceeding.

It may also be necessary to conduct a more rigorous sale process depending upon the outcome of our clients' further investigation when the confidential information is available.

Enclosed with this letter are copies of orders made by Mr Justice Robson on 21 August 2009 and 9 October 2010 in the Victorian Supreme Court in relation to the sale of some of the Timbercorp almond assets. These orders have been replicated three times and by two other Victorian Supreme Court judges in relation to other Timbercorp schemes - on 12 November 2009 by Mr Justice Croft in relation to the Timbercorp olive assets, on 11 December 2009 by Ms Justice Davies in relation to other Timbercorp almond assets and on 26 February 2010 by Ms Justice Davies in relation to Timbercorp citrus assets.

Our clients request that your clients amend their application to adopt the same procedure as adopted by the liquidators of the Timbercorp horticultural entities. In all the circumstances, this is, in our clients' view, the best



way to ensure that the growers' rights are recognised and protected and essential for your client to fulfil its obligations to the growers as members of the schemes while still making progress with the liquidation of the companies and the schemes. By adopting this procedure, the growers' rights will only be extinguished for value and, in the absence of agreement between the parties, the Court will settle upon a proper apportionment of the sale proceeds.

Please let us have a response at your earliest convenience.

Yours faithfully



Michael Fernon
Director

Enc

Direct Tel: 03 8681 4419
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Level 13
350 Collins Street
MELBOURNE VIC 3000

19 April 2010

James Healy
Middletons
Level 25, Rialto South Tower
525 Collins Street
MELBOURNE VIC 3000


Dear Mr Healy

**In the matter of Great Southern Managers Limited (In liquidation)
Supreme Court of Western Australia: Proceeding COR 35 of 2010**

I refer to your letter to my solicitor, Mark Bland of Clarendon Lawyers, dated 19 April 2010.

I confirm that I have appointed Mr Rob Burns as my agent and adviser for the purpose of representing my interests in the abovementioned proceedings. I also confirm and reiterate my solicitor's request that your client grants Mr Burns access to the confidential affidavits in order for him to adequately advise me in relation to this proceeding.

Yours faithfully,



Phillip Capicchiano

middletons

Melbourne | Perth | Sydney

23 April 2010

By Email: mark.bland@clarendonlawyers.com.au

Our reference
NCC.JMH.20090355

Mr M Bland
Director
Clarendon Lawyers
Level 17
Rialto North Tower
525 Collins Street
MELBOURNE VIC 3000

Your reference
MAB:KFD:100171

Dear Mark

**In the matter of Great Southern Managers Limited (In liquidation)
COR 35 of 2010**

We acknowledge receipt of your letter dated 19 April 2010.

Our client does not consent to the disclosure of the confidential information filed in these proceedings to Mr Burns. Could you please provide further details of the agency relationship between Mr Burns and the Growers to facilitate the Liquidators' decision as to whether a true agency relationship exists.

We note that you state that you now act for 119 Growers in these proceedings, and will file and serve notices of appearance in due course. Our client would appreciate receiving any communication with the Growers in soliciting their participation in these proceedings, to ensure such documentation is consistent with the law and is accurate.

Our clients do not agree with the matters raised in your letter. These issues have been considered by the Liquidators in filing the application, and are the very subject matter that our client wishes to bring to the attention of the Court. We note that your clients have had several opportunities to address the issues of concern you raise, but have failed to take the opportunity to propose viable solutions.

We suggest that if your clients are still concerned with the matter raised in your letter that the appropriate course is to raise such issue in any submissions filed in these proceedings.

Yours sincerely
Middletons



James Healy

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27 April 2010

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Our Ref: MAB: 1000171
Your Ref:

James Healy
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Dear James

Great Southern Managers Australian Limited COR 35 2010

We refer to the above proceeding.

We now enclose by way of service the following affidavits:

- (a) Affidavit of Michael Joseph Fernon dated 22 April 2010 (with exhibits MJF-1 to MJF-3); and
- (b) Affidavit of Robert Allen Burns dated 23 April 2010 (with exhibit RAB-1).

We also enclose a draft Interlocutory Process (undated). We will provide you with a sealed copy in due course.

We refer to the orders made in this proceeding on 8 April 2010. Our clients will seek an adjustment to the timetable prescribed by these orders at tomorrow's hearing. We anticipate filing submissions on behalf of our clients soon.

Yours sincerely

Mark Bland
Director

Enc

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Our reference
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Mr M Bland
Director
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Your reference
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Dear Mark

In the matter of Great Southern Managers Limited (In liquidation) COR 35 of 2010

We refer to:

1. the interlocutory process that was served on us this afternoon in respect of the hearing on 28 April 2010 at not before 11.30am (**Amended Application**);
2. your letter dated 27 April 2010 attaching:
 - (i) the affidavit of Michael Joseph Fernon dated 22 April 2010 (**Fernon Affidavit**);
 - (ii) the affidavit of Robert Allen Burns dated 23 April 2010 (**Burns Affidavit**); and
 - (iii) a draft interlocutory process (**Draft Application**); and
3. the telephone conversation between James Healy and yourself this afternoon.

Those applications have been brought without the conferral required by Order 59 Rule 9 of the *Rules of the Supreme Court 1971 (WA)*.

There have been at least 5 letters exchanged between us which set out your requests for Mr Robert Burns to be afforded access to the confidential information and our requests for further information as to the agency relationship between Mr Burns and the Growers. Only one of those letters was annexed to the Fernon Affidavit. The account presented by the affidavits filed by you is materially and relevantly incomplete.

Our requests for further information regarding the agency relationship between Mr Burns and the Growers have gone unanswered. You have provided new information in the Burns Affidavit which could have been disclosed to us as part of conferral process. We do not understand why it was not. As you are aware, the Court is unwilling and unable to make orders in the absence of proper conferral.

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You had an opportunity to raise the matters the subject of the Draft Application in your telephone discussions with James Healy. Regrettably, the first time we sighted this document is when we received your letter by email at 2.09pm this afternoon. Your letter indicates that a sealed copy of the application will be provided soon, which we assume means that this document will be filed without conferral.

You have not provided any supporting material with the Draft Application and as such, we are unable to evaluate your foundation for such orders.

Yours sincerely
Middletons



James Healy



28 April 2010

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Dear James

Great Southern Managers Australian Limited COR 35 2010

We refer to your three letters of 27 April received by email at 11.39pm EST in which you raise a number of issues affecting today's hearing which we wish to address.

Conferral

It is clear that the process of conferral is ongoing. We received additional information from you at 7.27pm EST yesterday evening and you have advised that we will be receiving further affidavit material today.

We have been given a very short time to bring an application as:

- a) your clients' application for interlocutory orders setting the timetable for this matter was brought ex parte on 8 April 2010, with notice to us of no more than 15 business minutes.
- b) your client sought to have the substantial matters heard on 28 April 2010;
- c) your client failed to comply with the timetable in the orders of 8 April, serving material on us after 15 April 2010 and continuing to do so;
- d) when asked by telephone on 8 April the effect of the orders, Ms Miller of your office did not disclose to me the requirement that our clients file material for this interlocutory process by 9 April. We did not discover this requirement until we received a copy of the orders at 2.15pm on 9 April and subsequently lost the opportunity to have the matter heard on 14 April.

We also note the interlocutory process is not a new interlocutory process but our 12 April interlocutory process amended. The amendments arise out of the ongoing conferral process.

We also note that a number of the additional documents being sought by our clients have been referred to in affidavits served by your client and ought to have been provided without our requesting them.

A notice of conferral has been under preparation but unable to be completed because of the matters above. We had proposed to put all relevant correspondence before the court and not just that exhibited to Mr. Fernon's affidavit.

Mr. Burns

Mr. Burns and his role in relation to growers of these Projects is well known to you and your clients and therefore we not accept your protestation about new information in relation to him. We note in particular the following:

- a) Mr. Burns has been involved in no less than 10 telephone conference calls with Mr. Martin Jones (the Fifth Plaintiff) in November and December 2010 regarding Great Southern managed investment schemes, in particular the forestry schemes.
- b) Mr. Jones and Mr. Burns both participated in telephone conference calls involving the Receivers Consultative Committee.



- c) He was identified by your client and you personally emailed him to serve him, on behalf of growers, material relating to the 10 March 2010 application by way of letter dated 11 March 2010.
- d) Save My Trees has been referred to repeatedly in materials filed by your client in these proceedings.

Please clarify your issue regarding the agency relationship between Mr. Burns and the Growers. You received a copy of Mr. Capicciano's letter of 19 April which was attached to the letter from Mr. Fernon of the same date to which you have not responded. Mr. Burns is appointed by Growers as an adviser on the basis of his expertise as set out in his affidavit. He is appointed by Growers as agent so as to enable him to provide instructions to us as the Growers lawyers. In light of his expertise and experience we consider this arrangement to of considerable benefit and necessity to Growers who have been joined to these proceedings with very little notice. He also provides, as previously discussed, a means by which Growers can meaningfully instruct lawyers in these proceedings while mitigating the risk of the confidentiality of materials in these proceedings being lost.

Attached is a sample of a letter referred to at paragraph 31 of Mr. Burns' affidavit.

Confidentiality Deed

You continue to assert that our knowledge that employees of Grant Samuel have been granted access to confidential documents in their capacity as advisers to Bendigo & Adelaide Bank constitutes a breach of the Confidentiality Deed.

I queried this view in our telephone conversation yesterday on the basis that the Confidentiality Deed does not prohibit one person disclosing to another that they have signed the Deed. Notwithstanding this, you have reasserted your claim without explaining the basis of it. Unless you can point to a provision that is breached by this conduct we will not be withdrawing paragraph 11.2 of our draft submissions.

Yours sincerely

Mark Bland
Director

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