

**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)**

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

AND

JAMES THACKRAY

First Defendant

TONY MCGRATH

Second Defendant

COLIN NICOL AND SIMON ANDREW REED

Third Defendants

THE GROWERS LISTED IN SCHEDULE 8 OF THE APPLICATION

Fourth Defendants

**OUTLINE OF PLAINTIFFS' SUBMISSIONS IN OPPOSITION TO 2 FOURTH
DEFENDANTS' AMENDED INTERLOCUTORY PROCESS DATED 23 APRIL 2010**

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Filed on behalf of: The plaintiffs

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1. The underlying proceedings

1. The plaintiffs comprise 3 companies in liquidation and their voluntary liquidators (**Liquidators**). The first plaintiff (**GSMAL**) is the responsible entity for (amongst others) 5 managed investment schemes for the cultivation of olives listed at schedule 2 of the plaintiffs' interlocutory process dated 7 April 2010. The second and third plaintiffs (**GSOC** and **GSOH**) are landlords who leased property (listed at schedule 3 to the 7 April application) to GSMAL pursuant to certain leases (listed at schedule 5 of the 7 April application)(**Head Leases**).
2. GSMAL is in longstanding, significant and uncured breach of the Head Leases.
3. The liquidators of GSOC and GSOH have incurred substantial liabilities to care for and maintain their Olive Properties. Under the Head Leases, those care and maintenance obligations were the responsibility of GSMAL.
4. The plaintiffs seek to re-enter the Olive Properties for breach and effect a sale of the Olive Properties, free and clear of liens and encumbrances, to buyers who, in the opinion of the Liquidators, represent the best price to be obtained for the Olive Properties.
5. The Growers have been aware since at least 6 September 2009 that the managed investment schemes were to be wound up. Notice was given to them by the Receivers and Managers that:

“GSMAL is insolvent and unable to meet its obligations as Responsible Entity of the Schemes without securing additional sources of funding. The Schemes require significant funding and are not viable under the existing Scheme Constitutions. Our preliminary view is that the Schemes require immediate funding of approximately \$14.9 million for operations and maintenance in order to obtain a commercial harvest in 2010. In order to obtain a commercial harvest in following years, the Schemes will also require substantial ongoing funding.”
6. On 26 February 2010 the Receivers and Managers of GSMAL advised Growers, as was the case, that GSMAL had on 25 February 2010 received notices of default from GSOC and GSOH.
7. In an application for relief by interlocutory process filed 7 April 2010, the plaintiffs seek orders sanctioning:
 - (a) termination of head lease agreements listed in Schedule 5 of the Application (**Head Lease Agreements**);
 - (b) winding up of the olive managed investment schemes listed in Schedule 2 of the Application (**Managed Investment Schemes**);
 - (c) a declaration and determination under s511 of the *Corporations Act 2001 (Cth)* that GSMAL has no right, interest or lien arising under the

Head Lease Agreements or Managed Investment Schemes in respect of produce derived from olive trees on the land the subject of Head Lease Agreements or as against any asset to be sold pursuant to the Asset Sale Agreements listed in Schedule 4 of the Application (**Asset Sale Agreements**);

- (d) a declaration and determination under s511 of the *Corporations Act 2001 (Cth)* that none of the Fourth Defendants has a right, interest or lien in respect of produce derived from olive trees on the land the subject of Head Lease Agreements or as against any asset to be sold pursuant to the Asset Sale Agreements;
 - (e) approval to enter into the Asset Sale Agreements and all other agreements necessary to give effect to the Asset Sale Agreements without further regard to any claims from, inter alia, the Fourth Defendants;
 - (f) directions that the proceeds arising from the Asset Sale Agreements or the sale of produce derived from olive trees on the land the subject of Head Lease Agreements be applied as set out in the Application, with no payment to the Fourth Defendants.
8. Orders for substituted service of the proceedings upon the 4,065 fourth defendants (**Growers**) were made by Acting Master Chapman on 8 April 2010. Two Growers have filed notices of appearance in the proceedings.

2. The present application

9. By letter sent to Acting Master Chapman of the Supreme Court of Western Australia dated 8 April 2010, "Save My Trees", by their solicitors Clarendon lawyers, stated an intention to appear as a contradictor to the application. No such application has been made.
10. By an interlocutory application dated 12 April 2010, 2 Growers sought orders that certain documents which the Court had ordered be kept confidential be served on all of the fourth defendants and sought certain pre-emptive costs orders.
11. On the afternoon of 27 April 2010, those 2 Growers transmitted to the plaintiffs an amended interlocutory process, in which they seek orders:
- (a) The affidavits ordered to be confidential in these proceedings (including any future affidavits) be provided to Mr Robert Allen Burns; and
 - (b) The plaintiffs provide certain documents to all of the Growers.
12. Later that afternoon the solicitors acting for the 2 Growers transmitted an unsealed interlocutory process on behalf of 17 Growers to remove the liquidators as liquidators of GSMAL.

13. The formal and substantive requirements of O 59 r 9(1) appear not to have been satisfied.

3. The plaintiffs' position

14. It is appropriate that the fourth defendants be properly informed so as to appear at and, if thought fit, oppose the plaintiffs' interlocutory application which does concern their interests.
15. However, the Liquidators have not completed the sale of the Olive Properties, are unable to (by reason of a condition precedent), and will not do so without court direction. It remains possible that the present sale will not be completed.
16. Against that possibility, the Liquidators have sought to keep confidential those documents which contain commercially sensitive terms of both the successful candidate purchasers and the unsuccessful candidate purchasers. If the sale were not to proceed for any reason, the publication of that information may diminish the price or terms on which the Olive Properties, or parts of them or rights in relation to them, could be sold or realised.
17. The Liquidators have sought to balance those two competing interests by making available most material on an open basis, but making available certain material only to solicitors, counsel and experts of parties, upon the entry into a confidentiality undertaking.
18. A confidentiality undertaking has been executed by 6 solicitors at Clarendon lawyers, but not by any solicitors at the 2 Growers' Perth solicitors, Solomon Brothers.

4. Provision of documents to Mr Burns

19. The 2 Growers seek orders that Mr Robert Allan Burns be given copies of the confidential affidavits.
20. Mr Burns is not:
 - (a) a party to the proceedings;
 - (b) a Grower in any Olive managed investment scheme;
 - (c) a solicitor or barrister;
 - (d) a person who is retained as a valuation, agricultural or other expert; nor
 - (e) a person who has entered a confidentiality undertaking.
21. The liquidators have sought to understand of Mr Burns role since the 2 Growers' application was filed on 12 April 2010. Most of the available

information concerning Mr Burns is contained in the affidavit sworn 23 April 2010, but only sighted by the plaintiffs yesterday afternoon.

22. From his affidavit, Mr Burns appears to be a person retained by Professional Investment Services Pty Ltd ABN 11 074 608 558 (which Mr Burns abbreviates to "PIS") "to head its internal team" in relation to the Great Southern Group, including because "he had a good level of respect from [his] peer network": ¶9.
23. PIS is said to be "the largest dealer group in Australia with approximately 1,500 authorised representatives [...] has had a long association with the Great Southern Group and their clients have a significant investment across the various MIS schemes operated by the Great Southern Group": ¶11.
24. Mr Burns refers to an entity named "Save My Trees": ¶13. Mr Burns is the "chairman" of the "Save my Trees" committee: ¶14. Mr Burns has been appointed in his "capacity as the Chairman" of "Save My Trees" to represent their interests by the 2 Growers who have filed notices of appearance: pp 5, 6.
25. There appears to be no entity named "Save My Trees", as an ASIC company and business name search reveals. The website of "Save my Trees" is owned by and operated by PIS. The website records that "Save my trees is an initiative sponsored by founding supporter Professional Investment Services." BCP Group is said to also be a founding sponsor BCP Group.
26. BCP is said to be "one of the largest integrated financial services businesses in South West Sydney that offers accounting, taxation, business advice and audit services": ¶1. BCP Group of which Mr Burns is the "Director and CEO" and with whom he has "worked for nearly 20 years during which he has developed a peer network with other accountants and financial planners both within PIS network and business generally": ¶1, 6.
27. PIS states that the principles of "Save my Trees" include:
 - (a) "It is apparent to date that there are many individuals and organisations taking or considering separate legal action, which may be more beneficial if coordinated effectively. This avoids the possibility that individual efforts, however well intentioned, may be counter-productive to achieving the best outcome possible for all";
 - (b) "UNITY is a key";
 - (c) "[...] it is certain that if we are not coordinated, if we do not show UNITY, if we do not lobby, we will find ourselves subject to outcomes dictated by others who may have grower outcomes far from their primary focus";
 - (d) "Our specific objectives:
 - (i) Protect and preserve the interests of growers;
 - (ii) Maximise the commercial outcome for a majority of growers;
 - (iii) Lead clear communication to growers and the industry; and
 - (iv) Harness the support of all stakeholders";

- (e) “Focused Action: Individually the growers are an easy target for the corporate world to divide and conquer. Together we stand a significantly improved chance of protecting our value and ensuring we receive what is rightfully ours, ie. the chance to see our Schemes to harvest and to benefit from the commercial proceeds thereof. Collectively we have substantial knowledge however, **without the ability to extract that knowledge from everyone and use it for a consistent purpose, we are placing ourselves in further jeopardy**”. [emphasis added]
28. Mr Burns’ affidavit does not set out how he will be compensated, or by whom.
29. Mr Burns affidavit does not state how he proposes to reconcile the principles of “Save my Trees” and his role as internal team leader for PIS with his role as agent for particular Growers (whatever that role may be).
30. It is submitted that:
- (a) given Mr Burns’ role as Chairman of the “Save my Trees” committee, he lacks the independence necessary to be an independent expert;
 - (b) Mr Burns’ role as “internal team” head for PIS (who appear to have given advice to many of those who became Growers) is inconsistent with the sought confidentiality;
 - (c) Mr Burns’ commitment to the principles of “UNITY” and “the ability to extract that knowledge from everyone and use it for a consistent purpose” is inconsistent with the confidentiality undertaking which the Liquidators required;
 - (d) in any event, Mr Burns does not depose to his preparedness to execute a confidentiality undertaking (and the orders are not conditioned on such execution); and
 - (e) Mr Burns’ role as “representative” of Growers in these proceedings remains unexplained.
31. In the circumstances, grounds are not made out as to why Mr Burns (i) would assist the Growers, or (ii) is a person to whom the Court should order the sensitive commercial material concerning the plaintiff companies revealed.
32. The information concerning Mr Burns role – which has been the subject of Liquidator inquiries – remains inadequate and was largely provided on 27 April 2010. Proper conferral was not possible, nor was it effected, in the absence of that information.
- 5. Provision of certain documents to all Growers**
33. Order 2 of the (unfiled) 27 April 2010 Amended Interlocutory Application seeks orders that the Liquidators provide certain documents to 4,065 Growers.

34. There are four objections to those orders as being unnecessary, oppressive and misconceived:
- (a) It is oppressively burdensome to the estates, the Liquidators (who will have to bear the expense) and, indeed, the Growers themselves, to have to dispatch many hundreds of pages to 4,065 Growers at the request of 2 Growers;
 - (b) The provision to all Growers will destroy the confidentiality of those documents, including offers to purchase specifically requested, will be destroyed by publication to all Growers and prejudice the ability of the Liquidators (or anyone else) to realise value from the Olive Properties by sale;
 - (c) The documents sought in paragraphs 2.3, 2.4 and 2.5 have been produced to the Growers' solicitors, and have been available to Growers, since about 11 December 2009. They were further provided on affidavit on 24 April 2010; and
 - (d) The document sought in paragraph 2.1 and 2.2 have been sought from the Receivers and Managers in whose control they are, and will be provided on a confidential basis to Clarendon Lawyers today.
35. There has not been adequate conferral in relation to these expansive and unnecessary orders.

6. Costs

36. In the circumstances of the present unnecessary application, the Liquidators seek the fixed costs of the hearing.

R W Douglas
Counsel
28 April 2010