

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)

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 A OF THE APPLICATION	Fourth Defendants

**SUBMISSION FOR CERTAIN FOURTH DEFENDANTS IN SUPPORT OF
INTERLOCUTORY PROCESS DATED 28 JULY 2010**

Date of Document: August 2010

Filed on behalf of: Those of the fourth defendants listed in Schedule A hereto

Date of Filing: August 2010

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1. These submissions are made in support of the interlocutory process dated 28 July 2010 by the fourth defendants named in Schedule 1 to that interlocutory process (**Defendant Growers**)
2. The Defendant Growers seek the following orders:
 1. *That the liquidators of the first, second, third and eighth plaintiffs pay:*
 - (a) *the reserved costs in this proceeding, and*
 - (b) *the costs of the application,*

of the fourth defendants named in schedule 1 on a full indemnity basis in accordance with Clarendon Lawyers' standard terms of engagement from the fund established from the completion of either or both of the Sumich Asset Sale Agreement and the Kailis Asset Sale Agreement
 2. *The liquidators of the first, second, third and eighth plaintiffs reimburse the fund for the costs referred to in paragraph .*
 3. *The hearing and determination of the question in paragraph 2 be adjourned to a date to be determined.*
 4. *Such further order or orders as the court deems fit.*

3. This application is supported by the affidavit of Michael Joseph Fernon, made 28 July 2010.
4. The Defendant Growers have incurred costs for preparing for and appearing on 12 May and 15 June 2010.
5. The Defendant Growers have acted in the role of objectors.
6. The following authorities give guidance to the Court in the award of costs to an objector. Costs have been ordered:
 - (a) in favour of objectors making submissions on behalf of shareholders of a company (see *Castlereagh Securities Ltd and The Companies Act* [1973] 1 NSWLR 624 per Street CJ; *Re Ampol Ltd* (1989) 14 ACLR 772 per Cohen J; *Quatro Ltd v Argo Investments Ltd* (1999) 32 ACSR 480 per Hansen J at 6-7);
 - (b) as a priority to receivers when undertaking steps for the benefit of all having an interest in the asset (see *ASIC v JDK Financial Solutions Pty Ltd (in liq) (No. 3)* (2008) 246 ALR 580 at 13-15) and to one charge holder who undertook work for work performed by one charge holder for the benefit of other charge holders (*Coad v Wellness Pursuit Pty Ltd* (2009) 71 ACSR 250, per Wheeler, Pullin & Buss JJA);
 - (c) when those objections are not successful (see *Re Arrowfield Group Ltd* (1995) 17 ACSR 649 per Cohen J; see also *Re Matine Ltd & Ors* (1998) 28 ACSR 492 per Santow J); and
 - (d) when the matters considered are of significant complexity (see *Re Arrowfield Group Ltd* (1995) 17 ACSR 649 per Cohen J).

7. Whether the conduct of the objector and whether the objections were reasonable is relevant (see *Re Matine Ltd & Ors* (1988) 28 ACSR 492 per Santow J).
8. In *Quatro Ltd v Argo Investments Ltd* (1999) 32 ACSR 480 Hansen J held that:
 6. *The discretion on costs is to be exercised having regard to all the relevant circumstances. In this case those circumstances include that the majority interest in a company has obtained a resolution of members under which an unwilling minority of preference shareholders face a disposal of their interest for a consideration they do not approve. The legislation imposes as part of the approval process before the resolution can operate a requirement that the company apply to and obtain from the court an order confirming the reduction. That provides an independent forum before which an objecting or dissentient shareholder can object to the application for approval and be heard in opposition. It is important that the minority shareholder is at risk of losing his or her property interest on allegedly unacceptable terms.*
 7. *Another relevant factor is that the presence and submissions of an objector on a company's application for confirmation of a capital reduction can be of material assistance to the court. Thus, for a long time now, as the authorities to which I was referred show, courts have been prepared to allow objectors their costs. See Carruth v Imperial Chemical Industries Ltd [1937] AC 707 at 771.*
15. See also His Honour's discussion on authorities at paragraph 13.
16. In *Re NRMA Ltd & Anor* (2000) 33 ACSR 595, Santow J considered a summons seeking orders from the Court to convene scheme meetings and to approve an explanatory statement for a proposed scheme of arrangement pursuant to s 411 of the Corporations Law. Several objectors to the scheme

opposed those orders. His Honour set out the following other relevant considerations (emphasis added):

45. *Whether the costs of objectors on their objection should be met by the applicant scheme company has been the subject of a number of cases, but all of them were in relation to cost applications made at the conclusion of the convening hearings. The principles which emerge from the cases show why that must be so. I will attempt to distil their effect in these terms:*

- (i) *The ordinary rule is that the scheme companies pay the objector's costs and do not suffer cost orders against them.*
- (ii) *However, this is subject to the objections not being frivolous or without substance but rather such as to be properly and justifiably advanced, even if unsuccessfully. I would add that even sensible objections should be capable of being advanced with reasonable economy of time, consistent with the summary nature of a s 411(1) application.*
- (iii) *These principles reflect the fact that the scheme procedure unavoidably must provide an independent court forum on two separate occasions — for convening and then to approve the scheme. The court will often be assisted by having a contradictor at either stage. It must not be forgotten that the end point of most schemes, if adjudged sufficiently fair and achieving the statutory majorities, is compulsory acquisition of the member's property and the court is no rubber stamp in that process.*
- (iv) *Where there is a clear indication that objectors are using the tactics of technical and artificial objection so as to stall a scheme of arrangement for their own purposes, the courts will not hesitate to make costs orders against objectors to the extent warranted; those cost orders may even be indemnity cost orders in appropriate cases.*
- (v) *Since assessment of the objections cannot be made in advance, cost orders should not be made in advance either.*

17. Barret J also provides a valuable summary of the authorities in *Re HIH Casualty and General Insurance Ltd & Ors* [2006] NSWSC 6 at paragraphs 11 to 15.
18. In *ASIC v JDK Financial Solutions Pty Ltd (in liq) (No. 3)* (2008) 246 ALR 580, Finkelstein J considered an application concerning the claims of receivers to the proceeds of sale of a parcel of land. His Honour held that where the receivers' costs are incurred for the benefit of all having an interest in an asset (for example, a farm that is subject to various claims), such costs must be borne by the fund. See paragraphs 13 to 15 at His Honour's judgment in particular.
19. In this case:
 - (a) the Defendant Growers has been funded by contributions from financial planners with clients affected by the scheme;
 - (b) submissions made by the Defendant Growers have prevented the extinguishment of all Growers' rights (not just the Defendant Growers);
 - (c) its submissions have preserved the proceeds of the SPD to allow for their just and equitable distribution;
 - (d) as a result of those submissions there is now a significant prospect of a greater return to all Growers; and
 - (e) accordingly, the actions of the Defendant Growers have been undertaken for the benefit of all Growers and its costs should be paid from the common fund.

Scale of costs – indemnity

20. The Defendant Growers seek all costs orders on an indemnity basis.

21. Rule 66.4 states that:
- (1) *Where property is the subject of any action or matter, or where any question arising therein will affect any right or claim to property, the Court may make an order that the costs of any party may be recovered out of the property with or without recourse against any other party: Provided that no such order shall be made unless the Court is satisfied that the party seeking the order had a genuine interest to protect, or that it was reasonable in the circumstances that he should appear.*
 - (2) *Where the Court orders payment of costs out of any property it shall direct out of what portion or portions the costs shall be paid*
 - (3) *The costs of inquiries to ascertain the person entitled to any share or interest in property shall be paid from such share or interest unless the Court shall otherwise direct.*
22. The fund may be a fund in which the party has only a limited interest, that is, a common fund (see Williams at [I 63.02.185], citing *Re National Safety Council of Australia (Vic Div) (No 2)* [1992] 1 VR 485 at 499).
23. Further, the indemnity costs being sought here are not punitive in any sense, merely compensatory.
24. It is appropriate to order costs on an indemnity basis because the Defendant Growers is acting for the benefit of Growers as a whole and it and its members and those previously funding it should not be prejudiced by the inevitable shortfall caused by party and party or solicitor and client costs.