
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CHAMBERS

CITATION : GREAT SOUTHERN MANAGERS AUSTRALIA
LTD (IN LIQ) IN ITS CAPACITY AS
RESPONSIBLE ENTITY OF THE MANAGED
INVESTMENT SCHEMES LISTED IN SCHEDULE
1 -v- THACKRAY [No 3] [2011] WASC 195

CORAM : LE MIERE J

HEARD : 6 JULY 2011

DELIVERED : 12 AUGUST 2011

FILE NO/S : COR 35 of 2010
Consolidated by Orders dated 30 June 2010

MATTER : Great Southern Managers Australia Limited
(ACN 083 825 405) (In Liq)

BETWEEN : GREAT SOUTHERN MANAGERS AUSTRALIA
LTD (IN LIQ) IN ITS CAPACITY AS
RESPONSIBLE ENTITY OF THE MANAGED
INVESTMENT SCHEMES LISTED IN
SCHEDULE 1
First Plaintiff

GREAT SOUTHERN OLIVES COMPANY LTD
(IN LIQ)
Second Plaintiff

GREAT SOUTHERN OLIVE HOLDINGS PTY LTD
(IN LIQ)
Third Plaintiff

ANDREW JOHN SAKER
Fourth Plaintiff

MARTIN BRUCE JONES
Fifth Plaintiff

DARREN GORDON WEAVER
Sixth Plaintiff

JAMES HENRY STEWART
Seventh Plaintiff

AND

JAMES GERARD THACKRAY
First Defendant

ANTHONY GREGORY MCGRATH
Second Defendant

COLIN MCINTOSH NICOL
SIMON ANDREW READ
Third Defendants

THE GROWERS LISTED IN SCHEDULE 8 OF THE
APPLICATION
BENDIGO AND ADELAIDE BANK
Fourth Defendants

FILE NO/S : COR 252 of 2009

MATTER : Great Southern Olives Company Ltd

EX PARTE

MARTIN JONES, ANDREW SAKER, DARREN
WEAVER AND JAMES STEWART AS
LIQUIDATORS OF GREAT SOUTHERN OLIVES
COMPANY LTD
Plaintiffs

Catchwords:

Corporations - Managed Investment Scheme - Rights Proceeding - Withdrawal of defences and counterclaims in Rights Proceeding - Allocation of net proceeds of fund - Rights of respective claimants - Turns on own facts

Legislation:

Corporations Act 2001 (Cth), s 511, s 545 (1)

Property Law Act 1969 (WA), s 81(4)

Rules of the Supreme Court 1971 (WA), O 23 r 2(4)

Trustees Act 1962 (WA), s 92(1)

Result:

Orders made

Category: B

Representation:

COR 35 of 2010

Consolidated by Orders dated 30 June 2010

Counsel:

First Plaintiff	:	Mr R W Douglas
Second Plaintiff	:	Mr R W Douglas
Third Plaintiff	:	Mr R W Douglas
Fourth Plaintiff	:	Mr R W Douglas
Fifth Plaintiff	:	Mr R W Douglas
Sixth Plaintiff	:	Mr R W Douglas
Seventh Plaintiff	:	Mr R W Douglas
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendants	:	No appearance
Fourth Defendants	:	No appearance

Solicitors:

First Plaintiff	:	Middletons
Second Plaintiff	:	Middletons
Third Plaintiff	:	Middletons
Fourth Plaintiff	:	Middletons
Fifth Plaintiff	:	Middletons
Sixth Plaintiff	:	Middletons
Seventh Plaintiff	:	Middletons
First Defendant	:	No appearance
Second Defendant	:	No appearance
Third Defendants	:	No appearance
Fourth Defendants	:	No appearance

COR 252 of 2009

Counsel:

Plaintiffs	:	Mr R W Douglas
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Solicitors:

Plaintiffs	:	Middletons
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Case(s) referred to in judgment(s):

Bosi Security Services Limited v Australian and New Zealand Banking Group
Ltd [2011] VSC 255

Chandless-Chandless v Nicholson [1942] 2 KB 321

Primary RE Limited v Great Southern Property Holdings Limited [2011] VSC
242

Re Timbercorp Securities Ltd (in liq) (2009) 74 ACSR 626

Warner v Sampson [1958] 1 QB 404; (1958) 1 All ER 314

1 **LE MIERE J:** On 27 May 2010 I ordered the liquidators of GSMAL
hold the proceeds of the sale of Olive Properties and assets of GSMAL on
trust pending the hearing and determination of a proceeding (Rights
Proceeding) to determine which persons have rights to the net proceeds
(the Fund). Following an out of court settlement, on 22 June 2011 the
fourth defendants listed in sch 8 of the amended originating process
withdrew their defences in the Rights Proceedings. The plaintiffs have
applied to the court to effect the distribution of the Fund.

Background

2 The background to this action can be summarised as follows. The
first plaintiff, GSMAL, is the responsible entity of five olive schemes
which are registered managed investment schemes (MIS) under ch 5C of
the *Corporations Act 2001* (Cth) (the Act). The purpose of the olive
schemes was the commercial cultivation and sale of olives for and on
behalf of the scheme members, who are known as growers. There are
approximately 4,065 registered growers in the olive schemes.

3 The olives were planted on properties in Western Australia and New
South Wales which are legally owned by the second plaintiff (GSOC) and
the third plaintiff (GSOH).

4 Each olive scheme, including the powers of GSMAL, is governed by
a constitution. The constitutions of each of the olive schemes are in
substantially the same terms.

5 Under the Head Leases GSMAL leased portions of the olive
properties from GSOH or GSOC respectively for a non-commercial cash
rent together with a variable proportion of the olive harvest. The Head
Leases are all in similar terms. All but one Head Lease has a term of
20 years.

6 GSMAL subleased to the growers of each olive scheme one or more
parcels of land known as grovelots, each being 0.1 ha on the olive
properties, pursuant to lease and management agreements (each a
sublease). In general, growers executed one sublease per olive scheme,
which specified the number of grovelots they leased.

7 GSMAL also utilises an olive processing plant located on the
Dandaragan olive property that is legally owned by Great Southern Olive
Processing Pty Ltd (GSOP).

8 GSMAL is insolvent and has been unable to meet its obligations under the Head Leases or otherwise continue to manage the olive schemes. GSOC, GSOH and GSOP are also each insolvent and are unable to meet their financial obligations. On 16 May 2009 the fourth to seventh plaintiffs, who I will refer to as the liquidators, were appointed as joint and several voluntary administrators of GSMAL, GSOC, GSOH and GSOP.

9 On 18 May 2009 Simon Read and the first to third defendants (who I will refer to as the receivers and managers) were appointed by a syndicate of secured lenders as the receivers and managers of the assets and undertakings of GSMAL.

10 On 19 November 2009 the creditors of GSMAL, GSOC, GSOH and on 3 December 2009, the creditors of GSOP, resolved that GSMAL, GSOC, GSOH and GSOP be wound up and that the liquidators be appointed as joint and several liquidators.

11 On 11 December 2009 the Receivers and Managers issued winding up notices to the growers of each olive scheme under s 601NC of the Act as the purpose of the schemes could no longer be accomplished. The receivers and managers have not wound up the olive schemes.

12 Since shortly after the commencement of the voluntary administration of GSMAL, GSOC, GSOH and GSOP, and subsequently after the commencement of the liquidation, the liquidators along with the receivers and managers, developed a strategy for an orderly realisation or recapitalisation of the olive schemes. This did not succeed in identifying any offer of a replacement responsible entity for the olive schemes. The process did however identify several parties interested in acquiring the olive properties and the olive processing plant on an unencumbered basis. The liquidators negotiated asset sale agreements with Kailis Organic Olive Groves Ltd (Kailis) and Sumich EVOO Australia Pty Ltd (Sumich) for the sale of the olive properties on an unencumbered basis.

Rights Proceedings

13 On 27 May 2010 I made orders permitting the termination of the Head Leases and subleases, and permitting the sale of the Western Australian olive properties, with the proceeds to be held by the liquidators for any claimant who has the rights to the net proceeds.

14 On 22 October 2010 I made orders in terms of a consent order on similar terms to the 27 May 2010 orders (together known as May

27 Orders) permitting a sale of certain olive properties in New South Wales, with the proceeds to be held by the liquidators, the beneficiaries of which are to be determined under the Rights Proceedings established under the 27 May Orders, as varied.

- 15 Between July 2010 and November 2010 the sales of the Western Australia Olive Properties settled, consistent with the terms of the 27 May 2010 orders as varied by orders made on 30 June 2010 and 21 September 2010. On 30 June 2011 the sale of the NSW olive properties settled, consistent with the terms of the 22 October 2010 orders.

Settlement of Rights Proceedings

- 16 Following an out of court settlement the Represented Growers and the Bank agreed to withdraw their defences and counterclaims in the Rights Proceedings and to take no further steps in those proceedings.
- 17 On 22 June 2011 by consent the court granted the Bank and Represented Growers leave pursuant to O 23 r 2(4) of the *Rules of the Supreme Court 1971 (WA)* to withdraw their respective defences and counterclaims. On 30 June 2011 the Bank filed and served a notice of withdrawal of amended defence and counterclaim. On 4 July 2011 the Represented Growers filed and served their notice of withdrawal of amended defence and counterclaim.
- 18 After deductions the liquidators pursuant to the 27 May Orders and as trustees of the Fund hold \$13,171,688. The liquidators now seek to distribute the Fund to the validly entitled claimants. The 27 May Orders require that the liquidators obtain orders of the court to distribute the Fund.

The application

- 19 By amended interlocutory process dated 5 July 2011, the liquidators apply to the court proposing the Fund be distributed one of two ways. The liquidators preferred method is that the court hear and determine the Rights Proceeding provided for in the 27 May Orders and pursuant to that determination, judgment be entered for GSOC, GSOH and GSOP. The liquidators propose the proceeds of the Fund be distributed as follows: GSOC receive \$8,857,370, GSOH receive \$5,070,360 and GSOP receive \$346,465. In each case together with any further receipt and less any permitted deduction. In addition, the liquidators seek an order that any further receipts of the Fund arising from the Kailis Asset Sale Agreement dated 26 March 2010 be paid to GSOC, GSOH and GSOP (in the

proportions allocated by the asset sale agreement), together with any further receipts and less any permitted deductions.

20 In the alternative, the liquidators seek an order that the Rights Proceeding be dismissed without any order as to costs and the court grant a direction to the liquidators, in each of their capacities as joint and several liquidators of GSMAL, GSOC, GSOH and GSOP and in their capacities as trustees of the Fund pursuant to order 6 of May 27 orders, that they are justified in distributing the Fund in the manner referred to above pursuant to s 92(1) of the *Trustees Act 1962* (WA) and s 511 of the *Corporations Act 2001* (Cth).

Non-representation at hearing

21 The plaintiffs were the only represented parties at this hearing. Solicitors for the first to third defendants confirmed by letter dated 5 July 2011 that they did not intend to appear and would abide by the decision of the court. The respective solicitors of the Represented Growers and the Bank confirmed by letter the parties reached an out of court settlement.

22 The affidavit of Ms King sworn 6 July 2011 deposes that of the 4,065 fourth defendants listed in sch 8 of the interlocutory process 53 entered an appearance. In an affidavit sworn 23 April 2010 Mr Burns deposed to receiving written authorisation from 114 Growers to act in this proceedings. Even if I take the higher figure, only a small fraction (0.3%) of the Growers entered an appearance in this matter and that interest has now been withdrawn. In two years since the appointment of liquidators as administrators and the passage of more than one year since the May 27 Orders, only a fraction of the Growers have made claims against the Fund and each of those claimants has withdrawn their claim to the Fund.

23 Given the circumstances above, I am satisfied that it is appropriate to hear and determine the Rights Proceeding provided for in orders 6 and 7 of the May 27 2010 orders and orders 7 to 10 of the orders made 22 October 2010.

Who are the validly entitled claimants?

24 In determining the Rights Proceeding, I must consider which persons have rights to the net proceeds of the Fund. The plaintiffs submit that there are no valid claimants other than the former owners and landlords of the olive properties and former owners of the associated assets (GSOC and GSOH) and the former owner of the olive processing plant and associated assets (GSOP) (together the Owner Claimants). Absent any

other claims, the Owner Claimants, as former owners, are entitled to the proceeds realised from assets they owned. The question then becomes whether there any bases upon which another party might have an interest in the Fund.

25 The plaintiff submits that the only competing claims asserted were those of certain Growers who maintained, prior to the withdrawal of their defences, five broad claims which were outlined orally and in the defence and counterclaims.

1. GSMAL had property Rights under Head Lease

26 The Represented Growers submitted that as tenant, GSMAL, pursuant to certain Head Leases, had property rights to certain olive properties for so long as it held valid and unexpired leaseholds. The liquidators agreed that there were such rights until the Head Leases were terminated. The liquidators submit that for the purposes of May 27 orders the court must have regard to the rights that would have existed had the termination been valid, lawful and effected following the determination of the Head Leases. The liquidators concede the Growers may have had property rights but they had questionable value due to the evidence of Mr Saker deposed to in his affidavit sworn 5 July 2011 that no replacement responsible entity could be found and it would take at least 20 years for the olive schemes to be profitable if they would be at all.

2. GSMAL was not in default of its leases

27 The Represented Growers maintained that GSMAL was not in default of its leases and therefore there was no entitlement by the Owner Claimants to terminate any Head Lease. The liquidators deny this claim submitting there were gross, repeated and continuing breaches by GSMAL of its covenants to maintain and develop the olive groves since at least 19 November 2009.

28 The affidavit of Mr Winter sworn 5 July 2011 and confidential affidavit of Mr Gumley sworn 19 April 2010 deposed that in order to conduct itself in accordance with the lease covenant of good industry practice in the cultivation of olives and develop the land for purpose of long term cultivation the following activities should be carried out; harvesting, fire prevention, pruning, weed control, nutrition, pest monitoring, disease control and irrigation. Mr Winter deposes that in regards to the News South Wales olive groves, no funding was made available by any Great Southern entity to manage the Olive Groves. The only management activities carried out between the appointment of

administrators in May 2009 and December 2009 was the creation of external firebreaks. There was no weed control conducted until late December 2009 and from May 2009 to the present the Olive Groves have not been adequately irrigated due in part to inadequate water supply. From approximately March 2009 no tree pruning activities have been conducted which has resulted in the trees growing into a bush-type plant which would required considerable expense to rehabilitate to make them commercially viable again. No harvest was conducted in 2010 because the trees were not sufficiently mature. In regards to 2011, the bushy shape of the trees combined with the weed infestation meant no harvest could be conducted. Mr Winter concludes that it is not commercially viable to rehabilitate the Olive Groves.

29 In the period of June to mid December 2009 the management of the olive trees has not met the standard required. As a result tree growth slowed and fruit yield declined.

30 I accept the liquidator's evidence that there were repeated and continuing breaches by GSMAL of the covenants to maintain and develop the Olive Groves caused by the expenses necessary to be incurred to perform these covenants and GSMAL's insolvency since 19 November 2009.

31 The Head Leases were terminated by the May 27 Orders on the premise that the rights to the Fund would be determined having regard to the rights that existed at that time. In effect, the question is whether the Head Leases would have been terminated but for the May 27 orders.

3. Entitlement to seek relief as head tenant

32 The Represented Growers submitted that as sub-tenants by reason of their subleases, they had an entitlement to step into the shoes of GSMAL as head tenant and perform those Head Leases and seek relief against forfeiture, on the same terms as the Head Lessee under s 81(4) *Property Law Act 1969* (WA).

33 The liquidators concede the Growers did have a right to relief against forfeiture but that right was predicated on curing past defaults and making adequate provision against future defaults. The liquidators submit that the growers had demonstrated an unwillingness or inability and remained unwilling or unable, to incur the very significant expenses necessary to cure the historical defaults and give adequate assurance against future defaults necessary to exercise any right to assume as sublessees, the Head Leases, or otherwise to seek relief against the forfeiture.

34 In his affidavit sworn 5 July 2011, Mr Saker deposes that the Olive Groves were fundamentally uneconomic and that unless a replacement Responsible Entity for the managed investment schemes could be found who would accept significant and continuing losses, there was no real prospect of net future return and the schemes were not economically viable. GSMAL was unable to cure any defaults it because it was insolvent.

35 In *Primary RE Limited v Great Southern Property Holdings Limited* [2011] VSC 242 Judd J noted relevantly:

Following service of the notices of default, the tenant took no steps to recommence management of the plantations, or to remedy any particular breach, or to make application for relief against forfeiture [11].

...

The business of the tenant was to establish and maintain the plantations. By reason of the collapse of the Group, the tenant had ceased performing those functions. It was no longer tending or managing the plantations in any manner or according to any practice. It was, quite simply, not performing any part of its obligation set out in cl 6(b) of each lease [122].

36 The above facts in *Primary* are similar to this case. The liquidators sent notices of default indicating a failure to comply with the maintenance covenants. To the extent maintenance was done it was performed by persons other than responsible entity charged under the Head Lease with the burden of performing it, namely the purchasers Kailis and Sumich.

37 I find there is clear evidence of GSMAL's insolvency and continual failure to comply with maintenance covenants. In circumstances where there is no prospect of the defaults being cured retrospectively or prospectively, equity should not intervene to afford relief from forfeiture: *Chandless-Chandless v Nicholson* [1942] 2 KB 321, 323. The Growers have not established the fundamental requirements for relief against forfeiture, namely a capacity or willingness to discharge the obligations under those Head Leases.

38 The consequence of the termination of the Head Lease will be to terminate the sublease granted to the Growers: *Warner v Sampson* [1958] 1 QB 404; (1958) 1 All ER 314. Consequently, following a valid termination of the lease the Growers have no interest remaining under the sublease.

4. Entitlement to perform head leases on terms of subleases

39 The Growers claimed, as sub-tenants by reason of their subleases, an entitlement to step into the shoes of GSMAL as head tenant and perform those Head Leases and seek relief against forfeiture, on the same terms as their subleases. This argument was founded on the decision of Robson J in *Re Timbercorp Securities Ltd (in liq)* (2009) 74 ACSR 626 in which his Honour found that such a step-in right existed in the context of a different managed investment scheme in Victoria.

40 In *Timbercorp* Robson J noted the Head Lease contained a clause providing that the landlord:

... irrevocably authorises and consents to the granting or continuation (or both) by the Growers of a right to occupy or use the Land granted under the Sub-leases, on the same terms and conditions as the Growers are granted sub-leases [57].

41 The liquidators submit and I accept that in this case there was no such provision in any Head Lease or sublease which gave any grower any right to assume any Head Lease in part or whole on the terms on which the Grower took the sublease, therefore no such step-in right was available to the Growers. There are other differences from the circumstances in *Timbercorp*, but it is unnecessary to consider them further.

5. Liquidators acting in conflict of interest

42 At the hearing of 12 May 2010, senior counsel for the Growers submitted that the conduct of the liquidators and the Owner Claimants in seeking to terminate the Head Leases was inconsistent with duty or equity. That proposition was never articulated with any precision other than was found in the transcript of the hearing of 12 May 2010 where Mr Bigmore QC stated:

It is a question of the propriety of the conduct of the liquidators and we would highlight very much the conflict of the interest ... and the way in which there appears to be a very strange manufacture of a basis for getting rid of the tenure underlying the growers' rights (ts 94).

The significance of this submission was articulated later in the hearing:

What we suspect, your Honour, is that the liquidators are making a cute point; they are saying that GSMAL did not provide the maintenance, rather GSOH and GSOC did, so with their hats on as liquidators of the landlords they procured a maintenance of the insurance and they accuse the tenant,

when they put its hat on, of not doing so. All that needs to be canvassed (ts 100).

43 The liquidators submit it was perfectly proper for the liquidators in their capacity as Owner Claimants to determine the Head Leases for breach when defaults of the covenant to maintain constituted a proper basis for determining the lease, the defaults resulted in the olive assets wasting and no buyer appeared willing to purchase the properties with the encumbrances of the Head Leases or subleases.

44 The liquidators submit it was proper not to resist the determination of the Head Leases for evident breaches, at all, and particularly not when defaults of the covenant to maintain, which by reason of GSMAL's insolvency were incurable, were a continuing cause of loss by GSMAL and to the Owner Claimants without any corresponding benefit to GSMAL.

45 In *Primary*, the plaintiff argued that it was unconscionable for the landlords to rely upon the tenant's omissions and failure to rectify the breaches. His Honour Judd J held:

There is no substance to the contention that the same conduct made it unconscionable for the landlords to rely upon the tenant's failure to rectify the breaches. Primary persistently overlooked the reality of the tenant's position following the collapse of the Group, and the circumstances in which it had failed to perform its obligations under the leases and forestry agreements ... Primary submitted that the court should ignore the past conduct of the tenant, as lessee, in the exercise of its discretion. That conduct, of course, included that which the landlords relied upon to support the estoppel. I have rejected that submission [187] - [188].

46 I agree with respect with his Honour's finding that when you give a notice of default for a failure to maintain a maintenance covenant, there is no means for it to be performed and it is not performed, that is a sufficient basis to terminate a lease and the landlord does not have to withhold exercising that right due to a hypothesised equitable principle.

47 It was claimed in the defence and counterclaim that the liquidators were duty bound to procure a replacement responsible entity. The replacement entity assumes the obligations of the managed investment scheme. In his affidavit sworn 23 April 2010, Mr McGrath deposes to the future likely outcomes of two of the properties namely the 2007 Diversified and 2008 Diversified Olive Properties. Mr McGrath finds that the cash flow for these schemes would remain negative until 2021 and 2024 respectively. The cash contribution required from the present day to

the point at which the cash flow would become positive, without interest charges or discount rate being applied, was \$12 million and \$21 million respectively. Given this evidence, it is not surprising that the liquidators could not find a replacement responsible entity.

- 48 There is no duty owed by the liquidators of GSMAL, whether in relation to GSMAL's role as a responsible entity of a managed investment scheme or otherwise, which obliges the liquidators of GSMAL to incur expenditure which GSMAL could not afford to meet, particularly having regard to s 545(1) of the Act. Section 545(1) of the Act provides that the liquidator is not obliged to incur any expense in relation to the winding up of a company where there are no available assets to meet the expense.

Evaluation of Growers' claims

- 49 I find there is no foundation for the claims by the Growers that there was a proper basis for GSMAL to resist the termination of the Head Leases, that any Olive Scheme was viable or that the liquidators seeking to cause the Owner Claimants to terminate the Head Leases was misconceived or improper.

Allocation of the Fund

- 50 The exercise of allocating the Fund is a two stage process. First, determine the legal and equitable rights of the respective claimants (if any). Second, allocate the value of the Fund to the holders of those rights in due proportion to respective values of those rights: *Bosi Security Services Limited v Australian and New Zealand Banking Group Ltd* [2011] VSC 255 [31] (Davies J).

Rights of respective claimants

- 51 The plaintiffs submit that there are no valid claimants other than the Owner Claimants. Absent any other claims, the Owner Claimants, as owners, are entitled to the proceeds realised from assets they owned. The question that must be answered is whether the court would have proceeded to terminate the Head Leases and therefore would have extinguished the property rights of the Growers that were subsisting.
- 52 In *Bosi*, the Growers put forward a similar argument as was put in this case, namely that since the effect of the equivalent to the May 27 Orders was to extinguish rights, that her Honour must determine what those rights would have been and then give some value to them. However, Davies J rejected that submission:

The growers argued that they held rights of a contractual and proprietary nature in respect of the Almond Assets pursuant to the constituent documents that governed each of the Almond Projects. They also argued that those rights were valuable as at 2 December 2009 when they were extinguished to enable the completion of the sale to Olam and that the value of those rights is the measure of their entitlement to share in the net proceeds [27].

Her Honour stated the error in that reasoning to be:

The misconception in the growers' primary case is that it presupposes that rights were given up in exchange for an interest in the net proceeds so that, pursuant to the orders of Robson J, the growers' and the banks' proportionate shares of the fund are to be measured by the value of the rights that each gave up [29].

The proper question is was there value in the first place. Her Honour states:

The difficulty with that submission is that Robson J's orders did not create in the growers any entitlement or any right to share in the net proceeds that the growers did not otherwise possess nor, in my opinion, on a fair reading of his Honour's decision, did his Honour purport to do so. Robson J could not create any interest for the growers in the net proceeds that they did not possess in law or equity [29].

Her Honour went on to say:

In view of my earlier conclusion that the growers must show a proprietary interest in the Almond Assets to found an entitlement to net proceeds, it follows that the contractual rights of the growers ... did not found an entitlement to share in the fund constituted from the sale of the Almond assets [48].

...

It was therefore incumbent upon the growers in this proceeding to found their entitlement to a share of the net proceeds. In order to do so they needed to establish that they held rights of a proprietary nature in and with respect to the Almond Assets that were converted into the fund constituted by the net proceeds from the sale of the Almond Assets. It was not sufficient for the growers to merely establish that the rights that were extinguished to enable the SPO to be completed were rights that had value [30].

Thus, it is necessary to consider the growers' pre-extinguishment rights in respect of the Almond Assets and ask with respect to those rights whether they were of a proprietary nature, and if so, determine the value of those proprietary rights [31].

53 I adopt the view of Davies J in *Bosi* that the Growers only acquired rights in the olives they grew and did not acquire any right in the realised assets. In very similar factual circumstances to those before me, her Honour stated:

[T]he growers only acquired rights of a proprietary nature in the almonds that they grew. They did not acquire any proprietary interest in the land, the almond trees, the capital works or the water licences, which they were authorised to use and occupy by licence only [47].

54 I find the Growers held no proprietary interest and therefore do not have an entitlement to the Fund: *Bosi* [79].

Conclusion

55 I find that GSMAL was insolvent, that GSMAL breached the Head Leases, that no replacement entity could be found for GSMAL and that it would be uneconomic for any replacement responsible entity to assume the obligations of GSMAL in respect to any Olive Scheme.

56 I find that the Owner Claimants would have sought, and been granted leave to terminate the Head Leases. Terminating the Head Lease would have the effect of determining the subleases. Therefore upon those terminations becoming effective, neither GSMAL nor any Grower, would have had a legal or equitable right against any Olive Property. Consequently, the only remaining valid claimants for the Fund are the Owner Claimants.

Allocation of the fund

57 I have found the only valid claimants to the Fund are the Owner Claimants. The allocation amongst the Owner Claimants is submitted to be set by the amount received from the sale of the olive properties, allocated according to the sale agreement, or by the best estimate of such allocation less the costs incurred in the sale processes and the costs and expenses satisfied in accordance with orders 6 and 7 of the May 27 Orders, allocated by the liquidators amongst the Owner Claimants on the basis of which Owner Claimant has the closest relation to those expenses.

58 In his affidavit sworn 5 July 2011, Mr Saker deposes that the allocation arrived at and agreed by the plaintiffs is as follows: GSOC receive \$8,857,370, GSOH receive \$5,070,360 and GSOP receive \$346,465 with any relevant receipt and less any permitted deduction.

Mr Saker's affidavit sets out how those figures have been calculated and I accept the proposed allocation as appropriate.

59 In addition, the Liquidators propose an order that any further receipts of the Fund arising from the Kailis Asset Sale Agreement be paid to GSOC, GSOH and GSOP in the proportions allocated by the asset sale agreement with any receipt and less any permitted deduction. I accept that this is appropriate in the circumstances.

60 I will make the orders sought by the applicants in their interlocutory process of 5 July 2011.