

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

**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

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**OUTLINE OF SUBMISSIONS FOR 12 MAY 2010 HEARING**

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1. These submissions are made on behalf of Growers' representative group Save My Trees. The details of the Growers' that we represent are set out in our clients' notices of appearance dated 12 April and 3 May 2010. These submissions oppose orders sought by the plaintiff and support the interlocutory process dated 6 May 2010.
2. In short, the Growers' that we represent say the Growers have valuable property rights and both those rights and the negotiated sale can be preserved by making orders that the sale proceeds be held on trust pending the hearing and determination of a trial as to the value of the respective competing rights to those proceeds as has been done in the various Timbercorp proceedings in Victoria.

**Section 511 of the *Corporations Act 2001 (Cth)***

3. Section 511 does not give the Court power to make a final determination as to rights. In an appropriate case the Court can hear and determine another application that will finally determine the rights of the parties in proceedings commenced under s 511. However, the Court must look elsewhere for jurisdiction to make those orders.
4. In *Re G B Nathan and Co Pty Ltd (In Liq)* (1991) 24 NSWLR 674, McLelland J considered the operation of the equivalent of s 479(3) of the *Corporations Act 2001* and held that the proper subject of a Liquidator's application for directions under that section is the manner in which the Liquidator should act in carrying out his functions and the only binding effect of, or arising from, a direction under such an application is that the Liquidator, if he or she has made full and fair disclosure to the Court of the material facts, will be protected from liability for any alleged breach of duty as Liquidator to a creditor or contributory or to the company in respect of anything done by him or her in accordance with the direction (at 679-680). In particular, his Honour said (at 680):

*It should be observed that there are instances where a court has, in proceedings commenced as a liquidator's application for directions, gone on to make orders declaratory of substantive rights, clearly intended to be of binding effect on the parties to the proceedings, and*

where necessary has made representative orders for this purpose: see, eg, *Re Staff Benefits Pty Ltd and the Companies Act* [1979] 1 NSWLR 207 and cf *Re Securitibank Ltd (In Liq)* [1978] 1 NZLR 97; *Re Securitibank Ltd* [1978] 2 NZLR 133 and *Re Securitibank Ltd (No 2)* [1978] 2 NZLR 136. The procedures of the court are sufficiently flexible to enable proceedings commenced as an application for directions to be changed into proceedings for the determination of substantive rights, and this is sometimes a convenient course in order to avoid the need to commence further proceedings involving additional cost and delay: see, eg, *Anmi Pty Ltd v Williams* [1981] 2 NSWLR 138 at 156-157. However it is important that the distinction between the two kinds of proceedings be not lost sight of or blurred, and such a fundamental change should not be permitted unless the court is satisfied that those affected either consent to that course (see, eg, *Re Standard Insurance Co Pty Ltd* (1963) 5 FLR 292; 80 WN (NSW) 1355 and *Murdoch* (at 100-101)), or will not suffer injustice in consequence of the alteration to the status of the proceedings.

5. (See also *Re Everything Australian Pty Ltd* (1992) 9 ACSR 75 at 76; *Re Magic Aust Pty Ltd (in Liq)* (1992) 7 ACSR 742 at 745-746; *Editions Tom Thompson Pty Ltd v Pilley* (1997) 148 ALR 146; *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 249 ALR 250.)
6. In *Re Mento Developments Pty Ltd (in liq)* (2009) 73 ACSR 622, Robson J summarised the principles emerging from the High Court in *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 249 ALR 250 as follows:

[49] I have dealt with *St Petka* at some length as I believe it has particular relevance to the issues raised by *Wixart*. Applying a similar approach to that adopted by the High Court to s 63 of the *Trustee Act*, in my view:

(1) The liquidator is entitled to seek directions on his administration of the winding up even though the issue about which he seeks a direction may be or become an adversarial issue in other proceedings.

(2) The direction or advice is to be directed to advising the liquidator on whether or not he or she is justified in conducting the winding up in a certain way and not deciding disputes between competing parties.

*(3) The direction or advice should not seek to resolve an issue between competing parties but the fact that the advice may tend to foreclose an issue in other disputed proceedings is not of special significance in the court exercising its discretion to give private advice to the liquidator.*

*(4) Where a liquidator seeks advice on an issue which may be contested between competing parties, the court should be alert to not going further than is necessary to give the advice sought.*

*(5) The liquidator is not limited to seeking directions about the limited range of matters that Wixart contended as set out above. It is unnecessary for me to proscribe the range.*

7. The plaintiffs seek to rely on *ASC v MAM* (1994) 49 FCR 334; 121 ALR 626 and *Meadow Springs Fairway Resort Ltd v Balanced Securities Ltd* [2007] FCA 1443 in support of the proposition that a final determination of substantive rights can be made under s 511 (see paragraph 38 of the plaintiffs' outline). Those cases are consistent with the above approach (see *ASC v MAM* at 121 ALR 637 to 644, esp 643; *Meadow Springs* at [48] to [51]).
8. For the reasons set out below, both the nature and value of the Growers rights are in dispute. Given the nature and complexity of proceedings necessary to quell that controversy, it is neither appropriate nor fair to determine those disputes summarily.
9. The Growers propose that orders be made holding the proceeds of sale pending a trial of their claim to those funds similar to the orders made in the Timbercorp proceedings in the Victorian Supreme Court. In the Victorian cases, fresh proceedings were commenced to determine those rights. Whether the hearing takes place in this Court under this proceeding number or under a fresh proceeding is a matter of procedure and the Growers that we represent, are happy to proceed either way, provided that they are given a proper opportunity to prepare their case, including preparing full and complete valuation evidence.

### **Value of the Growers' rights**

10. The affidavit of Mr Miles made 21 April 2010 suggests that the Growers' rights have little or no value (see Miles affidavit at paragraphs 55 to 65). That evidence should not be accepted.

11. Mr Miles distinguishes throughout his valuation between the value of the unencumbered land, the buildings, the improvements, the Olive Trees and the water rights. However, the Growers have an interest in each of those things.
12. Further, Mr Lynch, in his affidavit of 5 May 2010 and the exhibited report:
  - (a) values the Growers' interest in the scheme at between \$18,376,980 and \$15,740,600 (see p 11 Mr Lynch's report), on the basis of the financial assumptions and cashflows adopted from Mr Miles' report (see pp 4 and 10 of Mr Lynch's report); and
  - (b) identifies a need for more detailed information on Mr Miles' workings and assumptions before reaching a final view on the value of the Growers' rights (see p 11).

#### **Land, Olive Trees and Olive Grove Infrastructure**

13. Clause 2.1 of the Growers' Sub-Leases states that:

*The Lessor grants to the Grower and the Grower takes from the Lessor a lease of the Grovelot together with all improvements on the Grovelot, including but not limited to the Olive Trees and the Olive Grove Infrastructure, for the Term upon and subject to the Encumbrances, terms, conditions, covenants, reservations and provisions set out in this Deed.*

14. 'Grovelot' is defined as:

*Grovelot means an area of approximately 0.1 hectares comprising:*

- (a) *an Established Area; and*
- (b) *a New Area,*

*described in Item 3 of Schedule 1 and leased pursuant to this Deed, and where the context required means all the Grovelots leased by a Grower;*

15. The term 'Olive Grove Infrastructure' is defined as:

*Olive Grove Infrastructure means the olive infrastructure located, or to be located, on the Grovelot in accordance with Clause 10.4, including but not limited to the roaded catchment, dams, roads, fences, fire breaks and other Fixtures;*

16. 'Fixtures' is defined:

*Fixtures means all fences, pipes, conduits, drains, water courses, wires and equipment, leading through, over, into or situated upon the Grovelot as required from time to time for the purpose of conducting proper and efficient cultivation of olives;*

17. Clause 10.4 is not material.
18. Accordingly, the Growers have a right to exclusive possession of their Grovelots, which includes land, the Olive Trees and the infrastructure on that land.
19. Clause 6.3 of the Head Leases states that:

**6.3 Ownership of Olive Trees and Olive Grove Infrastructure**

*The parties agree and acknowledge that:*

*(a) the Olive Grove Infrastructure; and*

*(b) the Olive Trees,*

*are and will remain the property of the Owner.*

20. It may be said against the Growers that this renders the Olive Grove Infrastructure and the Olive Trees chattels in the hands of the land owner, that they were not leased to the Head Tenant and that, under the principle *nemo dat qui non habet*, the Growers could not have any greater interest in those things.
21. However:
- (a) clause 3.1 of the Head Leases states that:

*The Owner leases to the Lessee and the Lessee takes a lease of the Leased Land together with all improvements on the Leased Land, including but not limited to the Olive Trees and the Olive Grove Infrastructure, for the Term subject to the Encumbrances, on and subject to the terms and conditions of this Lease.*

- (b) clause 6.3 is merely “*belt and braces*” to ensure that the Growers’ rent payments are given the appropriate tax treatment, that is, to ensure that the Growers are not deemed to have acquired a capital asset through the payment of rent or other fees. This is illustrated by the use of the word “*acknowledges*”;
- (c) the use of the word “*property*” in clause 6.3 is ambiguous and can only be construed in the context of the whole Head Lease, particularly in light of:
  - (i) clause 3.1, which expressly grants an interest in the Olive Trees and Olive Grove Infrastructure to the Head Tenant;
  - (ii) clause 7.1, which requires the Head Tenant to work the land for the cultivation of olives;
  - (iii) clause 7.2, which requires the Head Tenant to maintain the Olive Trees and the Olive Grove Infrastructure; and
  - (iv) clause 17.4, which permits the Head Tenant to sub-lease the Leased Land pursuant to the Lease and Management Agreements (being the Growers’ Sub-Leases); and
- (d) if we are wrong, clause 6.3 can be given operation as a regrant to the land owner of an equitable interest in the Olive Trees and the Olive Grove Infrastructure that is, and must remain, subject to the Growers’ right to use and exploit them for the duration of the Sub-Leases. This is supported by the following:

- (i) the Olive Trees and Olive Grove Infrastructure are fixtures, so form part of the land conveyed to TSL in the Head Lease and the Growers in their Sub-Leases. It is possible to sever title to fixtures from title to land. However, title to the fixtures is equitable only (see *Commissioner of State Revenue v TEC Desert Pty Ltd* [2009] WASCA 128 at [84] to [105]);
- (ii) the precise nature of that equitable interest is not entirely clear (see *TEC Desert* at [98]); however, whatever its nature, equity will fashion an appropriate remedy to protect that interest. As the land owner's equitable interest in the Olive Trees and the Olive Grove Infrastructure arises out of the same deed as contains the Head Lease, equity will only fashion a remedy that is consistent with the Head Tenant's rights under that deed. Consequently, the remedy should be subject to the rights of the Head Tenant to use and enjoy the Olive Trees and the Olive Grove Infrastructure for the duration of the Head Leases; and
- (iii) consequently, even if clause 6.3 of the Head Leases conveys an interest in the Olive Trees and the Olive Grove Infrastructure to the land owner, it is an interest that is of no value while the Growers' Sub-Leases are subsisting and is the equivalent of a reversion.

## **Water**

- 22. The Growers have a right to the water rights attached to the land.
- 23. Clause 7 of the Head Leases state that:

### ***7. Lessee's Obligations relating to the Leased Land***

#### ***7.1 Cultivation of Olive Grove***

*The Lessee must at all times during the Term manage, cultivate and work the Olive Grove so as to maintain and develop the Olive Grove*

*Land for the purpose of long term commercial cultivation of olives in a proper and skilful manager and according to approved methods.*

...

24. Clause 9.5 of the Head Leases state that:

**9.5 Water Rights**

- (a) *During the Term the Owner grants to the Lessee the right to take water to irrigate the Olive Grove pursuant to any water licences held by the Owner in respect of the Leased Land pursuant to the Rights in Water and Irrigation Act 1914 (WA) or any other applicable legislation (Water Rights).*
- (b) *The Lessee must pay all fees and other moneys payable in respect of its exercise of the Water Rights and must comply with all the conditions of the Water Rights, any obligations imposed by the Lessor in respect of the exercise of the Water Rights and all legislative requirements in relation to the Water Rights.*
- (c) *The Owner must not sell, transfer, assign or otherwise deal with the Water Rights or do anything which will threaten the ability or right of the Lessee to use and avail itself of the Water Rights.*

25. Clause 2.1 of the Growers' Sub-Leases states that (emphasis added):

**2.1 Grant of Lease**

*The Lessor grants to the Grower and the Grower takes from the Lessor a lease of the Grovelots together with all improvements on the Grovelot, including but not limited to the Olive Trees and the Olive Grove Infrastructure, for the Term upon and subject to the Encumbrances, terms, conditions, covenants, reservations and provisions set out in this Deed.*

26. Clause 5 of the Growers' Sub-Lease states that:

**5. Use of Grovelot**

**5.1 Permitted Use**

*The Grower must not use or permit to be used the Grovelot for any purpose other than the cultivation of olives and is not entitled to use the Grovelot for the purpose of permanently or temporarily residing thereon or for residential, recreational or tourist purposes.*

**5.2 Cultivate**

*The Grower must at all times during the Term manage, cultivate and work the Grovelot so as to maintain and develop the Grovelot for the purpose of the long term commercial cultivation of olives in a proper and skilful manner and according to approved methods.*

**5.3 Good Condition**

*The Grower must at all times during the Term:*

...

(b) *keep the Olive Trees and the Olive Grove Infrastructure in good and substantial repair and order and condition and at the expiration or sooner determination of the Lease yield up to the Lessor the Grovelot, the Olive Trees and the Olive Grove Infrastructure.*

27. Clause 6.1 of the Growers' Sub-Leases states that:

**6.1 To Keep in Repair**

*The Grower must during the Term and otherwise so long as the Grower remains in possession or occupation of the Grovelot, when, where and so often as needed, maintain, replace, repair and keep the Olive Trees and the Olive Grove Infrastructure situated on the Grovelot in good or substantial repair, order and condition (having*

*regard to the condition of the Grovelot at the commencement of the Lease), damage by explosion, earthquake, aircraft, riot, civil commotion, fire, flood, lightening, storm, tempest, reasonable wear and tear, an act of God and war damage only accepted unless any insurance moneys are irrecoverable through the neglect, default or misconduct of the Grower or invitees.*

28. Clause 16.1 of the Growers' Sub-Leases states that:

***16.1 Performance of Initial Management Services and Ongoing Management Services***

*The Responsible Entity must perform the Initial Management Services and the Ongoing Management Services in a proper and efficient manner according to good industry practices for the cultivation of olives<sup>1</sup>, and the Responsible Entity warrants to the grower it either has or has access to, and covenants that it will maintain access to, such staff, personnel, consultants and other specialist services as may be reasonably necessary for it to perform the Initial Management Services and the Ongoing Management Services.*

29. Schedule 2 of the Growers' Sub-Leases contains the following:

***Schedule 2 – Initial Management Services***

*All services to be provided to the Growers during the Initial Management Period, including but not limited to:*

...

- (d) *cultivating, tending, culling, watering, pruning, replanting, spraying and otherwise caring for the Olive Trees, as necessary;*

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<sup>1</sup> The RE might have repudiated the Growers' Sub-Leases by declining to perform these Services, but its obligation under s.601FC(1)(c) and (3) of the *Corporations Act* is either to perform the Services or find a replacement RE or employ a manager to perform them.

(e) *keeping in good repair and condition any access road or roads within the Olive Grove, keeping in good repair and condition all waterways, dams, irrigation and pumping equipment within the Olive Grove, as necessary;*

....

(o) *any other activity that may be required to generally maintain the Olive Grove in accordance with good industry practice for the cultivation of olives or in respect of the provision of the services listed in this Schedule 2.*

30. Schedule 3 of the Growers' Sub-Leases contains the following:

***Schedule 3 – Ongoing Management Services***

*All commercial agronomy activities required to be carried on to manage and maintain the Olive Trees according to good agronomy and Olive Grove practice, including but not limited to:*

(a) *cultivating, tending, culling, watering, pruning, replanting, spraying and otherwise caring for the Olive Trees as and when required;*

(b) *keeping in good repair and condition any access road or roads within the Olive Grove, keeping in good repair and condition all the waterways, dams, irrigation and pumping equipment within the Olive Grove as required;*

...

(j) *any other activity that may be required to generally maintain the Olive Grove in accordance with good industry practice for the cultivation of olives.*

31. Clause 36.4 of the Growers' Sub-Leases states that:

***36.4 Reasonable endeavours***

*The parties must execute and do all such acts and things as are necessary or desirable in order to implement and give effect to the provisions and purposes of this Deed.*

### **Covenants run with the land and bind the reversion**

32. The Growers right to water is a covenant that touches on and concerns the land, so is an appurtenant right and part of the grant.
33. The usual test for whether a covenant touches upon and concerns the land is that the covenant (*Rogers v Hoosegood* [1900] 2 Ch 388 (CA) , Farwell J at 395; cited by Moore (2008) at [28.7.1830]):

*must either affect the land as regards the mode of occupation, or it must be such as per se, and not merely from collateral circumstances, affects the value of the land.*

34. Moore (2008) also provides the following useful summary of the various tests applied (at [28.7.1830]):

*The test was later restated as follows:*

*(1) the covenant benefits only the reversioner for [the] time being, and if separated from the reversion ceases to be of benefit to the covenantee;<sup>5</sup> (2) the covenant affects the nature, quality, mode of user or value of the land of the reversioner;<sup>6</sup> (3) the covenant is not expressed to be personal (that is to say neither being given only to a specific reversioner nor in respect*

<sup>5</sup> A covenant indicates that it benefits the reversioner for the time being only, and if separated from the reversion ceases to be of benefit to the covenantee, if “lessor” is defined to mean “the lessor, its successors and assigns” and if “lessee” is defined to include successors and assigns: *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) HCA 10, the Court at [75].

<sup>6</sup> A covenant to pay rent, which is an essential term of the lease, affects the value of the reversion: *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 82 ALJR 576; 244 ALR 1:[2008] ANZ ConvR 8-017; [2008] NSW ConvR 56-212; [2008] HCA 10, the Court at [76].

*of the obligations only of a specific tenant);<sup>7</sup> (4) the fact that a covenant is to pay a sum of money will not prevent it from touching and concerning the land so long as the three foregoing conditions are satisfied and the covenant is connected with something to be done on, to or in relation to the land.<sup>8</sup>*

*The tests have been described as obscure.<sup>9</sup> In each case, the Court must make a judgment as to whether the particular covenant has such a connection with the land that, in defiance of privity of contract, it should be held to travel with the land.<sup>10</sup>*

35. The Growers' right to water touches upon and concerns the land for the following reasons:
- (a) in *Jordain v Wilson* (1821) 4 B & Ald 266; 106 ER 935 a covenant to supply water was held to touch upon and concern the land;
  - (b) it is a right appurtenant to and necessary for the completion of the permitted and required purposes under the Sub-Leases;
  - (c) its absence would render the Sub-Leases materially less valuable;
  - (d) the right to the supply of water in the form expressed in the Sub-Leases is not able to be traded as there are no separately identified

<sup>7</sup> A covenant is not expressed to be personal where the terms "lessor" and "lessee" are defined to include their successors and assigns because then the covenant is not given to a specific reversioner nor in respect of the obligations of a specific tenant: *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 82 ALJR 576; 244 ALR 1; [2008] ANZ ConvR 8-017; [2008] NSW ConvR 56-212; [2008] HCA 10, the Court at [77].

<sup>8</sup> *P & A Swift Investments v Combined English Stores Group plc* [1989] AC 632; [1988] 3 WLR 313; [1988] 2 All ER 885, Lord Oliver at 642 (AC).

<sup>9</sup> *Kumar v Dunning* [1989] 1 QB 193; [1987] 3 WLR 1167; [1987] 2 All ER 801 (CA) Browne-Wilkinson V-C at 200 (QB) (Croom-Johnson and Neill LJJ concurring); *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548; [1994] NSW ConvR 55-710. Giles J at 556 (NSWLR).

<sup>10</sup> *Showa Shoji Australia Pty Ltd v Oceanic Life Ltd* (1994) 34 NSWLR 548; [1994] NSW ConvR 55-710. Giles J at 556-557 (NSWLR).

water licences. The right is limited to the right to have water supplied to the Grovelot; and

- (e) the water rights are owned by the land owner (clause 9.5(a) of the Head Leases). The Olive Trees are fixtures and revert to the land owner (see clauses 6.3 and 15.1(b) of the Head Leases). Accordingly, the use and enjoyment of the water rights affects the nature, quality, mode of user or value of the land of the reversioner.

36. Further, if the Growers' rights are (contrary to these submissions) characterised as "scheme property", s 601FC(2) of the *Corporations Act 2001* requires that they be held by the RE on trust for the Growers. If, on a winding up of a scheme or otherwise, such rights are dealt with<sup>2</sup> by the RE, s 601FC(1)(c) and (3) of that Act provide that the RE has an overriding duty to look to the best (commercial) interests of the Growers.

#### **Derogation from the grant**

37. Further or alternatively, it would be a derogation from the grant for the land owner or the Head Tenant to interfere with or deny the Growers access to water.
38. The doctrine, maxim or implied covenant that a landlord cannot derogate from his or her grant has been explained in various ways (see Bradbrook, Croft and Hay (2009) at [8.5]).
39. Woodfall explains the duty not to derogate from the grant as follows (at 11.083):

*If one man agrees to confer a particular benefit on another, he must not do anything which substantially deprives the other of the*

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<sup>2</sup> *Quaere* the source of power for such a dealing. *Capelli v Shepard* [2010] VSCA 2 ("Environinvest") at [147] – [151] indicates that the power will fall to be exercised in the event a scheme is ordered to be wound up. In all other cases (and possibly also in a winding up), the provisions of the scheme constitution must be considered.

*enjoyment of that benefit: because that would be to take away with one hand what is given with the other.*<sup>3</sup>

40. The protection offered by the implied covenant not to derogate from the grant extends to the use by the landlord of rights outside the four corners of the demise.

41. In *Aldin v Latimer, Clark, Muirhead & Co* [1894] 2 Ch 437, Stirling J stated the principle as (at 444, cited by Bradbrook, Croft and Hay (2009) at [8.5]):

*Where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on.*

42. In *Browne v Flower* [1911] 1 Ch 219 at 225, Parker J held that:

*If the grant or demise be made for a particular purpose the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the purpose for which the grant or demise was made.*

43. As stated by Bradbrook, Croft and Hay (2009, at [8.5]), the principle is best understood by way of illustration. For example:

- (a) in *Harmer v Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 Younger LJ held that erecting buildings within a distance prohibited by a licence for the storage of explosives, but outside the demised premises, making it illegal to continue using the premises for the purpose, is a derogation from the lessor's grant;

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<sup>3</sup> *Molton Builders v Westminster City Council* (1975) 30 P & CR 182, 186 per Lord Denning MR; *Birmingham Dudley & District Banking Co v Ross* (1887) 38 Ch D 295; *Johnston & Sons v Holland* [1988] 1 EGLR 264.

- (b) in *Todburn Pty Ltd v Taormina International Pty Ltd* (1990) 5 BPR 11,173, Powell J of the New South Wales Supreme Court held that converting a previously free carpark in a shopping centre to a commercial carpark and reducing the business of tenants at the centre derogated from the grant;
- (c) in *Nordern v Blueport Enterprises Ltd* [1996] 3 NZLR 450, the New Zealand High Court held that the landlord derogated from the grant when an upstairs premises was let as a brothel and interfered with the operation of the plaintiff's premises;
- (d) in *Oceanic Village Ltd v Shirayma Shokussan Co Ltd* [2001] L&TR 35, Nicholas Warren QC, sitting as a Deputy Judge of the Chancery Division, considered a case in which a tenant near an aquarium had the benefit of a covenant that it would be the only gift shop within a designated area. When the landlord opened a gift shop just outside that area, it was held to be a derogation from the grant;
- (e) in *Platt v London Underground* [2001] 2 EGLR 121, Neuberger J in the Chancery Division held that a change by the landlord of pedestrian traffic flow outside the plaintiff's shop that affected his business was a derogation from the grant;
- (f) in *Softplay Pty Ltd v Perpetual Trustees (WA) Pty Ltd* [2002] NSWSC 1059, Barrett J in the New South Wales Supreme Court found that it was arguable that installing play equipment and offering a free child minding service for customers at a shopping centre that would impact upon the plaintiff's commercial child-minding facilities at the same centre was a derogation from the grant;
- (g) failure by a landlord to maintain a street light over the tenant's tobacco stand was held to be a derogation from the grant in *Jenkins v Levinson* (1929) 29 SR (NSW) 151;
- (h) the erection of stalls by the lessor in the common area of a shopping centre breached the implied covenant not to derogate from the grant to

a tenant, which included a right to use and enjoy those common areas in *Arndale (Kilkenny) Pty Ltd v Gaetjens* (1970) 20 LGRA 37, by majority of the High Court of Australia;

- (i) the disconnection of a fire sprinkler system connected to the demised premises was held to be a derogation from the grant in *Kohua Pty Ltd v Tai Ping Trading Pty Ltd* (1985) 3 BPR 9705; (1986) NSW ConvR 55-271 by Young J; and
  - (j) the relocation of an exhaust fan by the landlord resulting in a reduction in its efficiency was held to be a derogation from the grant in *Battik Pty Ltd v Hawkesbury Nominees Pty Ltd* (2000) ANZ ConvR 182.
44. In this case, it would be a derogation from the grant of the Sub-Leases for the Head Tenant to interfere with or deny the Growers access to water because:
- (a) the permitted purpose under the Sub-Leases is limited to the cultivation of olives (clause 5.1);
  - (b) the Growers are obliged at all times during the term of their Sub-Lease to cultivate olives (clause 5.2);
  - (c) they are obliged to keep the Olive Trees in good and substantial repair and order (clauses 5.3(b) and 6.1);
  - (d) the Head Tenant is obliged to water the trees (clause 16.1 and Schedules 2 and 3); and
  - (e) the Head Tenant is bound by the reasonable endeavours clause of the Sub-Lease (clause 36.4).
  - (f) In any event, the Growers gain their title from a head lease from the land owner. The interference by the land owner with rights that derogated from the sub-leases would be no less of a derogation than an interference with those rights by the Head Tenant. In those circumstances, the Head Tenant is obliged under s.601FC(1)(c) and (d)

of the Corporations Act to act in the best interest of the Growers and to protect their right to water.

45. Accordingly, any interference with the supply of water would substantially interfere with the permitted and required purpose under the Growers' Sub-Leases, would render the Sub-Leases materially less fit for their purpose and would be a derogation from the grant.

### **Buildings**

46. The Growers also have an interest in the buildings on the land.
47. The buildings on each property consist of the homestead, machinery sheds, ablution facilities, water tanks, pump sheds, tracks, offices, packing sheds, storage facilities, garages, and other buildings and infrastructure used for the conduct of the olive farms (see various exhibits to Miles' affidavit at 26-7, 63, 101-2, 137-8 and 173-5).
48. Those items are necessary for the proper performance by the Growers of the permitted and required purpose under their Sub-Leases. A refusal by the Head Tenant to allow the Growers or their agents access to those buildings would render the Sub-Leases materially less fit for their purpose and would be a derogation from the grant.

### **Mr Miles' valuation does not disclose the value of the Growers' interests**

49. While the Sub-Leases remain on foot, the Growers have an interest in all items considered by Mr Miles in his valuation. The land owner holds an interest in the reversion only or that is otherwise subject to the Growers' rights.
50. However, Mr Miles was instructed to value the Growers' interest as the entitlement to produce proceeds attributable to the Growers under the relevant Olive Schemes (see Miles affidavit at 22 and exhibits BAM-2 and BAM-4).
51. The valuer's understanding of the Growers' rights is summarised in paragraph 22 of his affidavit as follows:

22. *In that letter, Mr Saker stated that under the relevant Olive Schemes, the Growers have a contractual right to the olive produce of the trees over a number of years and that, in distributing the proceeds of any sale of the Olive Properties to be valued, he may be required to consider the interests of the Growers in accordance with the Olive Schemes. If that was the case, he advised that he would require a valuation of the future produce from the trees which the Growers would otherwise have received pursuant to the Olive Schemes.*
52. However, the Growers' interests under their Sub-Leases are valuable. At paragraph 40, Mr Miles states that:
40. *Encumbrances can be detrimental to the overall value of the land because they restrict the value and amenity which accrues to the proprietor (although in some cases a valuable lease can increase the value of a property). I have noted in each of the Valuation Reports that each of the Olive Properties owned by either GSOH or GSOC are subject to lease to GSMAL (and are then subleased to the Growers) and that I consider this to be detrimental to the value of each of the Olive Properties as purchasers generally prefer to purchase unencumbered land. A lease is a particular detriment to a buyer who wishes to make use of the land himself, because the leasehold may restrict – perhaps quite severely – the use which the buyer may make of the land. In addition a below market lease value is considered a further detriment to market value. The detriment in value can be assessed as the loss of rental plus a loss of interest on that lost income until such times as a fair market rent is negotiated or the lease is concluded.*
53. The Head Leases are let at an uncommercial rent. Determination of the Head Leases and extinguishment of the Growers' Sub-Leases would increase the value of the freehold. If the Head Leases and the Growers' Sub-Leases were

not extinguished, the purchaser would only be acquiring an assignment of the reversion, which would have a significantly reduced market value.

54. Accordingly, the Growers' Sub-Leases give them bargaining power. However, Mr Miles makes no attempt to attribute a value to that interest and he was not instructed to do so.

#### **Value of Growers' right**

55. Mr Lynch was instructed to set out his opinion on:
- (a) whether the interests of the Growers' in the Olive Schemes presently have a quantifiable value; and
  - (b) if the answer to question (a) is yes, what further information does he require to enable him to quantify that value.
56. In undertaking that task, Mr Lynch has made the following assumptions (among others):

*I have considered whether the Growers' rights have any value based on two matters:*

- *Whether Growers had a likely financial benefit in the future outcome of the projects; i.e. would the projects provide a net cash return to Growers over the project life on an assumption of a valid and continuing lease.*

57. These assumptions are consistent with the Growers' rights as set out above.
58. Mr Lynch has also adopted the same financial assumptions and cash flows as were used by Mr Miller (see p. 4 of Mr Lynch's report).
59. Mr Lynch assesses the net present value of the Growers' interests in the Scheme at \$18,376,980.

### Relief from forfeiture

60. The Growers have rights as sub-tenants in possession of the olive groves. The plaintiffs seek the Court's imprimatur before terminating the head leases which, they submit, will in turn extinguish the Growers' sub-leases and provide clear title to the purchasers<sup>4</sup>.
61. Further, they submit that relief against forfeiture under s 81(4) of the *Property Law Act 1969 (WA) (PLA)* should not be granted in circumstances where the sub-tenant is unwilling to subscribe to a covenant to repair upon which the head tenant has defaulted (see paragraphs 49 to 51 of the plaintiffs' submissions).
62. The Court should not be distracted by hypothetical arguments about whether the Growers would or would not be able to maintain the olive groves if they sought relief against forfeiture. The Court is faced with the sale of an asset over which there are competing rights. The question for the Court is how best to do equity between the parties in circumstances where the sale of the assets requires the Growers' property rights to be extinguished. There is an established mechanism that allows the Court to resolve competing claims to the proceeds of sale in these circumstances, which is discussed in more detail below.
63. However, for the sake of completeness, the following submissions show that the Growers have an arguable case for relief against forfeiture.
64. Section 81(4) of the PLA provides:

(4) *Where a lessor is proceeding by action or otherwise to enforce or has enforced a right of re-entry or forfeiture*

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<sup>4</sup> It is noted that the plaintiffs have a clear conflict between their duty to realise value for the creditors of the land owners and their duty (e.g. under s.601FC as liquidators of the relevant RE) to realise value for the Growers. As liquidators of an RE, they have a like duty to that of the RE in liquidation itself (which is a trustee – s.601FC(2)); *Re Crest Realty Pty Ltd (in liq) and the Companies Act [1977]* 1 NSWLR 664 at 672.

(a) *under any covenant, provision or stipulation in a lease; or*

(b) *for non-payment of rent,*

*the Court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action, if any, or in any action brought by that person for that purpose, make an order vesting for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in the property, upon such conditions,*

(c) *as to execution of any deed or other document;*

(d) *payment of rent, costs, expenses, damages, compensation or giving security or otherwise,*

*as the Court in the circumstances of each case thinks fit, but in no case is the under-lessee entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.*

65. The relevant principles with regard to relief against forfeiture of a sub-tenancy are as follows:

- (a) the jurisdiction is very wide and regard will be had to the circumstances of each case (*Bradbrook Croft & Hay* (2009)). The only limitation or fetter on the Court's discretion is that the sub-lease term cannot exceed the term of the original sub-lease (*Woodfall* at 17.171);
- (b) relief may be granted over part of leased premises where that part of the premises has been sub-let (*Redfern & Cassidy* at [17 200]). Where the sub-let premises is a self-contained unit, it is more likely that a sub-

tenant will be granted relief as regards that part than where it forms an integral part of the property as a whole (*Woodfall* at 17.163);

- (c) by contrast in *Webber v Smith* (1689) 2 Vern 103; 23 ER 676<sup>5</sup> Lord Salisbury heard an application for relief from forfeiture by six sub-tenants after the head tenant had granted 100 sub-leases then failed to pay rent and to repair. The Court found that it could grant relief against forfeiture once the whole of the rent was paid and the repairs were undertaken and that it could order the other sub-tenants to contribute;
- (d) the Court has the widest possible discretion and the landlord is to be put back in the same position as he or she was before the forfeiture (*Chatham Empire Theatres (1955) Ltd v Ultrans Ltd* [1961] 1 WLR 817 at 820). However, the landlord is only entitled to be put back into the position *qua* that part of the premises sub-let, although each case must be considered on its facts. So, in *Chatham* the sub-tenants were only ordered to pay that part of the arrears attributable to their property (*Bradbrook Croft & Hay* (2009) at [19.6]);
- (e) the discretion is to be exercised sparingly (*Bradbrook Croft & Hay* (2009) at [19.6]). Whether to grant relief and on what terms are a matter for the Court (*Woodfall* at 17.170). However, an innocent sub-tenant could well expect to obtain relief (*Redfern & Cassidy* at [17 230]). In general, a court will grant relief to a sub-tenant on payment of rent in arrears and performance of the covenants under the head lease and costs (*Bradbrook Croft & Hay* (2009) at [19.6]; *Redfern & Cassidy* at [17 230]);
- (f) relief may be given to such a sub-tenant where the head tenant has failed to pay rent or has gone bankrupt (*Redfern & Cassidy* at [17 230]);

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<sup>5</sup> Cited with approval in *Belgravia Insurance Co Ltd v Meah* [1964] 1 QB 436 at 444 per Lord Denning, MR; and with apparent approval by Cohen J in *Commonwealth Development Bank of Australia v Eagle Hotels Pty Ltd* [1990] ANZ ConvR 100; BC8901607 at 10

*Wardens & Governors of Cholmley School, Highgate v Sewell* [1894] 2 QB 906 at 912; *Gray v Bensall* [1904] 1 KB 601);

- (g) the Court may have regard to the consent of the landlord in the creation of the estate by the sub-tenant (*Duncan* (2008) at [13.240]). Consent to sub-lease was provided in this case;
  - (h) factors to be taken into account include those applicable to landlord and tenant and also include (*Woodfall* at 17 170):
    - (i) whether the property sub-let is capable of convenient occupation under a lease divorced from the remainder of the property in the head lease;
    - (ii) whether the sub-tenant is himself in breach of the terms of the sub-lease;
    - (iii) whether the sub-tenant is willing to accept the obligations in the head lease;
    - (iv) whether the breach can be remedied and the sub-tenant is willing to remedy them; and
    - (v) whether the breach is wilful.
66. The following submissions are relevant to the exercise of the discretion to grant relief generally:
- (a) any uncertainty concerning the plaintiff's ability to comply with the lease should benefit the plaintiff because any subsequent breach can be met with termination for which relief from forfeiture is unlikely to be granted (*Old Papas Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11 at 132);
  - (b) relief may be granted, even though the breach has not been remedied (*Redfern & Cassidy* at [17 230]; *Beamer Pty Ltd v Star Lodge Supported Residential Services Pty Ltd* [2005] VSC 236 at [447]; *Platt v Ong* [1972] VR 197 at 199; *Lo Giudice v Biviano (No. 2)* [1962] VR

420 at 427). Relief is generally conditional upon remedy of the breach;

- (c) whether the damage sustained by the landlord is proportionate to the advantage he will obtain if no relief is granted is particularly relevant (*Woodfall* at 17.166, subparagraph (g); *Shiloh Spinners Ltd v Harding* [1973] AC 691, Lord Wilberforce at 723-724; *Legione v Hately* [1982-83] 152 CLR 406, Mason and Deane JJ at 449; *Muschinski v Dodds* (1984) 160 CLR 583 per Deane J at 620; *Tanwar Enterprises Pty Ltd v Gauchi* [2003] 217 CLR 315, Kirby J at 351 and at 341-2; Tilbury and Rossiter in Parkinson (ed), (2003) at [908]; *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 236, Young CJ in Eq at [69]; see also the discussion in Young, Croft and Smith *On Equity* (2009);
- (d) whether the breach was wilful or inadvertent is relevant (*Woodfall* at 17.166, notes 9 and 10) at [11.670]; and
- (e) other relevant factors are referred to in *Woodfall* at 17 166.

67. In this case:

- (a) the refusal to grant relief creates a windfall gain to creditors in the liquidation at the expense of the Growers' property rights. Mr Miles acknowledges the Growers' rights and Mr Lynch gives evidence that they are valued at around \$18M;
- (b) the unconscionability of this windfall is amplified by the fact that the Liquidators are in control of the land owner, the Head Tenant and the contracting party previously responsible for the maintenance of the olive groves (see paragraph 53 of the plaintiffs' submissions);
- (c) future maintenance of the trees is not relevant as the olive groves have been sold. The value of the Growers' equity to seek relief is no longer attached to their right to exclusive possession of their Grovelot. Instead, the Growers have a right to prove to the Court their claim to the sale proceeds;

- (d) in any event, we are instructed that there is evidence available that the Growers that we represent (and probably many others) are willing to comply with the maintenance obligations under the terms of the Head Leases;
- (e) alternatively, relief could be granted conditional upon compliance with the maintenance obligations under the Head Lease; and
- (f) in any event, the plaintiffs attach little or no value to the Olive Trees, so any derogation in their condition will not reduce their value and will cause the plaintiffs no prejudice.

### **Appropriate orders**

- 68. The appropriate orders in these circumstances are orders parallel to those made by Robson, Croft and Davies JJ in the various Timbercorp matters.
- 69. In *Re Hazelton Air Charter Pty Ltd v Mentha* (2002) 41 ACSR 472; [2002] FCA 529, Goldberg J considered competing claims over a fund of \$150M fund that was paid to the administrators of Ansett. The Administrators sought a declaration from the Court as to the appropriate method of distribution. The parties each advanced an apportionment on grounds of fairness and appropriateness. Justice Goldberg gave the following ruling:

*[31] Fairness or appropriateness is an insufficient basis on which to determine the interest of the Hazelton group in the fund of \$150m...*

*[32] I consider that the proper principle to be applied to determine the extent of the respective interests of the two groups in the fund and the manner of its apportionment between them is to determine what was bargained away or given up, by each group in exchange for the receipt of the \$150m and then to place a value on what each group bargained away or gave up. In this way it is possible to identify the relative value of what was relinquished in exchange for an interest in the fund of \$150m.*

- 70. His Honour continued:

*[35] In the absence of any agreement as to the apportionment of the \$150m between the Ansett group and the Hazelton group, I consider that the measure of their respective proprietary interests in the fund of \$150m is to be determined by reference to the relative proportions of the value of the rights or claims which each of them bargained away and gave up in exchange for the receipt of the \$150m. Each of them had a share in the fund of \$150m proportionate to the value of what they had bargained away.*

71. See also his Honour's discussion at [36] to [38].
72. *Re Timbercorp Securities Ltd (in liq)* (2009) 74 ACSR 626 is a case very similar to this one. Timbercorp Securities Limited is the responsible entity of a managed investment scheme for the cultivation of almonds. The Liquidator sought judicial approval for the distribution of the proceeds of sale of various almond groves. The documents were very similar in structure and content to the documents in this case. The growers had either an interest as sub-tenants in possession or, in some schemes, as licensees under a licence and joint venture. The almond groves were subject to mortgages and other securities held by a syndicate of banks. The groves were sold for around \$128M. The banks would only release their securities and permit the sale if \$6M less costs was paid to the growers and the balance paid to the banks. The growers submitted that they had valuable property rights. In considering the various claim, Robson J held that:

*[77] As the evidence in this case indicates, there is uncertainty at this stage as to precisely what property rights of the growers are to be transferred or surrendered as part of the consideration for the payment of the purchase price of approximately \$128 million. Until those rights are identified it is not possible according to law to fairly assess the value of the rights being surrendered on behalf of the growers.*

*[78] Despite the matters raised by the liquidators that I have referred to at length, in my view, it is not appropriate for the liquidators to*

*accept the bank offer merely because the banks assert that they will not allow their securities over the property to be sold as part of the almond assets.*

*[79] The banks are entitled to the full extent and benefit of their charges and securities. The banks are under no obligation to give up or surrender any of their security rights if they so chose. On the other hand, subject to any agreement that is made between the parties, if the sale proceeds, the banks are only entitled to that portion of the sale proceeds that represents the property over which they hold securities.*

*[80] In my opinion, the liquidators are not justified in entering into the agreement to accept \$6 million (less some undefined costs) in full satisfaction for the property rights transferred or surrendered by the growers' to enable Olam Orchards to obtain clear and unencumbered title and rights to the almond assets. As indicated, there are well recognised legal principles for determining the rights of several property owners whose property is lost or converted into a common fund. The fund, if it is created, is not to be allocated between the property owners on the basis of bargaining power. The fund is not to be allocated on arbitrary measures that may appear to be a fair and reasonable division of the fund. Rather, as the authorities establish, the fund is to be divided "by reference to the proportionate share of the fund measured by the extent and value of the claims or rights given up in exchange for an interest in the fund." <sup>6</sup>*

*[81] Accordingly, the amount owed to the Banks appears to be of residual relevance. The banks can obtain payment for only so much of the property as they have a charge over. The key issue is what proportion of the fund represents the property over which they hold security.*

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<sup>6</sup> *Hazelton* at [47] per Goldberg J.

*[89] Subsequently, after further submissions on 9 October 2009, orders were made with the agreement of the banks and TGG. ... The orders were as follows:*

*THE COURT DIRECTS THAT:*

- 1 The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in procuring the First Plaintiff as responsible entity of the managed investment schemes listed in Schedule 1 of this order (Registered Schemes) to enter into and perform the SPD and extinguishing all of the rights of Growers (investors in the schemes set out in schedules 1 and 2 of this order) in respect of the assets the subject of the SPD (Grower Rights).*
- 2 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in procuring the Second Plaintiff as manager of the unregistered managed investment scheme listed in Schedule 2 of this order to enter into and perform the SPD and extinguishing all of the Grower Rights.*
- 3 The Third and Fourth Plaintiffs (in their capacity as liquidators of the First Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPD.*
- 4 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in making, doing and executing such documents or things to give effect to the extinguishment of all of the Grower Rights in order to perform the SPD.*
- 5 The Third and Fourth Plaintiffs (in their capacity as liquidators of the Second Plaintiff) are justified in disclaiming the Project Management Agreements and the Licence and Joint Venture Agreements (as those respective terms are defined in the Affidavit) and to the extent necessary have leave to do so pursuant to section 568(1A) of the Corporations Act 2001 (Cth).*

*THE COURT ORDERS, DECLARES AND DIRECTS THAT:*

- 6 *The Third and Fourth Plaintiffs in their capacity as liquidators of the First, Second, Fifth and Sixth Plaintiffs may enter into and perform: the SPD; and any document referred to, in connection with, or necessary to give effect to the SPD.*
- 7 *Upon completion of any sale under the SPD the net proceeds of sale (after payment of selling costs and expenses, retentions (if any) and the costs and expenses of the liquidators of the First, Second, Fifth and Sixth Plaintiffs referable to the preservation and realisation of the assets the subject of the SPD, as approved by the committee of inspection of the Sixth Plaintiff and the Secured Creditors (as that term is defined in paragraph 13 of the Affidavit), or order of the court) (Net Proceeds) be held by the Sixth Plaintiff in an interest bearing trust account with an Australian bank (as defined in section 9 of the Corporations Act) pending the hearing and determination by the court of a proceeding (Rights Proceeding) to determine which person or persons have any rights to all or any part of the Net Proceeds (Claimants), and to be held on trust for the Claimants until further order of the court.*
- 8 *Insofar as each of the Secured Creditors have any rights to the assets the subject of the SPD, whether under their securities over those assets or otherwise, nothing in the release of those securities upon completion of the SPD will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.*
- 9 *In so far as the Growers have any rights to the assets the subject of the SPD nothing in orders 1 to 5 above, or any action taken thereunder by the Third and Fourth Plaintiffs, will prejudice those rights for the purposes of their claim to all or any part of the Net Proceeds.*

73. Similar orders were made by:

- (a) Croft J in *Re Timbercorp Securities Ltd (in liq)* [2009] VSC 530 (concerning olive schemes);
  - (b) Davies J in *Re Timbercorp Securities Ltd (in liq)* [2009] VSC 590 (concerning other almond schemes, known as the TPIF Almonds); and
  - (c) Davis J in *Re Timbercorp Securities Ltd (in liq)* [2010] VSC 050 (concerning citrus schemes).
74. The facts in those cases were materially similar to the facts in *Re Timbercorp Securities Ltd* (2009) 74 ACSR 626. The approach was not contested by the banks or the Liquidator.
75. The Timbercorp almonds case is well advanced. The parties have exchanged lists of documents and extensive submissions on the nature of the Growers' rights and now have a timetable for the exchange of evidence as to value. The matter has been tentatively listed for trial on 22 November 2010 on an estimate of seven sitting days.
76. The parties to the Timbercorp olives case are exchanging lists of documents and will exchange submissions shortly.
77. In this case:
- (a) the Growers currently have rights as sub-tenants in possession of their Grovelots and an equity to seek relief against forfeiture. This gives them bargaining power;
  - (b) the Court should expect dispute between the Growers and the plaintiffs as to the nature and extent of those interests;
  - (c) there is in evidence before the Court that those rights are valuable. However, that evidence is incomplete and we have not seen responding material from the plaintiffs;
  - (d) for the reasons set out above, the Court does not have power to determine the extent and value of the Growers rights on a summary

basis under s 511 of the *Corporations Act 2001*. The position should be preserved to allow the parties to fully articulate their cases as to the nature and extent of the Growers' rights and exchange evidence of the value of those rights; and

- (e) the sale at the agreed price and the rights of both the Growers and the plaintiffs can be preserved by making orders in the nature of those made in the Timbercorp proceedings.

78. A minute of the proposed orders and a proposed interlocutory timetable will be prepared and circulated prior to the hearing of this application.

### **Winding up of the Schemes**

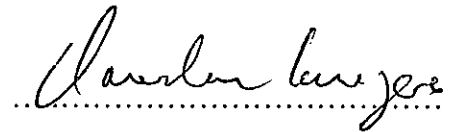
79. At paragraph 48 of their submissions, the plaintiffs suggest that they will disclaim the Head Leases if they are unable to terminate. However, this will not assist the plaintiffs because:

- (a) if the Liquidator were to disclaim the head leases, then the head leases will merge into the freehold and our clients' sub-leases survive the disclaimer under s 79(1) of the *Property Law Act 1968 (WA)* (see *NAB v NSW* [2009] FCA 1066 per Rares J, esp at 26);
- (b) alternatively, disclaimer is a cause of forfeiture giving rise to an equity to seek relief against forfeiture in the hand of a sub-tenant (see *Bradbrook, Croft and Hay* (2009) at [16.25], esp at 519, and at [17.21]); and

- (c) further or alternatively, the Growers have a right to seek a vesting order under s 568F of the *Corporations Act 2001* (see Bradbrook Croft and Hay (2009) at [16.25], esp at 518).

Dated 6 May 2010

Garry Bigmore and Sam Hopper

A handwritten signature in cursive script, appearing to read "Garry Bigmore and Sam Hopper", written over a horizontal dotted line.

Clarendon Lawyers