

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 TO THE INTERLOCUTORY APPLICATION DATED 7 APRIL 2010**

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 GERARD THACKRAY**

First Defendant

**ANTHONY GREGORY MCGRATH**

Second Defendant

**COLIN MCINTOSH NICOL**

Third Defendant

**THE GROWERS LISTED IN SCHEDULE 8 OF THE MINUTE OF AMENDED ORIGINATING PROCESS ANNEXED TO THE PLAINTIFFS' APPLICATION DATED 10 MAY 2010**

Fourth Defendants

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## **PLAINTIFFS' REPLY SUBMISSIONS FOR 12 MAY 2010 HEARING**

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### **Termination of the Head Leases**

1. The Liquidators approach the Court seeking directions as to the proper course to take in relation to the Head Leases. The Liquidators seek direction to terminate the Head Leases for breach.

2. Those Head Leases are in grave and long-standing default. The principal default is the failure to meet the covenant of care and maintenance of the Olive Groves. Without substantial and continuing further expenditure, the Olive Properties will waste. The Liquidators are unable to make that expenditure. Time is of the essence.
3. Notices of default were issued by GSOC and GSOH (the landlords) to GSMAL (the head tenant) on 25 February 2010. In accordance with the terms of the lease, they provided 1 month (subject to certain extensions to cure) to remedy. It is not in issue that there are noticed defaults which have not been remedied.
4. No party (including the objectors) has come forward to cure those defaults, nor provide against their future recurrence.
5. The 3 companies for which the Liquidators have responsibility (being both the 2 landlords and the head tenant) are insolvent and (with the exception of the contemplated sale of the Olive Properties) unable to raise monies or incur further liabilities.
6. The tenant's circumstances are well and widely known by interested parties. Growers have known:
  - (a) for 12 months, of the insolvency of the tenant by reason of the appointment of Voluntary Administrators to it, and 2 days later, Receivers and Managers: Affidavit of Andrew John Saker sworn 10 March 2010 (**Saker Affidavit**) at ¶¶24, 27;
  - (b) for 6 months, of the resolution of the head tenant's creditors to liquidate the head tenant after the inability of its Administrators to identify a route to solvency (since 19 November 2009): Saker Affidavit ¶ 28; AJS-17: p215, 19: p315, 20: p321 and 21: p327;
  - (c) for 5 months, of the failure (after search) to find a replacement for the head tenant as responsible entity of the managed investment schemes (since at least 11 December 2009, Saker Affidavit p332);
  - (d) for 5 months, of the proposed winding up of the Olive Schemes, possible breaches of the Head Leases and the prospect of the landlords terminating the Head Leases and, automatically thereby, the Growers' (the subtenants) subleases (since 11 December 2009): Saker Affidavit at p.346;

- (e) for 3 ½ months, of the failure to solicit funds from the Growers to cure the head tenant's defaults: Saker Affidavit p349;
  - (f) for 3½ months, of the winding up of the Olive Schemes and the further risk of termination of the Head Leases (since 25 January 2010): Saker Affidavit p.348;
  - (g) for 2½ months, of the notices of default issued by the landlords to the tenant for breach of the Head Leases and providing for 1 month to remedy, failing which the leases will be terminated: Saker Affidavit p.350; and
  - (h) for 1 month, of these proceedings (since 8 April 2010).
7. During the preceding 12 months, the Liquidators (with the Receivers and Managers) have partly met the burden of care and maintenance of the Olive Properties. They have been unable to fully meet that burden. In consequence, the Olive Properties have been adversely affected: Affidavit of J Gumley sworn 19 April 2010 (**Gumley Affidavit**) at ¶50.
8. The care and maintenance obligations of the Olive Properties (which the head tenant has failed to keep and the landlords have partly undertaken) include matters of public safety, such as the provision of firebreaks: Gumley Affidavit at ¶¶15 and 20.
9. The Liquidators have funded part of that expenditure by borrowing of the landlords from the contemplated purchasers of the Olive Groves. However, that source of funds is now exhausted. No other source of funds is apparent.
10. Consequently, the Liquidators:
- (a) on behalf of landlords, seek directions that they are justified in terminating the Head Leases; and
  - (b) on behalf of the head tenant, have brought these proceedings to afford interested parties a final opportunity to provide funding to cure the defaults or otherwise show cause why the Head Leases should not be terminated.

### **Contemplated sale of the Olive Properties**

11. Although only in control of (part of) GSMAL since March 2010, they have procured (with the Receivers and Managers) a sale of the Olive Properties by the landlords. That sale is expressly contingent on the approval of this Court.
12. The purchasers require to purchase the Olive Properties free and clear of liens and encumbrances. The purchase is expressly conditional upon a recognition by the Court that there are no such interests remaining in the Olive Properties.
13. That recognition would not be possible whilst the subleases remained in place. It is not in issue that the termination of the Head Leases has the necessary result of terminating the subleases (subject to one argument discussed below).
14. Consequently, the Liquidators:
  - (a) have a proper and necessary reason for expedition in relation to the termination of the Head Leases and approval of the sale;
  - (b) are unable to proceed with the sale without a determination of the matters sought in the Minute of Amended Originating Process annexed as A to the Plaintiffs' interlocutory process dated 10 May 2010 (**Minute of Amended Originating Process**); and
  - (c) approach the Court for directions in relation to the proposed sale.
15. If the sale does not proceed, the prospects of realising value from the Olive Properties are uncertain for the landlords (and, indeed, for any person), which may prejudice the timing and amount of any dividend from the landlords.

### **Alternatives to sale**

16. Neither objector opposes the sale and, indeed, each objector supports the sale (although stipulating that the proceeds must be held on trust for the true beneficiaries to be determined): Growers' submissions ¶2; BEN submissions ¶48.
17. However, that sale is not possible without orders, because the purchasers require the assets to be free and clear of encumbrances and for the status to be recognised by the Court.
18. In substance, the objectors contend that the subleases are not (presently or at all) capable of termination by the landlords terminating the Head Leases for breach by GSMAL. If that proposition were true, the Liquidators should not be

directed to terminate the Head Leases and no declaration may be made. If no such declaration were made, the Olive Properties will remain encumbered by valid (and, on the objectors' argument, effectively interminable) subleases. The conditions precedent of the sale will therefore fail, and the sale will not be accomplished.

19. The objectors' proposed alternative is that the sublessees "surrender" their subleases for value (being recourse to the proceeds of sale to be determined).
20. One difficulty is that the objectors represent less than  $(40/4065=)$  0.76% of the Growers. On one hand they seek to argue that the subleases are inviolable. On the other hand they argue that less than 1% of Growers can bind all Growers to surrender those immaculate (and diverse) interests in return for a claim against a pool with unspecified competing claimants. It is also not clear how compliance with s.601GC of the *Corporations Act 2001* (Cth) ("**Act**") is to be satisfied.
21. The constitution of a managed investment scheme may only be modified by (i) a special resolution of the members of the scheme, or (ii) by the responsible entity if it reasonably considers that the change will not adversely affect members' rights: s.601GC and Constitution cl. 40 (Saker Affidavit p. 59). Neither ground has been satisfied. The constitution is binding at law: s. 601GB and Constitution cl. 41.5 (Saker Affidavit p. 60).

## **OBJECTIONS**

22. Set against the proposed directions of the Liquidators are the 6 objections advanced by the objectors.
23. In survey, those objections are:
  - (a) Section 511 does not permit the Court to make a final determination of rights: Growers' Submissions ¶¶3-8;
  - (b) The subleases grant an interminable interest in the olive produce and/or Olive Properties to the Growers: Growers' Submissions ¶21-48; BEN ¶39-70;
  - (c) It would be inequitable to terminate the Grower subleases where the Growers are not in default and the Growers are entitled to relief against forfeiture: Growers ¶¶60-67; BEN Submissions ¶71-78;

- (d) The Growers have valuable property rights: Growers' Submissions ¶¶2, 10-12, 49-59, 79;
- (e) That the Liquidators are acting in a conflict of interest: Growers ¶60 (indirectly); BEN Submissions ¶¶79 -90; and
- (f) That the orders made in the *Timbercorp* proceedings are appropriate: Growers' Submissions ¶¶60-78.

### **Section 511 does not permit a final determination of rights**

- 24. The Liquidators submit that s.511 permits a final determination of rights as between parties.
- 25. The objection raised by the Growers only applies to Orders 12 and 13 of the Minute of Amended Originating Process (the declarations). Those declarations are not sought in respect of hypothetical future circumstances. They will only be sought if (and once) the Court grants the directions that the Liquidators are justified in terminating the Head Leases and the landlords then effect re-entry to the Olive Properties. It is anticipated that the re-entry can be effected (and deposited to) in less than half a day if the directions that the terminations are justified are made.
- 26. Section 511 relevantly provides:

#### **511 - Application to Court to have questions determined or powers exercised**

511(1) **[Application for determination or exercise of powers]** The liquidator, or any contributory or creditor may apply to the Court:

- (a) To determine any question arising in the winding up of a company; or
- (b) To exercise all or any of the powers that the Court might exercise if the company were being wound up by the Court.

[...]

511(2) **[Court's power]** The Court, if satisfied that the determination of the question or the exercise of power will be just and beneficial, may accede wholly or partially to any such application on such terms and conditions as it thinks fit or may make such other order on the application as it thinks just.

- 27. The language of s.511 is cast in significantly broader terms than other provisions of the Act which provide for the court to give directions to external administrators. Each of ss. 424(1) (controllers of property) and 479(3) (court-

appointed liquidators) provide only that application may be made to the Court “for directions in relation to any matter arising”. The expression “determine any question arising” is particular to s.511.

28. The Court’s powers under s.511 of the Act have been characterised as being declaratory in nature: RS French, ‘Declarations: Homer Simpson’s Remedy – Is there anything they cannot do?’ in Dharmananda and Papamatheos, *Perspectives on Declaratory Relief* (2009) at 32.
29. The prevailing modern view of the power under ss.479 and 511 is stated in two recent decisions:

There is no logical reason why final orders binding on other persons cannot be made on applications under s 479(3) with respect to other subject matters. [...] I can see no reason why binding orders cannot be made where the parties affected have been given the opportunity to be heard: *ASC v Melbourne Asset Management Nominees Pty Ltd* (1994) 49 FCR 334 at 352; (1994) 121 ALR 626 (Northrop J).

Given the more substantive character of the applications contemplated by s 511(1)(a) the [observations of Northrop J cited above] are even more apposite in applications made under that provision. Whether the Court should proceed to entertain applications for the determination of substantive rights and award final relief as between competing creditors and others in an application under s 511, is a matter of discretion. [...] In my opinion it is open to the Court, in a suitable case, to entertain an application for the determination of questions under s 511 by joining affected parties with competing interests as defendants and permitting them to file cross-claims for declaratory relief as between themselves and any other interested parties and the liquidator so that there can be a *res judicata* between all of them. Such a course may be appropriate where the evidence necessary to determine the questions and the competing claims is largely documentary and amenable to expeditious hearing and determination. Otherwise the parties can simply commence their own substantive proceedings: *Meadow Springs Fairway Resort Ltd v Balanced Securities Ltd* [2007] FCA 1443 at [50] to 51]; (2007) 25 ACLC 1443 (French J).

30. The Liquidators submit that the present case is a suitable one for determination pursuant to s.511 in that (i) the interested parties have been given notice, indeed joined, and an opportunity to be heard, (ii) the case is largely documentary, (iii) the case is amenable to expeditious hearing and determination.
31. The alternative recognised by French J (as he then was) was for the parties to “commence their own substantive proceedings”. That alternative has, in fact, been adopted here by the joining of the Growers and the Bank. If there be any defect in the procedure in constituting that proceedings (and none is identified),

the Court has regard to O 2 r 1(1), made applicable in these proceedings by *Supreme Court (Corporations) (WA) Rules 2004* r 1.3(2).

32. There is, as cited in the plaintiffs' earlier submissions, cases which take a view that provisions *other than* s.511 do not – as hearing for directions – give rise to a *res judicata*: principally *G B Nathan & Co Pty Ltd (In Liq)* (1991) 24 NSWLR 674.
33. The Liquidators submit that that case (i) is a correct statement of the s.479(3) when the application *is for directions only*, (ii) provides expressly, in the quote found at ¶4 of the Growers' submissions, that the Court procedures are sufficiently flexible to enable a directions hearing to be altered in such a way as to give rise to a *res judicata*, and (iii) does not state a principle inconsistent with the decisions relied upon in relation to s.511.
34. Further, s.511 provides for an application permitting the Court to “determine any question arising in the winding up of a company”: s.511(1)(a). The language is broad and unqualified and distinguishable from the other sections. Section 511 is therefore suited to conveying more than a mere right to seek directions.
35. Alternatively, if s.511 be altogether unavailable, the form and substance of the Minute of Amended Originating Process is broad enough to comprehend a declaration under the Court's general power. It is recognised that “the only real limitation upon the court's jurisdiction to make declarations arises where a statute expressly, or by necessary implication, ousts the court's jurisdiction”: RP Meagher, JD Heyon and MJ Leeming, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (LexisNexis, 4<sup>th</sup> Ed, 2002) [19-105](p.624). No such ouster is identified or apparent.
36. The grounds upon which relief may be granted are summarised by Lockhart J in *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 139 ALR 663 at 670-671, namely:
  - (a) The determination of a question that is not abstract or hypothetical, directed to the determination of a legal controversy, producing real consequences for the parties;
  - (b) The applicant must seek relief in relation to a real circumstances, and not “circumstances that [have] not occurred and might never happen”;
  - (c) The party seeking declaratory relief must have a real interest to raise it; and

(d) Generally, there must be a proper contradictor.

37. The Liquidators submit that those circumstances are satisfied in the present proceedings.

**Subleases grant an interminable interest in the olive produce or property**

38. It is convenient to commence by stating the matters not in issue, namely:

- (a) The Growers' interests in the Olive Properties arise from the subleases granted to them by GSMAL which, itself, holds Head Leases granted to it by the landlords;
- (b) GSMAL is in default of a number of covenants, the most economically significant being covenants to care for and maintain the Olive Properties;
- (c) Those defaults are continuing;
- (d) Those defaults have adversely affected the Olive Properties;
- (e) Those defaults will, unremedied, continue to adversely affect the Olive Properties;
- (f) GSMAL has been served with notices of default in relation to those defaults;
- (g) GSMAL has not cured the past defaults within the time specified in the notices or at all;
- (h) Part only of GSMAL's obligations have been met by the landlords (including by their external controllers), at significant expense;
- (i) GSMAL has no financial resources of its own to cure those defaults retrospectively or prospectively;
- (j) No party has offered to remedy those defaults, or to assist GSMAL to remedy those defaults; and
- (k) In the ordinary course, the termination of a Head Lease determines the subleases in respect of the leased property.

39. The Growers' objection is stated as the assertion that the Growers "have valuable property rights" ¶2, and "the Growers have an interest in [the land, buildings, improvements, Olive Trees and water rights] ¶11.

40. That the Growers presently have property rights in the form of their subleases is not in issue. The questions are, rather:
- (a) whether those subleases will be terminated upon any termination of the Head Leases; and
  - (b) whether there is any reason to stay the hand of the landlords.
41. Whether or not the subleases are valuable is a secondary question: it is not, of itself, a ground for relief against forfeiture, or a reason to stay the hand of the landlords. As will be seen below, the evidence does not support the contention that the subleases are valuable.
42. The first Grower objection appears to be that the plain words of Cl. 6.3 of the Head Leases (*“the parties agree and acknowledge that the Olive Grove Infrastructure and Olive Trees are and will remain the property of the Owner”*) is “ambiguous” and should be read down because:
- (a) it was designed to “ensure that the Growers are not deemed to have acquired a capital asset through the payment of rent or other fees”: Grower ¶21(a);
  - (b) the obligations of the head tenant to care for and maintain the olive assets give Cl 6.3 of the Head Lease an unspecified meaning which benefits the Growers; and
  - (c) clause 3.1 of the Head Lease provides that the “Owner leases to the Lessee and the Lessee takes a lease of the Leased Land together with all improvements [...] subject to the terms and conditions of this lease.
43. A showing of ambiguity depends upon multiple competing meanings, open in the context. None are shown, or apparent, here.
44. It is not apparent why recognition that a prominent feature of the Olive Schemes was to procure a tax deduction which would be *unavailable* if the Grower were to receive a capital interest in the scheme is relevant or persuasive to explain why the Grower in fact received an *interminable* interest in the Olive Properties.
45. The language used in the provisions cited is clear and does what might be expected of any lease agreement: grant a leasehold subject to terms. It is difficult to ascertain a further argument from the submissions.

46. The Growers' submissions are premised upon (and confined by) the qualification in paragraph 49 "While the Sub-Leases remain on foot [...]". The question, however, is whether the subleases will determine if the Head Leases are terminated.
47. The Bendigo and Adelaide Bank ("**BEN**") objection concerns cl. 6.4 of the Head Lease ("*the Olive produce and rights, benefits and credits arising from carbon sequestration on the Leased Land during the Term are and will remain the property of the Lessee or where applicable, the property of a Grower, on accordance with the terms of a Lease and Management Agreement, and may be sold or otherwise dealt with by the Lessee or those Growers*").
48. The question is whether that right determines, as with every other rights under the Head Leases, upon the determination of Head Lease, or whether it continues either (i) for the full term of the lease (i.e. 20 years), or (ii) in perpetuity.
49. BEN acknowledges that on one view the acknowledgement may be limited to the situation where the Head Lease remains on foot: ¶155.
50. The alternative construction advanced is that, if there be no default by the Growers, it may continue, even if the Head Lease be otherwise determined.
51. There are many reasons to reject this construction. First, under cl. 14.1, the "*Owner will be entitled to terminate this Lease and the Term if the Lessee is in default of any of the Lessee's Obligations and such default has continued [...] after receipt by the Lessee of written notice from the Owner specifying the default are requiring the default to be remedied.*"
52. "Lease" is defined to be "*the lease granted by the deed, as varied from time to time*". Cl. 1. There is no reason advanced, or apparent, why clause 6.4 is to be regarded as outside the "Lease". In particular, there is no clause providing that cl. 6.4 survives the termination of the Lease.
53. "Term" is defined to be "*the term specified in Item 5 of the Schedule and when the context requires includes any shorter term (in the event of the early determination of the Term)[...]*": Cl.1.
54. Finally, clause 15.3 expressly provides that "*The Owner will be legally entitled to any Olive Produce not harvested during the Term [...] not removed from the Leased Land within 3 months after the expiry or termination of the Term*". That clause is framed as operative, not recitative, and it is not confined as to the

“Lessee”. Further, Cl. 17.4 specifically provides that no sublease may excuse the Lessee from its obligations, which here include a recognition of the proprietorship of the Owner in Olive Produced not removed within 3 months of termination.

55. Where there is a general provision which, if applied in its entirety, would neutralise a specific provision dealing with the same subject matter, the specific provision must be read as a proviso to the general provision: *Goodwin v Phillips* (1908) 7 CLR 1 at 14 per O'Connor J. Here, cl. 15.3 is a specific exception to the general provisions under cl. 6.4 and with respect to the specific circumstance of termination, prevails.
56. Although s.11(2) of the *Property Law Act 1969* (WA) does permit a third party beneficiary of a contractual promise to enforce certain promises, the absence of a relevant promise leaves nothing for the alleged third party beneficiary to enforce.
57. Consequently, the effect of termination of the Head Leases will be to determine all the rights under the Lease, including the right to fruit harvested later than 3 months after a termination.

### **The growers have valuable property rights**

58. That the Growers have legal rights provided in and subject to (i) their subleases, and (ii) the Head Leases is not in issue.
59. The issue of whether those property rights are valuable is, however, assumed rather established than by the objections.
60. The best evidence as to the value of the subleases is the Solvency and Viability analysis prepared by the Receivers and Managers and which is annexed as AGM-1 to the affidavit of Anthony McGrath sworn 23 April 2010.
61. That document was summarised and circulated to Growers on or about 15 December 2009 and made available to the Growers via the internet investor portal: 23 April 2010 McGrath Affidavit ¶3.7. Growers were advised that the forecast cash flows to Growers were not achievable as no Responsible Entity would be willing to spend the amounts require to achieve the expected return: McGrath ¶3.8.
62. That report shows that, in summary, over the approximately 18 remaining years of the schemes lives, the Schemes perform as follow (in undiscounted terms):

Olive Scheme	2005	2006	2007	2007	2008	Totals
	Organic	Organic	Organic	Diversified	Diversified	
	\$'000	\$'000	\$'000	\$'000	\$'000	\$'000
Net Revenue	19,520	47,330	12,890	84,430	149,860	314,030
Total Expenses	(20,560)	(51,210)	(13,680)	(55,950)	(88,150)	(229,550)
Total Pre-tax cash flow	(1,040)	(3,880)	(790)	28,480	61,710	84,480
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Source: 23 April 2010 McGrath	17	58	101	144	189	
	\$m	\$m	\$m	\$m	\$m	\$m
Grower cash flow (pre tax)	9.0	1.2	0.4	18.3	53.5	82.4
RE cash flow (pre tax)	(10.0)	(5.0)	(1.2)	10.2	8.2	2.2
Net Scheme cash flow	(1.0)	(3.8)	(0.8)	28.5	61.7	84.6
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Cash flow negative until	Always	Always	Always	2021	2024	
Cash contribution required (\$m)	(10.0)	(12.9)	(3.7)	(12.1)	(21.0)	(59.7)
Until year	2028	2013	2014	2012	2015	
Source: 23 April 2010 McGrath	15	56	99	142	187	

63. Several conclusions can be drawn from this summary.
64. First, for the 2005 Organic, 2006 Organic and 2007 Organic Olive Schemes, the net scheme cash flow is negative over the lives of the schemes. The only means by which any Grower can obtain the identified cash flow is on the assumption that a responsible entity will fund and absorb those losses.
65. That assumption is without any foundation in reality where (i) GSMAL is incapable of meeting those expenses, (ii) no other responsible entity has been identified, (iii) no other entity has offered to meet that shortfall, despite a search, and (iv) no entity would rationally assume that obligation when its losses would exceed its gains.
66. The circumstances for those Olive Schemes, is, however, worse than it appears. In the case of the 2005 Organic Olive Groves, those losses occur in every single year. However, in the case of the 2006 Organic and 2007 Organic Olive Schemes, early losses are succeeded by later gains (although the aggregate in each case remains negative). Those capital commitments would continue for many years before they began to be reduced (although not, in any case, to zero). This means that any responsible entity would require to finance larger losses (in the earlier stages of the scheme) than the aggregate loss it ultimately bore. That can be seen from the fact that the (negative) cash contribution required line exceeds the (negative) net scheme cash flow. The amounts above do not reflect interest, discounting or finance costs. Any rational replacement

entity would expect to make a profit for the risk and commitment of funds contemplated by the role of responsible entity.

67. In each of those cases, the Olive Scheme suffers from a net negative cash flow because the aggregate net cash flow is split between the Growers and the responsible entity and the Grower positive cash flow is exceeded by the responsible entity loss. That is, those schemes would only produce cash flow for Growers if the responsible entity spent *more* in costs than the Growers withdraw in receipts.
68. In these circumstances, there is no reasonable commercial prospect that such a responsible entity will be found. This is consistent with the finding of the Receivers and Managers, published to the Growers in on about December 2009, that after a search, no responsible entity could be identified: Saker Affidavit at p. 332 to 347.
69. For the 2007 and 2008 Diversified Olive Schemes, the circumstances initially appear somewhat more favourable. Each is anticipated, over the 20 year life of the scheme, to produce a net positive cash flow for the responsible entity and the Growers.
70. However, producing that anticipated future cash flow requires a very substantial initial contribution of funds to achieve. That amount is \$12.1m and \$21.6m for the 2007 and 2008 Diversified Olive Schemes respectively. Thereafter, those schemes are anticipated to produce positive cash flow (which the projections show will ultimately exceed the cash contribution). They each depend, however, on the very substantial initial contributions of capital. The amounts are for undiscounted, without provision for interest or financing costs.
71. The Receivers and Managers report that they were unable to attract a responsible entity which was prepared to assume those risks. No replacement responsible entity has been identified by the objectors. In the meantime, a significant sum has already been spent in partial satisfaction of those some of those care and maintenance expenses. No source has been identified to meet those expenses.
72. Mr Lynch's report, exhibited to his affidavit sworn 5 May 2010 arrives at a different view. Mr Lynch concludes that the value of the Growers' interests in the Olive Schemes are between \$18.4m (at a discount rate of 17.5%) and \$15.7m (at a discount rate of 20%): Lynch Report p.13.

73. Mr Lynch endorses the assumptions and cash flows prepared by the Receivers and Managers: Lynch Report p. 9 and 11.
74. Mr Lynch's approach is to commence with the Receivers and Managers' cash flows and discount future Grower earnings by applying a net present value discount of 17.5% to 20.0%: Lynch Report at p. 9 and pp 14.
75. However, it is important to appreciate that Mr Lynch's valuation considers only the hypothetical cash flows to be received by the Growers on the *assumption* that a responsible entity assumes the negative cash flows and financing obligations which are required to be assumed by a responsible entity of the Olive Schemes: Lynch report at pp. 5 ("on the assumption of a valid and continuing lease" and "assuming [...] project continuity") and 7 ("An assessment of the Growers value assumes both the agronomic and capital matters would have been remedied, in the event of the projects continuing").
76. Mr Lynch also assumes that the underperformance of the Olive Properties identified by Mr Miles and Mr Gumley will be remedied: p.7. No reason is advanced for that assumption. Mr Gumley deposes that as a result of the defaults by GSMAL, tree growth has slowed, fruit yield potential has declined, and that these matters will adversely affect fruit yield in the present and future years: Gumley 19 April 2010 at ¶¶50. In the absence of further funding by the landlords, the fruit yield will decline further, not improve: Gumley 19 April 2010 at ¶¶44 to 54.
77. These assumptions permit Mr Lynch to reach his conclusion as to value. Mr Lynch does not provide in his evaluation for (i) the cessation of care and maintenance expenditure by GSMAL, (ii) the assumption of that expenditure by the Growers, (iii) the adverse effect of the existing defaults, or (iv) the withholding of proceeds from olive harvests to satisfy capital expenditure requirements already incurred by the Liquidators and Receivers and Managers.
78. The consequence of those assumptions is simply to ignore the costs of the responsible entity. That is not an assumption defended by Mr Lynch.
79. The consequence of the assuming away of the existing and future defaults of GSMAL, and the absence of any replacement responsible entity is that the conclusion as to value is wholly unrealistic. It bears no relationship to the actual circumstances of the Growers or of GSMAL.

*Relief against forfeiture*

80. In any event, the hypothetical assumption of value in the Growers' interests does not cure the existing defaults nor furnish a ground why the default notices can be ignored.
81. The proper course in order to preserve the subleases (whether or not the Lynch conclusion be correct) is for the Growers to assume the obligations of the GSMAL pursuant to s.81(4) of the *Property Law Act 1969* (WA). That section provides for relief against forfeiture in favour of a sub-tenant.
82. The Growers submissions contend that whether or not the Growers may seek relief against forfeiture is a hypothetical distraction: Grower submissions at ¶62. The Liquidators submit that it is the principal question which arises in the actual circumstance of mature notices of default.
83. The Growers contend that they do have an arguable case for such relief against forfeiture: Grower submissions at ¶¶63 to 67.
84. The Growers submissions refer to authority which makes it clear that the necessary predicate to relief against forfeiture for a sub-tenant is the assumption and discharge of the Head Lessor's obligations: Grower submissions at ¶65(c) to (h).
85. Those submissions accurately summarise the relevant principles. The critical absent factors in the present case are (i) any offer by the Growers (or any of them) to assume the terms of the Head Lease, and (ii) any showing of capacity or willingness to discharge the obligations under those Head Leases.
86. It is accepted by the Liquidators that if such an offer were promptly made, accompanied by the satisfaction of past defaults and adequate assurance of the satisfaction of future obligations, that relief against forfeiture would likely be appropriate and the present application would likely not be properly continued.
87. One purpose of this application was to solicit any such offers, so that the status of the subleases could be determined (including that they be restored to good standing in place of the Head Leases).
88. The Growers detailed statement of the applicable principles only serves to underline the absence of any offer by any Growers to satisfy the fundamental requirements.
89. No such offer has been made.

### **It would be inequitable to terminate the Grower subleases**

90. The “unconscionability” complained of by the Growers is that a windfall gain accrues to creditors at the expense of Growers’ property rights: Grower submissions at ¶67. That argument falls into two errors.
91. First, the Growers’ recognised property rights in the subleases are not rights at large: they are confined by the rights of the Head Lessor who grants the sublease and the right to subrogate into those rights under s.81(4) of the PLA. There is a clear mechanism to exercise those rights. It has not been exercised.
92. In short, the Grower submissions contend that the Grower property rights should be protected when convenient, but the same contractual and proprietary rights of others should be neglected when inconvenient. It is not possible to take the benefits of a lease without taking its burdens. However, that is precisely the course to which the Growers seek to persuade the Court.
93. Secondly, the employment of the term “unconscionability” does not create a cause of action. The principles surrounding the application of doctrines of unconscientiousness are, although not closed, well developed. They do not afford a dissatisfied party the opportunity to re-trade his bargain when it becomes inconvenient.
94. In each of *Re Timbercorp Securities Ltd (in liq) and Ors* [2009] VSC 510 at [75]; (2009) 74 ACSR 626 and *Re Hazelton* [2002] FCA 529 at [30] – [35]; (2002) 41 ACSR 472 (cited by the Growers, at ¶69 and 72) Justices Goldberg and Robson JJ respectively cited the judgments of the Court in *Muschinski v Dodds* (1985) 160 CLR 583 to the effect that:
- “The flexible remedy of the constructive trust is not so formless as to place proprietary rights in the discretionary disposition of a court acting according to vague notions of what is fair”* per Brennan J at 608; and
- “The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles: [...] proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion ... subjective views about which party ‘ought to win’ [...] and ‘the formless void of individual moral opinion’ [...]”* per Deane J at 615-6.
95. The present circumstances require the determination of the rights of parties having regard to the instruments entered by them and binding upon them.

Unconscientiousness may permit an attack upon the circumstances of entry into, or the subsequent enforceability of, an agreement. However, no such attack is made squarely here. The question here remains what are the rights of the parties under the operative agreements.

96. The court has regard to the objective circumstances of the transaction where those facts illuminate the meanings of the words: *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 351 (Mason J). The language of the present schemes were drafted to accomplish a tax deduction for the fees paid by the Growers. In order to accomplish that it was necessary to ensure that a Grower did not make a payment that could be characterised as being capital in nature. The consequence – that the Growers do not have ownership of the assets upon which they depended for future cash flows – is not an accidental or inadvertent result. It is the quite deliberate objective of the pursuit of a tax benefit.
97. It is therefore a misplaced submission that the ownership rights that were retained by GSOC and GSOH are an “unconscionable” “windfall”: Grower submissions at ¶67. No attempt has been made to recognise the tax benefit realised by the Growers in calculating the alleged “windfall”.
98. A second confusion in relation to unconscientiousness arises in relation to the status of the sale. The Growers maintain that the “future maintenance of the trees is not relevant as the olive groves have been sold”: Grower submissions at ¶67(c). That statement misunderstands the present status of the sale. The sale agreements are entirely contingent on the relief sought from Court by this Originating Process. If that relief is not granted, the Liquidators do not have an enforceable right to sell against the purchasers, and the issue of tree maintenance remains.
99. Tree maintenance is, however, very relevant to the defaults of GSMAL, where those defaults have caused damage to the trees and there is no remedy in prospect. It is that circumstance which may be appropriately addressed by a proper offer to remedy the past defaults, should any action for relief against forfeiture be commenced or foreshadowed.
100. The inequity complained of by BEN is that a sub-tenant may accept and face the risk of the Head Tenant defaulting but, he should not have to face the risk of the Head Tenant and the Landlord colluding: BEN submissions at ¶76.

101. That proposition, whatever its merits, is not applicable here. The difficulty for GSMAL is not a collusion with the Landlords to deprive the Growers of their entitlements: it is GSMAL's total inability to meet the obligations it undertook by the Head Leases. No suggestion is offered as to how GSMAL may cure those defaults.
102. The adjunct to that objection is that, by granting the Head Leases in circumstances where it knew that there were to be sub-tenants, the Landlord is to be restrained from acting inconsistently with that assumption: BEN ¶78.
103. In *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, the registered proprietors were found to have taken a transfer of the land subject to a contractual right to repurchase. Wilson, Brennan and Toohey JJ held the owners took subject to a constructive trust, Mason CJ and Dawson J subject to an express trust. Critically, however, there was a plain acceptance a clear right to repurchase.
104. No such right being identified here (other than cl. 6.4, which does not have the result contended for, for the reasons given above), the Landlords are not in circumstances of fraud complained of in *Bahr*.
105. Similarly in *Snowlong Pty Ltd v Choe* (1991) 23 NSWLR 198, Wood J held that the purchaser acknowledged or agreed to recognise that the lessee had a lease for five years, took subject to an express trust on those terms. Here, however, the objector is not content with the Head Lessor taking subject to the terms. Rather, it is contended that the Landlord must take subject to a Lease *irrespective* of compliance with its terms.
106. The circumstances identified do not disclose an acknowledgement of the kind required to give rise to a constructive or express trust.

### **Conflict of interest**

107. When the Liquidators caused GSOC and GSOH to issue notice of default, they were not in control of the recipient, GSMAL. However, following the issue of the notices of default, the Receivers and Managers withdrew from their role in respect of the Olive Schemes of GSMAL, and the Liquidators assumed that control.
108. The Liquidators are conscious of the unusual circumstance of being Liquidator of both the landlords and the tenant. That consciousness is one of the reasons they come to the Court seeking directions. The issue has not been concealed from any party: it was squarely raised in the plaintiffs' outline of submissions for

this hearing filed on 8 April 2010 (and subsequently revised on 15 April 2010) and posted to the plaintiffs' websites: Plaintiffs' submissions ¶¶52-55.

109. The Liquidators make three observations in relation to their role. Firstly, the Liquidators are not averse to the appointment of a special purpose liquidator. Indeed, that a draft application to that effect was circulated by the Growers, but has not, for whatever reason, been made.
110. In correspondence to the Growers, the Liquidators asked (i) how will the supplementary liquidators' fees be paid, given that GSMAL is impecunious and unlikely to be otherwise, (ii) the ambit of the role of a special purpose liquidator, and (iii) what the response of the Growers would be if the special purpose liquidator would recommend against an application for relief against forfeiture (the Growers would proceed anyway). Those questions remain relevant: no supplementary or replacement liquidator is in prospect.
111. Secondly, since the Growers can, under s. 81(4) apply for relief against forfeiture without the involvement of GSMAL (or its Liquidators), there is no bar to the Growers seeking relief directly. The Liquidators of GSMAL do not seek in any way to restrict any such application.
112. Thirdly, had the Liquidators simply resigned from their role at GSMAL, that would not have advanced the interests of the Growers. Rather, the Liquidators used funds not available within GSMAL to ensure that each of the Growers was given notice of the proceedings, affording a further opportunity (missed in the scheme termination process) to play a role in the determining the future of the Olive Schemes.
113. It is unclear what role the Growers want the Liquidators to play with respect to GSMAL. It is clear that GSMAL does not have the resources itself to cure the defaults. Any cure of those defaults will depend upon an outside party (and the most interested parties are Growers and, possibly, BEN).
114. The Growers and BEN suggest that the alternative is that GSMAL should exercise its powers to procure a surrender of the sub-leases for value. The difficulty with this proposal is that it assumes the question in issue. If the subleases are more valuable than the cost of curing the defaults, the Growers should fund the cure as part of an application for relief against forfeiture. If the subleases are worth less than the cost of curing the defaults, then they are not valuable assets. If the cost required to cure the defaults under the Head Leases is unattractive to any replacement responsible entity or to any financing party

who might lend against the subleases, the Growers' interests again appear to be without value.

115. A valuation prepared upon a series of wholly unrealistic premises does not render a lease valuable.
116. In GSMAL's actual circumstances of a complete inability to cure any breach, a "real sensible possibility of conflict" does not readily arise: *Queensland Mines Ltd v Hudson* (1978) 18 ALR 1 (PC); *Boulting v Association of Cinematograph, Television & Allied Technicians* [1963] 2 QB 606 at 637–8; [1963] 1 All ER 716; *Chan v Zacharia* (1984) 154 CLR 178; 53 ALR 417 at CLR 205; *Ultra Tune Australia Pty Ltd v McCann and Anor* (1999) 30 ACSR 651 at [76] to [79].
117. No allegation has been made (nor is there any foundation to conclude) that the Liquidators will receive a personal benefit or gain only by reason of the relief sought.
118. Upjohn LJ in *Boulting v Assoc of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606 at 637–8 that the conflict of duty and interest rule:  
 ... must be applied with common sense and with an appreciation of the sort of circumstances in which over the last 200 years and more it has been applied and thrived. It must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not to some theoretical or rhetorical conflict.
119. Having procured a possible sale (at the option of the Court), given the interested parties notice and brought the present proceedings to a head, the Liquidators remain quite ready to step down from their role at GSMAL.
120. It is not clear how that withdrawal, at any time prior, would have advanced the interests of the Growers or BEN.

**The orders made in the *Timbercorp* proceedings are appropriate**

121. Each of the Growers and BEN refer to the *Timbercorp* decision of Robson J as furnishing the solution to the present circumstance: *Re Timbercorp Securities Ltd (in liq)* (2009) 74 ACSR 626.
122. In the circumstances of that case, the liquidators proposed the surrender of certain subleases for value which was unacceptable to the Growers. In that case, although there was advice to the effect that the growers' interests were presently liable to be terminated for default, there was no evidence of default by the Growers: at [60](k). No record of a notice of default appears in the

judgment. The liquidators contended that they had the (apparently unexercised) right to terminate the growers' proprietary interests: [53](e). The Growers submitted that they had the right to seek relief against forfeiture under s.146(4) of the Property Law Act 1958 (Vic) (which concerns the right of a sublessee to seek relief against the forfeiture of a head lease under provisions similar to s.81(4) of the WA PLA): [57](c).

123. Importantly, the Head Lease contained a term providing that the landlord *"irrevocably authorised 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 subleases [...]":* [57](h). Consequently, the subleases bind the Landlord even if the Head Lessee was terminated: [57](i).
124. The case is, therefore, readily distinguishable on its facts from the present circumstances, where mature notices of default await and the Growers have no contractual right to continue with their subleases, as against the landlord, on the terms contained in them, even if the landlord terminated the head lease.
125. Further, and unsurprisingly, a special purpose liquidator appointed to the Head Tenant doubted, based on legal advice, that the growers' interest could be disclaimed by the liquidators of the landlord: [67]. The judge concluded that "[t]here are many complex legal issues that would need to be resolved to precisely identify the proprietary interest of the growers": [62].
126. The orders of Robson J appear well suited to the reported circumstances of that case. There is no legal principle held by that judgment, whether identified in the submissions or otherwise apparent, which bind this court, or which appear to be appropriate to the facts of this case.
127. In a case with different circumstances decided in January this year, the Victorian Court of Appeal distinguished the approach of Robson J in Timbercorp as not to be preferred to an order winding up a managed investment scheme in an appropriate case: *Capelli v Shepard and Ors* [2010] VSCA 2; (2010) 264 ALR 167 (Dodds-Streeton and Mandie JJA and Byrne AJA) at [74]-[75]. A key point of distinction for their Honours was that "in contrast to the Timbercorp scheme, the schemes in the present case were established by unchallenged evidence to be unviable": at [74]. The Court cited a prior decision in which the insolvency of a managed investment scheme had been wound up for insolvency: *Re Orchard Aginvest Ltd* [2008] QSC 2 per Fryberg J at 3.

128. The point of distinction identified by the Court of Appeal is applicable here. The Schemes are available, the Olive Properties require further expenditure which the landlords cannot meet and the Growers and their lender have no appetite to meet.
  
129. The Liquidators submit that the Timbercorp judgment is particular to its facts, and does not mandate that every managed investment scheme the subject of dispute must have its assets reserved for the determination of rights at some future time. Where rights are sufficiently clear, as here, they can be adjudicated without deferral.

R W Douglas

11 May 2010