

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

**GREAT SOUTHERN MANAGERS AUSTRALIA LIMITED (ACN 083 825 405) (IN  
LIQUIDATION) (RECEIVERS AND MANAGERS APPOINTED) INCLUDING IN ITS  
CAPACITY AS RESPONSIBLE ENTITY OF THE MANAGED INVESTMENT  
SCHEMES LISTED IN SCHEDULE 2 TO THE FURTHER AMENDED ORIGINATING  
PROCESS**

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

**GREAT SOUTHERN OLIVE PROCESSING PTY LTD  
(ACN 128 547 437) (IN LIQUIDATION)**

Eighth Plaintiff

**JAMES GERARD THACKRAY**

First Defendant

**ANTHONY GREGORY MCGRATH**

Second Defendant

**COLIN MCINTOSH NICOL AND SIMON ANDREW READ**

Third Defendants

**THE GROWERS LISTED IN SCHEDULE 8 OF THE  
FURTHER AMENDED ORIGINATING PROCESS**

Fourth Defendants

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**STATEMENT OF CLAIM**

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Case Manager: Le Miere J  
Date of Document: 9 July 2010  
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Filed on behalf of: The plaintiffs

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**PARTIES**

1. The first plaintiff (**GSMAL**) was at all material times a corporation incorporated within Australia pursuant to the *Corporations Act 2001* (Cth) (**Act**).
2. The second plaintiff (**GSOC**) was at all material times a corporation incorporated within Australia pursuant to the Act.
3. The third plaintiff (**GSOH**) was at all material times a corporation incorporated within Australia pursuant to the Act.
4. The eighth plaintiff (**GSOP**) was at all material times a corporation incorporated within Australia pursuant to the Act.
5. The fourth plaintiff was at all material times a Registered Liquidator registered pursuant to s.1283 of the Act, bearing Registration No. 176057.
6. The fifth plaintiff was at all material times a Registered Liquidator registered pursuant to s.1283 of the Act, bearing Registration No.16349.
7. The sixth plaintiff was at all material times a Registered Liquidator registered pursuant to s.1283 of the Act, bearing Registration No. 312789.
8. The seventh plaintiff was at all material times a Registered Liquidator registered pursuant to s.1283 of the Act, bearing Registration No. 166883 (together with the fourth, fifth and sixth plaintiffs, the **Liquidators**).
9. On and from 18 May 2009, the first, second and third defendants were together appointed as joint and several receivers and managers of GSMAL (**Receivers and Managers**) by ANZ Fiduciary Services Pty Ltd (ABN 91 100 709 493) (**ANZ Fiduciary Services**) (**Chargee**) which held, as trustee for the lenders pleaded in paragraph 30, 4 fixed and floating charges (**Charges**) registered with the Australian Securities and Investment Commission (**ASIC**) over certain assets of GSMAL.

**Particulars of Charges**

<b>Date</b>	<b>Registered</b>	<b>Chargee</b>	<b>ASIC Charge Reference</b>	<b>Charged Property</b>	<b>Transfer</b>
19.09.2000	26.9.2000	National Australia Bank Limited (ACN 004 044 937)	768260	The undertaking of GSMAL and all its property and assets whatsoever and wheresoever both present and future including: <ol style="list-style-type: none"> <li>1. the good will of GSMAL's business; and</li> <li>2. GSMAL's called but unpaid and uncalled Capital for the time</li> </ol>	Transferred to Australia and New Zealand Banking Group Limited (ACN 005 357 522) ( <b>ANZ Banking Group</b> ) dated 17.05.2005 and registered on 18.5.2005. Transferred to ANZ Fiduciary Services on 23.10.2007 and registered on 24.10.2007

				<p>being; and</p> <p>3. all GSMAL's intellectual property rights (even though some may not be capable of being charged as contemplate by the charge);</p> <p>or any part of the charged property.</p>	
25.10.2007	26.10.2007	ANZ Fiduciary Services	1536298	<p>All of the present and future undertaking, assets and rights of GSMAL including all real and personal property, choses in action, goodwill, uncalled and called but unpaid capital but excluding:</p> <p>1. all undertaking, assets and rights located or taken to be located in Queensland for the purposes of the mortgage duty provisions of the <i>Duties Act 2001</i> (QLD); and</p> <p>2. all undertaking, assets and right located or taken to be located in Western Australia for the purposes of the mortgage duty provisions of the <i>Stamp Act 1921</i> (WA).</p>	N/A
24.10.2007	12.11.2007	ANZ Fiduciary Services	1542445	<p>All of the present and future undertaking, assets and rights of GSMAL located in Western Australia for the purposes of the mortgage duty provisions of the <i>Stamp Act 1921</i> (WA) including all real and personal property, choses in action, goodwill, uncalled and called but unpaid capital.</p>	N/A
21.07.2008	25.7.2008	ANZ Fiduciary Services	1668705	<p>All of the present and future undertaking, assets and rights of GSMAL located in or taken to be located in Queensland for the purposes of the mortgage duty provisions of the <i>Duties Act 2001</i> (QLD) including all real and personal property, choses in action, good will, uncalled and called but unpaid capital.</p>	N/A

10. The fourth defendants listed in Schedule 1 of the Particulars at:
- (a) section 1 are members of a managed investment scheme, 2005 Organic Olives Project (ARSN 112 665 157) (**2005 Organic Scheme**) that was at all material times registered pursuant to Chapter 5C of the Act on and from 8 February 2005;
  - (b) section 2 are members of a managed investment scheme, 2006 Organic Olives Income Project (ARSN 112 665 308) (**2006 Organic Scheme**) that was at all material times registered pursuant to Chapter 5C of the Act on and from 8 February 2005;
  - (c) section 3 are members of a managed investment scheme, 2007 Organic Olives Income Project (ARSN 115 654 950) (**2007 Organic Scheme**) that was at all material times registered pursuant to Chapter 5C of the Act on and from 22 August 2005;
  - (d) section 4 are members of a managed investment scheme, 2007 Diversified Olives Income Project (ARSN 124 197 771) (**2007 Diversified Scheme**) that was at all material times registered pursuant to Chapter 5C of the Act on and from 15 March 2007; and
  - (e) section 5 are members of a managed investment scheme, 2008 Diversified Olives Income Project (ARSN 124 197 897) (**2008 Diversified Scheme**) that was at all material times registered pursuant to Chapter 5C of the Act on and from 15 March 2007,
- (together, the **Growers**).

### Particulars

Schedule 1 of the particulars to be provided.

11. The fourth defendant listed at item 4065 in Schedule 8 of the Further Amended Originating Process was at all material times a banking corporation incorporated within Australia and subject to the Act bearing AFSL No 237879 and ABN 11 068 049 178.

### THE OLIVE PROPERTIES

12. At all material times, GSOC owned the following properties which are located within Western Australia:

- (a) Lot 2 on Plan 17210 being the whole of the land comprising Certificate of Title Volume 1854 Folio 199 (**Waterville Property**);
  - (b) Lot 200 on Deposited Plan 55361 being the whole of the land comprising Certificate of Title Volume 2662 Folio 247 (**Beermullah Property**);
  - (c) Lot 13 on Plan 21851 being the whole of the land comprising Certificate of Title Volume 2096 Folio 426 (**Moore River Property**);
  - (d) Lot 5 on Deposited Plan 35198 being the whole of the land comprising Certificate of Title Volume 2534 Folio 998 and Lot 6 on Deposited Plan 41678 being the whole of the land comprising Certificate of Title Volume 2567 Folio 265 (**Dandaragan Property**); and
  - (e) Lot 5382 on Deposited Plan 206477 being the whole of the land comprising Certificate of Title Volume 2092 Folio 348 (**Twin Brooks Property**).
13. At all material times, GSOC:
- (a) owned Lot 4685 in Deposited Plan 767849 and Lot 5045 in Deposited Plan 43596 (**Collaroy Property**); and
  - (b) beneficially owned Lot 2 in Deposited Plan 1130925 (**Steak Plains Property**),
- which are both located in New South Wales.
14. At all material times, GSOH owned the following properties that are located within Western Australia:
- (a) Lot 141 on Deposited Plan 224668 being the whole of the land comprising Certificate of Title Volume 2107 Folio 268;
  - (b) Lot 589 on Deposited Plan 224668 being the whole of the land comprising Certificate of Title Volume 2107 Folio 269;
  - (c) Lot 851 on Deposited Plan 247097 being the whole of the land comprising Certificate of Title Volume 2107 Folio 270;
  - (d) Lot 852 on Deposited Plan 247098 being the whole of the land comprising Certificate of Title Volume 2107 Folio 271;

- (e) Lot 863 on Deposited Plan 247102 being the whole of the land comprising Certificate of Title Volume 2107 Folio 272;
- (f) Lot 21 on Deposited Plan 224523 being the whole of the land comprising Certificate of Title Volume 2107 Folio 273;
- (g) Lot 25 on Deposited Plan 224523 being the whole of the land comprising Certificate of Title Volume 2107 Folio 274;
- (h) Lot 26 on Deposited Plan 224523 being the whole of the land comprising Certificate of Title Volume 2107 Folio 275;
- (i) Lot 27 on Deposited Plan 224523 being the whole of the land comprising Certificate of Title Volume 799 Folio 24;
- (j) Lot 7077 on Deposited Plan 117973 being the whole of the land comprising Certificate of Title Volume 903 Folio 80;
- (k) Lot 30 on Deposited Plan 224523 being the whole of the land comprising Certificate of Title Volume 907 Folio 76;
- (l) Lot 23644 on Deposited Plan 146749 being the whole of the land comprising Certificate of Title Volume 1019 Folio 375;
- (m) Lot 31 on Deposited Plan 224523 being the whole of the land comprising Certificate of Title Volume 1098 Folio 937;
- (n) Lot 1239 on Deposited Plan 247026 being the whole of the land comprising Certificate of Title Volume 2046 Folio 590;
- (o) Lot 10188 on Deposited Plan 126023 being the whole of the land comprising Certificate of Title Volume 1003 Folio 577;
- (p) Lot 18759 on Deposited Plan 84418 being the whole of the land comprising Certificate of Title Volume 1252 Folio 792;
- (q) Lot 7454 on Deposited Plan 119883 being the whole of the land comprising Certificate of Title Volume 1385 Folio 141;
- (r) Lot 16114 on Deposited Plan 165028 being the whole of the land comprising Certificate of Title Volume 1562 Folio 587;
- (s) Lot 7455 on Deposited Plan 119884 being the whole of the land comprising Certificate of Title Volume 1245 Folio 725; and

- (t) Lot 7372 on Deposited Plan 118919 being the whole of the land comprising Certificate of Title Volume 1010 Folio 809,

(together, the **Avon Valley Property**); and

- (u) Lot 3707 on Deposited Plan 201646 being the whole of the land comprising Certificate of Title Volume 1573 Folio 883;

- (v) Lot 3706 on Deposited Plan 201646 being the whole of the land comprising Certificate of Title Volume 1570 Folio 197;

- (w) Lot 2524 on Deposited Plan 133875 being the whole of the land comprising Certificate of Title Volume 1170 Folio 539; and

- (x) Lot 3708 on Deposited Plan 201646 being the whole of the land comprising Certificate of Title Volume 1170 Folio 472,

(together, the **Preston Valley Property**) (each such property, together with each property pleaded in paragraph 12, together, the **Olive Properties**).

## HEAD LEASES

15. At all material times:

- (a) GSOC had granted a lease of each of the:

- (i) Waterville Property (**Waterville Lease**);
- (ii) Beermullah Property (**Beermullah Lease**);
- (iii) Moore River Property;
- (iv) Dandaragan Property;
- (v) Twin Brooks Property;
- (vi) Collaroy Property;
- (vii) Steak Plains Property; and

- (b) GSOH had granted a lease of each of the:

- (i) Avon Valley Property; and
- (ii) Preston Valley Property,

to GSMAL (the leases pleaded in this paragraph, excluding the leases of the Collaroy Property and Steak Plains Property, together the **Head Leases**).

#### Particulars of Leases

Property	Lease No	Lessor	Lessee	Execution Date	Rent Payable per annum ("Rent")	Commencement date	Expiry date
Waterville Property	K224583	GSOC	GSMAL	12.6.2007	\$10	15.6.2007	1.7.2027
Beermullah Property	K224573	GSOC	GSMAL	12.6.2007	\$10	15.6.2007	1.7.2027
Moore River Property	K575773	GSOC	GSMAL	15.4.2008	\$10	1.5.2008	1.7.2028
Dandaragan Property	K575772	GSOC	GSMAL	15.4.2008	\$10	1.5.2008	1.7.2028
Twin Brooks Property	K210223	GSOC	GSMAL	On or about 15.6.2007	\$10	15.6.2007	1.7.2027
Collaroy Property	AE10920	GSOC	GSMAL	6.6.2008	\$10	6.6.2008	1.7.2028
Steak Plains Property	Not registered	GSOC	GSMAL	On or about 1.5.2009	\$10	On or about 1.5.2009	1.7.2028
Avon Valley Property	J784210	GSOH	GSMAL	9.6.2006	10% of net proceeds of olive harvest	15.6.2006	1.7.2028
Preston Valley Property	J303764	GSOH	GSMAL	22.4.2005	10% of net proceeds of olive harvest	1.3.2005	30.6.2025

16. Each Head Lease obliged GSMAL among other things to:
- (a) annually pay the applicable Rent to the respective lessor of the Olive Property, GSOC or GSOH as applicable (each an **Owner**);
  - (b) at its cost, insure each respective Olive Property against public risk for an amount of not less than \$10 million in the names of GSMAL and the Owner for their respective rights and interests in the respective Olive Property (Head Lease cl 10.2);
  - (c) at its cost, use its reasonable endeavours to annually arrange insurance of each respective Olive Property in the names of GSMAL and the Owner for their respective rights and interests for the time being, so as to provide insurance cover in respect of the interest and obligations of GSMAL and the Owner with 1 or more reputable insurers, against destruction or damage to each respective Olive Property, the plant thereon, the olive trees thereon and the improvements on such Olive Property by fire and other usual risks, and the current and future olive produce by hail, frost, fire and or other usual risks in accordance with

- good industry practices for the commercial cultivation of olives (Head Lease cl 10.1);
- (d) conduct itself in managing each respective Olive Property in accordance with good industry practices for the cultivation of olives (Head Lease cl 6.2(a)(iii));
  - (e) manage, cultivate and work each respective Olive Property so as to maintain and develop the Olive Properties for the purpose of long term commercial cultivation of olives in a proper and skilful manner according to approved methods (Head Lease cl 7.1); and
  - (f) keep the olive trees and the improvements to each respective Olive Property in good and substantial repair, order and condition (Head Lease cl 7.2).
17. Each Head Lease provided that the Owner is entitled to terminate that Head Lease if:
- (a) GSMAL is in default of any of its obligations under that Head Lease pleaded in paragraph 16; and
  - (b) such default has continued:
    - (i) in the case of an obligation to pay money for 1 month; and
    - (ii) in any other case, for a period of 1 month or as is reasonable in the circumstances having regard to relevant agricultural and climatic considerations,after receipt by GSMAL of a written notice from the Owner specifying the default and requiring the default to be remedied (Head Lease cl 14.1).
18. Each Head Lease provided that the Owner is legally entitled to any olive produce not harvested during the term of that Head Lease, and not removed from that Olive Property within 3 months after the termination of the respective Head Lease (Head Lease cl 15.3).
19. Each Head Lease provided for agreement and acknowledgement that the improvements to the Olive Property and the olive trees on the Olive Property the subject of that Head Lease are and will remain the property of that Owner (Head Lease cl 6.3).

20. Each Head Lease provided that GSMAL may sublease the whole or any part of the Olive Property the subject of that Head Lease without the prior consent of the Owner, providing that any such grant of sublease or licence will not relieve, or be deemed to relieve, GSMAL from its obligations to the Owner to observe and perform the respective Head Lease (Head Lease cl 17.4).

### **OLIVE SCHEMES**

21. GSMAL was at all material times the responsible entity of those registered managed investment schemes listed in paragraph 10 above (together, the **Olive Schemes**).
22. GSMAL offered Grovelots in the 2005 Organic Scheme pursuant to:
- (a) a product disclosure statement (**PDS**) dated 3 March 2005;
  - (b) a scheme constitution dated January 2005 and registered with ASIC on 25 January 2005; subsequently varied by deed dated, and registered with ASIC on, 26 September 2008; and
  - (c) an undated compliance plan registered with ASIC on 25 January 2005 and subsequently replaced with a compliance plan dated 20 July 2007 and registered with ASIC on 2 August 2007.
23. GSMAL offered Grovelots in the 2006 Organic Scheme pursuant to:
- (a) a PDS dated 16 December 2005;
  - (b) a scheme constitution dated January 2005 and registered with ASIC on 25 January 2005, which was:
    - (i) replaced with a replacement scheme constitution dated, and registered with ASIC on, 12 December 2005;
    - (ii) further replaced with a replacement scheme constitution dated, and registered with ASIC on, 15 December 2005; and
    - (iii) subsequently varied by deed dated, and registered with ASIC on, 26 September 2008; and
  - (c) an undated compliance plan registered with ASIC on 25 January 2005, which was:

- (i) replaced with a compliance plan dated, and registered with ASIC on, 12 December 2005; and
  - (ii) subsequently replaced with a compliance plan dated 20 July 2007 and registered with ASIC on 2 August 2007.
  
- 24. GSMAL offered Grovelots in the 2007 Organic Scheme pursuant to:
  - (a) a PDS dated 16 December 2005;
  - (b) a supplementary PDS dated 30 June 2006;
  - (c) a scheme constitution dated 2 August 2005 and registered with ASIC on 8 August 2005 which was:
    - (i) replaced with a replacement scheme constitution dated, and registered with ASIC on, 12 December 2005;
    - (ii) varied by deed dated, and registered with ASIC on, 15 December 2005; and
    - (iii) subsequently varied by deed dated, and registered with ASIC on, 26 September 2008; and
  - (d) a compliance plan dated 2 August 2005 and registered with ASIC on 8 August 2005 which was:
    - (i) replaced with a compliance plan dated, and registered with ASIC on, 12 December 2005; and
    - (ii) subsequently replaced with a compliance plan dated 14 June 2006 and registered and with ASIC on 15 June 2006.
  
- 25. GSMAL offered Grovelots in the 2007 Diversified Scheme pursuant to:
  - (a) a PDS dated 4 April 2007;
  - (b) a scheme constitution dated 26 February 2007 and registered with ASIC on 1 March 2007 which was:
    - (i) varied by deed dated 15 March 2007 and registered with ASIC on 4 April 2007; and
    - (ii) subsequently varied by deed dated, and registered with ASIC on, 26 September 2008; and

- (c) a compliance plan dated 26 February 2007 and registered with ASIC on 1 March 2007 and subsequently replaced with a compliance plan dated 20 July 2007 and registered with ASIC on 2 August 2007.
26. GSMAL offered Grovelots in the 2008 Diversified Scheme pursuant to:
- (a) a PDS dated 4 April 2007;
  - (b) a scheme constitution dated 26 February 2007 and registered with ASIC on 1 March 2007 which was:
    - (i) varied by deed dated, and registered with ASIC on, 4 April 2007;
    - (ii) subsequently replaced with a replacement scheme constitution dated 20 May 2008 and registered with ASIC on 23 May 2008; and
    - (iii) subsequently varied by deed dated, and registered with ASIC on, 26 September 2008; and
  - (c) a compliance plan dated 26 February 2007 and registered with ASIC on 1 March 2007.

## **SUBLEASES**

27. Pursuant to each Olive Scheme, GSMAL granted to each respective Grower of each Olive Scheme a sublease (each a **Sublease**) of 1 or more parcels of land within the Olive Properties, each of approximately 0.1 hectares (each a **Grovelot**) on which the cultivation of the olives was proposed to take place pursuant to the applicable Olive Scheme.

### **Particulars of Subleases**

See Item 1 to Item 5 in Schedule 2 of the Particulars to be provided.

28. GSMAL granted each Sublease to each Grower on terms, amongst others, that:
- (a) each respective Grower must annually pay, to GSMAL, rent, comprising a percentage of the proceeds of sale net of the costs of harvest for the olive produce harvested in respect of the applicable Olive Scheme during each financial year as set out below (Sublease cl 3.1):

Olive Scheme	Percentage of net proceeds of olive produce to be taken by GSMAL pursuant to Sublease							
	2006	2007	2008	2009	2010	2011	2012	2013 to expiry of Sublease
2005 Organic	100%	100%	100%	100%	45%	45%	45%	45%
2006 Organic	-	100%	100%	100%	100%	45%	45%	45%
2007 Organic	-	-	100%	100%	100%	100%	45%	45%
2007 Diversified	-	-	100%	100%	100%	100%	40%	40%
2008 Diversified	-	-	-	100%	100%	100%	100%	40%

- (b) each respective Grower must annually pay such insurance premiums as are applicable to the olive trees, the improvements to the Olive Property in respect of the applicable Olive Scheme and the olive produce on the applicable Grovelot (Sublease cl 5.4(a) and (b)).

## CIRCUMSTANCES OF GSMAL

### External Administration

29. On 16 May 2009 the Liquidators were appointed as joint and several voluntary administrators of GSMAL, GSOC, GSOH and GSOP.
30. On or about 18 May 2009, GSMAL owed to certain secured creditors not less than \$379 million pursuant to certain credit facility agreements (**Credit Facilities**), the payments by GSMAL under which were secured by the Charges.

### Particulars of Credit Facilities

- (a) ANZ Facility Agreement executed by Great Southern Limited (ABN 54 052 046 536), GSMAL, Great Southern Land Holdings Pty Ltd (ABN 27 087 074 093), Great Southern Finance Pty Ltd (ABN 47 009 235 143), Great Southern Vineyard Holdings Pty Ltd (ABN 16 107 020 191), Great Southern Property Managers Limited (ABN 80 124 144 224) (as trustee for the Great Southern Property Trust), Great Southern Cattle Managers Pty Ltd (ABN 16 113 922 660), Great Southern Export Company Pty Ltd (ACN 113 408 549), Sylvatech Limited (ABN 61 073 019 093), Great Southern Cattle Holdings Pty Ltd (ABN 12 113 922 642), Great Southern Forestry NT Pty Ltd (ABN 94 084 646 435), Great Southern Property

- Holdings Limited (ABN 18 121 245 047) (as trustee for the Great Southern Property Trust No 2), GSOH, GSOC, Great Southern Almond Holdings Pty Ltd (ABN 84 122 130 652), Great Southern HVT Holdings Pty Ltd (ABN 26 123 433 778), Great Southern Infrastructure Pty Ltd (ABN 79 126 069 314) (together, the **Borrowers**) and ANZ Banking Group dated 26 September 2008;
- (b) CBA Facility Agreement executed by the Borrowers and Commonwealth Bank of Australia (ABN 48 123 123 124) (**CBA**) dated 26 September 2008;
  - (c) Bankwest Facility Agreement executed by the Borrowers and the Bank of Western Australia Ltd (ABN 22 050 494 455) (**Bankwest**) dated 26 September 2008;
  - (d) Mizuho Facility Agreement executed by the Borrowers and Mizuho Corporate Bank Ltd (ABN 83 099 031 106) (**Mizuho**) dated 1 October 2008;
  - (e) Deed of Amendment and Restatement – Deed of Common Provisions (Financing Arrangements for Great Southern Limited) between ANZ Fiduciary Services, ANZ Banking Group, CBA, Bankwest and Mizuho dated 26 September 2008; and
  - (f) Security Trust Deed between ANZ Fiduciary Services, ANZ Banking Group, CBA, Mizuno Corporate Bank Limited, Bankwest and the Borrowers dated 22 October 2007.
31. On or about 19 November 2009, the respective creditors of each of GSMAL, GSOC, GSOH resolved that each be wound up and that the Liquidators be appointed as joint and several liquidators of each of them.
32. On and after 2 March 2010 until at least 6 July 2010, GSMAL owed not less than \$363 million pursuant to the Credit Facilities, secured by the Charges.
33. On or about 2 March 2010 the scope of the Receivers and Managers' appointment to GSMAL was varied by the Chargee to exclude the office and business of GSMAL as responsible entity of the Olive Schemes, related rights arising by reason of the office of the responsible entity and certain other rights needed to operate the Olive Schemes.
34. The variation pleaded in paragraph 33:

- (a) did not prejudice or diminish any Charge; and
  - (b) did not prevent the appointment or re-appointment of a receiver and manager to GSMAL in respect of the assets and the office pleaded in paragraph 33, at any time whilst GSMAL was in default under and owed sums under the Credit Facilities.
35. During the period from 18 May 2009 to 2 March 2010, the Receivers and Managers exercised exclusive control over GSMAL including as responsible entity of the Olive Schemes.
36. On or about 2 March 2010, by reason of the variation pleaded in paragraph 33 above, the Liquidators assumed control of GSMAL as responsible entity of the Olive Schemes.

#### **Replacement of Responsible Entity & Winding up of Olive Schemes**

37. On and from 8 September 2009, the Receivers and Managers sought expressions of interest for an entity to replace GSMAL as the responsible entity for each Olive Scheme.

#### **Particulars**

- (a) Publication of a request for such expressions of interest to the websites of the Receivers and Managers and of the Great Southern Group of companies on or about 8 September 2009.
  - (b) Publication of an advertisement seeking such expressions in the *Australian Financial Review* on or about 8 September 2009.
38. By circular dated 18 September 2009 and published to the Growers on or about that date, the Receivers and Managers invited Growers to contribute funds towards the maintenance of the Olive Property.
39. No Grower contributed funds towards the maintenance of any Olive Property.
40. On or about 24 September 2009, the Receivers and Managers concluded and announced that no entity had been found to replace GSMAL as responsible entity for the Olive Schemes.
41. On or about 15 December 2009, the Receivers and Managers issued notices to each Grower and to ASIC in accordance with s.601NC(2) of the Act (**s.601NC**

**Notices**), in respect of each applicable Olive Scheme, providing that each Scheme was proposed to be wound up on the grounds that:

- (a) the purpose of the Olive Schemes could no longer be accomplished;
- (b) GSMAL had no funding to operate any Scheme; and
- (c) no replacement responsible entity for the Olive Schemes could be identified,

together with a circular to investors summarising the financial and operational position of the respective Olive Schemes.

- 42. From on or about 15 December 2009, the Growers were entitled to call a meeting of members under Division 1 of Part 2G.4 of the Act to consider the proposed winding up of the Olive Schemes.
- 43. No Grower called any meeting of members under s.601NC(2) of the Act, or at all, to consider the proposed winding up of the Olive Schemes.
- 44. On or about 12 January 2010, 28 days after the issuance of the notices as pleaded in paragraph 41, GSMAL became entitled under s.601NC(3) of the Act to wind up the Olive Schemes under Part 5C of the Act.
- 45. On or about:
  - (a) 22 January 2010, the Receivers and Managers wrote to ASIC advising that following the expiry of the s.601NC Notices, GSMAL proposed to commence winding up each Olive Scheme;
  - (b) 25 January 2010 and at all material times thereafter, GSMAL has been entitled to wind up each Olive Scheme under Part 5C of the Act; and
  - (c) 1 February 2010, the Receivers and Managers caused GSMAL to file with ASIC the necessary forms confirming that the winding up of each Olive Scheme had commenced on 25 January 2010.

## **GSMAL DEFAULT UNDER HEAD LEASES**

### **Failure to perform Maintenance Requirements**

- 46. From not later than 1 October 2009, GSMAL failed to:
  - (a) discharge the obligation pleaded in paragraph 16(a);

- (b) discharge the obligation pleaded in paragraph 16(b); and
  - (c) discharge the obligation pleaded in paragraph 16(c).
47. From not later than 1 October 2009, GSMAL failed to:
- (a) discharge the obligation pleaded in paragraph 16(d);
  - (b) discharge the obligation pleaded in paragraph 16(e); and
  - (c) discharge the obligation pleaded in paragraph 16(f),
- (together, the **Maintenance Requirements**).

#### **Particulars of default of Maintenance Requirements**

With respect to each Olive Property GSMAL failed to:

- (a) prepare for and conduct the 2010 olive harvest;
- (b) take adequate steps to prevent risk of fire;
- (c) adequately prune the olive trees thereon;
- (d) adequately prevent the growth of weeds thereon;
- (e) provide adequate nutrition to the olive trees thereon;
- (f) provide adequate pest monitoring to the olive trees thereon;
- (g) provide adequate pest and disease control measures to the olive trees thereon; or
- (h) provide adequate irrigation to the olive trees thereon.

#### **Incurred Maintenance Expenditure**

48. Following their appointment on 16 May 2009, the Liquidators (including during the period acting in their capacity as administrators of GSMAL) caused the incurrence of certain expenditure:
- (a) by, on behalf of and for the benefit of GSOC and GSOH respectively, to preserve the Olive Properties;
  - (b) which was not expended by or on behalf of GSMAL;

- (c) which was in partial, but not complete, substitute for the performance of the Maintenance Requirements;
- (d) in respect of which the Liquidators hold a lien over the applicable Olive Properties and fixtures and improvements to the Olive Properties;
- (e) in the amounts of not less than:
  - (i) \$1,999,427 in respect of GSOC; and
  - (ii) \$1,006,240 on behalf of GSOH.

**(Liquidator Maintenance Expenditure).**

### **Particulars of Liquidator Expenditure**

Particulars to be provided.

49. Following their appointment on 18 May 2009, the Receivers and Managers incurred certain expenditure:
- (a) to preserve the Olive Scheme property and the Head Leases, including for the benefit of the Chargee;
  - (b) which was in partial, but not complete, substitute for the performance of the Maintenance Requirements;
  - (c) which was secured by the Charges;
  - (d) in respect of which the Receivers and Managers hold a lien over the applicable Olive Properties and fixtures and improvements to the Olive Properties; and
  - (e) in the amount of not less than \$590,000 (**Receiver Expenditure**)
- (together with the Liquidator Expenditure, the **Incurred Expenditure**).

### **Particulars of Receiver Expenditure**

Particulars to be provided.

### **Required Maintenance Expenditure**

50. From at least 1 October 2009, GSMAL was unable to satisfy the Maintenance Requirements itself, by reason that it did not have the staff or equipment to

perform, alternatively fully perform, the activities required to satisfy the Maintenance Requirements.

51. By reason of the matters pleaded in paragraph 50, in order to satisfy the Maintenance Requirements over the term of the Head Leases, GSMAL was required to incur and satisfy net expenditure comprising:

- (a) the Incurred Expenditure; plus
- (b) approximately the following sums for at least the following periods (**Working Capital**):

	<b>2005 Organic</b>	<b>2006 Organic</b>	<b>2007 Organic</b>	<b>2007 Diversified</b>	<b>2008 Diversified</b>	<b>Total</b>
<b>Working Capital (\$m)</b>	10.0	12.9	3.7	12.1	21.0	59.7
<b>Required until at least year ended 30 June</b>	2028	2013	2014	2012	2015	

(together, the **Maintenance Expenditure**).

#### **Particulars**

Particulars to be provided.

52. Any material failure to make the Maintenance Expenditure in discharge of the Maintenance Requirements with respect to any Olive Property:

- (a) would result in failure by GSMAL to satisfy the Maintenance Requirements with respect to the applicable Olive Property;
- (b) would thereby result in default under the applicable Head Leases;
- (c) would thereby result in the Owner of the applicable Olive Property being entitled to give notice of default of the applicable Head Lease for 1 or more of the breaches pleaded in paragraphs 46 and 47 and, upon expiry of such notice without remedy of such defaults, to terminate such Head Lease; and
- (d) would thereupon result in the failure to derive any future financial benefit for GSMAL or any Grower from the terminated Head Lease following its termination.

53. As from 25 February 2010, by reason of the failure of GSMAL (or any other person) to fully perform the Maintenance Requirements, the olive fruit yield on the Olive Properties:

- (a) would likely be diminished in the 2010 harvest; further or alternatively;
- (b) would likely be diminished in not less than the succeeding 2 annual harvests,

which would adversely affect the future revenue for each Olive Scheme.

#### **GSMAL in default of Head Leases**

54. As at 25 February 2010, by reason of the obligations of GSMAL pleaded at paragraph 16 and:

- (a) the failures pleaded in paragraphs 46 and 47; and
- (b) the failure of GSMAL to pay the Incurred Expenditure promptly or at all,

GSMAL was in default of each Head Lease.

#### **DEFAULT NOTICES**

##### **Default Notices under certain Head Leases**

55. On or about 25 February 2010 GSOC and GSOH delivered notices, in accordance with each respective Head Lease other than the Waterville Lease, stating that events of default pleaded in paragraphs 46 and 47, alternatively stating 1 or more of those events, had occurred with respect to each respective Head Lease (**25 February Notices**).

56. On or about:

- (a) 26 February 2010, the Receivers and Managers published advice to the Growers that on 25 February 2010 GSMAL received notices from GSOC and GSOH specifying various purported defaults under the Head Leases and providing 1 month for such defaults to be cured, failing which the Head Leases would be terminated; and
- (b) 10 March 2010 the 25 February Notice in respect of the Moore River Property was posted to the website of Ferrier Hodgson, as annexure AJS-33 of the affidavit of Andrew John Saker sworn 10 March 2010, where it remained until at least 6 July 2010.

57. On 10 May 2010 the 25 February Notices were posted to the website of Ferrier Hodgson, as annexures AJS-92 to AJS-97 to the affidavit of Andrew John Saker sworn 10 May 2010, where they remained until at least 6 July 2010.
58. Each 25 February Notice was a valid and effective notice of each default pleaded in paragraphs 46 and 47 concerning each respective Head Lease other than the Waterville Lease, alternatively was a valid and effective notice of 1 or more of those defaults.
59. On or about 29 March 2010:
- (a) the defaults stated in each respective 25 February Notice were continuing with respect to each Head Lease other than the Waterville Lease, alternatively 1 or more of those events was continuing with respect to each such Head Lease;
  - (b) there were no agricultural or climactic conditions which prevented GSMAL from remedying the defaults identified in each respective 25 February Notice; and
  - (c) by reason of the matters pleaded at paragraph 54 to 58 and subparagraph (a) and (b) above, each of GSOC and GSOH was entitled to terminate their respective Head Leases, other than the Waterville Lease.
60. The matters pleaded in paragraph 59 have continued, alternatively arose and continued, following 29 March 2010 until at least 6 July 2010.

#### **Defaults under the Waterville Lease**

61. On or about 3 June 2010 GSOC delivered to GSMAL notices, in accordance with the Waterville Lease and the Beermullah Lease respectively, stating that events of default pleaded in paragraphs 46 and 47, alternatively stating 1 or more of those events, had occurred with respect to each of the Waterville Lease and the Beermullah Lease respectively (**3 June Notices**).
62. On 14 June 2010 the 3 June Notices were posted to the Ferrier Hodgson website, as annexures AJS-151 and AJS-152 to the affidavit of Andrew John Saker sworn 14 June 2010, where they remained until at least 6 July 2010.
63. Each 3 June Notice was a valid and effective notice of each default pleaded in paragraphs 46 and 47 concerning the Waterville Lease and the Beermullah

Lease, alternatively was a valid and effective notice of 1 or more of those defaults.

64. By not later than 5 July 2010:
- (a) the defaults stated in each respective 3 June Notice were continuing with respect to each of the Waterville Lease and the Beermullah Lease, alternatively 1 or more of those events was continuing with respect to each such Head Lease;
  - (b) there were no agricultural or climactic conditions which prevented GSMAL from remedying the defaults identified in each respective 3 June Notice; and
  - (c) by reason of the matters pleaded at paragraphs 54 and 61 to 63, and subparagraphs (a) and (b) above, GSOC was entitled to terminate the Waterville Lease and the Beermullah Lease respectively.
65. The matters pleaded in paragraph 64 have continued, alternatively arose and continued, following 5 July 2010.

#### **Further default notices**

66. For so long as any default pleaded in paragraph 54 was continuing, alternatively arose and was continuing, each of GSOC or GSOH as applicable was willing and able to issue further notices of default under any Head Lease to the extent required, if any, in order to permit the Owner to terminate the applicable Head Lease.

#### **INABILITY TO REMEDY DEFAULT UNDER HEAD LEASES**

##### **Financial Circumstances of GSMAL**

67. At all material times, GSMAL was the responsible entity of a number of managed investment schemes, other than the Olive Schemes, registered under Part 5C of the Act (the **Other Schemes**).

##### **Particulars of Other Schemes**

See Schedule 3 of the Particulars to be provided.

68. From at least 16 May 2009, pursuant to s.601FC(2) of the Act, GSMAL held:

- (a) the assets of each Olive Scheme on trust for the Growers of that Olive Scheme; and
  - (b) the assets of each Other Scheme on trust for the members of each respective Other Scheme.
69. At all material times the assets of GSMAL, other than scheme property held as responsible entity of any Olive Scheme or any Other Scheme, were charged in favour of the Chargee, pursuant to 1 or more of the Charges.
70. As at and from at least 26 February 2010, GSMAL had incurred and owed to the Receivers and Managers of GSMAL not less than \$6 million in Receivers and Managers' fees and expenses, which sum was secured pursuant to 1 or more of the Charges, and which remained outstanding.
71. As at and from 10 April 2010, GSMAL had incurred and owed to the administrators and Liquidators of GSMAL in those capacities, not less than \$326,000 in expenses and \$615,000 in fees, which sums remained outstanding.

### **Particulars**

Particulars to be provided.

72. From at least 1 October 2009, GSMAL did not hold any amount of cash:
- (a) beneficially, which was not subject to 1 or more of the Charges; or
  - (b) as responsible entity of any Olive Scheme.
73. From at least 1 October 2009, GSMAL beneficially held no material assets which were not subject to 1 or more of the Charges.
74. On or about 2 March 2010, GSMAL held as responsible entity of any Olive Scheme no material assets other than to the extent they were scheme property of any Olive Scheme, if any, the Head Leases.
75. From at least 16 May 2009 and at all times thereafter, each of:
- (a) GSMAL;
  - (b) GSOC;
  - (c) GSOH; and
  - (d) GSOP,

was unable to pay its debts as and when they became due and payable.

**Grower inability or unwillingness to cure GSMAL defaults**

76. From at least 1 October 2009, in the circumstances pleaded in paragraphs 9, 29 to 32, 35 to 45, 51, 53 to 57, 61 and 62 (each applicable from the dates pleaded) no Grower did, nor offered to the Receivers and Managers or to the Liquidators to:
- (a) assume or indemnify the obligations of GSMAL as responsible entity of Olive Scheme;
  - (b) remedy any default pleaded in paragraph 54;
  - (c) apply for relief against forfeiture or apply for an injunction to prevent the re-entry by any Owner to an Olive Property, following notice as pleaded in paragraphs 56, 57, 61 and 62; or
  - (d) fund the Maintenance Expenditure.
77. By reason of the matters pleaded in paragraphs 76, 79(a), 79(b), 79(d)(i) and 79(d)(ii)(A), no Grower, nor any group of Growers, was willing, further or alternatively able, to:
- (a) remedy any default pleaded in paragraph 54; or
  - (b) fund the Maintenance Expenditure.

**GSMAL inability to meet Maintenance Requirements**

78. From at least 1 October 2009, GSMAL was unable to pay the Maintenance Expenditure because it was unable to meet the costs of performing those obligations promptly or at all:
- (a) from its own cash, by reason of the matters pleaded in paragraph 72;
  - (b) from funds provided by the Growers by reason of the matters pleaded in paragraphs 76 and 77;
  - (c) from its own cash flows, by reason of the matters pleaded in paragraphs 29 to 53 and 67 to 75 (each as applicable from each date pleaded);
  - (d) from unsecured borrowing, by reason that there was no reasonable prospect of any lender advancing unsecured loans to GSMAL in the amount of the Incurred Expenditure, further or alternatively in the amount

of the Working Capital, to GSMAL in the circumstances pleaded in paragraphs 29 to 75 (each as applicable from each date pleaded);

- (e) from borrowing secured by the Head Leases of any Olive Scheme, by reason:
  - (i) of the circumstances pleaded at paragraphs 29 to 75 (each as applicable from the date pleaded);
  - (ii) where to the extent, if any, that Head Leases were charged in favour of the Chargee, GSMAL had covenanted not to further charge the Head Leases without the consent of the Chargee, which consent would not be granted whilst the sum secured in favour of the Chargee remained outstanding in the amounts pleaded in paragraphs 30 and 32, or at all;
  - (iii) where to the extent, if any, that any Head Lease was scheme property (as that term is defined in s.9 of the Act) of an Olive Scheme:
    - (A) each respective Olive Scheme constitution, together with s.601GA(3) of the Act, provided that GSMAL must not borrow any monies secured by any such property (each Olive Scheme Constitution cl.11.2); and
    - (B) no such Head Lease could be charged in support of the borrowing of any other Olive Scheme by reason of the matters pleaded in paragraph 68(a); and
  - (iv) where the Liquidators did not prior to 2 March 2010 exercise control over GSMAL, and were thereby unable to procure the grant of any charge over any Head Lease; and
  - (v) where, to the extent, if any, that GSMAL could grant a second charge over any Head Lease in favour of a lender (which is denied), there was no reasonable prospect of any such lender loaning to GSMAL an amount equal to the Incurred Expenses, further or alternatively, the Working Capital by reason of the matters pleaded at paragraphs 29 to 53 and 66 to 75; or
- (f) from borrowing secured by any other asset of GSMAL, by reason:

- (i) of the circumstances pleaded at paragraphs 29 to 75 (each as applicable from the date pleaded);
- (ii) that, as concerns any property of GSMAL subject to 1 or more of the Charges, GSMAL had covenanted not to further charge such property without the consent of the Chargee, which consent would not be granted while the sum secured in favour of the Chargee remained outstanding in the amounts pleaded in paragraphs 30 and 32, or at all;
- (iii) that those assets which GSMAL held as scheme property as responsible entity for any Other Scheme were held on trust for the members of each such Other Scheme pursuant to s.601FC(2) of the Act as pleaded in paragraph 68(b), and were not available to be charged for the benefit of any Olive Scheme;
- (iv) that to the extent, if any, that any such asset was scheme property (as that term is defined in s.9 of the Act) of an Olive Scheme:
  - (A) no such asset could be charged in support of the borrowing of any other Olive Scheme by reason of the matters pleaded in paragraph 68(a);
  - (B) each Olive Scheme Constitution, together with s.601GA(3) of the Act, provided that GSMAL must not borrow monies secured by any Olive Scheme property (Constitution cl.11.2);
- (v) that to the extent, if any, GSMAL could grant a second ranking charge over any other such asset of GSMAL in favour of a lender (which is denied), there was no reasonable prospect of any such lender loaning to GSMAL on any such security an amount equal to the Incurred Expenses, further or alternatively, the Working Capital by reason of the matters pleaded at paragraphs 29 to 75; and
- (vi) other than:
  - (A) the scheme property held as responsible entity of the Olive Schemes and the Other Schemes;
  - (B) the property the subject of the Charges;

- (C) any right of indemnity from the assets of each Olive Scheme;

GSMAL had no, alternatively no material, assets; or

- (g) from selling or leasing any of its assets, by reason:
  - (i) that those assets which GSMAL held as scheme property as responsible entity for the Other Scheme were held on trust for the members of each such Other Scheme pursuant to s.601FC(2) of the Act, and were not available to be sold or leased for the benefit of any Olive Scheme; and
  - (ii) that the Liquidators did not prior to 2 March 2010 exercise control over the Head Leases and were thereby unable to procure the sale or lease of any asset of GSMAL;
  - (iii) that to the extent that any such property was subject to 1 or more Charges, in the circumstances pleaded in paragraphs 9 and 34, the Chargee and not GSMAL, was entitled to the proceeds of any such sale or lease; and
  - (iv) other than:
    - (A) the scheme property held as responsible entity of the Olive Schemes and the Other Schemes;
    - (B) the property subject of the Charges;
    - (C) any right of indemnity from the assets of each Olive Scheme;

GSMAL had no, alternatively no material, assets.

79. There was no proper corporate purpose for GSMAL to incur the Maintenance Expenditure by reason that:
- (a) in respect of each Olive Scheme, over the term of each Olive Scheme, such expenditure would likely exceed the revenue GSMAL would derive from the Olive Scheme (were any Olive Scheme to continue, which is denied);
  - (b) in respect of the 2005 Organic Scheme, the 2006 Organic Scheme and the 2007 Organic Scheme, such expenditure would likely exceed the

revenue that the Growers in those Schemes would derive from each respective Olive Scheme (were any Olive Scheme to continue, which is denied);

- (c) GSMAL was insolvent, and any incurrence of Maintenance Expenditure by GSMAL would be funded from, and therefore reduce, the net assets distributable ratably to the creditors of GSMAL, whereas the benefit would impermissibly accrue to the Growers who were not, in their capacity as sublessees, creditors of GSMAL, inconsistent with the requirements of ss.555 and 556 of the Act; and
- (d) the incurrence of the Maintenance Expenditure would:
  - (i) by reason of the matters pleaded at paragraphs 50 to 52 and 78 likely be futile; and
  - (ii) likely be at greater cost to GSMAL than the amount of any revenue lost by the Growers following termination of any Head Lease;
    - (A) in absolute dollar terms; and
    - (B) in dividend to creditor terms.

### **Relief against Forfeiture**

- 80. In the circumstances pleaded in paragraphs 29 to 79, any application by GSMAL for relief against forfeiture from the termination of any Head Lease under any 25 February Notice or any 3 June Notice would be granted, if at all, only upon the condition that GSMAL:
  - (a) remedied all outstanding defaults under such Head Lease; and
  - (b) provide adequate assurance that there would not be further defaults under each such Head Lease.
- 81. In the circumstances pleaded in paragraphs 29 to 79, any application by any Grower for relief against forfeiture as sublessee pursuant to s.81(4) of the *Property Law Act 1969 (WA)* in respect of the termination of any Head Lease under the 25 February Notices or the 3 June Notices would be granted, if at all, only upon condition that such Grower:
  - (a) remedy all outstanding defaults under such Head Lease; and

- (b) provide adequate assurance that there would not be further defaults under each such Head Lease.
82. Satisfaction of the requirement pleaded in paragraph 80(a) or 81(a) would have required GSMAL or the Grower, as applicable, at least to pay in full the Incurred Expenditure applicable to each Head Lease at or about the time of making any such application for relief against forfeiture in respect of that Head Lease.
83. Satisfaction of the requirement pleaded in paragraph 80(b) or 81(b) would have required GSMAL or the Grower, as applicable, at or about the time of making any such application for relief against forfeiture, to have funding available over the periods specified in paragraph 51(b) in an amount not less than the amount of Working Capital.
84. By reason of the matters pleaded at paragraphs 78 and 79, GSMAL was unable to meet the requirements pleaded in paragraph 80.
85. By reason of the matters pleaded at paragraphs 76 and 77, no Grower was willing, further or alternatively able, to meet the requirements pleaded in paragraph 81.
86. By reason of the matters pleaded in paragraph 80 to 85, the grounds for relief against forfeiture in respect of the termination of any Head Lease could not be made out and, consequently, no Grower nor GSMAL had or would have entitlement to any such relief.

#### **TERMINATION OF HEAD LEASES**

87. From:
- (i) 29 March 2010 in respect of any Head Lease, other than the Waterville Lease and;
  - (ii) 5 July 2010 in respect of the Waterville Lease;
- (a) any default pleaded in paragraph 54 was continuing, alternatively arose and was continuing;
  - (b) a valid and effective applicable default notice as pleaded in paragraphs 55, 61 and 66 had been issued in respect of any 1 such default; and

- (c) in the circumstances pleaded in paragraphs 59(b) and 64(b), 1 month had elapsed since the issuance of such default notice without the default being remedied,

the Liquidators of each of GSOC or GSOH, as applicable, were willing and able to:

- (d) seek a direction from a court of competent jurisdiction pursuant to s.511 of the Act that they were justified in terminating each respective Head Lease; and
- (e) upon grant of any such direction to cause the Owner to terminate the applicable Head Lease.

88. By reason of the matters pleaded in paragraphs 54, 59, 60, 64 to 66, 77 to 79, and 86, the Liquidators of GSOC and GSOH were justified in terminating each Head Lease.

89. Under the terms of each Head Lease as pleaded at paragraphs 17 to 20 and applicable law, the effect of a valid termination of any Head Lease would be:

- (a) the termination of each and every Sublease granted in respect of that Olive Property which was the subject of the terminated Head Lease;
- (b) the termination and extinguishment of all rights *in rem* in respect of each such Olive Property; and
- (c) the termination of any right to olive fruit from each such Olive Property not removed by any Grower within 3 months of the termination of such Head Lease.

#### **CLAIMS OF GSOC, GSOH AND GSOP AGAINST NET PROCEEDS**

90. At all material times, GSOC, GSOH and GSOP each respectively owned certain property:

- (a) in the circumstances pleaded in paragraphs 19 and 20, which was not the subject of any Head Lease; and
- (b) which was the subject of one of:
  - (i) that Kailis Asset Sale Agreement between the Liquidators, GSOC, GSOH and GSOP and Kailis Organic Olive Groves Limited (ACN 095 927 969) as amended from time to time; or

- (ii) that Sumich Sale Asset Agreement between the Liquidators, GSOC Cranmount Investments Pty Ltd (ACN 115 500 304), Sumich EVOO Australia Pty Ltd (ACN 123 114 492) and Olive West Management Pty Ltd (ACN 123 114 527) as amended from time to time,

(the **Unleased Property**); and

### **Particulars of Unleased Property**

Particulars to be provided.

- (c) the proceeds of sale of which, under an agreement pleaded in subparagraph (b), contributed to those Net Proceeds (**Net Proceeds**) provided for by Order 6 of the Orders made by this Honourable Court in this proceeding on 27 May 2010 (the **27 May Orders**).
91. By reason of being the owners of the Unleased Property, GSOC, GSOH and GSOP are entitled to:
- (a) that respective part of those Net Proceeds which represents the fair market value of their respective Unleased Property, less the costs of selling such assets; together with
- (b) the interest actually accrued on the Net Proceeds on account of the amount pleaded in subparagraph (a).
92. By reason of being respective Owners of the Olive Properties and of the matters pleaded in paragraphs 87 to 89, GSOC and GSOH are entitled to:
- (a) the whole of the balance of the Net Proceeds, less the deduction of:
- (i) the sums pleaded in paragraph 91; and
- (ii) the amounts to be deducted pursuant to Order 7 of the 27 May Orders,
- (the **Available Proceeds**),
- allocated pro-rata in accordance with the fair market value of the assets sold by each of them (other than the assets pleaded in paragraph 91) and contributed to the Net Proceeds; together with

(b) the interest actually accrued on the Net Proceeds on account of the amount pleaded in subparagraph (a).

93. In the alternative to paragraph 91, if the matters pleaded in paragraph 87 to 89 are not established GSOC and GSOH are entitled, as Owners, to the whole of the balance of the Available Proceeds after deducting that amount, if any, attributable to GSMAL and that amount, if any, attributable to the Growers.

#### **CLAIM OF GSMAL AGAINST NET PROCEEDS**

94. By reason of and during the term of each respective Head Lease, GSMAL is the holder of an interest in the applicable Olive Property, comprising the right to occupy each Olive Property pursuant to the respective Head Lease, subject to compliance with the obligations, amongst others, pleaded in paragraph 16.

95. By reason of and during the term of each Sublease, GSMAL granted to each Grower the right to occupy the applicable Grovelot pursuant to the respective Sublease, subject to compliance with the obligations, amongst others, pleaded in paragraph 28.

96. If, which is denied, any Head Lease was not terminable for breach on 29 March 2010, or on 5 July 2010, or thereafter, GSMAL would (but for the effect of the 27 May Orders) remain the lessee under any such Head Lease and the lessor under any Sublease in respect of that Olive Property the subject of that Head Lease.

97. For so long as the circumstances pleaded in paragraph 96 obtain, GSMAL is entitled:

(a) to rent payments from the each Grower comprising that part of the net harvest proceeds pleaded in paragraph 28(a); and

(b) payment by each Grower of that insurance premium pleaded in paragraph 28(b).

98. By reason of the matters pleaded in paragraphs 94 to 97, GSMAL's interest in the Available Proceeds is, in respect of each Head Lease, that proportion of the Available Proceeds comprised by the GSMAL Value as a proportion of the sum of:

(a) the GSMAL Value;

(b) any Grower Value; and

- (c) the Owner Value; where
- (i) **GSMAL Value** comprises the fair market value of the Head Leases calculated as:
- (A) the known, or where not known reasonably anticipated, net harvest proceeds attributable to GSMAL in the proportions stated in paragraph 28 over the term of the Head Lease; *less*
  - (B) the known, or where not known reasonably anticipated, cost of performing the obligations pleaded in paragraph 16 (including the costs of each Olive Harvest) over the term of the Head Lease; *plus*
  - (C) the known, or where not known reasonably anticipated, difference between the harvest proceeds and the net harvest proceeds over the term of the Head Lease,

in each case discounted back to present value as at 12 May 2010 by a discount rate reflecting the cost of capital applicable to agricultural enterprises comparable to the Olive Schemes;

- (ii) **Grower Value** comprises the value of the Subleases of the Olive Properties the subject of such Head Lease, calculated as:
- (A) the known, or where not known reasonably anticipated, net harvest proceeds attributable to the Growers in the reciprocal of the proportions stated in paragraph 28 over the term of the Head Leases; *less*
  - (B) the known, or where not known, reasonably anticipated cost of the payment by each Grower of that insurance premium pleaded in paragraph 28(b) over the term of the Head Leases;

in each case discounted back to present value as at 12 May 2010 by a discount rate reflecting the cost of capital applicable to agricultural enterprises comparable to the Olive Schemes;

- (iii) **Owner Value** comprises the value of the reversionary interest of the Owner in the Olive Property the subject of the Head Lease, calculated as:

- (A) the reasonably anticipated net harvest proceeds attributable to the Owner on and following the determination of such Head Lease; *less*
- (B) the reasonably anticipated cost of performing the Maintenance Requirements;

in each case discounted back to present value as at 12 May 2010 by a discount rate reflecting the cost of capital applicable to agricultural enterprises comparable to the Olive Schemes.

#### **PRAYER FOR RELIEF**

- A. GSOC, GSOH and GSOP claim, in their respective proportions, that part of the Net Proceeds pleaded in paragraph 91 and seek a direction that the Liquidators, as trustees of the Net Proceeds, do pay to each of them the respective sums claimed.
- B. GSOC and GSOH claim, in their respective proportions:
  - (1) the whole of the balance of the Available Proceeds; alternatively
  - (2) the balance of the Available Proceeds after deducting:
    - (i) any amount attributable to GSMAL; and
    - (ii) any amount attributable to the Growers,

and seek a direction that the Liquidators, as trustees of the Net Proceeds, do pay to each of them the respective sums claimed.
- C. In the alternative to paragraph B(1), GSMAL claims that part of the Available Proceeds pleaded in paragraph 98, and seeks a direction that the Liquidators, as trustees of the Net Proceeds, do pay such sum to it.
- D. GSOC, GSOH, GSOP and GSMAL each claim:
  - (a) such further relief as this Honourable Court thinks fit; and
  - (b) costs.

A handwritten signature in black ink, appearing to read "R. W. Douglas". The signature is stylized with large, sweeping loops and a prominent flourish at the end.

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R W Douglas  
Counsel  
9 July 2010