

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION
COMMERCIAL COURT
CORPORATIONS LIST

No. 6816 of 2011
No. 6762 of 2011

IN THE MATTER of WILLMOTT FORESTS LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)

WILLMOTT FORESTS LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650) & ORS (according to the schedule attached) Plaintiffs

JUDGE: Davies J
WHERE HELD: Melbourne
DATE OF HEARING: 23 - 25 January 2012
DATE OF JUDGMENT: 9 February 2012
CASE MAY BE CITED AS: Re Willmott Forests Ltd
MEDIUM NEUTRAL CITATION: [2012] VSC 29

CORPORATIONS – LIQUIDATION – DISCLAIMER OF ONEROUS PROPERTY – Where the plaintiff is in liquidation – Where the plaintiff acts as the responsible entity and manager of registered and unregistered managed investment schemes operated on freehold land and land leased by the plaintiffs to the members of the schemes – Liquidator of the plaintiff wants to sell the freehold unencumbered by the leases – Whether the liquidators disclaimer of the leases would have the effect of extinguishing the Growers’ leasehold estate or interest in the subject land – *Corporations Act 2001* (Cth) ss 477, 511, 568

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	Mr P Anastassiou SC with Mr R Craig	Arnold Bloch Leibler
For the Receivers	Ms W Harris SC with Mr T Clarke	Allens Arthur Robinson
For WGG	Mr G Bigmore QC with Mr M Kennedy	Clarendon Lawyers
For WAG	Mr D Denton SC with Mr A Downie	Eales & MacKenzie
For DK Investment Services (an Intervener)	Mr C Coulsen	Morgan Conley

HER HONOUR:

Introduction

1 The first plaintiff, Willmott Forests Limited (“WFL”) is the responsible entity and/or manager of eight registered managed investment schemes (“MIS”), six unregistered “Professional Investor” MIS, eleven unregistered contractual MIS and five unregistered partnership MIS. These MIS are forestry operations conducted on land which is either freehold land owned by WFL or leased by WFL from third parties. The members of the MIS (“the Growers”) have rights to grow and harvest trees on that land under project documents that include lease and licence agreements with WFL for the use and occupation of the land. WFL is in liquidation and the liquidators have entered into six interdependent contracts (“the sale contracts”) for the sale of part of the freehold land, unencumbered by the rights of the Growers conferred by the project documents, including the leases and licences (“the Growers’ rights”). A transfer of clear title to the freehold land cannot be effected unless the Growers’ rights are terminated or extinguished. On 29 June 2011, the liquidators sought and obtained directions from the Federal Court that they were justified:

- a) in amending the constitutions of the registered MIS and the investment deeds of the Professional Investor MIS to confer on WFL a power to terminate Growers’ rights in respect of the MIS, on the condition that Court approval is obtained before exercising that power; and
- b) (as the contractual and partnership MIS do not have constitutions) in disclaiming the project documents of the contractual and partnership MIS as onerous pursuant to s 568(1) of the *Corporations Act 2001* (Cth) (“the Act”), on the condition that the liquidators seek the Court’s consent before disclaiming the project documents.¹

The sale contracts contain conditions precedent to the completion of the sale that the liquidators obtain orders and directions from the Court on or before 31 January 2012,

¹ *Willmott Forests Ltd, in the matter of Willmott Forests Ltd (Receivers and Managers appointed) (in liq)* [2011] FCA 1517 (Dodds-Streeton J).

authorising the liquidators:

- a) to exercise the powers to terminate, relinquish or surrender the project documents of the registered MIS and Professional Investor MIS; and
- b) to disclaim the project documents of the contractual and partnership MIS as onerous pursuant to s 568(1) of the Act.

The liquidators have now made application to the Court to obtain those orders and directions under s 511 of the Act. In addition, they seek pursuant to s 477(2B) of the Act, the Court's approval of their entry into the sale contracts and a direction under s 511 of the Act that they are justified in procuring WFL to enter into and perform the sale contracts. The receivers of WFL (who are also parties to the sale contracts) support their application, but the Willmott Growers Group Inc ("WGG") and the WILLMOTT ACTION GROUP INC ("WAG") (which each represent different groups of Growers and have leave to intervene as contradictors) oppose it.

Preliminary question

- 2 The application came on for hearing on 23 January 2012 in order to accommodate the time constraints imposed by the sale contracts, which specified 31 January 2012 as the date by which the orders and directions must be obtained. At the commencement of the hearing, Senior Counsel for the liquidators identified ten issues that are material to the Court's consideration as to whether the orders and directions sought should be made. It soon became apparent that the application could not be completed by 31 January 2012 due to the number of issues raised by the voluminous and complex material to be considered and the fact that WAG was not ready as it had not had proper and sufficient opportunity to prepare its case. On application by the liquidators, which was supported by the receivers and both interveners, I heard argument on one of the questions as a separate and preliminary question for determination and otherwise adjourned the application for further hearing to 27 February 2012. I was informed that the date by which the conditions precedent are to be fulfilled would be extended to 15 February 2012 to enable the preliminary question to be answered before the time expired.

3 The question for separate and preliminary determination is as follows:

Are the liquidators able to disclaim the Growers' leases with the effect of extinguishing the Growers' leasehold estate or interest in the subject land?

4 This question was expressly left open by the Federal Court in making the orders and directions on 29 June 2011.² For the reasons that follow I have concluded that the answer to the question is "No".

Legislation

5 The starting point is s 568 of the Act which gives liquidators the power to disclaim certain "property of the company". Section 568 relevantly provides as follows:

568(1) [liquidator's power to disclaim] Subject to this section, a liquidator of a company may at any time, on the company's behalf, by signed writing disclaim property of the company that consists of :

- (a) land burdened with onerous covenants; or
 - (b) shares; or
 - (c) property that is unsaleable or is not readily saleable; or
 - (d) property that may give rise to a liability to pay money or some other onerous obligation; or
 - (e) property where it is reasonable to expect that the costs, charges and expenses that would be incurred in realising the property would exceed the proceeds of realising the property; or
 - (f) a contract;
- whether or not:
- (g) except in the case of a contract – the liquidator has tried to sell the property, has taken possession of it or exercised an act of ownership in relation to it; or
 - (h) in the case of a contract – the company or the liquidator has tried to assign, or has exercised rights in relation to, the contract or any property to which it relates.

² *Willmott Forests Ltd, in the matter of Willmott Forests Ltd (Receivers and Managers appointed) (in liq)* [2011] FCA 1517 par 119, 110 (Dodds-Streeton J).

...

568(1A) [Disclaiming of contracts] A liquidator cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with leave of the Court.

568(1B) [Power of Court] On an application for leave under subsection (1A), the Court may:

- (a) grant leave subject to such conditions; and
- (b) make such orders in connection with matters arising under, or relating to, the contract;

as the Court considers just and equitable.

...

568D(1) [Effective disclaimer terminates company's rights] A disclaimer is taken to have terminated, as from the day on which it is taken because of 568C(3) to take effect, the company's rights, interests, liabilities and property in or in respect of the disclaimer property, but does not affect any other person's rights or liabilities except so far as necessary in order to release the company and its property from liability.

568D(2) [Person aggrieved by disclaimer] A person aggrieved by the operation of a disclaimer is taken to be a creditor of the company to the extent of any loss suffered by the person because of the disclaimer and may prove such a loss as a debt in the winding up.

- 6 The legislative purpose of these provisions has been discussed in a number of authorities, which have generally held that the purpose is to enable a liquidator to relieve the company of obligations or liabilities which would prevent a prompt and efficient winding up of the affairs of a company.³ That object is facilitated by the wide scope of "property of a company" that a liquidator may disclaim under s 568. Relevantly, a contract for the lease of land is "property" that a liquidator may disclaim under s 568.⁴
- 7 Section 568D(1) makes it clear that the effect of disclaimer is to terminate the company's rights, interests, liabilities and property "for or in respect of" the disclaimed property, but that third party rights or liabilities are not affected by the disclaimer "except so far

³ *Sims & anor (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd & anor* (2005) 53 ASCR 295 at 299-300 (Spigelman CJ with whom Sheller JA and Brownie AJA agreed); *Re Middle Harbour Investments Ltd (in Liq) (No 2)* [1977] 2 NSWLR 652 at 657 (Bowen CJ in Eq); *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in Liq)* (2000) 35 ACSR 484 at [65] (Santow J);

⁴ Section 568(1)(f) and s 568(1A).

as is necessary in order to release the company or its property from liability”.⁵ The legislative scheme thus intends that the effect of the disclaimer on third party rights and liabilities “should go no further than what is necessary to release the company or its property from liability”.⁶ As Lord Nicholls of Birkenhead in *Hindcastle Ltd v Barbara Attenborough Associates Ltd*⁷ said about the cognate UK disclaimer provisions:

Disclaimer will, inevitably, have an adverse impact on others: those with whom the contracts were made, and those who have rights and liabilities in respect of the property. The rights and obligations of these other persons are to be affected as little as possible. They are to be affected only to the extent necessary to achieve the primary object: the release of the company from all liability. Those who are prejudiced by the loss of their rights are entitled to prove in the winding up of the company as though they were creditors.⁸

Thus the consequence of disclaimer is that the company’s rights, liabilities and obligations in respect of the “property” disclaimed are terminated but the disclaimer takes effect under s 568 in respect of third party rights and liabilities only so far as is necessary to release the company or its property from liability.

Analysis

8 It was submitted for the liquidators that when a lease is disclaimed, the leasehold estate ceases to exist. Reliance was placed on a passage from *Hindcastle Ltd v Barbara Attenborough Associates Ltd* in which Lord Nicholls of Birkenhead considered the application of the cognate UK disclaimer provisions “to the principal types of landlord and tenant situations”. His Lordship said:

The simplest case is of a landlord and an insolvent tenant. No third parties are involved. Disclaimer operates to determine all the tenant’s obligations under the tenant’s covenants, and all his rights under the landlord’s covenants. In order to determine these rights and obligations it is necessary, in the nature of things, that the landlord’s obligations and rights, which are the reverse side of the tenant’s rights and obligations, must also be determined. If the tenant’s liabilities to the landlord are to be extinguished, of necessity so also must be the landlord’s rights against the tenant. The one cannot be achieved without the other.

⁵ The Corporations Act 2001 (Cth), s 568D(1).

⁶ *Sims & anor (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd & anor* (2005) 53 ASCR 295, 301 [26].
⁷ [1997] AC 70

⁸ [1997] AC 70, 87; cited with approval in *Sims & anor (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd & anor* (2005) 53 ASCR 295, 302 [30].

Disclaimer also operates to determine the tenant's interest in the property, namely the lease. Determination of a leasehold estate has the effect of accelerating the reversion expectant upon the determination of that estate. The leasehold estate ceases to exist. I can see no reason to question that this is the effect of disclaimer when the only parties involved are the landlord and the tenant.⁹

It was submitted that this analysis is equally applicable where the disclaimer of the lease is by the liquidator of the landlord, as the landlord and tenant have correlative rights under the lease with the result that the disclaimer by the liquidator must extinguish the tenant's rights. I disagree.

- 9 The submission, in my view, fails to give due regard to the position in law that a lease creates both contractual and proprietary rights. A lease is a contract between the parties but a lease is also the grant by the landlord of an estate in land in the tenant,¹⁰ which is a different estate in land to the landlord's freehold estate. The leasehold interest is a legal estate of which the tenant is the owner.¹¹
- 10 The reason that a disclaimer of a lease by a liquidator of the tenant operates to determine the tenant's interest in the property is that by and under s 568D(1), the act of disclaimer terminates all the tenant's rights, interests, liabilities and property in respect of the leased property and so, effects an extinguishment of the leasehold interest.¹² Thus disclaimer has the consequence that the land ceases to be subject to the lease. Upon disclaimer, no separate vesting order in the landlord is usually necessary as the landlord has the reversionary interest so that the landlord takes the property as if the lease had been surrendered by the tenant and the surrender accepted by the landlord.
- 11 This reasoning is not apposite to the case of an insolvent landlord and tenant. As the tenant's leasehold interest is the property of the tenant, a disclaimer of the lease by the liquidator of the landlord would only terminate the rights, interests, liabilities and property of the landlord but it would not bring the lease to an end for all purposes.¹³

⁹ [1997] AC 70, 87.

¹⁰ *Radaich v Smith* (1959) 101 CLR 209.

¹¹ *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70, 85.

¹² *Re Teller Home Furnishers Pty Ltd (In Liquidation) Electronic Industries v Horsburgh* [1967] VR 313, 317 (Gowans J)

¹³ *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70; *Sandtara Pty Ltd v Abigroup Ltd* (1996) 19 ACSR 578

Specifically, it would not bring the tenant's proprietary interest in the land to an end. The tenant's proprietary rights in the land will continue to subsist, even though the effect of disclaimer is that the landlord's interests and liabilities under the lease have been terminated. Thus the effect of disclaimer is different where the lease is disclaimed by the liquidator of the landlord.

- 12 This conclusion is supported by *Re Bastable; Ex parte The Trustee*.¹⁴ Romer LJ, in the context of analogous legislation, considered whether a trustee in bankruptcy of the vendor of a contract of sale of real estate could, by disclaiming the contract alone, put himself in the position of the owner of the estate, freed altogether from the purchaser's interest in the land. His Lordship held that the purchaser's interest in the land was not divested by disclaimer of the contract, reasoning that:

The fallacy of the argument ... lies, I think, in ignoring the nature of the interest of a purchaser of real estate after a contract for its sale has been made between him and the owner of the estate. The purchaser has, then, something more than a pecuniary interest under his contract. He has an equitable interest in the land itself.¹⁵

In *Dekala Pty Ltd (in liq) v Perth Land & Leisure Ltd*¹⁶ Young J expressed a similar view. The issue in that case was whether a disclaimer by the liquidator of a company of an option agreement that the company had entered into in respect of land it owned was effective to extinguish the rights of the option holder. Whilst the case was decided on the basis that the option holder did not hold any interest in the land, His Honour, citing *Re Bastable; Ex parte The Trustee*,¹⁷ considered that the disclaimer could not have the effect of divesting any equitable interest of the option holder, if held to exist.

- 13 Senior Counsel for the liquidators sought to distinguish both cases on the basis that they were decided before *Hindcastle Ltd v Barbara Attenborough Associates Ltd* and dealt with the effect of disclaimer in a different context. The points of distinction are without substance, in my view. The statement of principle in *Hindcastle Ltd v Barbara Attenborough Associates Ltd* was expressly confined to the disclaimer of a lease by the

¹⁴ [1901] 2 KB 518

¹⁵ [1901] 2 KB 518, 528.

¹⁶ (1987) 17 NSWLR 664.

¹⁷ (1987) 17 NSWLR 664, 666.

liquidator of the tenant and the impact on the tenant's interest and, as I have held, the reasoning is inapposite to the disclaimer of a lease by the liquidator of the landlord and the impact on the tenant's leasehold interest. I am not persuaded that *Re Bastable; Ex parte The Trustee and Dekala Pty Ltd (in liq) v Perth Land & Leisure Ltd* are not authoritative on the question.¹⁸

14 A disclaimer nonetheless will impact on the rights and liabilities of the tenant to the extent necessary to release the company or its property from liability.¹⁹ It was argued for the liquidators that the proviso must apply to effect the termination of the Growers' leasehold estate in the leased property because the Growers' rights as lessees to occupy the land is interdependent with the rights and liabilities of the landlord to lease the land. It was argued that if the disclaimer of the lease did not have the effect of terminating the tenant's right of possession, then disclaimer of the lease would be inutile. It can be accepted in the circumstances of this case that the disclaimer of the leases by the liquidators of WFL would be inutile unless the disclaimer had the effect of terminating the Growers' leasehold estates. However, that does not provide the answer. It is necessary to return to the language of the section. Is the termination of the Growers' leasehold estates necessary to release WFL or its property from liability?

15 In *Re Jandowae Estates Pty Ltd*, a decision of a Master of the Supreme Court of Queensland, it was held that a lease disclaimed by the liquidator of a landlord would have the effect of terminating the correlative rights, interests and liabilities of the lessee.²⁰ The Master however did not illuminate on whether, in his view, the correlative rights and liabilities extended to the property rights of the tenants.

16 In my view, it does not follow *a fortiori* that the disclaimer would operate upon the separate property rights of the Growers by virtue of the proviso. First, it is not apt to describe a leasehold estate as a liability nor is it apt to characterise it as an encumbrance on the landlord's property. A leasehold estate is a grant of property right and the grant of property right confers on the tenant different legal rights in the property than the

¹⁸ See also *Capital Prime Properties plc v Worthgate Ltd (in liq)* [2000] B.C.C 525.

¹⁹ *The Corporations Act 2001* (Cth), s 568D.

²⁰ (1989) 7 ACLC 179.

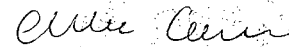
rights attaching to the landlord's reversionary interest. It is therefore unnecessary to extinguish the Growers' leasehold estates in order to release WFL's property from its liability. Moreover, it is to be borne in mind that the property proposed to be disclaimed is the contract for lease, under which WFL has already leased the land to the Growers. It is therefore unnecessary to interfere with the Growers' property rights in order to release WFL from its liability to lease because the leases have been effected. Accordingly, the answer is that the proviso in s 568D has no application.

17 Accordingly, a disclaimer of the leases by the liquidators of WFL will not have the effect of extinguishing the Growers' leasehold estates.

CERTIFICATE

I certify that this and the 9 preceding pages are a true copy of the reasons for Judgment of Davies J of the Supreme Court of Victoria delivered on 9 February 2012.

DATED this ninth day of February 2012.



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Associate

SCHEDULE OF PARTIES

No. 6816 of 2011

No. 6762 of 2011

BETWEEN:

WILLMOTT FORESTS LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650) IN ITS CAPACITY AS RESPONSIBLE ENTITY OF THE MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2 AND IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED SCHEMES LISTED IN SCHEDULES 3 AND 4 AND ORS ACCORDING TO SCHEDULE 1	First Plaintiff
CRAIG DAVID CROSBIE IN HIS CAPACITY AS LIQUIDATOR OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)	Second Plaintiff
IAN MENZIES CARSON IN HIS CAPACITY AS LIQUIDATOR OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (CAN 063 263 650)	Third Plaintiff
WILLMOTT GROWERS GROUP INC	Intervener
WILLMOTT ACTION GROUP INC	Intervener
DK INVESTMENT SERVICES	Intervener

