SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2012 0026

In the Matter of Willmott Forests Limited (Receivers and Managers appointed) (in liquidation) (ACN 063 263 650)

BETWEEN

| | |
|---|---|
| WILLMOTT FORESTS LTD (Receivers and Managers appointed) (in liquidation) (in its capacity as Responsible Entity of the unregistered schemes listed in Schedule 2 and others (according to the schedule attached). | Appellants |

and

| | |
|---|---|
| WILLMOTT GROWERS GROUP INC | First Intervener |
| WILLMOTT ACTION GROUP INC | Second Intervener |

---

| | |
|---|---|
| JUDGES | WARREN CJ, REDLICH JA and SIFRIS AJA |
| WHERE HELD | MELBOURNE |
| DATE OF HEARING | 23 May 2012 |
| DATE OF JUDGMENT | 29 August 2012 |
| MEDIUM NEUTRAL CITATION | [2012] VSCA 202 |
| JUDGMENT APPEALED FROM | *Re Willmott Forests Ltd* [2012] VSC 29 |

---

CORPORATIONS – Liquidation – Liquidator of lessor disclaims lease agreement under s 568(1) of *Corporations Act 2001* (Cth) – Whether disclaimer extinguishes leasehold interest – Whether leasehold interest survives termination of the lease agreement – *Progressive Mailing House Proprietary Limited v Tabali Proprietary Limited* (1985) 157 CLR 17 – *Apriaden Pty Ltd v Seacrest Pty Ltd* (2005) 12 VR 319.

CORPORATIONS – Liquidation – Consequence and extent of disclaimer on 'other person's rights' – Necessary to extinguish lessees' tenure to release the company and its property from liability – Whether implied covenant for quiet enjoyment constitutes a liability – *Corporations Act 2001* (Cth) ss 477, 511, 568, 568D – Appeal allowed.

---

| Appearances: | Counsel | Solicitors |
|---|---|---|
| For the Appellants | Mr P Crutchfield SC with Mr R Craig | Arnold Bloch Leibler |
| For the first and second intervener | Mr G Bigmore QC with Mr M Kennedy | Mills Oakley |

WARREN CJ
SIFRIS AJA:

*Introduction*

1 The critical question in this appeal is whether a leasehold interest in land is extinguished by the disclaimer of the lease agreement by the liquidator of the lessor, pursuant to s 568(1) of the *Corporations Act 2001* (Cth) ('the Act').

2 Willmott Forests Limited ('WFL') owns, or leases from third parties, certain freehold properties that it has leased to lessees pursuant to lease agreements. The term of the relevant leases is 25 years. WFL is now in liquidation and its liquidators wish to sell its interest in the properties, unencumbered by the leases. As part of any sale, WFL's liquidators propose to disclaim the lease agreements and apply to the court for the approval of such disclaimers.

3 The lessees assert that disclaimer of the lease agreements does not extinguish the lessees' proprietary or leasehold interest in the land. The trial judge agreed with the lessees and rejected the submissions of the liquidator to the effect that the leasehold interests were extinguished upon the lease agreements being disclaimed. Her Honour held further that the leasehold interests could not be characterised as liabilities or encumbrances upon the property of the lessor, and it was consequently not necessary to extinguish such interests.[1]

4 The liquidators appeal the decision of the trial judge. In light of the urgency of the matter, this court granted an expedited hearing of the appeal. By the time of the appeal that urgency had changed for various reasons.

*Background*

5 The relevant facts are not in dispute and may be shortly stated.

---

1 *Re Willmott Forests Ltd* [2012] VSC 29, [1], [3]–[4].

6 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.

7 WFL is in liquidation and the liquidators 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.

8 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), on the condition that the liquidators seek the Court's consent before disclaiming the project documents.

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

10 The liquidators made an application to the Court to obtain those orders and directions under s 511 of the Act. In addition, they sought, 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) supported their application, but the Willmott Growers Group Inc ('WGG') and the WILLMOTTACTIONGROUP INC ('WAG') (which each represent different groups of Growers and were granted leave to intervene as contradictors) opposed the granting of such relief.

11 The application by the liquidators under s 511 relates to a number of matters. Given the initial urgency of the matter, the parties and the Court agreed to determine the disclaimer issue as a preliminary matter. The agreed question for separate and preliminary determination was 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?

12 The question was expressly left open by the Federal Court in making the orders and directions on 29 June 2011.

13 During the course of the appeal, we were informed that the sale contracts are no longer on foot but that the question still remains and will self-evidently affect any future sale.

14 Although the question in respect of which judicial advice is sought, is essentially a legal question, the answer to some extent depends on the nature and characterisation of the leasehold interest. To this extent, the parties filed an agreed statement of facts and included a sample lease and other documents in the Appeal Book. The documents and agreed facts were before her Honour.

*The Legislation*

15 Under s 568 of the Act, liquidators have the power to disclaim property of a company in liquidation or contracts entered into by the company.

16 The Act 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.
>
> ...
>
> **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.

17 The purpose of the provisions 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.[2] That object is facilitated, amongst other things, 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.

18 Section 568D(1) makes it clear that the effect of a 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 as is necessary in order to release the company or its property from liability'.

*The Judgment Below*

19 The trial judge held that disclaimer of the lease agreements by the liquidator of the lessor did not have the effect of extinguishing the leasehold interests of the lessees in the subject land.

20 The critical reasoning of the trial judge was as follows:

(a) A lease creates both contractual and proprietary rights.

(b) Under s 568D(1) of the Act, the effect of a disclaimer is to terminate 'the company's rights, interests, liabilities and property in or in respect of

---

2 *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq)* (2000) 35 ACSR 484, 498 [65] (Santow J); *Sims v TXU Electricity* [2005] NSWCA 12.

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.'

(c) Although disclaimer of a lease agreement by the liquidator of a lessee would terminate all of the lessee's rights arising from that lease agreement, including by extinguishing the lessee's leasehold interest, this is not the case with the disclaimer of a lease contract by the liquidator of a lessor.

(d) A leasehold interest is the property of the lessee and disclaimer of the lease by the liquidator of the lessor only terminates the lessor's rights, interest and liabilities under that lease (and other persons' rights and liabilities only to the extent necessary). Such a disclaimer would not bring the lease to an end for all purposes. Specifically, such a disclaimer 'would not bring the tenant's proprietary interest in the land to an end.'[3]

(e) A leasehold interest cannot be described as a liability or encumbrance upon the property of the lessor and it is not necessary to extinguish such an interest to release the lessor or its property from a liability.[4]

*Grounds of Appeal*

21 By Notice of Appeal dated 20 April 2012, the liquidators appeal on the basis that the trial judge erred insofar as her Honour:

(a) held that the liquidators were not able to disclaim the leases pursuant to s 568(1) of the Act with the effect of extinguishing the lessees' leasehold interests in the land;

(b) held that disclaimer of the lease contracts would not bring the lessee's proprietary interest in the land to an end;

---

3 *Re Willmott Forests Ltd* [2012] VSC 29, [11].

4 Ibid [16].

(c) held that the leasehold interests were not a liability for the purposes of s 568D(1) of the Act; and

(d) held that it was unnecessary to extinguish the lessees' leasehold interests in order to release the property from liability.

*The consequences of disclaiming the lease agreements*

22 The Liquidator proposes to disclaim the lease agreements and has sought judicial advice as to whether this would have the effect of extinguishing the leasehold interest of the Growers.

23 The consequences of any disclaimer, so far as it affects the company and other parties, is set out in s 568D of the Act.

24 Under s 568D of the Act the disclaimer –

(a) terminates the company's 'rights, interests, liabilities and property' in the disclaimed property; and

(b) only affects another person's property if it is necessary 'to release the company and its property from liability'.

25 By disclaiming the contract, WFL no longer has any contractual rights or liabilities under the contract. It is no longer required to perform its part of the contractual bargain. It does not have to provide the lessee with possession and quiet enjoyment. It follows that the lessee, as the other contracting party, loses its rights and is no longer required to fulfil its obligations. This is because the rights and duties of WFL as lessor and the lessee are reciprocal and interdependent. However, there is a qualification to the extent to which the other parties' interests or property is affected. It is only affected to the extent necessary to release the company [WFL] from liability.

26 It is clear from the words used that third party rights and interests can be affected and indeed they may affect the most innocent of parties. The remedy is provided in s 568D(2). This section provides for such person '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'. Accordingly, the Growers can prove for the amount they have been deprived of because of non-performance of the contract by WFL.[5] Further, ss 568B and 568E provide a further remedy to parties aggrieved by any disclaimer. They can apply to the Court to set aside the disclaimer. They need to establish that the prejudice they will suffer is 'grossly out of proportion' to the prejudice to the company's creditors.[6] These factual matters were not before the trial judge or this court.

27 The critical question therefore, is how far it is necessary to go (in relation to the lease of the lessee grower) in order to release WFL from liability. This begs the question of what the liability of the lessor is?

28 The ongoing requirement to provide the lessee with possession and quiet enjoyment is clearly an obligation of WFL. It continues for the duration of the lease. It is self evident that the obligation to provide such tenure is a liability of WFL. The liability of WFL arises directly out of the tenure of the lessee. Put another way, the lessee's right to possession (a right derived from the disclaimed contract) will only terminate if it has the effect of releasing WFL from liability. In our opinion, termination of the contract would relieve WFL from its ongoing liability to provide quiet enjoyment.

29 Mr Bigmore QC, who appeared with Mr Kennedy for the Growers, submitted that the rights of the Growers as lessees will have accrued or become vested at the time of any disclaimer and are therefore preserved.

30 Mr Crutchfield SC, who appeared with Mr Craig for WFL, submitted that the liability was an ongoing liability to perform which could be terminated in relation to such future performance. He relied on *Rothwells Ltd (in liquidation) and Others v*

---

5 *Re Richardson Meat Industries Ltd* (1989) 15 ACCR 343. See also *Christopher Moran Holdings Ltd v Bairstow and Anor* [2000] 2 AC 172, 180 where Lord Hobhouse referred to a similar section as '...a statutory right to compensation directly analogous to a right to claim damages for a statutory fault. It's character is compensatory.'

6 SS 568B(3) and 568E(5).

*Spedley Securities Ltd (in liquidation) & Anor.*[7]

31 In *Rothwells*, Hodgson J held that a disclaimer cannot terminate obligations which have accrued in the past. At page 422 his Honour said:

> I accept Mr Bathurst's submission that contractual rights can be property, and that there are, in this case, contractual rights such as the absolute right to receive $895,915, which can be characterised as property. However, it seems to me that obligations which have already accrued in the past are not liabilities which can be terminated. Liabilities which can be terminated could be such things as an obligation to arise in the future to pay money or transfer property or provide goods or services, and they could be restrictions on or inroads into the use or enjoyment of property. Where an obligation has arisen but the time for performance has not arrived, or where the obligation is subject to conditions which are not yet performed, then it may be, as Mr Bathurst submits, that that is a liability which can be terminated. In some cases, however, a question of degree may arise whether in substance this is a fully accrued obligation which cannot be terminated, or in substance an obligation in relation to the future which can be.

32 In our opinion, the continuing and prospective obligation to provide possession and quiet enjoyment is not a fully accrued obligation or liability that cannot be terminated.[8]

33 That the obligation to provide quiet enjoyment to a lessee was a liability of the lessor was confirmed by Lord Nicholls of Birkenhead in *Hindcastle v Barbara Attenborough Ltd.*[9]

34 In *Hindcastle*, Lord Nicholls said:[10]

> A tenant enjoys *rights* under a lease as well as being subject to liabilities. The landlord covenants that the tenant will enjoy the property free from disturbance. The landlord may undertake repairing obligations, or obligations to provide services. The rights of a tenant under these covenants will be enforceable by him against the landlord, either by virtue of privity of contract, or privity of estate, or both.
>
> Each of the liabilities of the tenant has a reverse side. A tenant is under a liability to the landlord to pay the rent. The reverse side is that the landlord has a right to be paid the rent. Similarly with the rights of a tenant: a tenant has a right to quiet enjoyment. **The reverse side is that the landlord is under a liability to the tenant to afford quiet enjoyment** (emphasis added).

---

7 (1990) 20 NSWLR 417 ('*Rothwells*').

8 Hodgson J uses the words 'obligation' and 'liability' interchangeably in *Rothwells.*

9 [1997] AC 70 ('Hindcastle').

10 Ibid 85 D–E.

35 Mr Crutchfield contended that the word liability in s 568D(1) was wide enough to embrace the continuing obligation on the part of WFL to provide quiet enjoyment. He relied further on the decision of Hayne J in *Crimmins v Stevedoring Committee*.[11]

36 In *Crimmins* Hayne J said:[12]

> [137] The precise meaning to be given to the word "liabilities" depends on its context. In *Tickle Industries Pty Ltd v Hann*, Barwick CJ pointed out:
>
> > "The use of the word 'liable' can cause difficulty in construction because of the various senses in which the word is or has been from time to time employed. The word takes its particular significance, however, from the context in which it appears and the subject matter and evident policy of the legislation in which it is found".
>
> This is so, even though some judges have expressed the opinion that the "ordinary or natural meaning" of the word is limited to "actual" (rather than "potential") liability.
>
> [138] In some contexts, the meaning of "liabilities" will be wide enough to embrace a "contingent" or "inchoate" liability. Thus, *Jowitt's Dictionary of English Law* defines "liability" as:
>
> > "... the condition of being actually or *potentially subject to an obligation*, either generally, as including every kind of obligation, or, in a more special sense, to denote *inchoate, future, unascertained or imperfect obligations*, as opposed to debts, the essence of which is that they are ascertained and certain. Thus when a person becomes surety for another, he makes himself liable, though it is unascertained in what obligation or debt the liability may ultimately result".
>
> [139] In *Ogden Industries Pty Ltd v Lucas* Windeyer J, after describing the words "liable" and "liability" as "chameleon-hue", said that:
>
> > "... there are at least three main senses in which lawyers speak of a liability or liabilities. The first, a legal obligation or duty: the second the consequence of a breach of such an obligation or duty: the third a situation in which a duty or obligation can arise as the result of the occurrence of some act or event".

37 The context of the word 'liability' in s 568D(1) suggests that it should be given the widest possible meaning and include the obligation to provide possession and quiet enjoyment. The section is specifically designed to enable a liquidator 'to cease

---

11 [1999] 200 CLR 1 ('*Crimmins*').

12 Ibid [137]–[139].

performing obligations ... [and] to achieve a release of the company in liquidation from its obligations'.[13] If WFL is to be relieved of its obligation to provide quiet enjoyment, clearly and in context a liability, the interest of the lessee so far as tenure is concerned is directly related to and underpins such liability. The tenure must go. It is necessary to affect the Growers rights (tenure) in order to release WFL from its liability (possession and quiet enjoyment). The cases where rights have been preserved usually involve claims against third parties unrelated to any liability of the company in liquidation.[14]

38 The remaining question is whether, notwithstanding the termination of the interests of the lessee under the disclaimed contract – because the termination of such interest is necessary to relieve WFL from liability – the asserted leasehold interest remains. The trial judge held that it did, essentially because it was not necessary to terminate such interest in order to relieve WFL of liability. We disagree.

39 For reasons that follow we are of the opinion that if the contract is disclaimed, the leasehold interest is also extinguished. In our opinion, any leasehold interest is governed by the contract of lease. It is the contract that regulates the substance and termination of the leasehold interest.

40 The authorities support the proposition that any leasehold interest is governed by the law of contract. It is regrettable that the authorities referred to below were not brought to the attention of the trial judge. The authorities were plainly relevant. Neither counsel before us were able to explain how the authorities and relevant points were not raised.

41 It is clear that in a change from the previous position, the doctrines of frustration and repudiation apply to leases.[15] This represented a clear change in judicial thinking. Instead of viewing leases essentially or exclusively in terms of

---

13 *Sims v TXU Electricity* [2005] NSWCA 12, [20] (Spigelman CJ).

14 *Hindcastle* is such a case, as is *Sandtara Pty Ltd v Abigroup Ltd* (1996) 19 ACSR 578.

15 *Progressive Mailing House Proprietary Limited v Tabali Proprietary Limited* (1985) 157 CLR 17 ('Progressive Mailing'); Commercial Tenancy Law (Bradbrook, Croft and Hay) 3ed, 519-548.

their proprietary character, a development associated with the feudal origin of leases, leases have been considered from a contractual perspective. This involved a recognition that modern commercial leases, with extensive contractual provisions, stand in stark contrast to a long term lease of agricultural land at *Blackacre* at minimal or no rent. This contrast was recognised by Deane J in *Progressive Mailing*.

42 In *Progressive Mailing*, Deane J said:[16]

> [T]he leasehold estate cannot be divorced from its origins and basis in the law of contract (c.f. per Aitkin L.J. in *Matthew v Curling*): the lease should be seen as 'resting on covenant' (or contractual promise) and it is 'the contract...and not the state...which is the determining factor': see per Isaacs J., *Frith v O'Halloran* quoting from *Hallen v Spaeth* .
>
> ...
>
> [O]nce it is accepted that the principles of the law of contract governing termination for fundamental breach are, as a matter of theory, applicable to leases generally, there is no difficulty in applying them in the present case in much the same fashion as an ordinary executory contract: '[i]f the contract is avoided or dissolved...the estate falls with it': per Lord Wright, *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd.*

43 The other members of the High Court in *Progressive Mailing* made similar statements.[17] After reviewing the authorities, Mason J said:[18]

> Accordingly, the balance of authority here as well as overseas, and the reasons on which it is based, support the proposition that the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases.

44 In *Apriaden Pty Ltd v Seacrest Pty Ltd*,[19] this court held that the termination of a contract for lease, by accepting a repudiation, had the effect of determining the leasehold interest.

45 Ormiston JA said:[20]

---

16 (1985) 157 CLR 17, 53 and 54, footnotes omitted.

17 Ibid 29–30 (Mason J); 45–50 (Brennan J); 53–54 (Wilson J); 56 (Dawson J).

18 Ibid 29 (Mason J).

19 (2005) 12 VR 319.

20 Ibid [3]–[4], footnotes omitted.

[3] In truth, other than tenancies elaborately controlled by the Residential Tenancies Act and tenancies created under legislative powers, leases these days more often than not take the form of complex commercial documents more akin to contracts than demises. One need only look at the elaborate document recently discussed by this court in *Australia Pacific Airports (Melbourne) Pty Ltd v Nuance Group (Australia) Pty Ltd*. It is therefore not surprising that the High Court some 20 years ago reached a view, at least by majority, which has never been refuted by that court and has in fact been implicitly accepted by it, that "the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases": see *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*. The only exceptions to this general approach acknowledged by the majority are cases where the lease by its very terms can be taken to have excluded conventional contractual remedies and leases of the kind where ordinary contractual remedies are effectively impossible to apply, for example, because the only consideration has been a premium and a nominal rent.

[4] .... I think one must now accept that the decision of the High Court in *Tabali* represents the common law of Australia, for it has been effectively unchallenged by any decision of authority in the succeeding 20 years and none of the doubts expressed in a few cases in that period would deny the authority of what the High Court then said. The majority were well aware of the theoretical problems posed in the judgment of Brennan J but chose deliberately to prefer in the ordinary case the potential application of the law of contract as a basis for determining a leasehold interest.

46 Williams AJA said:[21]

[61] It is common ground that contractual principles relating to repudiation apply to leases after *Tabali* and that, if the acceptance of repudiation also determines the lease under property law doctrines, contractual damages will be available to the innocent party.

[62] The first issue between the parties is as to whether the contractual doctrine of repudiation provides an additional means by which a lease may be terminated by the innocent party. In my opinion, the balance of authority suggests that it does.

[63] There was some early support in New South Wales for Priestley JA's views in *Wood Factory* that the ratio of *Tabali* should be confined. However, more recently, courts in New South Wales, Western Australia, South Australia, the Australian Capital Territory and, significantly, in this State, as well as academic commentators have recognised the general applicability of contractual principles to leases. Further, in *Laurinda*, the High Court followed the same course, holding that the subject lease had been repudiated, without reference to the termination of the leasehold estate under property law doctrines, in circumstances in which it might have been argued that there had been a surrender of the lease.

...

---

21 Ibid [61]–[63], [65], footnotes omitted.

> [65] Further, in my respectful opinion, the position contemplated by counsel for the appellant and referred to by Brennan J in *Tabali*, of a contract of lease being terminated by repudiation at one point and then, some time later, the leasehold estate being determined by acceptance of a surrender or forfeiture, would seem likely to produce uncertainty and confusion if the parties were bound, in the interim, only by those surviving covenants of the lease touching and concerning the land.

47 Although the event bringing about the termination of the contract of lease (and as a consequence, any leasehold interest) was a repudiation accepted by the non-defaulting party, it is the consequences of such termination, (namely termination of the leasehold interest) however brought about, that are relevant. There is no reason in principle or policy that should treat the consequences of disclaiming a contract of lease in a different way. In both cases, the lease agreement is at an end and what follows is a matter of law, namely termination of the leasehold interest that does not depend in any way on the reason for such termination. According to the Macquarie Dictionary, disclaim means:[22]

> 1. to repudiate or deny interest in or connection with; disavow; disown; disclaiming all participation; 2. Law to renounce a claim or right to; 3. to reject the claims or authority of; 4. Law to renounce or repudiate a legal claim or right; 5 Obsolete to disavow interest.

48 In *Cricklewood Property and Investment Trust Limited v Leighton's Investment Trust Limited*,[23] Lord Wright said:[24]

> If the contract is avoided or dissolved, as it may be by either party, under the express terms of the lease, the estate in land falls with it. I do not see why this may not be also true if the lease were dissolved by operation of law.

49 In our opinion, the decision of Lord Nicholls in *Hindcastle* provides support for the principle. His Lordship said:[25]

> 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

---

22 *Macquarie Dictionary* (5th Edition).

23 [1945] AC 221.

24 Ibid 240.

25 [1997] AC 70, 87.

> 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.
>
> Disclaimer also operates to determine the tenant's interest in the property, namely the lease... 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.

50 Although his Lordship was dealing with a contractual disclaimer by the liquidator of a lessee, we do not understand his Lordship to suggest that the same consequences – determination of the leasehold interest – would not apply in the case of the liquidation of the landlord. His Lordship was dealing with the consequences of the termination of the lease agreement. Why should the consequences differ if the underlying event that informs the consequences, namely termination of the contract, is the same?

51 Finally, in assessing where the leases fit on the continuum referred to by Deane J in *Progressive Mailing* (Blackacre v complex contractual covenants), it is important to place the lease agreements of the kind in evidence in their proper commercial context. It is but one document in a suite of inter-related documents that regulate the rights and liabilities of various parties in a managed investment scheme that may fairly be regarded as tax driven. The scheme is underpinned by a constitution and the existence of numerous growers or investors who pool their resources and permit a manager to attend to all the necessary work. In this context, as with shopping centre leases, it is difficult to regard the grower or investor (they are not called lessees) as holding a leasehold interest or estate. The better view is that there is no demise of the kind that would survive any termination of the very contract that created the tenure.

52 The notion that a commercial lease is a demise that confers an interest in land and survives the termination of the contract creating the demise is to ignore recent, significant developments in the law that clearly suggest otherwise.

53 Although not fully argued, s 568(1A) may provide further support. There is no basis to suggest that the liquidator referred to in that section must be a liquidator

of the lessee because only the lessee has a 'lease of land'. The reference to lease of land in a contractual context seems to include the leasehold interest.

54 In *Re Real Investments Pty Ltd*, Chesterman J said:[26]

> Ordinarily one might think that a "lease of land" would constitute land which can only be disclaimed if burdened with onerous covenants (see s568(1)(a)) but the draftsman seems to have regarded leases as a species of contract, not an interest in land, and permitted that species and one other to be disclaimed without leave.

55 As this matter was not fully argued, it is not necessary to deal with this aspect any further.[27]

56 The cases of *Re Bastable*[28] and *Dekala*[29] referred to and relied on by Mr Bigmore, do not deal with leases and are distinguishable and of marginal relevance. Mr Crutchfield submitted that they are distinguishable on the basis that the liquidator cannot disclaim someone else's property and to the extent that this was permissible, it was not necessary in these cases. In view of the peculiar and specific way in which the 'contractualisation of leases' has developed,[30] it is not necessary to deal with the submission.

57 The National Australia Bank cases referred to by Mr Bigmore deal with an entirely different factual and legal position.[31] In these cases, the liquidator disclaimed the property itself as in both cases, the properties were burdened by substantial mortgages which were considered burdensome.

58 Accordingly, in our opinion, the grounds of appeal are made out. For the reasons given, any leasehold interest cannot survive the termination of the very

---

26 [2000] 2 Qd R 555, 559 [13].

27 We do not deal with whether the leases may be disclaimed on the basis that they are unprofitable contracts or property (the leases) containing onerous obligations as these matters were not fully argued.

28 *Re Bastable; Ex parte the Trustee* [1901] KB 518.

29 *Dekala Pty Ltd (in liquidation) v Perth Land & Leisure Ltd* (1987) 17 NSWLR 664.

30 Commercial Tenancy Law (Bradbrook, Croft and Hay) 3 ed, 519.

31 *National Australia Bank v The State of Victoria* [2010] FCA 1230; *National Australia Bank v New South Wales* [2009] FCA 1066.

contract that created it and regulated the tenure of the Grower. It is this tenure which creates, and is the basis of, the obligation or liability on the part of WFL to provide quiet enjoyment. Section 586D(1) allows the liquidator to terminate this obligation or liability despite its intrusion into the property rights of an innocent party. The evident policy is to permit the loss of these rights in order to enable the company in liquidation to be free of obligations so that it can be wound up without delay for the benefit of its creditors. To compensate, the rights of the affected parties are transmuted into various statutory rights and claims.

59 We would answer the question, yes.

REDLICH JA:

60 This appeal is brought by Willmott Forests Ltd ('WFL') in its capacity as the manager of various contractual and partnership schemes, together with its liquidators who together may be referred to as the appellants. WFL, as the owner of the freehold in certain land, leased that land to investors or 'growers' in those schemes. The growers, some of whom are the respondents, have rights to grow and harvest trees on that land pursuant to project documents which include lease and licence agreements with WFL for the use and occupation of the land. The liquidators of WFL had entered into sales contracts for the sale of part of that freehold land unencumbered by the rights of the growers conferred by the leases. The sales contracts contained conditions precedent to the completion of the sale that require the liquidators to obtain, inter alia, an order and direction from the Court authorising the liquidators to disclaim the project documents including the leases as owners pursuant to s 568(1) of the *Corporations Act 2001* (Cth) ('the Act'). In proceedings in the Federal Court before Dodds-Streeton J, her Honour ordered that the liquidators were 'justified in disclaiming the project documents' as they were 'onerous pursuant to s 568(1) of [the Act], on the condition that the plaintiffs will seek the Court's consent before disclaiming the project documents'.

61 The liquidators made application to this Court to obtain such orders and directions. The following preliminary question arose for determination by the trial judge:

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

62 The trial judge answered the preliminary question in the negative on two principal grounds. First, that the tenants' proprietary rights in the land would continue to subsist even though the effect of a disclaimer of the lease contracts by the landlord meant that the landlord's interests and liabilities under the lease had been terminated. Second, her Honour viewed it as inapt to describe a tenant's leasehold estate as a liability or to characterise it as an encumbrance on the landlord's property. Hence her Honour concluded that it was unnecessary to extinguish the growers' leasehold estates in order to release WFL's property from its liability.

63 The legislative intent of Division 7A of the Act is to enable insolvency administrators to relieve themselves of ongoing liabilities which would prolong the administration and delay the dividend to creditors.[32] The appellants assert that the liquidators are justified in disclaiming the project documents of the contractual and partnership schemes, including the lease contracts, as they are onerous and unprofitable and are incompatible with the liquidators' duty to realise WFL's property and pay a dividend at the earliest possible time. More particularly they rely upon the primary purpose of the disclaimer provisions which is to release the company from all its liabilities.[33]

64 Section 568(1)(f) empowers the liquidator to disclaim property of a company that consists of a contract. Section 568(1A) requires the liquidator to obtain leave of the court to disclaim a contract other than 'an unprofitable contract or a lease of

---

32 *Global Television Pty Ltd v Sports Vision Australia Pty Ltd (In Liq)* (2000) 35 ACSR 484, 498 [65] (Santow J); approved by Spigelman CJ in *Sims & Anor (as liquidators of Enron Australia Pty Ltd) v TXU Electricity Ltd* [2005] NSWCA 12 [16]–[18].

33 *Hindcastle Ltd v Barbara Attenborough Ltd* [1997] AC 70, 87 (Lord Nicholls of Birkenhead); *Sims & Anor (as liquidators of Enron Australia Pty Ltd) v TXU Electricity Ltd* [2005] NSWCA 12 [20] (Spigelman CJ).

land'. Chesterman J in *Re Real Investments Pty Ltd*[34] considered s 568(1A) reflected an intention to regard leases 'as a species of contract, not an interest in land'. There is no discernible reason why a lease of land should not be treated as a contract for the purposes of s 568.

65 Section 568D(1) provides that the disclaimer terminates the company's rights and liabilities in respect of the disclaimed contract but the rights and obligations of counterparties are to be affected as little as possible. Their rights and liabilities are to be affected only so far as is necessary in order to release the company and its property from liability.

66 The respondents contended before the trial judge and on appeal that a landlord cannot disclaim a tenant's *in rem* rights as the tenant has acquired a vested estate or interest in the land. While a tenant may disclaim its estate or interest, the insolvent landlord cannot determine the tenant's estate, as the leasehold estate is not the landlord's property to divest. This trial judge accepted these submissions.

67 The view that a lease, conveying an interest in land, did not come to an end like an ordinary contract on repudiation and acceptance,[35] was rejected by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd.*[36] on the basis that contractual doctrines should be applied uniformly and that there was no convincing argument in principle why they ought not to apply to the divestment of an interest in land.

68 The trial judge was not taken by any of the parties to that case or cases such as *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[37] and *Apriaden Pty Ltd v Seacrest Pty Ltd.*[38] This line of authority was now at the forefront of the appellants' argument on

---

34 [2000] 2 Qd R 555, 559 [13].

35 *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [I972] 1 QB 318, 324 (Denning MR).

36 [I981] AC 675; 1 All ER 161, 168 (Lord Hailsham of St Marylebone LC), 170 (Lord Wilberforce), 176 (Lord Simon of Glaisdale), 187 (Lord Roskill).

37 (1985) 157 CLR 17.

38 (2005) 12 VR 319.

appeal to support one of their primary contentions that under contract law, if the contract is repudiated the estate in land falls with it.

69 Deane J was to observe in *Progressive Mailing* that –

> the leasehold estate cannot be divorced from its origins and basis in the law of contract: the lease should be seen as 'resting on covenant' (or contractual promise) and it is 'a contract ... and not the estate ... which is the determining factor'. See per Isaacs J: *Firth v Halloran* quoting from *Hallen v Spaeth*.[39]

70 Deane J also stated that the contractual doctrines of frustration and termination for fundamental breach or for repudiation as they developed were not seen as applicable to an executed demise under which an interest or estate in land had actually passed to the tenant. He found that the clear trend of common law authority was now to deny any general immunity of contractual leases from the operation of those doctrines of contract law.[40] Deane J, with whom the majority of the Court agreed, considered that the trend should be followed so that as a general matter and subject to one qualification, the ordinary principles of contract law are applicable to contractual leases. The qualification recognised by the majority are those leases where by their very terms are to be understood to exclude conventional contractual remedies and leases where those remedies are impossible to apply.[41]

71 *Progressive Mailing* and other subsequent cases[42] were considered by Williams AJA in *Apriaden*.[43] Her Honour, with whom Ormiston and Batt JJA agreed, concluded that the common law contractual doctrine of repudiation provided a means by which a lease could be terminated without the separate need for termination of the leasehold under property law principles of surrender or forfeiture.[44] There have been many cases since where the Australian courts have

---

39 (1985) 157 CLR 17, 53 (citations omitted).

40 Ibid 52.

41 Ibid 53 (Deane J).

42 For example *Sunbird Plaza Pty Ltd v Maloney* (1998) 166 CLR 245; *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623.

43 (2005) 12 VR 319, 328–331.

44 Ibid 334 [62].

accepted, what has been termed, the "contractualisation" of leases. [45]

72 The lease creates rights *in rem* being an estate or interest in the land demised.[46] The right to possession which gives rise to the interest in the land is an essential part of the lease.[47] The demise of an estate for a term of years is so intertwined with the covenant and contractual provisions relating to it that they must be viewed as constituting one legal transaction. Where the estate in land is one which has come into existence by virtue of a lease contract the disclaimer of the contract involves a direct repudiation of the relation of landlord and tenant which, once accepted, brings the estate to an end.

73 Disclaimer in the exercise of the statutory power is different from that under contract law where the act of disclaimer or repudiation does not of itself determine the tenancy. The innocent party has an option to bring it to an end. Statutory disclaimer does not require acceptance of the act of repudiation of the relation of landlord and tenant. Disclaimer by the exercise of a power conferred by statute of itself determines the tenancy. No question of acceptance of the disclaimer arises.[48]

74 Lord Nicholls of Birkenhead, dealing with a tenant's statutory disclaimer of the lease in *Hindcastle Ltd v Barbara Attenborough Ltd*,[49] stated that the disclaimer operates to determine the tenant's interest in the property. The disclaimer of the contract will bring to an end the tenant's leasehold interest if it is necessary that the landlord be released from any continuing liability arising from the contract or the estate. In such circumstances the consequences for the leasehold estate will be the same under a statutory disclaimer of a lease contract as it would for termination of the leasehold applying contractual doctrines. The repudiation of the relationship of

---

45 See Bradbrook, Croft and Hay Commercial Tenancy Law 3rd ed, LexisNexis Butterworths, (2009), [16.28].

46 *Haidar v Blendale Pty Ltd* [1993] 2 VR 524.

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

48 *W G Clark (Properties) Ltd v Dupre Properties Ltd* [1992] Ch 297 (T R A Morrison QC as a deputy judge of the High Court).

49 [1997] AC 70.

landlord and tenant means that the leasehold estate thereafter ceases to exist.[50]

75 The respondents contended in oral argument that the appellants' reliance upon the contractual doctrine of repudiation as informing the consequences of statutory disclaimer involved a false analogy between repudiation by tenant and repudiation by landlord. But we are not here concerned with the effect of contractual doctrines upon repudiation by a landlord but with the effect of the exercise of the statutory power of disclaimer. The exercise of a statutory power to disclaim a lease contract operates to terminate the landlord's rights and liabilities under the lease so far as is necessary in order to release the landlord from liability. It has a corresponding effect on the tenant's rights and liabilities. Section 568D does not confine the rights that may be affected by the disclaimer of the contract.

76 *Re The Nottingham General Cemetery Co*[51] provides a useful example of a disclaimer by the owner of the freehold. The liquidator of the Nottingham General Cemetery Co sought an order that he be at liberty to disclaim land constituting the company's cemetery together with all implied contracts with holders of grave certificates in respect of graves in the cemetery and all contracts for the upkeep of graves. Wynn-Parry J authorised the liquidator to disclaim the property in question holding, inter alia, that the land was 'burdened with onerous covenants'.[52] It was argued that there was an implied obligation on the company not to derogate from its own grant by using the land inconsistently with the company's undertakings but that such an obligation did not touch or concern the land. The form of grant was held to confer an exclusive right to burial in a specified part of the cemetery and that it necessarily followed that the land could not be used for any purpose conflicting with that right. Were the liquidator to sell the land, any purchaser would take with notice of the restrictions and would be subject to an action for specific performance by the grantee against the purchaser. Hence, the land was burdened with onerous

---

50 Ibid 87.

51 [1955] 1 Ch 683.

52 Ibid 691.

covenants and the company was permitted to disclaim the land and its undertakings.

77 The respondents' second principal argument, advanced at trial and on appeal was that once the contract was extinguished the landlord had no continuing liability from which it was necessary to release the landlord. The trial judge accepted this contention. Her Honour viewed the leasehold estate as a grant of property right which conferred on the tenants different legal rights in the property so that it was unnecessary to extinguish the leasehold estates in order to release WFL's property from liability.

78 It was common ground that the only arguable continuing liability under the leases was the covenant in respect of quiet enjoyment. At trial the respondents had submitted that the term 'liability' in s 586D meant a financial obligation. In answer the appellants submitted that compliance with the covenant would necessarily require the landlord to meet various expenses relating to the property but that in any event 'liability' extended beyond financial obligations. During oral argument on the appeal the respondents resiled from the contention that the covenant to provide quiet enjoyment was not a liability and conceded that her Honour had been in error in concluding otherwise.[53] Rather it was maintained that it was unnecessary to terminate the leasehold estate as the liability to provide quiet enjoyment occasioned no inconvenience to the liquidator or creditors. The continuation of the leasehold estate simply meant that the liquidator could only be able to realise the landlord's reversion which would be worth less than the freehold estate. That, it was submitted by the respondents, did not give rise to a 'liability' under the statute that made it necessary to strike down the leasehold estate. It was said that the existence of an inconvenient commercial encumbrance on the land could not justify a liquidator striking down accrued rights *in rem*.

79 Each of the respondents' contentions in this regard are unsustainable.

80 The implied covenant for quiet enjoyment arises from the relationship of

---

53 [2012] VSC 29, [16].

landlord and tenant and does not depend for its implication on the terms of the lease.[54] The covenant protects the tenant against interference with his quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord.[55] The purpose of the covenant is to prevent the landlord annulling its own deed by interfering with the possession of the tenant.[56] It obliges the landlord to allow the tenant to remain peacefully in possession during the term of the lease but it is prospective in nature. Hence the covenant may be seen as flowing from the general implied covenant not to derogate from the grant.

81 Evatt J in *Dimond v Moore*[57] referred to the consequences on use and enjoyment where there is repudiation of the relationship of landlord and tenant when he said of the tenant:

> He repudiated and disclaimed any relationship of tenancy from year to year. The agreement, which was intended by both parties to define fully and completely the user and enjoyment of the land, was duly rescinded by acceptance of breach. The respondent should not be allowed to say that there is still a yearly holding.[58]

82 Save where the terms of the lease provide otherwise, the landlord will ordinarily be obliged to meet various expenses arising from ownership of the freehold to ensure the tenant's undisturbed possession of the land. But 'liability' in the context of s 568D is not to be confined to a financial obligation or immediate financial detriment. There is nothing in s 568D or Div 7A to suggest that the term liability is not so wide as to include 'a legal obligation or duty.'[59] The term 'liability' has a broad meaning which covers executory obligations in relation to the quiet possession, use and enjoyment of the land into the future.[60] To release the appellants

---

54 *Birmingham, Dudley and District Banking Co v Ross* (1888) 38 Ch D 295, 308; *Baynes v Lloyd* [1895] 1 QB 820.

55 *Kenny v Preen* [1963] 1 QB 499, 511.

56 *Goldsworthy Mining Ltd v FC of T* (1973) 128 CLR 199, 214.

57 (1931) 45 CLR 159.

58 Ibid 187.

59 *Crimmins v Stevedoring Industry Finance Committee.* (1999) 200 CLR 1, 137–139 (Hayne J).

60 *Rothwells Ltd (In Liq) & Ors v Spedley Securities Ltd (In Liq) & Anor* (1990) 20 NSWLR 417, 422.

from these obligations it is necessary that the respondents' estates or interests in the leased lands be extinguished at the same time as the contracts.

83 Accordingly, I would answer the question in the affirmative.

84 The respondents will of course have a right to prove for the damage they suffer as a result of the disclaimer of the leases which would include the loss of opportunity to grow and sell the trees.

---

## SCHEDULE 2 – REGISTERED MANAGED INVESTMENT SCHEMES

1. Willmott Forests 1989 – 1991 Project (ARSN 092 516 651)
2. Willmott Forests 1995 – 1999 Project (ARSN 089 598 612)
3. Willmott Forests Project (ARSN 089 379 975)
4. BioForest Dual Income Project 2006 (ARSN 119 153 623)
5. BioForest Sustainable Timber and Biofuel Project 2007 (ARSN 124 135 535)
6. Willmott Forests Premium Forestry Blend Project (ARSN 131 549 589)
7. Willmott Forests Premium Forestry Blend Project – 2010 Project (ARSN 142 722 585)
8. Willmott Forests Premium Timberland No 1 (ARSN 136 768 520)