

**WILLMOTT GROWERS GROUP INC v WILLMOTT FORESTS LTD (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) & ORS (M53/2013)**

Court appealed from: Court of Appeal of the Supreme Court of Victoria  
[2012] VSCA 202

Date of judgment: 29 August 2012

Date special leave granted: 10 May 2013

The issue 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').

The first respondent ('WFL') owned, or leased from third parties, certain freehold properties that it leased to lessees pursuant to lease agreements, as part of various managed investment schemes. WFL was placed in liquidation in March 2011 and its liquidators (the second & third respondents) wished to sell its interest in the properties, unencumbered by the leases. As part of any sale, WFL's liquidators proposed to disclaim the lease agreements and they applied to the Supreme Court for the approval of such disclaimers. The appellant (Willmott Growers), representing members of 4 of the partnership schemes and lessees of WFL, intervened in the application. The lessees asserted that disclaimer of the lease agreements would not extinguish their proprietary or leasehold interest in the land. The trial judge (Davies J) determined a preliminary question and 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 land. 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.

The liquidators sought to appeal to the Court of Appeal and were successful. The Court (Warren CJ, Redlich JA and Sifris AJA) considered that the continuing and prospective obligation of WFL, to provide possession and quiet enjoyment of the land to the lessees, was not a fully accrued obligation or liability that could not be terminated. The context of the word 'liability' in s 568D(1) of the Act suggested that it should be given the widest possible meaning and include the obligation to provide possession and quiet enjoyment. The section was specifically designed to enable a liquidator '*to cease performing obligations ... [and] to achieve a release of the company in liquidation from its obligations*'. If WFL was to be relieved of its obligation to provide quiet enjoyment, the interest of the lessee so far as tenure is concerned was directly related to and underpinned such liability. The tenure therefore had to go. It was necessary to affect the lessees' rights (tenure) in order to release WFL from its liability (possession and quiet enjoyment).

The remaining question was whether, notwithstanding the termination of the interests of the lessee under the disclaimed contract, the asserted leasehold interest remained. The Court held that if the contract was disclaimed, the leasehold interest was also extinguished. Any leasehold interest was governed by the contract of lease. It was the contract that regulated the substance and termination of the leasehold interest. 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 was the consequences of such termination, (namely termination of the leasehold interest) however brought about, that were relevant. The lease agreement was at an end and what followed was a matter of law, namely termination of the leasehold interest, that did not depend in any way on the reason for such termination. The notion that a commercial lease was a demise that conferred an interest in land and survived the termination of the contract creating the demise was to ignore recent, significant developments in the law that clearly suggested otherwise.

The ground of appeal is:

- The Court of Appeal erred in finding that the liquidator of a land-owning company to have power under s 568(1) of the *Corporations Act 2001* (Cth) to extinguish the property rights of the company's tenant?