IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M53 of 2013

BETWEEN:

WILLMOTT GROWERS GROUP INC
Appellant

and

WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) IN ITS CAPACITY AS MANAGER OF THE UNREGISTERED MANAGED INVESTMENT SCHEMES LISTED IN SCHEDULE 2
First Respondent

and

CRAIG DAVID CROSBIE IN HIS CAPACITY AS LIQUIDATOR OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)
Second Respondent

and

IAN MENZIES CARSON IN HIS CAPACITY AS LIQUIDATOR OF WILLMOTT FORESTS LIMITED (RECEIVERS AND MANAGERS APPOINTED) (IN LIQUIDATION) (ACN 063 263 650)
Third Respondent

and

WILLMOTT ACTION GROUP INC
Fourth Respondent

APPELLANT'S SUBMISSIONS

Part I:

1. The submission is in a form suitable for publication on the internet.

Part II:

2. The issue the appeal presents is whether a liquidator of a land-owning company has power under s 568(1) of the *Corporations Act 2001* (**the Act**) to extinguish the

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property rights of the company's tenant.

Part III:

3. The Appellant considers that notice need not be given pursuant to s 78B of the *Judiciary Act 1903*.

Part IV:

4. The reasons for judgment of the primary judge (in the Supreme Court of Victoria) are reported: *Re Willmott Forests Ltd* (2012) 258 FLR 160.

5. The reasons for judgment of the Victorian Court of Appeal are reported: *Re Willmott Forests Limited* (2012) 91 ACSR 182.

Part V:

6. Agreed statements of fact were filed in the Supreme Court at first instance and in the Court of Appeal proceeding.

7. The First Respondent (**Willmott**) was the manager of numerous forestry investment schemes (**Willmott Schemes**) including 15 unregistered managed investment schemes known as the "Contractual and Partnership Schemes" listed in the schedule hereto. Willmott was also a landowner and leased its land to members of certain of the Willmott Schemes including the Contractual and Partnership Schemes.

8. Willmott was placed in liquidation on or about 22 March 2011 and the Second and Third Respondents were appointed its liquidators (**the Liquidators**).

9. In May 2012, the First to Third Respondents initially applied to the Federal Court seeking directions, pursuant to s 511 of the Act, that the Liquidators were justified in disclaiming, pursuant to s 568(1) of the Act, the project documents (including the leases) of the Contractual and Partnership Schemes.

10. In the Federal Court application, Justice Dodds-Streeton made an order that the Liquidators were justified in disclaiming the project documents of the Contractual and Partnership Schemes, on the pre-condition the Liquidators sought and obtained the Court's consent before disclaiming. Her Honour did not consider the issue that arises on this appeal, deferring it for the occasion if and when the Liquidators sought consent.

11. The Liquidators embarked upon a sale process to realise the assets of Willmott.

12. In December 2012, the First to Third Respondents applied to the Supreme Court of Victoria seeking further directions regarding the sale of the Willmott assets, including seeking the Court's consent to disclaim the project documents and leases held by members of the Contractual and Partnership Schemes, as contemplated by the order of Justice Dodds-Streeton.

13. The Appellant intervened in the First to Third Respondents' application for directions, to address the Court on the question of whether the Liquidators could disclaim leases of the members of the Contractual and Partnership Schemes.

14. The Appellant represented members of four of the 'partnership schemes' comprising the Contractual and Partnership Schemes (**Partnership Schemes**). The members of the Partnership Schemes, who were lessees of Willmott (**Lessees**). The Appellant had developed a proposal for the continuation of four of the Partnership Schemes, including the appointment of a replacement forestry manager. Meetings of members of the four Partnership Schemes to consider the proposal have been adjourned on several occasions pending resolution of the appeals, including this appeal.

15. The Partnership Schemes were established and are operated on land located near Bombala, in north-east Victoria and south-east New South Wales (**Bombala land**). The Liquidators had entered into a conditional sale contract that included the Bombala land. The sale was conditional, in part, on all title to land passing free of encumbrances, including the Contractual and Partnership Schemes members' leases.

16. As part of the First to Third Respondents' application for directions, Her Honour Justice Davies heard argument, by way of preliminary hearing and determination, on the following question:

> *Are the liquidators able to disclaim the Growers' leases with the effect of extinguishing the Growers' leasehold estate or interest in the subject land.*
>
> (**Preliminary Question**)

17. An "exemplar" lease was provided to the Supreme Court and to the Court of Appeal (**the Lease**) with the agreed statement of facts referred to at paragraph 6 above. The Lease is for a 25 year term and the rental for the term was paid in advance. The tenant is granted exclusive possession by special condition B.2.(a) of the Lease.

18. In a judgment dated 9 February 2012, Her Honour answered the Preliminary Question, "No".

19. The First to Third Respondents sought and obtained leave to appeal from Justice Davies' negative answer to the Preliminary Question. The Appellant was granted leave by the Court of Appeal to intervene in the appeal proceeding, at the request of the First to Third Respondents.

20. The Court of Appeal found the Liquidators could disclaim the leases and, in doing so, extinguish the Lessees' interests in the land.

21. The Court of Appeal ordered the Appellant to pay the costs of the First to Third Respondents.

Part VI:

22. The long-established purpose of the disclaimer power currently found in Division 7A of Part 5.6 of the Act is not controversial. The power exists so as to enable liquidators to relieve the company of burdensome financial obligations or ongoing liabilities that would prolong the administration or delay payment of a dividend to creditors.[1]

23. However, the power has not hitherto enabled a liquidator to improve the value of an asset of the company by extinguishing the property rights of an arm's-length party.[2] As long ago as 1901, an insolvency practitioner was described by Cozens-Hardy J as impudent for attempting to achieve such an opportunistic outcome.[3]

24. The relevant provisions of the Act are set out in the **Annexure**.

The "disclaimer property"

25. Subsection 568(1) of the Act contemplates identification by the liquidator of the property of the company intended to be the subject of disclaimer. Subsets of such property are listed exhaustively in paragraphs 568(1)(a)-(f).

26. Intuitively, one might think that an unmarketable reversion would consist of "land burdened with onerous covenants", certainly if the landlord's covenants included significant expenditure on, for example, capital works, and probably (as in the present case) if the only covenant were to provide quiet enjoyment but the rent had all been prepaid.

27. One might also think it inapt that property be contemplated by the Legislature as consisting of "a contract", as distinct perhaps from "rights under a contract"[4]. (Further textual challenges exist when one considers the notion of termination, pursuant to subsection 568D(1), of "liabilities ... in respect of the disclaimer property" without impairment of "other person's rights ... except so far as necessary in order to release the company and its property from liability").

28. It may be accepted that "a contract" in paragraph 568(1)(f) includes "a lease of land" – so much is apparent form the choice of language in subsection 568(1A). But that begs the question of whether "a contract" includes a reversion. In other words, as a matter of statutory interpretation, if a reversion answers the description of "land burdened with onerous covenants", can the lease in respect of which the reversion exists as property of the company answer the description of "a contract"?

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[1] *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq)* (2000) 35 ACSR 484, 498 [65] (Santow J); approved by Spigelman CJ in *Sims (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd* (2005) 53 ACSR 295, 299–300 [18]. See also *Sims (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd* (2005) 53 ACSR 295, 299 [16] – [17].

[2] At least over the protestations of that party; see *Re Jandowae Estates Pty Ltd* (1989) 7 ACLC 179, a decision of a Master of the Supreme Court of Queensland on an unopposed application.

[3] *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122 at 124.6.

[4] *Rothwells Ltd (in liquidation) and Others v Spedley Securities Ltd (in liquidation) & Anor* (1990) 20 NSWLR 417 at 422 C-D

29. As a matter of common sense, a construction of paragraphs 568(1)(a) and (f) which places a reversion within the former subset of "property of the company" and a lessee's interest in the lease under the latter, is to be preferred to one (as applied by the Court of Appeal) that has the effect that a lessee's tenure can be extinguished by the liquidator of a company holding the reversion.

30. *Tabali* and the other cases said to indicate the "contractualisation of leases" do not assist in answering this question, which rather requires the application of familiar principles of statutory interpretation. The Court of Appeal was diverted from the task of application of those principles by equating "contract" (in paragraph 568(1)(f)) with "lease".

31. The Liquidators identified the property of the company for disclaimer as consisting of the leases and submitted that the leases were contracts within the meaning of paragraph 568(1)(f). The Court of Appeal should have rejected both the identification and the submission. The relevant property of the company ought to have been found to consist of "land burdened with onerous covenants" (s 568(1)(a)) or "property that is unsaleable or not readily saleable" (s 568(1)(c)).

32. Property rights granted by a lease are rights in the nature of a chattel real. They are rights 'carved out' of the freehold and are a sale of part of it (see Bradbrook, Croft and Hay, *Commercial Tenancy Law*, 3rd ed, Butterworths 2009, at [1.13] and [1.7]). Hence the requirement for a term certain. It follows that there can be no sense in which a grant of exclusive possession is executory.

33. This was recognised by Deane J in *Tabali*, when his Honour held that (at 51) that:

> *A lease for a term of years ordinarily possesses a duality of character which can give rise to conceptual difficulties. It is both an executory contract and an executed demise.*

34. And further (at 55) that:

> *Indeed, one may reach the case where it would be quite artificial to regard the tenant's rights as anything other than an estate or interest in land (e.g., a ninety-nine year lease of unimproved land on payment of a premium and with no rent, or only a nominal rent, reserved).*

35. The only covenant in Deane J's hypothetical lease is the covenant of quiet enjoyment. It follows that his Honour must have considered the grant of exclusive possession to be an executed demise.

36. Accordingly, the Court of Appeal erred in not finding that a grant of exclusive possession is an accrued right or a vested demise.

37. The property in the lease, in the sense required by the statute, vests in the tenant and does not vest in the landlord company. The landlord company holds only a reversion, being the freehold burdened by covenants (see sub-s 568(1)(a) of the Act).

38. This approach is supported by the text of s 568 and surrounding material as follows:

(a) as set out above, a lease is more than a mere contract – it is both an executory contract and an executed demise. The '*property*' in a lease vests in the tenant. The landlord holds the reversion;

(b) vested rights and obligations that have already accrued are unaffected by the disclaimer of the company's property: *Sims and Anor (as liqs of Enron Australia Pty Ltd) v TXU Electricity* Ltd (2005) 53 ACSR 295 at [23];

190 (c) further, it is well-established that courts must presume, in the absence of clear words to the contrary, that Parliament did not intend to interfere with vested property rights;[5]

(d) Parliament must have intended that a lease is the property of the tenant, and not the '*property of the [landlord] company*' for the purposes of s 568(1) of the Act;

(e) the '*property of the company*' contemplated by Parliament is the unsaleable reversion burdened by onerous covenants (see sub-s 568(1)(a), (c) and (e));

(f) a similar approach to the interpretation of a materially indistinguishable predecessor to s 568 was adopted by Collins LJ in *Bastable*[6] (at 525 to 526,
200 discussed further below);

(g) the reference in sub-s 568(1A) to *'an unprofitable contract or a lease of land'* must be construed as a reference to a lease of land granted *to* the company in liquidation and not *by* that company. Sub-section 568(1A) was intended to allow insolvency practitioners appointed to tenants to disclaim leases without the expense or delay of seeking court approval. Parliament did not have disclaimer by a landlord in mind. The Explanatory Memorandum regarding the precursor provision in the *Bankruptcy Amendment Bill 1979* states at paragraph 152:

> Amendments*: the provisions relating to the disclaimer of onerous*
> 210 *property will be amended…*
>
> *(b) A notice to a lessor (and any sub-lessee or mortgagee) of intention to disclaim a lease* must *be given by prescribed form…*

Harmer's 'General Insolvency Inquiry' Report No. 45 1988, Ch 13 'Insolvency administration' states at page 261, paragraph 619:

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[5] See Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed, Butterworths 2006, at [5.17]; *Clissold v Perry* (1904) 1 CLR 363 at 373 per Griffith CJ; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commrs* [1927] AC 343 (PC) at 359; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18

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

Although it is essential that persons affected by the disclaimer of a lease, such as a lessor, a sub-lessee or a mortgagee of a lease be entitled to notice that the lease is being disclaimed, it does not appear justifiable to permit such persons alone to be able to require the insolvency administrator to seek leave of the court before disclaiming.

(h) it is consistent with the definition of '*property*' contained in s 9 of the Act;

(i) it is also consistent with the purpose of the disclaimer power, being to enable insolvency administrators to relieve themselves of burdensome financial obligations or ongoing liabilities which prolong the administration and delay the dividend;[7]

(j) it is also consistent with Parliament's intention in s 568D that the disclaimer power '*...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*';

(k) an unsaleable reversion burdened by onerous covenants can be disclaimed without conceptual difficulties. The reversion escheats to the Crown and subordinate interests (such as mortgages or leases) survive the disclaimer;[8]

(l) if disclaimer were permitted by a landlord's liquidator, the tenant's only remedies would be either to prove in the landlord's liquidation or to seek to set aside the disclaimer. To set aside the disclaimer, ss 568B and 568E require the tenant to show prejudice that is *'grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors'*. It is unlikely that Parliament would have intended such drastic consequences, particularly in light of the suggestion by Warren CJ and Sifris AJA that the decision would apply equally to shopping centre tenants (see paragraph [51] of the Court of Appeal's reasons);

(m) further, to interpret the statute otherwise would:

i. allow the Liquidator to extinguish an executed demise and vested property rights to increase the value of the land for the benefit of creditors at the expense of third parties to the liquidation, subverting the true purpose of the disclaimer power; and

ii. enable another person's property (rights, interests or actions) to be disclaimed, rather than the '*property of the company*'; and

(n) that interpretation could not have been intended by Parliament and should not be the law in Australia.

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[7] See footnote 1 above.

[8] *National Australia Bank Ltd v State of New South Wales* (2009) 182 FCR 52; (2009) 260 ALR 115; [2009] FCA 1066 per Rares J; *National Australia Bank Limited v The State of Victoria* [2010] FCA 1230 per Bennet J.

Further or alternatively, the tenant's interest in land survives disclaimer

39. For the reasons set out above, this appeal involves a question of Parliamentary intention. The authority of *Tabali* does not arise. There, this Honourable Court was considering the application of common law doctrines of repudiation and acceptance and their application to leases and was not considering statutory disclaimer.

40. Importantly, repudiation requires repudiatory conduct by the tenant that can then be accepted by the landlord. The act of repudiation (a concept arising from the law of contract) may also be understood as an act of surrender of the tenant's interest in the land. However, there is neither repudiation nor surrender when the landlord's liquidator purports to disclaim. (The language of s 568 does not permit of a construction whereby a liquidator's disclaimer is equated with an act of repudiation by the company in liquidation coupled with a statutorily mandated acceptance by the tenant).

41. Further:

(a) the common law has long recognised the ability of a lessor or a lessee to unilaterally assign the reversion or the lease respectively. Landlords regularly assign their reversions without the consent of, or a deed of novation from, the tenant. The new landlord has privity of estate to sue the tenant on the covenants in the lease that touch and concern the land, even though there is no contract between them;[9]

(b) similarly, the contractual relationship between the original contracting parties also survives assignment of the interest in land. Landlords can and do sue assignees when the assignor defaults as the landlord is still in privity of contract with the assignor, notwithstanding assignment of the term;[10]

(c) in recognising the dual character of leases, the decision in *Tabali* does not seek to upset that position.[11] To the contrary, the law has functioned happily with only those covenants that touch and concern the land binding the respective assignees;

(d) the approach adopted by her Honour Justice Davies at first instance is consistent with that approach, namely, that the tenant's estate in land (including those covenants that touch and concern the land) can remain after the 'contract' has been disclaimed; and

(e) a similar approach was adopted by Romer LJ in *Bastable* (at 527 to 529).

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[9] See Bradbrook Croft and Hay, *Commercial Tenancy Law* (3rd edn LexisNexis Butterworths, 2009) at [15.1].
[10] *Ibid* at [15.8].
[11] See also *Haidar v Blendale Pty Ltd* [1993] 2 VR 524 per Gobbo J at 527, citing with approval the dictum of Nourse LJ in *City of London Corporation v Fell* [1993] QB 589 at 603-4; see also the speech of Lord Templeman in *City of London Corp v Fell* [1993] All ER 968.

42. Further or alternatively, there must be a limit to the '*contractualisation*' of leases to avoid reverting to the medieval position referred to by Deane J at 51 and 53 of *Tabali*. Both tenants and their financiers take leases over and above a mere contractual licence because, in part, of the security of tenure offered by an estate or interest in land. The approach contended for by the First to Third Respondents means, in a very real sense, that tenants and their financiers are taking a risk on their landlords' solvency in circumstances where tenants have no control over the assignment of the reversion. It is submitted that this consequence was not intended by Parliament and should not be the law in Australia.

Bastable and Dekala

43. The Court of Appeal was incorrect to find that *Bastable* and *Dekala* were irrelevant or distinguishable.[12] The legislation applied in those cases is relevantly indistinguishable. If a "purchaser's lien" under an executory contract for the sale of land cannot be destroyed upon purported disclaimer of the contract by the trustee in bankruptcy (so another deposit could be opportunistically[13] obtained), then a lessee's tenure should not be destroyed upon purported disclaimer of the contract between landlord and tenant by the liquidator of the landlord.

Hindcastle

44. *Hindcastle* was not concerned with disclaimer by the liquidator of a landlord; it is readily distinguishable. The consequences of disclaimer by a landlord's liquidator are not the same as the consequences of disclaimer by a tenant's liquidator because:

    (a) the tenant has vested property rights; and

    (b) the landlord company holds only a reversion and does not have any property in the leasehold interest in the sense required by the statute.

Subsection 568D(1)

45. A disclaimer by a landlord's liquidator does not necessitate (in terms of subsection 568D(1)) the extinguishment of the tenant's rights in land or to quiet enjoyment. The liquidator of a landlord company can avoid the company's liabilities pursuant to onerous covenants in a lease by disclaiming the reversion, without affecting the tenant's vested right to quiet enjoyment of the land for the lease term (see paragraph 38(k) above). Disclaimer of Willmott's right to re-entry under the leases would not necessitate the termination of the Lessees' quiet enjoyment. Quiet enjoyment is not a liability of Willmott "in or in respect of" the "disclaimer property", being the reversion.

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[12] *Re Willmott Forests Limited* [2012] VSCA 202 at [56]

[13] In *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122 at 124, Cozens-Hardy J described such opportunism as "impudence".

46. Section 568D(1) provides that disclaimer is taken to have terminated the company's rights, interests, liabilities and property '*in or in respect of the disclaimer property*'. Whether possession and quiet enjoyment is a relevant 'liability', therefore, depends on identifying the 'disclaimer property'. The disclaimer property must be property as defined in the Act, being '*any legal or equitable estate or interest (whether present or future and whether vested or contingent) in real or personal property of any description and includes a thing in action*'.

47. It is well established that existing, vested contractual rights[14] and obligations that have already accrued in the past[15] are unaffected by the disclaimer of the company's property. The Court of Appeal erred in not finding that the tenant's right to possession and quiet enjoyment had accrued and, consequently, would be unaffected by any disclaimer of the First Respondent's property by the Second and Third Respondents. As Deane J held in *Tabali* at 51 '*a lease for a term of years ordinarily possesses a duality of character which can give rise to conceptual difficulties. It is both an executory contract and an executed demise*'.

Costs

48. The Court of Appeal erred in its order that the Appellant, as intervener, pay the costs of the First, Second and Third Respondents.

49. The First to Third Respondents' applied to the Court, pursuant to s 511 of the Act, for directions that they were justified in disclaiming the leases of the members' of the schemes. The Appellant's intervention to represent the interests of members of a number of schemes was consented to by the First to Third Respondents on the basis that the Appellant was a necessary and proper contradictor. The Appellant's role as intervener would ensure that the interests of members of the schemes it represented would be heard and those members would be bound by the result of the Liquidators' application: see *Norman, in the matter of Forest Enterprises Australia Limited (Administrators Appointed) (Receivers & Managers Appointed) v FEA Plantations Ltd (Administrators Appointed (Receivers Appointed) (No 3)* [2011] FCA 624 at [4] to [7]; *Re Lofthouse; Riverside Nursing Care Pty Ltd (subject to deed of arrangement)* (2004) 22 ACLC 215; [2004] FCA 93 at 217-218.

50. Justice Davies ordered that the Appellant was entitled to an order that its costs be paid as an expense of the winding up of the First Respondent consistently with the reasoning in *Gothard, in the matter of AFG Pty Ltd (Receivers and Mangers appointed) (in liq) v Davey (No 2)* [2011] FCA 59 (***Gothard***).

51. Having lost on the Preliminary Question, the First to Third Respondents sought leave to appeal that decision. As was entirely appropriate, in the appeal to the Court of Appeal the First to Third Respondents requested and consented to the intervention of the Appellant. The Appellant consented to the grant of leave to appeal.

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[14] *Sims (as liq of Enron Australia Pty Ltd) v TXU Electricity Ltd* (2005) 53 ACSR 295, 300 [23]-[24] per Spigelman CJ.
[15] *Rothwells Ltd v Spedley Securities Ltd (in liquidation)* (1990) 20 NSWLR 417, 422 D-E.

52. The Appellant participated in the hearing before the Court of Appeal, putting the case it had argued before the Honourable Justice Davies below. The Appellant did not take up any of the Court of Appeal's time with new argument, other than to respond to the argument now put by the First to Third Respondents regarding the application of *Tabali*, which had not been raised before Davies J.

53. In *Farrow Finance Co Ltd (in liq) v ANZ Executors and Trustee Co Ltd* (1996) 23 ACSR 521, Justice Hansen considered the available authorities in respect of the question of costs in a liquidator's application for directions. Justice Hansen extracted the following principles:

    (a) generally, where the application is necessitated only by the stand taken by a creditor acting only in their own interest and the question involved is not complex, and the liquidator's position is ultimately vindicated, costs should follow the event, with reference to *Re Masureik & Allan Pty Ltd* (1981) ACLR 39;

    (b) on the other hand, generally, where the issue is a complex one, or one involving a relatively novel proposition in law, the starting point is that the costs of all necessary parties are to be paid by the liquidator and counted as costs in the liquidation, with reference to *Re GPI Leisure Corp Ltd (in liq)* (1994) 130 ALR 256; 15 ACSR 282.

54. Justice Hansen went on to refer to *ASC v Melbourne Asset Management Nominees Pty Ltd (rec & mgr apptd)* (1994) 49 FCR 334, as an example of a case involving multiple defendants and complex questions of fact and law. His Honour said at 527:

> *No doubt various competing submissions were made by the parties in that case, and some of those parties "lost" in the sense that their submissions were rejected. That factor was not, however, mentioned by Northrop J in dealing with costs. Instead, his Honour held that, having regard to the peculiar features of the matters before the court, the costs of all five parties represented should be paid on a solicitor and own client basis as part of the liquidator's costs in the liquidation, and be costs in the winding up. In my opinion, the same order should be made in this case, save for the costs of the third and fourth defendants which should be paid on an indemnity basis as ordered on 4 October 1996.*

55. In *Gothard,* the respondents sought an order that their costs of and incidental to the proceedings be paid on a full indemnity basis from any monies from the companies in receivership and liquidation. In support of the order, the respondents said that it was relevant that the applicants, as receivers, were being funded out of the property of the relevant companies and the applicants were coming to the Court for assistance and, in effect, relying on the respondents as contradictors.

56. Edmonds J said at [21]:

> *Although there does not appear to be a great deal of authority on the principles to be applied in respect of successful or unsuccessful parties, in awarding costs in circumstances where receivers, administrators or liquidators seek directions from a court in respect of the treatment of company assets, it appears that the approach adopted in* Farrow Finance Co Ltd (in liq) v ANZ Executors and Trustee Co Ltd *(1996) 23 ACSR 521 at 526 – 527 by Hansen J, has found favour and should be adopted.*

57. Edmonds J went on to say at [26]:

> *In the present proceedings, the respondents were not acting in their own interests, but as representatives and in defence of their statutory entitlements. They were, as was correctly submitted by counsel for the applicants, necessary parties to perform the role of contradictors, and to do so as representatives…"*

58. At [56] – [57], Edmonds J found:

> *This is a case where the respondents costs are not payable by the applicants personally but out of a fund or pool of property which has come in the applicant's hands…The respondents were necessary parties if the proceeding, as commenced by the applicants, was to have any real utility in resolving the issue of which company or companies employed the respondents. Moreover, it had a factual complexity and, on the applicants arguments, involved such novel propositions in law…*
>
> *Even if the Respondents had not been as successful as they were, the foregoing considerations would, in my view, warrant that their costs be fully indemnified out of the assets in the hands, or under the control, of the receivers as a cost of the receivership.*"

59. The First to Third Respondents had been given the Court's view before Justice Davies regarding the question of whether they were justified in disclaiming the leases of the scheme members. As they were not happy with that determination, the First to Third Respondents were seeking a second determination of the question it sought directions for from the Court of Appeal. For a second time, the First to Third Respondents were seeking an indulgence from the Court and the imprimatur of the Court to extinguish scheme member's interests in land.

60. In the circumstances, rather than ordering the Appellant to pay the costs of the First to Third Respondents, the Court of Appeal ought to have ordered, as did Justice Davies, that the Appellant's costs be paid as an expense in the winding up.

61. The Court of Appeal's orders will otherwise act as a deterrent against proper contradictors assisting the Courts in difficult questions arising out of large and complex insolvencies.

Part VII:

62. Copies of the relevant statutory provisions as they existed at the relevant time are attached as an **Annexure**. Each of those provisions is still in force, in that form, as at the date of these submissions.

Part VIII:

63. The Appellant seeks the following orders:

    1. The Appeal be allowed.

    2. The judgment of the Court of Appeal be set aside and in its place order that:

        (a) the answer to the question 'Are the liquidators able to disclaim the growers' leases with the effect of extinguishing the growers' leasehold estate or interest in the subject land?', is No; and

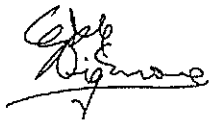
        (b) the First, Second and Third Respondents pay the Appellant's costs in the Court of Appeal.

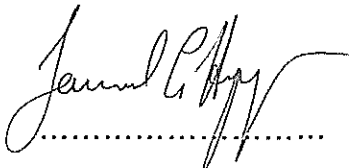
    3. The First, Second and Third Respondents pay the Appellant's costs in this Court.

Part IX:

64. The Appellant estimates that 1.5 hours will be required for the presentation of its oral argument.

Dated: 14 June 2013





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SCHEDULE 2 – UNREGISTERED MANAGED INVESTMENT SCHEMES: CONTRACTUAL SCHEMES AND PARTNERSHIP SCHEMES

CONTRACTUAL SCHEMES

1. 1983 (No Project)
2. 1984 (No Project)
3. 1985 (No Project)
4. 1986 (No Project)
5. 1987 (No Project)
6. 1989 (No Project)
7. 1990 (No Project) Interest Only Offer
8. 1991 (No Project)
9. Sharp/Reed Plantation Project -1998 Information Memorandum
10. 2001 (No Project)

PARTNERSHIP SCHEMES

1. McKenzie & Partners - Forestry Partnership No.1 (1993)
2. Grimsey & Associates Pty Ltd - Forestry Partnership No. 1 (1994)
3. Grimsey & Associates Pty Ltd - Forestry Partnership No. 2 (1994)
4. Grimsey & Associates Pty Ltd - Forestry Partnership No. 3 (1994)
5. McKenzie & Partners - Forestry Partnership No. 2 (1994)

ANNEXURE TO APPELLANT'S OUTLINE OF SUBMISSIONS

Part 5.6 – Winding up generally Division 7A – Disclaimer of onerous property *Corporations Act 2001*

Corporations Act 2001

Act No. 50 of 2001 as amended

This compilation was prepared on 3 January 2013
taking into account amendments up to Act No. 180 of 2012

Volume 2 includes: Table of Contents
Chapters 2L–5B (ss. 283AA – 601DJ)

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Division 7A—Disclaimer of onerous property

568 Disclaimer by liquidator; application to Court by party to contract

(1) 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.

(1AA) This section does not apply to:

(a) an agreement by the company to buy back its own shares; or

(b) PPSA retention of title property that is taken to form part of the property of the company because of the definition of ***property*** in section 513AA.

Note: The definition of ***property*** in section 513AA includes PPSA retention of title property of the company, if the security interest in the property has vested in the company in certain situations.

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

(1B) 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.

(8) Where:

(a) an application in writing has been made to the liquidator by a person interested in property requiring the liquidator to decide whether he or she will disclaim the property; and

(b) the liquidator has, for the period of 28 days after the receipt of the application, or for such extended period as is allowed by the Court, declined or neglected to disclaim the property;

the liquidator is not entitled to disclaim the property under this section and, in the case of a contract, he or she is taken to have adopted it.

(9) The Court may, on the application of a person who is, as against the company, entitled to the benefit or subject to the burden of a contract made with the company, make an order:

(a) discharging the contract on such terms as to payment by or to either party of damages for the non-performance of the contract, or otherwise, as the Court thinks proper; or

(b) rescinding the contract on such terms as to restitution by or to either party, or otherwise, as the Court thinks proper.

(10) Amounts payable pursuant to an order under subsection (9) may be proved as a debt in the winding up.

(13) For the purpose of determining whether property of a company is of a kind to which subsection (1) applies, the liquidator may, by notice served on a person claiming to have an interest in the property, require the person to give to the liquidator within such period, not being less than 14 days, as is specified in the notice, a statement of the interest claimed by the person and the person must comply with the requirement.

568A Liquidator must give notice of disclaimer

(1) As soon as practicable after disclaiming property, a liquidator must:

(a) lodge a written notice of the disclaimer; and

(b) give written notice of the disclaimer to each person who appears to the liquidator to have, or to claim to have, an interest in the property; and

(c) if the liquidator has reason to suspect that some person or persons may have, or may claim to have, an interest or interests in the property, but either does not know who, or does not know where, the person is or the persons are—comply with subsection (2); and

(d) if a law of the Commonwealth or of a State or Territory requires the transfer or transmission of the property to be registered—give written notice of the disclaimer to the registrar or other person who has the function under that law of registering the transfer or transmission of the property.

Note: For electronic notification under paragraph (b), see section 600G.

(2) If paragraph (1)(c) applies, the liquidator must cause a notice setting out the prescribed information about the disclaimer to be published in the prescribed manner.

568B Application to set aside disclaimer before it takes effect

(1) A person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer before it takes effect, but may only do so within 14 days after:

(a) if the liquidator gives to the person notice of the disclaimer, because of paragraph 568A(1)(b), before the end of 14 days after the liquidator lodges such notice—the liquidator gives such notice to the person; or

(b) if paragraph (a) does not apply but notice of the disclaimer is published under subsection 568A(2) before the end of the 14 days referred to in that paragraph—the last such notice to be so published is so published; or

(c) otherwise—the liquidator lodges notice of the disclaimer.

(2) On an application under subsection (1), the Court:

(a) may by order set aside the disclaimer; and

(b) if it does so—may make such further orders as it thinks appropriate.

(3) However, the Court may set aside a disclaimer under this section only if satisfied that the disclaimer would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors.

568C When disclaimer takes effect

(1) A disclaimer takes effect if, and only if:

(a) in a case where only one application under section 568B for an order setting aside the disclaimer, or each of 2 or more such applications, is made within the period that that section prescribes for making the application—the application, or each of the applications, is unsuccessful; or

(b) no such application is so made.

(2) For the purposes of subsection (1), an application under section 568B is successful if, and only if, the result of the application, and all appeals (if any) arising out of the application, being finally determined or otherwise disposed of is an order setting aside the disclaimer (whether or not further orders are also made).

(3) A disclaimer that takes effect because of subsection (1) is taken to have taken effect on the day after:

(a) if:

(i) the liquidator gave to a person notice of the disclaimer because of paragraph 568A(1)(b); or

(ii) notice of the disclaimer was published under subsection 568A(2);

before the end of 14 days after the liquidator lodged notice of the disclaimer—the last day when the liquidator so gave such notice or such notice was so published; or

(b) otherwise—the day when the liquidator lodged notice of the disclaimer.

568D Effect of disclaimer

(1) A disclaimer is taken to have terminated, as from the day on which it is taken because of subsection 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.

(2) 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.

568E Application to set aside disclaimer after it has taken effect

(1) With the leave of the Court, a person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer after it has taken effect.

(2) The Court may give leave only if it is satisfied that it is unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect.

(3) The Court may give leave subject to conditions.

(4) On an application under subsection (1), the Court:
  (a) may by order set aside the disclaimer; and
  (b) if it does so—may make such further orders as it thinks appropriate, including orders necessary to put the company, the liquidator or anyone else in the same position, as nearly as practicable, as if the disclaimer had never taken effect.

(5) However, the Court may set aside a disclaimer only if satisfied that the disclaimer has caused, or would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer (and making any further orders) would cause to:
  (a) the company's creditors; and
  (b) persons who have changed their position in reliance on the disclaimer taking effect.

568F Court may dispose of disclaimed property

(1) The Court may order that disclaimed property vest in, or be delivered to:
  (a) a person entitled to the property; or

(b) a person in or to whom it seems to the Court appropriate that the property be vested or delivered; or

(c) a person as trustee for a person of a kind referred to in paragraph (a) or (b).

(2) The Court may make an order under subsection (1):

(a) on the application of a person who claims an interest in the property, or is under a liability in respect of the property that this Act has not discharged; and

(b) after hearing such persons as it thinks appropriate.

(3) Subject to subsection (4), where an order is made under subsection (1) vesting property, the property vests immediately, for the purposes of the order, without any conveyance, transfer or assignment.

(4) Where:

(a) a law of the Commonwealth or of a State or Territory requires the transfer of property vested by an order under subsection (1) to be registered; and

(b) that law enables the order to be registered;

the property vests in equity because of the order but does not vest at law until that law has been complied with.