

On appeal from the Court of Appeal, Victoria

B E T W E E N:

WILLMOTT GROWERS GROUP INC
Appellant

-and-

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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

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-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

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APPELLANT'S REPLY

Part I:

1. The Appellant certifies that this reply is in a form suitable for publication on the internet.

Part II:

Summary

2. The Appellant says in reply that:

- (a) contracts disclaimed under s 568(1)(f) are not extinguished "*in toto*";
- (b) the Appellant made no material concession;
- 40 (c) authority and commentary from the USA generally supports the appellant; and
- (d) there was no agreement as to the order for costs made in the Court of Appeal.

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Filed on Behalf of: The Appellant, Willmott Growers Group Inc A0055077L

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Preliminary issues

Marketing of land sale

3. The First to Third Respondents say the Liquidators ran an extensive campaign to sell the Bombala land and other assets either encumbered by the schemes or unencumbered, referring to paras [76]-[120] of the affidavit of Craig David Crosbie, dated 13 December 2011. Mr Crosbie exhibits, at CDC-11 (see para [86]), the advertisements used in the campaign. Not one advertisement in CDC-11 offers the assets on an encumbered basis.
4. Mr Crosbie states that 364 persons were emailed about the assets and those who contacted the Liquidators were sent a letter and information overview stating: "... *Willmott land and plantation assets are being offered both "in one line" or on a "property by property" basis. The land and assets are also being offered on an unencumbered basis or, if potential purchasers wish to continue with any of the Willmott managed investment schemes, on the basis that they are subject to those schemes.*"

Change from "unprofitable contract" to "contract"

5. Division 7A of the *Corporations Act* continues to concern the disclaimer of **onerous** property. It remains a purpose of the disclaimer provisions that they "*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*" (s.568D).
6. Save in the respects noted by the First to Third Respondents at paragraph 15 of their submissions, the usage of "contract" has not changed since *Bastable*.

Disclaimed contracts under s 568(1)(f) are not extinguished "in toto"

7. The Appellant's primary contention remains that, having regard to the legislative purpose of minimising the impact of the disclaimer provisions on the rights of strangers to the insolvency, the First Respondent's reversions naturally fit the description of "land burdened with onerous covenants" (s.568(1)(a)). A Liquidator is not at liberty simply to elect which paragraph of sub-section 568(1) best serves the interests of the company's creditors, regardless of the impact on third parties to the liquidation.¹
8. To the extent that the First to Third Respondents are entitled to disclaim under s 568(1)(f), the sub-section does not require the contract to be extinguished "*in toto*":
 - (a) the First to Third Respondents have no real answer to the fact that the contractual rights and obligations and the estate in land created by a lease may exist separately if, for example, the lease or the reversion are assigned;

¹ The words of Earl Cairns in *Hill v East and West India Dock Co* (1884) 9 App Cas 448 at 455 are germane. The statute in that case stated that a lease was deemed to be surrendered on disclaimer by the tenant's trustee. In finding that the obligation of an assignor who guaranteed the payment of rent in consideration for the landlord's consent to an assignment would survive disclaimer of the lease by the assignor's trustee in bankruptcy, Earl Cairns held that: "... *The first construction [viz. that the guarantee fell with the disclaimed lease] requires us, if the section is taken literally, to do that for which there is no motive, and as to which there can be no explanation given, that is to say, to destroy the rights and property of third persons, without accomplishing any beneficial object whatever for the purpose of the bankruptcy.*"

- (b) in light of the words "*property of the company that consists of*" in the preamble to s 568(1), the reference to "contract" in s 568(1)(f) must be read as the company's *chose in action* to have the contract performed;
- (c) the contract "*in toto*" also contains other persons' rights;
- (d) the obligation of an assignor or its guarantor to pay rent survives disclaimer of the assignee's interests (see *Hill v East and West India Dock Co* (1884) 9 App Cas 448; *Warnford Investments Ltd v Duckworth* [1979] 1 Ch 127 at 135);
- 10 (e) a lease disclaimed by a tenant is not extinguished for all times and purposes, as some rights of sub-tenant under it survive. In the words of Uthwatt J in *Thompson and Cottrell's Contract* [1943] 1 Ch 97 at 100: "*the lease there, to a certain extent, is something like a volcano. It may break out into active operation at any time*" (see also *In re Finley*; *ex parte Clothworkers' Company* (1888) 21 QBD 475);
- (f) similarly, the House of Lords held in *Hindcastle Ltd v Barbara Attenborough Ltd* that (at 89):

20 *The third typical case is where a third party has acquired such an interest. The prime example is a subtenant ... Accordingly the subtenant holds his estate on the same terms, and subject to the same rights and obligations, as would be applicable if the tenant's interest had continued. If he pays the rent and performs the tenant covenants in the disclaimed lease, the landlord cannot eject him. ... In practice, matters are likely to be brought to a head by one of the parties making an application for a vesting order.*

- (g) there is nothing in the text of s 568(1)(f) or the surrounding provisions requiring disclaimer of a contract under that section to operate differently.

9. Accordingly, to the extent that the statute is open to the construction that the First to Third Respondents contend for, it should be construed in favour of protecting the vested property rights of third parties to the Liquidation.

30 **No concession**

10. The First to Third Respondents submit that the Appellant conceded in the court of Appeal that the obligation to provide quiet enjoyment is a liability. No such concession was made (see transcript, at pages 233 to 240 of the Appeal Book).

Hindcastle

11. The First to Third Respondents erroneously assert that *Hindcastle* supports the proposition that disclaimer by a liquidator of a tenant company is the same as disclaimer by a liquidator of a landlord company.

***Jandowae and other cases*²**

- 40 12. The Appellant has dealt with *Jandowae* in paragraph 23 of its original submissions. The comments of Wallace J in *Re Richmond Commercial Developments*, referred to by the First to Third Respondents at paragraph 65 of their submissions, assist neither the First to Third Respondents' case, nor the Court. The decision in *Capital +*

² See paragraph 65 of the First to Third Respondents' submissions.

Merchant Investments Ltd v Russell Management Ltd [2008] NZHC 2125 does not advance the discussion.

United States jurisprudence

13. The Respondents rely on a case from the United States, *Matter of New York Investors Mutual Group* concerning section 70 of the *Bankruptcy Act* (1938) 11 USCA § 110.³
14. That section is worded quite differently from the statutes considered by the English and Australian courts.
15. No American authorities were referred to in the courts below.
- 10 16. There are divided opinions in American cases and commentary as to the effect of a disclaimer of a lease by a landlord's liquidator or trustee in bankruptcy. The balance of American jurisprudence favours the Appellant's contentions.⁴

Costs

17. The Appellants appeal the costs order sought by the Respondents and made in the Court of Appeal. The benefit of any prior agreement enjoyed by the Appellant in respect of costs was and remains irrelevant to the decision to make that order.

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³ See paragraph 83 and following of the First to Third Respondents' submissions.

⁴ See: *Bolles v Crescent Drug & Chemical Co.* 53 N.J. Eq. 614, 32 A. 1061 (1895) at 1063; *In re Hays, Foster & Ward Co.* 117 F. 879 (W.D. Ky 1902) at 884-5; *American Brake Shoe & Foundary Co. v New York Rys Co.*, 278 Fed. 842 (SDNY 1922); *Vass v Conron Bros. Co.*, 59 F.2d 969 (2d Cir. 1932) at 971; James Angell McLaughlin, *Amendment of the Bankruptcy Act*, (1927) 40 Harv. L. Rev. 583 at 605-6 and 608-9; John J. Creedon and Robert M. Zinman, *Landlord's Bankruptcy: Laissez Les Lessees*, (1971) 26 Bus. Law 1391 at 1392-1393, 1396-1401 and 1405-1413; Scott B. Ehrlich, *The Assumption and Rejection of Unexpired Real Property Leases Under the Bankruptcy Code – A New Look*, (1983) 32 Buff. L. Rev. 1 at 67-76; Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, (1988) 59 U. Colo. L. Rev. 846 at 902-906.; cf: L.B. Bartell, *Revisiting Rejection: Secured Party Interests in Leases and Executory Contracts*, 103 Dick. L. Rev. 497 at 526-528.

**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)
- 10 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)
1. Grimsey & Associates Pty Ltd - Forestry Partnership No. 1 (1994)
2. Grimsey & Associates Pty Ltd - Forestry Partnership No. 2 (1994)
- 20 3. Grimsey & Associates Pty Ltd - Forestry Partnership No. 3 (1994)
4. McKenzie & Partners - Forestry Partnership No. 2 (1994)