The breadth of a liquidator's power to disclaim "property" of the company

***Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed)(In Liquidation) & Ors* [2013] HCA 51; (2013) 251 CLR 592**

1. Assume that a company in liquidation is the lessor of property under a long-term lease. The liquidator is of the view that it is in the interests of creditors that the land be sold unencumbered by the lessee's leasehold interest. The liquidator purports to disclaim the lease. Does the liquidator have the power to do so? Assuming that the liquidator does have such power, what happens to the lessee and what rights does the lessee have following such disclaimer? Does the fact that the lessee may have paid all the rent that was required to be paid under the lease change this analysis?

2. In *Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers* Appointed*)(In Liquidation) &* Ors [2013] HCA 51; (2013) 251 CLR 592, the liquidators of Willmott Forests Limited sought to disclaim leases which the company had granted. The High Court confirmed that the liquidators had such power. The effect of a disclaimer in such circumstances is that the lessee's leasehold interest is determined (even though the lessee may have paid the entirety of its rent) and the lessee is left to prove for its loss in the winding up of the lessor company. The High Court's decision demonstrates the risks that lessees, and persons who have taken security over a leasehold interest, face where there is a possibility that the lessor company will be wound up during the term of the lease.

The disclaimer provisions in the *Corporations Act 2001* (Cth)

3. A liquidator's power to disclaim property has existed in Australia for the best part of a century. Its origins lay in the *Bankruptcy Act 1869* (UK). A similar provision which applied to corporations was enacted in s 267 of the *Companies Act 1929* (UK) and was shortly thereafter adopted in Australia. One of the earliest disclaimer provisions in Australia (found in s 300(1) of the *Companies Act 1936* (NSW)) was in the following terms:

> Where any part of the property of a company which is being wound up consists of
> (a) land of any tenure burdened with onerous covenants; or
> (b) shares or stock in companies; or
> (c) unprofitable contracts; or
> (d) any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money,
>
> the liquidator of the company, notwithstanding that he has endeavoured to sell or has taken possession of the property, or exercised any act of ownership in relation thereto, may, with the leave of the court and subject to the provisions of this section, by writing signed by him, at any time within twelve months after the commence-ment of the winding up or such extended period as is allowed by the court, disclaim the property.

4. The present form of the disclaimer regime that is found in Division 7A of Part 5.6 of the *Corporations Act 2001* (Cth) (**Corporations Act**) was introduced by the *Corporate Law Reform Act 1992* (Cth), which adopted in large measure some of the reforms suggested in the Harmer Report.[1] As noted in the introduction, the disclaimer provisions are intended to enable liquidators to relieve themselves of ongoing liabilities which prolong the liquidation and delay the dividend: *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq).*[2] According to the Victorian Court of Appeal in *Re Willmott Forests Limited*[3] "[t]hat object is facilitated, amongst other things, by the wide scope of 'property of a company' that a liquidator may disclaim under s 568".

5. The power to disclaim is, however, only available to liquidators.[4] Such power is not available to receivers, nor is it available in the context of voluntary administrations.[5]

6. Section 568, which gives a liquidator the power to disclaim certain property of the company, is (relevantly) in the following terms:

> (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:

---

[1] Otherwise known as the Australian Law Reform Commission, *General insolvency Inquiry*, Report No 45 (1988).

[2] (2000) 35 ACSR 484 at 498 [65] per Santow J. In *Re Middle Harbour Investments Limited (in liq) (No 2*) [1977] 2 NSWLR 652 at 657 Bowen CJ in Eq said that:

> The purpose of providing for disclaimer by an official receiver or trustee in bankruptcy or by a liquidator in winding up seems clear enough. It is to enable him to rid himself or, in the case of liquidation, the company, of burdensome financial obligations which might otherwise continue to the detriment of those interested in the administration; it is given to enable the official receiver, or trustee, or the liquidator to advance the prompt, orderly and beneficial administration of the bankrupt estate or, in the case of a company, of the winding up of its affairs.

[3] *Re Willmott Forests Limited* [2012] VSCA 202; (2012) 91 ACSR 182 at [17] per Warren CJ and Sifris AJA.

[4] *In the matter of Oliver Brown Pty Ltd (No 2*) [2012] NSWSC 1222 at [15].

[5] As Black J said in *In the matter of Oliver Brown Pty Ltd (No 2*) at [48], an administrator has power under s 443B of the *Corporations Act* to give notice that he or she does not propose to exercise rights in relation to premises leased by the corporation, which protects him or her against personal liability for rent but would not generally bear on the company's liability and is not the same as a disclaimer by a liquidator: *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd* (1996) 63 FCR 391. A similar provision in relation to receivers is found in s 419A of the Corporations Act.

(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.

…

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

…

7. If a liquidator does nothing about disclaiming property, any person interested in the onerous property may apply to the liquidator in writing and require her or him to elect whether or not to disclaim the property: s 568(8). If the liquidator then fails for a period of 28 days to disclaim the property, the right to disclaim is lost and, in the case of a contract, the liquidator will be deemed to have adopted it.

8. In determining whether property is of a kind covered by s 568(1) a liquidator is able to serve a notice on a person who claims an interest in the property, requiring that person, within a specified period (not being less than 14 days), to provide a statement of the interest claimed by the person (s 568(13)).

9. In order to disclaim a contract other than an unprofitable contract or a lease of land, the liquidator requires the leave of the Court[6] under s 568(1A). If there is any doubt as to whether leave is required to disclaim, a liquidator should seek the leave of the Court. Rule 10.2(1) of the *Supreme Court (Corporations) Rules 1999* (NSW)[7] provides that the affidavit in support of an application by a liquidator, under s 568(1A) of the Corporations Act, for leave to disclaim a contract in relation to a company must (a) specify the persons interested, and their interests, under the contract; and (b) state the facts on which it is submitted that the contract should be disclaimed. Rule 10(2)(2) in turn provides the liquidator must serve the affidavit on each party to the contract (except the company) and on any person interested in the contract. The leave provision in s 568(1A) exists in addition to the general power in s 511 of the Corporations Act given to liquidators to apply to the Court to determine any question arising in the winding up of the company.

[6] "Court" is defined in s 58AA of the Corporations Act to mean, in effect, the Federal Court or the Supreme Courts of the States or Territories.

[7] See also rule 10.2 of the *Federal Court (Corporations) Rules 2000* (Cth).

10. Section 568A provides that a liquidator must give notice of disclaimer, which must be given in accordance with the form of notice prescribed in reg 5.6.70B of the *Corporations Regulations 2001* (Cth). Section 568B provides that a person affected may make an application to set aside a disclaimer before it takes effect and s 568B(2) provides that 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".

11. Section 568C makes provision for when a disclaimer is deemed to take effect. Of more immediate concern, however, is s 568D, which is in the following terms:

> (1) 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.[8]
>
> (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.

12. A person who 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 (s 568E(1)), but only if the person can demonstrate that it was unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect: s 568E(2).

13. Where property is disclaimed, the Court may order that it vest in or be delivered to a person entitled to the property, a person in or to whom it seems appropriate to vest or deliver the property, or a person as trustee for one of the persons just referred to (s 568F(1)). Disclaimer of real property can present particular problems in this regard. Although it has been said that "as all judges since Jessel MR have recognised, the question of where the title goes after a disclaimer is as clear as mud",[9] there is

---

[8] As Spigelman CJ (with whom Sheller JA and Brownie AJA agreed) said in *Sims & Anor (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd* (2005) 53 ACSR 295 at [26]*:*

> It would … be anomalous if an order could be made by the Court, in the context of an application for leave to disclaim, which could have an effect on the other party to the contract of a character broader than the effect which the statute itself provides the actual act of disclaimer may have upon that other party. **The Parliament has expressly considered the extent to which third parties are to be affected by the exercise of the statutory right of disclaimer. The power to make orders under s568(1B)(b) should be read down to be subject to a similar restriction. Any effect on another person's rights or liabilities should go no further than what is necessary to release the company or its property from liability**. The broad language of s568(1B)(b) should be read down accordingly (emphasis added).

[9] *National Australia Bank Ltd v New South Wales* (2009) 182 FCR 52 at [28].

authority for the proposition that where mortgaged property is disclaimed by a liquidator, the Court may order that the property vest in the mortgagee to enable it to be sold[10] and that any surplus be paid to the liquidator as if the mortgagee had exercised a power of sale under the real property legislation.[11] If there is no one that the Court thinks should have the property, the property would, as a matter of last resort, vest in the Crown as *bona vacantia* or by escheat.[12]

14. The exact metes and bounds of the liquidator's disclaimer power in s 568(1) are still unknown. In particular, the issue of exactly what happens where the liquidator of a company that is a lessor purports to disclaim a lease remained unresolved until very recently. There are, of course, a number of good commercial reasons why a liquidator might wish to disclaim a lease where the company in liquidation is the lessor. For instance, the rent received under the lease might be below market value, or the property might be worth more if it is sold unencumbered, or the covenants in the lease (for example, any covenant to conduct ongoing repairs) might be onerous.

What is a lease?

15. Before consideration is given to the decision of the High Court in *Willmott Growers* itself, something should be said about the general nature of leases. The word "lease" can mean a number of things. It can refer to the grant ("I have been given a lease of Blackacre"), it can refer to that which was granted ("I have a leasehold interest in Blackacre"), or it can refer to the document by which the interest in land was granted ("I have signed a lease"). According to Windeyer J in *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 8:

> A lease strictly means a species of conveyance, the grant of a right to the exclusive possession of land for a term less than that which the grantor has. But by a usage that is apparently metonymical in origin the word 'lease' can describe not only the grant but that which is granted, namely the term.

---

[10] See *Re Middle Harbour Investments Ltd (In Liq)* [1977] 2 NSWLR 652; *RAMS Mortgage Corporation Ltd v Skipworth and Anor (No 2)* (2007) 239 ALR 799 at [12] – [19]; *Commonwealth of Australia v New South Wales ;in the matter of the Condobolin Bila CDEP Limited (deregistered*) (2006) 59 ACSR 68 at [9].

[11] In *National Australia Bank Ltd v New South Wales* (2009) 182 FCR 52, Rares J was required to consider the consequences of a disclaimer by the trustee in bankruptcy of mortgaged property owned by a bankrupt (the Bankruptcy Act 1966 (Cth) contains a disclaimer provision similar to that in the Corporations Act). His Honour held that the land should vest in the mortgagee, the National Australia Bank Ltd, for the purpose of securing the moneys due to it, and after the sale of the land the bank should provide an account of its payments and receipts to (a) the trustee in bankruptcy; (b) the bankrupt; (c) the respondent, the State of New South Wales; (d) the Registrar of the Federal Court and pay to the trustee any surplus in accordance with s 58(3) of the *Real Property Act 1900* (NSW) as if it had exercised a power of sale.

[12] In *National Australia Bank Ltd v New South Wales* (2009) 182 FCR 52, Rares J said that the better view is "that by force of a disclaimer under the Bankruptcy Act (or Div 7A of Pt 5.6 of the Corporations Act) the title to the fee simple or other property does not escheat absolutely to the Crown in right of the State because the Court can make an order vesting that title in someone else. The Court's power to make such a vesting order is created by a law of the Commonwealth (s 133(9) of the Bankruptcy Act or s 568F(1) of the Corporations Act)".

In an earlier case, Windeyer J[13] had pointed to the fact that a legal right of exclusive possession is a tenancy and the creation of such a right is a demise.

16. In *Western Australia v Ward* (2002) 213 CLR 1 at [42], McHugh J stated that a lease is:

> … a conveyance by way of *demise* of lands or tenements for a life or lives, or for years or at will. It is a contract by which a person having an estate in land or tenements transfers a portion of his or her interest in that estate to another person, usually in consideration of the payment of rent or other recompense. The consideration is paid for the exclusive possession and profits of the land or tenements. However, the grant of exclusive possession may constitute a lease although no rent is reserved.

17. The key feature of a lease is that the person who is granted the interest in land has been given the legal right to exclusive possession of the land for a period less than the term for which the grantor holds the land. After the granting of the interest in the land, the grantor (the lessor) retains a reversionary interest in the land. Provision for the payment of rent, whilst typical, is not an essential constituent of a lease.[14] The implied covenant for quiet enjoyment[15] also arises from the relationship of lessor and lessee and may be seen as flowing from the general implied covenant not to derogate from the grant.[16]

18. A lease is, of course, distinct from a licence. The granting of a licence generally does not create a proprietary interest in the land for the licencee: "*A dispensation or licence properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful*".[17]

19. One issue that arose during the course of the twentieth century is whether leases should be considered through the prism of contract law or whether they stand aside from it. As Butt notes,[18] the doctrine of estates did not apply to leases because leases were traditionally seen as a form of personal property. In time, however, it became

---

[13] *Radaich v Smith* (1959) 101 CLR 209 at 222.

[14] P Butt, *Land Law* 6th Edition, Pyrmont, N.S.W: Thomson Reuters, 2010 at [1503].

[15] In *Todburn Pty Limited v Taormina International Pty Ltd* (1990) 5 BPR 11,173 Powell J said (at 11,177)

> The covenant for quiet enjoyment operates to secure the tenant, not merely in the possession, but in the enjoyment, of the subject premises and any rights appurtenant thereto, for all usual purposes; and where the ordinary and lawful enjoyment of the premises or of the rights appurtenant thereto is substantially interfered with by the acts or omissions of the landlord or those lawfully claiming under him, the covenant is broken, even if neither title to, nor the possession of, the demised premises, or of those rights, is otherwise affected. Whether or not any interference is substantial is a question of fact.

[16] *Re Willmott Forests Limited* [2012] VSCA 202; (2012) 91 ACSR 182 at [80] per Redlich JA.

[17] *Thomas v. Sorrell* (1673) 124 ER 1098 at 1109. The situation is slightly more complicated where there is a licence coupled with a grant, which creates something akin to a proprietary interest. See P Young et al, *On Equity*, Pyrmont, N.S.W: Thomson Reuters/Lawbook Co, 2009 at [11.690]. Further, whilst a contractual licence carries with it an implied term that the licensor will not revoke the licence during the term of the licence, there is a dispute as to whether the licencee would be able to get an injunction restraining revocation or whether the licencee would be left to his or her remedy in damages.

[18] P Butt, *Land Law* 6th Edition, at [624].

accepted that a lessee for a term, although denied "seisin" in the strict sense, had a right to "possession", which was an interest in the land that he or she was entitled to protect against third parties.[19] For a long time, contractual doctrines such as frustration and repudiation did not seem to be applicable to a lease, being executed demises under which an estate in land is passed to the lessee. This had all changed by the latter half of the twentieth century, however, and today it can be said that a lease "combines the twin features of contract and interest in land".[20] This sentiment was expressed most famously by Deane J in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[21] where his Honour pointed out 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".[22]

20. Although courts in Australia[23] have now accepted the general applicability of contractual principles to leases, uncertainty remained as to what were the precise consequences of a disclaimer of a lease by a liquidator of a lessor, which (on one view at least) only had the effect of bringing to an end executory rights and obligations and would not affect accrued rights. The fact that the matter had not been resolved authoritatively until late last year in *Willmott Growers* is surprising[24] given that it has been said that leases are the most commonly disclaimed form of property of a

---

[19] *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 51.

[20] P Butt, *Land Law* 6th Edition at [1501].

[21] (1985) 157 CLR 17 at 51. See also (1985) 157 CLR 17 at 30 (Mason J); 38 (Wilson J); 56 (Dawson J).

[22] In *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 8, Windeyer J referred to the fact that the lessee "had a right to exclusive possession as against all others including his landlord. Such a right, when it flows from contract with the landlord, is the very essence of tenancy".

[23] See *Apriaden Pty Ltd v Seacrest Pty Ltd* [2005] VSCA 139; (2005) 12 VR 319 at [63], where Williams AJA said that although there was some early support for the view that the *ratio* of *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* should be confined "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".

[24] That said, during the course of the special leave argument, Kiefel J expressed the view that the position taken by the liquidator was "novel": [2013] HCATrans 106. During the course of the litigation, the parties could only identify one case where disclaimer by a lessor had been permitted, which was a decision of a Master of the Supreme Court of Queensland in *Re Jandowae Estates Pty Ltd* (1989) 7 ACLC 179. The decision in *Re Jandowae Estates* was, however, made in the context of an earlier disclaimer regime and in circumstances where the Court found that the lease was an "unprofitable contract". In *Re Real Investments Pty Ltd* [2000] 2 Qd R 555 at [13] Chesterman J said:

> The parties are united in arguing that what is involved is whether the agreement is an unprofitable contract. Neither contends it is a lease. It may have been possible to regard the agreement as equivalent to a lease ... Support for this view might be found in the terms of s 568(1A) which allows a liquidator to disclaim two types of contracts without the leave of the court – unprofitable contracts and leases of land. Ordinarily one might think that a 'lease of land' would constitute land which can only be disclaimed if burdened with onerous covenants (see s 568(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. This curiosity need not detain me for the parties are content to limit their arguments.

company in liquidation[25] (although a disclaimer of lease is admittedly more likely to occur when the company in liquidation is the lessee).

The facts in Willmott Growers

21. Willmott Forests Limited (**Willmott**) was the responsible entity and the manager of a number of forestry investment schemes, including 15 unregistered managed investment schemes. Willmott was also a landowner and leased its land to members of certain of the Willmott schemes. Some leases required the rent to be fully paid in advance rather than periodically, whilst others provided for substantial rent to be paid in advance and then for periodical payments thereafter. The leases were not (and it seems that they were not required to be) registered under the *Transfer of Land Act 1958* (Vic).[26]

22. Willmott was placed in liquidation on or about 22 March 2011. The liquidators concluded that the Willmott schemes could not continue to operate and considered that it was very unlikely that a party would be willing to take over as responsible entity and manager of the schemes. No persons expressed an interest in purchasing any of the assets encumbered by the Willmott schemes, or in becoming the responsible entity or manager of any of the Willmott schemes.

23. The liquidators subsequently negotiated contracts to sell Willmott's interest in the lands unencumbered by the leases. The contracts for sale also provided that title to trees on the land would also pass to the purchasers on settlement. Pursuant to s 511 of the Corporations Act, the liquidators applied to the Supreme Court of Victoria for directions and orders about the sales that had been negotiated. One of the issues for determination was whether the liquidators could disclaim the leases. Willmott Growers Group Inc and the Willmott Action Group Inc, which each represented different groups of the members of the schemes, intervened as contradictors of the arguments advanced by the liquidators (for the purposes of the discussion of the decisions in this matter I have referred to those entities as the "Growers").

---

[25] AR Keay, *McPherson, the law of company liquidation*, 4th Edition**,** Sydney: LBC Information Services, 1999 at [8.2280].

[26] Section 42(2)(e) of the *Transfer of Land Act 1958* (Vic) provides that the land which is included in any folio of the Register or registered instrument shall be subject to the interest (but excluding any option to purchase) of a tenant in possession of the land. In contrast, s 53(1) of the *Real Property Act 1900 (*NSW) provides that a lease for a term exceeding three years should be in the approved form. To obtain the benefit of indefeasibility such lease should registered, which will give the lease priority over all later registered interests under s 42(d) of the *Reap Property Act 1900* (NSW).

24. Justice Davies (now of the Federal Court) framed the issue for determination in the following terms:

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

25. Justice Davies concluded that the answer to the question was "no": *Re Willmott Forests Ltd (Receivers and Managers appointed) (in liq)* [2012] VSC 29; (2012) 258 FLR 160. In considering the question, Davies J, who acknowledged the now well-established principle that a lease creates both contractual and proprietary rights, considered two alternative scenarios.

26. First, Davies J considered the situation where the liquidator of a lessee wishes to disclaim a lease. According to her Honour, the disclaimer of a lease by the liquidator of a lessee terminates all the lessee's "rights, interests, liabilities" in respect of the leased property and so effects an extinguishment of the leasehold interest. No separate vesting order in the lessor is usually necessary as the lessor has the reversionary interest and takes the property as if the lease had been surrendered by the lessee and the surrender accepted by the lessor. [27]

27. According to her Honour, such reasoning is, however, not applicable in the case of an insolvent lessor (Willmott being an insolvent lessor). The lessee's leasehold interest is the property of the lessee and, as such, a disclaimer of the lease by the liquidators of the lessor would only terminate the rights, interests and liabilities in respect of the leased property but would not bring the lease to an end for all purposes. This is because, according to her Honour, a leasehold interest cannot be described as a liability or encumbrance upon the property of the lessor and it was not necessary to extinguish such an interest to release the lessor or its property from a liability.[28]

28. In my view, (and as the High Court's reasoning will show), the difficulty with her Honour's approach is that it failed to take account of the fact that the lessee's *right* of exclusive possession and of quiet enjoyment of the leased property is a necessary concomitant of the lessor's ongoing *obligation* to provide exclusive possession and quiet enjoyment. If it be the case that disclaimer terminated the lessor's "rights, interests, and liabilities" in respect of the lease, it is difficult to see how the lessor's obligation (which, contrary to what Davies J found, must be considered a liability for the lessor) to provide exclusive possession, and the lessee's correlative right to have exclusive possession of the property, could remain extant. The central features of a lease, and of a leasehold interest, would be absent.

---

[27] [2012] VSC 29; (2012) 258 FLR 160 at [10].
[28] [2012] VSC 29; (2012) 258 FLR 160 at [11]; [16].

29. The liquidators appealed to the Victorian Court of Appeal. The Victorian Court of Appeal (Warren CJ, Redlich JA and Sifris AJA) allowed the appeal, set aside the order answering the separate question "No", and ordered that the question be answered "Yes".[29] In so deciding, Warren CJ and Sifris AJA referred to the fact that in *Apriaden Pty Ltd v Seacrest Pty Ltd* [2005] VSCA 139; (2005) 12 VR 319, the Victorian Court of Appeal held that the termination of a contract for lease, by accepting a repudiation, had the effect of determining the leasehold interest and that "[t]here is no reason in principle or policy that should treat the consequences of disclaiming a contract of lease in a different way".[30]

The High Court proceedings

30. The Growers appealed to the High Court. The Growers advanced two broad arguments, neither of which were accepted by the High Court.

The Growers' first argument

31. The Growers submitted that the liquidators only had the power to disclaim Willmott's reversionary interest, that is, the estate in possession that would have otherwise reverted to Willmott as lessor once the Growers' right to exclusive possession ceased (such interest being a species of property that fell with s 568(1)(a) and (c)). The liquidators of course did not purport to disclaim Willmott's reversionary interests in the leased property. The Growers also submitted that even if the liquidators were permitted to disclaim leases under s 568(1)(f) (on the footing that leases be regarded as a type of contract) the leases in question were property of the Growers and not Willmott.

32. The plurality (French CJ, Hayne and Kiefel JJ) rejected this submission. According to their Honours, the word "property" in s 568(1) should be interpreted broadly and refers to the "company's possession of any of a wide variety of legal rights against others in respect of some tangible or intangible object of property". Rights and duties that arose under a contract could properly be the subject of a disclaimer. [31]

33. The plurality also emphasised that it is now established that a lease is a species of contract, referring to the well-known description by Deane J in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* of a lease as both an executed demise *and* an executory contract and that the ordinary principles of contract apply to leases.[32] As Gageler J put it in his concurring reasons, Deane J's description of a lease as both an executory contract and an executed demise "reflects not a temporal dichotomy in the contractual and proprietary operation of a lease but rather the 'duality' of the character of a lease

[29] *Re Willmott Forests Limited* [2012] VSCA 202; (2012) 91 ACSR 182.
[30] *Apriaden Pty Ltd v Seacrest Pty Ltd* (2005) 12 VR 319 at [47].
[31] [2013] HCA 51; (2013) 251 CLR 592 at [36]; [38].
[32] [2013] HCA 51; (2013) 251 CLR 592 at [39].

throughout its term as both a contract and a demise. The critical point for present purposes is that, during the term of the lease, the contract and the demise are one and the same: executed as to the past, and executory as to the future". [33]

34. The leases in the present case were executory as to the future, notwithstanding that the Growers had paid the entirety of the rent in advance. This is because (issues of disclaimer notwithstanding) both parties to the leases had continuing obligations (in the case of Willmott, to continue to provide exclusive possession and quiet enjoyment; in the case of the Growers, to comply with the covenants in the leases). The plurality also said that the fact that Willmott's rights and obligations under the lease contracts could be considered to be a form of property, coupled with the reference in s 568(1A) to "a contract ... other than a lease of land", made it plain that a "lease of land" should not be confined to leases *to* the company in liquidation.[34]

The Growers' second argument

35. In considering the effect of the disclaimer of the leases, the plurality noted that whilst it has long been accepted that a lease creates an interest in land in the hands of the lessee, the relevant question was whether disclaimer of the lease brings the leasehold interest to an end. [35]

36. According to the plurality, it was important to recognise that the Growers did not stand as third parties divorced from the "rights, interests and liabilities" of Willmott and that Willmott's "rights, interests and liabilities" cannot be brought to an end without bringing to an end the correlative "liabilities, interests and rights" of the Growers. As such, the Growers' rights to exclusive possession of the leased land are terminated by the disclaimer of the leases and the Growers interest or estate in the lands must come to an end.[36]

The reasons of Gageler J

37. Justice Gageler's approach differed slightly from that of French CJ, Hayne and Kiefel JJ. Whilst the plurality focused on the text of s 568(1)(f), Gageler J looked at the how the issue of disclaimer had been judicially considered. His Honour concluded that disclaimer only operates to release a company from its prospective rights and obligations in relation to the property that is disclaimed, not any liability which the company incurred to another person in relation to the property before the disclaimer took effect, nor an interest in the property which the company transferred to another person before the disclaimer took effect.[37] As such, his Honour concluded that a lease

[33] [2013] HCA 51; (2013) 251 CLR 592 at [67].
[34] [2013] HCA 51; (2013) 251 CLR 592 at [40]-[41].
[35] [2013] HCA 51; (2013) 251 CLR 592 at [54].
[36] [2013] HCA 51; (2013) 251 CLR 592 at [55].
[37] [2013] HCA 51; (2013) 251 CLR 592 at [71].

cannot be assimilated to an interest in property which has already been transferred, given that it is contingent upon the ongoing enjoyment of rights conferred by the lease.[38]

Justice Keane's dissent

38. Justice Keane was the sole dissentient in this case. His Honour delivered lengthy and detailed reasons, focussing upon two issues. First, his Honour considered whether it was necessary for the liquidators to seek the leave of the Court to disclaim the leases. Secondly, his Honour considered (on the assumption that leave to disclaim was needed and was obtained) what would be the effect of such disclaimer.

The leave to disclaim issue

39. Justice Keane concluded that leave to disclaim the leases was necessary (in contrast to the plurality, which did not consider the issue).[39] His Honour observed that leave had not been sought in this case.[40] Nevertheless, the following comments of Davies J at first instance are to be noted:

> The sale contracts contain conditions precedent to the completion of the sale that the liquidators obtain orders and directions from the Court on or before 31 January 2012, authorising the liquidators:
>
> a) to exercise the powers to terminate, relinquish or surrender the project documents [including the Leases]; and
> b) to disclaim the [including the Leases] as onerous pursuant to s 568(1) of the Act.
>
> The liquidators have now made application to the Court to obtain those orders and directions under s 511 of the Act. In addition, they seek pursuant to s 477(2B) of the Act, the Court's approval of their entry into the sale contracts and a direction under s 511 of the Act that they are justified in procuring WFL to enter into and perform the sale contracts …[41]

40. Justice Keane's reasoning concerning the necessity of leave appears to rest upon a distinction between a liquidator being able to disclaim rights of a company in liquidation (for which, according to his Honour, leave is not required) and disclaim obligations of the company (for which, according to his Honour, leave is required). Whilst Keane J accepted that property of the company "*consisting of a contract that is a lease of land"* could be disclaimed without the leave of the Court[42], his Honour was also of the view that disclaimer of a company's property consisting of a contract only occurs where the company's rights under the contract (and not its obligations) are disclaimed. As his Honour said (emphasis added):

---

[38] [2013] HCA 51; (2013) 251 CLR 592 at [72].
[39] [2013] HCA 51; (2013) 251 CLR 592 at [56].
[40] [2013] HCA 51; (2013) 251 CLR 592 at [116].
[41] [2012] VSC 29 at [1]; (2012) 258 FLR 160 at [1].
[42] [2013] HCA 51; (2013) 251 CLR 592 at [110].

> Section 568(1)(f) proceeds on the express footing that the power to disclaim operates upon a contract which is property of the company. A contract usually confers rights and obligations upon each party to it. **The postulate on which s 568(1)(f) proceeds looks to the rights conferred on the company rather than the obligations assumed by it. It is the rights conferred by a contract which make it sensible to speak of the contract as "property of the company". It is the right to possession of land conferred on the lessee which attracts the description of "a contract" to a lease of land. As a matter of ordinary parlance, "to disclaim" is to renounce or repudiate a right which the person disclaiming might otherwise enjoy. In ordinary parlance, the word "disclaimer" is primarily concerned with the disowning of rights rather than the repudiation of an obligation.** [43]
>
> ….
>
> An understanding of the power to disclaim as primarily concerned with the renunciation of rights, rather than the repudiation of liabilities, is confirmed by the history of "disclaimer" as a concept in the law of insolvency ... Disclaimer was not, and has never been, regarded as a device whereby a trustee in bankruptcy or liquidator may effect a unilateral discharge of the liabilities of the insolvent estate: that would have been antithetical to the due administration of the estate of the insolvent person. **Rather, the scope of the power to disclaim, as distinct from the consequences of its exercise, was, and has remained, limited by its focus upon the rights of the insolvent company.** [44]

41. Justice Keane appeared to conclude that because the liquidators were not disclaiming a contract that was "property of the company" (given that the company's rights under the leases were not being disclaimed) leave to disclaim under s 568(1A) was required.[45]

42. According to his Honour, given that that the liquidators had not sought and obtained leave of the Court, the purported disclaimer was of no effect. [46]

The effect of any disclaimer

43. Justice Keane also considered the effect of any disclaimer. His Honour was of the view that if leave to disclaim had been sought and granted, Willmott's obligations to the Growers would be terminated but that did not mean that the liquidators could seize possession of the leased land.

44. According to Keane J, the authorities[47] have consistently held that the exercise of the power to disclaim does not undo a completed transaction or divest rights which have accrued. The notion that disclaimer of a contract does not affect accrued rights applied, *a fortiori*, in the present case where the Growers' obligation to pay rent had been fully met and in circumstances where the only obligation (apparently) resting

[43] [2013] HCA 51; (2013) 251 CLR 592 at [112].
[44] [2013] HCA 51; (2013) 251 CLR 592 at [115].
[45] [2013] HCA 51; (2013) 251 CLR 592 at [116].
[46] [2013] HCA 51; (2013) 251 CLR 592 at [134]; [161].
[47] Discussed at [2013] HCA 51; (2013) 251 CLR 592 [136]-[143].

upon Willmott was observance of the covenant for quiet enjoyment when realising the money value of the reversion.[48] His Honour was also of the view that the principle in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* did not support a contrary view of the effect of a disclaimer given that *Progressive Mailing House* only related to circumstances where a lessee has repudiated its executory obligations under the lease and where such repudiation is accepted by the lessor.[49]

45. The conclusion reached by Keane J was in the following terms:

> … while a disclaimer authorised by s 568(1)(f) of the Act would be effective to relieve the liquidator from ongoing obligations under the contract disclaimed, it would not divest rights already accrued to the counterparty. The Growers' right to their interest had been unconditionally acquired by them before the purported disclaimer. A termination of the contract in such a case could not have the consequence of expropriating from the Growers the accrued rights for which they had paid, at least to the extent that a court of equity would protect by injunction the vested property rights of the Growers who have paid in full for their interest in the leases for a term of 25 years.[50]

46. As noted above, the ordinary principles of contract law, including the important distinctions between executed and executory obligations, and between conditional and independent contractual obligations, apply to leases. As Deane J said in *Progressive Mailing House*, "except perhaps in the quite exceptional case of a completely unconditional demise for a long term with no rent reserved the leasehold estate cannot be divorced from its origins and basis in the law of contract".[51]

47. As the approach of the majority in *Willmott Growers* seems to suggest, Keane J's conclusion possibly elides the fact that leases, whilst they remain on foot, will almost always be executory in nature, even in circumstances where the rent under the lease is fully paid in advance. True it is that, as a statement of general principle, "termination of the performance of a contract for breach or repudiation does not divest an accrued right to receive performance".[52] To similar effect are Sir Owen Dixon's comments in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476-477 where his Honour said that where a contract has come to an end "[b]oth parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired". It is not apt, however, in my opinion, to describe the Growers as having accrued an unconditional right to receive exclusive possession for the life of leases. As Professor Carter notes, an accrued right to receive performance will not arise if there is a relationship of dependency between the

[48] [2013] HCA 51; (2013) 251 CLR 592 at [147].
[49] [2013] HCA 51; (2013) 251 CLR 592 at [156].
[50] [2013] HCA 51; (2013) 251 CLR 592 at [157].
[51] (1985) 157 CLR 17 at 53.
[52] J W Carter, *Carter's breach of contract*, Chatswood, N.S.W: LexisNexis Butterworths, 2011 at [13.15].

obligation sought to be enforced and the obligations discharged by termination.[53] Issues of disclaimer aside, whilst a lessor is under an obligation to provide excusive possession and quiet enjoyment, the lessee's right to receive the benefit of the lessor's obligation to give exclusive possession is dependent on the lessee continuing to abide by all the covenants in the lease. If the lessee fails to comply, it risks (subject to relief against forfeiture and the like) being deprived of its right to exclusive possession, even though it may have paid all the rent.

Concluding thoughts

48. The decision of the High Court in *Willmott Growers* is significant for a number of reasons. First, as emphasised by the plurality and by Gageler J, property that is capable of being disclaimed is broad in nature, and encompasses the company's possession of "any of a wide variety of legal rights against others in respect of some tangible or intangible object of property".[54] Where a contract is sought to be disclaimed, it is apt to describe the company's obligations, as well as its rights under the contract, as "property of the company". Secondly, *Willmott Growers* is significant because, to the extent that it was in doubt, the decision confirmed that leases are a species of contract and that ordinary contractual principles apply to leases. When a contract of lease is terminated or disclaimed, the leasehold estate necessarily falls away with it.

49. The decision in *Willmott Growers* is likely to be a source of considerable alarm for commercial lessees. The decision leaves lessees who have paid the entirety of the rent in advance, or who have paid a substantial lease premium, or who have undertaken an expensive fit-out, or who have installed fixtures (on the assumption that they will be able to remove them before the leases expires) in a precarious position. Would-be lessees might think that it is now prudent to undertake costly due diligence in relation to the solvency of their would-be landlords. Persons who have taken security over a leasehold interest in exchange for providing a loan face the risk that their security might end up being worthless.

50. As the plurality noted, a lessee whose lease has been disclaimed by the liquidator of a lessor may consider that being left to prove as an unsecured creditor in the winding up gives little effective compensation for what has been taken away.[55] Given the effect of *Willmott Growers* is to leave some lessees in a precarious position, it is likely that the issue of whether a disclaimer of property should be set aside by a person affected by a disclaimer because the prejudice that person would suffer "is grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the

[53] J W Carter, *Carter's breach of contract* at [13.26, [13.28].
[54] [2013] HCA 51; (2013) 251 CLR 592 at [36].
[55] [2013] HCA 51; (2013) 251 CLR 592 at [56].

company's creditors" (s 568B(3)) will provide fertile ground for future litigation.[56] As one commentator aptly puts it, "if liquidators embrace this newly found power, the courts should expect plenty of business".[57]

M.J. Smith
21 March 2014

[56] One glimmer of hope for lessees is that there are statements to the effect that in determining the relative prejudices, the Court will look at the situation on the assumption that the contract or lease is disclaimed and compare this to the counterfactual situation. As Chesterman J said in *Re Real Investments Pty Ltd* [2000] 2 Qd R 555 at [30]-[31]:

> In fact two sets of comparisons are called for. The first is an examination of the relative positions of [the person affected by the disclaimer] and the creditors, on the supposition that the agreement is ended by disclaimer. The second is the same examination on the supposition that the agreement remains in force. The contrast in position between those comparisons allows the court to make the assessment described by the section.
>
> The pre-condition is satisfied only if the alteration in [the person affected by the disclaimer's] position between the first and second comparisons is to its disadvantage and is grossly out of proportion to the prejudice suffered by the creditors as shown by the two comparative positions. What is meant by `grossly out of proportion' is, I think, that the change in [the person affected by the disclaimer's] position between comparison one and comparison two must be much greater than the alteration in the creditors' position.

In *Sullivan v Energy Services International Pty Ltd (in liq)* (2002) 43 ACSR 179 at [30] Young J stated that it cannot be said that creditors of a company in liquidation will suffer any prejudice at all if they are (which is a rare case) to be paid in full (or close to in full).

[57] Powers, "Disclaimed leases: Is there any hope for tenants?" (2014) 25 *Journal of Banking and Finance Law and Practice* 48 at 51.