HIGH COURT OF AUSTRALIA

FRENCH CJ,
HAYNE, KIEFEL, GAGELER AND KEANE JJ

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 & ORS RESPONDENTS

Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)
[2013] HCA 51
4 December 2013
M53/2013

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

G T Bigmore QC with M P Kennedy and S G Hopper for the appellant (instructed by Mills Oakley Lawyers)

P D Crutchfield SC with R G Craig and D J Snyder for the first to third respondents (instructed by Arnold Bloch Leibler Lawyers)

No appearance for the fourth respondent

CATCHWORDS

Willmott Growers Group Inc v Willmott Forests Limited (Receivers and Managers Appointed) (In Liquidation)

Corporations law – Winding up – Insolvency – Liquidators appointed to manager of forestry investment schemes – Liquidators sought to sell assets of manager unencumbered by schemes – Assets included land over which leases granted by manager – Whether liquidators could disclaim leases granted by manager under s 568(1) of *Corporations Act* 2001 (Cth) – Whether lease "a contract" under s 568(1)(f) – Whether disclaimer of lease terminated tenant's estate or interest in land.

Words and phrases – "effect of disclaimer", "lease of land", "property of the company that consists of ... a contract", "rights, interests, liabilities and property".

Corporations Act 2001 (Cth), ss 568(1), 568(1A), 568D(1).

FRENCH CJ, HAYNE AND KIEFEL JJ.

The issues in the appeal

1 A company leased land to tenants for the tenants to grow and harvest trees. The company became insolvent and is being wound up. Does Div 7A (ss 568-568F) of Pt 5.6 of the *Corporations Act* 2001 (Cth) ("the Act") give the company's liquidators power to disclaim the leases which the company granted? If the Act gives that power, does disclaimer terminate the tenants' rights arising under the leases?

Two statutory questions and their answers

2 The issues in this appeal present two statutory questions. Section 568(1) of the Act gives the liquidator of a company power to disclaim certain property of the company, including property that consists of a contract. Section 568D(1) provides that a disclaimer is taken to terminate, from the effective date of the disclaimer, the company's rights, interests, liabilities and property in or in respect of the disclaimer property. The relevant questions are: first, does s 568(1) give a liquidator power to disclaim a lease which the company granted to a tenant; and, second, if a liquidator has power to disclaim such a lease, what does s 568D(1) provide to be the effect of that disclaimer?

3 Section 568(1) gives the power to disclaim. It provides:

> "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:
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> (a) land burdened with onerous covenants; or
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> (b) shares; or
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> (c) property that is unsaleable or is not readily saleable; or
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> (d) property that may give rise to a liability to pay money or some other onerous obligation; or
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> (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
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> (f) a contract;
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> 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."

4 The central question of construction of s 568(1) is whether a lease granted by the company to a tenant is "a contract" within the meaning of s 568(1)(f)[1]. Section 568(1A) of the Act provides that "[a] liquidator cannot disclaim a contract (other than an unprofitable contract or *a lease of land*) except with the leave of the Court" (emphasis added). Evidently, "a contract" in s 568(1)(f) includes a lease of land. Should the reference to "a lease of land" in s 568(1A) be read as referring to *any* lease to which the company is a party, or only to leases of land in which the company is the *tenant*?

5 These reasons will show that s 568(1) should be construed as giving the liquidator of a company power to disclaim a lease granted by the company to a tenant. A lease granted by the company to a tenant is "a contract" within the meaning of s 568(1)(f). This conclusion follows both from the relevant attributes of a lease and from the reference in s 568(1A) to "a lease of land", an expression which cannot be read as confined to leases in which the company is the tenant.

6 Section 568D prescribes the effect of a disclaimer. It provides:

"(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."

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1 Until the enactment of the *Corporate Law Reform Act* 1992 (Cth), Australian company statutes had given the liquidator of a company power to disclaim "*unprofitable* contracts". (See, for example, *Companies Act* 1961 (NSW), s 296(1)(c); *Companies (New South Wales) Code*, s 454(1)(d); Corporations Law, s 568(1)(d).)

7 It was not disputed that, if the liquidator has power to disclaim a lease which a company has granted to a tenant, the effect of the disclaimer is that, from the relevant day, the company's rights, interests, liabilities and property in or in respect of the lease are terminated. The appellant, Willmott Growers Group Inc ("WGG"), submitted, however, that termination of the company's rights, interests, liabilities and property in or in respect of the disclaimer property did not bring the tenant's rights to an end.

8 Section 568D(1) requires that a tenant's rights and liabilities are terminated so far as necessary to release the company and its property from liability. These reasons will show that it necessarily follows that, from the effective date of the disclaimer, the company's liability to provide the tenant with quiet enjoyment of the leased property (and not derogate from the grant of a right to exclusive possession) and the tenant's rights to quiet enjoyment of the property (and to non-derogation from the grant of exclusive possession) are terminated. If the tenant suffers loss because of the disclaimer, the tenant may prove for that loss in the winding up[2].

The essential facts

9 The first respondent, Willmott Forests Limited ("WFL"), was the manager of numerous forestry investment schemes associated with a group of companies which can be referred to as "the Willmott group". WFL, or its predecessor in title, leased to participants in those schemes portions of land which WFL owned or leased. The leases were made at various times. Each lease was for a term of years (generally 25 years) and some leases gave the tenant an option for a further term. Some leases provided for the whole of the rent due to be paid in advance; some provided for rent to be paid annually.

10 The forestry investment schemes took different forms. It is not necessary to examine those differences in great detail. It is enough to notice that all related to forest plantations. Each investor leased an area on which trees were to be grown. Generally, each investor made a forestry management agreement with a company in the Willmott group, by which that company agreed to plant, maintain and harvest the trees. Most forestry management agreements provided for the investor to pay the relevant company an initial fee, but for the investor to pay no further sum until the trees were harvested.

11 Some of the schemes were registered managed investment schemes under Ch 5C of the Act; others were not. No question arises in the appeal about the

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2 s 568D(2).

application of Ch 5C to any of the unregistered investment schemes. The unregistered schemes were of three types, described as "contractual schemes", "partnership schemes" and "professional investor schemes". WFL acted as the responsible entity and manager of eight registered managed investment schemes and, so far as relevant to this appeal, as manager of 22 unregistered schemes. These registered and unregistered schemes (together referred to as "the Willmott schemes") related to plantation projects in six areas, described as "Bombala Victoria", "Bombala New South Wales", "Murray Valley Victoria", "Murray Valley New South Wales", "North Coast New South Wales" and "North Coast Queensland".

12 The land used in a particular investment scheme (registered or unregistered) was not always a single contiguous block. So, for example, one of the schemes was conducted on 105 different plantations. Although trees were planted as a single plantation, and not in individual lots, one investor's lot might be adjacent to one or more lots leased to investors in other schemes.

13 In September 2010, WFL (and other companies in the Willmott group) went into voluntary administration. Receivers and managers were also appointed to property which companies in the Willmott group had charged and the receivers and managers took possession of the charged assets. Freehold land owned by WFL in and around the town of Bombala in New South Wales, comprising 27,861 hectares, was not charged. At September 2010, about 70 per cent of that land had been planted with pine trees.

14 In March 2011, the creditors of WFL resolved[3] that the company be wound up and appointed the second and third respondents in this Court as liquidators of WFL ("the liquidators").

15 The liquidators concluded that the Willmott schemes could not continue to operate. The liquidators considered that it was "very unlikely" that "a party would be willing to take over as responsible entity and manager of the Willmott Schemes in circumstances where that party would be required to assume the liabilities of WFL and fund the continued operation of the Willmott Schemes without any income or contributions from [individual investors] until harvest". The liquidators further concluded that it would not be practicable to maintain separately, or harvest separately, the trees on any individual lot leased to a particular investor and that the individual investors' "right to maintain and harvest their own trees is a theoretical right which cannot be exercised".

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3 ss 439C(c) and 446A.

16 In conjunction with the receivers and managers, the liquidators sought to sell the assets of WFL, including its freehold land and its interests as lessee of certain land on which plantations had been established. The sale campaign was said to have been run on the basis that parties could either purchase the relevant assets "unencumbered by the Willmott Schemes" or purchase those assets "encumbered by the Willmott Schemes with the ability to take over as responsible entity and manager of the schemes". Expressions of interest were received from 229 parties, of whom 92 submitted "indicative non-binding offers".

17 No person who responded to the request for expressions of interest in purchasing assets from the liquidators or receivers and managers expressed interest in purchasing any of the assets encumbered by the Willmott schemes, or in becoming responsible entity or manager of any of the Willmott schemes.

18 After those who had provided indicative offers were given an opportunity to examine information and documents about the assets, 54 binding offers were made to acquire assets. Separate conditional contracts of sale were then concluded with the one purchaser with respect to each of the six areas in which the Willmott schemes were conducted. Each contract provided that title to the assets the subject of the contract was to pass to the purchaser free from the encumbrances arising out of the Willmott schemes and, more particularly, that title to the trees on the land was to pass to the purchaser at settlement.

Proceedings about the proposed sales

19 Pursuant to s 511 of the Act, the liquidators applied to the Supreme Court of Victoria for directions and orders about the sales that had been negotiated. WGG and another body associated with investors who sought to continue the schemes in which they had invested, Willmott Action Group Inc ("WAG") (the fourth respondent), sought and were granted leave to intervene in the proceedings. The receivers and managers of WFL were not named as parties to the proceedings but were represented and supported the application by the liquidators. WGG and WAG acted as contradictors of the arguments advanced by the liquidators.

20 Because of the time constraints presented by the contracts of sale that had been made, the primary judge (Davies J) ordered separate determination[4] of the question:

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4 In earlier proceedings in the Federal Court of Australia, concerning the liquidators' power to terminate the Willmott schemes, Dodds-Streeton J had determined that

(Footnote continues on next page)

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

Her Honour answered[5] that question "No". There were two principal elements in her Honour's reasoning.

21 First, the negative answer was said[6] to be supported by cases on "analogous" legislation, in particular, *In re Bastable; Ex parte The Trustee*[7] (concerning the application of s 55 of the *Bankruptcy Act* 1883 (UK)).

22 Second, her Honour reasoned[8] that termination of the leases granted by WFL to investors was not *necessary* to release WFL or its property from a liability. So much followed, in her Honour's opinion[9], from the fact that WFL's grant of proprietary rights to the tenants created rights in the tenants that were different from WFL's reversionary interest in the leased land. Davies J said[10] that it was "unnecessary to interfere with the Growers' property rights in order to release WFL from its liability to lease because the leases have been effected" and that, accordingly, "the proviso in s 568D has no application".

23 The liquidators appealed to the Court of Appeal. That Court (Warren CJ, Redlich JA and Sifris AJA) allowed[11] the appeal, set aside the order answering the separate question "No", and ordered that the question be answered "Yes".

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the liquidators were justified in disclaiming the project documents relating to some of those schemes, but on condition that the liquidators seek the Court's consent before doing so. See *Willmott Forests Ltd, in the matter of Willmott Forests Ltd (Receivers and Managers Appointed) (in liq)* [2011] FCA 1517.

5 *Re Willmott Forests Ltd (Receivers and Managers appointed) (in liq)* (2012) 258 FLR 160.

6 (2012) 258 FLR 160 at 165 [12].

7 [1901] 2 KB 518.

8 (2012) 258 FLR 160 at 166 [16].

9 (2012) 258 FLR 160 at 166 [16].

10 (2012) 258 FLR 160 at 166 [16].

11 *Re Willmott Forests Ltd* (2012) 91 ACSR 182.

24 The plurality in the Court of Appeal (Warren CJ and Sifris AJA) identified[12] the critical question as "how far it is necessary to go (in relation to the lease of the lessee grower) in order to release WFL from liability". Their Honours noted[13] that the liquidators identified that liability as (among other things) WFL's continuing obligation to provide the tenant with quiet enjoyment of the land. By contrast, WGG submitted[14] that the rights of the investors as lessees had accrued or become vested before the time of any disclaimer and would therefore be preserved. Yet, as Redlich JA noted[15], WGG resiled in argument from the contention that the covenant to provide quiet enjoyment was not a liability of WFL, and accepted that the primary judge had been wrong to conclude otherwise.

25 All members of the Court of Appeal rejected[16] WGG's submissions.

26 By special leave, WGG appealed to this Court.

WGG's arguments

27 WGG advanced two principal arguments in this Court. Those arguments were: first, that the "proper" disclaimer property was WFL's unsaleable reversion, and second, that the tenants' leasehold estates would survive disclaimer of the lease contracts. It is convenient to deal with them in turn.

The "proper" subject of disclaimer

28 The liquidators seek to disclaim the leases to investors of which WFL is landlord. They do not seek to disclaim WFL's reversionary interest in the land which is subject to those leases.

29 It will be recalled that s 568(1) gives the liquidator of a company power to disclaim "property of the company that consists of" any of six enumerated categories of property. Paragraphs (a) and (b) of s 568(1) refer to "land" and

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12 (2012) 91 ACSR 182 at 188 [27].

13 (2012) 91 ACSR 182 at 188 [28], [30].

14 (2012) 91 ACSR 182 at 188 [29].

15 (2012) 91 ACSR 182 at 198 [78].

16 (2012) 91 ACSR 182 at 190 [38], 198 [79].

"shares"; pars (c), (d) and (e) refer to "property" of various kinds; and par (f) refers simply to "a contract".

30 WGG submitted that the only "proper" subject of disclaimer in this case was WFL's reversionary interest in the land that had been leased to investors. That is, WGG submitted that only pars (a) and (c) of s 568(1) could be engaged in this case and only in respect of WFL's reversionary interest. Section 568(1), therefore, did not authorise disclaimer of the leases.

31 It may be accepted that WFL's land subject to the leases is "land burdened with onerous covenants" (within par (a)) and is also "property that is ... not readily saleable" (within par (c)). But, as WGG's argument necessarily acknowledged, property which may be disclaimed under s 568(1) may engage more than one of the specific descriptions given in pars (a) to (e) of that sub-section. There is no foundation for reading the several forms of property enumerated in pars (a) to (f) of s 568(1) as mutually exclusive. Property which consists of "land burdened with onerous covenants" within the meaning of par (a) may also be not only "property that is unsaleable or is not readily saleable" within par (c) but also "property that may give rise to a liability to pay money or some other onerous obligation" within par (d).

32 WGG's argument at least flirted with, perhaps even embraced, the proposition that satisfaction of a paragraph appearing earlier in s 568(1) entails that other, later, paragraphs of the sub-section are to be ignored as irrelevant or inapplicable. That cannot be right. A company may have several different kinds of property which are the subject of s 568(1). Demonstrating that one kind of property of the company (in this case its reversionary interest in land) falls within one or more of the paragraphs of s 568(1) does not entail that another kind of property of the company (here the leases to investors) cannot be disclaimed.

33 WGG's submission might be understood as asserting that, because pars (a) and (c) of s 568(1) identify some of the rights and obligations which arise under the leases, the disclaimer of *any* of the rights and obligations arising under those leases must be made using the power provided by those paragraphs. If that was the argument, and it was right, it would follow that the power provided by par (f) of s 568(1) in relation to "a contract" could not be exercised. But how or why s 568(1)(f) would be read down to achieve such a result was never explained satisfactorily.

34 WGG's argument about the "proper" subject of disclaimer must, then, be understood as in effect asserting that the leases are not property of the company for the purposes of s 568(1). That is, WGG's argument was that the sub-section provides no power to disclaim property of that kind.

What is "property of the company"?

35 Care must always be exercised[17] in understanding how the word "property" is used in legal discourse. The word may be used in different senses and the very concept of "property" may be elusive[18]. The Act's conferral of a power to "disclaim property" can be given legally sensible operation only by reading the reference in the chapeau to s 568(1) to "property of the company" as not confined to the *object* in respect of which the property rights exist. Rather, the reference to "property of the company" must be read as directing attention to the *legal relationship* which exists between the company and the object[19] (whether that object is land, shares, a contract or some other object of property). That reading of the chapeau is consistent with the Act's definition[20] of "property" as "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 includ[ing] a thing in action".

36 The breadth of the kinds of "property" with which s 568(1) deals both demonstrates and requires that no narrow meaning can be given to the legal relationships which are embraced by the word "property" whenever it is used in the provision. The word "property" should be understood as referring 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.

37 If land was the only object of property with which s 568(1) dealt, the nature and extent of the property rights which may be disclaimed might usefully have been elucidated by reference only to general land law and, in particular, doctrines of estates. But s 568(1) does not deal only with property in land. It deals with a company's "property" in, among other things, bilateral contracts. In that context, as well as in other contexts in which s 568(1) must operate, doctrines of estates cannot inform, let alone limit, the scope of the word "property".

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17 *Yanner v Eaton* (1999) 201 CLR 351 at 365-367 [17]-[19]; [1999] HCA 53.

18 Gray, "Property in Thin Air", (1991) 50 *Cambridge Law Journal* 252; *White v Director of Public Prosecutions (WA)* (2011) 243 CLR 478 at 485 [10]-[11]; [2011] HCA 20.

19 cf *Yanner v Eaton* (1999) 201 CLR 351 at 365-366 [17].

20 s 9. (The text of the definition is given in the form it took at the time of the hearing before the primary judge. Nothing turns on the later amendment of the definition.)

38 Once it is understood, as it must be, that "property" in the chapeau to s 568(1) is a compendious description of legal relationships amounting to "ownership" of objects of property (both tangible and intangible), the reference in par (f) to "a contract" must be understood as identifying, as the disclaimer property, the rights and duties which arise under the contract. The contract is the source of those rights and duties.

39 It is then important to recognise that it is now firmly established that a lease is a species of contract. As Deane J said[21] in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*, "[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*" (emphasis added). Hence, as Mason J said[22], "the ordinary principles of contract law, including that of termination for repudiation or fundamental breach, apply to leases".

40 The rights and duties which a landlord and tenant have under a lease are bundles of rights and duties which together can be identified as species of property. The origins of those rights and duties lie in the contract which the landlord and tenant or their predecessors in title made. In every case, the rights and duties of the landlord and tenant, whether as an original party to the lease or as a successor in title, stem from the contract of lease and any later contract made in relation to that lease. When a company is the landlord, the rights and duties which that company has in respect of the lease are properly described as "property of the company that consists of ... a contract". The landlord's rights and duties are a form of property; those rights and duties "consist of", in the sense of derive from, the contract of lease.

41 This conclusion, which follows from identifying the nature and source of the rights and duties which a landlord has in respect of leased land, is put beyond any doubt by the reference in s 568(1A) to "a contract ... other than a lease of land". The reference in that provision to "a lease of land" cannot be read as referring only to leases in which the company is a tenant. As WGG pointed out, the Harmer Report on Insolvency identified[23] leases granted to a company as tenant as an example of onerous property which a liquidator should have power to disclaim. References to the recommendations of that report can be found in

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21 (1985) 157 CLR 17 at 51; [1985] HCA 14.

22 (1985) 157 CLR 17 at 29. See also at 51-54 per Deane J; *Apriaden Pty Ltd v Seacrest Pty Ltd* (2005) 12 VR 319 at 321-322 [3]-[4], 334-335 [61]-[65].

23 Australia, The Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988) vol 1 at 261 [619]-[620].

extrinsic material[24] relevant to the introduction, by the *Corporate Law Reform Act* 1992 (Cth), of provisions substantially like those now found in Div 7A of Pt 5.6 of the Act. Nothing in the extrinsic material suggests, however, that the otherwise general words of what is now s 568(1) of the Act, or the reference in s 568(1A) to "a lease of land", should be confined to leases *to* the relevant company. There is no textual foundation for limiting the words in that way. WGG's submission that the words should be so confined must be rejected.

42 The leases to investors of which WFL is landlord are property of the company which may be disclaimed. Each lease is "a contract" within s 568(1)(f). To the extent to which WGG's "proper" subject of disclaimer argument depended upon denying that proposition, it should be rejected.

WGG's reliance on an earlier decision

43 WGG sought to support its proposition that the only "proper" subject of disclaimer is the company's reversionary interest in the land by reference to statements made in *Bastable*[25]. (It will be recalled that the primary judge treated[26] *Bastable* as supporting the conclusion that the liquidators could not disclaim the leases which had been granted to investors.) WGG submitted that *Bastable* established that a vested interest in land cannot be brought to an end by disclaimer of the contract which created that interest. It followed in this case, so the argument continued, that because each investor has a vested interest in the land which the investor leased from WFL, the only property of the company which the liquidators can disclaim is the company's reversionary interest in the land.

44 *Bastable* concerned a disclaimer by a trustee in bankruptcy, under s 55 of the *Bankruptcy Act* 1883 (UK)[27], of a contract for the sale of a lease of land. The

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24 Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [971]-[976].

25 [1901] 2 KB 518 at 526 per Collins LJ, 527-528 per Romer LJ.

26 (2012) 258 FLR 160 at 165 [12].

27 Section 55(1) provided, so far as presently relevant:

> "Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor

(Footnote continues on next page)

contract had been made before the vendor became bankrupt. The purchaser of the lease had paid a deposit of £50. The unpaid balance of the purchase price was £40. The trustee alleged[28] that carrying out the contract of sale would be "unprofitable" to the bankrupt's estate in the sense that the bankrupt's estate would be better off with the lease than it would be if the lease were transferred to the purchaser in return for payment of the balance of the purchase money that had been agreed.

45 The Court of Appeal dismissed the trustee's appeal against the decision of a divisional court declaring the disclaimer void. The premise for the Court of Appeal's decision was that the statute did not authorise the disclaimer of the contract for sale of the lease because it was not in any relevant sense onerous property[29] (as s 55 of the *Bankruptcy Act* required.) Completion of the contract according to its terms placed no burden on the estate or the trustee.

46 No doubt, as WGG submitted, both Collins LJ and Romer LJ described[30] the effect of the contract of sale as being to vest an interest in the purchaser which disclaimer would not affect. Indeed Romer LJ identified[31] the fallacy in the trustee's argument as lying in ignoring the nature of the interest of a purchaser of real estate after a contract for its sale had been made. And in the course of argument, the Court had identified[32] the purchaser's interest in the land as being ownership in equity of the property (being the lease which the bankrupt had agreed to sell). It was this interest which Romer LJ described[33] as being an "interest in the land [which] would remain whatever might be the effect of a disclaimer by the trustee in the vendor's bankruptcy of the contract for sale". Hence, the actual orders made[34] in *Bastable* required the trustee either to disclaim

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thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee ... may ... disclaim the property."

28 [1901] 2 KB 518 at 521, 525.

29 [1901] 2 KB 518 at 525 per Collins LJ, Romer and Rigby LJJ agreeing.

30 [1901] 2 KB 518 at 526-527 per Collins LJ, 528 per Romer LJ.

31 [1901] 2 KB 518 at 528.

32 [1901] 2 KB 518 at 523.

33 [1901] 2 KB 518 at 528.

34 [1901] 2 KB 518 at 529-530.

the lease which was the subject of sale or to convey the leasehold estate to the purchaser.

47 Three points may be made about what was said in *Bastable*. First, the statutory provision for disclaimer considered in the case differed from the provisions which must be considered in this matter. Only "unprofitable" contracts, and other onerous property, could be disclaimed by a trustee in bankruptcy.

48 Second, great care must be exercised in treating unqualified statements made in the course of ex tempore reasons for decision given for deciding a particular case as establishing some absolute or universally applicable gloss upon the relevant statutory provision. Especially is that so when differently worded statutory provisions are to be applied in the instant case.

49 Third, the proposition in *Bastable*, that the purchaser's interest in the lease "would remain", was necessarily directed only to the *consequences* of disclaimer, not the ambit of the *power* to disclaim. It is, therefore, a proposition which does not speak directly to WGG's submission that the only "proper" subject for disclaimer is WFL's reversionary interest in the land. The proposition emphasised that terminating the vendor's liability to convey the legal title to the leasehold interest upon tender of the balance of the purchase price would leave unaffected the purchaser's equitable interest as purchaser of the leasehold. But, as these reasons will later demonstrate, when consideration is given to the effect of disclaimer, the analysis of the relationship between the parties in *Bastable* cannot be applied directly to the present case, if only because the relevant rights and liabilities with respect to quiet enjoyment of the leased land (and non-derogation from the grant of exclusive possession) are continuing rights and liabilities. And because those rights and liabilities are continuing, the Act can, and in this case does, bring them to an end with the consequence that from the effective date of the disclaimer there are neither the continuing rights to quiet enjoyment of the leased land (and non-derogation from the grant of exclusive possession) nor the corresponding liabilities. Termination of those rights and liabilities entails termination of the tenants' estates or interests in the land.

50 The decision in *Bastable* does not support WGG's submission that the "proper" subject for disclaimer in this case was WFL's reversionary interest in the land. It is, therefore, not necessary to examine whether, as WGG submitted, on disclaimer of that reversionary interest, the land would escheat to the Crown but still be subject to whatever may be the leasehold interests of investors. Rather, it is necessary to examine the second limb of WGG's argument, which was that the investors' leasehold interests in the land would survive disclaimer.

The effect of disclaimer

51 WGG's second submission necessarily accepted that the liquidators could disclaim the leases of which WFL was landlord. It must, therefore, be taken to have proceeded from an acceptance that s 568(1) treats a company's lease of land to a tenant as "a contract" within s 568(1)(f).

52 The effect of disclaimer is provided for, and governed, by s 568D(1), the text of which is set out earlier in these reasons. Section 568D(1) provides that, from the day on which the disclaimer takes effect, the disclaimer "is taken to have terminated ... the company's rights, interests, liabilities and property in or in respect of the disclaimer property". WGG submitted that, despite this effect on the rights, interests and liabilities of the company, the disclaimer of a lease could not operate "to destroy a third person's interest in property which existed before the disclaimer".

53 WGG gave little prominence in argument in support of this submission to the proposition (advanced before the primary judge) that WFL's obligation to provide continuing quiet enjoyment of the leased property was not a liability of the company. Rather, the argument was advanced primarily, perhaps exclusively, by reference to three related ideas. First, emphasis was given to each lease having created an estate or interest in land. Second, by describing the tenants as "third persons" or "third parties", it was suggested that the tenants stood apart from the rights, interests and liabilities of the company which were terminated by disclaimer. And third, it was asserted that termination of the tenants' estates or interests in the land would not follow from, or be compelled by the "release [of] the company and its property from liability".

54 WGG's argument must be rejected. The first of the three points made by WGG is undoubtedly correct. Each lease created an estate or interest in land. But the relevant question is whether the effect of the operation of the statute is that the estate or interest is brought to an end. In that respect, it is critically important to recognise that the tenants do not stand as third parties divorced from the rights, interests and liabilities of the company which are to be brought to an end. In every case the tenant is the party that has the liability, interest or right which is correlative to the relevant right, interest or liability of the company[35]. And contrary to the submissions of WGG, the company's rights, interests and liabilities in respect of the leases cannot be brought to an end without bringing to an end the correlative liabilities, interests and rights of the tenants. That is, to

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35 cf *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70 at 87 per Lord Nicholls of Birkenhead.

adopt the closing words of s 568D(1), "in order to release the company ... from liability", it is necessary to terminate the tenants' rights under the leases. This operates to terminate the tenants' estates or interests in the land.

55 As the liquidators correctly submitted, the liabilities of WFL that would be terminated by disclaimer of the leases include its obligations to provide quiet enjoyment and not derogate from the grant of exclusive possession of the land. And as the liquidators further submitted, again correctly, it necessarily follows that the tenants' rights to quiet enjoyment and, non-derogation are terminated by the disclaimer of the leases with consequent termination of the company's correlative liabilities or duties. It follows that the tenants' estates or interests are also brought to an end[36]. The tenants are then left with the right to prove in the winding up as creditors for whatever damage is thereby inflicted.

Questions not considered

56 Obviously, a tenant whose lease has been disclaimed by the liquidator of a landlord may consider that being left to proof as an unsecured creditor in the winding up gives little effective compensation for what has been taken away. Whether that is so in this case was not examined in argument and is not considered. Nor has there been any occasion to consider in this case whether the liquidators require the leave of the "Court"[37] before disclaiming the investors' leases or, if they do require leave, what considerations would inform the decision to grant or refuse leave. It may be noted that the Act does provide expressly, in s 568B(3), that the "Court", on application, may set aside a disclaimer "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" (emphasis added). Again, however, whether or how that provision would apply in this case was not explored in argument.

Conclusion and orders

57 For these reasons, the liquidators have the power to disclaim the leases to investors. Each lease is "a contract" for the purposes of s 568(1)(f) of the Act. The liabilities of WFL (including its obligations to provide quiet enjoyment and not derogate from the grant of exclusive possession) would be terminated from the day on which the disclaimer takes effect, as would the correlative rights of

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36 cf *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 53-54.

37 As defined by s 58AA(1) of the Act.

the tenant. Each tenant's estate or interest in the land would be terminated. The appeal should be dismissed with costs.

GAGELER J.

Introduction

58 Writing 80 years ago, William O Douglas and Jerome Frank noted that some questions which then arose in the law of insolvency would more readily be answered if commercial leases of land were to be recognised as contracts[38]. That development has since occurred in Australia.

59 The question which now arises in the liquidation of Willmott Forests Ltd ("WFL") is whether the *Corporations Act* 2001 (Cth) ("the Act") allows the liquidators of WFL to disclaim long-term leases of forested land leased by WFL to members of investment schemes ("the Growers") with the effect of terminating the Growers' leasehold estates or interests in that land.

60 The answer, in my view, is that the liquidators have that ability. The answer flows substantially from recognition that, despite the rent being fully paid, the Growers' leases remain contracts between WFL and the Growers under which WFL has ongoing obligations to give the Growers exclusive possession of land and from recognition that the Growers' leasehold estates or interests are proprietary interests which derive from and depend on the continuation of those contractual obligations. The liquidators' disclaimer of the Growers' leases would terminate those contractual obligations for the future and thereby bring the leasehold estates or interests to an end.

Contracts, leases and leasehold interests

61 There is a distinction between a lease, and the proprietary interest of the lessee – the leasehold estate or interest – which results from a lease. The distinction is often conflated. Windeyer J explained[39]:

> "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."

Windeyer J had made the same distinction in different words earlier when he said that "a legal right of exclusive possession is a tenancy and the creation of such a

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38 Douglas and Frank, "Landlords' Claims in Reorganizations", (1933) 42 *Yale Law Journal* 1003 at 1004-1005.

39 *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 8; [1966] HCA 15.

right is a demise"[40]. He explained that "a right to exclusive possession as against all others including [the] landlord", "when it flows from contract with the landlord, is the very essence of tenancy" and "creates an interest in land"[41].

62 *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[42] confirmed that, save perhaps in exceptional cases, a right to the exclusive possession of land for a term is given by contract between the lessor and the lessee. The legal consequence, that rights conferred and obligations imposed by a contract that is a lease become attached to the respective estates or interests in land of the lessor and the lessee, does not detract from the underlying legal character of a lease as a species of contract. Thus, a contract giving a right to exclusive possession of land for a term less than that which the lessor has is a lease, and the proprietary interest of the lessee that results from the contractual giving of that right is a leasehold estate or interest. Whether a contract giving a right to exclusive possession of land which is not the lessor's to give might also answer the description of a lease in a particular statutory context does not now arise for consideration[43].

63 *Tabali* also confirmed that the proprietary interest of the lessee which results from a lease depends on the lessee's right to the exclusive possession of land continuing to have contractual force during the term. The leasehold estate or interest is an ongoing proprietary consequence of the ongoing contract between the lessor and the lessee: "[i]f the contract is avoided or dissolved", whether pursuant to the contract itself or by operation of law, "the estate in land falls with it"[44]. Early doubts about the generality of that proposition have now been resolved[45].

64 The leasehold estate or interest, stemming as it does from the lessee's right to the exclusive possession of land, reduces, while it remains, the lessor's own

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40 *Radaich v Smith* (1959) 101 CLR 209 at 222; [1959] HCA 45.

41 *Chelsea Investments Pty Ltd v Federal Commissioner of Taxation* (1966) 115 CLR 1 at 7.

42 (1985) 157 CLR 17; [1985] HCA 14.

43 Cf *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406; Gray and Gray, *Elements of Land Law*, 3rd ed (2001) at 326-328.

44 (1985) 157 CLR 17 at 54, quoting *Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd* [1945] AC 221 at 240.

45 *Apriaden Pty Ltd v Seacrest Pty Ltd* (2005) 12 VR 319 at 328-331 [32]-[51], 334-335 [61]-[65].

prior estate in the land (whether freehold or leasehold) to an estate in reversion. If and when the leasehold estate or interest ceases to exist as a consequence of the lessee's right to the exclusive possession of land ceasing to exist, the lessor's estate itself reverts to an estate in possession.

65 The ongoing contractual right of the lessee to have exclusive possession, essential to the existence of a lease, is reciprocated in the ongoing contractual obligation of the lessor to give that exclusive possession. The precise fit between that ongoing obligation of the lessor to give exclusive possession and more specific express or implied obligations of the lessor to provide quiet enjoyment and not to derogate from the grant of the lease need not be explored[46]. What is plain is that "full effect cannot be given to the intention of the parties without implying an obligation that the lessor shall neither disturb the possession himself nor authorize its disturbance by others"[47].

66 Even where the rent is fully paid, a lease is therefore never fully executed during its term. To the extent, at the very least, of the lessee's ongoing right to have exclusive possession and the lessor's ongoing obligation to give exclusive possession, a lease is always "partly executory: rights and obligations remain outstanding on both sides throughout its currency"[48].

67 The now classic description by Deane J in *Tabali* 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 throughout its term as both a contract and a demise[49]. 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. The continuity of the leasehold estate or interest conveyed by the lease depends on the continuity of the lease.

Disclaimer and its effects

68 The Act confers power on a liquidator of a company to act on the company's behalf to "disclaim property of the company that consists of",

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46 Cf *Goldsworthy Mining Ltd v Federal Commissioner of Taxation* (1973) 128 CLR 199 at 214; [1973] HCA 7; *Ryde Municipal Council v Macquarie University* (1978) 139 CLR 633 at 659; [1978] HCA 58.

47 *O'Keefe v Williams* (1910) 11 CLR 171 at 192; [1910] HCA 40. See also at 197-198, 200-201, 211; *Miller v Emcer Products Ltd* [1956] Ch 304 at 321.

48 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 at 705.

49 (1985) 157 CLR 17 at 51.

amongst other things, "land burdened with onerous covenants" and "a contract"[50]. The term "property", where used within the Act except where a contrary intention appears, "means any legal or equitable estate or interest ... in real or personal property of any description"[51].

69 A liquidator's exercise of the power to disclaim property of the company is subject to qualifications. One qualification is that the liquidator "cannot disclaim a contract (other than an unprofitable contract or a lease of land) except with the leave of the Court"[52]. That leave may be given, on application, subject to such conditions as the Court considers just and equitable[53]. Another qualification is that the liquidator must give notice of the disclaimer to each person who might have or claim an interest in the property[54]. The Court, on application made within a specified period after that notice, may then set aside the disclaimer if satisfied that the disclaimer would cause to such persons "prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors"[55]. The disclaimer takes effect if, and only if, such an application either is not made or is unsuccessful, and the disclaimer is then treated as having taken effect from the day after the date the liquidator gave or lodged the notice[56].

70 The statutory effect of the exercise of power by a liquidator to disclaim property of the company is then twofold. First, as from the day on which it is treated as having taken effect, the disclaimer is taken to have "terminated ... the company's rights, interests, liabilities and property in or in respect of the disclaimer property" but not to "affect any other person's rights or liabilities except so far as necessary in order to release the company and its property from liability"[57]. Secondly, a person aggrieved is taken to be a creditor of the

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50 Section 568(1)(a) and (f).

51 Section 9.

52 Section 568(1A).

53 Section 568(1B).

54 Section 568A.

55 Section 568B.

56 Section 568C.

57 Section 568D(1).

company to the extent of any loss suffered because of the disclaimer and is allowed to prove that loss as a debt in the winding up of the company[58].

71 What is apparent from the statutory language prescribing the statutory effect of a liquidator's exercise of power to disclaim property of the company is confirmed by the long history of judicial consideration of similar provisions in insolvency legislation dating back to the middle of the nineteenth century[59]. Disclaimer operates only prospectively to terminate the company's rights and obligations in relation to the property disclaimed; and it has no effect on the rights or obligations of any other person except so far as is necessary prospectively to release the company from its rights and obligations in relation to that property[60]. Thus, disclaimer does not affect a liability which the company incurred to another person in relation to the property before the disclaimer took effect[61], and disclaimer does not affect an interest in the property which the company transferred to another person before the disclaimer took effect[62]. *In re Bastable; Ex parte The Trustee*[63], on which much of the argument in this appeal was focused, is no more than an illustration of that latter proposition in the context of early bankruptcy legislation. It continues to be cited in a leading English text on corporate insolvency as an example of a person, who has a "real right", as opposed to a "personal claim", against a company in liquidation, remaining free to assert that right[64].

72 It can therefore be accepted that a liquidator's disclaimer of property of a company does not affect an interest in that property which the company transferred to another person before the disclaimer took effect. But a lease cannot be equated to an interest in property which has already been transferred. The critical reason, already discussed, is that the continuation of the leasehold estate or interest conveyed by the lease is necessarily contingent on the ongoing

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58 Section 568D(2).

59 Section 23 of the *Bankruptcy Act* 1869 (UK).

60 See eg *Sims v TXU Electricity Ltd* (2005) 53 ACSR 295 at 300-301 [22]-[26].

61 See eg *Rothwells Ltd (In Liq) v Spedley Securities Ltd (In Liq)* (1990) 20 NSWLR 417 at 422; *Official Assignee of Bowen v Watt* [1922] NZLR 702 at 704-705.

62 See eg *Ex parte Walton; In re Levy* (1881) 17 Ch D 746 at 751.

63 [1901] 2 KB 518.

64 Goode, *Principles of Corporate Insolvency Law*, 4th ed (2011) at 196. To similar effect, see McQuade and Gronow, *McDonald, Henry & Meek: Australian Bankruptcy Law and Practice*, 6th ed (2008) at 10-3067 [133.2.25].

enjoyment of rights conferred by the lease and on the ongoing performance of obligations imposed by the lease.

73 Just how a liquidator's exercise of power to disclaim property of the company plays out in a case where the property disclaimed comprises a lease in respect of which the company is a lessee was expounded, in the context of materially identical provisions concerning the statutory effect of a liquidator's exercise of power to disclaim, by Lord Nicholls of Birkenhead in *Hindcastle Ltd v Barbara Attenborough Associates Ltd*[65]:

> "Disclaimer operates to determine all the tenant's obligations under the tenant's covenants, and all his rights under the landlord's covenants. In order to determine these rights and obligations it is necessary, in the nature of things, that the landlord's obligations and rights, which are the reverse side of the tenant's rights and obligations, must also be determined. If the tenant's liabilities to the landlord are to be extinguished, of necessity so also must be the landlord's rights against the tenant. The one cannot be achieved without the other."

Lord Nicholls went on to explain that disclaimer in such a case also has the further effect that "[t]he leasehold estate ceases to exist" and that the reversion expectant upon the determination of that estate is accelerated[66].

74 Like the Court of Appeal of the Supreme Court of Victoria in the decision under appeal, I cannot see that a liquidator's exercise of power to disclaim plays out in any materially different way where the property disclaimed comprises a lease in respect of which the company is a lessor. Disclaimer operates to terminate all of the company's rights and obligations as lessor. Those terminated obligations centrally include the obligation of the company to continue to give exclusive possession. If the obligation of the company to continue to give exclusive possession is terminated, the correlative right of the lessee to continue to have exclusive possession is necessarily also terminated. The consequence of the termination of the lessee's right to have exclusive possession is that the leasehold estate or interest must cease to exist.

75 That being the effect of disclaimer of a lease, if it can occur, the question remains as to whether a lease of which the company is the lessor answers the description of "property of the company that consists of ... a contract", so as to fall within the power of the liquidator to disclaim.

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65 [1997] AC 70 at 87.

66 [1997] AC 70 at 87.

76 There is some tension between the statutory reference to property consisting of a contract and the statutory definition of property as meaning a legal or equitable estate or interest in property. The tension arises because a contract to which the company is a party, to the extent the contract remains executory, will rarely, if ever, simply confer continuing rights on the company. The contract will ordinarily also impose continuing obligations on the company. That must invariably be so in the case of an unprofitable contract, the unprofitability of which will be an incident of the likely effect on creditors of the contractual obligations continuing to be imposed on the company[67]. At least to the extent that the company has an ongoing obligation to pay rent or to observe any other covenants, contractual obligations of the company will also continue to exist in the case of a lease of land of which the company is lessee. The tension is resolved by the operative provision concerning the effect of disclaimer[68], which recognises that disclaimed property may in every case be property in respect of which the company has liabilities as well as rights and interests. Its effect is to enlarge in its relevant application the meaning of "property", consistent with the express qualification to the statutory definition of property, "Unless the contrary intention appears"[69]. The property of the company that consists of a contract able to be disclaimed therefore encompasses the totality of the executory rights and obligations the company has under that contract.

77 That tension being resolved, full effect must be given to the express statutory acknowledgement of a lease as a species of contract. For the power of disclaimer to be enlivened to disclaim a lease, it is sufficient that the lease is a contract which remains at least in part executory and to which the company in liquidation is a party, whether as lessor or as lessee. That the reversion (if the company is lessor) might or might not also answer the description of land burdened by onerous covenants is not to the point. Such power as the liquidator has to disclaim the property of the company consisting of the reversion cannot limit the power of the liquidator to disclaim the distinct property of the company consisting of the lease. That is so even though the exercise of the power to disclaim has the ultimate effect of accelerating the reversion and can thereby be expected to enhance the value of property of the company ultimately available to the company's creditors. Those creditors would, of course, include the lessee to the extent the lessee suffered loss because of the disclaimer of the lease. The exercise of the power to disclaim the lease would always be liable to be set aside on application by the lessee were the prejudice to the lessee shown to be grossly

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67 *Re Real Investments Pty Ltd* [2000] 2 Qd R 555 at 561 [21].

68 Section 568D.

69 Section 9.

out of proportion to the prejudice that setting aside the disclaimer would cause to the company's creditors generally.

Conclusion

78 The Growers' leases being contracts between WFL and the Growers under which WFL has ongoing obligations to give the Growers exclusive possession of land owned or leased by WFL, the liquidators of WFL have power to disclaim them. The Growers' leasehold estates or interests being proprietary interests deriving from and dependent on the continuation of those contractual obligations, disclaimer would have the effect of terminating them on and from the date the disclaimer takes effect.

79 The answer given by the Court of Appeal to the question ordered for separate determination by the primary judge was therefore correct. The liquidators are able to disclaim the Growers' leases with the effect of terminating the Growers' leasehold estates or interests in the land on and from the date the disclaimer takes effect. The appeal should be dismissed with costs.

80 KEANE J. Section 568(1) of the *Corporations Act* 2001 (Cth) ("the Act") authorises a liquidator of a company to disclaim specified categories of property of the company. The question tendered by the parties in this case is whether s 568(1) authorises a liquidator to disclaim a lease granted by the company with the effect of extinguishing the rights of the lessees in respect of the land leased to them.

81 The question so presented conflates two issues: first, whether s 568(1) contemplates the disclaimer of a lease by the liquidator of the lessor, bearing in mind that the leasehold interest created by the lease is the property, not of the lessor but of the lessee; and secondly, whether the effect of the disclaimer is to divest the lessee of its leasehold interest in the land leaving the lessee to prove as an unsecured creditor in the winding up of the lessor.

82 The primary judge concluded that the disclaimer did not extinguish the rights of the lessees to possession of the land leased to them. The Court of Appeal of Victoria reversed that decision, determining both issues in the affirmative.

83 For the reasons which follow, I would resolve both issues in the negative.

The proceedings

84 The first respondent ("Willmott") was the manager of a number of forestry investment schemes, which included 15 unregistered investment schemes described as the "Contractual and Partnership Schemes". Willmott owned the freehold estate in the land, which was leased to participants in the Contractual and Partnership Schemes ("the Growers").

85 On 22 March 2011, Willmott was put into liquidation, and the second and third respondents were appointed its liquidators ("the Liquidators").

86 In the course of the winding up, the Liquidators applied to the Supreme Court of Victoria for directions in relation to the sale of Willmott's assets. The Liquidators had entered into a contract for the sale of land near Bombala. The contract was conditional on the land being free of encumbrances.

87 The primary judge, Davies J, was asked to determine whether the Liquidators were able to disclaim the Growers' leases with the effect of extinguishing their leasehold interest in the Bombala land.

88 The appellant was given leave to intervene in this application as representative of the Growers in four of the Contractual and Partnership Schemes operated on the land.

89 "Exemplar" leases were tendered to the Supreme Court as part of a statement of agreed facts for the purpose of determination of the question. The

leases granted the Growers, represented by the appellant, exclusive possession of their respective parcels of the Bombala land for a term of 25 years. The total rent payable to Willmott under these leases was paid in advance by the Growers. The position in relation to other leases is different; in particular, the terms are shorter and the position as to payment of rent is not clear.

90 There are some aspects of the exemplar leases which might suggest some want of clarity of intention on the part of those responsible for their drafting; but none of the parties sought to make anything of the specific provisions of the leases. In particular, the first to third respondents were content to accept that the Growers' interests should be regarded as leases of land.

91 In order to understand the conclusions of the primary judge and the Court of Appeal, and the arguments of the parties in this Court, it is necessary to refer to the relevant provisions of the Act.

The Act

92 Section 568 of the Act provides relevantly as follows:

> "(1) Subject to this section, a liquidator of a company may at any time, on the company's behalf, by signed writing disclaim property[70] of the company that consists of:
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> (a) land burdened with onerous covenants; or
>
> (b) shares; or
>
> (c) property that is unsaleable or is not readily saleable; or
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> (d) property that may give rise to a liability to pay money or some other onerous obligation; or
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> (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;

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70 Section 9 of the *Corporations Act* 2001 (Cth) defines "property" as 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".

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.

…

(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."

93 It was common ground between the parties that the reference in s 568(1)(a) to "land" is a reference to any estate or interest in land[71].

94 It is necessary to refer as well to s 568D of the Act, which concerns the effect of disclaimer. It provides relevantly:

"(1) A disclaimer is taken to have terminated … 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."

95 It is also necessary to refer to s 568B of the Act, which provides:

"(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

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71 See also *Acts Interpretation Act* 1901 (Cth), s 2B.

(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."

The decision of the primary judge

96 The primary judge accepted that the Liquidators could disclaim the leases, but reasoned that an affirmative answer to the question posed by the Liquidators failed to "give due regard to the position in law that a lease creates both contractual and proprietary rights."[72]

97 Her Honour held that a disclaimer by a liquidator under s 568(1) of the Act was not apt to "bring the tenant's proprietary interest in the land to an end."[73]

The decision of the Court of Appeal

98 All members of the Court of Appeal accepted both limbs of the argument advanced for the Liquidators. As to the first limb (which concerned the first issue posed for determination by this Court), their Honours focused upon the reference in s 568D(1) of the Act to the termination of, among other things, the company's "liabilities", and proceeded to characterise Willmott's ongoing obligation under the Growers' leases to provide quiet enjoyment as a "liability" susceptible of disclaimer under s 568(1)[74]. That liability, once disclaimed,

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72 *Re Willmott Forests Ltd* (2012) 258 FLR 160 at 164 [9].

73 (2012) 258 FLR 160 at 165 [11].

74 *Re Willmott Forests Ltd* (2012) 91 ACSR 182 at 188-190 [30]-[37], 198 [78].

brought the Growers' rights to an end[75]. This argument was also advanced in this Court.

99 As to the second limb (which concerned the second issue posed for determination by this Court), the Court of Appeal held that, once the lease contracts were disclaimed by the Liquidators, each Grower's leasehold interest was extinguished[76].

100 Warren CJ and Sifris AJA regarded the decision of this Court in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd*[77] as establishing that, once Willmott was relieved of its contractual liabilities under each lease to provide the Grower with exclusive possession and quiet enjoyment, each Grower automatically lost its entitlement to exclusive possession under the lease[78]: once "the contract is disclaimed, the leasehold interest is also extinguished."[79]

101 Similarly, Redlich JA held that the effect of the disclaimer on each lease considered as a contract was decisive, in that "[w]here the estate in land is one which has come into existence by virtue of a lease contract the disclaimer of the contract involves a direct repudiation of the relation of landlord and tenant which, once accepted, brings the estate to an end."[80]

102 In the view of the Court of Appeal, the Growers would remain entitled to prove in the winding up under s 568D(2) as "a creditor of the company to the extent of any loss suffered by [them] because of the disclaimer"[81].

The appellant's submissions

103 In this Court, the appellant's first submission was that the power of disclaimer engaged here is to be found in par (a) or par (c) of s 568(1) rather than in par (f). But even if s 568(1)(f) were regarded as a relevant source of power, s 568(1) empowers a liquidator to disclaim property of the company, and the

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75 (2012) 91 ACSR 182 at 189-190 [37], 197 [75]-[76].

76 (2012) 91 ACSR 182 at 190 [39], 196 [72].

77 (1985) 157 CLR 17; [1985] HCA 14.

78 (2012) 91 ACSR 182 at 190-194 [38]-[58].

79 (2012) 91 ACSR 182 at 190 [39].

80 (2012) 91 ACSR 182 at 196 [72].

81 (2012) 91 ACSR 182 at 187 [26].

leases were not Willmott's property to disclaim. Even if a lease be regarded as a contract within s 568(1)(f), the leases in question here were the property of the Growers not Willmott.

104 The appellant's second submission was that, even if the disclaimable property of the company was Willmott's contracts to lease the land to the Growers, the rights vested in the Growers are not susceptible to extinguishment by the termination of those contracts in terms of s 568D(1) of the Act[82].

105 The appellant argued that *Tabali* does not stand in the way of its second submission. First, *Tabali* was concerned with the termination of a lease as a result of the acceptance by the lessor of a repudiation by the lessee. In the present case, there was neither repudiation by the Growers, nor acceptance by Willmott. And secondly, *Tabali* does not support the proposition that accrued rights are divested upon termination of a contract.

The first to third respondents' submissions

106 The first to third respondents submitted that s 568(1)(f) is the source of the Liquidators' power to disclaim a contract of the company as property capable of being disclaimed *in toto*. The Court of Appeal was correct to proceed on the basis that the reference to a "contract" in s 568(1)(f) is to the contract *in toto* so that, under s 568D(1), the effect of the disclaimer is to terminate "the company's rights, interests, liabilities and property in or in respect of" the contract. Once Willmott's rights, powers and liabilities in respect of the leases were terminated, as the Court of Appeal held[83], the leasehold interest necessarily fell away[84]. The leasehold estate cannot exist, so it was said, following the termination of the rights and liabilities which govern its existence, and the leasehold estate cannot survive where neither lessor nor lessee is any longer bound to perform the obligations or covenants in the lease.

107 The first to third respondents relied upon the decision in *Tabali* to support the propositions that a lease is essentially a contractual interest, dependent on the continued subsistence of the contract between lessor and lessee, and that as such

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82 *Clissold v Perry* (1904) 1 CLR 363 at 373; [1904] HCA 12; *Colonial Sugar Refining Co Ltd v Melbourne Harbour Trust Commissioners* (1927) 38 CLR 547 at 559; [1927] AC 343 at 359; *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; [1990] HCA 24; *Sims (as liqs of Enron Australia Pty Ltd) v TXU Electricity Ltd* (2005) 53 ACSR 295 at 300-301 [23]-[24].

83 (2012) 91 ACSR 182 at 190 [38]-[39], 197 [75].

84 *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70 at 85-87.

it is susceptible of annihilation upon the termination of the contract. In this regard, they invoked the statement of Deane J in *Tabali*[85]:

> "[O]nce it is accepted that the principles of the law of contract governing termination for fundamental breach are, as a matter of theory, applicable to leases generally, there is no difficulty in applying them in the present case in much the same fashion as to an ordinary executory contract: '[i]f the contract is avoided or dissolved ... the estate in land falls with it'".

The scope of s 568(1)

108 As to the first issue for determination, it may be accepted that neither par (a) nor par (c) of s 568(1) is an exclusive source of power to disclaim a lease, and that s 568(1)(f) does empower a liquidator to disclaim the property of a company consisting of a lease. But considerations of text, context, policy, legislative history and authority support the view that the power to disclaim property of the company consisting of "a lease of land" is concerned with the property of the lessee.

Textual considerations

109 Section 568(1) confers upon a liquidator of a company power to "disclaim property of the company that consists of" the various species of property itemised in pars (a) to (f). In relation to s 568(1)(f), what may be disclaimed is property of the company which consists of "a contract". By virtue of s 568(1A) property of a company which consists of a contract "other than an unprofitable contract or a lease of land" may be disclaimed under s 568(1), but only with the leave of the court.

110 One may accept that, as the first to third respondents argued, the inclusion of "a lease of land" in s 568(1A) is an indication by the legislature that a lease of land is included as a species of "contract" referred to in s 568(1)(f). But if one reads s 568(1)(f) exegetically with s 568(1A), it reads relevantly: "a liquidator … may … disclaim property of the company that consists of … a contract [but a] liquidator cannot disclaim a contract (other than ... a lease of land) except with the leave of the Court." That is to say, the liquidator is empowered to disclaim, without leave of the court, property consisting of a contract that is a lease of land. And as a matter of ordinary parlance, to speak of property consisting of a lease of land is to speak of the property of the lessee.

111 To read s 568(1)(f) exegetically with s 568(1A) in this way is not to read down the express words of the provision "by making implications or imposing

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85 (1985) 157 CLR 17 at 54.

limitations which are not found in the express words."[86] Rather, it is to give effect to all the words of sub-ss (1) and (1A) of s 568.

112 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.

113 According to the *Macquarie Dictionary*, "disclaim" means[87]:

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

114 To the extent that "disclaim" has a technical legal meaning, that meaning is also concerned with the renunciation of a right which might otherwise be claimed by the person disclaiming. In *Jowitt's Dictionary of English Law*, it is said[88]:

> "To disclaim a right, interest or office is to renounce all claim to it or refuse to accept it. … Under the practice of the Court of Chancery before the Judicature Acts 1873-75, if a bill claiming relief was filed against a person who had no interest in the subject-matter of the suit, his proper course was to file a disclaimer, alleging that he had not any right or title, and that he did not and never did claim any title to the subject-matter of the suit."

115 An understanding of the power to disclaim as primarily concerned with the renunciation of rights, rather than the repudiation of liabilities, is confirmed

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86 *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 420-421; [1994] HCA 54. See also *FAI General Insurance Co Ltd v Southern Cross Exploration NL* (1988) 165 CLR 268 at 283-284, 290; [1988] HCA 13.

87 *Macquarie Dictionary*, 5th ed (2009) at 478.

88 *Jowitt's Dictionary of English Law*, 2nd ed (1977) at 620-621.

by the history of "disclaimer" as a concept in the law of insolvency. The disclaimer of property entered the law of insolvency in England to allow a trustee in bankruptcy to decline to accept, as part of the insolvent estate to be administered, property the realisation of which was likely to be more trouble than it was worth in terms of the due administration of the estate of the bankrupt[89]. 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.

116 While a liquidator of a lessor may disclaim the lessor's property consisting of a contract to lease land, that would not be a disclaimer of the lessor's property consisting of "a lease of land". By virtue of s 568(1A) of the Act, it would be necessary for a liquidator to seek leave of the court to disclaim the lessor's contract to lease land. The Liquidators have not sought leave of the court in that regard.

Contextual considerations

117 Section 568(1) authorises a liquidator to disclaim "property of the company". Section 568D(1) provides that the effect of the disclaimer is to terminate the company's "rights, interests, liabilities and property", as well as counterparties' "rights or liabilities". It may be noted that s 568D(1) does not provide for an adverse effect upon the "property" of a counterparty. This tends to confirm that it is the rights of the company with which disclaimer is immediately or directly concerned.

118 Section 568D(1) states the consequences of a valid disclaimer: it provides that the disclaimer of a company's rights automatically operates to release the company from its ongoing correlative liabilities; but it does not confer the power to disclaim or fix its scope. That work is done by s 568(1) of the Act. The circumstance that s 568D(1) refers expressly to the termination of the company's "liabilities" is itself an indication that they are not the focus of the power conferred by s 568(1), a provision in which that term is not used.

119 The termination of the liabilities of the disclaiming party is the automatic legal consequence of the disclaimer of that party's rights. As Lord Nicholls of

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89 Andrew, "Executory Contracts in Bankruptcy: Understanding 'Rejection'", (1988) 59 *University of Colorado Law Review* 845 at 858 fn 65; *Ex parte Walton; In re Levy* (1881) 17 Ch D 746 at 754, 756-757.

Birkenhead explained in *Hindcastle Ltd v Barbara Attenborough Associates Ltd*, speaking of the effect of a statutory disclaimer by the liquidator of a *lessee*[90]:

> "In order to determine these [scil the lessee's] rights and obligations it is necessary, in the nature of things, that the landlord's obligations and rights, which are the reverse side of the tenant's rights and obligations, must also be determined."

120 In the Court of Appeal, and in this Court, the first to third respondents identified the ongoing obligation of Willmott to provide quiet possession to the Growers as an ongoing liability of the kind that might be terminated by a disclaimer. This argument treats the provision of the Act which states the consequences of a disclaimer as controlling the scope of the power to disclaim and mistakes the true orientation of s 568(1), which is directed at the company's rights.

121 The judges of the Court of Appeal focused upon the statement in s 568D(1) of the consequences of a disclaimer under s 568(1) for the "liabilities" of the company, and proceeded to the conclusion that Willmott's ongoing obligation as lessor to give quiet enjoyment to the Growers for the term of the leases was a "liability" of the company and, therefore, susceptible of disclaimer. The argument accepted by their Honours fixed upon the view reflected in the decision of Hodgson J in *Rothwells Ltd (In Liquidation) v Spedley Securities Ltd (In Liquidation)* that[91]:

> "obligations which have already accrued in the past are not liabilities which can be terminated. Liabilities which can be terminated could be such things as an obligation to arise in the future to pay money or transfer property or provide goods or services … Where an obligation has arisen but the time for performance has not arrived, or where the obligation is subject to conditions which are not yet performed, then it may be … that that is a liability which can be terminated. In some cases … a question of degree may arise whether in substance this is a fully accrued obligation which cannot be terminated, or in substance an obligation in relation to the future which can be."

122 The Court of Appeal then concluded that because Willmott was subject to ongoing obligations to provide quiet enjoyment, that liability was sufficient to allow the Liquidators to disclaim the leases.

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90 [1997] AC 70 at 87.

91 (1990) 20 NSWLR 417 at 422.

123 But Hodgson J was speaking of the consequences of disclaimer rather than the scope of its operation. To use the statement in s 568D(1) of the consequences of an effective disclaimer of a company's rights or property as controlling the availability of the power to disclaim conferred by s 568(1) is to obscure the point that the power conferred by s 568(1) acts primarily or directly upon the property (or rights) of Willmott and only consequentially upon its liabilities.

Policy considerations

124 In *Re Middle Harbour Investments Ltd (In Liq) and the Companies Act*[92] Bowen CJ in Eq (as his Honour then was) traced the history of the liquidator's power of disclaimer from its origins in s 23 of the *Bankruptcy Act* 1869 (UK), and explained that the purpose of providing a liquidator with the power to disclaim is to enable the liquidator "to rid … 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 liquidator to advance the prompt, orderly and beneficial administration … of the winding up of its affairs"[93]. This understanding of the purpose of the disclaimer provisions applies in relation to the Act[94].

125 Three points may be made here. First, the policy of prompt realisation of the company's assets is consistent with the view that what may be disclaimed is property of the company, whether real or personal, the continued enjoyment of which depends on meeting ongoing obligations. Secondly, the policy which informs s 568(1), as explained above, is to expedite the realisation of the money value of the company's assets in the course of the efficient administration of the insolvent estate. It is distinctly not to expand the pool of assets available to creditors by clawing back property previously disposed of by the company[95]. Since the introduction of the statutory power of disclaimer in 1869, neither judicial exegesis nor academic commentary has attributed to the power of disclaimer the potential to enhance the value of the estate of a company in liquidation, much less to alter the position of those who have dealt with the insolvent by divesting them of rights vested in them.

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92 [1977] 2 NSWLR 652 at 657.

93 See also *Ex parte Walton; In re Levy* (1881) 17 Ch D 746 at 754, 756-757; *In re The Nottingham General Cemetery Co* [1955] Ch 683 at 695.

94 *Re Real Investments Pty Ltd* [2000] 2 Qd R 555 at 559-560 [15]-[16]; *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq)* (2000) 35 ACSR 484 at 498 [65].

95 *In re Bastable; Ex parte The Trustee* [1901] 2 KB 518 at 526.

126 Thirdly, the policy which informs s 568 is not impeded by recognising that the power does not extend to the setting aside of a lease on the initiative of the liquidator of a lessor. The liquidator is at liberty to sell the reversion for whatever it may bring. That may not be much. The present is a case in point. The Growers have already paid the total rent payable by them for a term of 25 years; and the price obtainable for the reversion will reflect the circumstance that a leasehold interest of long duration has been created and no further rent can be expected for the balance of the term. To say that is simply to recognise that the Growers have paid Willmott for rights vested in them.

Recent legislative history

127 Section 568(1)(f) was introduced by the *Corporate Law Reform Act* 1992 (Cth). The Explanatory Memorandum to the Bill for that Act made reference to the Harmer Report on Insolvency[96]. In the Harmer Report, the following was said in relation to the topic of "Disclaimer"[97]:

> "*The issues*
>
> Trustees in bankruptcy and liquidators have a power to disclaim property where the property is, at the very least, of no benefit to the insolvent estate. The power is not frequently used, but should nevertheless exist.[98] It is desirable that the provisions for disclaimer in individual and corporate insolvency be the same where possible. The provisions are already largely similar, but there are three issues in relation to which a greater degree of uniformity could be achieved:
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> - property which may be disclaimed
> - time limits for disclaiming property and
> - the time from which a disclaimer operates.

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96 Australia, House of Representatives, Corporate Law Reform Bill 1992, Explanatory Memorandum at [971]-[976], [984]-[985].

97 The Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 258-259 [611]-[613].

98 The power to disclaim a contract entered into by an insolvent is particularly important where a trustee or liquidator might otherwise be personally liable under the contract (as, for example, a trustee in bankruptcy in respect of a lease made by a bankrupt as lessee).

Property which may be disclaimed

Differences between corporate and individual insolvency. There are two main differences between individual and corporate insolvency in this area:

- a trustee in bankruptcy can disclaim any contract[99] (although the leave of the court must be obtained for disclaiming a contract other than an unprofitable contract)[100], whereas a liquidator can only disclaim unprofitable contracts[101] and

- a liquidator can disclaim shares in corporations[102] whereas a trustee in bankruptcy cannot disclaim shares unless they constitute property that is unsaleable or not readily saleable.[103]

Disclaimer of contracts. The power under the Bankruptcy Act to disclaim any contract was introduced in 1980. The explanatory memorandum to the amending Act stated that the new provisions would include contracts which were not actually unprofitable at the time of the disclaimer but the profitability of which may be in doubt because the property is unsaleable or not readily saleable. It also stated that the provisions would assist the trustee (subject to the control of the court whose leave would have to be sought to disclaim a contract other than an unprofitable contract) in dealing with contracts which involve difficulties and risks that would render their completion inadvisable. The Commission recommends that a similar expanded power of disclaimer should apply in the case of corporate insolvency."

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99 *Bankruptcy Act* 1966 (Cth), s 133(1A).

100 *Bankruptcy Act* 1966 (Cth), s 133(5A).

101 *Companies Act* 1981 (Cth), s 454(1)(d). As adopted by the States in *Companies (Application of Laws) Act* 1981 (NSW), s 6; *Companies (Application of Laws) Act* 1981 (Vic), s 6; *Companies (Application of Laws) Act* 1982 (SA), s 6; *Companies (Application of Laws) Act* 1981 (Q), s 6; *Companies (Application of Laws) Act* 1981 (WA), s 6; *Companies (Application of Laws) Act* 1982 (Tas), s 6.

102 *Companies Act* 1981 (Cth), s 454(1)(b).

103 *Bankruptcy Act* 1966 (Cth), s 133(1)(b).

128 Further, in relation to disclaimer of leases, the Harmer Report said[104]:

> "*Existing law*. Special provision is made in both individual and corporate insolvency for disclaimer of a lease. A trustee in bankruptcy or a liquidator is not entitled to disclaim a lease without the leave of the court unless 28 days' notice of the intention to disclaim has been given to the lessor and any sub-lessee, and such person has not within that time required the trustee or the liquidator to apply for leave. It is difficult to discover why those affected by the disclaimer of a lease are placed in a more favourable position than others. Any person who suffers damage by reason of a disclaimer may have an admissible claim in the insolvency. Although it is essential that persons affected by the disclaimer of a lease, such as the 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 the leave of the court before disclaiming. The Insolvency Act 1967 (NZ) does not place leases in a special category.
>
> *Recommendation.* The Commission recommends that no distinction should be drawn between the disclaimer of a lease and disclaimer of other onerous property. The Commission's recommendation for notice to be given to a person affected by a disclaimer should provide adequate protection to a person affected by the disclaimer of a lease. Such persons would still be able to protect their interests, but the trustee or liquidator would not be obliged to apply for leave as a matter of course." (footnotes omitted)

129 These aspects of the legislative history are of some significance in relation to both aspects of the question presented to the Court. In relation to the first issue in the appeal, the first paragraph of the last passage cited above tends to confirm that, as a matter of ordinary language, to speak of "disclaiming a lease" is to speak of disclaiming a contract which is the property of the lessee. Further, in the discussion in the Explanatory Memorandum and the Harmer Report there is no revision of the basic understanding of disclaimer as a renunciation by a trustee in bankruptcy or liquidator of property as an asset of the insolvent estate to be administered by the trustee or liquidator.

130 As to the second issue, the recent legislative history does not suggest dissent from, or dissatisfaction with, the settled understanding that the disclaimer provisions terminate executory obligations as distinct from discharging vested rights. Neither do the Explanatory Memorandum or the Harmer Report identify

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104 The Law Reform Commission, *General Insolvency Inquiry*, Report No 45, (1988), vol 1 at 261 [619]-[620].

any mischief which would warrant an expansion of the effect of an exercise of a disclaimer to extinguish accrued rights. Nor do they recommend the adoption of any measure which would have the effect of exposing parties who have accrued rights against a company to the loss of those rights by the exercise of the power to disclaim the property of the company.

The authorities

131 In no case has it been decided that s 568(1), or any of its earlier analogues, authorises the disclaimer of a lease by the liquidator of the lessor. In a small number of cases it has been said to be arguable that a liquidator of an insolvent landlord may disclaim the lease[105]; but in those cases the point was not argued or decided. Thus, in *Re Real Investments Pty Ltd*[106] 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 ... See the discussion of *In Re Maughan; Ex parte Monkhouse* (1885) 14 QBD 956 found in *Disclaimer of Contracts in Bankruptcy* by Melville, (1952) 15 MLR 28 at 29. 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 to the question whether the agreement is an unprofitable contract."

132 It is apparent that Chesterman J had s 568(1A) in mind when he spoke of a lease as one of the two species of contract that may be disclaimed without leave. It is also evident that, absent s 568(1A), his Honour would not have taken such an expansive view of the scope of s 568(1)(f) of the Act. Finally, it is also evident that his Honour did not stay to consider the operation of s 568(1A).

133 It may well be that the absence of any judicial decision to the broad effect for which the first to third respondents contended is a reflection of the circumstance that a lease will normally be beneficial to the lessor by reason of

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105 *Re Jandowae Estates Pty Ltd* (1989) 7 ACLC 179 at 181; *Re Richmond Commercial Developments Ltd* (1990) 5 NZCLC 66,336 at 66,341; *Re Real Investments Pty Ltd* [2000] 2 Qd R 555 at 559 [13].

106 [2000] 2 Qd R 555 at 559 [13].

the rent which it generates. That may be so, but that might also explain the legislature's choice in s 568(1A) to treat "an unprofitable contract or a lease of land" as the specific exceptions to the rule that a contract may be disclaimed under s 568(1)(f) only with the leave of the court. It might suggest that the legislature has been content to proceed on the practical assumption that a lessor's contract to lease is beneficial to the lessor company so that leave should be required to enable leases to be disclaimed.

The effect of disclaimer

134 If the Liquidators applied to the court under s 568(1A) for leave to disclaim the contracts to lease and leave were granted, that would mean that Willmott's ongoing obligations to the Growers would be terminated; it would not mean that the Liquidators could seize possession of the leased land contrary to the rights which have accrued to each of the Growers.

Termination not extinguishment

135 Section 568D(1) speaks of the "termination" of rights and liabilities, that is to say, the bringing to an end of rights and liabilities for the future. Section 568D(1) provides that disclaimer effects a "termination", rather than an extinguishment, of rights and liabilities. It may also be noted that pars (a) and (b) of s 568(9) refer respectively to "discharging" and "rescinding", presumably to differentiate their operation from that of s 568D(1) by allowing a wider remedial discretion to the court.

136 The authorities have consistently held that the exercise of the power to disclaim does not undo a completed transaction or divest rights which have accrued[107]. Thus in *Hindcastle* it was expressly acknowledged that the effect of a disclaimer is to release both parties from executory obligations, but not to undo accrued rights[108].

137 The view that accrued rights are not affected by the exercise of the power to disclaim is consistent with the historical function of disclaimer in English insolvency law, which was to free the insolvent individual or company from the performance of ongoing obligations in relation to an item of property where the ongoing enjoyment of the rights attaching to that item of property required that performance. The statutory regime relating to winding up in Pt 5.6 of the Act,

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107 *Rothwells Ltd (In Liquidation) v Spedley Securities Ltd (In Liquidation)* (1990) 20 NSWLR 417 at 422; *Re Real Investments Pty Ltd* [2000] 2 Qd R 555; *Global Television Pty Ltd v Sportsvision Australia Pty Ltd (in liq)* (2000) 35 ACSR 484 at 497 [62].

108 [1997] AC 70 at 75.

within which s 568 appears, is concerned with the getting in of the assets of a company with a view to the payment of its debts. Section 568 provides a means to that end. In this context, s 568 does not contemplate that debts owed to creditors of the company might be extinguished, or that other completed transactions between the company and other persons might be reopened, by the exercise of the power of disclaimer.

138 It has never been suggested that the power to disclaim authorises the annihilation by a mortgagor of the charge given in favour of the mortgagee to leave the mortgagee an unsecured creditor in the winding up. On the other hand, it has been held that it does not authorise the setting aside of an equitable interest in land.

139 *In re Bastable; Ex parte The Trustee*[109] is a case in point[110]. Bastable, prior to his bankruptcy, was the lessee of a house for a term of 99 years. He executed a mortgage of the house and later agreed to sell the equity of redemption subject to the mortgage. The purchaser paid a deposit, but Bastable became bankrupt before the balance of the purchase price had been paid. Pursuant to the *Bankruptcy Act* 1883 (UK) ("the Bankruptcy Act"), the trustee in bankruptcy purported to disclaim the sale contract[111].

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109 [1901] 2 KB 518.

110 See also *Dekala Pty Ltd (In Liq) v Perth Land & Leisure Ltd* (1987) 17 NSWLR 664 at 666.

111 Section 55 of the *Bankruptcy Act* 1883 (UK) provided materially:

> "(1) Where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants, of shares or stock in companies, of unprofitable contracts, or of 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 trustee … may ... disclaim the property.
>
> ...
>
> (2) The disclaimer shall operate to determine, as from the date of disclaimer, the rights, interests, and liabilities of the bankrupt and his property in or in respect of the property disclaimed, and shall also discharge the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him, but shall not, except so far as is necessary for the purpose of

(Footnote continues on next page)

140 The Court of Appeal held that the contract of sale was not an "unprofitable contract" and therefore was not disclaimable property[112]. Importantly for present purposes, the Court of Appeal also held that the purchaser had an equitable interest in the land as purchaser which would remain intact notwithstanding the disclaimer. Collins LJ said[113] that s 55 of the Bankruptcy Act operated within the established principle that "the trustee in bankruptcy is bound by all the equities which affect a bankrupt or a liquidating debtor" and that there is nothing in the terms of the statute whereby "the effect of a disclaimer of the contract now would be not to relieve the trustee from a burden, but to divest and take out of the purchaser the property which is already vested in him."

141 Similarly, Romer LJ said[114]:

> "A disclaimer of a contract … cannot operate to destroy a third person's interest in property which existed before the disclaimer. No disclaimer … could … take away the equitable interest in the land which the purchaser had acquired under his contract."

142 The first to third respondents submitted that this part of the Court of Appeal's reasoning was not necessary for its decision and that *Bastable* is distinguishable on the basis that it concerned a contract for the sale of land and not a lease. Finally, it was argued that the Bankruptcy Act only allowed for disclaimer of "unprofitable contracts"[115].

143 None of these considerations lessens the force of the point made by the Court of Appeal in *Bastable* that the materially indistinguishable terms of the predecessor of s 568(1) could not be invoked to take away from a purchaser of land the interest which a court of equity was prepared to protect.

144 That the power to disclaim a contract (without leave of the court) is confined to "unprofitable contract[s] or a lease of land" has a bearing on the scope of the power to disclaim, but does not elucidate the effect of the disclaimer permitted by s 568(1) of the Act.

> releasing the bankrupt and his property and the trustee from liability, affect the rights or liabilities of any other person."

112 [1901] 2 KB 518 at 525-526.

113 [1901] 2 KB 518 at 526.

114 [1901] 2 KB 518 at 529.

115 *Re Richmond Commercial Developments Ltd* (1990) 5 NZCLC 66,336 at 66,341.

145 The first to third respondents also referred to sub-ss (8) and (9) of s 568 of the Act. These sub-sections are not apt to have altered the position established by *Bastable*: the precursors of these provisions were sub-ss (4) and (5) of s 55 of the Bankruptcy Act considered in *Bastable.*

146 In none of the extrinsic materials to which reference was made above has there been an expression of dissatisfaction with the view in *Bastable* that a party to a contract who has an entitlement in respect of property under the contract which is enforceable in equity is not vulnerable to the loss of that entitlement by reason of a disclaimer. Nor did the extrinsic materials suggest dissatisfaction with the view that the exercise of the power to disclaim a transaction has been understood to release, for the future, the bundle of rights and correlative obligations associated with an uncompleted transaction. In this way it facilitates the expeditious realisation of the company's assets and payment of its debts by freeing the company in liquidation from executory obligations to be performed by it over time while converting the correlative rights of the counterparty to a debt provable in the company's liquidation.

147 Even more strongly does that conclusion flow where, as here, the obligations of the lessee as to the payment of rent have been performed and the only ongoing obligation upon the company is the observance of the covenant for quiet enjoyment when realising the money value of the reversion.

148 Something was made in argument of the inconvenience of the present situation for the winding up. And to the suggestion that the Liquidators might solve that problem by disclaiming the reversion pursuant to s 568(1)(a), it was said that an escheat of the freehold to the Crown would be likely to be inconvenient. But that sort of inconvenience is inherent in the disclaimer of any interest in land pursuant to s 568(1)(a) of the Act.

Tabali

149 *Tabali* does not support a contrary view of the effect of a disclaimer. That case established that the principles relating to the termination of a contract by acceptance by one party of the other party's repudiation extend to leases. *Tabali* was followed in this regard by this Court in *Chan v Cresdon Pty Ltd*[116] and *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*[117].

150 All these decisions support the view that, where a lessee repudiates its executory obligations under a lease, and that repudiation is accepted by the

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116 (1989) 168 CLR 242; [1989] HCA 63.

117 (1989) 166 CLR 623; [1989] HCA 23.

lessor, the contractual underpinning of the lease is brought to an end and that is sufficient to terminate the lease for the future.

151 In *Tabali*, however, Mason J, with whom Wilson and Dawson JJ agreed, expressly recognised the continuing relevance of considerations which may be peculiar to a lease[118]:

> "Repudiation or fundamental breach of a lease involves considerations which are not present in the case of an ordinary contract. First, the lease vests an estate or interest in land in the lessee and a complex relationship between the parties centres upon that interest in property. Secondly, this relationship has been shaped historically in very large measure by the law of property, though in recent times the relationship has been refined and developed by means of contractual arrangements. Thus, traditionally at common law a breach of a covenant by a lessee, even breach of the covenant to pay rent, conferred no right on the lessor to re-enter unless the lease reserved a right of re-entry: *Lane v Dixon*[119]; *Doe d Dixon v Roe*[120]. And in equity the proviso for re-entry was treated as a security for the payment of the rent (*Howard v Fanshawe*[121]; *Ezekiel v Orakpo*[122]), so that on payment of the rent equity would relieve against the forfeiture: *Dendy v Evans*[123]. The object and effect of s 129 of the *Conveyancing Act* [1919 (NSW)] was to give further protection to the lessee and to preclude forfeiture of his interest in property within the sphere of the section's operation, except in accordance with its terms.
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> These incidents of the law of landlord and tenant indicate that mere breaches of covenant on the part of the lessee do not amount to a repudiation or fundamental breach. Indeed, it is of some significance that the instances in which courts have held that a lessee has repudiated his lease are cases in which the lessee has abandoned possession of the leased property. But too much should not be made of this as very few cases of repudiation by lessees have come before the courts. I would therefore

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118 (1985) 157 CLR 17 at 33-34.

119 (1847) 3 CB 776 [136 ER 311].

120 (1849) 7 CB 134 [137 ER 55].

121 [1895] 2 Ch 581 at 588.

122 [1977] QB 260 at 268-269.

123 [1910] 1 KB 263.

> specifically reject the appellant's submission that abandonment of possession is necessary to constitute a case of repudiation by a lessee. *On the other hand, it should be acknowledged that it would be rare indeed that facts which fell short of abandonment would properly be seen as constituting repudiation by the lessee in the case of a long lease at a rental which was either nominal or but a fraction of the amount which could be obtained in the market place*." (emphasis added)

152 The observations of Mason J apply a fortiori to the case where no future rent is payable by the lessee because the whole rent has been paid "up front".

153 In *Tabali*, Deane J also recognised that the ordinary contractual principles concerning termination for breach or repudiation operate only "in future" and may be subject to limitations in the case of leases. His Honour said[124]:

> "The actual application to leasehold interests of the common law doctrines of frustration and termination for fundamental breach involves some unresolved questions which are best left to be considered on a case by case basis whereby adequate attention can be focused on particular problems which might be overlooked in any effort at judicial codification. One cannot however ignore the fact that the clear trend of common law authority is to deny any general immunity of contractual leases from the operation of those doctrines of contract law … At first impression, that trend may appear to represent a step back towards the medieval days when the lessee's interest under a term of years was seen as a mere right in personam to sue the lessor for breach of covenant. Upon analysis however, it involves no more than recognition of the fact that the analogy between a leasehold and a freehold estate is an imperfect one and of the related fact that, except perhaps in the quite exceptional case of a completely unconditional demise for a long term with no rent reserved (cf *Knight's Case*[125]), the leasehold estate cannot be divorced from its origins and basis in the law of contract (cf per Atkin LJ, *Matthey v Curling*[126]): the lease should be seen as 'resting on covenant' (or contractual promise) and it is 'the contract ... and not the estate ... which is the determining factor': see per Isaacs J, *Firth v Halloran*[127] quoting from *Hallen v Spaeth*[128]. That trend should be followed in this Court and it

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124 (1985) 157 CLR 17 at 52-53.

125 (1588) 5 Co Rep 54b [77 ER 137].

126 [1922] 2 AC 180 at 199-200.

127 (1926) 38 CLR 261 at 269; [1926] HCA 24.

128 [1923] AC 684 at 690.

> should be accepted that, as a general matter and subject to one qualification, the ordinary principles of contract law are applicable to contractual leases. *The qualification is that the further one moves away from the case where the rights of the parties are, as a matter of substance, essentially defined by executory covenant or contractual promise to the case where the tenant's rights are, as a matter of substance, more properly to be viewed by reference to their character as an estate (albeit a chattel one) in land with a root of title in the executed demise, the more difficult it will be to establish that the lease has been avoided or terminated pursuant to the operation of the ordinary principles of frustration or fundamental breach. 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 (eg, a ninety-nine year lease of unimproved land on payment of a premium and with no rent, or only a nominal rent, reserved). In such a case, it may be difficult to envisage circumstances in which conduct of the tenant short of actual abandonment would properly be held to constitute repudiation or fundamental breach or in which anything less than a cataclysmic event such as the 'vast convulsion' referred to by Viscount Simon LC in Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd*[129] *would warrant a finding of frustration.*" (emphasis added)

154 Consistently with that view, Ormiston JA, in *Apriaden Pty Ltd v Seacrest Pty Ltd*[130], identified, as an exception to the general rule that the principles of contract law relating to termination for repudiation or fundamental breach apply to leases, those:

> "cases where the lease by its very terms can be taken to have excluded conventional contractual remedies and leases of the kind where ordinary contractual remedies are effectively impossible to apply, for example, because the only consideration has been a premium and a nominal rent."

155 The observations of Mason and Deane JJ in *Tabali* and those of Ormiston JA are all in accord with the fundamental principle stated by Dixon J in *McDonald v Dennys Lascelles Ltd*[131]:

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning.

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129 [1945] AC 221 at 229.

130 (2005) 12 VR 319 at 321-322 [3]; see also at 334 [64] per Williams AJA.

131 (1933) 48 CLR 457 at 476-477; [1933] HCA 25.

> Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."

156 Two points may be made here. First, the principles relating to termination of contract discussed in *Tabali* operate to release each party from the performance of its obligations for the future, rather than to rescind the contract from the beginning so as to restore each party to its pre-contractual position. Secondly, the release of both parties arises in consequence of the election by the innocent party to accept the breach or repudiation by the other party as bringing the contract to an end: termination is not an outcome which can be forced on the innocent party. An effective exercise of the power to disclaim obviates any occasion for the counterparty to elect to accept the liquidator's statutorily authorised repudiation as bringing the disclaimed contract to an end. But the analogy with termination for breach does not afford any reason to treat a disclaimer as having an effect beyond releasing the parties from the future performance of obligations which remain executory.

157 Accordingly, 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.

158 In this regard, in *National Trustees, Executors and Agency Co of Australasia Ltd v Boyd*[132] this Court held that a lease for a term of seven years, which was not registered as required by s 61 of the *Transfer of Land Act* 1915 (Vic), was effective to give the lessee an equitable lease for seven years, which

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132 (1926) 39 CLR 72; [1926] HCA 44.

was sufficient to defeat a claim by the successors in title of the lessor to recover possession of the premises. Knox CJ, Gavan Duffy and Rich JJ, rejecting the contention that the lease, for want of registration, could operate only as a contract and not as a lease binding the reversion, said that the lease "operates, not merely to create contractual rights and duties, but to create an equitable term of years"[133]. That proposition was expressly approved by Mason J in *Tabali*[134] and by Mason CJ, Brennan, Deane and McHugh JJ in *Chan*[135].

159 In *Chan* their Honours reviewed the authorities and said[136]:

> "Although it has been stated sometimes that the equitable interest is commensurate with what a court of equity would decree to enforce the contract, whether by way of specific performance ..., the references in the earlier cases to specific performance should be understood in the sense of Sir Frederick Jordan's explanation adopted by Deane and Dawson JJ in *Stern v McArthur*[137]:
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> > 'Specific performance in this sense means not merely specific performance in the primary sense of the enforcing of an executory contract by compelling the execution of an assurance to complete it, but also the protection by injunction or otherwise of rights acquired under a contract which defines the rights of the parties'".

160 In this case, no argument was directed to whether a court of equity might for some reason refuse to grant an injunction to protect the interests of the Growers. It is sufficient for present purposes to say that, prima facie, the Growers' interests under their leases are sufficient to support the grant of an injunction to prevent the Liquidators taking possession of the land leased to them.

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133 (1926) 39 CLR 72 at 82.

134 (1985) 157 CLR 17 at 27.

135 (1989) 168 CLR 242 at 251.

136 (1989) 168 CLR 242 at 252-253.

137 (1988) 165 CLR 489 at 522; [1988] HCA 51.

Conclusion and orders

161 The two issues posed for determination should be answered as follows:

(a) without the leave of the court pursuant to s 568(1A), the Liquidators' disclaimers are not effective at all; and

(b) if the Liquidators were to disclaim Willmott's contracts to lease the parcels of land in question with the leave of the court, that disclaimer would free Willmott from further observance of its obligations under the leases, but it would not be effective to deprive the Growers of their right to possession for the balance of the term, to the extent that a court of equity would restrain an attempt to deprive the Growers of their right to possession.

162 The appeal must be allowed.

163 The orders of the Court of Appeal should be set aside and the orders of the primary judge restored.

164 The first to third respondents must pay the appellant's costs in the Court of Appeal and in this Court.