

Willmott Growers Group Inc v Willmott Forests Ltd (receivers and managers appointed) (in liquidation) [2013] HCA 51

Reconstruction & Insolvency Update

The High Court of Australia yesterday delivered its judgment in *Willmott Growers Group Inc v Willmott Forests Ltd (receivers and managers appointed) (in liquidation)* [2013] HCA 51.

The court provided a final answer to the question of whether a landlord's disclaimer of a lease by the liquidator of a landlord has the effect of extinguishing the leasehold estate of the tenant. The High Court decided such a disclaimer does have that effect.

Willmott Forests Limited, a company now in liquidation, was the manager of forestry investment schemes. It also owned or leased land, portions of which were leased or subleased to participants in its schemes. Upon the company's winding up in 2011, the liquidators sought to sell the company's assets. No one expressed interest in purchasing any of the assets encumbered by the schemes or in becoming the responsible entity or manager of any of the schemes.

The central question before the High Court was the proper construction of the s 568(1A) of the *Corporations Act 2001* (Cth), which 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'. The specific issue was, whether 'a lease of land' includes any lease to which the company is a party including as lessor, or only leases in which the company is the tenant. The majority (French CJ, Hayne and Kiefel JJ) held that a lease granted by the company to a tenant is a contract, and the liquidators are therefore empowered to disclaim the leases. As a result, Willmott Forests' liquidators can now deal with the land unencumbered by its leases.

The result for a tenant of land owned by a company in liquidation is that it can lose its lease and possession of the leased land. The tenant is then treated as a creditor of the company for the loss it has suffered as a result of the disclaimer. This may be small comfort given the insolvency of the company.

Who does this affect?

- Tenants
- Landlords
- Insolvency practitioners
- Bankers

Article Highlights

- Tenants can lose the benefit of a lease if the landlord goes into liquidation.
- A liquidator of a landlord can disclaim leases granted by that landlord.



The High Court's decision is of great significance to liquidators, tenants and financiers as it:

1. could reduce certainty of tenancy for long-term tenants by exposing their leases to extinguishment upon the liquidation of the corporate landlord. Prospective tenants will need to factor this risk into any long-term leases.
2. impacts upon the willingness of tenants' financiers to finance businesses that are heavily reliant on long-term leases.

It remains the case that in most instances, liquidators of landlords will prefer to retain the lease and deal with the land on a 'subject to lease' basis, since the value is often closely connected with the long-term lease.

There will however be situations where leases are disclaimed which will create great uncertainty for tenants.

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