

SUPREME COURT OF QUEENSLAND

CITATION: *Steinhardt v Trenfield & Park as liquidators of Wealth Base South Coolum Pty Ltd (in liq)* [2015] QSC 237

PARTIES: **KEITH ROSS STEINHARDT**
(applicant)
v
KELLY-ANNE LAVINA TRENFIELD AND JOHN RICHARD PARK AS LIQUIDATORS OF WEALTH BASE SOUTH COOLUM PTY LTD (IN LIQUIDATION)
ACN 126 710 316
(respondent)

FILE NO/S: SC No 4771 of 2015

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 19 August 2015

DELIVERED AT: Brisbane

HEARING DATE: 27 May 2015

JUDGE: Philip McMurdo J

ORDER:

1. **The applicant be granted leave to apply under s 568E of the *Corporations Act 2001* (Cth).**
2. **Upon the applicant providing an undertaking to the court in the following terms:**
 - **Upon the making of a contract for the sale of lot 2 on RP98409 (with or without other land) which is not subject to a condition precedent to performance, or upon a contract for the sale of that land (with or without other land) becoming no longer subject to such a condition, the applicant will cause to be provided to the respondents:**
 - (a) **vacant possession of lot 2 on RP98409; and**
 - (b) **a surrender of the applicant's lease, capable of immediate registration,****within 21 days of written notice from the respondents to the applicant of the existence of such an unconditional contract or by a date**

which is three business days prior to the date for completion of that contract (whichever is the earlier);

the disclaimer of the lease between the applicant and the company in liquidation be set aside.

CATCHWORDS: CORPORATIONS – WINDING UP – CONDUCT AND INCIDENTS OF WINDING UP – EFFECT OF WINDING UP ON OTHER TRANSACTIONS – DISCLAIMER OF ONEROUS PROPERTY– application under s 568E of the *Corporations Act 2001* (Cth) to set aside a disclaimer by liquidators of a lease of land held by the applicant from the company in liquidation – whether the disclaimer would cause the applicant prejudice that was grossly out of proportion to the prejudice that setting aside the disclaimer would cause to the company’s creditors – where the applicant’s evidence established the existence of substantial financial prejudice from the disclaimer of the lease – where the liquidators claimed the prejudice from setting aside the disclaimer would be that the company’s land assets would be unable to be sold until the expiry of the applicant’s lease – where the applicant proposed to provide an undertaking to the court to surrender the lease if and when the liquidators sold the subject lot – where no discernible prejudice to the company’s creditors for the purposes of s 568E by setting aside the disclaimer and allowing the applicant to remain in possession

LANDLORD AND TENANT – RIGHTS AND LIABILITIES APART FROM COVENANT – OTHER MATTERS

LANDLORD AND TENANT – TERMINATION OF THE TENANCY – PROVISIONS GIVING RIGHT TO TERMINATE IN NAMED CIRCUMSTANCES – OTHER

Corporations Act 2001 (Cth), s 568(1), s 568D, s 568E

Willmott Growers Group Inc v Willmott Forests Limited (Receivers & Managers Appointed) (in liq) & Ors (2013) 251 CLR 592, cited

COUNSEL: C Wilson for the applicant
J W Peden for the respondent

SOLICITORS: Rigby Lawyers for the applicant
HWL Ebsworth for the respondent

[1] The applicant, Mr Steinhardt, applies to set aside a disclaimer by liquidators of a lease of land which he held from the company in liquidation. His application is made under s 568E of the *Corporations Act 2001* (Cth).

- [2] Mr Steinhardt was formerly the registered owner of this land and two adjacent lots before selling all three lots in 2007 to the company for a total price of \$11.2 million. An amount of \$4.2 million was paid at settlement and the balance was to be paid over the next 10 years. The debt was secured by a second mortgage granted by the company over all three lots.
- [3] It was a term of his contract for the sale of the subject lot that the company grant a lease to him for a period of 10 years from 8 November 2007 at a rental of \$1.00 for the entire term. That lease was granted and registered. The permitted uses under the lease were “agriculture and/or grazing and/or agistment of livestock” but the improvements on the lot included a house. By cl 13 of the lease, it was agreed that if the company paid to Mr Steinhardt all of the outstanding mortgage debt then the company might terminate the lease on one month’s notice.
- [4] All three lots were and remain mortgaged to National Australia Bank as the first mortgagee. It consented to the grant of the lease and until the disclaimer of the lease, was thereby precluded from exercising its power of sale of the subject lot except by a sale which was subject to the lease.
- [5] The lot which is leased was improved by the house and some sheds. The other lots are unimproved. The three lots were purchased by the company with a view to developing them as one parcel. The proposed development did not go ahead and the company was wound up on 25 May 2011.
- [6] In November 2011, the respondent liquidators wrote to Mr Steinhardt’s solicitor saying that they intended to disclaim the lease. In response, Mr Steinhardt said that he would apply to set aside any disclaimer.
- [7] In April 2014, the respondents’ lawyer wrote to Mr Steinhardt’s lawyer, saying that after putting “consideration of disclaiming the Lease in abeyance because the land was not being marketed pending the outcome of the zoning appeal”, the respondents were preparing to undertake a marketing campaign with respect to the land and were again “considering their position with respect to the Lease”. They asked whether it remained Mr Steinhardt’s position that he would apply to set aside a disclaimer of the lease. Mr Steinhardt’s solicitor did not respond immediately and the respondents then sent real estate agents to inspect and photograph the property for marketing and valuation purposes. They were refused entry. Mr Steinhardt’s son and his family then lived in the house. Mr Steinhardt’s son and sometimes his children still live there.
- [8] In May 2014, the respondents’ solicitors sent a notice to enter pursuant to s 107 of the *Property Law Act 1974 (Qld)* in order to enter the property. A few days later Mr Steinhardt’s solicitor wrote to dispute that the notice under s 107 had been duly served. It seems that entry was eventually allowed in about August 2014. At about the same time, the respondents received correspondence from the National Australia Bank advising that overdue rates on the three lots had been paid by the bank. In November and December 2014, the respondents sought further access to the subject property for the purposes of marketing it and the other lots but with no response.
- [9] On 20 March 2015, a notice of disclaimer of the lease was lodged with the Australian Securities Investment Commission. The notice was addressed to Mr Steinhardt who was wrongly described as “the *lessor* of property ... being registered lease numbered ...”.

The notice stated that “the property is property of the Company and consists of property that may give rise to the liability to pay money or some other onerous obligation”. Possibly that was a reference to the company’s liability, as the owner of the land, to pay local authority rates. The notice also gave the wrong registration number for the lease. But neither that error nor the mistaken reference to Mr Steinhardt as the lessor is said to be relevant. Mr Steinhardt’s argument accepts that the lease was effectively disclaimed by the respondents.

[10] Pursuant to s 568B, the respondents sent to Mr Steinhardt, by a letter addressed to him at the subject property, the notice of disclaimer. However, Mr Steinhardt became aware of that letter only when he went to the property on 20 April 2015. He accepts that the notice was duly given to him on or about 19 March 2015, so that absent leave being granted by the court, his application to set aside the disclaimer had to be made within 14 days of when the notice was lodged with ASIC, when the disclaimer took effect on or about 4 April 2015.¹

[11] Consequently, it is under s 568E that Mr Steinhardt applies to set aside the disclaimer. He requires the leave of the court for this application, which can be granted only if the court is satisfied that it is unreasonable in all the circumstances to expect Mr Steinhardt to have applied for an order setting aside the disclaimer before it took effect.² The respondents concede that leave can and should be granted. I am satisfied that Mr Steinhardt, not unreasonably, was unaware of the disclaimer until after it took effect.

[12] The disclaimer was made under s 568 which relevantly provides 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 of the company that consists of:

...

(f) a contract;

...

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

A lease of land entered into by a company as lessor is a “contract” within the meaning of s 568(1)(f) and therefore may be disclaimed under s 568 without obtaining the leave of the court: *Willmott Growers Group Inc v Willmott Forests Limited (Receivers & Managers Appointed) (in liq) & Ors.*³

[13] The effect of a disclaimer is described within s 568D as follows:

“(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

¹ ss 568B(1), 568C(1)(b).

² s 568E(2).

³ (2013) 251 CLR 592.

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.”

In *Willmott Growers*, it was held that from the effective date of a disclaimer of a lease which had been granted by the company, the tenant’s rights to quiet enjoyment of the property and otherwise as a tenant are terminated and he is left to prove in the winding up for any loss suffered because of the disclaimer.⁴

[14] Section 568E is as follows:

- “(1) With the leave of the Court, a person who has, or claims to have, an interest in disclaimed property may apply to the Court for an order setting aside the disclaimer after it has taken effect.
- (2) The Court may give leave only if it is satisfied that it is unreasonable in all the circumstances to expect the person to have applied for an order setting aside the disclaimer before it took effect.
- (3) The Court may give leave subject to conditions.
- (4) On an application under subsection (1), the Court:
- (a) may by order set aside the disclaimer; and
- (b) if it does so—may make such further orders as it thinks appropriate, including orders necessary to put the company, the liquidator or anyone else in the same position, as nearly as practicable, as if the disclaimer had never taken effect.
- (5) However, the Court may set aside a disclaimer only if satisfied that the disclaimer has caused, or would cause, to persons who have, or claim to have, interests in the property, prejudice that is grossly out of proportion to the prejudice that setting aside the disclaimer (and making any further orders) would cause to:
- (a) the company's creditors; and
- (b) persons who have changed their position in reliance on the disclaimer taking effect.”

[15] Section 568E(5) limits the court’s power to set aside a disclaimer to where prejudice of the nature and extent there specified is established. If the court is satisfied of that matter, there is then a discretion to be exercised in deciding whether to set aside the disclaimer and to make further orders as are appropriate under s 568E(4)(b).

[16] I go first to the prejudice to Mr Steinhardt from the disclaimer. He does not live on the property. As I have noted, it is occupied by his son, sometimes with his son’s children. It is not submitted that the son has a proprietary interest or claims to have such an interest

⁴ (2013) 251 CLR 592, 597 [8].

in the property. But Mr Steinhardt's unchallenged evidence is that he will have to provide some financial support for his son if the son has to find somewhere else to live.

- [17] Mr Steinhardt uses the sheds on the property to house machinery and equipment used in his earthmoving business. The respondents say that this use is irrelevant because it is not a permitted use under the lease. It is not specified as a permitted use. But the lease provided that the land could be used for any other purpose permitted by the lessor which permission was not to be arbitrarily refused.⁵ It appears that the sheds have been used for that purpose for some years and there is no indication of any basis upon which the consent to that use could have been withheld. The same may be said of the use of the house.
- [18] Mr Steinhardt grazes cattle on the property and horses are agisted on a number of its paddocks for which he is paid agistment fees. Apparently referring to these fees and his use of the sheds, he says that the termination of the lease "will have an adverse [e]ffect on my income ...".
- [19] Mr Steinhardt does not attempt to quantify his actual or likely losses. Nor is there any evidence of the value of the leasehold. Nevertheless, his evidence establishes the existence of substantial, as distinct from negligible, financial prejudice from the disclaimer of the lease.
- [20] What must then be considered is the prejudice "that setting aside the disclaimer ... would cause to ... the company's creditors ...".⁶
- [21] The only assets of the company are the three lots of land. It is clear from the evidence that there is no prospect that they could be sold for more than the bank's debt. The evidence for the liquidators is that only the bank will receive anything from the sale. The bank is owed about \$7.7 million and Mr Steinhardt as second mortgagee is owed about \$6.7 million. There are unsecured creditors whose debts total about \$1.15 million.
- [22] The liquidators say that the prejudice from setting aside the disclaimer will be that the three lots will be unable to be sold until the expiry of the lease. But Mr Steinhardt has proposed a compromise, by which he would surrender the lease (if it is restored) if and when the liquidators sell the subject lot. He argues that by this means any prejudice could be avoided.
- [23] This proposal by Mr Steinhardt was offered in correspondence from his solicitors only a few days prior to the hearing. It is unfortunate that it was not proposed, at least in such definite terms, at an earlier stage because with more time to consider it, the liquidators may have been able to reach an agreement with Mr Steinhardt which would have avoided the present proceeding. The liquidators' response to it was an argument that the continued occupation by Mr Steinhardt and his son would prejudice a sale because, it was argued without the benefit of any evidence, an occupied property such as this is more difficult to sell than an unoccupied one. Courts are not unfamiliar with the preference of mortgagees to have vacant possession before putting a property to sale. However, in the absence of evidence, it cannot be assumed that this property would be more difficult to sell if Mr Steinhardt and his son remained in possession until some point prior to the completion of any contract of sale. I accept that it would be preferable to have them vacate the

⁵ cl 5.1.

⁶ In this case, there is no suggestion of prejudice to "persons who have changed their position in reliance on the disclaimer taking effect": s 568E(5)(b).

property on a date which is comfortably prior to the date of settlement of a contract of sale, rather than on the date of settlement. But if that can be ensured by an appropriate undertaking by Mr Steinhardt to the court, there is no discernible prejudice by setting aside the disclaimer and allowing Mr Steinhardt and his son to remain in possession for the time being.

[24] If there would be a prejudice of the kind suggested by the liquidators, there would be a question as to whether that would be a relevant prejudice for the purposes of s 568E, in that it may be doubted that this would be a prejudice “to the company’s creditors”. The only creditor which could be prejudiced would be the bank, which would be paid by the enforcement of its security rather than by receiving a dividend as a creditor under the liquidation. Section 568E(5) refers to a certain prejudice, which is the prejudice to “the company’s creditors” rather than a prejudice to one of them. It may be questioned whether a liquidator’s power of disclaimer should be exercised only for the benefit of the secured creditor. Similarly, it may be questioned whether a prejudice only to a secured creditor and in that capacity constitutes a prejudice to the company’s creditors in the sense which is relevant under s 568E(5). It is unnecessary to decide this question which was not the subject of substantial argument, given my conclusion which is that the disclaimer should be set aside if an appropriate undertaking is provided by Mr Steinhardt.

[25] An appropriate undertaking, which is consistent with Mr Steinhardt’s proposal, is as follows. Upon the making of a contract for the sale of lot 2 on RP98409 (with or without other land) which is not subject to a condition precedent to performance, or upon a contract for the sale of that land (with or without other land) becoming no longer subject to such a condition, the applicant will cause to be provided to the respondents:

- (a) vacant possession of lot 2 on RP98409; and
- (b) a surrender of the applicant’s lease capable of immediate registration,

within 21 days of written notice from the respondents to the applicant of the existence of such an unconditional contract, or by a date which is three business days prior to the date for completion of that contract (whichever is the earlier).

[26] I am satisfied that if the disclaimer is set aside but with that undertaking, there would be no prejudice to any creditor of the company so that the prejudice to Mr Steinhardt from the disclaimer would be sufficient to satisfy the threshold of s 568E(5).

[27] For these reasons, the orders will be:

- (1) Grant leave to the applicant to apply under s 568E.
- (2) Upon an undertaking being provided to the court in the terms of that set out above, or such similar terms as the parties shall agree, the disclaimer of the lease between the applicant and the company be set aside.