

How secure are you ... if your Landlord goes into liquidation?

Generally speaking, a Liquidator is concerned to exercise control over as much property as he can. The more property he controls and then realises, the greater is the dividend that will be paid to creditors.

That said, in some circumstances, a Liquidator may wish to divest himself of property ... to avoid responsibilities or costs or other onerous obligations which come with it.

Pursuant to Section 568 of the *Corporations Act 2001*, in certain circumstances a Liquidator may disclaim property that is:-

- (a) land burdened with onerous covenants;
- (b) shares;
- (c) property that is unsaleable or not readily saleable;
- (d) property that may give rise to a liability to pay money or some other onerous obligation;
- (e) property where it is reasonable to expect that the costs in realising would exceed the proceeds realised; or
- (f) a contract.

It seems this ability to disclaim has broad application.

In *Wilmot Forest Ltd (in liquidation)*, the Court of Appeal in Victoria confirmed that the Liquidators of that company were entitled to terminate leases so as to facilitate the sale of the property. This left Tenants out of their premises with only a right to claim damages, together with the other unsecured creditors, against the company in liquidation.

Tenants can resist attempts by Liquidators to disclaim a lease ... where the benefit to the

Liquidator (and the company's creditors) is disproportionate to the detriment suffered by the Tenant.

To protect themselves, Tenants should:-

- satisfy themselves that the Landlord is financially sound;
 - ensure that your lease is not uncommercial or significantly above (or below) market value;
 - ensure that the lease doesn't contain financial obligations on the Landlord which are disproportionate to the rent being received;
 - avoid over-capitalising the leased property.
- For example, where a property requires significant capital investment, rather than negotiating a low rent so that the Tenant pays for the capital improvements, have the Landlord pay for the capital improvements and then just pay market rent;
- take any incentives as upfront payments or contributions to fitout at the start of the lease... rather than as rent abatements during the term of the lease.

The indefeasibility gained by registering the lease is not *absolute*, but registration is an essential precaution.

Ultimately, a Tenant needs to ensure that its lease adds value to the property. In those circumstances it will be in the Liquidator's interests to retain the lease. If the lease makes the property unsaleable or significantly reduces its value, the Tenant's position may be tenuous.