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LawTalk Blog

Disclaiming a lease when a landlord goes into liquidation

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If a landlord goes into liquidation then the liquidator may disclaim a lease; see the recent High Court decision *Willmott Growers Group Inc. -v- Willmott Forests Limited (Receivers and Managers Appointed)*. In this case, the landlord was a company, however if a landlord is a natural person the trustee in bankruptcy has the same rights under the *Bankruptcy Act*.

A disclaim of the lease is usually done if the lease poses some impediment to the liquidator; for example the lease may be onerous in that it is unattractive to a potential buyer. It may be that the rent may be too low, the landlord's obligations under the lease may pose difficulties or the lease term may be excessively long. In these cases the liquidator may consider that a better outcome for the company's unsecured creditors may be achieved if the lease is disclaimed.

What does this mean for tenants if a lease is disclaimed?

If a lease is disclaimed, the liquidator may exercise the right to bring the lease to an end and the tenant loses all of the rights it has under the lease. The right to disclaim the leases by the liquidator comes from the *Corporations Act*.

The tenant will then need to either find new premises or attempt to renegotiate a new lease.

If the tenant needs to find new premises it may mean that:

- Expenses are incurred by the tenant in moving and fitting out the new premises;
- There may be disruption in the conduct of the business;
- Existing clients who have become accustomed to the existing location may be lost;
- Good will and reputation built by the tenant from the existing premises may be lost;
- The issue of security for obtaining finance for the business may be affected.

What can a tenant do if their lease is disclaimed?

The lease should be registered on the Certificate of Title and also on the Personal Properties Security Register. Whilst such registration does not guarantee that the liquidator will not disclaim the lease it means that the liquidator must notify all interested parties including financiers.

The liquidator must notify the tenant of his/her intentions to disclaim the lease as soon as practical.

If the landlord is a company, the tenant has 14 days after receiving such notice to make an application to the Supreme Court to challenge the disclaimer. If the landlord is a natural person, the tenant has 28 days after receiving the notice to lodge an application in the Federal Court.

Such applications should be filed within the time period specified, however applications may still be made outside the time period in which the disclaimer has taken effect but this is a more expensive option and the likelihood of success is lower.

The Court will take into account the rights of the tenant and the rights of the landlord's unsecured creditors in determining the matter. The Court is required to consider the benefits to the creditors as opposed to the losses the tenant will suffer if the disclaimer is allowed.

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