FEDERAL COURT OF AUSTRALIA

Silvia v Fea Carbon Pty Ltd (ACN 009 505 195) (Administrators Appointed) (Receivers and Managers Appointed) [2010] FCA 515

Citation:	Silvia v Fea Carbon Pty Ltd (ACN 009 505 195) (Administrators Appointed) (Receivers and Managers Appointed) [2010] FCA 515
Parties:	**BRIAN SILVIA, PETER KREJCI AND MATHEW MULDOON IN THEIR CAPACITY AS ADMINISTRATORS OF FEA CARBON PTY LTD (ACN 009 505 195) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED), FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED), TASMANIAN PLANTATION PTY LTD (ACN 009 560 463) (ADMINISTRATORS APPOINTED) (CONTROLLERS APPOINTED) AND FEA PLANTATIONS LTD (ACN 055 969 429) (ADMINISTRATORS APPOINTED) and FEA PLANTATIONS LTD (ACN 055 969 429) (ADMINISTRATORS APPOINTED) v FEA CARBON PTY LTD (ACN 009 505 195) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED), FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) and TASMANIAN PLANTATION PTY LTD (ACN 009 560 463) (CONTROLLERS APPOINTED)**
File number:	VID 283 of 2010
Judge:	FINKELSTEIN J
Date of judgment:	30 April 2010
Catchwords:	**CORPORATIONS** – voluntary administration – administrator's liability for rent under s 443B – extension of time during which administrator not personally liable – when appropriate to grant extension **CORPORATIONS** – voluntary administration – whether mere service of notice under s 443B(3) constitutes repudiation of lease

Legislation:	*Corporations Act 2001* (Cth), ss 440C & 443B
Cases cited:	*Buchanan v Byrnes* (1906) 3 CLR 704 cited *Lam Soon Australia Pty Ltd (administrator appointed) v Molit (No 55) Pty Ltd* (1997) 70 FCR 34 discussed *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd (administrator appointed)* (1996) 19 ACSR 160 discussed *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 cited *Shevill v Builders Licensing Board* (1982) 149 CLR 620 cited
Date of hearing:	28 April 2010
Place:	Melbourne
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	29
Counsel for the Plaintiffs:	A P Young
Solicitor for the Plaintiffs:	DLA Phillips Fox
Counsel for the Defendants:	J G Santamaria QC and H N G Austin
Solicitor for the Defendants:	Maddocks

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 283 of 2010**

BETWEEN:	**BRIAN SILVIA, PETER KREJCI AND MATHEW MULDOON IN THEIR CAPACITY AS ADMINISTRATORS OF FEA CARBON PTY LTD (ACN 009 505 195) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED), FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED), TASMANIAN PLANTATION PTY LTD (ACN 009 560 463) (ADMINISTRATORS APPOINTED) (CONTROLLERS APPOINTED) AND FEA PLANTATIONS LTD (ACN 055 969 429) (ADMINISTRATORS APPOINTED)** **First Plaintiff**
	FEA PLANTATIONS LTD (ACN 055 969 429) (ADMINISTRATORS APPOINTED) **Second Plaintiff**
AND:	**FEA CARBON PTY LTD (ACN 009 505 195) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED)** **First Defendant**
	FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) **Second Defendant**
	TASMANIAN PLANTATION PTY LTD (ACN 009 560 463) (CONTROLLERS APPOINTED) **Third Defendant**

JUDGE:	**FINKELSTEIN J**
DATE OF ORDER:	**30 APRIL 2010**
WHERE MADE:	**MELBOURNE**

THE COURT ORDERS THAT:

1. The title to the proceeding is amended so that the name "Brian Silvia" is inserted in substitution for the name "Brian Silva" wherever the latter appears.

2. Pursuant to section 447A of the Corporations Act 2001 (Cth) ("the Act"), Part 5.3A of the Act is to operate in relation to each of Forest Enterprises Australia Ltd (ACN 009 553 548) (administrators appointed) (receivers and managers appointed) and FEA Plantations Ltd (ACN 055 969 429) (administrators appointed) as if s 443B(2)(a) of the Act provided in relation to each of the said companies "that begins after 31 May 2010".

3. Pursuant to section 447A of the Act Part 5.3A of the Act is to operate in relation to each of the said companies as if s 443B(3) of the Act provided in relation to each of the said companies "by 31 May 2010, the administrator may give to the owner or lessor a notice that specifies the property and states that the company does not propose to exercise rights in relation to the property".

4. The plaintiffs pay the defendants' costs of the proceeding including reserved costs.

5. The plaintiffs' costs of the proceeding and the costs they are required to pay the defendants pursuant to paragraph 4 above are costs and expenses of the administration of the second plaintiff.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules. The text of entered orders can be located using Federal Law Search on the Court's website.

IN THE FEDERAL COURT OF AUSTRALIA
VICTORIA DISTRICT REGISTRY
GENERAL DIVISION **VID 283 of 2010**

BETWEEN:	**BRIAN SILVIA, PETER KREJCI AND MATHEW MULDOON IN THEIR CAPACITY AS ADMINISTRATORS OF FEA CARBON PTY LTD (ACN 009 505 195) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED), FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED), TASMANIAN PLANTATION PTY LTD (ACN 009 560 463) (ADMINISTRATORS APPOINTED) (CONTROLLERS APPOINTED) AND FEA PLANTATIONS LTD (ACN 055 969 429) (ADMININSTRATORS APPOINTED)** **First Plaintiff**
	FEA PLANTATIONS LTD (ACN 055 969 429) (ADMINISTRATORS APPOINTED) **Second Plaintiff**
AND:	**FEA CARBON PTY LTD (ACN 009 505 195) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED)** **First Defendant**
	FOREST ENTERPRISES AUSTRALIA LTD (ACN 009 553 548) (ADMINISTRATORS APPOINTED) (RECEIVERS AND MANAGERS APPOINTED) **Second Defendant**
	TASMANIAN PLANTATION PTY LTD (ACN 009 560 463) (CONTROLLERS APPOINTED) **Third Defendant**
JUDGE:	**FINKELSTEIN J J**
DATE:	**30 APRIL 2010**
PLACE:	**MELBOURNE**

REASONS FOR JUDGMENT

1 Section 443B of the *Corporations Act 2001* (Cth) imposes liability on a company's administrator, in certain circumstances, for rent owing under a lease entered into by the company prior to the administration commencing. The administrator has a grace period

before his liability arises, and may avoid liability altogether by giving notice to the lessor, during the grace period, that the company will not exercise rights in relation to the leased property. In this application, the plaintiffs, who are the joint administrators of two companies in the FEA group, seek an order to extend the period during which they will not personally be liable for rent. They also seek an order to extend the period within which they can serve on lessors a notice of non-exercise of rights.

2 The relevant facts are in very short compass. The FEA group operates and manages 19 or so managed investment schemes in which there are, in aggregate, approximately 13,000 investors. The managed investment schemes involve forestry operations. The operations are conducted on land leased from third parties and from group companies. The rent due to third party lessors has been paid up to 30 June 2010. This application does not relate to those leases.

3 The leasing arrangements within the FEA group are a little complex. Most of the leased land is owned by the third defendant, Tasmanian Plantation Pty Ltd (Tasmanian Plantation). The remainder is owned by the second defendant, Forest Enterprises Australia Ltd (FEA), the group holding company. The terms of the leasing arrangements for land owned by Tasmanian Plantation is governed by an agreement between Tasmanian Plantation, FEA and FEA Plantations Ltd (FEAP), the responsible entity of each scheme. By that agreement Tasmanian Plantation granted 19 year leases to FEA which, in turn, subleased the land to FEA Plantations Ltd. Likewise FEA granted 19 year leases or forestry rights over its blocks to FEAP. In all bar one managed investment scheme, FEAP granted the investors sub-subleases (or forestry rights) in respect of land owned by Tasmanian Plantation or FEA.

4 The responsible entity FEAP does not manage the schemes. There is a head management agreement between FEAP and FEA under which the management role has been assumed by FEA.

5 The administrators were appointed to FEAP and other group companies by resolution of the directors of each company on 14 April 2010. On the same day, the secured creditor, ANZ Fiduciary, which holds fixed and floating charges over the assets of each group company as trustee for the ANZ and the CBA, appointed receivers and managers to several group companies (including the first defendant and FEA), and appointed a controller to

Tasmanian Plantation. The receivers, Messrs Algeri and Norman, have taken control of those companies. No receiver was appointed to FEAP.

6 The rent due by FEAP to FEA was paid up to 30 April 2010. The next monthly instalment, which is approximately $1.3 million, was due on 1 May 2010. FEAP has no funds with which to pay the rent. In any event, ANZ Fiduciary has demanded that any money held by FEAP be transferred to ANZ Fiduciary pursuant to the debentures.

7 It is unsurprising that the administrators do not wish to be liable for the rent. It seems there are no assets against which the administrators could obtain exoneration or reimbursement.

8 Mr Muldoon, one of the administrators, has explained why they need time to consider whether to serve a notice of non-exercise of rights. He said that because the management of the schemes was contracted to FEA, the administrators do not have complete records in relation to the schemes. The receivers have just recently made the scheme documents available but, because of their bulk, the administrators have not had sufficient time to consider them. Thus, according to Mr Muldoon, the administrators do not have a complete understanding of what payments are due in respect of which leases and the ramifications which might arise for FEAP if notice is given. He also said that because of lack of access to the documents, the administrators have not been able to form a view regarding what would be in the best interests of members and creditors of the FEA group.

9 This is a convenient point at which to set out s 443B. It provides:

> (1) This section applies if, under an agreement made before the administration of a company began, the company continues to use or occupy, or to be in possession of, property of which someone else is the owner or lessor.
>
> (2) Subject to this section, the administrator is liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period:
>
> (a) that begins more than 5 business days after the administration began; and
>
> (b) throughout which:
>
> (i) the company continues to use or occupy, or to be in possession of, the property; and
>
> (ii) the administration continues.
>
> (3) Within 5 business days after the beginning of the administration, the administrator may give to the owner or lessor a notice that specifies the property and states that the company does not propose to exercise rights in relation to the property.

(4) Despite subsection (2), the administrator is not liable for so much of the rent or other amounts payable by the company under the agreement as is attributable to a period during which a notice under subsection (3) is in force, but such a notice does not affect a liability of the company.

(5) A notice under subsection (3) ceases to have effect if:
  (a) the administrator revokes it by writing given to the owner or lessor; or
  (b) the company exercises, or purports to exercise, a right in relation to the property.

(6) For the purposes of subsection (5), the company does not exercise, or purport to exercise, a right in relation to the property merely because the company continues to occupy, or to be in possession of, the property, unless the company:
  (a) also uses the property; or
  (b) asserts a right, as against the owner or lessor, so to continue.

(7) Subsection (2) does not apply in relation to so much of a period as elapses after:
  (a) a receiver of the property is appointed; or
  (b) a chargee appoints an agent, under the provisions of a charge on the property, to enter into possession, or to assume control, of the property; or
  (c) a chargee takes possession, or assumes control, of the property under the provisions of a charge on the property;

but this subsection does not affect a liability of the company.

(8) Subsection (2) does not apply in so far as a court, by order, excuses the administrator from liability, but an order does not affect a liability of the company.

(9) The administrator is not taken because of subsection (2):
  (a) to have adopted the agreement; or
  (b) to be liable under the agreement otherwise than as mentioned in subsection (2).

10 The reason for the section is clear enough. The administrator of a company under administration is the company's agent: s 437B. Under the general law, an agent would not be liable for rent due under a lease entered into by his (or her) principal, whether or not the rent fell due before or after his appointment, unless, by his conduct, the agent has adopted the lease. This was thought to be unacceptable in respect of property which the administrator used during the administration in circumstances where s 440C places a bar on an owner or lessor taking possession of his property without the administrator's consent or the court's leave. So, if the administrator allows the company in administration to continue to use leased property for the purposes of the administration, it was thought only fair that the administrator be personally liable for the rent.

11 However, as the legislation makes plain, the administrator is given a period of grace. He has 5 business days within which to investigate the affairs of the company and decide

whether or not he wishes to avoid liability to pay rent. If he does wish to avoid that liability then he must give a notice under subsection (3).

12 Often 5 business days will not be enough time in which to conduct the necessary investigation to decide whether the administrator thinks it best to retain or give up possession of leased property. Indeed, 5 business days may be too short a period to discover what are the outstanding leases into which the company has entered.

13 Principally for this reason, subsection (8) allows the court to excuse the administrator from liability to pay rent after the 5 business day period has passed. At least that is the explanation for the subsection given in the Harmer Committee Report which recommended the enactment of Part 5.3A: Australian Law Reform Commission, *General Insolvency Inquiry,* Report No 45 (1988) [91]

14 Subsection (8) allows the court ex post to excuse an administrator from the liability imposed by s 443B. Perhaps that subsection may also apply ex ante. If not, s 447A can be employed to avoid liability before it is imposed. That is, if the short period an administrator is given to conduct an investigation is not sufficient to uncover all leases, an order could be made under s 447A to extend the time for the investigation. Curiously, subsection (8) does not provide for an extension of time for the service of a notice under subsection (3). For that purpose, it is necessary to go to s 447A.

15 Whether or not orders should be made giving the administrators more time is controversial. The application is opposed by Timber Plantation and FEA. I should, in this connection, make clear that the opposition is being directed by the receivers. No doubt it is in the interests of ANZ and CBA (the beneficiaries of the security) that either the rent due is collected or they be in a position where they can terminate the leases.

16 Apart from concerns regarding inadequate time for an investigation, the administrators appear also to be concerned about another issue regarding the service of a notice. The leases between group companies contain the standard forfeiture provision (clause 4(a)) for non-payment of rent. After 28 days of outstanding payment, the provision allows the lessor to give 28 days notice requiring the breach to be remedied and, if not remedied, the lessor may determine the lease and re-enter. However, presumably because these leases are

entered into between group companies, there is a limitation on the power to determine and re-enter for non-payment of rent. The leases (by clause 4(c)) provide that if the default in payment of rent is due to "FEAP going into voluntary administration, liquidation or receivership, the lessor agrees not to take any action to terminate [the] lease for a period of six months after the date of liquidation, administration or receivership, in order to allow the receiver, liquidator or administrator of ... FEAP an opportunity to bring the Rent payments up-to-date."

17 It is not necessary to consider precisely what the parties had in mind by this provision. One reading – and there may well be others – suggests that so far as the present parties are concerned, the clause will prevent the lessor terminating the lease for non-payment of rent falling due for the 6 months commencing on the appointment of the administrators to the lessee.

18 What concerns the administrators is that if, following their investigation into the affairs of the company, they decide to serve a subsection (3) notice, that might amount to a repudiation of the lease entitling the lessor to determine the lease, notwithstanding the (arguable) 6 month stay under the leases. If serving the notice by the administrator amounts to a repudiation of the lease when the parties have otherwise agreed for a stay, it might also be relevant to whether an extension of time should be granted. However, for reasons which I will now discuss, I do not think service of a notice without more amounts to a repudiation of a lease.

19 The discussion should begin with the decision in *Molit (No 55) Pty Ltd v Lam Soon Australia Pty Ltd (administrator appointed)* (1996) 19 ACSR 160. There a company in administration was the lessee of a supermarket in the Adelaide Central Market. The administrator closed down the business and removed the stock, plant and equipment. He then gave notice to the landlord under subsection (3) that the company did not propose to exercise any rights in relation to the property. The judge, Branson J, said (at 166) that this conduct (ie closing the supermarket, removing the tenant's property and serving the notice) amounted to as repudiation of the lease by the company. On appeal (*Lam Soon Australia Pty Ltd (administrator appointed) v Molit (No 55) Pty Ltd* (1997) 70 FCR 34), this finding was not challenged. Nonetheless, in dicta, the Full Court said (at 37) the finding was "undoubtedly correct".

20 I do not take either the decision of Branson J or the Full Court to be authority for the proposition that the mere service of a subsection (3) notice amounts to a repudiation of a lease. I accept that the application of common law doctrines of termination for breach and termination for repudiation can apply to leasehold interests. Cases such as *Shevill v Builders Licensing Board* (1982) 149 CLR 620 and *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 show that these principles can apply, although it may also be necessary to take into account when considering the extent of their application, that what is involved are property interests.

21 Putting that to one side, the question of what amounts to a repudiation of a contract has been discussed in many authorities. What is at the heart of a repudiation is that a contracting party has acted in such a way as to lead the other party to the conclusion that the first party will not fulfil his part of the contract. "It is not a mere refusal or omission of one of the contracting parties to do something which he ought to do, that will justify the other end repudiating the contract; but there must be an absolute refusal to perform his side of the contract": *Freeth v Burr* (1874) LR 9 CP 208, 214.

22 By the service of a subsection (3) notice the administrator does no such thing. The notice need only state that the company will not exercise its 'rights' in relation to the property. The notice only applies, at most, during the period the company is in administration, and as subsection (5) shows, may apply for an even shorter period. Further, subsection (6) makes clear that the mere fact that the company remains in occupation or possession of the leased property does not amount to exercising rights in relation to the property.

23 It is impossible to hold that a lessee has repudiated its lease simply by its administrator serving a notice under subsection (3) which says nothing about, and does not preclude the company from, continuing to occupy or possess the premises. Moreover, the notice relates to the 'rights' of the company and is not concerned with the performance by the company of its obligations. As subsection (4) makes clear, the service of a notice does not affect those obligations.

24 In my view, a notice under subsection (3) is nothing more than an indication by an administrator that he will not "use" the leased property and a statement that he does not

accept personal liability for the continuing occupation or possession of the property. Whatever rights the landlord has in those circumstances are to be found in the terms of the lease. Those rights are not altered, either to the lessor's advantage or the lessee's detriment, by the notice. The notice may, however, be relevant to an application for possession under s 440C.

25 *Lam Soon* is correctly decided provided one understands that the facts which gave rise to the holding that there had been a repudiation are facts which would justify the conclusion that the company had abandoned the lease. While abandonment of possession is not necessary to constitute a repudiation of a lease, were abandonment to occur that would properly be seen as constituting a repudiation: *Buchanan v Byrnes* (1906) 3 CLR 704. On the other hand, if in *Lam Soon* the judge meant that the mere service of a subsection (3) notice constitutes a repudiation then, with great respect, that is a clear error, as would be the equivalent dictum of the Full Court.

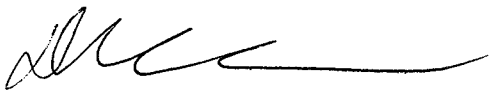
26 Returning to the case at hand, though by their application the administrators initially sought relief until 30 June, Mr Young, who appeared on their behalf, said that they would be able to complete their investigation within 30 days. On one view, this is much longer than the time allowed by the statute. The other view is that it is not such a long time when one bears in mind that there is a large amount of paperwork to go through and the receivers are not really in a position to assist.

27 In my view, the proper thing to do is to grant the relief sought in relation to FEAP but only until 31 May 2010. This will cause no real prejudice to Timber Plantation or FEA, who arguably may not be able to re-enter the leased property for 6 months and, in any event, do not have a substitute tenant in the wings. If it turns out that this extension is insufficient time to track down all outstanding leases then it may be appropriate for the administrators to seek further relief.

28 The administrators also seek similar relief in respect of FEA. Strictly relief is not necessary because the appointment of receivers means that the time within which the notice must be served is held in suspense (s 443B(7)(a)). But, as the administrators point out, the receivers may retire from office without the administrators' knowledge. For that reason it is also convenient to grant the same relief in respect of FEA.

29 There will be orders accordingly. As to costs, the administrators have sought an indulgence and the usual rule should apply. All the costs will be costs in the administration.

I certify that the preceding twenty-nine (29) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Finkelstein j.

Associate: 

Dated: 25 May 2010