

Restructuring and Insolvency  
Case Law Update  
Rosling King LLP



### Background

This was an appeal by Dr Mohammed Abdulla (the “**Appellant**”), the husband of Mrs Sarah Amin (the “**Bankrupt**”), against the decision at first instance in favour of (1) Mr Andrew John Whelan (2) Mr Walter Terence Weir (3) Mr David Ansell and (4) the Bankrupt (together the “**Respondents**”). The pertinent facts are:

- Mr Whelan was the trustee in bankruptcy for Mrs Amin (the “**Trustee**”).
- Mrs Amin was the joint tenant of an underlease dated 29 September 2003 (the “**Underlease**”), alongside a Mr Elhilali (together the “**Tenants**”), of which Mr Weir and Mr Ansell were the landlords.
- Following his appointment, in accordance with section 315 of the Act, the Trustee served two notices of disclaimer in respect of the Underlease (the “**Disclaimers**”).
- There was a dispute over the effect of the Disclaimers and the County Court held that the Disclaimers did not have the effect of preventing the landlords from submitting a claim for rents falling due after the Disclaimers were served.

### The Appeal

As with the first instance decision, the Court dealt with a number of provisions in the Act, primarily Section 315. Section 315(1) of the Act provides that the Trustee may disclaim any “onerous property”, which is defined in section 315(2) as:

- a) “any unprofitable contract, and
- b) any other property comprised in the bankrupt’s estate which is unsaleable or not readily saleable, or is such that it may give rise to a liability to pay money or perform any other onerous act.”

Section 315(3) provides that a disclaimer:

- a) “operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the bankrupt and his estate in or in respect of the property disclaimed, and
- b) discharges the trustee from all personal liability in respect of that property as from the commencement of his trusteeship, but does not, except so far as necessary for the purpose of releasing the bankrupt, the bankrupt’s estate and the trustee from any liability, affect the rights or liabilities of any other person.”

The Appellant argued that the service of the Disclaimers meant the legal estate in the Underlease had been determined and therefore no rent was payable after the date the Disclaimers were served. In support of this contention, the Appellant firstly cited the case of Hindcastle Limited v Barbara Attenborough Associates Limited [1997], arguing that this case supported the ability of the Trustee to fulfil the primary purpose of freeing the bankrupt from all liabilities (including disclaiming the Underlease), whilst at the same time doing the

minimum 'violence' to accepted property law principles. Secondly, the Appellant referred to the Court of Appeal case of Lee v Lee (A Bankrupt) [2000], where there was a disclaimer of the legal interest in a lease not merely a disclaimer of an equitable interest.

The Respondents' submissions relied on the following three grounds:-

- 1) that the Tenants held the Underlease as joint legal owners on trust for themselves;
- 2) that the legal estate in the Underlease had remained at all times in the names of the Bankrupt and Mr Elhilali as trustees (subject to the question of disclaimer); and
- 3) that what had vested in the Trustee was the Bankrupt's beneficial interest in the Underlease as one of two tenants in common.

Therefore, the Respondents submitted the Disclaimers had no effect on the legal estate in the Underlease as the legal estate did not comprise of part of the Bankrupt's estate and did not pass to the Trustee. The Trustee only had an interest as one of two beneficial joint tenants so therefore it was not possible to disclaim something not in their ownership.

### Decision

The Judge agreed with the Respondents' argument that the legal estate in the Underlease did not vest in the Trustee. He referred to the principles established in the case of ReCarthy (A Bankrupt) [1975] which stated that 'a legal estate cannot be severed at law and the bankruptcy cannot divest the state of the co-trustee'. The effect is that the Trustee could only disclaim what is part of the Bankrupt's estate; the Underlease was not part of that estate. The Judge concluded that the legal interest in the Underlease remained, and remains, in the names of the Bankrupt and Mr Elhilali and it had not been disclaimed. As such, rent continued to be payable to the landlords. The appeal was dismissed.

### Comment

This case provides useful commentary on a trustee in bankruptcy's ability to disclaim a lease, specifically where the lease is held jointly by two people. Despite the Appellant's attempts to 'muddy the waters' and raise doubts over the relationship between insolvency law and property law, this case reinforces key principles in both areas and therefore the outcome should not come as a surprise. For bankruptcy creditors, the effect of this decision will be that it will increase a landlord's provable debt, in that they can continue to prove for rent following a tenant's bankruptcy. As well as for landlords, the decision that legal interests in leases cannot be disclaimed is also positive news for non-bankrupt joint tenants.

For further information, please contact [James Walton](#) or the Partner with whom you usually deal.