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## 42. Disclaimers

Disclaiming property of the insolvency where that property is onerous, including the process to be followed for an effective disclaimer

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## Frequently asked questions

### What is a disclaimer?

In the general legal sense, a disclaimer is an act of renouncing a claim over property. In the more specific sense of insolvency legislation, a disclaimer is an act provided for in the legislation allowing a liquidator or trustee to renounce their claim over property vested in the insolvent's estate, but only where the property brings with it some onerous obligation.

## Why issue a disclaimer?

Whilst many assets with no value may simply be abandoned (as often happens with jewellery), this is simply not an option for those assets where ownership of the asset brings with it an obligation to perform a specific act; for example, an obligation to maintain a leasehold property or pay rent. If the ability to issue a disclaimer was not available the only option available to the liquidator or trustee would be to bring the obligation to an end by dealing with the property by way of transfer or sale thereby unnecessarily prolonging the administration of the estate, and adding costs and reducing the amount available to return to creditors.

Additionally, in a bankruptcy estate the property (and, therefore, the obligation) vests in the trustee personally; leaving the possibility of the trustee being personally liable for financial penalties relating to ownership of the asset.

## How is a disclaimer issued?

A disclaimer is issued by describing the property to be disclaimed on a statutory form, having the liquidator or trustee authenticate and date the form and serving the form on parties with an interest in the property.

See 'Procedure for disclaiming' for further information.

## When should a disclaimer be issued?

A disclaimer should be issued where the official receiver, as liquidator or trustee becomes aware of property in the estate that has no value, and to which there is an obligation to perform some onerous task. Whilst, in these circumstances, a disclaimer should be issued as soon as possible, care should be taken not to disclaim an interest in property having a value to the estate which, instead, should be dealt with as any other asset.

See 'Matters to consider prior to the issue of a disclaimer', particularly paragraph 42.3 for further information.

## What is an onerous task?

This is described in the legislation as “onerous property”; being an unprofitable contract, or any other property comprised in the insolvency 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.

## Who may issue a disclaimer?

The official receiver, when acting as liquidator or trustee, may issue a disclaimer at any time.

See ‘Matters to consider prior to the issue of a disclaimer’, particularly paragraph 42.4 for further information.

## Who should receive notice of a disclaimer?

Notice of the disclaimer, including a copy of the disclaimer once authenticated and dated by the liquidator or trustee, should be served on any party having, or appearing to have, an interest in the disclaimed property. Notice should be given to the Land Registry where solely owned registered property is being disclaimed.

See ‘Procedure for disclaiming’, particularly paragraph 42.54, for further information.

## What may be disclaimed?

Effectively, there is no limit to the type of property that may be disclaimed. Typically, disclaimers are issued in respect of leased property, but may also be issued in relation to freehold or leasehold property, rights of actions, property licences or shares, to give a few examples.

See ‘Matters to consider prior to the issue of a disclaimer’, particularly paragraph 42.6, for further information.

## What is a notice to elect / notice requiring disclaimer decision?

A party with an interest in a property forming part of an insolvency estate may require the official receiver as liquidator or trustee to make a decision as to whether or not the property in question is to be disclaimed. This request will be made in writing and was previously required to be in a prescribed form known as ‘notice to elect’ (the prescribed form is no longer required). The official receiver must issue a disclaimer (where it is appropriate to do so) within 28 calendar days of receiving the request to make a decision; otherwise, the official receiver will be considered to have adopted the property and the obligations (for example, to pay rent) attaching to it.

See 'Notice to elect/notice requiring disclaimer decision' for further information.

## What is a vesting order?

Where a liquidator or trustee has disclaimed their interest in property, it is open to certain persons to make application to court for the property to be vested in them.

There should normally be no need for the official receiver to be party to, or otherwise involved in, an application for a vesting order.

## What happens to the property once the official receiver's interest has been disclaimed?

The effect of a disclaimer is to end, as from the date of the disclaimer, the rights, interests and liabilities of the insolvent in relation to the property. This might result in the property passing to a joint owner or, even, to the Crown. A person with an interest in the property may apply to court for an order to take possession of the property. This is known as a vesting order.

## Introduction

### 42.1 General

This chapter gives general advice and guidance relating to disclaimers, including matters to be taken into consideration before issuing a disclaimer, the effect of a disclaimer and the procedure for issuing a disclaimer.

### 42.2 Background

In the general legal sense, a disclaimer is an act of renouncing one's claim over property. In the more specific sense of insolvency legislation, a disclaimer is an act provided for in the legislation allowing a liquidator or trustee to renounce their claim over property vested in the insolvent's estate, but only where the property brings with it some onerous obligation.

Whilst many assets with no value may simply be abandoned (as often happens with jewellery), this is simply not an option for those assets where ownership of the asset brings with it an onerous obligation; for example, an obligation to maintain a leasehold property or pay rent, or perform any other specific act. If the ability to issue a disclaimer were not available the only option for the liquidator or trustee would be

to bring the obligation to an end by dealing with the property by way of transfer or sale thereby unnecessarily prolonging the administration of the estate and adding costs and reducing the amount available to return to creditors.

Additionally, in a bankruptcy estate the property (and, therefore, the obligation) vests in the trustee personally; leaving the possibility of the trustee being personally liable for financial penalties relating to ownership of the asset.

The chapter contains a section of frequently asked questions (FAQs), which give an overview of the subject of disclaimers. The FAQs are intended to be a useful introduction to the subject, or to be used as a training tool, but should not be seen as a replacement for the more detailed advice given in the chapter.

## Considering a disclaimer

### 42.3 General

A disclaimer should be considered where the official receiver, as liquidator or trustee becomes aware of property in the estate that has no value, and to which there is an obligation to perform some onerous task. This is described in the legislation as “onerous property”; being an unprofitable contract, or any other property comprised in the insolvency 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<sup>1, 2</sup>.

Whilst, in these circumstances, a disclaimer should be issued as soon as possible, care should be taken not to disclaim an interest in property having a value to the estate which, instead, should be dealt with as any other asset.

1. Section 178(3)

2. Section 315(2)

### 42.4 Power to disclaim

The official receiver can disclaim only when they are acting as liquidator or trustee<sup>1, 2</sup>. They have no power to disclaim when acting as interim receiver.

1. Section 178

2. Section 315

### 42.5 Timing of a disclaimer

Ideally, the official receiver when acting a liquidator or trustee should disclaim onerous property as soon as possible in order to minimise the exposure to a liability<sup>1</sup>.  
<sup>2</sup>. See paragraph 42.9 for a circumstance in which it may be appropriate to delay the issue of a disclaimer.

1. Section 178

2. Section 315

## 42.6 Definition of property

As a disclaimer can only be issued in respect of property, it is important to understand what is meant by this term in the context of insolvency proceedings. The Act defines property as including “money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property.”<sup>1</sup>.

The fact that the property held may be of no value to the creditors is irrelevant; it is the general nature of the property or property right and not its value in particular circumstances which determines the issue<sup>2</sup>.

Property must involve some element of benefit or entitlement for the person holding it<sup>3</sup>.

1. Section 436

2. *De Rothschild v Bell (A Bankrupt)* [2000] 32 HLR 274

3. *In re SSSL Realisations (2002) Ltd (in liquidation) In re Save Group plc* [2006] EWCA Civ 7]

## 42.7 Types of property over which a disclaimer may be issued

Typically, most disclaimers will be issued in respect of leased property. Having said this, there is no limit to the type of property that may be subject to a disclaimer (though see paragraph 42.25 regarding disclaimers and motor vehicles). Apart from leased property, common examples of property in relation to which a disclaimer may be issued include freehold property, contracts, licences, shares or rights of action.

Where the insolvent is tenant of only part of a premises demised by a tenancy, the power to disclaim is exercisable only in relation to the part of the premises of which the insolvent is tenant<sup>1</sup>.

Property excluded from the bankruptcy estate cannot be disclaimed, for example, the legal estate in a lease held on trust by a bankrupt and her co-tenant on behalf of

themselves was “property held on trust for any other person” within the Insolvency Act 1986 section 283(3) and so was excluded from the bankrupt’s estate. A disclaimer served by the trustee in bankruptcy therefore did not end the legal estate in the lease or the bankrupt’s liability to pay rent<sup>2</sup>.

1. Landlord and Tenant (Covenants) Act 1995 section 21(1)(a)

2. *Abdulla v Whelan* [2017] EWHC 605 (Ch)

## 42.8 Obtaining information regarding property

When the official receiver is undertaking an inspection or preliminary interview, sufficient information should be obtained to allow for an effective decision to be made regarding whether or not the property should be disclaimed; and to obtain sufficient information for the completion of the relevant statutory form (see paragraph 42.49) if that is the decision taken.

Where the official receiver is dealing with property subject to a lease, they should consider obtaining the following:

- copy of lease
- any sub lease
- any assignments
- Land Registry search on property
- guarantors
- details of solicitors or property management agents acting
- any authorised guarantee agreement (see paragraph 42.13)
- other interested parties
- charge holder details
- arrears of rent

The official receiver’s enquiries should not be limited to property in which the insolvent has a current interest, but should extend to leases in which the insolvent has had an interest (see paragraphs 42.12 and 42.13).

Where the property in question is a dwelling house, the bankrupt should be asked to identify all persons who occupy, or who have a legal right to occupy, the property, together with their addresses (if they live elsewhere), as these persons will need to be served with a notice of disclaimer (see paragraphs 42.54 and 42.56).

## 42.9 Valuation prior to disclaimer

Property should not be disclaimed where it has a value in excess of any obligations attached to it and is readily saleable. Consideration should be given to the effect of any forfeiture clause in the case of the insolvency of a party in relation to property

such as a lease or a contract. In cases of doubt the official receiver should instruct agents to carry out a formal valuation of the property.

See also paragraph 42.16 regarding tenant's rights when considering the value of property.

## 42.10 Valuation of leasehold property

When in doubt a valuation should always be obtained. However, where the official receiver's experience in dealing with a lease suggests that the lease is unlikely to have any value, or the existence of a forfeiture clause (see chapter 28) on an insolvency event would suggest the official receiver is unlikely to be able to sell the lease, then funds should not be used in obtaining a valuation simply to confirm the official receiver's view.

See also paragraph 42.16

## 42.11 Disclaimer of property held under a lease

The vast majority of disclaimers issued by official receivers will be in respect of property held under a lease. Where an insolvent is the current lessee of property at the time of the insolvency order, the insolvent's interest in that property should be disclaimed if it is unsaleable or not readily saleable, or is burdened with any liability to pay money (for example, rent or maintenance charges), or gives rise to any other liability to pay money or to perform any other onerous act (for example, to maintain or upkeep the property).

See also paragraphs 42.12 to 42.13 regarding actual or contingent liability (under a lease assigned from the insolvent prior to the insolvency order) and paragraph 42.15 regarding tenancies excluded from the bankrupt's estate.

Where an insolvent is a joint lessee, only the insolvent's interest in the lease can be disclaimed.

See paragraph 42.79 for information on the disclaimer of fixtures.

See paragraphs 42.29 and 42.76 where property held under a lease has a sitting sub-tenant.

## 42.12 Continuing obligations under leases

Where a tenancy was created before 1 January 1996, an insolvent may have obligations under the lease (this is referred to as "privity of contract") despite the fact

that they have assigned it to a third party<sup>1</sup>. The obligation may be after an assignment where the original lessee may remain liable under covenants<sup>2</sup>.

Whether or not the tenancy was created before 1 January 1996 the insolvent may have a liability under the lease where a guarantee was given to the landlord.

See the following paragraph for further information on privity of contract.

1. Hindcastle Limited v Barbara Attenborough Associates Limited [1996] 2 WLR 262

2. Warnford Investments Ltd v. Duckworth [1979] 1 Ch 127

## 42.13 Authorised guarantee agreements

For tenancies created after 1 January 1996, the concept of liability under privity of contract was discontinued<sup>1</sup>. A landlord may require a tenant who assigns a lease to enter into an “authorised guarantee agreement”, under which the tenant who assigns the lease or tenancy may guarantee performance of the tenant’s covenants by the assignee, but not any subsequent assignee<sup>2</sup>.

In the case that the insolvent is party to an authorised guarantee agreement the disclaimer wording (see paragraph 42.50) should reflect this (for example “the authorised guarantee agreement dated [date] and related lease.....”).

1. Landlord and Tenant (Covenants) Act 1995 section 3

2. Landlord and Tenant (Covenants) Act 1995 section 16

## 42.14 Disclaimer of a tenancy

The majority of tenancies encountered by official receivers will be in connection with the bankrupt’s residence. Many tenancies are excluded from the bankruptcy estate by operation of law and therefore a disclaimer would not be appropriate. From the point of view of considering a disclaimer, official receivers should treat those tenancies not excluded (including those in a liquidation) as leases and follow the information and guidance in paragraph 42.11.

## 42.15 Exclusion of certain types of tenancies

The following types of tenancies do not form part of the bankrupt’s estate<sup>1</sup> (unless actively claimed by the trustee<sup>2</sup>) and, therefore, a disclaimer would not be appropriate:

Assured tenancy or assured agricultural occupancy within the meaning of Part I of the Housing Act 1988, and the terms of which inhibit an assignment.

A protected tenancy, within the meaning of the Rent Act 1977 in respect of which no premium can lawfully be required as a condition of assignment.

A tenancy of a dwelling house by virtue of which the bankrupt is, within the meaning of the Rent (Agriculture) Act 1976, a protected occupier of the dwelling house, and the terms of which inhibit an assignment.

A secure tenancy, within the meaning of Part IV of the Housing Act 1985, which is not capable of being assigned.

In practice many council, housing association and private landlord tenancies in respect of dwelling houses will fall under one of the categories listed above. In cases of doubt, the official receiver should inspect the tenancy agreement before ruling out a disclaimer.

1. Section 283(3A)

2. Section 308A

## 42.16 Tenant rights

Certain leases or tenancies may include what are known as “tenant’s rights”, such as the right to grow and harvest crops, graze livestock or hunt animals. These rights will be lost to the liquidator or trustee if a disclaimer is issued in respect of the lease or tenancy.

As the rights themselves may have a value in excess of any liabilities due under the lease or tenancy, the official receiver should assess the benefits likely to be achieved by retention of the property against any obligations which will have to be performed while the property is retained. It is likely that the official receiver will need to employ agents to assist with the valuation. Property should not be retained without adequate indemnities from creditors as regards payments to be made.

## 42.17 Disclaimer of licence to assign

Where the insolvent’s interest in the lease is by way of a licence to assign, the description of the property on the notice of disclaimer (see paragraph 42.49) should cover both the interest in the licence to assign and the original lease. Having said this, it has been held that a disclaimer of a licence to assign is effective as a disclaimer of a lease<sup>1</sup>.

1. MEPC plc v Scottish Amicable Life Assurance Society, Neville Richard Eckley (Third Party) (1993) The Times, 6 April

## 42.18 Surrender of a lease

A lease or tenancy may be surrendered by operation of law where the actions of both parties to the lease or tenancy make it clear that they intend the lease or tenancy to come to an end (see paragraph 42.49 and chapter 28 for more information on this). Alternatively it may be relinquished by exchange of letters (sometimes referred to by the official receiver as an ‘informal surrender’ although in legal terms this is incorrect). Neither of these two options should be adopted by the official receiver, even with legal advice, because of the difficulties that can arise if all relevant matters (not just the liability for future rent) are not resolved prior to the ending of the lease or tenancy. If it is not beneficial to the estate to disclaim the lease or tenancy, the guidance in paragraph 42.49 for formal surrender may be followed – though this is appropriate only for company cases and, even then, only in exceptional circumstances.

Ideally, the official receiver should issue a disclaimer even when the landlord is prepared to accept possession by way of a surrender of premises. A disclaimer will result in a “clean-break” of the estate’s interest in the property and will avoid any future problems in relation to contingent liabilities.

## 42.19 Disclaimer of a lease that has been terminated

A lease may be disclaimed even if it has been terminated – whether by expiration of the period of the lease or by forfeiture<sup>1, 2</sup>. The reasons why this may be necessary are explained at paragraph 42.12 concerning contingent and continuing liabilities.

1. Ex parte Sir W Hart Dyke. In re Morrish 22 Ch.D. 410

2. Ex parte Paterson. In re Throckmorton 11 Ch.D 908

## 42.20 Lease held in trust for another

A lease held in trust for another person by an insolvent may form part of the company’s estate or vest in the trustee in bankruptcy<sup>1</sup>. It is, therefore, appropriate that, where a company in liquidation or a bankrupt has an interest in a lease as trustee, a disclaimer is issued (assuming a disclaimer is otherwise appropriate).

1. The Governors of St Thomas’ Hospital v Richardson [1910] 1 KD 271

## 42.21 A disclaimer of property overseas or outside of the jurisdiction

Occasionally, it will be necessary for the official receiver to disclaim property situated overseas or outside of the jurisdiction. The effect of the disclaimer, especially where

the property is outside the EU, is open to question and the disclaimer may not be recognised in the country in which it is issued, depending on the law of that country<sup>1</sup>.

Where, however, action is taken, in the foreign jurisdiction, against the official receiver, as liquidator or trustee, in relation to the disclaimed foreign property, the enforcement of any judgment against the official receiver would have to be taken in, or recognised by, the English/Welsh court which would, in turn, recognise or consider the effects of the disclaimer, thereby affording the official receiver some measure of protection.

Annexes B, C and D are documents that explain the effects of a disclaimer in German, French and Spanish respectively. [Annex E](#) is an English translation of those documents.

1. Joint Liquidators of the Scottish Coal Co Ltd (2014) SLT 259 [1]

## 42.22 Disclaimer of a licences or permits for dealing with waste

In order for a business to deal in controlled waste it must hold a permit or a licence issued by the Environment Agency. Formerly, businesses were issued with Waste Management Licences, but these are gradually being replaced by Pollution Prevention and Control Permits.

It has been held that Waste Management Licences are property as defined by the Act<sup>1</sup> and can, therefore, be disclaimed as onerous property<sup>2</sup>.

On this basis, the official receiver should disclaim, where appropriate, their interest in a Waste Management Licence or Pollution Prevention and Control Permit. It should be noted, however, that a disclaimer of a Pollution Prevention Control Permit has yet to be tested in court, and the Environment Agency has indicated that it would challenge such a disclaimer.

Where the official receiver is disclaiming an interest in a Waste Management Licence or a Pollution Prevention and Control Permit they should ensure that both the Environment Agency and the local authority Environmental Health Department are sent notice of the disclaimer (see paragraph 42.49).

See also paragraph 42.23 regarding disclaiming waste.

1. Insolvency Act 1986 section 436

2. Re Celtic Extraction Ltd (In Liquidation) [2001] Ch 475

## 42.23 Disclaiming waste

Where waste is disclaimed the official receiver should serve notice of the disclaimer on the Environment Agency and the local authority Environmental Health Department. Waste should not be disclaimed where it is on land which is part of the insolvent's estate (i.e. a vesting lease or a solely-owned freehold property, but not a non-vesting tenancy (see paragraph 42.15) or a jointly-owned freehold property), unless the land or tenancy to the land is also disclaimed as, to do so, may result in the official receiver being considered to be keeping waste, which is an offence without the appropriate permit.

The official receiver will, therefore, need to consider the value of the land or tenancy against the costs of dealing with the waste before deciding if a disclaimer is appropriate.

## 42.24 Disclaiming a mine

Where a mine is abandoned the person abandoning the mine is required to carry out various duties such as issuing a notice to interested parties.

Where a disclaimer is issued in respect of a mine, it will not be deemed to be an abandonment of the mine and, therefore, any duties as required by the relevant legislation need not be carried out. Notice of the disclaimer (see paragraph 42.49) should, however, be sent to the [Environment Agency](#).

## 42.25 Disclaimer of motor vehicles

Motor vehicles are subject to strict rules regarding disposal and any person (including the official receiver where a motor vehicle vests) not complying with those regulations may leave themselves open to financial sanctions, even where a disclaimer has been issued. For this reason, the Insolvency Service has taken a decision that the issuing of a disclaimer in respect of a motor vehicle would be appropriate in only limited circumstances (see chapter 27).

It is, in any case, extremely unlikely that the official receiver would have cause to issue a disclaimer in respect of a motor vehicle. If the motor vehicle has an inherent value then it will either be realised (see chapter 27) or treated as exempt property (see chapter 24). If, on the other hand, the vehicle has no realisable value (and cannot be treated as exempt property) then it will be dealt with under the procedures for dealing with "end of life" vehicles (see chapter 27).

Where a disclaimer is issued in respect of a motor vehicle, and the vehicle is registered in the UK, notice of the disclaimer should be served on the Driver and Vehicle Licensing Agency (DVLA)

## 42.26 Disclaimer of a lease relating to an Islamic mortgage

Where a person has entered into an agreement to purchase a property under an Ijara or Diminishing Musharaka scheme the property is held in trust with the trustees granting a lease to the person covering the term over which it has been agreed that they will purchase the property.

With an Ijara payments made towards the purchase price of the property at the date of the bankruptcy order may give rise to a beneficial interest in the property which would form part of the bankruptcy estate, or be a debt payable by the bank to the bankruptcy estate (the contract of sale having been uncompleted). With a Diminishing Musharaka the bank's beneficial interest transfers to the borrower once agreed payment stages are completed. By the end of the rental period, the borrower will hold a 100% beneficial interest in the property and will require the trustees to transfer legal title.

With both the Ijara and Diminishing Musharaka, at the date of the bankruptcy order the property would not vest in the bankruptcy estate, as the legal and beneficial owner is the bank. Any agreement to purchase the property is a contract capable of vesting in the trustee in bankruptcy as is the lease agreement. Forfeiture or disclaimer of the lease might defeat any interest the trustee in bankruptcy holds in the property. Where a disclaimer is considered in this respect, care should be taken that the beneficial interest in the property is not lost through a carelessly worded disclaimer aimed at the lease agreement.

Further information on Islamic mortgages is contained in chapter 28.

## 42.27 Disclaimer of a right of action

As with any other property, it is open to the trustee to disclaim a right of action where it is considered to be onerous property<sup>1</sup>. Once disclaimed it is not possible for the right of action to be vested back to the bankrupt<sup>2</sup>. Consequently when considering a disclaimer the official receiver should be careful to avoid giving the impression to the bankrupt that they would be able to regain control of the action by way of a vesting order. The reasons for this are discussed in detail in paragraph 42.92.

Whilst the Act<sup>3</sup> makes it clear that a disclaimer operates to bring the interest of a bankrupt and their estate in the disclaimed property to an end, it does not follow from this that the property itself ceases to exist. In view of the effect of a disclaimer on the interest of the bankruptcy estate, it may in some cases be preferable to refrain from disclaiming the right of action, where it is not possible to assign or settle it at that time, so that the matter may be revisited in the future, subject to the expiry of the

limitation period. However, different considerations would apply if proceedings had been issued and the official receiver was being put under pressure by the parties to the proceedings (or the court) to deal with the matter. In this case, it may be possible to settle the matter by way of a consent order (known as a “Tomlin Order”), with each party responsible for their own costs.

A right to defend an action cannot be subject to a disclaimer<sup>4</sup> and it is not considered to be property, but merely a liability<sup>5</sup>.

More information regarding rights of action can be found in chapter 37.

1. Insolvency Act 1986 section 315(2)(b)

2. *Skinner v Hood* [2005] EWCA Civ 1634

3. Section 315(3)(a)

4. *Zakharov v White* (Appeal against Order) (Ch D) Chancery Division 2004 EWHC 2829

5. *Heath v Tang* [1993] 1WLR 1421

## 42.28 Disclaimer of freehold property

The disclaimer of mortgaged or unsaleable freehold property may be necessary where such property has some onerous condition or liability attached. Examples of this may be where a local authority has made a demolition order, or there is a responsibility to pay for the upkeep of the property. This would not include property that cannot be disposed of only because there appears to be no available equity – for which, the guidance in chapter 28 should be followed.

As an alternative to issuing a disclaimer, the official receiver could consider issuing a notice for the property to re-vest in the bankrupt<sup>1</sup> (see chapter 28)

Please see paragraphs 42.77 and 42.78 for the effect on jointly-owned and solely owned property, respectively.

1. Rule 10.170

## 42.29 Disclaimer and the Landlord and Tenant Act 1987

The Landlord and Tenant Act 1987 gives tenants the right to acquire a property where the landlord is disposing of it. The Landlord and Tenant Act 1987 is comprehensively discussed in chapter 28 and reference should be made to the information contained therein before issuing a disclaimer in respect of a freehold or leasehold property with sitting tenants.

See paragraph 42.76 for information on the effect of a disclaimer on a leasehold property with a sitting sub-tenant.

## 42.30 Disclaimer of shares

A disclaimer should be issued in respect of shares that may burden the estate with a liability in excess of their value. For example, in the case of partly paid shares, or where a tax liability may accrue on sale.

See chapter 33 for information on dealing with shares with value, in particular the circumstances where it may be appropriate to issue a disclaimer in respect of shares with minimal value.

In any case where a disclaimer is issued in respect of shares, the notice of disclaimer should be sent to the company's registrar of shares.

## 42.31 Disclaimer of a contract for sale

Where a bankrupt has entered into a contract for the sale of a property held under a lease, the trustee cannot disclaim the contract without also disclaiming the lease<sup>1</sup>.

1. *Pearce v Bastable's Trustee in Bankruptcy* Chancery Division [1900] P.2593

## 42.32 Additional notices disclaimer

There is no longer a requirement in the Insolvency (England and Wales) Rules 2016 for a liquidator or trustee in bankruptcy to require persons to declare their interest in any property which they are considering disclaiming. However, the Official Receiver as trustee or liquidator who is disclaiming property may at any time deliver a copy of the notice of the disclaimer to any other person whom the Official Receiver thinks ought, in the public interest or otherwise, to be informed of the disclaimer<sup>1</sup>.

1. Rule 19.6

## 42.33 Property claimed by trustee

Where, in a bankruptcy, the official receiver, as trustee, lays claim to after acquired property<sup>1</sup>, exempt property exceeding the value of a reasonable replacement<sup>2</sup> or a certain type of tenancy<sup>3</sup> they will not be able to subsequently disclaim that property without the court's permission<sup>4, 5</sup>.

The application may be made without notice to any other party, and must be accompanied by a report giving details of the property, setting out the reasons why the property – having been claimed for the estate – is now to be considered for disclaimer and specifying the persons (if any) who have been informed of the

trustee's intention to make the application. If the report states any person's consent to the disclaimer then the consent must be annexed to the report<sup>6</sup>.

1. Section 307

2. Section 308

3. Section 308A

4. Section 315(4)

5. Rule 19.8

6. *Scmla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] EGCS 52

## 42.34 Property (including leasehold property) subject to a charge

A disclaimer ought not to affect a mortgagee's position in relation to the property disclaimed due to provisions in the Act protecting the rights of third parties (see paragraph 42.67)<sup>1</sup>.

That said, where the official receiver is considering issuing a disclaimer in respect of property subject to a charge, they should first contact the charge-holder and bring this intention to their attention to afford them the earliest opportunity to consider making application for a vesting order or to exercise their right to dispose of the property.

A Land Registry search of a property should be carried out to obtain details of chargeholders.

1. *Re Gee ex p Official Receiver* [1889] 24 QBD 65

## 42.35 Disclaimer of an attornment clause

A lease may contain a clause (usually created by a mortgage) whereby the tenant agrees to become the tenant of a successor landlord, for example where a mortgagee has taken possession of the property.

Where there is an attornment clause in a lease, the trustee would remain liable for rent accruing after the property vested in them, unless the mortgage is for the whole residue of the term of the lease, as this property would not then vest in the trustee<sup>1</sup>.

It is unlikely that official receivers will encounter leases with attornment clauses, as they are rarely used. They were, however, more common in the past and, therefore, are more likely to be encountered in older mortgaged property.

1. *Re Gee ex p Official Receiver* [1889] 24 QBD 65

## 42.36 Review of the official receiver's disclaimer decision

Any person aggrieved by an act or decision of the liquidator may make application for a review of that act or decision. That way, an aggrieved person can seek a review of the official receiver's decision to, or not to, issue a disclaimer<sup>1,2</sup>. Unless the decision to disclaim was in bad faith, or perverse, the court would not intervene to set aside the disclaimer.

Similarly, it is open to a bankrupt, or any creditor of a bankrupt, to make application to the court for a review of any act, omission or decision of a trustee<sup>3</sup>.

1. Insolvency Act 1986 section 168(5)

2. Re Hans Place Ltd [1992] BCC 237

3. Section 303

## Notice to elect / notice requiring disclaimer decision

### 42.37 Notice to official receiver requiring a disclaimer decision – general

The official receiver, as liquidator or trustee, may receive an application from an interested party requiring a decision as to whether or not property is to be disclaimed<sup>1,2</sup>. Prior to 6 April 2010 this request had to be in a prescribed form known as a 'Notice to Elect'. Whilst the notice to elect form is still available and may be used, the application can be made in any written format.

The liquidator or trustee then has 28 calendar days from the date that the application was made to give notice of disclaimer if they decide that a disclaimer is appropriate. Failure to disclaim constitutes adoption of the agreement and brings with it all the liabilities and obligations relating to the property. The trustee or liquidator, having chosen not to disclaim, cannot change their mind.

Additionally, failure to deal properly with an application may constitute negligence, leading to a personal liability on the liquidator<sup>3</sup> or trustee<sup>4</sup>.

It is, therefore, vitally important that, having received an application requiring a disclaimer decision or a notice to elect, the official receiver makes the decision

regarding whether or not to issue a disclaimer as soon as practical after the receipt of the notice, and certainly within the 28 day period (see also paragraph 42.48). Details of the matters to be taken into account when considering a disclaimer are included earlier in this chapter.

The bankrupt cannot be an interested party in the property as a result of automatic vesting<sup>5</sup>.

1. Section 178(5)

2. Section 316

3. Section 212(1)(b)

4. Section 304(1)(b)

5. *Frosdick v Fox* [2017] EWHC 1737 (Ch)

## 42.38 Format and delivery of a notice requiring disclaimer decision

The Insolvency (England and Wales) Rules 2016 provide that the application must be delivered to the office-holder and the applicant must provide proof of delivery if requested<sup>1, 2</sup>.

Prior to 6 April 2010 an application to the official receiver as trustee or liquidator under section 178(5) or 316 requiring a decision on a disclaimer had to be made on the 'Notice to Elect' prescribed by the Rules, or on a substantially similar form, and had to be delivered personally or sent by registered post. Following amendment to the Rules in 2010, although this format could still be used, those provisions no longer applied. Instead it was required that the application was to be delivered to the liquidator or trustee personally, by electronic means, or by any other means of delivery which enabled proof of receipt of the application to be provided if requested<sup>3</sup>.

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1. Rule 19.9

2. Rule 1.52

2. Rule 1.45

## 42.39 Persons who may serve a notice requiring a disclaimer decision

The Act states that an application requiring the trustee or liquidator to decide whether to issue a disclaimer or not may be made by “a person interested in the property”<sup>1, 2</sup>. There is no definition of ‘a person interested’ in the Act.

Previously, local authorities have served notices to elect on official receivers in order to accelerate the disclaimer process with, perhaps, the intention that a party other than the insolvent could be looked to as the new rateable occupant of the property.

Legal advice has been received which suggests that, for the purposes of the provisions relating to notices to elect, a local authority cannot be considered a “person interested” as it has no rights which are exercisable in respect of the property. A local authority only has powers to recover unpaid rates by bringing proceedings for recovery against the owner or occupier of the property (as opposed, for example, to a mortgagee or landlord, who have the right to take possession of the property itself)<sup>3</sup>.

Similarly, a bankrupt cannot be considered to have an interest in property formed in their estate as it would, following the making of the bankruptcy order, become vested in the trustee<sup>4</sup>, thereby ending the bankrupt’s interest.

1. Section 178(5)(a)

2. Section 316(1)(a)sub>

3. London Borough of Hackney v Crown Estate Commissioners (1996) BPIR 428

4. Section 306

## 42.40 Action to be taken where official receiver receives a notice requiring a disclaimer decision from a local authority

In the circumstances that the official receiver receives an application under section 178(5) or section 316 requiring a decision on a disclaimer from a local authority acting as a rating authority (or any other party whom the official receiver considers not to be an interested party), they should respond by stating that they will not accept the application as they do not consider the person who served it to be a person with an interest in the property. If the authority disagrees with this view, then ORS advice may be consulted, as it is possible that court proceedings will result.

Of course, if the official receiver is in the position to issue a disclaimer and this is, otherwise, the correct course of action, there would be no need to challenge the validity of the application. In these circumstances, the official receiver should still inform them that they are not considered to be an interested party but that they have concluded anyway that a disclaimer is appropriate

## 42.41 Notice served on official receiver where another party is liquidator or trustee

Where the official receiver receives an application under section 178(5) or section 316 at a time where another person is acting as liquidator or trustee, they should ensure that the communication is forwarded to the acting insolvency practitioner as a matter of urgency. It would be prudent to telephone the practitioner to bring the matter to their attention at the earliest possible opportunity.

## 42.42 Consultation with potential appointee following receipt of a notice requiring a disclaimer decision

Where the official receiver is liquidator or trustee and it is likely that an insolvency practitioner whose identity is known will be appointed in their place, the official receiver should make immediate contact with them to ascertain whether they, when appointed, would disclaim the property.

## 42.43 Potential appointee agrees to disclaimer following receipt of notice

If the potential liquidator or trustee is of the opinion that the property should be disclaimed then the notice can be issued in the usual way by the official receiver. In these circumstances, the insolvency practitioner's views should be obtained in writing.

## 42.44 Potential appointee not able to agree to disclaimer following notice

If, on the other hand, the potential liquidator or trustee feels that a disclaimer is not appropriate, the official receiver should inform the person who has made the application requiring a disclaimer decision of the position and ask that they agree to the withdrawal of their request pending the appointment of the insolvency practitioner. Any withdrawal of notice should be in writing. The view of the potential liquidator or trustee in this matter should be obtained in writing.

If the person who served the notice or application does not agree to withdraw it then the advice and information in the following paragraph should be followed.

## 42.45 Extension of time to issue disclaimer following receipt of application requiring disclaimer decision

It is possible for the liquidator or trustee to seek an extension of the 28-day limit allowed for dealing with an application under section 178(5) or section 316 by application to court - even if the 28-day period has already expired<sup>1, 2, 3</sup>.

For such an application to be successful the court would wish to be satisfied that there was a good cause for the extension to be granted. In reaching its decision, the court is likely to consider the length of the delay (if the application is out of time); the merits of the application having regard to the overall position of the bankruptcy and any prejudice caused to interested parties<sup>4</sup>.

1. Section 178(5)(b)

2. Section 376

3. Rule 1.3 sch. 5

4. *Solomons v Williams* [2001] BPIR 112

## 42.46 Circumstances where extension of period allowed following receipt of a notice requiring disclaimer decision is appropriate

An example of a circumstance where an extension of the period allowed to issue a disclaimer following receipt of an application requiring a decision on a disclaimer would be appropriate is given in paragraph 42.44. Another reason may be where the official receiver was unable, for reasons outside their control to obtain sufficient information to allow for a decision to be made regarding whether or not a disclaimer should be issued.

Where the circumstances described in paragraph 42.44 apply, an application for an extension of time, should be accompanied by a request for alternative directions in the event that no extension of time is allowed<sup>1, 2</sup>.

1. Section 168(3)

2. Section 303(2)

## 42.47 Extension of time where claimed property subject to notice requiring disclaimer decision.

If a trustee has claimed exempt or after acquired property, any disclaimer of that property requires the court's permission (see paragraph 42.33). Where an application requiring a disclaimer decision is received in respect of that property it is likely that an extension of the 28-day period will be required to allow for an application for permission to disclaim to be heard by the court. In the circumstances where an application for permission to disclaim is made within the 28-day period the court must extend the time allowed to the date fixed for the hearing of the application for permission<sup>1</sup>.

1. Rule 19.9

## 42.48 Consequences of failure to disclaim following an application requiring a disclaimer decision

The consequences of the failure to disclaim by the official receiver are discussed in paragraph 42.37. The official receiver will normally be unable to issue a disclaimer if he has not done so within the 28 day period or extended period, although an application for extension or further extension of time after the original period has lapsed is possible (see preceding paragraph).

# Procedure for disclaiming

## 42.49 Procedure for disclaiming – statutory notice of disclaimer

A disclaimer of onerous property is effected by the service of a statutory form, referred to as a notice of disclaimer,<sup>1</sup> on interested parties (see paragraph 42.54), once authenticated and dated by the liquidator or trustee<sup>2</sup>. There is no longer the requirement to have the notice sealed by the court prior to service on interested parties.

1. Form NODIS

## 42.50 Description of property

The notice of disclaimer should contain a description of the property sufficiently detailed to ensure that there can be no doubt as to the property being disclaimed<sup>1</sup>. For example, in relation to a lease a suitable wording would be:

“.....the [type of lease, e.g., counterpart] lease dated [date of lease] of the premises known as and situated at [address of property] comprising [e.g., a two-storey terraced house] which was let to the [company/bankrupt] from [date of commencement of lease] at an [annual/monthly] rent of [£].”

A suitable description for a right of action might be:

“.....the claim numbered [claim number] in the [court] between [insolvent] and [other side] which was issued on [date].”

Where the property concerned consists of land or buildings the nature of the interest should be stated (e.g. leasehold or freehold) and if registered land the title number should be included.

## 42.51 Description of property where there is doubt

Where there is some uncertainty whether or not the insolvent has an interest in the property in question, or as to the nature of the interest, the official receiver may preface the description with the following:

“.....all the interest (if any) of [the company/bankrupt] in the.....”

Similarly, where the official receiver is unable to obtain full information regarding the property (for example, where the director or bankrupt has failed to co-operate) they may describe the property in terms containing that information which is known. It is generally better to issue such a disclaimer based on incomplete information than not issue one at all.

## 42.52 Power to disclaim

The power to disclaim is given to the liquidator or trustee<sup>1,2</sup>. Where the official receiver is liquidator or trustee, this power is extended to any assistant official receiver appointed as a deputy official receiver to that official receiver<sup>3,4</sup>. It is likely that an assistant official receiver in a standard official receiver's office will have been

appointed as a deputy<sup>5</sup> but, where there is doubt, reference should be made to the relevant certificate of appointment provided by the Secretary of State.

1. Section 178

2. Section 315

3. Section 399

4. Section 401

5. Section 401(2)

## 42.53 Disclaimer to be authenticated and dated by the official receiver

The notice of disclaimer must be authenticated and dated by the official receiver as liquidator or trustee<sup>1</sup>.

A document in electronic form is sufficiently authenticated –

- a) if the identify of the sender is confirmed in a manner specified by the recipient; or
- b) where the recipient has not so specified, if the communication contains or is accompanied by a statement of the identity of the sender and the recipient has no reason to doubt the truth of that statement

A document in hard-copy form is sufficiently authenticated if it is signed.<sup>2</sup>

There are no specific provisions for partnership winding up cases but it has been agreed that official receivers will file a copy of the disclaimer notice with the court in such cases.

In all cases, where the disclaimer is of registered land, a copy of the notice must be sent to the Chief Land Registrar, as soon as reasonably practicable<sup>3</sup> (for further details see paragraphs 42.62 to 42.63).

1. Rule 19.9

2. Rule 1.5(2)

3. Rule 19.2(3)

## 42.54 Service on interested parties

Within seven business days<sup>1</sup> of the official receiver authenticating and dating the notice of disclaimer, they must serve copies<sup>2</sup> on all, or any, of the following:

- for leasehold property, every person who (to the official receiver's knowledge) claims as underlessee or mortgagee<sup>3</sup>

- any person who claims an interest in the property<sup>4</sup>
- any person who is under a liability in respect of the property, not being a liability discharged by the disclaimer<sup>5</sup>
- for unprofitable contracts, all such persons as to their knowledge are parties to, or have an interest, in the contract<sup>6</sup>
- for dwelling houses (leased, leasehold or freehold), every person who (to the official receiver's knowledge) is in occupation of, or claims a right to occupy the house. This may include the bankrupt, who is likely to be in occupation<sup>7, 8</sup>

The notice to interested parties need not be signed (by the official receiver or any other officer) and can be issued by anybody acting for the official receiver.

See also paragraph 42.65 for additional notices that should be sent.

1. Rule 19.3(1)

2. Rule 19.9

3. Rule 19.4

4. Rule 19.3(1)(a)

5. Rule 19.3(1)(b)

6. Rule 19.3(1)(c)

7. Rule 19.3

8. Rule 19.5

## 42.55 Disclaimer in German, French, Spanish speaking country

Where the official receiver is issuing a disclaimer to an interested party based in a German-speaking, French-speaking or Spanish-speaking country they may issue the documents attached at [Annex B](#), [Annex C](#) or [Annex D](#) respectively.

## 42.56 Identification of further interested parties

If, after the end of the seven business day period, the official receiver becomes aware of any other interested party, they must send or give them a copy of the notice of disclaimer as soon as reasonably practicable. This is not required if the official receiver is satisfied that the person has already been made aware of the disclaimer and its date or the court has ordered that compliance is not required<sup>1, 2</sup>.

1. Rule 19.3(2)

## 42.57 Service of notice of a disclaimer of a firearm

Where the official receiver issues a disclaimer in respect of a firearm, they should serve notice of the disclaimer on the firearms licensing section of the local police force.

See chapter 34 for further information on dealing with firearms.

## 42.58 Record of service of notice

The official receiver is no longer required to notify the court of all persons upon whom notice of the disclaimer has been served. Instead the official receiver must maintain a record on their own file of the following<sup>1</sup>.

In practice, this record should be maintained by ensuring that copies of all of the following forms are placed on the office file:

- NODIS – notice of disclaimer to be served on each interested party
- NDISC – notice of disclaimer under S178 of the Insolvency Act 1986 to Companies House. (The NDISC is not an ISCIS form but a Companies House form. A copy for completion can be found on [Gov.uk](https://www.gov.uk))
- DISCRT1 – Letter requesting a copy of the notice of disclaimer be filed with the court (bankruptcy and partnership winding up)

1. Rule 19.7

## 42.59 No delay to service on interested parties

The official receiver is required to give notice to interested parties<sup>1</sup> within seven business days and, therefore, delayed notice cannot be used as a tool to delay the effectiveness of the disclaimer. Where, between the sealing of the disclaimer and its return to the official receiver, another liquidator or trustee is appointed then the official receiver should bring the outstanding service to the notice of the practitioner appointed as a matter of urgency in order that they can effect timely service.

1. Rule 19.3(1)

## 42.60 Notice of disclaimer served on minors

Persons under the age of 18 in occupation of, or claiming a right to occupy, a dwelling house have a right to receive notice of the disclaimer. Service of the notice

on those persons may, though, be effected by service on the parent or guardian of that person<sup>1</sup>.

1. Rule 19.5(3)

## 42.61 Disclaimer of solely owned freehold property

Where it is necessary to disclaim an interest in a solely owned freehold property, the property will escheat (pass at common law to the crown). See paragraph 42.78 for further information on escheat. Where the property is located within the County Palatine of Lancaster\* or the County of Cornwall the property will fall to be dealt with by the Duchies. In all other cases the properties will fall to be dealt with by the Crown Estates Commissioners. Notice of the disclaimer should be served on either the Crown Estate Commissioners solicitors or the Duchies solicitors.

The address for service on the Crown Estates Commissioners is:

Crown Estates Commissioners

Burgess Salmon LLP

One Glass Wharf

Bristol

BS2 0ZX

The Crown Estate Commissioners have advised that they prefer to receive notices by post, but if there is a need to serve by e-mail, it should be addressed to [Conal.McLoughlin@burges-salmon.com](mailto:Conal.McLoughlin@burges-salmon.com)

The address for service on the Duchies is:

Farrer & Co

66 Lincoln's Inn Fields

London

WC2A 3LH

\*The County Palatine of Lancaster includes the County of Lancashire and parts of Merseyside, Greater Manchester, Cheshire and Cumbria.

## 42.62 Noting the disclaimer at HM Land Registry – freehold property

Where there is a disclaimer of a solely owned freehold property the official receiver as liquidator or trustee must arrange for a copy of the notice of disclaimer to be sent to HM Land Registry to enter notice of the disclaimer against the property<sup>1</sup>. Sending a copy of the notice of disclaimer is not necessary where the disclaimer was issued in respect of a jointly owned property as this has no effect on the legal title to the property – which would remain with the joint owner.

A covering letter seeking confirmation that the disclaimer will be noted should accompany the documents. It is likely that the Registrar will refrain from registering the disclaimer until the period allowed for applying for a vesting order has expired (see paragraph 42.85).

See paragraphs 42.77 and 42.78 for more information of the effect of a disclaimer on freehold property.

The procedure detailed above may also be followed in the very unlikely event that the official receiver, as liquidator, has property vested in them<sup>2</sup>. In such circumstances a copy of the court order vesting the property in the official receiver should also be sent to Land Registry.

1. Rule 19.2(3)

2. Section 145(1)

## 42.63 Noting of the disclaimer at HM Land Registry – leased property

As explained in chapter 7 certain leases are subject to compulsory registration at the land registry, whilst some others can be registered on a voluntary basis. If the official receiver is disclaiming a solely-held registered lease then a copy of the notice of disclaimer should be sent to HM Land Registry in line with the guidance in the preceding paragraph.

This would not be necessary where the lease is held in the joint names of the insolvent and a third party (see preceding paragraph for an explanation).

## 42.64 Land Registry certificate – suggested form of wording

Occasionally, (usually in connection with an application to determine a lease) the Land Registry may require a certificate to be provided in connection with the registration of a disclaimer.

If required, a suggested form of wording for the certificate required to ensure that a disclaimer is registered at the Land Registry (see paragraph 42.62) would be:

“I, [official receiver’s full name and address] certify:-

On [date of bankruptcy order] a bankruptcy order was made against [bankrupt’s name] in the [name of court]. I am trustee of the bankrupt’s estate.

The bankrupt is the registered proprietor of the land in title number [title number] and at the date of the bankruptcy order the bankrupt had a legal title to the property.

The bankrupt’s legal title to the property forms part of the bankrupt’s estate and has been vested in me under section 306 of the Insolvency Act 1986.

On [date] I disclaimed my interest in the above title pursuant to sections 315 and [317(leasehold)/318(dwelling house)] of the Insolvency Act 1986. Notice of the disclaimer was served pursuant to rules 19.3, 19.4 and 19.5 of the Insolvency (England and Wales) Rules 2016 on [date]. I am not aware of any application to the court for a vesting order pursuant to section 320 of the Insolvency Act 1986.

Signed: [official receiver] Date: [date]”

## 42.65 Additional notices

The official receiver is not limited to serving notice on those persons mentioned at paragraph 42.56. Notice may be served on any person where the official receiver considers this to be appropriate. An example of this may be where notice is served on the bankrupt in respect of a disclaimer of a right of action to avoid any continuation of the claim<sup>1</sup> (see paragraph 42.27).

Where a solicitor has been acting for any of the parties mentioned in paragraph 42.56 a copy of the notice should be also sent to the solicitors.

1. Rule 19.6

## Effect of a disclaimer

### 42.66 Disclaimer presumed valid/effective

Any disclaimer of property by the official receiver as liquidator/trustee is presumed valid and effective, unless it can be shown that they are in breach of their duty in respect of giving notice of disclaimer (see paragraphs 42.54 to 42.56).<sup>1, 2, 3</sup>

1. Rule 19.10

2. Section 315

3. Insolvency Act 1986 section 319

## 42.67 Effect of disclaimer – general

A disclaimer operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the insolvent in or in respect of the property disclaimed (in this context “determine” means “to bring to an end”) and discharges the trustee from any personal liability in respect of that property as from the commencement of their trusteeship. The rights and liabilities of any other person are not affected, except so far as is necessary to release the insolvent estate, the insolvent and the trustee from any liability<sup>1, 2</sup>. When the disclaimer becomes effective the official receiver should cancel any insurance policy they have obtained in accordance with the advice in chapter 14.

1. Section 178(4)

2. Section 315(3)

## 42.68 Effective date of a disclaimer – general rule

The disclaimer will generally be effective from the date the notice is authenticated by the official receiver<sup>1</sup>.

There are, though, exceptions to this general rule.

1. Rule 19.2(7)

## 42.69 Effective date of disclaimer – exceptions to general rule

Where the disclaimer is in respect of a property held under a lease, or of any dwelling house<sup>1</sup>, the disclaimer will not take effect unless every person who is a mortgagee or underlessee (for leased properties)<sup>2, 3</sup> and/or every person in occupation of or claiming a right to occupy the property (for dwelling houses)<sup>4</sup> has been served with the notice of disclaimer.

Further, in these circumstances, the disclaimer will not take effect until 14 days after the day on which the last notice of disclaimer was served on an interested person, unless an application is made for a vesting order (see paragraph 42.86)<sup>5, 6, 7</sup>. In the circumstances where an application is made for a vesting order, the effective date of the disclaimer will be decided by the court when dealing with that application<sup>8, 9</sup>.

An application for a vesting order made after the 14-day period referred to above does not act to suspend the disclaimer.

1. Section 385(1)

2. Section 179

3. Section 317

4. Section 318

5. Section 179(1)(a)

6. Section 317(1)(a)

7. Section 318(1)(a)

8. Section 317(1)(b)

9. Section 318(1)(b)

## 42.70 Purpose of delay in effective date of disclaimer

The reason for the delay between the date of the service of the notice of disclaimer and the date that it takes effect is to ensure that those who may have an interest in the property have an opportunity to take steps to protect that interest. An example of this would be where a fellow occupier of a leased property may be adversely affected by the early termination of the insolvent's interest in that property. In these circumstances, the occupier would have the opportunity to take over the lease and, perhaps, avoid an eviction.

## 42.71 Effective date where delay

Where the effect of the disclaimer is delayed and there has been no application for a vesting order within the 14 day period the disclaimer will retrospectively take effect from the date that it is authenticated by the official receiver.

## 42.72 Loss or damage resulting from the issue of a disclaimer

Any person suffering loss or damage in consequence of the operation of a disclaimer is deemed to be a creditor of the insolvent estate to the extent of the loss or damage suffered and may prove in the estate for the resultant loss. Examples of this would be for outstanding and/or future rent under a lease or the cost of disposing of disclaimed hazardous waste<sup>1, 2</sup>.

1. Section 178(6)

2. Section 315(5)

## 42.73 Valuation of loss or damage resulting from the issue

The court has held<sup>1</sup> that the appropriate basis on which to calculate the amount due to the landlord would be to calculate the value of any sums payable by the tenant to which the landlord would have been entitled during the residue of the term of the lease (allowing for a reduction for accelerated payment), then to give credit to the landlord for the value of what was left to them after the disclaimer (for example, the market value of the residue of the lease) and, finally, add or subtract an amount depending on the state in which the tenant had left the property. Additionally, some consideration must be given to the effect of any vesting order<sup>2, 3</sup>.

1. *Re Park Air Services plc* [ChD [1996] WLR 649

2. Section 181(5)

3. Section 320(5)

## 42.74 Liability of sureties or previous tenants

Where a landlord has suffered a loss as a consequence of the operation of a disclaimer, this loss may be claimable from sureties of the insolvent or former tenants of the property<sup>1</sup>. This may be of particular concern where the official receiver is dealing with the affairs of an insolvent that is a surety or former tenant in relation to a property subject to a disclaimer (see paragraph 42.12).

1. *Hindcastle v Barbara Attenborough Associates Ltd* [1996] 1 All ER 737

## 42.75 Effect of disclaimer on leased property

Where an original lease held in the sole name of the insolvent is disclaimed, the effect is to determine (end) the lease, whereas if an assigned lease is disclaimed, it reverts to the assignor (see paragraph 42.12). Where the lease is jointly-held then the legal title to the lease would remain with the joint tenant.

## 42.76 Effect of a disclaimer on a leasehold with sitting sub-tenants

As previously explained, the effect of a disclaimer is to end the insolvent's interest in the disclaimed property and, therefore, any sub-leases created as a result of the insolvent's interest in the lease would also be ended. However, despite what may be thought, this does not end the sub-tenant's right to remain in possession during the term granted by the sub-lease, so long as the terms of the head-lease are complied

with. The landlord does, though, have a right to re-enter the property if the terms of the head-lease are not complied with<sup>1</sup>.

1. *AE Realisations* [1987] 3 All ER 83

## 42.77 Effect of disclaimer on freehold property - jointly owned

The liquidator's/trustee's interest in a jointly-owned freehold property is in the beneficial interest in the property, rather than in the legal title to the property itself (see chapter 28). As explained earlier the effect of a disclaimer is to determine (end) the insolvent's interest in the property – thereby, effectively leaving the interest without an owner. Assuming no vesting order is made, the interest would become bona vacantia (see chapter 54) and would vest in the Crown. Property that is bona vacantia is dealt with by the [Bona Vacantia](#) division of the Government Legal department. They are not required, as a matter of law, to assert a claim to the property, which is, or may be, bona vacantia.

Both bona vacantia property and property under escheat (see paragraph 42.78) in the Duchies of Cornwall (which covers the modern county of Cornwall) and Lancaster (which covers the modern county of Lancashire and parts of Merseyside, Greater Manchester, Cheshire and Cumbria) falls to the respective Duchy. The solicitor to these Duchies is [Farrer & Co](#).

## 42.78 Effect of disclaimer on freehold property – solely owned

interest is in the legal title to the property itself. The effect of a disclaimer ending this interest would leave the property without an owner. Where freehold property is left without an owner it passes at common law, by escheat (a law dating back to feudal times making ownerless land the property of the Lord holding the superior interest, which, in modern times, tends to be the Sovereign), to the Crown<sup>1</sup>. The solicitors who deal with these matters on behalf of the Crown are [Burgess Salmon](#).

Both bona vacantia property and property under escheat in the Duchies of Cornwall (which covers the modern county of Cornwall) and Lancaster (which covers the modern county of Lancashire and parts of Merseyside, Greater Manchester, Cheshire and Cumbria) falls to the respective Duchy. The solicitor to these Duchies is [Farrer & Co](#).

1. *Scmlia Properties v Gesso Properties* [1995] BCC p793

## 42.79 Effect of disclaimer on fixtures

As regards fixtures, the general principle in law is that fixtures that are permanently attached to the building pass with the lease. An exception to this general rule would be in respect of trade fixtures (those fixtures that have been fixed for the purpose of trade or manufacture). Trade fixtures, and all loose fittings, pass too the estate. Therefore, a disclaimer of a lease would also cover those fixtures that pass with the lease.

The court may, however, make a special order as to fixtures, tenant's improvements and other relevant matters where there has been an application for a vesting order (see paragraph 42.86)<sup>1, 2</sup>.

Further details regarding fixtures can be found in chapter 40.

1. Section 179(2)

2. Section 317(2)

## 42.80 Effect of disclaimer on shares

Where the official receiver issues a disclaimer on partly paid shares, it may be necessary to admit a proof for the amount of any unpaid calls, and for an estimated amount in respect of the contingent liability for uncalled capital.

## 42.81 Effect of disclaimer on surplus in a lease or other property

Generally, the ending of the insolvent's interest in property by virtue of a disclaimer would also, obviously, end any interest in the realisable value, or surplus realisable value of the property.

It has been held, however, that the court may make an order vesting surplus proceeds in the estate where a vesting order is made. See paragraph 42.89 for further information; if no application for a vesting order has been made see paragraph 42.93.

## 42.82 Rent deposits

It is likely that any rent deposit held by a landlord following the disclaimer will be used to off-set outstanding rent. If not, the question of ownership of the deposit may rest in the wording of the lease – for example, the lease may state that the deposit is forfeit in the event of the issue of a disclaimer, or the insolvency of the tenant.

Assuming neither of these options settle the matter, then the deposit would become bona vacantia.

## Vesting orders

### 42.83 Vesting orders – general

Where a liquidator or trustee has disclaimed their interest in property, it is open to certain persons to make application to court for the property to be vested in them<sup>1, 2</sup>.

There should normally be no need for the official receiver to be party to, or otherwise involved in, an application for a vesting order. However, see paragraph 42.89 where the Official Receiver may consider claiming an interest in surplus proceeds.

1. Section 181(3)

2. Section 320(3)

### 42.84 Persons who may apply for a vesting order

Persons who may apply for a vesting order are as follows:

- any person who claims an interest in the disclaimed property<sup>1, 2</sup> or
- any person who is under a liability in respect of the disclaimed property, not being a liability discharged by the bankruptcy<sup>3, 4</sup>, and
- (in respect of bankruptcy only and where the disclaimed property is property in a dwelling house) any person who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house, even if only part of the disclaimed property is a dwelling house<sup>5, 6</sup>

1. Section 181(2)(a)

2. Section 320(2)(a)

3. Section 181(2)(b)

4. Section 320(2)(b)

5. Section 320(2)(c)

6. Hunt v Conwy CBC [2013] EWHC 1154 (Ch) [1]

## 42.85 Time limit for an application for a vesting order

An application for a vesting order must be made within three months of the applicant becoming aware of the disclaimer, or of them receiving a copy of the liquidator's/trustee's notice of disclaimer<sup>1</sup>. This time limit is not explained in the notice of disclaimer or the letter<sup>2</sup> that accompanies it when served on the interested party. Where the official receiver is aware that a party has indicated an intention to apply for a vesting order, it would be appropriate to bring the time limit to their attention.

The period of three months may be extended at the discretion of the court<sup>3</sup>.

1. Rule 19.11(2)

2. NODIS

3. *W H Smith Ltd v Wyndham Investments Ltd* [1994] BCC 699

## 42.86 Application for a vesting order

The application for a vesting order must be accompanied by a witness statement that:

- sets out the type of the application (i.e., whether it is as a claim on the property, an undischarged liability or occupation of a dwelling house)<sup>1</sup>
- specifies the date on which the notice of disclaimer was received, or otherwise the date on which the applicant became aware of the disclaimer<sup>1</sup>, and
- specifies the grounds for the application and the order desired<sup>1</sup>

1. Rule 19.11(3)

## 42.87 Notice of hearing to be given to liquidator or trustee

On receiving the application for a vesting order, the court will set a hearing date and venue. The applicant is required to give the liquidator or trustee notice of the date, time and venue for the hearing, accompanied by copies of the application and related witness statement, no later than 5 business days before the date fixed<sup>1</sup>.

1. Rule 19.11(4) (5)

## 42.88 Making of a vesting order

The court, on hearing the application, may make an order vesting the disclaimed property in, or for its delivery, to:

- a person entitled to it or a trustee for such person<sup>1, 2</sup>
- a person subject to a liability in respect of the disclaimed property<sup>1, 2</sup> (where it would be just to do so for the purpose of compensating that person in relation to their liability<sup>3, 4</sup>, or
- (in a bankruptcy) where the disclaimed property is a dwelling house, any person who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house<sup>5</sup>

A conveyance, assignment or transfer is not needed to complete a vesting order<sup>6, 7, 8, 9</sup>.

See also paragraph 42.91 in respect of vesting orders made in respect of properties held under a lease.

1. Section 181(3)(a)(b)

2. Section 320(3)(a)(b)

3. Section 181(4)

4. Section 320(4)

5. Section 320(3)(c)

6. Section 181(6)

7. Section 320(6)

8. Law of Property Act 1925 section 52

9. Law of Property Act 1925 section 42

## 42.89 Vesting order to be made on terms court thinks fit

On considering an application for a vesting order, the court has discretion to make the vesting order on such terms as it thinks fit<sup>1, 2</sup>. When making a vesting order, the court has the power to order that any surplus, in which no other person had claimed an interest, resulting from the sale of the disclaimed property should be given back to the liquidator or trustee for the benefit of creditors<sup>3</sup>.

This situation may arise where the property turns out to have a value in excess of that originally assessed by the official receiver, or where charges against the property are lower than anticipated. If, on receiving notice of an application for a vesting order, the official receiver forms the opinion that there may be a value to the estate of the asset they should bring this to the attention of the court so that an order can be made as to how to deal with any surplus.

1. Section 181(3)

2. Section 320(3)

3. Lee v Lee [1998] 2 BCLC 219

## 42.90 Vesting order can apply to part of the property

It has been held that a vesting order can apply to part of the property disclaimed, where, for example, only part of the property is a dwelling house (see paragraph 42.84)<sup>1</sup>.

1. Hunt v Conwy CBC [2013] EWHC 1154 (Ch) [1]

## 42.91 Vesting orders relating to leasehold property

Where the court makes a vesting order in respect of property held under a lease, it must be on the terms of making that person:

- subject to the same liabilities as the insolvent was under at the date of the commencement of the winding-up or presentation of the bankruptcy petition<sup>1, 2</sup>, or
- if the court thinks fit, subject to the same liabilities and obligations as that person would be subject to if the lease had been assigned to them at the date of the commencement of the winding-up or presentation of the bankruptcy petition<sup>3, 4</sup>

Where persons decline to accept an order made under these terms, the court may make adjustments to interests in the property concerned<sup>5, 6</sup>.

1. Section 181(1)(a)

2. Section 321(1)(a)

3. Section 182(2)(b)

4. Section 321(1)(b)

5. Section 182(3) and (4)

6. Section 321(3) and (4)

## 42.92 Bankrupt applying for vesting order

A vesting order cannot be made in favour of a bankrupt, except in the circumstances where the property is a dwelling house and the bankrupt was in occupation of or entitled to occupy the dwelling house (see paragraph 42.54). For the purpose of a

disclaimer, the term “dwelling house” can be taken to include leased, as well as freehold property.

Apart from where the disclaimed property is a dwelling house (see above), and as explained at paragraph 42.84 the only persons who can be the beneficiaries of a vesting order are those entitled to the property, or those subject to a liability under the property – neither of which would apply to the bankrupt.

Obviously, the bankrupt would have no liability under the property by virtue of the making of the bankruptcy order.

As regards whether the bankrupt can claim an entitlement to the property, it has been viewed that any entitlement that the bankrupt may have had would be ended by the operation of the disclaimer, as the effect of the disclaimer is to bring to an end the interest of the bankrupt and their estate in the property<sup>1, 2</sup>.

1. Section 315(3)(a)

2. *Skinner v Hood* [2005] EWCA Civ 1634

## 42.93 Official Receiver claiming surplus proceeds of sale following disclaimer

The case of *Lee v Lee* [1998] 2 BCLC 219 provided that where a disclaimed lease had vested in a mortgagee and, after realisation and payment of the mortgage debt and other charges, a surplus resulted, the trustee was entitled to recover that surplus for the benefit of the bankrupt's estate.

Accordingly, where the Official Receiver is made aware of a surplus following an earlier disclaimer they should consider making an application<sup>1</sup> to the Court, based on the decision in the *Lee* case, for an order for the surplus funds to be paid to the Official Receiver for the benefit of the bankruptcy estate. Prior to making any application the Official Receiver will need to consider the circumstances of the case and of the disclaimer.

Where such an application is to be made then the Official Receiver should liaise with the Government Legal Department (*Bona Vacantia*) and any other parties they consider may have a claim on the surplus funds.

Where an application is to be made or is pending then the Official Receiver should take steps to ensure the funds are secured until the application is determined either by way of a solicitor's undertaking to hold them or by having the funds paid into Court.

1. Section 363(1)