



Précis Paper

Aprile v State of Queensland, in the matter of Leftwich [2021] FCA 471 - Disclaimers of Property

A discussion about the case of *Aprile v State of Queensland, in the matter of Leftwich* [2021] FCA 471, including a discussion about disclaimers of property, vesting via escheat and orders.

Discussion Includes

- Key Facts
- Disclaimer of Property by Trustee in Bankruptcy
- Escheat
- Effect of Disclaimer on Encumbrances Registered on Title
- Applicants
- Orders and Surplus of Proceeds
- Determination on the Papers
- Options Available to a Mortgagee

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Aprile v State of Queensland, in the matter of Leftwich [2021] FCA 471 - Disclaimers of Property

In this edition of BenchTV, David Keane (Barrister, Bar Association of Queensland, Brisbane) and Samantha Amos (Barrister, Bar Association of Queensland, Brisbane) discuss the case *Aprile v State of Queensland, in the matter of Leftwich* [2021] FCA 471.

Key Facts

1. The case (*Aprile*) involved an application for a vesting order of real property under the *Bankruptcy Act 1966* (Cth). The property had previously been disclaimed by the trustee in bankruptcy. The case provides a helpful summary of the law relating to section 133 of the *Bankruptcy Act 1966* (Cth) and is also an example of where the application is brought by a co-owner rather than a mortgagee.
2. In this case, the applicant, Ms Aprile, was a co-owner of real property in Robina purchased in 2013 with Mr Leftwich. Ms Aprile and Mr Leftwich were joint tenants prior to that joint tenancy being severed by his bankruptcy. He became bankrupt in 2018 and his trustee in bankruptcy disclaimed his interest in the property in February 2021. Ms Aprile had been making the mortgage payments by herself since his bankruptcy. She filed the application to disclaim the property so that she could sell it and discharge the mortgage over it.

Disclaimer of Property by Trustee in Bankruptcy

3. Sections 133(1AA) and 133(1AB) of the *Bankruptcy Act 1966* (Cth) provide the circumstances in which section 133 will apply; that is, where any part of the property of the bankrupt consists of land of any tenure burdened with onerous covenants or property that is unsaleable or is not readily saleable.
4. Section 133(1AB) provides that where any part of the property of the bankrupt consists of property, being neither land nor an interest in land, and it may reasonably be expected that the costs, charges and expenses that the trustee would incur in realising the property would exceed the proceeds of realising the property, the trustee in bankruptcy is empowered to at any time disclaim the property. In effect, it is a way that a trustee in bankruptcy can relieve themselves of onerous financial obligations over the property.
5. Section 133(2) provides that the effect of the disclaimer operates immediately to determine the rights, interests and liabilities of the bankrupt and in his or her property in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him or her, but does not, except so far as it is necessary for the purpose of releasing the

bankrupt and his or her property and the trustee from liability, affect the rights or liabilities of any other person.

6. The effect of the disclaimer is not dependent upon registration of a notice of the disclaimer by the trustee in bankruptcy. This was confirmed in the decision of *Aprile* at paragraph 13.
7. Property which is burdened with onerous covenants includes financial obligations which can be enforced against the landowners. In *Re Tulloch Ltd (in liq) and the Companies Act* (1977) 3 ACLR 808 at 8112, the Court found that in practical terms, the trustee in bankruptcy may choose to disclaim property where the mortgage exceeds the value of the property.
8. Section 133 provides the circumstances where leave is required of the court to disclaim certain property. These are essentially in relation to leases and contracts. A trustee is not entitled to disclaim a lease without the leave of the court unless they have given an appropriate notice and there has been no response within 28 days. A trustee is not entitled to disclaim the contract other than an unprofitable contract without the leave of the court.
9. Section 133(6) provides that, where the trustee has for a period of 28 days after receipt of the application, or such extended period as is allowed by the court, declined or neglected to disclaim the property, the trustee is not entitled to disclaim the property. In the case of contract, the trustees are deemed to have adopted it.
10. There is a question as to whether a trustee who was never registered on title and only ever held the equitable title to the property could in fact disclaim the full legal title.
11. Justice Edelman discussed two views as to the nature of the interest disclaimed under section 133 in *Commonwealth Bank of Australia v State of Queensland, in the matter of Ginn* [2016] FCA 1337.
12. One view is that the disclaimer operates to determine all the trustee's title and interests in relation to the bankrupt's property. Where the title is not registered in the name of the trustee, then the only title to disclaim is the equitable title, and this could have the effect that the bankrupt continued to hold the notion of legal title.
13. The other view is that although the trustee had only equitable title in relation to the disclaimed property, the effect of the disclaimer was to disclaim rights that the trustee did not have. Section 133(2) determines all rights and interests of the bankrupt in respect of the property disclaimed (the trustee's equitable title).
14. Justice Edelman proceeded on the assumption that if the second construction is correct, the dominant view in the authorities is that the disclaimer by the trustee immediately caused all the title to the property to escheat to the Crown.
15. In *Australia and New Zealand Banking Group Limited v State of Queensland, in the matter of McFarlane (a Bankrupt)* [2017] FCA 696 at paragraph 17, Justice Derrington held that section 133(1) enables a bankruptcy trustee to disclaim the totality of ownership, rights,

titles and interests in relation to the land owned by the bankrupt and that is so notwithstanding that legal title to that land has not vested in the bankruptcy trustee.

Escheat

16. The effect of the trustee in bankruptcy disclaimer is that the previously held interest in the property will vest via escheat in the Crown in the right of the State of Queensland for real property in Queensland (or the relevant state in Australia).
17. Escheat provides for the reversion of real property to the Crown. It is an incident of the doctrine of tenure and ensures that no land in which the Crown has granted an interest is without a legal owner.
18. In *National Australia Bank Limited v State of New South Wales* [2014] FCA 298, it was said that escheat signifies when land tenure returns to the ward or sovereign by whom the tenure was created.
19. The uncertainties regarding the practical effect of escheat on property was considered by Justice Edelman in *Westpac Banking Corporation v State of Queensland* [2016] FCA 269 at paragraphs 32 to 36. Those include whether the escheat is absolutely to the Crown because the Crown has powers to make vesting orders in respect of the disclaimed property, and whether it escheats to the Crown in the right of the State or the Commonwealth.
20. However, it is now commonplace that the full and complete title to disclaim probably vests via escheat to the Crown in the right of the State. This was considered by Justice Derrington in *Aprile* at paragraphs 12 and 13. Previous authorities had suggested that the Crown is a mere temporary repository of the title because it is still subject to the Court's powers to make a vesting order under section 133 of the *Bankruptcy Act 1966* (Cth).
21. There seems to remain some tension with Justice Derrington's view in *Aprile* given the State only holds the land until there is a vesting order under 133(9) and there is no time limit for making such an order. There also remains further controversy about whether the State is entitled to any surplus proceeds.

Effect of Disclaimer on Encumbrances Registered on Title

22. Section 133(2) of the *Bankruptcy Act 1966* (Cth) provides the disclaimer does not affect the rights or liabilities of a person other than to release the bankrupt and the trustee's liability. The title is vested in the Crown by escheat and remains subject to any securities attaching to that land. The fee simple remains encumbered by those security interests.
23. In this case, the disclaimer had the effect of releasing Mr Leftwich from his obligations under the loan agreement, but did not otherwise affect co-owner Ms Aprile's liability to

pay under the mortgage, nor did it give the bank an ability to otherwise realise its registered security or enforce it against the State of Queensland.

24. It is common that these types of applications be brought by a bank where the property is solely owned by one person, and where he or she becomes bankrupt and the trustee in bankruptcy has disclaimed the property before the bank can serve its required notices under the National Credit Code (Schedule 1 *National Consumer Credit Protection Act 2009* (Cth)) and the *Property Law Act 1974* (QLD) to exercise its power of sale. As the property is escheated to the Crown, the Crown has no liability to pay under any loan agreement and the mortgage is not enforceable against the Crown. The bank is left in a position where it cannot possibly realise its security other than through an order under section 133(9).

Applicants

25. A person with an interest in the fee simple, such as the mortgagee, may make an application under section 133 of the *Bankruptcy Act 1966* (Cth). A person who is under a liability not discharged by the Act in respect of the disclaimed property also has standing.
26. Section 133(9) is a discretionary power. The Court must be satisfied that it is just and equitable for a disclaimed property to be vested in the applicant.
27. In *Aprile* at paragraph 13, the Court cited *Australia and New Zealand Banking Group Limited v State of Queensland, in the matter of McFarlane (a Bankrupt)* [2017] FCA 696 and *ING Bank (Australia) Limited v State of Queensland, in the matter of Watson* [2017] FCA 411 and considered that prima facie, it is just and equitable to vest title to the disclaimed fee simple interest in land in an unsatisfied security holder whose security exists over that interest because the making of an order removes all doubt as to the veracity of the action by a security holder to recover their debt, to refuse to make an order would diminish the value of securities including registered securities, the disclaiming by the trustee strongly indicates that the security holder's claim exceeds the land's value, and the security holder has an interest to realise the land for the highest value.
28. In the circumstances in *Aprile*, Justice Derrington considered it just and equitable for the orders to be made. The orders were not opposed by either the State or the bank.

Orders and Surplus of Proceeds

29. In exercising its discretionary power, a court can make any orders on any terms that it considers just and equitable.
30. In *Aprile*, because Ms Aprile was already burdened by the mortgage, it was appropriate to vest the entire interest to her. No order for account was made in *Aprile* because the applicant was a joint owner and the Court considered it just and equitable for her to retain any surplus if there was any after the discharge and the expenses.
31. Where the mortgagee is the applicant, the orders usually provide for the property to vest in the mortgagee. The mortgage would be permitted but not required to deal with the

property as if it were exercising its powers as mortgagee in possession under the *Land Titles Act 1994 (QLD)*, *Property Law Act 1974 (QLD)* and the mortgage, including exercising the right to sell the estate in fee simple. In exercising any power of sale, the mortgagee is not required to serve any notices. The mortgagee is entitled to calculate the entirety of the debt secured and owing to the mortgage as if there had been no disclaimer and keep or deduct any proceeds of sale for its own use as if the money were secured by the mortgage, and then apply the proceeds of sale in usually a specific order: firstly in payment of any statutory charges, then in payment of the costs of the sale of the property and then in discharge of the mortgage, and lastly in discharge of any subsequent mortgages.

32. In *Aprile*, there was a significant delay between the bankruptcy and the disclaimer, and there can usually be a further delay between the disclaimer and the ultimate sale of the property. Had there been any increase in the value of the property between disclaimer and sale, it would not be appropriate for the mortgagee to retain any more than the debt owed.
33. There is at present an unresolved controversy as to whether the process should be paid into court or to the trustee in bankruptcy for distribution to creditors. In *Bank of Queensland Limited v State of Western Australia* [2020] FCA 442, the Judge stated that the funds paid into Court will remain there in the absence of any further application, requiring Court resources to manage them and depriving creditors of their benefit. The Judge followed the decision in *AMP Bank Ltd v New South Wales* [2014] FCA 1437, which was that the surplus was to be paid to the bankrupt estate for distribution to creditors or other persons entitled, as was envisaged under the original mortgage.
34. In *National Australia Bank Limited v State of Queensland, in the matter of Collins (a bankrupt)* [2020] FCA 1889, Justice Reeves decided that it was only appropriate to order the surplus be paid into court in circumstances where it was not expected that there would be any surplus.

Determination on the Papers

35. As evident in *Aprile*, the current practice is that applications are determined on the papers. Justice Derrington observed in *Commonwealth Bank of Australia v State of Queensland, in the matter of Hewton* [2021] FCA 22 (*Hewton*) that these types of applications are usually unopposed and do not involve any complex questions of fact or law.
36. The case of *Hewton* is useful in setting out the procedural requirements of an application under section 133 of the *Bankruptcy Act 1966* (Cth) that would assist in having any application which is not opposed determined promptly. Firstly, the proper parties to the application should be identified and given notice. The State is seen as a necessary respondent because the effect of the order under the section 133(9) is to deprive the

State of an interest in the property. Any person who has an interest in the property who is on the title is also a necessary party. Examples are given in that case of a person who lodged a caveat or who is a co-owner. It was observed in *Hewton* that it is general practice to not include the trustee in bankruptcy as a responding party, but it is prudent to give the trustee notice of the application.

37. Paragraph 20 of the judgment in *Hewton* provides a list of matters that must be demonstrated for a court to determine the application on the first return date. The procedural matters relate to service on the respondents, notification to any relevant person, such as the trustee in bankruptcy, and responses by those persons to the application. The relevant evidence relates to the existence of the land, the security holder's interest in the land and the entitlement to enforce its security.
38. Although the decision in *Aprile* did indicate that the State identified some problems in the application in its original form, those problems appeared to have been addressed by the applicant and the State did not ultimately oppose the application.
39. *Westpac Banking Corporation v State of Queensland* [2016] FCA 269 was an example of an application where it was opposed by the de facto partner of the registered proprietor. The de facto partner was in sole possession of the disclaimed property and claimed an equitable interest in it by reason of contribution towards the purchase price, payments to the mortgage and improvements to the property. The Court found that de facto partner had a beneficial interest in the property from a resulting trust and a constructive trust. However, any beneficial interest was still subject to the registered interest of the mortgagee. Ultimately, the matter resolved by mediation and the terms of the settlement were reflected in the judgment.

Options Available to a Mortgagee

40. There is now in Queensland potentially another option for a mortgagee where property has been disclaimed by the trustee in bankruptcy or liquidator. There is a similar mechanism to section 133 for disclaimer of a property by a liquidator under Part 5.6. Division 7A of the *Corporations Act 2001* (Cth). Section 84A of the *Property Law Act 1974* (QLD) was inserted on 25 May 2020 and applies to property where disclaimer occurs or takes effect after the commencement. If disclaimer has occurred prior to that date, a vesting order will need to be obtained. Section 84A applies in the circumstances specified in subsection (1).
41. The section also applies in relation to the mortgaged freehold property of the company that is being disclaimed by a liquidator. This means that a mortgagee may exercise a power of sale following the disclaimer of real property by trustee in bankruptcy or liquidator without the need for vesting orders under the *Bankruptcy Act 1966* (Cth) or *Corporations Act 2001* (Cth). However, notices must be given to all interested persons and

to the Registrar of Titles. The exercise of power of sale can then proceed after 30 days from the time the last notice was given.

42. Under section 88 of the *Property Law Act 1974* (QLD), any residual funds remaining after the sale of the property and all secured interests are to be remitted to the Supreme Court of Queensland. Section 84A does not apply to any exercise of a power of sale conferred by the *Land Titles Act 1994* (QLD).

BIOGRAPHY

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David has a broad civil and commercial practice. He has advised and appeared on behalf of clients in the Supreme Court, the Federal Court, the District Court and Magistrates Courts together with representation at Tribunals. He has experience in interlocutory applications, trials and appeals. He is also experienced in alternative dispute resolution, including mediation and arbitration.

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Since being called to the bar in 2019, Samantha has acted as Counsel Assisting in the Paradise Dam Commission of Inquiry and has been briefed in commercial, insolvency, administrative and taxation matters, appearing in the Supreme Court, Magistrates Court and the Queensland Civil and Administrative Tribunal (QCAT). Samantha has experience in taxation, bankruptcy and insolvency, contract disputes, property and tenancy matters and judicial review.

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