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Bona Vacantia Escheats (2020)
16th March 2020

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Bona Vacantia Escheats (2020)

The law as stated during this webinar is up to date as of **13th March 2020**

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Introduction

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What we are going to cover in this Webinar

- Quick Quiz
- Background to:
  - Bona Vacantia
  - Disclaimer
  - Escheat
- How property becomes bona vacantia
- Property held on trust
- Restoration of a company as a solution
- Disclaimer by the Crown and Vesting Orders and special rules in the cases of leases
- Worked Example 1
- Escheat
- Worked Example 2
- Final Quiz

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Quick Quiz to get started (don't worry there is a longer quiz later)

1. What does Bona Vacantia mean?

A) Vacant possession

B) Ownerless goods

C) Good vacation

2. What property can become bona vacantia? (choose all that apply)

A) Land and interests in land in England and Wales (both freehold and leasehold).

B) Liabilities, such as debts and mortgages.

C) Bank accounts and cash, including insurance policies.

D) Intellectual property.

3. What does the term "escheat" mean?

A) To cheat

B) It's a process whereby freehold land which becomes ownerless may, in some circumstances, fall to the monarch as the owner of the superior interest

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Key Concepts – Bona Vacantia, Disclaimer and Escheat

1. Bona Vacantia
- Comes from the Latin meaning "ownerless goods"
- For commercial property purposes, property that a company beneficially owned immediately before its dissolution passes to the Crown
- Part 31 of the Companies Act 2006 contains the relevant provisions

2. Disclaimer
- Note this webinar focuses on the Crown's disclaimer. We are not covering liquidators, trustees in bankruptcy or Official Receiver.
- The Crown has a statutory power to disclaim – s.1015 CA 2006
- Crown will usually disclaim or sell for full market value
- Reasons for Crown disclaimer – usually liability, risk or lack of cost effectiveness
- Effect on freehold property = title extinguished resulting in escheat to the Crown

3. Escheat
- From Latin meaning to fall away / be destroyed
- English land law's feudal roots – system of tenure with Sovereign as lord of all the land in the realm
- Only applies to freehold properties

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How does property become bona vacantia?

- Companies Act 2006, section 1012(1):

  When a company is dissolved, all property and rights whatsoever vest in or held in trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be bona vacantia and –

  (a) accordingly belong to the Crown, or to the Duchy of Lancaster or to the Duke of Cornwall for the time being (as the case may be), and

  (b) Vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall.
- "company" here means a company formed and registered under the Companies Act 2006 or one of its statutory predecessors (CA 2006, s. 1)
- Ways in which a company may be dissolved:
  - Striking off on an application by the company (CA 2006, s. 1003)
  - Striking off on notice by the registrar of companies (CA 2006, s 1000)
  - Dissolution on completion of insolvency process (Insolvency Act 1986, ss. 201-204; Sch B1, para 84)
- It may be that property other than freehold land may pass to the Crown on a disclaimer by a liquidator.

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Property held on trust by the company for another

- Such property is expressly excluded from the scope of bona vacantia passing by virtue of CA 2006, s 1012(1)
- What happens to the legal title?
- *Re Strathblaine Estates Ltd* [1948] 1 Ch 228: "… such legal estate must under the general law have passed to the Crown, subject to the trust, on the principle that there must always be some owner of a legal estate in fee simple"
- Hence the beneficiary of the trust can seek a vesting order pursuant to the Trustee Act 1925, s. 44 vesting the legal title in the beneficiary.
- Since the legal title has not passed as bona vacantia, the relevant respondent is not the Treasury Solicitor but the Attorney-General; see the Chancery Guide para 29.46.

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Restoration as a way to recover property of a dissolved company

- Restoration of a dissolved company to the register of Companies
- Part 31 of the Companies Act 2006 (CA 2006) creates two procedures:

1. Administrative restoration.
   a) Usually represents the most straightforward option
   b) Only available in certain limited circumstances
      i. Strike off must have been under sections 1000 /1001 of the 2006 Act or under section 652 of the Companies Act 1985
      ii. 6 year limitation period applies (section 1024, CA 2006.)
   c) Former member or director must apply
   d) Requires form RT01, Statement of Compliance and fee. Crown waiver letter required

2. Restoration to the register by court order
   a) See sections 1029 to 1034 of the 2006 Act
   b) Part 8 Claim. Crown waiver letter also required.
   c) A wider group may apply under this option than under administrative restoration
   d) Section 1029 CA 2006 – conditions for court to restore by order
   e) Limitation in most instances = 6 years of the company's dissolution

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Disclaimer by the Crown

- Under the Companies Act 2006, the Crown has power to disclaim property that has vested in it as bona vacantia; see section 1013.
- The provisions relating to disclaimer by the Crown are closely similar to the provisions in the Insolvency Act 1986 relating to disclaimer by liquidators and trustees in bankruptcy.
- Where the Crown disclaims, the effect is
  - That the property is deemed not to have vested in the Crown (s 1014), and
  - That the disclaimer "operates so as to terminate, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed." But it "does not, except so far as necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person."
- Suppose the property disclaimed is a lease, the company's rights in and liabilities under the lease will be brought to an end, but not the rights of a sublessee or a guarantor. See ***Hindcastle Ltd v Barbara Attenborough Associates Ltd*** [1997] AC 70. In this situation, the Crown will have no further role to play.
- If the property is freehold property, then the effect of the disclaimer is to terminate the freehold estate and the land goes by escheat to the Crown in a different capacity, as is addressed later.

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Vesting orders on disclaimer – Companies Act 2006, section 1017

- Section 1017 provides

  (1) The court may on application by a person who–

  (a) claims an interest in the disclaimed property, or

  (b) is under a liability in respect of the disclaimed property that is not discharged by the disclaimer,

  make an order under this section in respect of the property.

  (2) An order under this section is an order for the vesting of the disclaimed property in, or its delivery to–

  (a) a person entitled to it (or a trustee for such a person), or

  (b) a person subject to such a liability as is mentioned in subsection (1)(b) (or a trustee for such a person).

  (3) An order under subsection (2)(b) may only be made where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer.

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Three questions

- Who can apply?
  - A person who claims an interest in the disclaimed property
  - A person who is under a liability in respect of the disclaimed property that is not discharged by the disclaimer
- Who can the property be vested in?
  - A person entitled to the property
  - A person subject to a liability in respect of the the disclaimed property that is not discharged by the disclaimer
  - A trustee for either of such persons
- Where the order is sought in favour of a person subject to a liability, the order may only be made "where it appears to the court that it would be just to do so for the purpose of compensating the person subject to the liability in respect of the disclaimer"

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Special rules in case of leases

- Where the vesting order relates to leasehold property, the court must not make a vesting order in favour of an underlessee or mortgagee except on terms making that person either
  - Subject to the same liabilities and obligations as those to which the company was subject under the lease; or
  - If the court thinks fit, subject to the same liabilities and obligations as if the leases had been assigned to him.
- A person claiming under the company as underlessee or mortgagee who declines to accept a vesting order on such terms is excluded from all interest in the property

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Leon v Attorney General [2019] EWCA Civ 2047

- Facts (slightly simplified)
  - Westminster CityCouncil let a flat to a company
  - The company mortgaged the lese to a lender
  - Mr Leon, who was the sole owner of the company, joined in the mortgage as co-mortgagor
  - The company was dissolved and too long ago for it to be restored
  - After the company's dissolution, Mr Leon had acted as if he was the owner of the lease: he sublet and received rent from the sub-tenant, using that rent to pay the lender
  - Westminster discovered this and informed the Treasury Solicitor who then disclaimed the lease on behalf of the Crown.
  - Mr Leon then sought a vesting order pursuant to section 1017
  - Chief Master Marsh granted the order on the basis that Mr Leon was interested in the lease because he had a right to redeem the mortgage and secondly because he had a liability arising in respect of the property.
  - But, on appeal, that order was set aside by Arnold J [2019] Bus LR 618 and his decision was upheld on appeal by the Court of Appeal [2019] EWCA Civ 2047.

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Why?

- Mr Leon's first argument was that he claimed an interest in the property, giving him standing to apply, and that he was entitled to the property, making him a person in whose favour a vesting order could be made.
- But he had no right to the lease. As co-mortgagor he did not have any interest in the lease; he was simply a kind of surety. He had a right to redeem the mortgage, but he did not own the right of redemption. If he did redeem the mortgage, the effect would have been that the lease would stand in the hands of the lessee company (or whoever held its interest in the circumstances). So, Mr Leon's first argument failed.
- His second argument was that he was under a relevant liability. Plainly he was but the issue then was whether compensation purpose in section 1017(3) was fulfilled.
- The liability outstanding on the loan was £392,000. The lease of the flat was worth £800,000. So if the lease were vested in Mr Leon, he would get a windfall of some £400,000. The compensation did not have to match the liability exactly but there did have to be a reasonable relationship between the liability and the benefit that would accrue. Arnold J and the Court of Appeal held that the relationship was not reasonable here and so the condition that the vesting order must be to compensate for the relevant loss.

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Case study 1

- Facts:
  - In 2005 the freeholder A let a head lease of a block of 12 flats to B Ltd for a term of 99 years.
  - B Ltd has granted underleases of the flats for 99 years less ten days to a series of underlessees, T1 to T12.
  - In 2011 B Ltd was struck off for failing to file returns. Somehow this has gone unnoticed until 2019. It is too late to apply to restore B Ltd.
  - A wants to enforce the repairing covenant in the headlease.
  - Tenants, T1 to T4, want to get the repairs done and are willing to pay for them.
  - Tenants, T5 to T8, would like the repairs done but don't want to pay for them.
  - Tenants, T9 to T12, don't care about the repairs but certainly don't want to pay for them.
- What should A do?
- What should any of tenants T1 to T4 do, if A decides to do nothing?
- Can the other tenants get the repairs done for free?

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Case Study 1 - Outcome

- What should A do?
  - A as the freeholder and landlord to apply for a vesting order; see ***Leon v Attorney General*** [2019] EWCA Civ 2047
  - but is not entitled to the headlease as such and so cannot get a vesting order in favour of himself; see *re* ***ITM Corpn Ltd, Sterling Estates v Pickard UK Ltd*** [1997] 2 BCLC 389
  - A can seek a vesting order vesting the headlease in the tenants
  - Where there are differences between the tenants, the approach might be to vest the lease in the largest group
  - But here the court might well favour T1 to T4 since they are going to comply willingly with the terms of the headlease.

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Case study – outcome 2

- What should any of tenants T1 to T4 do, if A decides to do nothing?
  - They can apply for the head lease to be vested in themselves
  - They could also apply for the headlease to be vested in a trustee or nominee to hold it on their behalf; see *re Holmes, ex p Ashworth* [1908] 2 KB 812.

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Case Study 1 - outcome 3

- Can the other tenants get the repairs done for free?
  - No.

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Escheat

- Routes by which escheat arises:

1. The Crown disclaims bona vacantia freehold land that belonged to a now-dissolved company.

2. A liquidator disclaims freehold land belonging to a company in liquidation.

3. A foreign company that owned freehold land in England or Wales or Northern Ireland no longer exists. Note of caution re foreign companies being dissolved owning freehold land.

- Escheat takes place automatically and extinguishes a freehold title
- The Crown Estate becomes entitled (but not obliged) to take possession of the land.
- The Crown Estate can sell escheated land – to a suitable buyer and usually for market value.
- Escheat does not terminate any subordinate interests in the relevant land such as a lease or security interest.
- Burges Salmon LLP act on behalf of the Crown Estate.
- Vesting Order will be required to get out of this situation unless your client wants to pay market value.
- The "boomerang effect" – Crown Estate Commissioners is the Defendant in such cases
- Their general policy is that they won't positively agree to a vesting order but may, if they don't' oppose, indicate that they won't interfere with.

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Case Study 2

Facts:

- Freehold management company struck off the register in August 2009
- Dissolution went unnoticed for 7 years until 2016 when a leaseholder attempted to sell.
- All leases were short therefore value of the freehold reversion was considerable.
- November 2016 the Treasury Solicitor disclaimed the freehold interest which had vested as *bona vacantia*.
- Restoration was not an option therefore claimants sought vesting order under section 1017 CA 2006
- Claimants were the former shareholders in the Company and also the long leasehold owners of the flats in the Property. Cs therefore satisfied s. 1017 of the 2006 Act.

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Case Study 2 – the outcome

- Vesting Order was sought in the alternative under s. 181 of the 1925 Law of Property Act, which enables the court to "*create a corresponding estate and vest the same in the person who would have been entitled to the estate which determined had it remained a subsisting estate.*"
- Vesting orders were made by the court following escheat in both **UBS Global Asset Management (UK) Ltd v Crown Estate Commissioners** [2011] EWHC 3368 and **Quadracolor Ltd v Crown Estate Commissioners** [2013] EWHC 4842.
- Vesting Order provided for a direction to the Chief Land Registrar to create a new registered title corresponding to the title which was determined and to registered the same in the joint names of Cs.

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Thank you for listening!

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