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Vesting Orders: JPLA Talk

Presenter: Matthew Tonnard

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mtonnard@radcliffechambers.com



Overview: Part 1

- Possible scenarios
- What happens to property owned by a Company that has been dissolved i.e. *bona vacantia*
- What type of property?
- Disclaimer

Overview: Part 2

- Restoration of a Company to the register
- Vesting Orders:
 - Section 181 of the Insolvency Act 1986
 - Section 1017 of the Companies Act 2006
 - Section 181 of the Law of Property Act 1925
 - Section 44 of the Trustee Act 1925

Possible Scenarios

- Voluntary Strike Off:
 - Failure to dispose of Property
 - Inadequate record keeping
 - Liquidator becomes aware *after* the event
- Involuntary Strike Off:
 - Sections 1000 and 1001 of the Companies Act 2006
 - “... reasonable cause to believe that a company is not carrying on business or operation”
 - Common scenario = Company fails to make periodic filings

Bona Vacantia

- Section 1012 of the Companies Act 2006:
 - *"... When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution... are deemed to be bona vacantia"*
- *Bona Vacantia* – “Ownerless goods”
- What type of property?
- Property held by the dissolved company as trustee? (s.1012 of the Companies Act 2006)
- Overseas property?
- Overseas entities?
 - *Hamilton v Her Majesty’s Attorney-General* [2022] EWHC 2132 (Ch)

Who Deals with *Bona Vacantia*?

- **The Crown**

- The Duchy of Lancaster
- The Duchy of Cornwall

- **The *Bona Vacantia* Division (“the BVD”)**

The Crown/BVD can may either:

- Sell the property
- Disclaim (see section 1013 of the Companies Act 2006)

- **The Crown as a fiduciary?**

- *Potier v Solicitor for the Affairs of Her Majesty’s Treasury Crown Nominee for Bona Vacantia* [2021] EWHC 1524 (Ch)

- **What happens to security interests?**

- Property devolves subject to security

Disclaimer

Disclaimer by the Liquidator

- Occurs prior to property becoming *bona vacantia*
- Section 178 of the Insolvency Act 1986:
 - “... a liquidator may, by the giving of the prescribed notice, disclaim any onerous property and may do so notwithstanding that he has taken possession of it, endeavouring to sell it, or otherwise exercised rights of ownership in relation to it”
- “onerous”? = section 178(3) of the Insolvency Act 1986:
 - Any unprofitable contract; and
 - Any other property of the company 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
- What’s the effect?
 - Section 178(4) of the Insolvency Act:
 - “... operates so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed”
 - Freehold? Leases? All other property?

Disclaimer

Disclaimer by the Crown

- Section 1013 of the Companies Act 2006:
 - “Where property vests in the Crown under section 1012, the Crown’s title to it under that section may be disclaimed by a notice signed by the Crown representative, that is to say the Treasury Solicitor...”
- Procedure:
 - The Crown has 3 years, from the date of notice, to disclaim *bona vacantia* (section 1013(3) of the Companies Act 2006)
 - Notice of disclaimer to be executed within 12 months of an application by an interested party (section 1013(4) of the Companies Act 2006)
 - Notice of Disclaimer by the Treasury Solicitor (section 1013(1) of the Companies Act 2006)
 - Registered at Companies House (section 1013(6) of the Companies Act 2006)
 - Published in the London Gazette AND sent to interested parties (section 1013(7) of the Companies Act 2006)
- Procedure for Leasehold Property (section 1016(1) of the Companies Act 2006):
 - Service of the Notice of Disclaimer on potential underlessee and/or mortgagee
 - Disclaimer does not take effect until:
 - There has been no application for a vesting order within 14 days of service; or
 - Where an application has been made, but the court orders disclaimer is to take effect anyway

Disclaimer

Disclaimer by the Crown

- What is the effect? Section 1015(1):
 - “*The Crown’s 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*”
 - Note similarity with section 178(4) of the Insolvency Act – *Mistral Asset Finance Limited* [2020] EWHC 3027 (Ch) at [9]
- Leasehold Property:
 - Title is extinguished
 - Rights and obligations of third-parties? (see *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1997] AC 70)
 - Resurrect title? (see *Mistral Asset Finance Limited* [2020] EWHC 3027 (Ch))
- Freehold Property:
 - Any interest is extinguished AND the property *escheats* to the Crown Estate
 - Disclaimed property subject to security? (*Smlla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793)
 - Resurrect title? (see *Re Fivestar Properties Ltd* [2015] EWHC 2782 (Ch))

Disclaimer

Disclaimer by the Crown: *Escheat*

- Only applies to freehold land
- The process by which freehold land reverts to the Crown Estate (not the Crown)
- When property *escheats*:
 - Any *interest* in the property is extinguished
 - Registered title remains – Rule 173 of the Land Registration Rules 2003
- What does the Crown Estate do?
 - Take possession
 - Sell the property

Restoring a Dissolved Company

Administrative Restoration

- Sections 1024 – 1028A of the Companies Act 2006
- Points to note:
 - The application may only be made by a former director or former member of the Company
 - The Company must have been struck off under sections 1000 or 1001 of the Companies Act 2006
 - The application *must* be made within 6 years of dissolution

Restoration by Court Order

- Sections 1029 – 1034 of the Companies Act 2006
- Points to note:
 - Broader scope of applicants
 - No time limit for an application to restore for the purposes of commencing proceedings arising from personal injury (s.1030(1) of the Companies Act 2006)
 - All other cases, application to be made within 6 years of dissolution (s.1030(4) of the Companies Act 2006)

Restoring a Dissolved Company

Effect of Restoration

- Section 1032(1):
 - “The general effect of an order by the court for restoration to the registrar is that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register”
- What happens to *bona vacantia*?
- Restoration of foreign entities? (*Lizzium Ltd v Crown Estate Commissioners* [2021] EWHC 941 (Ch))
- What about property sold or disclaimed?
 - Restoration does not unwind disposition (s.1032(2) of the Companies Act 2006)
 - Disclaimed property does not amount to disposition (*Mistral Asset Finance Ltd v Registrar of Companies and HM Attorney General* [2020] EWHC 3027 (Ch) and *Re Fivestar Properties Ltd* [2015] EWHC 2782 (Ch))

Vesting Orders

Procedural Routes

- Section 181 of the Insolvency Act 1986
 - Where property has been disclaimed by the liquidator
- Section 1017 of the Companies Act 2006
 - Where property has been disclaimed by the Crown
- Section 181 of the Law of Property Act 1925
 - Where property has *escheated* to the Crown Estate
- Section 44 of the Trustee Act 1925
 - Where the now dissolved Company held property as a trustee

Vesting Orders

Section 181 of the Insolvency Act 1986

- Who can apply? (s.181(2) of the Insolvency Act 1986)
 - Individuals who claim to have:
 - An interest in the disclaimed Property; or
 - A liability in respect of the disclaimed Property
- Time limits? Rule 19.11(2) of the Insolvency Rules 2016
 - 3 Months
- Procedure: Rule 19.11(3) of the Insolvency Rules 2016
 - Witness statement:
 - Statutory basis for the application
 - Date on which the applicant received the notice of disclaimer, or otherwise become aware of disclaimer
 - Grounds of the application

Vesting Orders

Section 1017 of the Companies Act 2006

- Section 1017(1) and (2) – cf. with section 181 of the Insolvency Act 1986
 - Individuals who claim to have:
 - An interest in the disclaimed Property; or
 - A liability in respect of the disclaimed Property
- Procedure:
 - Part 8 Claim – Chancery Division of the High Court
 - Named Defendant: Attorney General
 - Detailed witness statement
- Time limits?

Vesting Orders

Section 181 of the Law of Property Act 1925

- “Where, by reason of the dissolution of a corporation either before or after the commencement of this Act, a legal estate in any property has determined, the court may by order 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”
- In simple terms – it must be established that there is a legal right or interest in the former estate i.e. by way of an option.
 - Intention is not good enough (*Lizzium Ltd v The Crown Estate Commissioners* [2021] EWHC 941 (Ch))
- Restored foreign company?
 - Section 181 of the Law of Property Act 1925 vs section 44 of the Trustee Act 1925
 - *Hamilton v Her Majesty’s Attorney-General* [2022] EWHC 2132 (Ch)

Vesting Orders

Section 44 of the Trustee Act 1925

- Subsections (1)-(7) – numerous scenarios whereby the court may make a vesting order
- Vest property in remaining trustee? (*Re Harrison's Settlement Trusts* [1965] 1 WLR 1492)
- Vest property in the beneficiaries? (*Re Godfrey's Trust* [1883] 23 Ch.D 205 and *Hamilton v Her Majesty's Attorney General* [2022] EWHC 2132 (Ch)) "

Concluding Remarks

- Be mindful of the various steps:
 - Property held by a dissolved company = *bona vacantia*
 - *Bona vacantia* = vested in the Crown
 - Sell the Property; or
 - Disclaim
 - Disclaimer by liquidator (during the course of liquidation) or disclaimer by the Crown (as *bona vacantia*)
 - Determines the rights and liabilities of the Company
 - Freehold land *escheats*
 - Is restoration an option?
 - Vesting Orders

Contact Details: mtonnard@radcliffechambers.com

Radcliffe Chambers

Radcliffe Chambers
11 New Square
Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
clerks@radcliffechambers.com

www.radcliffechambers.com

