



## Bona vacantia, escheat and company restoration – two conflicting decisions explored

Company dissolution and restoration, and its effects upon property of the company, is a difficult area to grapple with. Two recent decisions dealt with similar issues but with completely different outcomes. We analyse the decisions and which one should be viewed as correct.

### The background

Upon company dissolution, all property of companies vests in the Crown under the “bona vacantia” provisions of Part V, Chapter 2 of the Companies Act 2006 (CA 2006). This is the same whether dissolution occurs at the conclusion of liquidation, by voluntary dissolution or by motion of the Registrar of Companies.

The difficulty with real estate in particular arises with the ability of the Crown (usually acting through the Treasury Solicitor) to disclaim its interest in bona vacantia **after** dissolution has occurred, the effect of which is to destroy the freehold or leasehold estate in the land. At this point the land reverts to the Crown under the principles of “escheat”, an ancient mechanism stemming from the feudal principle that all land is owned by the Crown.

### The issues

The issue comes when the Crown disclaims bona vacantia, but the company is subsequently restored. What happens at this point? Does the land revert to the restored company, or is title lost forever? The issue was considered in two cases, the first decided by the English High Court (*In the matter of Fivestar Properties Limited sub nom In the matter of Bromwich Commercial Limited* [2015] EWHC 2782 (Ch)), the seconded by the Scottish Court of Session (Inner House) (*ELB Securities Limited v Alan Love and Preswick Homes Limited* [2015] CSIH 67).

Each case contained essentially the same issue, in that the Crown disclaimed its interest in real estate owned by each company **after** dissolution had occurred, and each company was subsequently restored to the register. The court was asked to determine whether the real estate re-vested in the company upon restoration.

### What did the courts decide and which approach is right?

In *Fivestar*, the High Court decided that the real estate did re-vest. The Court of Session decided that the property was permanently disappropriated in *ELB Securities*, however. So which approach is right?

It is suggested that *Fivestar* represents the better decision. The effect of section 1015 of CA 2006 is that the notice of disclaimer terminates a company’s interest in the relevant property **at the date of the notice** (i.e. disclaimer takes effect only **after** dissolution has occurred). Turning, then, to sections 1028 and 1032 CA 2006 (which concern the effect of restoration of companies), those sections state that the company is deemed to have continued in existence as if it had not been dissolved or struck off the register. The logical result of this (although not expressly set out) is that any property passing to the Crown under the bona vacantia rules is restored to it (see *Re C W Dixon Ltd* [1947] Ch. 251 at 255). As disclaimer of bona vacantia (escheat) is a post-dissolution event, the restoration “trumps” the escheat. This is the conclusion reached in *Fivestar*. It should further be noted that section 1034 confers protection upon the Crown for disposals of bona vacantia which occur between dissolution and restoration (the disposals are valid, but the Crown has to account for the company for any consideration received), however escheat is not a “disposal” as such and will not be preserved by this provision.

### What about disclaimers of onerous property in liquidation?

Disclaimers of real estate in liquidation also result in escheat of the property. Although this issue was not addressed in either decision, the difference is that with disclaimer in liquidation, the disclaimer occurs **during** the liquidation (i.e. **before** the company is dissolved), and so upon restoration there is no property to restore to a company.

## What does this mean for practitioners?

As will have been gathered, this is an obscure and somewhat abstract area of the law, but is still relevant and indeed a thriving area. Whilst *Fivestar* should be regarded as good law for UK-incorporated entities, the position becomes fiendishly complicated when dealing with the dissolution and restoration of overseas companies which own UK real estate. Specialist input should be sought at the earliest opportunity.

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