



Neutral Citation Number: [2021] EWHC 941 (Ch)

Case No: PT-2020-000965

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES (ChD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27/4/2021

Before:

MASTER CLARK

Between:

(1) LIZZIUM LIMITED
(a company incorporated in Jersey)
(2) CLAIRVALE LIMITED
(a company incorporated in Gibraltar)
(1)

Claimants

- and -

THE CROWN ESTATE COMMISSIONERS

Defendant

Harry Martin (instructed by **Maurice Turnor Gardner LLP**) for the **Claimant**

Hearing date: 9 February 2021

Approved Judgment

I direct that this approved judgment, sent to the parties by email on 27 April 2021, shall be deemed to be handed down on that date, and copies of this version as handed down may be treated as authentic.

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Master Clark:

1. This is an application by Pt 8 claim dated 8 September 2020 seeking a vesting order under section 181 of the Law of Property Act 1925. This provides:

“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.”

2. In summary, the application arises from the fact that the second claimant (“Clairvale”), a company incorporated in Gibraltar, was dissolved whilst it remained the owner of a freehold property in Newmarket known as Rutleigh Lodge (“the Property”). By the process known as ‘escheat’ the freehold therefore determined, and the land vested in the Crown. The claimants seek a vesting order in respect of the property – there is an issue as to which of the claimants is the appropriate company in which to re-vest the property. The claim is not opposed by the Crown.

Evidence

3. The claim is supported by the following evidence:
 - (1) a letter dated 25 November 2020 from Burges Salmon setting out the Crown’s position;
 - (2) the witness statement dated 25 November 2020 of Melanie Jane Livingston;
 - (3) the witness statement dated 1 December 2020 of Philip Vasquez.
4. Ms Livingston is and has since August 2017 been a director of Ananke Limited (“Ananke”), a Jersey incorporated company, which is the sole shareholder of Clairvale. As will be seen, the relevant events in this claim took place in 1997, so she has no direct knowledge of them. She describes herself as having endeavoured to collate as much as possible of the historic information regarding the claimants, the Property and the 1997 events.
5. The primary evidence in this case is therefore documentary. To the extent that Ms Livingston gives evidence as to matters not evidenced in the documents, she does not state the source of her information or belief, and this significantly diminishes the weight of her evidence.
6. Mr Vasquez is an authorised barrister and acting solicitor in Gibraltar. His witness statement helpfully sets out:
 - (1) the legal basis of Clairvale’s being struck off and dissolved;
 - (2) the process by which Clairvale was restored to the Register of Companies;
 - (3) the consequences of the restoration, including that Clairvale is deemed to have continued in existence as if its name had not been struck off.

Factual background

7. Clairvale was incorporated in Gibraltar on 26 July 1990.

8. On 29 April 1991 Clairvale was registered as the proprietor of the freehold of Warren Towers, Moulton Road, Newmarket, registered at HM Land Registry under title number CB113183 (“Warren Towers”).
9. On 8 November 1995 Clairvale was registered as the proprietor of the freehold of the Property: Rutleigh Lodge, Warren Hill, Cheveley, registered at HM Land Registry under title number CB189170.
10. Warren Towers is a large property with a value of approximately £4m. the Property is a much smaller bungalow, formerly the gatehouse of Warren Towers, with a value of approximately £375,000.
11. There is no evidence as to when the first claimant (“Lizzium”), a Jersey incorporated company, was incorporated. Ms Livingston’s evidence is that Lizzium acts as nominee for Ananke in its capacity as trustee of a family trust. The family trust is said to own Clairvale. This is, I assume, shorthand for saying that Ananke holds its 100% shareholding in Clairvale in its capacity as trustee of the family trust.
12. Ms Livingston’s evidence is that in 1997 a restructuring took place as part of which Clairvale transferred Warren Towers to Lizzium. Lizzium was registered as the proprietor of Warren Towers on 11 March 1997.
13. Her evidence continues at para 15:

“[the Property] ought to have been transferred with Warren Towers. However, [the Property] was overlooked in an administrative error. I understand it was wrongly assumed that it was part of the main title rather than a standalone piece of land. As part of the restructuring there was a valuation undertaken of all the properties. In one of these valuations it states that [the Property] had been purchased and incorporated into the demise of Warren Towers. I understand this was then taken as fact and going forward there was only reference to Warren Towers.”
14. Ms Livingston does not, however, state the basis of her understanding in the two instances mentioned. She also does not identify who “assumed” or who took “as fact” that the Property had been incorporated into Warren Towers.
15. The valuation referred to by Ms Livingston is exhibited by her. It is a valuation review report dated 31 December 1996 by Knight Frank stating

“We understand that since our initial valuation, [the Property] has been purchased and incorporated into the demise of Warren Towers. We have not been able to inspect [the Property] (which we advised has been comprehensively redeveloped), however an allowance has been made within our appraisal figure to reflect the inclusion of this unit.”
16. The meaning of this is not entirely clear. I accept however that the most likely meaning is that the title to the Property had been incorporated into the title of

Warren Towers. If so, the statement was in error. The title to the Property remained separately registered, with Clairvale registered as its proprietor.

17. On 21 December 1998, Clairvale was struck off the Register of Companies in Gibraltar and dissolved pursuant to s.267 of the Companies Act 1930. Mr Vasquez states that this provides:

“When the affairs or [*sic*] of the company have been completely wound up, the court shall make an order that the company be dissolved from the date of the order, and the company shall be dissolved accordingly.”

18. Clairvale’s dissolution caused its title to escheat to the Crown, as explained below.
19. In 2015 Lizzium sought to sell Warren Towers and Rutleigh. It then became apparent that Lizzium did not own the Property. By this time there was no physical boundary between the two properties.
20. On 11 June 2020 the Supreme Court of Gibraltar ordered that Clairvale be restored to the Register of Companies in Gibraltar, and it was restored on 24 September 2020.

Legal principles

21. The process of escheat occurs when a foreign company which owns land is dissolved, as was explained by Roth J in *UBS Global Asset Management (UK) Limited v Crown Estate Commissioners* [2011] EWHC 3368 (Ch), at [8]:

“The reference to an overseas company is significant. If the freehold had been held by an English company, then its real property interests would vest in the Crown as *bona vacantia* pursuant to what is now section 1012 of the Companies Act 2006, but that is not the case with an overseas company to which the Companies Act does not apply. Accordingly, for an overseas company holding land in England the old feudal law of land tenure continues to be relevant and the land will escheat to the Crown. Escheat, in essence, is a form of reversion in that when there is no longer any tenant holding the land the fee simple estate returns to the lord by whom the tenure was originally created. And as all land is originally derived from the Crown and it is assumed that there is no intermediate lord between the Crown and the freehold owner, the estate returns to the Crown upon the termination of the freehold. However, the Crown takes the land subject to subordinate interests, such as, for example, a subsisting lease (see the very helpful discussion of escheat considering a range of old authorities by Mr Stanley Burnton QC (as he then was) sitting as a Deputy High Court Judge in *SCLA Properties Limited v Gesso Properties (BVI) Limited* [1995] BCC 793).”

22. The power under s.181 is discretionary, so that even where the conditions for it is exercise are established, it is not inevitable that it will be exercised. The person in whose favour the power may be exercised is not restricted to the legal owner before the escheat i.e. the dissolved company, if restored. It may be exercised in favour of another person “who would have been entitled to the estate which determined had it remained a subsisting estate”.

23. I was referred to two cases in which the company remained dissolved, and the power was exercised to vest the estate in another person.
24. The first was *UBS Global* (referred to above), in which the facts were as follows. A company incorporated in the British Virgin Islands owned the freehold of a property in Shropshire. It granted a long lease of the property to two other companies. It then granted an option to purchase the freehold to the claimant, exercisable within 21 years for a price of £1. 6 years later the claimant sought to exercise the option to purchase the freehold. To do so, it had to serve notice to exercise the option on the company, and pay it £1. The claimant attempted to serve that notice in accordance with the terms of the option agreement, by post to the company's London office, and to its solicitors specified in the agreement. However, by this time, the company had been struck off the register and dissolved in the BVI. The letter to the company was returned undelivered, and the solicitors replied that they no longer acted for the company.
25. The judge held that the claimant had complied so far as it was able with the conditions of the option agreement validly to exercise the option. He held therefore that, had the company continued to exist and hold the freehold, it would pass to the claimant. He did not expressly deal with the payment of £1. He granted the claimant's application for an order under section 181 vesting the freehold in it.
26. In *Quadracolour Limited v Crown Estate Commissioners* [2013] EWHC 4842 (Ch), a vesting order was also made in favour of another person.
27. The company in *Quadracolour* was an English company, which owned the freehold of a property in London. The company sold part of the property to the claimant and granted an option to purchase the balance, a car park, for £1. The car park suffered from contamination from chemical storage tanks located under the ground. The option agreement included provisions for each side to take steps to operate the option:
 - (1) the company was to serve notice on the claimant that it no longer required the tanks, to take steps to procure the release of various rights and covenants to which the car park was subject, and to ensure that the tanks were emptied and made safe; and then to serve a further notice on the claimant;
 - (2) the claimant was to serve a counter notice requiring the company to convey the car park to it.
28. In practice, the claimant began using the car park immediately and did so for many years. The company took the steps necessary to pump out and make the tanks safe, and informed the claimant in correspondence that it had done this. There was no evidence that the company had taken any steps to release the rights and covenants affecting the car park.
29. 3 years later, the company was struck off the Register of Companies and dissolved, so that the car park passed to the Crown as *bona vacantia*. The Crown disclaimed the interest. That resulted in the freehold determining and the car park becoming vested in the Crown by process of escheat. This meant that the steps contemplated by the agreement could not be gone through.

30. The judge held that, although the company had not given formal notice that it no longer required the use of the tanks, the manner in which it expressed itself (when writing to the claimant) was only consistent with that understanding. Once the company no longer had any need for the tanks, it would, he held, have been bound to perform its obligations under the agreement had the claimant taken the necessary steps.
31. He went on to find, on the evidence, that the claimant would have, but for the dissolution of the company, gone through all the steps it needed to take to exercise the option, and would have been entitled to the conveyance of the car park. He therefore made an order under section 181 vesting the car park in the claimant.

Analysis and conclusions

Vesting the Property

32. In my judgment the court's jurisdiction to make an order under section 181 is engaged. By reason of the dissolution of Clairvale ("a corporation") the freehold estate in the Property ("a legal estate in any property") has determined.
33. As to whether the court should exercise this discretionary jurisdiction to create an estate corresponding to the Property and vest it in one of the claimants, I consider the following factors put forward by the claimants' counsel.
34. First, although I have no direct evidence of the circumstances in which Clairvale was dissolved, I accept that it is very likely that the decision to do so without transferring the Property out of it was mistaken, and I so find. The order sought will correct that mistake.
35. Secondly, if the mistake is not corrected, then the Crown will receive a windfall; and, as noted, the Crown does not oppose the claim.
36. Thirdly, in their letter dated 5 March 2020, the Crown's solicitors stated:

"The Crown Estate does not propose to take any action which might be construed as an act of management, possession or ownership in relation to the Property, since to do so may incur upon it liabilities with which the Property is, or may become, encumbered."
37. The claimants' counsel submitted that if an order is not made, the Property will, for practical purposes, remain ownerless for some time. However, I note that the Crown Estate is willing to sell the Property to Clairvale for its market value; and for this reason, I consider that this is not a significant factor. Linked to this factor is the fact that the boundaries of the Property, as indicated on the Land Registry plan, are no longer physically marked. Again, I consider this is not a significant factor, as they could be remarked if the Property and Warren Towers remained in separate ownership.
38. Fourthly, the claimants' counsel submitted that now that Clairvale has been restored, an order restoring its property would be consistent with the intent behind the companies legislation in both England and Gibraltar.

39. Sections 332(15) of the Companies Act 1930 and 415(7) of the Companies Act 2014 in Gibraltar provide that, once restored

“the company shall be deemed to have continued in existence as if its name had not been struck off”.

This legislation does not, however, have the extra-territorial effect of revesting English land in the Gibraltar company.

40. Section 1032 of the Companies Act 2006 in England provides that

“the general effect of an order by the court for restoration to the register is that the company is deemed to have continued in existence as if it had not been dissolved or struck of the register”

and that

“the court may give such directions and make such provision as seems just for placing the company and all other person in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register.”

This is capable of application to land in England, but is not capable of application to a foreign company.

41. I agree that the intention manifested in these provisions supports the exercise of discretion to make a vesting order in Clairvale. It will restore the *status quo* before the dissolution of Clairvale, and there is no indication in the evidence that it will have an adverse impact upon the rights of third parties.
42. For these reasons, I would be willing to make an order that the Property be vested in Clairvale.
43. The claimants, however, seek an order vesting the Property in Lizzium. Their counsel submitted that Lizzium is

“the person who *would have been entitled* to the estate which determined had it remained a subsisting estate”.
(emphasis added)

44. The claimants’ case is that is that their intention in 1997 was for the Property to be transferred to Lizzium along with Warren Towers. They rely on the following matters:

- (1) Ms Livingston’s evidence that the Property ought to have been transferred to Lizzium in 1997 with Warren Towers, but it was overlooked in an administrative error because it was wrongly assumed that it was part of the title of Warren Towers;
- (2) The Knight Frank report, which wrongly stated that the Property had been incorporated into the demise of Warren Towers;

- (3) The fact that the dissolution of Clairvale in Gibraltar in 1998 was on the ground that its affairs had been “completely wound up”, from which it is to be inferred, they submit, that it was mistakenly assumed that Clairvale no longer owned any assets, because the Property had been transferred to Lizzium;
 - (4) The treatment of Warren Towers and the Property ‘on the ground’ as a single title;
 - (5) Ms Livingston’s evidence that it was only discovered that the Property was not owned by Lizzium when the due diligence was done for a proposed sale to Smech Properties Limited (“Smech”) in around 2015.
 - (6) The fact that the contract for the sale of the Property by Lizzium to Smech provides (at clause 6.1) for Lizzium to use reasonable endeavours to procure that the Property is registered in its name at the Land Registry, so that the sale to Smech can complete;
 - (7) Both Lizzium and Clairvale by this claim seek an order that the Property be vested directly in Lizzium.
45. There was no evidence before me as to the fiscal consequences of the two alternative courses of vesting the Property in Clairvale or Lizzium.
 46. In support of his submission that Lizzium was the person in whose favour the vesting order should be made, the claimants’ counsel relied upon the two decisions discussed above, in which the land was vested in the person entitled to the benefit of an option agreement with the dissolved company. He particularly relied on the fact that in *Quadracolor* it was not possible for the option holder to exercise the option according to its terms, because of the dissolution of the company holding the land. Nonetheless, he submitted, the court found that the option would have been exercised, and therefore the option holder would have become entitled to the land.
 47. Whether the court is able to vest the Property in Lizzium is a question of the construction of the expression “the person who would have been entitled to the estate which determined had it remained a subsisting estate”. The particular focus in this case is on “would have been entitled”, and the counterfactual this entails considering.
 48. On a narrow construction “would have been entitled” refers to legal entitlement. In both *UBS Global* and *Quadracolor*, the entitlement arose from a binding agreement in existence at the date of the dissolution. In *UBS Global*, the judge found a present entitlement under the agreement, albeit one that arose after the dissolution.
 49. In *Quadracolor*, the judge, in order to reach his conclusion, had to take a broader view than that in *UBS Global* of the meaning of “would have been entitled”. He found a counterfactual entitlement: had the company not been dissolved
 - (1) it would have performed its obligations under the agreement; and
 - (2) the claimant would have exercised its rights and performed its obligations under the agreement.
 50. However, in *Quadracolor*, as in *UBS Global*, the entitlement also arose under the agreement, albeit on a counterfactual basis of what would have happened if the dissolution had not occurred.

51. In my judgment, in both these decisions, a narrow approach is taken to the meaning of “would have been entitled” to mean entitled as a matter of legal rights subsisting the date of dissolution. As I have noted, in both cases the original legal owner was not a party to the claim, and, indeed, remained dissolved, so that there was no other candidate for the vesting order.
52. In this case, the claimants do not allege that at the date of Clairvale’s dissolution, Lizzium had a subsisting legal entitlement to the Property, or even (as in the two cases relied upon) an entitlement that was contingent upon the occurrence of certain further events.
53. The claimants’ counsel submitted as follows. In this case, it was the intention in 1997 for the Property to be transferred to Lizzium along with Warren Towers. That, he said, did not happen only because of a mistake as to the title. Had Clairvale not been dissolved, and had the land not passed by escheat, the mistake would by now have been corrected by the simple step of transferring the Property to Lizzium. Lizzium is, therefore, he submitted, “the person who would have been entitled to the estate which determined had it remained a subsisting estate”.
54. The claimants’ case is therefore based on the court making the counterfactual assumption that had Clairvale not been dissolved, it would have transferred the Property to Lizzium, and Lizzium would thereby have become entitled to it.
55. In my judgment, this extends the scope of the expression “would have been entitled” in a way which is unsupported by the two decisions relied upon. In both those cases, the claimant had at the date of dissolution, clear legal rights under the option agreements, and in order to become entitled, it was only necessary that certain steps were taken under the agreements. In my judgment, the expression is to be construed as meaning entitled as a matter of a legal right subsisting at the date of the escheat, even if some further steps need to be taken to achieve an enforceable entitlement to the property.
56. In this case, it is not suggested that Lizzium had any legal rights (e.g. to rectify the Transfer) against Clairvale at the date of its dissolution. I do not consider that the fact that Clairvale might or even would have decided to transfer the Property to Lizzium at some point after 1998 (when it had no binding obligation to do so) is sufficient to make Lizzium a person who would have been entitled to the Property had it continued as a subsisting estate.
57. For these reasons, therefore, I will not make an order vesting the Property in Lizzium.