



Law of Property Act 1925 – the first 100 years

Focus on section 181

As will have become apparent from the previous articles in this series, the hallmark of the 1925 legislation was that it tidied-up and brought simplicity to the tangle of law which had developed and evolved in this country over the many previous centuries.

S.181, though, is a rare provision of the LPA 1925 in that its purpose is wholly embedded in what came before, and harks right back to the mediæval, feudal origins of our system of land tenure, in some of the (rare) circumstances where that remains relevant.

When we think of land ownership today, we tend to work on the assumption that the freehold owner has paramount title to his or her land. Indeed, given the (pretty much) unlimited powers of dealing which are vested in a freeholder, for most purposes that is a reasonable assumption. But in this corner of the law it's important to remember that a freeholder is also properly described as a *tenant* in fee simple. The reason for that is that, at heart, all land in this jurisdiction is owned by the Crown. Some of that land remains in the occupation of the Crown and current convention, as in sections 79 to 81 of the Land Registration Act 2002, is to refer to such land as 'demesne' land. The remainder is all land which at some point the Crown has granted to another person.

Historically, there were multiple different forms of tenure, with romantic titles such as *grand sergeanty*, *frankalmoign* and *homage ancestral*. Happily, we needn't concern ourselves here with the details of how each of those functioned or the obligations they imposed on their tenants to their feudal lords, themselves the recipients of royal largesse. But, which is the crucial point, any sort of tenure, including a fee simple, requires a tenant. If there is no tenant, the land returns to its superior owner, which is what is meant by escheat. An interest without a tenant escheats back to its lord, and where there was no mesne (intervening) lord, ultimately back to the Crown. And when an interest escheats, it determines. Where a freehold interest escheats in this way, the Crown¹ doesn't obtain the fee simple, then, but simply holds the land by its

¹ It is worth noting is that escheat is actually either to the Crown, the Duchy of Lancaster or the Duchy of Cornwall, depending on where the land is. For simplicity, though, I refer only to the Crown here.



own right. As Stanley Burnton explained in his very helpful decision in *Scmlla Properties v Gesso Properties (BVI) Ltd* [1995] BCC 793:

“The Crown... has an unfettered right to the land; to put it more accurately, the Crown’s seignory is no longer encumbered by the freehold interest.”

Although many forms of escheat have been abolished (such as escheat for non-treasonous felonies, which was removed by the Forfeiture Act 1870) our much-simplified modern system of registered land is still built on these feudal foundations, and consequently escheat of freeholds does still occur (as is recognised by section 8(3) of the Crown Estates Act 1961), in three sets of circumstances:

- 1) where the Crown has made a grant of the freehold subject to user restrictions, the restrictions are enforceable by a right of re-entry, as is permitted by section 3(8) of the Crown Estates Act 1961, and that right has been exercised. That is very rare and I do not refer to it further here;
- 2) most commonly, where an individual’s trustee in bankruptcy or a company’s liquidator exercises a statutory power to disclaim a freehold interest in land; and
- 3) on the dissolution of a company at a time when it still holds a freehold interest in land.

For simplicity, this article focuses on the third of these only.

Where a company registered in this jurisdiction is dissolved whilst still owning a freehold interest in land, the problem of escheat is mitigated by s.1012 of the Companies Act 2006. That is the current incarnation of a provision which first appeared in the Companies Act 1929, to the effect that all property and rights vested in a company or held on trust for it immediately before its dissolution are deemed to be *bona vacantia* (goods without an owner), and as such vest in the Crown (in the person of the Attorney-General) and can be dealt with by it like any other *bona vacantia*. Under that provision, then, a freehold interest held by such a company would vest in the Crown but would be deemed to continue in existence, rather than escheating and so determining.²

² Property held by the company on trust for another is expressly excluded from the effect of s.1012, but has also been held not to escheat (see *Re Strathblaine Ltd* [1948] 1 Ch 228) and is outside the scope of this article.



However, ss.1013-1016 of the Companies Act 2006 give the Crown power to disclaim a freehold which has so vested in it. If it does so, then the deeming provision ceases to apply, the freehold interest ‘boomerangs’ back to the Crown (in the guise of the Crown Estate Commissioners, who deal with the Crown’s demesne land) and, now unprotected by the legislation, escheats.

There are, though, various means available to assist parties who have suffered a loss as a result of such an escheat.

First, by s.1015 of the 2006 Act, although the disclaimer operates to determine the company’s interest, it doesn’t affect the rights or liabilities of any other parties, save insofar as is necessary to release the dissolved company from any liability.

Second, if caught in time, the company can simply be restored to the Register. S.1012 takes effect subject to the possible restoration of the company. On restoration, the company is deemed to have continued in existence as if it had not been dissolved so that, unless the Crown has effected a disposition in the interim (in which case there are compensation provisions in s.1034), the company is deemed once again to own the freehold, as though it had never passed to the Crown as *bona vacantia* in the first place: see *Re Fivestar Properties* [2016] 1 WLR 1104.

Third, under s.1017 of the 2006, the Court has power to vest a disclaimed freehold in a person who is entitled to it, or who is under a liability in respect of it.

However, none of those provisions of the Companies Act 2006 apply where a company registered overseas is dissolved, even where the property which it holds is land in this jurisdiction. That means that, if such a company is dissolved whilst holding a freehold interest, the old position described above obtains, without the intervention of the Companies Act. The freehold is not deemed to be *bona vacantia*, but simply escheats immediately. And, even if a company is restored to the relevant register overseas (or otherwise revived in accordance with local laws), and even where the effect of that restoration would be to restore the company’s property to it in its home jurisdiction, those steps will not be effective to recover an escheated freehold of land in this jurisdiction: see *Lizzium v Crown Estate Commissioners* [2021] EWHC 941 (Ch).



This problem first came to my attention when I was instructed in a case called *UBS Global Asset Management (UK) Limited v Crown Estate Commissioners* [2011] EWHC 3368. That case concerned a freehold property in Shropshire owned by a company registered in the BVI. The client had the benefit of an option to purchase the freehold. In 2009, the client sought to exercise that option in accordance with the relevant agreement, serving notice on the company's London office and to its solicitors, as was contractually required. The letter to the company was returned undelivered, and that sent to the solicitors elicited a response that they no longer acted for that company. The client therefore carried out some enquiries and established that the company had been struck off the register and dissolved in the BVI in 2004.

Because the Companies Act did not apply, the client's position was instead governed directly by the feudal law of land tenure which I have described above. Accordingly, when the company was dissolved its freehold automatically escheated to the Crown and determined without any need for an intervening disclaimer. In accordance with the careful analysis in *SCMLLA* (supra), however, even at common law subordinate interests survive the termination of the freehold, and the Crown takes subject to them.

Accordingly, the client was able to rely on the useful – but at that time, hardly used – s.181 of the Law of Property 1925, which 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.”

Crucially, this is a provision which allows the court to create a *new* freehold in place of the one which was lost, without recourse to the Crown. In *UBS*, the argument was that once all the conditions precedent to the exercise of the option had been fulfilled, the claimant became ‘entitled’ to the determined estate within the meaning of that provision, and consequently that the court had power to vest a *new* freehold interest in it pursuant to that section. The Court noted that the provision creates a discretion, but absent any objection from the Crown was willing to make an order on that basis.



Notably, the broad reference in s.181 to a ‘corporation’ means that that section is able to encompass any body corporate, whether incorporated in this jurisdiction or elsewhere: *In Re Prudential Assurance Co Ltd* [1939] Ch 878. And that is a testament to the care with which the 1925 legislation was drafted. By the time of the *UBS* case in 2011, that provision had been in force for over 85 years, but I was unable to find a single reported case in which an order had been made under it. Presumably that is because the *bona vacantia* scheme under the Companies Act 1929 had resolved most of the mischief which it was originally intended to address. But the broad discretion which is provided by s.181 allows it to come to the rescue in circumstances where that statute and its successors are of no application.

After *UBS*, I imagined that it would be something of a one-off. However, amazingly, for so venerable a provision which seemed to have lain dormant for so long, I am now regularly instructed in matters where a claim under s.181 is one of the, or sometimes the only, means of recovering a freehold lost to escheat. No doubt that is partly because of a huge increase in land held by foreign companies since 1925, partly because the new registration requirements for foreign entities under the Economic Crime (Transparency and Enforcement) Act 2022 have brought to light numerous ‘lost’ freeholds which had escheated without anyone noticing, and partly because the provision is now more familiar.

Most of those cases are not reported, but an increasing body of authority has now built up, and it provides fertile ground for interested parties. A striking feature is that the Crown does not actively defend these cases and, perhaps because of that, the case law is not all easily reconcilable.

Perhaps the most crucial question still at large is as to what is meant by a person, “*who would have been entitled to the estate had it remained a subsisting estate*”. In *UBS*, the client had the benefit of an option as at the date of dissolution of the relevant company (and so, at the date on which the freehold escheated). It had subsequently taken all the necessary steps to comply with the conditions precedent to the exercise of that option, insofar as that was possible once the grantor of the option had ceased to be, and the Judge was content to base his claim on the counterfactual assumption that, had the freehold *not* escheated, the client would (eventually) have exercised the option and been entitled to the freehold. A similar decision was reached in *Quadracolour v Crown Estate Commissioners* [2013] EWHC 4842 (Ch), another option-holder case. In *Lizzium* (supra), however, Master Clarke said that ‘entitled’ in s.181 meant, “*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”, noting that in both those prior cases there was some pre-existing contractual relationship, albeit a conditional one with conditions unfulfilled.

In *Lizzium*, the Claimant asked the Court to make a similar counterfactual assumption to the effect that, had the company continued in existence, it would have transferred its freehold interest to the Claimant company. Notwithstanding evidence that the dissolved company had intended to do so, believed it had given effect to that intention before its dissolution, and (having been restored overseas) supported the claim, it was refused.

More recently, however, in both *Dixon v Crown Estate Commissioners* [2022] EWHC 3256 (Ch) and *Cropp v Crown Estate Commissioners* [2024] EWHC 3107 (Ch), a claim via proprietary estoppel was considered to suffice for s.181, as was a claim based on an entitlement to rectify a transfer, both of those *equitable* interests, and those conclusions therefore apparently at odds with the position in *Lizzium*. It remains to be seen how that issue will be resolved.

Other areas of uncertainty also remain. S.181 confers a discretion, but although it is one which is now regularly exercised, there is little judicial discussion of the factors which fall to be considered. Again, that is no doubt an effect of the one-sided nature of these disputes, but cases do arise where the Court is compelled to choose between competing claims, and we can anticipate more development here.

In summary, then, s.181 is a special and curious mix, guarding against a remnant of our ancient land law, and yet really proving its worth only in a modern, globalised world. As with so many other provisions, we (and so many of our clients) can only appreciate now the care with which the 1925 legislation was drafted, as evidenced by its longevity and ongoing value.

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