Neutral Citation Number: [2018] EWHC 3489 (Ch)

Case No: 1106 of 2015

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
COMPANIES AND INSOLVENCY LIST (Chd)

IN THE MATTER OF THE ESTATE OF JILLIAN PAULA MASCALL (Deceased)
AND IN THE MATTER OF THE ADMINISTRATION OF INSOLVENT ESTATES OF DECEASED PERSONS ORDER

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Leeds Combined Court Centre,
Leeds LS1 3GY

Date: 19/12/2018

Before :

HIS HONOUR JUDGE DAVIS-WHITE QC
(SITTING AS A JUDGE OF THE CHANCERY DIVISION)

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Between :

JAMES SLEIGHT **(as trustee of the estate of** **Jillian Paula Mascall deceased)**	**Applicant**
- and -	
THE CROWN ESTATE COMMISSIONERS	**Respondent**

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- -

Mr James Malam (instructed by **LCF Law**) for the Applicant
The Respondent was not represented and did not attend
Hearing date: 13 December 2018

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Judgment Approved

If this Transcript is to be reported or published, there is a requirement to ensure that no reporting restriction will be breached. This is particularly important in relation to any case involving a sexual offence, where the victim is guaranteed lifetime anonymity (Sexual Offences (Amendment) Act 1992), or where an order has been made in relation to a young person.

His Honour Judge Davis-White QC :

1. In circumstances where a trustee in bankruptcy has disclaimed an asset which is subsequently realised such as to create a surplus, may the trustee obtain a vesting order in relation to such surplus?

The Facts

2. The applicant, an employee of PKF Geoffrey Martin and Co Limited, is the trustee in bankruptcy of the estate of the late Jillian Mascall (the "Deceased"). Her estate is being administered as an insolvent estate in bankruptcy under the Administration of Insolvent Estates of Deceased Persons Order 1986 (the "1986 Order"). The 1986 Order broadly applies the relevant personal insolvency or bankruptcy provisions of the Insolvency Act 1986 to estates being administered in insolvency under its terms.

3. The Deceased died on 4 December 2014. A grant of probate of her last will and testament was granted on 21 October 2015 to her executrix, Alison Carmel Rose. It becoming apparent that the estate was insolvent, the executrix petitioned the County Court at Leeds for the making of an insolvency administration order. That order was made on 22 December 2015. On the same day Mr Sleight, the Applicant, was appointed trustee of the estate by the Secretary of State.

4. The Deceased owned some 27 properties or so. In about February 2016, 24 of these properties appeared to be in a situation of negative equity (in that sums secured over them by way of charge exceeded their then value), as well as being subject to tenancies, with ongoing obligations on the landlord. Receivers having been appointed in relation to certain of these properties, the Applicant disclaimed some 20 of the properties as "onerous property". The vast majority were disclaimed on or about 15 March 2016, two were disclaimed on or about 26 May 2016. The application before me concerns two of these properties: 32 Mexborough Grove, Leeds (the "MG Property") and 16 Clark Road, Leeds (the "CR Property") (together, the "Properties").

5. The MG Property was freehold land. It was subject to a charge in favour of Bank of Scotland ("BoS"). It was disclaimed by the Applicant as onerous property by notice dated 26 May 2012.

6. The CR Property was also freehold land. It was also subject to a charge in favour of BoS (Birmingham Midshires Division). It was disclaimed by the Applicant as onerous property by notice dated 15 March 2016.

7. In March 2018, the MG Property was sold by BoS. Having discharged the debts due to BoS, costs of sale and so on there was a remaining surplus of £17,924.96. In May 2018, the CR Property was sold by BoS. Having discharged the debts due to BoS there was a remaining surplus of £1,057.08.

8. The BoS proposed (and as I understand it still proposes) to pay such sums into court.

9. If the total of the two surpluses, a sum of just under £19,000, were to be received into the insolvent estate then the projected dividend for creditors would become 33p in the pound rather than 26p in the pound.

The Current application

10. By the application notice before me dated 28 June 2018, and issued on 2 July 2018, the Applicant primarily seeks an order that the Properties (and the corresponding surpluses) do vest in him pursuant to s320 of the Insolvency Act 1986.

11. The application was originally issued with the Government Legal Department ("the "GLD") as defendant, on the basis that it was considered that the Properties had vested in the Crown as being *bona vacantia*. By e-mail dated 8 August 2018, the solicitors acting for the Applicant were informed by GLD (in Croydon) that the effect of the disclaimer of the freehold properties was that the same would escheat to Burges Salmon Solicitors. In fact, the escheat would be to the Crown but for these purposes Burges Salmon act for the Crown. By letter from the GLD (but signed for the Treasury Solicitor) dated 9 August 2018 and responding to service of the application and evidence upon it, it was asserted that the GLD was the incorrect defendant to the proceedings. So far as *bona vacantia* is concerned, the Treasury Solicitor not GLD is the correct defendant. However, in any event, *bona vacantia* was not in issue. "Freehold property which has been disclaimed by a trustee in bankruptcy does not vest in the Crown as *bona vacantia* but rather becomes subject to escheat to the Crown and may be dealt with thereafter by the Crown Estate….As regards the surplus proceeds of sale arising from the sale of the two properties by the mortgagees in possession, my understanding is that these proceeds would also fall to be collected by the Crown Estate." Under a gentle threat of adverse costs orders being sought, the Applicant was requested to withdraw the proceedings against the GLD.

12. By letter dated 29 August 2018, Burges Salmon confirmed that "where freehold land is disclaimed by the Treasury Solicitor" (which was of course not the position being put to them), the Land "may be deemed subject to escheat to the Crown" and that Burges Salmon act for the Crown Estate in relation to such matters. "Longstanding legal advice to the Crown Estate Commissioners is that if they undertake no act of possession, entry or management, no liability or responsibility in respect of the property arises in the circumstances of escheat." And that neither the letter nor any other communication was to be deemed to constitute such an act. It was accepted that the Crown Estate Commissioners should be joined as respondents to the application but Burges Salmon made clear that the Commissioners did not oppose (nor support) the application, nor would they appear or be represented at any hearing nor should they be taken as expressing any view on the validity of the application, the proposed order sought or (even) whether there had been any prior application for a vesting order.

13. By an Order that I made on 30 August 2018 the Commissioners were joined as respondents and the GLD was removed as a respondent. At that hearing, it was clear to me that a major plank of the Applicant's case was that the surpluses in question were in effect not claimed by anyone and that justice was that they should be vested in him for the benefit of the creditors of the deceased. The factual situation was similar to that in *Lee v Lee* [1999] BPIR 926 where, on a vesting order being made in favour of a chargee, it was ordered (in effect) that any surplus proceeds on subsequent sale by the charge that were not claimed should vest in the trustee in bankruptcy. I return to this case later. On the basis that, it seemed to me, there were certainly arguments that the Applicant had no locus to make the application and that the Crown was entitled to the surpluses, I suggested that further letters be written to Burges Salmon and the Attorney General.

14. I am told that no response has been received from the Attorney General. As regards Burges Salmon, their position reflected that of the Commissioners before Knox J in *London Borough of Hackney v Crown Estate Commissioners* [1996] BPIR 428. He described such approach as displaying a "*rather passive attitude*". In essence, Burges Salmon said that only upon an act of management would the properties fall within the Crown Estate and that such properties could be burdened with significant liabilities. Accordingly, they were not prepared to make any representations in the current application nor to be represented at the same in case to do so might amount to "an act of management" in relation to the properties.

The Law

15. The disclaimer provisions currently contained in the Insolvency Act 1986 comprise provisions covering both companies (ss178-182) and individuals (ss315-321). The relevant rules for both are contained in Part 19 of the Insolvency (England and Wales) Rules 2016.

16. As regards bankrupts, the power of a trustee in bankruptcy to disclaim goes well back into bankruptcy legislation in the nineteenth century. A similar power was conferred on liquidators by the Companies Act, 1929, although permission of the court was required in the case of companies until the Insolvency Act 1985.

17. The disclaimer provisions in the Bankruptcy Act 1869 conferred a power to apply to the court for a vesting order in relation to disclaimed property on "Any person interested in any disclaimed property". By the Bankruptcy Act 1883 the right to apply was extended to any person who was under any liability in respect of the disclaimed property. By the Insolvency Act 1985, section 161, the right was further extended in the case of disclaimed property which was property in a dwelling house to any who at the time when the bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house.

18. The precise effect of disclaimer on property has been much debated over the years but one aspect is clear. By what is now s315(3) a disclaimer:

> "*operates so as to determine, from the date of the disclaimer, the rights, interests and liabilities of the bankrupt and his estate in or in respect of the property disclaimed...*"

19. The current provision with regard to vesting orders is s320 Insolvency Act 1986 which provides as follows:

> "*320 Court order vesting disclaimed property*
>
> *(1) This section and the next apply where the trustee has disclaimed property under section 315.*
>
> *(2) An application may be made to the court under this section by—*
>
> *(a) any person who claims an interest in the disclaimed property,*

(b) any person who is under any liability in respect of the disclaimed property, not being a liability discharged by the disclaimer, or

(c) where the disclaimed property is property in a dwelling-house, any person who at the time when the [bankruptcy application was made or (as the case may be) the] bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house.

(3) Subject as follows in this section and the next, the court may, on an application under this section, make an order on such terms as it thinks fit for the vesting of the disclaimed property in, or for its delivery to—

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

(b) a person subject to such a liability as is mentioned in subsection (2)(b) or a trustee for such a person, or

(c) where the disclaimed property is property in a dwelling-house, any person who at the time when the [bankruptcy application was made or (as the case may be) the] bankruptcy petition was presented was in occupation of or entitled to occupy the dwelling house.

(6) The court shall not make an order by virtue of subsection (3)(b) except 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.

(5) The effect of any order under this section shall be taken into account in assessing for the purposes of section 315(5) the extent of any loss or damage sustained by any person in consequence of the disclaimer.

(6) An order under this section vesting property in any person need not be completed by any conveyance, assignment or transfer.

Locus of the applicant

20. Mr Malam submits for the trustee that the trustee falls within s320(2)(a) as a person who claims an interest because he is claiming to have an interest vested in him under the vesting order that he seeks. This argument seems to me obviously bad. It is simply circular to confer a right to apply a vesting order on any person who applies for one. Further, it would render otiose s320(2)(b) and (c).

21. Further, it seems to me that it is clear from the legislative scheme that s320(2)(a) is referring to a person who at the time of the application in fact has (or at the very least "claims", perhaps for example in relation to a proprietary estoppel) a proprietary interest in the asset in question and not simply someone who is "interested" in a much looser legal sense in the asset (see in relation to the concept of a looser concept of "interest" which is not a proprietary interest, for example in *Re New Millennium Experience Company Limited* [2004] 1 All ER 687 paragraphs [80] to [88]). So far as the statutory scheme is concerned that seems to me to be confirmed by (a) the

existence of s320(2)(b) and (c) which would be unnecessary if s320(2)(a) was given a wide reading beyond an existing proprietary interest, (b) the link between s320(2)(a) and 320(3)(a) and (c) the use of "interest" in s315(3)(a) (which in any event would mean that the trustee could not fall within s320(2)(a) whatever "interest" meant).

22. This construction is also supported by high authority. Thus, in *Hill v The East and west India Dock Company (1884) 9 App. Cas. 448,* the issue was whether the original lessee of a lease remained liable for rent notwithstanding the disclaimer of the lease by the bankrupt of a later assignee of the original tenant who had become bankrupt. The House of Lords held that the lessee remained liable. Lord Bramwell dissenting referred to the great injustice, as he saw it, of this result. One of the issues he considered was whether the original lessee could obtain a vesting order from the court vesting the lease in him. Referring to what was then s23 Bankruptcy Act 1869 conferring a right to make such an application on "any person interested in any disclaimed property", Lord Bramwell said:

> *"Is he interested in the disclaimed property? Certainly not. He has parted with all his interest in it. His only interest in it is that unpleasant one of having a duty in respect of it. It seems to me that if he were to apply to the Court, it would be impossible that the Court would grant him possession of it."*

Accordingly, there was a "*revolting absurdity and shocking injustice*" in that the tenant "*would have to pay rent to the end of the term and yet have no enjoyment of the property*" (see at page 468).

23. Under the 1883 Bankruptcy Act (which did not apply to the facts in the Hill case) the particular injustice identified was remedied because of the insertion of the equivalent of what is now s320(2)(b) Insolvency Act 1986.

24. Lord Nicholls in *Hindcastle v Barbara Attenborough Ltd* [1997] AC 70 at 91 D-F referred to the change to the position made by the 1883 and pointed out that applications for vesting orders were not thereafter confined to "*persons having a proprietary interest*" because of extension of the right to apply for vesting orders on persons under any liability in respect of the disclaimed property which was not discharged by the Act.

25. I therefore conclude that there is no standing in the applicant to apply for a vesting order.

Vesting of what?

26. There is a further complication. The Properties which were disclaimed were freehold property. The power of the court under s320 is to vest those freehold properties in a (proper) applicant for the vesting order. However, it seems to me that that is not possible or appropriate in any event. The reason for that is that the property has since been sold to a third party. It would, in my view, not be realistic to assume that the Court would now make a vesting order in favour of any applicant under s320 in relation to the Properties themselves (unless perhaps the current owners). The applicant suggests that the surpluses could be vested in him.

27. To consider this aspect it is necessary to consider the legal position in relation to the freehold and to understand the limits of s320.

28. When land is subject to escheat the freehold title simply determines **and** the Crown becomes the owner of the land in question freed from the previous freehold interest, without any action on the part of the Crown to bring about this result (see *Scmlla Properties v Gesso Properties (BVI) Limited* [1995] BCC 793 at 805F and *Hunt v Withinshaw* [2015] EWHC 3072(Ch) at paragraph 37. However, such automatic vesting does not result in the land in question becoming part of the Crown Estate under the management and responsibility of the Commissioners (see *Scmlla Properties* at 817G-H).

29. I was not addressed in detail as to what has happened in the current case but it seems to me that there are three possibilities by which freehold title to the land might be dealt with after a disclaimer:

    29.1 The Crown might create a new freehold title as seems to have occurred in *Hunt v Withinshaw*;

    19.2 A chargee/mortgagee might apply for a vesting order as seems to have happened in *Lee v Lee* [1999] BPIR 926 (as regards a leasehold) and *LBC* v *Crown Estate Commissioners* [1996] BPIR 428 (as regards freehold property). This involves a "statutory recreation" (if necessary) see *Hindcastle* at page 89A;

    19.3 The mortgagee might have relied upon its existing proprietary interest in the Properties and s315(3) Insolvency Act 1986 preserving its rights and interest as would be applicable if the freehold interest remained in being. This seems to be what happened in the *Scmlla* case.

    I do not need to address in this judgment the efficacy of the third possibility and whether it is subject to any limits (see discussion in the *Scmlla* case at pages 808G-811A.).

30. In the absence of any vesting order and on the assumption that the third of the alternatives in paragraph 19 above was adopted in this case, the prima facie position would be, in my view, that the entitlement to the surpluses in this case would have vested in the Crown (see e.g. s105 Law of Property Act 1925). I do not see how there is any locus on the Applicant to apply for a vesting order in relation to such surpluses.

31. In *Lee v Lee*, however, a vesting order was applied for by the mortgagee. The Court ordered that the disclaimed leasehold property in question should vest in the mortgagee. The Court of Appeal was of the view, as was the Judge at first instance, that on the face of it the effect of a vesting order with no further provision would be that entitlement to the surplus would have belonged to the mortgagee, as the person entitled to the property from which the proceeds would have arisen (see at page 937). This was subject to any entitlement of the wife of the bankrupt who was claiming a 50% beneficial interest in the property which would remain in existence following the disclaimer. The mortgagee did not want the surplus and consented to an order, as part of the vesting order, that 50% of the surplus should be paid to the disclaiming trustee

in bankruptcy for the benefit of the creditors of the bankrupt's estate. The other 50% was to be dependent on whether the wife established an entitlement to the same, there was some agreement between her and the trustee or the court otherwise ordered. The Court of Appeal upheld this result on the basis that the Court had a wide discretion as to the terms upon which a vesting order might be made (see at page 937).

32. In this case, I am unable to make a vesting order. I cannot therefore exercise the power used in *Lee v Lee*. The unsatisfactory position therefore is that had a vesting order been sought and obtained by the mortgagee in this case the likelihood is that the surplus could have been ordered to be paid to the applicant for the benefit of creditors. However, notwithstanding the Crown does not wish to assert a claim to the money and notwithstanding the mortgagee does not either, I cannot order that the surplus is paid to the applicant. The likely result seems to be that the money will languish with and be held by the court funds office for an indefinite period.

Timing of application

33. By virtue of what is now r19.11 of the Insolvency (England and Wales) Rules 2016, an application for a vesting order under s320 must be made within three months of the applicant becoming aware of the disclaimer of receiving a copy of notice of disclaimer delivered under certain earlier rules.

34. There is power to extend the time under s376 Insolvency Act 1986 and the 2016 Rules (Schedule 5) and see also *W H Smith Ltd v Wyndram Investments Limited* [1994] 2 BCLC 571 at 577e to which I was referred. Here it is said that the trustee acted promptly when he found out about the surpluses in question. In light of my conclusions as to the locus of the trustee there is no point in my extending time.

Conclusion

35. I therefore dismiss the application.

36. I adjourn all questions consequential on this judgment, including (without limitation) the form of order and any question of permission to appeal to a hearing to be fixed by telephone in the event that the matter cannot be determined on the papers in the meantime.