

# REVIEW



**Bona Vacantia  
Property - A shift in  
policy and practice**



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# REVIEW

## Introduction

Welcome to our electronic news review published by M&P Legal. We hope that the publication is of interest to recipients. Please contact any of the individuals listed on the contact us page with comments for future articles.



### Advocate Christopher Murphy reviews ...

...recent changes in practice relating to the treatment of bona vacantia property in the company context

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## Bona Vacantia Property – A Shift In Policy and Practice

The Isle of Man as an established offshore centre sees a high turnover of companies relative to its size. Every year a significant number of companies are struck off and dissolved by administrative process undertaken by the Registrar pursuant to Section 273 of the Companies Act 1931 or Section 183 of the Companies Act 2006. Under these provisions inactive companies or companies in long standing default of filing requirements may be removed from the Register. The Registrar does not make any enquiry as to whether the company has divested itself of all of its assets. Occasionally there will be companies which are dissolved by this process which still hold assets. Such property is deemed bona vacantia and title to it becomes vested in the Treasury of the Isle of Man Government upon trust for the British Crown.

In former times, the approach to the treatment of a defunct company's property passing bona vacantia did not generally involve the imposition of any financial charge or penalty by or on behalf of the Crown or by the Treasury or any other authority as a condition of the re-vesting of such property in those claiming to be rightfully entitled to it. However the policy it seems has now changed. Any party now seeking to procure the transfer of bona vacantia property can expect to face the imposition of a financial charge by the Treasury.

In the Isle of Man, bona vacantia property has formerly been dealt with according to a statutory procedure laid down in the

Companies Acts. Essentially a two stage process is prescribed. Firstly, the claimant must demonstrate to the Treasury that the claimant is rightfully entitled to the property. Usually the claimant(s) will be the shareholder(s) or ultimate beneficial owner(s) of the shares of the dissolved company. Formal request must be submitted to the Treasury requesting that the Treasury issue a notice of disclaimer of the property. The Treasury would readily issue such a notice in most cases. The second stage of the process then follows wherein the claimant must then make application to the High Court pursuant to Section 252(6) of the Companies Act 1931, for an Order vesting title to the property in the claimant. To neatly sidestep complications with respect to the title to the property and the rights and liabilities attaching to such property, the relevant statutory provisions further provide that where a notice of disclaimer is issued by the Treasury the property is deemed never to have vested in the Treasury and upon the High Court granting the Order vesting the property in the Claimant, the disclaimer is taken to have occurred immediately before the dissolution of the company.

It would appear however that the policy and practice of the Treasury towards bona vacantia property will no longer result in the issue of a notice of disclaimer as a matter of routine. Instead the Treasury is more likely to propose that the bona vacantia property be dealt with by way of a discretionary grant on conditions that the claimant meets the Treasury's costs of the property transfer

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and making payment of a sum equivalent to the filing fees (including late filing fees) that would otherwise have fallen due annually had the company not been dissolved.

Proceeding by way of a discretionary grant with the imposition of conditions is not all bad news for the claimant, but this may give rise to some uncertainties as to the legal basis. As a discretionary grant involves the transfer of title of the property to the claimant, it will not be necessary for the claimant to incur the cost and time of submitting an application to the High Court for a vesting order. Avoiding the cost and delay of a court process clearly has some advantage. However, where the procedure for issuing disclaimer is not followed, the property remains truly vested in the Treasury up to the point at which it is transferred to the claimant by way of discretionary grant. This raises some interesting legal questions, not least as to how any benefits and liabilities associated with such property are to be treated for the period during which the property has remained vested in the Treasury as trustee for the Crown. Whether, for example, it is equitable to seek to impose a financial penalty on a claimant who has borne the liabilities of the property owner, when in law the Crown holds the legal title to the property.

The practical approach currently being taken by the Treasury suggests that the Crown will not expect to bear any liabilities of the property but at the same time will not insist on enjoying the benefits of the

property either. By way of illustration in a recent case this firm has handled, a claimant sought a disclaimer in relation to property partly comprising of a residential property held in the name of a long since dissolved company. The claimant's claim to the property was based on the claimant being the sole shareholder of the defunct company. Since the date of the company's dissolution the claimant had continued to live in the property and had enjoyed all the benefits thereof. However, the claimant had also borne all property rates and other outgoings in relation to the property personally as well as the cost of the property's on-going maintenance and repair throughout the period in which legal title to the property had been vested in the Treasury. When the claimant sought to regularise the position the Treasury declined to issue a disclaimer of the property, instead proposing that it be conveyed to the claimant by way of discretionary grant. As a condition for the transfer of the property the Treasury required payment of the outstanding filing fees in relation to the company, a not inconsiderable sum due to the relatively lengthy passage of time since the company's dissolution. It was suggested to the Treasury that some credit might be given against the sum claimed by the Treasury to take into account the costs borne by the claimant with respect to the property but this was rejected. It should be noted that the Treasury, did not seek the payment of a market rental from the claimant with respect to the claimant's occupation of the property for the relevant period.

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In the case in point, the claimant was agreeable to meeting the Treasury's demands. Whether this approach will work out every time is open to debate. The former practice of issuing a disclaimer which then became effective at the point of the company's dissolution had the undoubted benefit of avoiding any issues as to whether the Crown should enjoy the benefits or bear the liabilities of bona vacantia property. However what will be the position where a claimant cannot or will not pay for a re-vesting of the property? It could lead to unresolved and difficult positions for both Treasury and claimant. Quite how the courts will unravel such matters is also less than certain. The position under English (with which Manx law in this respect is closely aligned) has always been unclear on the issue of whether obligations to which the legal estate of land is subject when held as a private interest can be enforced against the Crown. (see *Toff v McDowell* (1993) 69 P & CR 535). Where the Crown has actively taken responsibility for property then it will be treated as having adopted the liabilities, but merely offering property for sale is not so regarded. What may at first sight appear to be an attractive means of raising extra revenue for government finances in difficult economic times may carry with it the potential burden of Treasury having to more actively manage such situations at perhaps significant costs both financially

and administratively, as well as having to resolve difficult questions about the benefits and liabilities of property vested in it as bona vacantia. Further statutory provision in this area to clarify such matters may be welcome.

Aside from the interesting legal issues which the Treasury's current policy in relation to bona vacantia property throws up, the lesson perhaps for the time being for practitioners and for all those who place property into corporate ownership is to be mindful even more so of the need to avoid allowing a company to fall into administrative dissolution by filing defaults.

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