



Neutral Citation Number: [2021] EWHC 1835 (Ch)

Case No: BL-2020-000309

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST

Rolls Building
London
EC4A 1NL

Date: 05/07/2021

Before:

CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS
(sitting as a Deputy High Court Judge of the Chancery Division)

Between:

PALL MALL 3 LIMITED **Claimant**
- and -
(1) NETWORK RAIL **Defendants**
(2) VOLKERFITZPATRICK LIMITED

TIMOTHY MORSHEAD QC (instructed by **Claire Mairs LLP**) for the **Claimant**
IAN CLARKE QC (instructed by **Addleshaw Goddard LLP**) for the **First Defendant**
TIM CALLAND (instructed by **Birketts LLP**) for the **Second Defendant**

Hearing dates: 24 June 2021

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10:30 hrs on 05 July 2021

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHIEF INSOLVENCY AND COMPANIES COURT JUDGE BRIGGS

Chief ICC Judge Briggs:

Introduction

1. The question before the court is deceptively easy to articulate: does dominant land with the benefit of an established easement of drainage lose the easement upon escheat occurring on disclaimer of the freehold title.
2. This is the trial of a preliminary issue ordered by Master Shuman on 18 November 2020.

The easement of drainage

3. The background facts are not in dispute. A railway line runs through Hackney Wick from East to West. Network Rail owns the land just North of the line. On the Eastern boundary lies freehold land that was registered under title number EGL416269. This land (“EGL416269”) was owned by a company known as NCNA Properties Limited (“NCNA”), previously known as CNC Properties Limited. Adjacent to EGL416269, but also North of the line, lies a narrow strip of land (the “Adjacent Land”). Pall Mall 3 Limited (“Pall Mall”) holds the Adjacent Land with possessory title.
4. NCNA entered creditors’ voluntary liquidation and was dissolved on 20 October 2016. Upon dissolution EGL416269 vested in the Crown pursuant to section 1012 of the Companies Act 2006 (“CA 2006”).
5. On 17 December 2018, a notice of disclaimer was tendered by the Treasury Solicitor. The notice is expressed to take effect as a disclaimer of the Crown’s title to EGL416269.
6. Upon this disclaimer, EGL416269 escheated to the Crown.
7. By transfer dated 29 January 2019 (the “2019 Transfer”) the Queen’s Most Excellent Majesty and the Crown Estate Commissioners transferred EGL416269 to Pall Mall for the sum of £5,000.
8. The 2019 Transfer includes the following recitals:

“(1) Immediately before its dissolution as mentioned below NCNA Properties Limited (“the Company”) was the Registered Proprietor with freehold title absolute of the premises comprised in the registered title (“the Former Title”) registered under the

Former Title Number and shortly known as Land and buildings on the south side of Wallis Road

(2)(a) Upon the dissolution of the Company the freehold estate of the Company in the said premises vested in the Crown under 5.1012 of the Companies Act 2006

(2)(b) On 17 December 2018 notice of disclaimer was given by the Crown's representative that is to say the Treasury Solicitor, which was expressed to take effect as a disclaimer of the Crown's title to the said premises

(3) It is apprehended that the said premises there upon became subject to escheat to Her Majesty

(4) The Commissioners have agreed with the Purchaser for the sale to the Purchaser in manner hereinafter appearing of such fee simple estate in respect of the said premises subject to escheat as Her Majesty may now be able to grant ("the Property") for the sum mentioned below

(5) The Commissioners have at no time prior to the date of this Transfer taken possession or control of the said premises or entered into occupation thereof or effected any actual or presumed acts of ownership or management in regard thereto."

9. Without guarantee of title the Commissioners transferred, to the extent they were able, the "Property":

"subject to (so far as affecting the Property or any part thereof and so far as now subsisting and capable of being enforced and whether legal or equitable and whether or not subsisting at the date of the said disclaimer above referred to or arising thereafter) all (if any):

Estates and interests...

(e) easements rights quasi-easements rights of common public or other rights...

(g) prescriptive rights or rights or interests which may arise by reason of any enactment relating to the limitation of actions."

10. This included "the Lease referred to in the Charges Register of the Former Title [defined in the 2019 Transfer] a Lease dated 15 April 1988 between (1) NCNA Properties Limited (previously known as C.N.C Properties Limited) and (2) SAK investments Limited" and "the covenants conditions stipulations or other provisions contained or referred to in the Property and Charges Registers of the Former."

11. The new title for the same land is registered at HM Land Registry under title number AGL467420 (“AGL467420”). AGL467420 comprises land and various buildings that have been on the land for about 60 years.
12. The lease “referred to in the Charges Register of the Former Title a Lease dated 15 April 1988” was in favour of Pall Mall. It was for a term of 999 years and was registered under title number EGL220091 (“EGL220091”).
13. Network Rail owns the railway and embankment adjoining Hackney Wick Railway Station. It is agreed between the parties that the railway and embankment may be, for the purposes of this issue, classified as the servient land (the “Servient Land”) whereas AGL467420 and the Adjacent Land classified as the dominant land (the “Dominant Land”).
14. A drain, within the curtilage of Unit 86 on the Dominant Land, and containing six manholes, runs downhill from East (the “East Drain”) to the West. When the drain leaves the Dominant Land, (and become the “West Drain”) it continues West within the Adjacent Land and beyond the curtilage of Unit 86, through the Servient Land. The drain takes surface water and foul waste to a public sewer under Wallis Road. This is the easement of drainage that benefits the Dominant Land.
15. In 2017, Network Rail, through its contractors, carried out substantial works to extend Hackney Wick Railway Station. These works involved, amongst other things, the demolition of a building immediately to the west of Unit 86 on the Western part of AGL467420. During the works the drain was rendered inoperable.
16. The relief sought by Pall Mall is for a declaration that the Dominant Land retains the easement of drainage notwithstanding the dissolution of NCNA, escheat and disclaimer. It seeks the broken drain to be reinstated and damages for interference.

The case for Network Rail in summary

17. The pleaded case of Network Rail, relevant to the issue before the court today, is that Pall Mall does not have the benefit of the easement of drainage. It contends the relief sought is not available.
18. It is said that Pall Mall cannot maintain its case for prescription under section 2 of the Prescription Act 1832, alternatively under the doctrine of lost modern grant, because until

4 February 2019 it only possessed a leasehold interest in the premises. In argument Mr Clarke says that tenure is relevant for determining rights over land because the freehold EGL416269 estate came to an end upon escheat to the Crown. Escheat is not a disposition, transfer or conveyance.

19. A right obtained by prescription may only be obtained as appurtenant to the freehold estate of a dominant tenement. This was expanded upon to the effect that an easement has no independent existence. An easement cannot be severed from the freehold interest, assigned or transferred to a third party.
20. Mr Clarke argues that the Crown cannot transfer an easement of drainage from land that was escheat. The new title will not have had the benefit of the easement that had been appurtenant to EGL416269. It would be independent of the AGL467420 title and represent “a transfer in gross”.
21. As AGL467420 has no ancillary easement Network Rail was entitled to destroy the drain in question without recourse. Put simply, Pall Mall is not the successor in title to EGL416269. As it is not the successor it does not take the prescriptive rights previously held under that title.

The case for Pall Mall in summary

22. Mr Morshead argues that modern land law is born from the ancient laws of the land, but the law has not stood still and the policy considerations that applied in medieval times do not necessarily apply today. With that said the legislative policy behind escheat is to reduce the exposure of risk (burdens) to the Crown, but not affect benefits. The escheat is to ensure that the land belongs to a legal person.
23. The case for Pall Mall, then, has the advantage of simplicity. Escheat does not extinguish an easement and did not extinguish the easement of drainage enjoyed by EGL416269.
24. The starting point is the Crown Estate Act 1961 (the “CEA”). This provides that where land escheats it vests in the Crown and any proceedings may be taken in respect of it.
25. The term “land” includes easements.
26. The Law of Property Act 1925 (the “LPA”) provides that a transfer will include easements.

27. The 2019 Transfer for the fee simple absolute included the easement of drainage.

Easements- a brief overview

28. Although time was taken at trial on the issue of establishing an express or implied easement (easements by prescription or the fiction of a lost modern grant) I intend to say little about it here. This is simply because it is conceded for the purposes of the preliminary issue that NCNA as freeholder had the benefit of an easement of drainage prior to its dissolution.

29. It has been authoritatively determined that there must be a dominant and a servient tenement and that an easement must accommodate the dominant tenement. The dominant and servient owners must be different persons and a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant: *Regency Villas Title Ltd v Diamond Resorts (Europe) Ltd* [2019] AC 553.

30. Other than form, it is a matter of indifference to the user of an easement whether its origin was express or by lapse of time. Megarry and Wade, the Law of Property 9th Edition 27-0043 states:

“The court may therefore presume on proof of the fact of long enjoyment, that there once was an actual grant of the right, even though it is impossible to produce any direct evidence of such a grant. It is then “the habit, and in my view, the duty, of the court, to far as it lawfully can, to clothe the fact with a right”. This policy extinguishes stale claims, quiets titles, and preserves established property, while at the same time paying lip service to the doctrine that every easement must owe its origin to a grant.”

31. The proof of the fact of long enjoyment is not always sufficient for the court to “clothe the fact with a right”. A tenant cannot obtain an easement by prescription against another tenant holding under the same landlord and prescription was not available either at common law or under the Prescription Act 1832 by or to owners of a lesser estate than an estate in fee simple. In *Simmons v Dobson* [1991] 1 WLR 720 Lord Justice Fox observed that the proposition that one tenant cannot acquire an easement of way by prescription against another tenant holding of the same landlord had held good for a number of years. He did so by referring to *Kilgour v. Gaddes* [1904] 1 K.B. 457 (which itself referred to *Wheaton v. Maple & Co.* [1893] 3 Ch. 48) where Lindley L.J. explained:

“The whole theory of prescription at common law is against presuming any grant or covenant not to interrupt, by or with anyone except an owner in fee. A right claimed by prescription must be claimed as appendant or appurtenant to land, and not as annexed to it for a term of years.”

32. An easement has to be asserted as appurtenant to land. It cannot exist in gross: *Alfred F Beckett Limited v Lyons* [1967] Ch 449. An “easement, right or privilege” must be “for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute”.

33. The issue before the court in *Wall v Collins* [2007] EWCA Civ 444, [2007] Ch 390 concerned a merger of a leasehold and freehold. Conventional wisdom was that the easement was lost as it was attached to the lease. Carnwath L.J (as he was) found that although the easement could not last longer than the term of years absolute, as the easement attached to the land, it had not extinguished by merger but survived for the benefit of the freehold (paragraphs 14-15). In any event a lessee who acquired the freehold acquired the same easement under section 62 of the LPA. The decision has been remarked upon in leading texts such as *Gale on Easements* (21st Edition) para 1-32: “This second conclusion seems sound whereas the first conclusion is more doubtful”.

34. In its report “Making Land Work: Easements, Covenants and Profits à Prendre” (2011) Law Com No 327 (HC 1067), [2011] EWLC 327 at para 2.25 the Law Commission advised that statute reverse the first element of decision, The Law Commission reasoned [3.247]:

“...that an easement granted to a leaseholder is annexed to the land rather than to the lease would seem to imply that such an easement would therefore survive forfeiture, surrender and disclaimer. Yet we have found no suggestion in legal writing since *Wall v Collins* that the effect of the decision extends beyond merger. We can say with some confidence that it would not be applied to forfeiture; the axiom that forfeiture brings to an end every aspect of a lease is so well-embedded in the law that we think it implausible that any court would extend the ratio of *Wall v Collins* thus far. To do so would be to give landlords an incentive to forfeit in some cases, in order to obtain valuable rights attached to the lease, and that would be highly controversial.”

35. The Law Commission recommendations have not been acted upon. The current state of the law is admirably summed up in *Ruoff & Roper on Registered Conveyancing* at 25.050:

“Upon the merger of a lease with the superior freehold, it used to be thought that any appurtenant easement granted for the benefit of the leasehold estate also came to end, with the result that the easement could not be exercised by the owner of the freehold estate and could not be carried forward to the register of the freehold title. This also meant that, unless the reversionary title enjoyed an equivalent easement, the lessee should not apply for merger in order to maintain the leasehold estate for which the easement existed. However, following the Court of Appeal’s decision in *Wall v Collins*, it is now clear that so long as the easement is appurtenant to a dominant tenement per se and that the original grantee had an interest that was at least co- extensive with the period of the easement, it is not required that the easement be appurtenant to any particular interest in that tenement. Consequently, an easement existing for (apparently) the benefit of a leasehold estate, can continue to be enjoyed by the freeholder on merger and can be carried over to the register of the superior title...However, it would be otherwise if the easement was granted expressly for the benefit of the leasehold estate and limited to expire on termination of the lease. In that case, the benefit would carry through to the superior title on merger, and be available to the freeholder, but only for that period which remained of the term of the lease. The same considerations apply in relation to titles adversely affected by easements and noted leases (not being a registrable title).”

36. The extinguishment of the easement of drainage is not said to have arisen by reason of merger of the freehold and leasehold. It was said to arise at the time when title EGL416269 vested in the Crown. The 2019 Transfer, governed in part by the LPA, could not, says Mr Clarke, include the easement. I turn to the relevant provisions of the LPA.

Statutory provisions

37. By section 1 of the LPA only two estates exist at law:

“(1) The only estates in land which are capable of subsisting or of being conveyed or created at law are—

- (a) An estate in fee simple absolute in possession;
- (b) A term of years absolute.”

38. Interests in the land that are capable of conveyance are limited by section 1(2) but include an easement:

“The only interests or charges in or over land which are capable of subsisting or of being conveyed or created at law are:

- (a) An easement, right, or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute...”

39. Section 62 of the LPA concerns conveyancing or transfers of land. Subsection (1) provides:

“A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.”

40. Section 62 (4) and (5) provide for applicability and reveal limitations:

“(4) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions therein contained

(5) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.”

41. Section 187 concerns legal easements:

“Where an easement, right or privilege for a legal estate is created, it shall enure for the benefit of the land to which it is intended to be annexed”

42. By section 205 LPA a “disposition” includes a “conveyance” and a “conveyance” includes (among other things) an “assent, vesting declaration, vesting instrument” and a “disclaimer”. By section 205 (ix) “Land” is defined as (where relevant):

“land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege, or benefit in, over, or derived from land...”

43. The definition of “land” is wide.

44. Whilst setting out the relevant statutory provisions I also mention section 8(3) of the CEA provide:

“Where land escheats to Her Majesty in right of the Crown or of the Duchy of Lancaster, or to the Duke of Cornwall or Her Majesty in right of the Duchy of Cornwall, then (without prejudice to the rights of other persons) the land shall vest accordingly, and may be dealt with, and any proceedings may be taken in relation to it, without the title by escheat being found of record by inquisition or otherwise.”

45. “Land” is not otherwise defined in the CEA. The Schedule to the Interpretation Act 1978 provides a definition:

“Land’ includes building and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land.”

46. I shall now turn to the provisions of the CA 2006 that concern dissolution.

Dissolution of NCNA under the CA 2006

47. The consequences of dissolution of a company are governed by the CA 2006. Once NCNA had been dissolved any assets in its ownership vested in the Crown as bona vacantia pursuant to section 1012 CA 2006 which provides:

“(1) When a company is dissolved, all property and rights whatsoever vested in ... the company immediately before its dissolution ... are deemed to be bona vacantia and—

(a) accordingly belong to the Crown... , and

(b) vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown...”

48. The parties agree that “property” includes fee simple absolute estate. Section 1013 concerns Crown disclaimer:

“(1) Where property vests in the Crown under section 1012, the Crown’s title to it under that section may be disclaimed by a notice signed by the Crown representative, that is to say the Treasury Solicitor...”

49. The effect of such a disclaimer is provided for by section 1014 as follows:

“(1) Where notice of disclaimer is executed under section 1013 as respects any property, that property is deemed not to have vested in the Crown under section 1012.”

50. The general effect of the disclaimer, relevant to this case, is that it terminates the “rights, interests and liabilities of the *company* in or in respect of the property disclaimed”: see section 1015 CA 2006.
51. The provisions of the CA 2006 applied to NCNA lead to the following analysis.
52. First, by reason of dissolution NCNA ceased to exist.
53. Secondly, on dissolution title EGL416269 vested in the Crown as *bona vacantia*. The land under title EGL416269 did not disappear on vesting.
54. To expand, the title was capable of revesting in NCNA if NCNA were restored to the register. Generally, a company may be restored to the register at any time in a six year period from dissolution: section 1030(4) CA 2006. 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 off the register: section 1032(1) CA 2006. Vesting *bona vacantia* is reversed.
55. Thirdly, on the facts of this case the notice of disclaimer dated 17 December 2018 triggered the operation of section 1014 of the CA 2006, so that the title was deemed not to have “vested in the Crown under section 1012”.
56. Fourthly, although by operation of section 1014 CA 2006, EGL416269 was deemed not to have vested in the Crown, the effect of sections 1012 -1014 of CA 2006 was that the land under the title became escheat to the Crown.
57. Lastly, by reason of escheat the estate under title EGL416269 of fee simple absolute was extinguished. I shall turn to escheat now.

Escheat

58. Escheat is explained in Halsbury Laws volume 29 as part of:

“the seigniorial revenues of the Crown and can apply to other lords of freehold land, known as mesne lords. Escheat is the capacity of the chief lord to resume land granted by him or a predecessor in title on determination of the estate granted. It may

now arise on disclaimer. This may be by a trustee in bankruptcy or a liquidator or the Treasury Solicitor. As there are now few known or recognised mesne lords the normal effect of escheat is a passing of title to the Crown.”

59. Escheat may be seen as “a principle inseparable from tenure which ensures that land can never be without an owner, for if there is no tenant and no mesne lord it will return to the Crown”: *Scmla Properties Ltd v Gesso Properties (BVI) Ltd* [1995] BCC 793, 798D citing Megarry and Wade (5th Edition) p. 34 of the Law of Real Property.

60. The Deputy Judge in *Gesso Properties* provided reasoning that has stood good for more than 25 years.

61. In his introduction the Deputy Judge explained:

“This case raises a difficult but important point as to the application of the Landlord and Tenant Act 1987 to premises the freehold of which has been disclaimed on the insolvency of the landlord. If the argument of the defendant is well-founded, there is a significant lacuna in the provisions of the Act, resulting from the operation of the medieval doctrine of escheat. I have to say that I was initially amused, but ultimately dismayed, that the rights of the parties under a modern statute reforming the law of landlord and tenant should depend on the vestiges of feudal land law. My dismay grew as it became apparent that my decision in this case involved an examination of fundamental concepts of our land law, and an examination of concepts and authorities dating back several centuries. It was with some relief that I noted that the last authority to be cited in this case was a textbook dating from as recent a date as 1794; but even that referred me back to medieval writs of escheat.”

62. He noted that the argument concerned the “effect of the disclaimer of the freeholds under s. 178(4) of the Insolvency Act 1986”. That is not the position in this matter but the terms of the disclaimer provision in the Insolvency Act 1986 and the CA 2006 are not materially different in effect. The provisions of both Acts operate “so as to determine, as from the date of the disclaimer, the rights, interests and liabilities of the company in or in respect of the property disclaimed.”

63. The Deputy Judge cited Megarry and Wade (5th edition) (now Megarry and Wade at 2-030 (9th edition)) to support the view that no matter what tenure once attached to the land, the Crown holds the land directly on escheat:

“There is only one feudal tenure left today, namely socage, now called freehold. Feudal incidents have in practice disappeared, except for land formerly held in grand sergeanty, petty sergeanty or copyhold, where some traces of the former tenure remain. Except in the case of land formerly copyhold, mesne lordships are nearly all untraceable, for it is many years since there were any enforceable rights to preserve evidence of the relationship of lord and tenant; consequently the courts are ready to act on the presumption that the land is held directly of the Crown, e.g. for the purposes of escheat”

64. The authors of Megarry and Wade opine:

“For most practical purposes the law of tenure is no longer of an instance in solving problems about rights over land. The owner in fee simple is regarded as absolute owner, and the fundamentals of his or her title depend on principles which have nothing to do with tenure.”

65. The Deputy Judge observed [page 798C]:

“It is because all land is held, ultimately, of the Crown that the definition of land in the Law of Property Act 1925 and in the Land Registration Act 1925 includes ‘land of any tenure’. It is because the Crown cannot hold land of itself that the ancient lands of the Crown are not registered as freeholds. To this extent, there is a major, but unremarked, lacuna in the system of land registration in England and Wales.”

66. Drawing on the learnings he cited the Deputy Judge found that the Crown:

- 66.1. is not a successor in title to the freeholder (page 805B);
- 66.2. does not come under any personal obligation to a mortgagee in respect of the mortgage debt;
- 66.3. 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 (page 805 F); and that
- 66.4. subordinate interests in the land survive escheat: “the crown on a forfeiture takes the estate subject to all charges and incumbrances, which would have bound the party forfeiting, and must be bound too, where no fraud in respect of the crown” (page 806 D- page 808C citing *Duke of Bedford v Coke* (1751) 2 Ves Sen 116). In

my judgment it would be illogical to find that only the incumbrances pass to the Crown. The Crown takes the benefits and the burdens.

67. I was taken by Mr Clarke to two other authorities. First, *Re Buzzlines* [2020] EWHC 3027 (Ch) where the court had to decide if a mortgage over land survived dissolution of the mortgagor, and secondly *In the matter of Carrowreagh Management Company Limited* [2018] NICH 18 where McBride J found that a reversion of lands to the Crown by escheat is not a “disposition”. With reference to the reasoning in *Gesso Properties* the Judge reached the following conclusions:

67.1. That there was no transfer or a conveyance of the freehold to the Crown as escheat operates automatically;

67.2. under the doctrine of escheat the freehold estate is extinguished, as there is no one at law entitled to hold that estate; and

67.3. upon restoration to the register the law deems no interruption to title and the company retains ownership of the lands.

68. The judgment of *Re Buzzline* provides a helpful analysis of the CA 2006 provisions concerning dissolution but carries little authoritative weight as only one counsel appeared. In any event it is not directly relevant to the determination of whether the easement of drainage survived escheat. The impressive judgment of McBride J carries little persuasive weight as only one counsel appeared.

The washing out of interests in land - analysis

69. Upon escheat the Crown does not hold the land as an estate. In this case the freehold title was extinguished. The extinction of the freehold estate may be rationalised on the basis that the Crown will not hold the freehold estate from itself.

70. On escheat the Crown takes the land without conveyance. The vesting is of allodial land.

71. In my judgment the loss of an estate on escheat does not of itself bring an end to derivative interests in the land.

72. The Crown, as direct owner, may take an active role and bring an end to any derivative interests.

73. The recitals to 2019 Transfer provide incontrovertible evidence that the Crown “at no time” took possession or control “or effected any actual or presumed acts of ownership or management in regard there too”.
74. The common law deems vesting automatic as, in circumstances such as these, it would be very unlikely for there to be a counterparty to a conveyance. Without a counterparty the purpose of escheat, to maintain ownership, is frustrated. This is not the only area of law where the likelihood of an absent counterparty would frustrate the purpose of vesting. In a statutory context, upon the appointment of a trustee in bankruptcy all the property of the bankrupt automatically vests without assignment conveyance or transfer in the trustee pursuant to section 306 Insolvency Act 1986. The automatic vesting prevents the need of a bankrupt, reluctant to accept his or her status as an adjudged bankrupt, or an absent bankrupt, from frustrating the statutory scheme.
75. In my judgment vesting in these circumstances confers escheat land to the Crown by way of transfer. It is only by transfer that the Crown takes the land directly and the freehold title is extinguished: *Gesso Properties* [page 805]. The automatic vesting in the Crown is made as if by conveyance. If the land is later transferred to a third party the Crown Estate Commissioners are required to transfer the land using the usual formalities with reference to the former estate (the Former Title).
76. By reason of section 62 LPA the transfer is deemed to include the easement of drainage. This reasoning is consistent with *Wall v Collins* [paragraph 15] where it was held that an easement enures for the benefit of the land and not the estate by reason of section 187 LPA.
77. The maintenance of the easement of drainage on escheat for the benefit of the Crown is consistent with section 8 CEA which provides that any proceedings may be taken in respect of the land once vested. I agree with Mr Morshead that the use of the word “land” in that section includes an easement by reason of the Interpretation Act 1978.
78. If Mr Clarke is correct, on escheat, the Crown would not have the benefit of an established easement. That would include an easement that provided the sole access to the escheated land. On transfer to a third party, when referring to the “Former Title”, the transfer would need to exclude the easement of access that had attached to the “Former Title”, in the

knowledge that by operation of escheat, it had washed free. To reach this conclusion would be to provide an extraordinary outcome.

79. Despite counsel's efforts no authority or textbook has been found to support the contention that the easement of drainage or any other derivative interest will be washed free of the land on escheat. On the other hand there is support for finding that benefits are transferred on escheat: *Gesso Properties* at 807F-808C citing Simpson, *A History of the Land Law* (2nd edn) at p. 53, by Milsom, *Historical Foundations of the Common Law* (2nd edn) at pp. 111-114, and by Holdsworth, *A History of English Law* (3rd edn) vol. 3, p. 43.
80. That the easement of drainage endured escheat, is consistent with the 2019 Transfer. The 2019 Transfer expressly provided for the transfer of derivative interests in the land where they existed. There was no investigation into proprietary rights under the "Former Title" and so the Commissioners provide no guarantee. It may be inferred that the Commissioners did not subscribe to the view that the land had been washed clean of easements and other derivative interests upon the occurrence of escheat and that it was possible to transfer the easement of drainage where it had existed prior to escheat.
81. It follows that I answer the question posed by Master Shuman in the negative. The fee simple estate registered EGL416269 had come to an end on escheat but the land registered under that title did not and neither did the derivative interests. The easement of drainage remained attached to the land. The easement was transferred for the benefit of Pall Mall by the 2019 Transfer.
82. I invite the parties to agree an order.