

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (ChD)

In the Matter of Buzzlines Coaches Limited
And in the Matter of the Companies Act 2006

Date:12th November 2020

Before :

His Honour Judge Halliwell sitting as a Judge of the High Court

Between :

MISTRAL ASSET FINANCE LIMITED

Claimant

- and -

(1) THE REGISTRAR OF COMPANIES
(2) HER MAJESTY'S ATTORNEY GENERAL

Defendants

Dr Nathan Smith (instructed by **Beyond Corporate Limited**) for the **Claimant**

Hearing date: 29th October 2020

APPROVED JUDGMENT

<p>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.</p>
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HHJ Halliwell:

(1) Introduction

1. By these proceedings, the Claimant seeks a declaration that it remains entitled to a legal mortgage of leasehold property at 3A-3B Defiant Close, Hawkinge, Folkestone, Kent (“the Property”) following the dissolution of the mortgagor, Buzzlines Coaches Limited (“the Company”). The Claim Form also incorporates a claim for an order restoring the Company to the Register of Companies and, in the alternative, a vesting order under the provisions of *Section 1017* of the *Companies Act 2006*. The Registrar of Companies has administratively restored the Company to the Register so as to dispense with the need for an order in respect of this part of the claim. However, the Company was not restored to the Register until after proceedings had been commenced and, by that time, the Treasury Solicitor had filed notice of disclaimer. Questions thus arise about the overall effect of the disclaimer.

2. At the hearing before me, Dr Nathan Smith appeared on behalf of the Claimant. The Defendants did not attend. Since it was not in existence when proceedings were commenced, the Company was not joined as a Defendant at that stage and it has not been formally joined as a party subsequently. However, I shall make an order providing for notice of the judgment to be served on the Company which will then be entitled, for a period of 28 days, to apply for an order varying or setting judgment aside and seek further directions under *Section 1032(3)* of the *Companies Act 2006*.

- (2) Factual background***

3. The registered leasehold title is based on a lease dated 25th April 2016 between Pentland Properties Limited and the Company. It is for a term of 999 years at a yearly rent of £1. The premium was £310,000 plus VAT.

4. The Claimant is a specialist provider of vehicle purchase finance to bus and coach operators. In December 2017, it advanced funds to Buzzlines Travel Limited (“Buzzlines Travel”) and, by a legal charge dated 31st December 2017 (“the 2017 Charge”), the Company charged the Property with Buzzline Travel’s indebtedness. However, Buzzline Travel defaulted on its obligations to the Claimant and eventually went into insolvent liquidation.
5. On 31st December 2019, the Company was struck off the Register of Companies and, on 7th January 2020, it was dissolved. On 17th March 2020 or thereabouts, the Treasury Solicitor filed notice of disclaimer but did not serve such notice on the Claimant until 19th May 2020. This prompted the Claimant to commence the current proceedings on 1st June 2020. However, it appears that, on 1st July 2020, a former director of the Company submitted an application for administrative restoration under the provisions of *Section 1024* of the *2006 Act* and the Company was duly restored to the Register prior to the hearing before me.

(3) Disclaimer of bona vacantia on dissolution of companies

6. At common law, land was never entirely ownerless. The editors of *Megarry and Wade on “the Law of Real Property”* (9th edn) (2019) observe, at *Para 2-023*, that, in the absence of a freehold owner or mesne lord, the freehold would historically return or escheat to the Crown. However, leasehold ownership was treated differently. Until the *Companies Act 1929*, a lease of land vested in a company simply came to an end if and when the company was dissolved, *Hastings Corporation v Letton* [1908] 1 KB 378. At that point, the reversion was accelerated and the company’s immediate landlord became entitled to an estate in possession.

7. Following the *Companies Acts 1929 and 1948*, a dissolved company's property vests in the Crown as *bona vacantia* subject to the Crown's right of disclaimer. This includes freehold and leasehold property. In the event that the Crown disclaims the freehold title, it escheats in accordance with common law principles, *Scmla Properties Ltd v Geso Properties (BVI) Ltd [1995] BCC 793*. The statutory regime is now contained in *Part 31* of the *Companies Act 2006* and applies to companies to which the *Companies Acts* apply. For other companies, the principles of escheat at common law are applicable at common law.
8. In the case of freehold land, the dissolution of the company and the exercise of the Crown's rights of disclaimer did not extinguish derivative interests at common law, such as leases or mortgages, see *Scmla Properties (supra) p808*.
9. It has now been authoritatively established, in *Hindcastle Ltd v Barbara Attenborough Ltd [1997] AC 70*, that where a lease is disclaimed by a liquidator under the provisions of *Section 178* of the *Insolvency Act 1986*, this does not operate to statutorily extinguish the rights and liabilities of third parties, such as sub-tenants and guarantors. *Section 178(4)* provides, in terms, that "a disclaimer...(a) operates 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; but (b) *does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person*" (My italics). These provisions are in essentially the same terms as *Section 1015 (1) and (2)* of the *Companies Act 2006* (see below). In these respects, there can be no good reason for any distinction between the statutory regimes governing corporate insolvency and dissolution. It can reasonably be assumed that the Crown's disclaimer, under *Section 1013* of the *2006 Act*, does not operate to extinguish third party liabilities and rights.

(4) *The statutory framework*

10. The relevant statutory provisions, in *Part 31* of the *Companies Act 2006*, are as follows.

1012 *Property of dissolved company to be bona vacantia*

(1) When a company is dissolved, all property and rights whatsoever vested in or held on trust for the company immediately before its dissolution (including leasehold property, but not including property held by the company on trust for another person) are deemed to be bona vacantia and-

(a) accordingly belong to the Crown, or the Duchy of Lancaster or to the Duke of Cornwall for the time being (as the case may be), and

(b) vest and may be dealt with in the same manner as other bona vacantia accruing to the Crown, to the Duchy of Lancaster or to the Duke of Cornwall

(2) Subsection (1) has effect subject to the possible restoration of the company to the register under Chapter 3 (see section 1034).

1013 *Crown disclaimer of property vesting as bona vacantia*

(1) Where property vests in the Crown under section 1012, the Crown's title...may be disclaimed by a notice signed by the Crown representative...

1014 *Effect of Crown disclaimer*

(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.

(2) The following sections contain provisions as to the effect of the Crown disclaimer-

sections 1015 to 1019 apply in relation to property in England and Wales or Northern Ireland

sections 1020 to 1022 apply in relation to property in Scotland.

1015 *General effect of disclaimer*

(1) The Crown's disclaimer operates so as to terminate, as from the date of the disclaimer, the rights, interests and liabilities of the company in respect of the property disclaimed.

(2) It does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person.

1016 *Disclaimer of leaseholds*

(1) The disclaimer of any property of a leasehold character does not take effect unless a copy of the disclaimer has been served (so far as the Crown representative is aware of their address) on every person claiming under the company as underlessee or mortgagee, and either-

(a) no application under section 1017 (power of court to make a vesting order) is made with respect to that property before the end of the period of 14 days beginning with the day on which the last notice under this paragraph was served, or

(b) where such an application has been made, the court directs that the disclaimer shall take effect.

1017 *Power of court to make a vesting order*

- (1) The court may on application by a person who-
 - (a) claims an interest in the disclaimed property, or
 - (b) is under a liability in respect of the disclaimed property that is not discharged by the disclaimer,make an order under this section in respect of the property.

- (2) An order under this section is an order for the vesting of the disclaimed property in, or its delivery to-
 - (a) a person entitled to it (or a trustee for such a person), or
 - (b) a person subject to such a liability as is mentioned in subsection (1)(b) (or a trustee for such a person).

1024 *Application for administrative restoration to the register*

- (1) An application may be made to the registrar to restore to the register a company that has been struck off the register...
- (2) An application under this section may be made whether or not the company has in consequence been dissolved.

1028 *Effect of administrative restoration*

- (1) The general effect of administrative restoration to the register is that the company is deemed to have continued in existence as it had not been dissolved or struck off the register.

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

1034 *Effect of restoration to the register where property has vested as bona vacantia*

(1) The person in whom any property or right is vested by section 1012 (property of dissolved company to be bona vacantia) may dispose of, or of an interest in, that property or right despite the fact that the company may be restored to the register...

(2) If the company is restored to the register-

(a) the restoration does not affect the disposition (but without prejudice to its effect in relation to any other property or right previously vested in or held on trust for the company), and

(b) the Crown or, as the case may be, the Duke of Cornwall shall pay to the company an amount equal to-

(i) the amount of any consideration received for the property or right or, as the case may be, the interest in it, or

(ii) the value of any consideration at the time of the disposition,

or, if not consideration was received an amount equal to the value of the property, right or interest disposed of, as at the date of the disposition”.

(5) Did the Claimant’s rights under the 2017 Charge survive the Crown’s disclaimer?

11. In my judgment, the answer to this question is yes. This is so regardless of whether the Crown's disclaimer ever took effect. *Section 1015(2)* of the *2006 Act* provides that the disclaimer "...does not, except so far as is necessary for the purpose of releasing the company from any liability, affect the rights or liabilities of any other person". It is thus in the same terms as *Section 178(4)* of the *Insolvency Act 1986*. In *Hindcastle v Barbara Attenborough (supra)*, Lord Nicholls dealt specifically, at 89E-G, with the rights of third parties, such as sub-tenants, who acquired a proprietary interest under the lease before disclaimer. "In order to free the tenant from liability, it is necessary to extinguish the landlord's rights against the tenant and also the subtenant's rights against the tenant. The tenant's interest in the property is determined, but not so as to affect the interest of the sub-tenant. Determination of the subtenant's interest in the property is not necessary to free the tenant from liability. Hence the subtenant's interest continues. No deeming provision is necessary to produce this result. Here the deeming relates to the terms on which the subtenant's proprietary interest continues. His interest continues unaffected by the determination of the tenant's interest. Accordingly, the subtenant holds his estate on the same terms, and subject to the same rights and obligations as would be applicable if the tenant's interest had continued..."

12. In the present case, the 2017 Charge took effect as a charge by way of legal mortgage for the purposes of *Section 86(1)* of the *Law of Property Act 1925*. As mortgagee, the Claimant thus became entitled to the rights it would have had if granted a sub-term one day shorter than the term vested in the Company, *LPA 1925 s87(1)*. Following disclaimer of the Company's lease, it would have remained entitled to the same rights and obligations as would have been applicable if the Company's interest had continued consistently with the observations of Lord Nicholls in *Hindcastle v Barbara Attenborough (supra)*.

(6) Was the Crown's disclaimer precluded from taking effect by the provisions of Section 1016(1) of the 2006 Act?

13. In my judgment, the answer to this question is, again, yes. *Section 1016(1)* (above) precludes the disclaimer from taking effect until notice has been served on every person claiming under the company and 14 days has elapsed without prompting an application for a vesting order unless the Court makes a direction to the contrary.

14. In the present case, the notice of disclaimer was first served on the Claimant on 19th May and the Claimant issued the present proceedings less than 14 days later, on 1st June 2020. Since the present proceedings included an application for a vesting order, the disclaimer cannot have taken effect. I am not invited to make a contrary direction under *Section 1016(1)(b)* of the *Act* and I can see no reason to do so.

(7) On the hypothesis that the Crown's disclaimer took effect, did the Property automatically re-vest in the Company on restoration?

15. In my judgement, the answer to this question is, also, yes. Upon restoration, the Company was deemed to have continued in existence as if it had not been dissolved or struck off by virtue of the provisions of *Section 1028(1)* of the *2006 Act*. On that basis, the Company's property and rights could no longer be deemed *bona vacantia* under *Section 1012(1)* of the *2006 Act* and there could thus be no room for the Crown to have disclaimed such property under the provisions of *Section 1013(1)* of the *2006 Act*. *Section 1034(2)* of the *2006 Act* provides that restoration does not affect any *disposition* of property by a person in whom *bona vacantia* is vested. However, it has been adjudged in three first instance decisions of the High Courts of England and Wales, and Northern Ireland that a disclaimer is not a disposition of property for these purposes. In Scotland, the Inner House of the Court of

Session have reached a different conclusion. However, the statutory regime in Scotland is not precisely the same as the regime applicable in England and Wales.

16. In the trilogy of High Court decisions, the judgment of Garland J in *Allied Dunbar Assurance plc v Fowle and others* [1994] BCC 422 came first. A landlord sued the sureties of a corporate tenant after the company was dissolved and the Crown disclaimed the lease. Garland J adjudged that, whilst the disclaimer had initially operated to release the sureties from liability, their liability was retroactively revived when the company was restored to the register under a statutory regime mirrored, for material purposes, by the provisions of *Section 1028(1),(3) and 1032(1),(3) of the 2006 Act*. In ruling that the disclaimer had initially operated to release the sureties, Garland J followed the judgment of the Court of Appeal in *Stacey v Hill* [1901] 1 KB 660, subsequently overruled by the House of Lords in *Hindcastle Ltd v Barbara Attenborough Associates Ltd (supra)*. However, in concluding that their liability was revived when the company was restored to the register, Garland J can be taken to have accepted the landlord's argument that, since the lease was thus statutorily deemed never to have vested in the Crown, the Crown must also be deemed not to have disclaimed the lease. He also accepted its submissions, consistent with the judgment of Danckwerts LJ in *Re Paradise Motor Co Ltd* [1968] 1 WLR 1125, that a disclaimer operates by way of avoidance rather than disposition. On this basis, the disclaimer did not survive restoration under the statutory regime now contained, albeit in modified form, in *Section 1034 of the 2006 Act*.

17. The issue was next raised before the Inner House of the Court of Session in *ELB Securities Limited v Love* [2015] CSIH 67. In their opinion delivered, on 18th September 2015, by Lady Paton, the Court of Session concluded that the restoration of a company registered in Scotland did not operate to revive a disclaimed lease. This was on the basis that the

statutory provision, in *Section 1032*, for “the company to be deemed to have continued in existence as if it had not been dissolved” was of general effect only subject to “the specific and detailed provisions” for the property to be deemed *bona vacantia* and, as such, disclaimed by the Crown, [26]. The Court of Session did not expressly determine whether the disclaimer amounted to a disposition within the meaning of *Section 1034* of the *2006 Act* but distinguished *Allied Dunbar Assurance plc v Fowle and others (supra)* on the basis that, in the *Allied Dunbar* case, “...the issue was not a question of the company’s property, but rather the effect of dissolution and restoration on the obligations of two guarantors who had entered into a covenant guaranteeing the performance of certain obligations by the company”, [32].

18. Shortly after *ELB Securities (supra)*, the issue was considered again; this time by HHJ David Cooke sitting as a judge of the High Court in Birmingham in *re Fivestar Properties Ltd [2016] 1 WLR 1104*. Judgment was delivered on 8th October 2015 following a hearing on 28th September 2015. Not surprisingly, given the close proximity of the two decisions, *ELB Securities* was not brought to the attention of HHJ Cooke before he gave judgment. *Fivestar (supra)* again involved a Crown disclaimer following the dissolution of a company. However, it differed from *Allied Dunbar (supra)* in that the company’s estate encompassed the freehold title. HHJ Cooke considered that this was not a material distinction. Applying *Allied Dunbar*, he concluded (at [23]) that the Crown disclaimer was not a disposition and, when the relevant company was restored to the register, the freehold estate was “retrospectively re-created and re-vested in the company as if it had not been dissolved and as if the freehold had never been disclaimed”.

19. The final judgment in the trilogy of High Court decisions was delivered by McBride J in *re Carrowreagh Management Company [2018] NICH 18*. After carefully considering *Allied*

Dunbar, ELB Securities and *re Five Star Properties (supra)*, McBride J preferred the analysis in *Allied Dunbar* and *re Five Star Properties* to the opinion of the Inner House of the Court of Session in *ELB Securities* and concluded that, once a company was restored to the register of companies in Northern Ireland, the company's freehold title had become re-vested in the company notwithstanding that Crown disclaimer. This was on the basis that *Section 1012(2)* of the *2006 Act* expressly provides that the provisions for land to be deemed *bona vacantia* following the dissolution of a company are "...subject to the possible restoration of the company to the register..." and *Section 1032* provides that the general effect of a court order restoring a company to the register is that it is deemed to have continued in existence, such a company should be deemed to have continued in existence as if it had not been dissolved or struck off [39]. Having reached this conclusion, McBride J was also satisfied that a crown disclaimer under which freehold land escheated to the Crown itself was not a "disposition" within the meaning of the *2006 Act* [41-44]. McBride J declined to follow the approach of the Court of Session on the basis that there are differences between the legislation governing Scotland and the common law jurisdictions of England and Wales and Northern Ireland [46]. He was also unpersuaded by the Court of Session's analysis [47-51].

20. Consistently with the judgments in *Allied Dunbar, ELB Securities* and *re Five Star Properties* and *Carrowreagh Management Company (supra)*, I am satisfied, in the present case, that the Property automatically re-vested in the Company upon restoration to the register of companies.

21. Firstly, if the *general* effect of *Sections 1028* and *1032* of the *Companies Act 2006* is for a company to be deemed to have continued in existence, following restoration, as if it had not been dissolved, transmissions of title are *prima facie* avoided if they are a function of

the dissolution itself. In expressly validating dispositions of property that would otherwise have been avoided, *Section 1034(2)* is consistent with this proposition. It is an illustration of the principle to which the Court of Session referred in *ELB Securities* (at [21]) that the “general provision must give way to the special provisions”.

22. In the present case, the Crown’s disclaimer is a function of the dissolution and is thus *prima facie* avoided by the provisions of *Section 1028* and *1032*. It is thus necessary to ask whether it is rescued by one or more of the other provisions of the *2006 Act*. At [22] of their Opinion, the Court of Session identified as “special provisions”, *sections 1012-1014* and *1020-1022*, but not *section 1034*. I shall not comment on *sections 1020-1022* since these relate exclusively to the effect of Crown disclaimer in Scotland. However, *sections 1012-1014* set out the statutory scheme under which, following the dissolution of a company, its property is deemed to be *bona vacantia* together with the Crown’s rights of disclaimer. They are not intended to qualify, in some way, the provisions in *Section 1028* and *1032* about the effect of a company’s restoration to the register. In my judgment, *sections 1012* to *1014* do not derogate from *Section 1028* and *1032*; the real question is whether *sections 1028* and *1032* are apt to qualify or vary the statutory regime for *bona vacantia* and disclaimer in *Sections 1012-1014*. If the general effect of *Sections 1028* and *1032* of the *Companies Act 2006* is to avoid transmissions of title, the latter are not rescued by *sections 1012* to *1014*.

23. In my judgment, if a transmission of title under *sections 1012* to *1014* can be statutorily rescued following restoration, the means for doing so is provided by *Section 1034*. Since *Section 1034* provides, in specific terms, that the restoration of a company does not affect the *disposition* of an interest or right in the property, the critical question, in the present

case, is whether the Crown disclaimer itself took effect as a disposition under *section 1034(1)*.

24. This is by no means a straightforward question, particularly given the unique nature of a statutory disclaimer of *bona vacantia*. *Section 1034(1)* is in wide terms. When construed together with *Section 1034(2)*, it encompasses the “disposition” of an “interest” or “right” in property. However, there is no statutory definition of “disposition” in the *2006 Act*. In this sense, the *2006 Act* is distinct from the *Law of Property Act 1925* in which “‘disposition’ is defined widely so as to ‘include a conveyance and also a devise, bequest, or an appointment of property contained in a will’ on the basis “‘dispose of’ has a corresponding meaning” and “conveyance” is sufficiently wide to “include a mortgage, charge, lease, assent, vesting declaration, vesting instrument, *disclaimer*, release and every other assurance of property or of an interest therein by any instrument, except a will...” (My italics). Under this legislation, the statutory definition is not comprehensive and it remains necessary to identify the point at which the disposition takes place¹ but it provides a list of transactions which are deemed to be included. However, unlike other legislation², the *Companies Act 2006* does not provide for “disposition” to bear the same meaning as it does in the *Law of Property Act 1925* nor does it otherwise incorporate any part of the statutory formula in the *1925 Act*.

25. In the trilogy of High Court cases, each judge was thus able to conclude that a statutory disclaimer of *bona vacantia* was not a statutory disposition within the meaning of *sections 655 and 1034* of the *Companies Act 1985* and *2006* respectively. The logic of Garland J’s judgment in *Allied Dunbar (supra)* was that a disclaimer operates by way of avoidance, not

¹ See, for example, *Spiro v Glencrown [1991] Ch 537* in which it was concluded that the unilateral exercise of an option did not form any part of a statutory disposition of the property.

² See, especially, *Section 1(6)* and *Section 2* of the *Law of Property (Miscellaneous Provisions) Act 1989*.

disposition, a principle followed and endorsed in relation to freehold land by HHJ Cooke in *re Fivestar (supra)*. Similarly, in *Carrowreach Management Company Limited (supra)*, McBride J concluded that the reversion of freehold land to the Crown by escheat, at common law, operated to extinguish the freehold title rather than dispose of it.

26. As McBride J observed (at [49]), it is not without significance that judgment in the *Allied Dunbar* case was delivered in January 1994, upwards of ten years before the *2006 Act* was enacted and can be taken to have accurately stated the law at the time. Although Parliament was thus afforded the opportunity to make amendments to the statutory regime, it did not do so. In *ELB Securities (supra)* (at [32]), the Court of Session sought to distinguish *Allied Dunbar* on the basis it related to the liability of the sureties. However, this can have had no logical bearing on the question of whether a disclaimer amounts to a disposition within the meaning of *Section 655 or 1034 of the 1985 or 2006 Acts*. Garland J's conclusion, in *Allied Dunbar*, that the sureties were initially released by the disclaimer can no longer stand following *Hindcastle v Barbara Attenborough Associates Ltd (supra)*. However, on the hypothesis that the sureties were initially released, his conclusion that the sureties' liability revived on restoration has not been reversed; indeed, one of the main purposes of Lord Nicholls' speech in *Hindcastle v Barbara Attenborough Associates Ltd* was to re-align the liability of sureties with the liability of the original tenant on the basis that the separate treatment of sureties was a historical anomaly.

27. In my judgment, it can now be taken to be settled law in England and Wales that a statutory disclaimer of land deemed *bona vacantia* does not, in itself, survive the restoration of a dissolved company. Whilst statutory protection is accorded, under *section 1034*, to third party transferees of property deemed *bona vacantia*, the same is not true of the restored companies and their successors in title. When, in *Hindcastle Limited v Barbara*

Attenborough Ltd (supra), Lord Nicholls concluded the time had come to over-rule *Stacey v Hill [1901] 1 KB 660*, he was confident guarantors did not assume their obligations in the expectation they would “not be liable in the very circumstances at which the guarantee [was] primarily aimed”. However, no analogy can be drawn with transactions in relation to the title to disclaimed property. Consistently with *Allied Dunbar Assurance plc v Fowle*, *Re Fivestar Properties Ltd* and *Carrowreagh Management Company Ltd (supra)*, it is more than conceivable that transactions have been concluded or parties have otherwise acted on the basis that, upon restoration to the register, a company’s leasehold or freehold title re-vests in the company notwithstanding any disclaimer.

28. In these circumstances, I shall follow these judgments. I recognise that the opinion of the Inner Court of Session in *ELB Securities Limited v Love [2015] CSIH 67* has gone the other way. However, the statutory regime in Scotland and the law to which it applies are not the same as the law of England and Wales. There is no reason to believe that *ELB Securities* has been followed or relied upon in England and Wales and I do not recognise the distinction drawn by the Inner House of the Court of Session with *Allied Dunbar v Fowle (supra)* on the basis that the latter related to the liability of sureties and, by implication, is thus confined to such liability.

29. In the present case, I am satisfied that the Property automatically re-vested in the Company on restoration.

(8) Disposal

30. I am invited to declare that the Crown’s disclaimer did not take effect since notice of disclaimer was first served on the Claimant less than 14 days prior to the issue of the present proceedings and that, if not, leasehold title to the Property would have re-vested in the

Company when it was restored to the register of companies. I shall do so. I am also minded to declare that the 2017 Charge remains vested in the Claimant.