The Court of Session Etc. Fees Amendment Order 1994, Great Britain, Great Britain. Scottish Office, H.M. Stationery Office, 011043868X, 9780110438689, . .

, , , , , .

The M4 Motorway (Junction 32, Coryton, Cardiff) and A470 Trunk Road (Coryton Interchange, Cardiff to Abercynon Roundabout, Rhondda Cynon Taf) (Temporary Prohibition of Vehicles and 50 MPH Speed Limit) Order 2013 / Gorchymyn Trafforddyr M4 (Cyffordd 32, Coryton, Caerdydd) a Chefnfforddyr A470 (Cyfnewidfa Coryton, Caerdydd i Gylchfan Abercynon, Rhondda Cynon Taf) (Gwahardd Cerbydau Dros Dro a Therfyn Cyflymder 50 MYA Dros Dro) 2013

[1] On 29 April 2013 the court ordered the winding up of The Scottish Coal Company Ltd ("SCC") and appointed the noters as interim liquidators. They had been appointed on 19 April 2013 as provisional liquidators of SCC. At a meeting of creditors on 3 June 2013 they were appointed liquidators. In this application they seek directions from the court in relation to the performance of their duties.

[2] SCC carried on several businesses including the operation of open-cast mining on seven sites in Scotland. Those sites were (i) House of Water, East Ayrshire, (ii) Broken Cross, South Lanarkshire, (iii) Dalfad, East Ayrshire, (iv) Dunstonhill, East Ayrshire, (v) Mainshill, South Lanarkshire, (vi) St Ninians, Fife, and (vii) Blair House, Fife. The site at Blair House had been mothballed when the noters were appointed provisional liquidators. Since their appointment the petitioners have ceased the mining operations but continue pumping and securing the safety of the sites.

[3] The noters have sold several sites and parts of other sites to Hargreaves Surface Mining Ltd ("Hargreaves"). SCC has retained several disused open cast sites or parts of sites at Headlecross, Glentaggart, Spireslack, Powharnal/Dalfad, Dunstonhill, Blair House and Shiel. This application is concerned with those sites or parts of sites.

[4] Mining operations are subject to various statutory obligations to control land use, to protect the environment, habitats and birds and to ensure the safety of the public by fencing disused mines and quarries. Several of the statutory obligations have been enacted to implement directives of the European Union. The costs of complying with the statutory obligations are significant. The obligations include the protection of the environment from the discharge of polluted water from the sites and the obligations under planning legislation to restore the sites.

[5] The principal environmental dangers relate to the pollution of water courses and ground water by (i) rain water run off carrying chemicals and fuels used in the mining process, and minerals exposed by the removal of surface cover on excavation of the voids and (ii) discharges, including silt, from settlement ponds or lagoons. In this case the principal regulatory provisions were and are the Water Environment (Controlled Activities) (Scotland) Regulations 2005 (which is revoked subject to transitional provisions) and 2011 ("CAR") which protect the water environment and the Pollution

Prevention and Control (Scotland) Regulations 2000 (now revoked) and 2012 ("PPC") for which the Scottish Environment Protection Agency ("SEPA") is responsible. Scottish Natural Heritage ("SNH") also was represented as it is concerned with a special protection area at Muirkirk and North Lowther uplands special protection area ("SPA") under Conservation (Natural Habitats etc.) Regulations 1994 in which SCC's former site at Powharnal is located.

[6] SCC granted the Bank of Scotland plc a first ranking floating charge over all of the assets comprised in its property and undertaking. SCC's directors applied for the company to be wound up rather than appoint an administrator because it was insolvent and did not wish the cost of performing its environmental obligations to use up the funds realised from the sale of its assets. Before the sale to Hargreaves the noters had been spending about £1.4 million per month on maintaining the retained sites in conformity with the environmental authorisations that govern their use. The noters estimate that the sale to Hargreaves and future realisations will give them funds of between £9.7 million and £10.5 million. They calculate that they will spend about £478,000 per month on maintaining the sites that remain in their control. Thus if no other charges were incurred, the noters would have funds to maintain the sites for between 20 and 22 months.

[7] The noters wish to protect SCC's unsecured creditors and the bank, as holder of the floating charge, from the dissipation of the proceeds of disposal of SCC's assets which continued performance of the statutory obligations will entail. Mr Sellar estimated that the costs of restoring the sites and former sites in accordance with the planning conditions governing the sites and the planning agreements into which SCC had entered would be about £73 million. There is no question of SCC having the means to meet those planning obligations. The focus of the discussion therefore was on CAR and whether SCC's insolvent estate was liable to meet the costs of measures which SEPA would require to accept the surrender of its licences.

[8] The noters aver that the winding up of SCC creates a statutory trust over the company's assets in favour of its ordinary creditors and that they must apply the proceeds of the realisation of those assets ranking the unsecured creditors of the company pari passu. The noters assert that the continued expenditure on meeting SCC's environmental obligations would give a preference to the costs of performing those obligations which was contrary to the statutory pari passu ranking.

[10] Because of the potential for serious environmental damage if the sites and former sites were not properly maintained and also significant financial costs which might fall on the taxpayer if the relevant local authorities or other statutory bodies had to carry out remediation works, the following public bodies or persons lodged answers to the note and were represented by counsel at the hearing:

[11] As the noters and some of the respondents sought the directions as a matter of urgency, all of the represented parties prepared detailed written submissions and agreed a timetable for the hearing which restricted the time that each could make oral submissions. I am grateful to counsel for their industry and the skill with which they presented their written and oral submissions. Without that I would not have been able to give the directions within the desired time.

[12] Mr Howie for the local authorities raised an issue of the competency of the proceedings as he submitted that not all interested parties were represented at the hearing. He argued that the template for the application for directions was a petition by trustees for directions, which was competent only if all contradictors were before the court and the facts were not disputed (Peel's Trustees v Drummond 1936 SC 786).

I do not see the matter as one of competency. A liquidator as an officer of court has the right to apply to the court for directions which relate to his duties and are needed to allow him to perform those duties (Liquidator of Upper Clyde Shipbuilders Ltd 1975 SLT 39). The court will need to be satisfied that an interested party is aware of both the application and the hearing before it would give directions which could directly affect that party. But I do not think that it is necessary to go further and require that all interested parties attend or are represented at that hearing. To require that would involve a person in unnecessary expense and would give a veto to a party with an interest

contrary to that of the general body of creditors.

[13] The immediate issue which causes the noters and SEPA to ask for an urgent determination is whether the noters can by disclaimer relieve themselves (and thus the creditors of SCC) of the cost of complying with their obligations under CAR. Mr Sellar accepted that there was no immediacy in relation to the fourth direction and agreed to hold that over for later discussion in order to allow the hearing on the other directions to be completed in the time available.

[14] There is no express statutory provision which allows the liquidator of a Scottish registered company to disclaim onerous property. This is in contrast with section 178 of the Insolvency Act 1986 ("the 1986 Act") which gives such a power to the liquidator of a company incorporated in England and Wales. Section 178 allows a liquidator by disclaimer to bring to an end the company's ownership of property, including land, which as a result vests in the Crown. Counsel were not able to find any case law or textbook which shows a liquidator of a Scottish company exercising a power to abandon heritable property. It was agreed that the principal issue raised in this application was without precedent in this jurisdiction.

Company legislation has adopted this method of formulating the powers of the liquidator of a Scottish company since 1862 (Companies Act 1862, section 171). Mr Sellar submitted that a trustee in sequestration had power to abandon land in order to protect the bankrupt's creditors from the cost of performing obligations in relation to the land and to achieve the efficient and prompt administration and distribution of the bankrupt estate. He submitted that if one read that power across to the regime for winding up registered companies in Scotland, it entailed a process similar to the disclaimer of onerous property in section 178 of the 1986 Act.

[18] Where a trustee decides not to adopt a contract or a lease or shares or to take up heritable property which had vested in him, the effect of that abandonment is to reverse the vesting under section 31 so that the right or property remains in the ownership of the bankrupt (Mitchell's Trustees v Pearson (above); Air v Royal Bank of Scotland (1885) 13 R 734; Whyte v Northern Heritable Securities Investment Co Ltd (1891) 18 R (HL) 37, Lord Watson at 39; Goudy (above) p 371; Bankruptcy (Scotland) Act 1985 section 32(9)(a)). This form of abandonment does not render the property ownerless or cause it to vest in the Crown. But it is all that is needed to free the trustee from liability in relation to the abandoned asset and to allow him to realise and distribute the remainder of the bankrupt's estate.

[19] It was submitted that the power of a trustee to decline to perform had a contractual basis and that the abolition of the feudal system of land tenure by the 2000 Act meant that a trustee could not abandon land. I disagree. Absent statutory provision to the contrary, I see no reason why the trustee should not decline to take title to land and indicate to the bankrupt that he does not intend to realise it in the sequestration. The trustee might do so either because the land was burdened by obligations or because there was no market for it. If the trustee makes clear that he is not taking up the land, the bankrupt would be free to deal with it. Such abandonment would not render the land ownerless. If the trustee did not register his title, the bankrupt throughout would retain the real right of ownership. What the trustee would abandon would be the right to administer and realise value from the land.

[20] The difficulty that arises from the statutory model by which the powers of a trustee in bankruptcy are given to the liquidator of a registered company is that the winding up order does not vest the company's property in the liquidator. Instead he is the manager of the company's property which remains vested in it (Smith v Lord Advocate 1978 SC 259, Lord President Emslie at 270-272). The liquidator can obtain a vesting order from the court under section 145 of the 1986 Act. But a liquidator very rarely does so. Because there is no automatic vesting, the noters proceed on the basis that the only way in which a liquidator can protect the funds, which he holds for the company's creditors, from onerous obligations relating to property is for him to bring to an end the company's ownership of that property. In other words the noters argue that the application by section 169 of the 1986 Act of the trustee's powers gives a liquidator of a Scottish company a power to disclaim ownership of property similar to that of the liquidator of a company registered in England under

section 178 of the 1986 Act.

[21] The respondents submit that this is not possible in Scots law as there is no power to abandon the ownership of land and as ownerless land is an impossibility. This challenge raises two questions. First, can someone abandon the ownership of land in Scotland? Secondly, can there be ownerless land in our legal system?

[22] Counsel were not able to find any authority which supported the idea that an owner could abandon land in Scotland. At a time when the ownership of land has been become regulated in the public interest through planning and environmental legislation, it is easy to see why a unilateral power to abandon land could be abused if it existed. I note that in Roman Dutch law, with which Scots property law has strong affinities, it was possible to abandon land except where the sole purpose of the abandonment was to escape dues on the property (Van der Merwe and De Waal, The Law of Things and Servitudes (1993) para 205). The German Civil Code at section 928 has a procedure by which an owner of land can abandon it by tendering a declaration of relinquishment to the land register office. It appears that it is not impossible in principle in an essentially civilian property system for an owner to abandon land. But I have been shown no precedent for doing so in Scotland. Absent any authority, I consider that, by closest analogy, the Roman Dutch prohibition on abandonment to avoid obligations suggests that any abandonment by an owner, other than in the context of an insolvency regime, would have to be regulated by the courts.

[23] The respondents submitted that the statutory provisions relating to the transfer of land prohibited such relinquishment, if it existed at common law. I disagree. It was suggested that section 3 of the Land Registration (Scotland) Act 1979 ("the 1979 Act") made no provision for the registration of an abandonment of land. But section 2(4) of that Act provides:

Thus, if an owner has power to abandon land and in particular if the transposition of the powers of the trustee in sequestration to the corporate liquidation regime enables a liquidator to relinquish a company's ownership of property, section 4(2) of the 2000 Act and section 2(4) of the 1979 Act would allow that abandonment of ownership.

[24] I turn to the submission that there cannot be ownerless land in Scotland. Mr Sellar and counsel for the respondents appeared to agree that ownerless land was an impossibility. But the authorities to which they referred did not support that submission. Without a feudal system in which the Crown is the ultimate superior, ownerless land may result from the Crown's waiver of its prerogative right to bona vacantia. It appears that both at common law and under statute, the Crown can waive its ownership of bona vacantia. MacMillan, The Law of Bona Vacantia in Scotland (1936) suggests (pp.10-12) that the prerogative right is discretionary in its exercise and that the Crown can waive its entitlement in the public interest. I recognise that the institutional writers speak of abandoned property passing to the Crown and the Second Division applied the maxim quod nullius est fit domini regis in the St Ninian's Isle treasure case (Lord Advocate v University of Aberdeen and Budge 1963 SC 533, Lord Patrick at 553-554 and Lord Mackintosh at 558-559). I note also that section 58 of the 2000 Act preserved prerogative rights in relation to ownerless or unclaimed property. But if the Crown can disclaim ownership of such property, the prerogative by which it acquires land does not compel it to retain ownership of that land.

Thus Parliament has provided for the property of a dissolved company which is disclaimed by the Crown to become ownerless. Mr Sellar submitted that the section needed to be read down so that it did not apply to land. He referred me to a short note concerning English law by D W Elliott (Land without an owner [1954] 70 LQR 26) in support of this proposition. It is not clear what was the policy behind the enactment of the prior provision in the Companies Act 1947. But effect has to be given to the words of the 2006 Act, which is consistent with the Crown's prerogative rights in relation to bona vacantia in Scotland. It appears to me therefore that Scots law does not exclude the possibility of ownerless land which can be acquired occupatione, by persuading the Keeper of the Registers to accept an a non domino disposition and possessing the subjects for the prescriptive period.

[26] In summary, I consider that it may be possible for an owner to abandon land and circumstances

may arise when, on a disclaimer by the Crown, land becomes ownerless. I see no reason in principle why this should not be the case. If it is possible to abandon corporeal moveable property, it should be possible to abandon land. But in the absence of a statutory regime, it seems to me that the court should regulate such abandonment to prevent its abuse as a means of avoiding obligations.

[27] It is not clear to me that a liquidator needs in every case to disclaim the company's ownership of property in order to protect the funds available to its creditors from obligations which will diminish the insolvent estate. Like a trustee in sequestration a liquidator can choose not to adopt a contract and thus leave the counterparty to claim damages against the company by ranking in its liquidation (Asphaltic Limestone Concrete Co Ltd v Glasgow Corporation 1907 SC 463, Lord McLaren at 473; Joint Administrators of Rangers Football Club plc, Noters 2012 SLT 599 at paras 46 and 47). Similarly, a liquidator can abandon a lease, leaving the landlord with the remedy of damages against the insolvent company (Crown Estate Commissioners v Liquidators of Highland Engineering Ltd 1975 SLT 58). Such abandonment does not of itself bring the lease to an end because the landlord would first have to terminate it (P & O Property Holdings Ltd v City of Glasgow Council 2000 SLT 444, Lord Macfadyen at 448 I-J). In each case the liquidator declines to take up an asset and use the company's funds to meet obligations relating to the asset.