Hardwicke Building

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PROPERTY TEAM NEWSLETTER

Article: Administration – a few economic thoughts for landlords…

For those of us longing for the warmth of the summer sun, it is cheering that the days are lengthening and the hours of sunlight are on the increase. For those of longing for the warmth of a more amenable economic climate it seems, excluding Sir Fred Goodwin and his £16m pension pot, that winter has settled and there is no sign of it being other than here to stay. Whilst good news for insolvency practitioners, it is beyond any doubt that there will be landlords whose corporate tenants have started or will start to be unable to pay their rent (and other bills).

This is not the place for a full-scale review of the landlord's various remedies in all insolvency situations. However, one area does require immediate consideration. The Blairite thrust of the Enterprise Act 2002 was to encourage economic growth and, to an extent, free debtors from the shackles imposed by their economic commitments. The stream-lining of administration orders, in particular, arose from the aim of promoting the rehabilitation of an insolvent company. In that sense the aim remains to suspend the rights of all creditors, whether secured or no, whilst an attempt if made to manage, continue and reconstruct the insolvent (or potentially insolvent) company's business.

The administrator must perform his functions (under paragraph 3(1) of Schedule B1 to the Insolvency Act 1986) with the objective of
(i) rescuing the company as a going concern,
(ii) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration), or
(iii) realising property in order to make a distribution to one or more secured or preferential creditors.

The administrator must perform his function with the objective of rescuing the company as a going concern unless he thinks that it is not reasonably practicable to achieve that result or that he could otherwise achieve a better result for the creditors as a whole. He can only perform with the third objective if he thinks it is not reasonably practicable to achieve either of the other objectives and if he does not unnecessarily harm the interests of the creditors as a whole.

Critically for landlords, a moratorium is imposed upon the progress or initiation of proceedings from the moment an application for an administration order is made or a notice of intention to appoint an administrator is filed (paragraph 44 of Schedule B1). If the administration fails to resurrect the company and liquidation follows, the landlord will need to prove as an unsecured debtor for any rent due before the administration application or notice of intention to appoint an administrator (new system).

Technicalities aside, the real question for a landlord whilst administration is ongoing is in respect of current ongoing rent and doesn't change: "Where's my money?" Often the landlord can reach an agreement with the administrator for rent to form part of the administration costs. Where the administrator continues to use the landlord's premises, under the pre-Enterprise Act system the court would often order that rent be paid as an administration cost upon an application by the landlord to the court under section 11(3) (see **Re Atlantic Computers Systems plc** [1992] Ch. 505). The old regime was described by Nicholls LJ a system where the principles applicable in liquidations were to be applied flexibly in the context of administration, with no automatic presumption that, for example, the rent on premises let to the company before the administration but used by the company during, and for the benefit of, the administration should be paid as an expense. This was, in essence, because administration was seen as an interim and temporary regime.

Whilst it was thought at the time the new regime came into effect that this practice might continue, the attitude adopted by the Courts appears to be altering. The caselaw has developed through **Re Toshoku Finance plc** [2002] 1 WLR 671, **Re Allders Department Stores** [2005] EWHC 172, and **Exeter City Council v. Bairstow**

[2007] EWHC 400). Albeit that **Toshoku** was decided in the context of liquidation rather than administration, a much tougher approach was taken there to the statutory provisions which govern the payment of liquidation expenses – rejecting the **Atlantic Computers** exposition in relation to expenses falling within r.4.218 of the Insolvency Rules. In **Bairstow,** a case in the context of an administration, David Richards J. noted the critical new factor introduced by the new regime – the inclusion, for the first time, in Schedule B1 of a list of administration expenses which effectively mirrors the provision in relation to liquidation expenses. He said that on the basis that the Insolvency Service, the rule making authorities and others must have been aware of Tokushu when drawing up r.2.67, that rule falls to be interpreted in the same way as r.4.218. The submission that r.2.67 could only properly be determined in the context of administrations and the policy considerations underlining them (ie: differently to the way in which r.4.218 was construed in **Toshoku**) was rejected.

Although it must be born in mind that both **Toshoku** and **Bairstow** were decisions in relation to tax and rate liabilities and there is no present conclusive authority in relation to rent, and whilst persuasive counter-arguments exist, it is thought to be a real prospect that if the question of rent in the context of an administration is litigated, administrators will have to pay rents on properties used in the administration as administration expenses.

Edward Rowntree

Did you see…….. ? Recent cases you may have missed

Mortgages

Security transaction, clogs on the equity of redemption

Brighton & Hove City Council v Audus [2009] EWHC 340 (Ch)

The council (C) had a statutory charge under s.22 of the Health and Social Services and Social Security Adjudications Act 1983 over a leasehold flat (to secure residential care home fees), which ranked 3rd in priority to 2 legal charges in favour of the Defendant (A) who was the nephew of the owner (B), who was not a party to the proceedings.

In 1988 B (and her late husband) had exercised the right to buy a long lease of the flat with funds provided entirely by A, under an arrangement whereby the Bs would live in the flat would rent free for the rest of their lives, after which the property would revert to A. Two legal charges had been executed: the first in respect of the purchase monies; and the second in respect of any capital appreciation of the flat. C sought a declaration that the 2nd legal charge was void, being a security transaction which restricted the B's right to redeem the mortgage.

Held: Following the Court of Appeal decision in *Welsh Development Agency v Export Finance Co Ltd [1992] BCC 270*, where a mortgage formed part of a composite transaction the court should look at the substance of the transaction to ascertain its true legal nature. In this case it was 'something more complex than a mortgage' and had not simply a security interest. As such the equitable rules relied upon by C did not apply and the claim was dismissed.

Adverse Possession

Without prejudice communication, whether acknowledgment under s.29 Limitation Act 1980

Ofulue and Another v Bossert [2009] UKHL 16

O appealed the CA's dismissal of her appeal against the decision that the title to a property, of which she was one of the former joint legal owners, be registered in the Respondent's name. B had been let into occupation of the property in 1981 by former tenants. Possession proceedings had been pursued in 1987, in the course of which B had sent a 'without prejudice' letter to O in 1992. The proceedings were stayed in 2000 and a new claim issued in 2003, which B defended by asserting a right to adverse possession.

Held: The acknowledgment of O's title in the without prejudice communication was made with a view to settling the proceedings. It was therefore not admissible and did not stop time for the purposes of s.29 of the LA 1980. Taking an unattractive point did not fall within the exceptional circumstances in which the without prejudice rule might be overcome (*Unilever plc v The Procter and Gamble Co [2000] 1 WLR 2436*). Additionally, the original defence did not operate as a continuing acknowledgment throughout those proceedings.

The Government's Homeowner Mortgage Support Scheme starts in April

This is the latest scheme to help borrowers (with interest only mortgages) facing a temporary loss of household income. Applicant's must have made regular (though not full) payments over the proceeding 5 month period and must still be able to pay 30% of the CMI. The 'unaffordable' interest is then rolled up and the government

guarantees upto 80% of this deferred interest if the borrower subsequently defaults and the sale results in a mortgage shortfall. See www.communities.gov.uk/housing/buyingandselling/mortgagesupportscheme

Case summaries by Andy Creer

Upcoming Events

Insolvency for Property Lawyers: a mini-conference
Tuesday 7th April
2pm – 6pm
The Royal Institute of British Architects (RIBA), 66 Portland Place London W1B 1AD

This timely discussion examining the key insolvency issues faced by property lawyers. The speakers are barristers Sara Benbow, Edward Rowntree and Sarah McCann, each of whom is a specialist in both property matters and insolvency.

This seminar will cover a range of topics including the following:

- What is insolvency? An exploration of the different varieties of insolvency and their consequences
- The impact of insolvency for landlord and tenant
- The impact of insolvency on freehold property rights
- The risks of disclaimer and other knotty problems including consideration of recent developments as to administrators' liabilities, challenges to prior transactions and the requirement of leave

The conference will be followed by drinks and light refreshments. This seminar will be accredited with 3 CPD points. The cost of the seminar is £75 plus VAT (£86.25). If you would like to attend or have any queries please do not hesitate to contact Louise Poppelwell on 020 7242 2523 or email louise.poppelwell@hardwicke.co.uk

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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Stephen Lennard	1976	Kerry Bretherton	1992	Andrew Lane	1999
Robert Leonard	1976	Alexander Goold	1994	Sarah McCann	2001
Wendy Parker	1978	Andrew Skelly	1994	Dean Underwood	2002
Karl King	1985	Alexander Bastin	1995	Michael Wheater	2003
Michelle Stevens-Hoare	1986	Edward Rowntree	1996	Phillipa Harris	2005
Steven Woolf	1989	David Pliener	1996	Andy Creer	2005
Sara Benbow	1990	Brendan Mullee	1996	Philip Fellows	2007
Daniel Gatty	1990	Nicola Muir	1998	Laura Tweedy	2007
Rupert Higgins	1991	Alison Meacher	1998		
Arthur Moore	1992	Alastair Redpath-Stevens	1998		