TRAVERS SMITH

Game Landlords succeed

No more "rent free quarter" for tenants in administration

Yesterday, the Court of Appeal gave landlords the pleasing news that where a property is being used for the purposes of an administration, rent is payable as an expense for the relevant period.

Unhappy tenants

The prospect of an insolvent tenant is never appealing for anyone involved. The recent High Court cases of *Goldacre* and *Luminar* put a further troubling slant on the situation for landlords. It seemed that if a tenant went into administration the day after a quarter day, its administrators could avoid paying rent for the coming quarter. The basis for this was, broadly, that rent payable in advance cannot be apportioned – a premise established in the Apportionment Act 1870. If the rent payment date fell just before a tenant entered into administration, no part of that money was designated an expense of the administration. The practical upshot was that landlords could not recover those funds from administrators.

Unhappy landlords

In yesterday's ruling in *Jervis & Anr v Pillar Denton Ltd & Ors,* referred to as "*Game*", the opining judge identified that this left the law in a "very unsatisfactory state". Whether the business of the insolvent tenant company is sold on immediately, as was the case in *Game*, whether the property is left vacant, or occupied by administrators, the corollary for landlords is that they have been missing out on up to three months' rent.

Game off

The case turned on the administration of the Game group. One of its companies was the tenant of hundreds of leasehold retail properties, amongst whose landlords numbered such industry heavyweights as British Land, Hammerson, Intu Properties and Land Securities. Game went into administration, exploiting the *Goldacre/Luminar* model, on 26 March 2012, the day after the quarter day, leaving approximately £3m of rent unpaid.

Whether it coloured the judges' ruling that the business and assets of the Game group were swiftly sold on, is a point of interest, if not of law. Speaking of the *Goldacre/Luminar* position, Lewison LJ commented as follows:

> *"From the perspective of the landlords the position is exacerbated by a swift sale of the business to a new company that can, in effect, trade for the first three months rent free."*

Salvaging the situation

In this sensible judgment, it was decided that where a leasehold premises is being used for the purpose of the administration, rent is payable as an administration expense.

> *"If rent falls within the principle known variously as the "salvage principle"[or] "the liquidation expenses principle"...it is an administration expense. If not, not."*

Game tells us that the Apportionment Act principle (rent payable in advance is not apportionable) does not preclude the salvage principle from applying. If the Act is operating properly, it relieves the tenant from part of the liability for rent, or transfers liability from one tenant to another. If the salvage principle applies, there is no termination of the lease, no change of tenant. The rent is treated as:

- a provable debt,
- accruing from day to day; and
- an insolvency expense.

Consistent with this reasoning, the judges allowed a cross appeal put forward by the Game group, that rent can be apportioned if the administrators cease to use the premises for the benefit of the administration before the next quarter day.

Game on?

An appeal of this case to the Lords is possible, but far from certain to go ahead. Unless in individual cases the landlord has waived the right, it is possible that this case will pave the way for landlords to seek to recover unpaid rent withheld on G*oldacre/ Luminar* principles. This may prompt a flurry of retrospective claims by landlords, seeking to recover unpaid rent arrears as expenses of administration. In any event, landlords will welcome this judgment going forward.

Travers Smith
10 Snow Hill
London EC1A 2AL
T +44 (0)20 7295 3000
F +44 (0)20 7295 3500

Andrew Eaton
andrew.eaton@traverssmith.com
+44 (0)20 7295 3427
Partner: Banking and Corporate Recovery

Anthony Judge
anthony.judge@traverssmith.com
+44 (0)20 7295 3237
Partner: Real Estate

February 2014

www.traverssmith.com