

Game over for Goldacre and Luminar

On 24 February the Court of Appeal issued a unanimous judgment ([2014] EWCA Civ 180) that companies in administration will be liable to pay rent for the period during which leasehold premises are used for the purpose of the administration.

This is the position irrespective of when the rent falls due and how it may be payable. Most importantly from the landlords' perspective, the rent will rank as an expense of the administration. This means that rent will be paid on a priority basis before the administrators' own remuneration and costs. From the administrators' perspective, the result is not an entirely unsatisfactory one given the certainty that the Court of Appeal's decision provides. Whilst administrators will no longer be in a position to avoid paying rent as an expense where that rent fell due for payment outside of the period of administration, rent will be payable as an expense for the period when premises are used for the purpose of the administration.

The appeal judgment is to be welcomed for bringing clarity to the much-talked about administration expenses regime, insofar as it relates to rent. It will be seen by many as reaching the right conclusions, based on the long standing principles of what is fair and equitable.

Good news for landlords

Landlords had been unhappy with the principles established by the Luminar case from May 2012, which decided that rent was simply a provable debt. In that case, administrators had been appointed the day immediately following the rent quarter payment

day, and as a result they avoided paying the rent in full even though they remained in occupation of the leased properties. The Court of Appeal's decision in Game Station has overruled the Luminar case and removed what some have considered to be the arbitrary nature of the timing of appointment from the question of how the rent is to be treated in an administration. It will be very much welcomed by landlords as a result.

Good news for insolvency practitioners?

From the insolvency practitioners' perspective, there is also some good news in that the Court of Appeal has also overruled a previous decision known as the Goldacre case. That case had decided that where a quarter's rent fell due during an administration, the whole of the rent was payable as an administration expense, even if the administrators had not occupied the properties for the whole of that period. The Court of Appeal has said that rent will be an administration expense, but only to the extent that it relates to the period for which the property is used.

Impact of the decision

Game Station places landlords on a surer footing in relation to where they stand if a tenant is subject to an insolvency process and the officeholder wishes to retain the premises.

Key issues

- Landlords get rent on a priority basis in administration/liquidation
- Administrators only pay for the period where they retain the benefit of the premises
- Goldacre and Luminar overruled

The officeholder must meet the rental payments in full for the period for which the property is used for the benefit of the relevant insolvency proceeding, and the Court of Appeal's decision equally applies to administration and liquidation in this regard. This removes some of the flexibility for officeholders that existed in some administrations whereby administrators were able to negotiate paying what they could towards rent and would typically remain in occupation whilst doing so. The duration of the period for which the insolvent estate gets the benefit of the property will, however, be fact-specific and may give rise to questions of interpretation, especially in the realm of what constitutes a benefit to the estate.

As the case elevates the payment of rent to an administration expense, it could have the effect of reducing the

number of companies for which administration is a viable rescue option. With this additional priority burden, rescuing the company may no longer be possible unless arrangements can be made to fund the payment of rent on a priority basis. On the other hand it could potentially promote alternative solutions such as company voluntary arrangements, another insolvency process which has generated its own comment within the landlord community.

For all future cases, however, the additional clarity provided by the Court of Appeal's decision will be welcomed. Irrespective of the timing of the appointment, if an administrator uses leasehold property for the purpose of the administration, then he will be liable to pay the related rent as an expense.

Authors



Adrian Cohen

Partner

T: +44 20 7006 1627

E: adrian.cohen@cliffordchance.com



Philip Hertz

Partner

T: +44 20 7006 1666

E: philip.hertz@cliffordchance.com



John MacLennan

Partner

T: +44 20 7006 1642

E: john.maclennan@cliffordchance.com



David Steinberg

Partner

T: +44 20 7006 1621

E: david.steinberg@cliffordchance.com



Iain White

Partner

T: +44 20 7006 2825

E: iain.white@cliffordchance.com



David Towers

Associate

T: +44 20 7006 8036

E: david.towers@cliffordchance.com

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www.cliffordchance.com

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