

Enforcing a moratorium against Landlords

In the recent Court of Appeal case of *Sunberry Properties Limited v Innovate Logistics Limited (in administration)* the Court gave a useful judgement supporting an administrator's ability to grant a licence to occupy to the purchaser of the business and assets of an insolvent company and thereafter to use the statutory moratorium to prevent the Landlord asserting his rights.

On 30 June 2008 Innovate was placed in administration and simultaneously there was a pre-packed sale to YHL. YHL did not wish to take an assignment of the lease as they intended to relocate. The administrator therefore granted a 6 month licence to occupy.

The Landlord objected to the licence and was granted relief at first instance. However this was overturned by the Court of Appeal. The Court conducted the balancing exercise set out in *Re: Atlantic Computer Systems plc (1992)*. It affirmed the requirement of the Landlord to satisfy the Court that the use of the moratorium was unfair in the circumstances, when balancing the legitimate interests of the Landlord and those of creditors and the insolvent company.

The Court of Appeal found that one of the main purposes of the administration was the collection of book debts which was for the benefit of creditors as a whole. In order to collect these book debts it was essential that there was a period of trading from the premises. The Landlord was to be paid rent for the period of occupation, and therefore was compensated.

The Court also found that the purpose was not achieved at the conclusion of a pre-pack sale but could continue, in this case with the realisation of assets by progressive book debt collections.

While each case turns on its particular facts this case underlines an administrator's ability to grant licences to further the purpose of the administration. Ordinarily it would be to protect a buyer while an assignment is negotiated. Usually this would require the Landlord's co-operation. However if a Landlord is required to give reasonable consent to an assignment then the moratorium could be used to protect the buyer during negotiations. Of course rent must be paid in the period of occupation and any extended licence period would be more difficult to justify.

Controversially the Court also commented that the Landlord had "*no automatic right*" to be paid rent as an expense of the administration during occupation. While this is good law and will give administrators a better bargaining position to argue that rent may not be due it is difficult to see that rent should be used if trading is taking place.

A more common circumstance is where the administrator is marketing the property but not trading. There is no decided case on this point, that I am aware of, but it would be risky to assume that rent was not due as an expense. Surely marketing is with a view to obtaining a premium which is for the benefit of creditors. The facts of such a case would be crucial, in particular any attempts by the landlord to repossess. This issue is one which a number of my landlord clients are struggling with and I would be interested to receive anyone specific experiences.

Gary Player

Partner

01293 742809

gary.player@thomaseggar.com