Briefing

Corporate Turnaround and Insolvency

BURGES SALMON

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Goldacre overruled - rent to be paid as an expense pro rata

The Court of Appeal in *Pillar Denton Ltd & Others v (1) Jervis (2) Maddison and (3) Game Retail Ltd ([2014] EWCA Civ 180)* yesterday overruled previous High Court authority, deciding that rent should be treated as an expense of the administration based on actual usage and not on when the rent falls due. What does this mean for practitioners?

The background

The status of rent as an expense of the administration has been a hot topic over the past two years due to the competing interests of landlords and other creditors. One the one hand, there is an issue of (legally) when rent falls due. On the other, there is an apparent injustice in allowing companies in administration to have a period of "free" occupation and usage of premises merely by timing the entry into administration after a quarter date to ensure that the rent roll forms part of the pre-administration liabilities.

The High Court authorities to date (in Goldacre and Re Lumina Lava Ignite) have focussed upon the question of the date on which, legally, rent falls due as the main issue, with the result that the status of rent as an expense depends entirely on when the appointment takes place.

This appeal arose from the administration of the Game group, which was put into administration on 26 March 2012, the day after the first quarter day of the year. The administrators refused to pay any of the first quarter's rent, arguing that it was a pre-administration debt and so did not form part of the administration expenses. Having won the issue in the High Court, the landlords appealed to the Court of Appeal.

The issues

The issues in front of the court were whether (i) on the one hand, liability for rent was determined by the date on which it legally became due or (ii) whether the so-called "salvage" principle should be applied, allowing rent to be treated as if falling due over a period of usage during the administration, rather than falling due up-front in its entirety. It was agreed between the parties that the Apportionment Act 1870 could not apportion rent payable in advance (unlike rent payable in arrears) and so could not be taken in to account.

What did the court decide?

The Court of Appeal decided that the "salvage principle" was an equitable principle. This meant that such part of the advance rent which was attributable to a period of usage in administration, and for the benefit of the administration, should be treated as if it were a debt incurred by the administrator and hence an expense.

What does this mean for practitioners?

Although this decision remains subject to appeal to the Supreme Court, for the time being it appears that rent will be paid for as an administration expense, regardless of when it falls due, on a daily basis for the period during which the administrator uses a premises for the benefit of the administration. This mirrors the position generally accepted to be the case prior to the Goldacre decision and avoids the stark outcomes posed by Goldacre and Luminar Lava Ignite. The question of when administrators start to incur liability for rent and the actual period during which premises are occupied for the benefit of the administration remains open, and will ultimately be a matter of fact in each individual case.

In terms of what this means for existing cases, obviously IPs should set aside funds to ensure that rent attributable to a period of occupation/ use by the administrators are treated as an expense. Many prudent practitioners have already been doing so. Whether this decision will result in disgruntled landlords seeking to re-open administrations which have already been settled remains to be seen. Much depends on whether - relying on then current case law - administrators can be said to be misfeasant in failing to take rent into account as part of their expenses. Equally important is the issue of whether landlords will be willing to fund such litigation in cases where administrators have already obtained their release. Much as with Re Spectrum Plus, it may be that the speculation results in little of the way of further action.

Finally, this decision remains subject to permission to appeal to the Supreme Court. Unless and until the willingness to appeal is made clear, it may be prudent to hold off settling these types of claim either way.

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