



Corporate Turnaround and Insolvency

February 2014

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 Lumina 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.

For more information on this subject please contact:



Colin Ligman, Partner
+44(0)117 902 2789
colin.ligman@burgess-salmon.com



Richard Clark, Senior Associate
+44(0)117 902 6626
richard.clark@burgess-salmon.com

Burgess Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

www.burgess-salmon.com

Burgess Salmon LLP is a Limited Liability Partnership registered in England and Wales (LLP number OC307212) and is authorised and regulated by the Solicitors Regulation Authority. A list of members, all of whom are solicitors, may be inspected at our registered office: One Glass Wharf, Bristol BS2 0ZX.

© Burgess Salmon LLP 2014. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged. Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burgess-salmon.com.