

Game Administration – Landlords Granted Permission to Challenge *Goldacre* Decision

Introduction

Landlords left out of pocket in the Game administration have been granted leave to appeal to the Court of Appeal to challenge whether rents accruing just prior to the appointment of the administrators ought properly to be treated as an expense of the administration (and therefore paid in priority to other creditors), effectively seeking to overturn the position established in the *Goldacre* and *Luminar* decisions.

Background

As is often the case in retail administrations, the company operated from a portfolio of leasehold premises, where the rent was payable quarterly in advance on the usual quarter days. The administrators were appointed just after the quarter day and disposed of the business before the next quarter day, effectively enjoying a quarter's occupation at the expense of the landlords, on the basis that (under current case law), the quarter's rent would rank only as an unsecured claim in the administration. Assuming total realisations only permit a small dividend to unsecured creditors it is likely that, if their challenge fails, the landlords will receive only a tiny fraction of their full entitlement.

Again, as is common in such disposals, the buyer was granted a temporary licence to occupy the Company's premises whilst they negotiate for assignments of the properties they wish to keep, on the basis that the buyer indemnifies the administrators against any claims received as a result of that occupation. Since the leases will typically provide that the landlord can insist upon all arrears being cleared before consenting to an assignment, there is clearly a commercial negotiation still to be had in relation to certain of the premises. For those landlords where the buyer does not wish to take an assignment of their premises, this issue will be much more pertinent.

Court Decision

The Court at first instance was obliged to follow *Goldacre* and *Luminar*, so the parties have agreed to "fast-track" the appeal. Due to the indemnity given by the buyer, it is believed that the administrators will take a neutral stance and it will be left to the buyer as co-respondent to contest the landlords' position.

Although the grounds of argument are not yet known, the presumption must be that the landlords are arguing for a return to a situation where administrators should be considered obliged to pay for actual usage, rather than the issue of their obligation to pay being determined according to an arbitrary quarter date. If successful, although it would doubtless help landlords to some extent in this situation, it would re-introduce the idea of administrators having a discretion as to when payment should be made and at what rate, more in keeping with the pre-*Goldacre* regime, where parties relied upon *Re Atlantic Computers* to negotiate a pro rata, "pay as you go", daily rate for actual usage.

Conclusion

Although many would welcome a return to such a pragmatic and flexible regime, it would take away the certainty of operation that the *Goldacre* decision introduced. It remains to be seen whether the

Court of Appeal will also take the opportunity to address some of the unanswered questions left by *Goldacre*, such as what constitutes “use” and what other liabilities accruing under the lease during that period of use ought properly to be treated as an expense of the administration.

If you have questions, please contact your usual Squire Sanders lawyers or the author listed below.

Contact

Daniel French
T +44 121 222 3697
daniel.french@squiresanders.com