SQUIRE SANDERS

A GAME CHANGER?

Jervis and another v Pillar Denton Limited (Game Station) and others A2/2013/2005

This week the Court of Appeal has heard the long awaited appeal in Jervis and another v Pillar Denton Limited (Game Station) and others, better known as the Game Station case, which (depending on the outcome) may trigger a drastic change to the way in which rent in administration is treated.

As the law currently stands, by virtue of the well-known cases of *Goldacre* [1] and *Luminar*[2], where rent is payable in advance (which is usually the case) and an administrator is appointed after the rent date has passed, the outstanding rent will be deemed to be an unsecured debt and the landlord will rank amongst the company's unsecured creditors. Consequently, the landlord is highly unlikely to recover the entire sum he is owed. To compound the situation, the Administrator is entitled to make use of the premises until the next rent date without having to pay a penny to the landlord.

On the other hand, if an Administrator is appointed before the rent falls due, and is still in occupation when the next rent day comes around, the rent will be treated as an expense of the administration and therefore paid in priority to other debts of the company.

In the Game Station case, financial difficulties within the retailer caused it to appoint Administrators on 26 March 2012 (the day after the March quarter day). In reliance on Goldacre and Luminar, the Administrator refused to pay the rent which had fallen due before his appointment but continued to trade from the property rent free until the next quarter day. The Administrator's actions, which from the landlords' perspective seemed rather unjust, were upheld by the High Court. However on the basis that the issues involved were likely to be of general concern to administrators, landlords, and other professions alike, permission to appeal was granted.

During the two day Appeal hearing, which took place on 12 – 13 February 2014 , the Appellant, which consisted of a consortium of Game Station's landlords, sought to argue that the court should apply the Lundy Granite principle i.e. that any person making use of a property for the benefit of the company's creditors should pay for that use, to rent payable in advance.

In support of this proposition, it suggested that the court should deviate from Goldacre and Luminar for policy reasons, as the current law provides an incentive to:

(i) administrators to rush appointments to avoid hefty rent payments; and

(ii) company directors to delay administration to side step a payment to the landlord, thereby prolonging the trading life of the company with a real risk that it will not be able to pay the additional debts it incurs during that prolonged period.

In reply, Game Station relied heavily on the effect of the Apportionment Act 1870, i.e. that only rent which is payable in arrears can be apportioned to the period of use. Further it submitted that landlords are not disadvantaged under Goldacre: if they chose to negotiate and enter into leases where rent is payable in advance they must reap the consequences. In response to the policy issues, Game Station's stance was that such concerns were unfounded as it was unlikely that directors or administrators would act in such a cavalier fashion and in clear breach of their respective duties.

Unsurprisingly, the court has decided to reserve judgment and so far there has been no indication as to which route the decision might follow or when it will be available. No doubt all practitioners and landlords will await with interest the final decision.

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1 Goldacre (Offices) Ltd v Nortel Networks UK Ltd (in administration) [2009] EWHC 3389 (Ch)

2 Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd (in administration) [2012] EWHC 951 (Ch)

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