SQUIRE SANDERS

GAME OVER: LANDLORDS SCORE MAJOR VICTORY IN COURT OF APPEAL

The Court of Appeal has today overturned the previous decisions in *Goldacre* and *Luminar* and reinstated the "pay for what you use" principle for calculating rent as an administration expense. This is a significant victory for landlords faced with insolvent tenants and will doubtless bring an end to the recent practice of timing tenant administration appointments to commence just after a rent payment falls due. Leave to appeal to the Supreme Court has been refused.

Comment

The decision sees a move away from a prescriptive, formulaic approach and a return to a more equitable and flexible treatment of such expenses, effectively endorsing a return to the approach set out in long-established decisions such as *Re Atlantic Computer Systems plc*. Many affected will approve of the flexibility this allows and consider this a fairer and more common-sense position for all parties.

The decision will also have potentially serious ramifications for a number of ongoing administrations, where the treatment of a quarter's rent as an unsecured claim was highly relevant to the overall recovery strategy. Landlords and administrators will doubtless be urgently reviewing their respective positions as a result of this decision.

Background

As previously reported in our article on 14 February 2014, under the *Goldacre* and *Luminar* cases, where rent is payable in advance and an administrator is appointed after the payment date has passed, the outstanding rent is deemed to be an unsecured debt. This means that the landlord ranks amongst the company's unsecured creditors for at least part of the annual rent, rather than all of the rent being paid as an expense of the administration.

In the Game Station case, administrators were appointed on 26 March 2012, which was the day after the March quarter day. Under *Goldacre* and *Luminar*, the administrators refused to pay the rent which had fallen due before their appointment, but continued to trade from the property until the next quarter day. The administrators said that the rent that fell due on 25 March should be treated as an unsecured debt. The High Court approved the administrators' actions in July 2013.

On appeal, the landlords argued that the Court should apply the Lundy Granite principle. This means that any person who uses the property for the benefit of the administration should pay for that use. It was argued that under *Goldacre* and *Luminar*, there were incentives for administrators and company directors to time their appointments to avoid high rent payments being treated as an expense of the administration.

Judgment was handed down on 24 February, with the result that *Goldacre* and *Luminar* have been overruled and there has been a return to the previous, equitable, position under Lundy Granite. Administrators must now pay rent as an expense of the administration on a pro rata basis for the duration of any period in which they are in possession of a property for the benefit of the winding up or administration. Furthermore, the duration of such a period is a question of fact and is not calculated in relation to rent days. This could result in administrators and landlords having to recalculate the amounts payable as an expense in an ongoing administration and consequently change the amount available for distribution to other creditors.

12288/02/14