FORSTERS

NEWSLETTER

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BUYING PROPERTY FROM A RECEIVER – WHAT YOU NEED TO KNOW

Purchasing property from an insolvency practitioner or receiver may seem like an attractive way to acquire an asset for a knock-down price, but buyers should be aware of the additional risks which they assume on an insolvency purchase.

WHY ARE RECEIVERS APPOINTED?

When a company becomes insolvent, a creditor - typically a bank - can elect to appoint a receiver to enforce its security over the property. This could be either a fixed charge receiver or an LPA receiver. There is sometimes confusion as to what is meant by these terms. However they are, in effect, one and the same.

Usually a creditor will prefer to appoint a receiver rather than exercise its power of sale, particularly when dealing with a multi-let property, since this offers the creditor a degree of legal separation from handling the property directly.

Once appointed, in most cases, the receiver will be the agent of the owner of the property, although his primary duty will be to the creditor to realise the value of the assets in order to satisfy the outstanding debt.

The receiver will be under an obligation to ensure he gets the best price reasonably obtainable for the property and, as such, will not accept an offer until he is satisfied that he has received the best offer available in the market. However, this will need to be balanced against the need to minimise any delay in concluding the sale so as to release funds to the creditor.

DUE DILIGENCE AND LIABILITY

Since the receiver will have no prior knowledge of the property, any replies to enquiries will typically be extremely limited (if indeed any are given at all) and the management information provided may well be incomplete. In these circumstances, the buyer must be prepared to take such investigative steps as it can to expand on the information available and form its own view of the potential liabilities and issues affecting the property.

As well as not accepting any personal liability, a receiver will want to distribute all of the proceeds of sale and so will be extremely reluctant to consent to any arrangement where a buyer could make a claim against the insolvent company after completion. As a result, it is unlikely to provide any representations or contractual warranties for the buyer to rely on.

The net effect of this is that a shortage of time and lack of information may prevent the buyer from conducting as extensive a due diligence exercise as it would like and yet no comfort is forthcoming from the insolvency practitioner or insolvent company. We always advise our clients to undertake an inspection and survey, but their importance cannot be underestimated in these circumstances.

Difficulties may arise, for example, where a buyer is expected to take over any existing maintenance contracts affecting the property. Although the receiver may be able to provide copies of the contracts, they are unlikely to confirm whether any have been terminated or varied or whether there are any additional contracts which have not been disclosed. Regardless, the buyer will be expected to take responsibility for all maintenance contracts affecting the property, disclosed or not.

However, whilst a buyer may not gain much assistance from the insolvency practitioner and his advisers in filling in any gaps, additional information can often be gleaned through other means such as visits to the property or enquiries of any on-site building manager. In the example of the maintenance contracts, a review of the service charge accounts from previous years should show up payments to indicate whether or not there are any additional contracts in place.

OTHER POTENTIAL ISSUES

The buyer may need to be prepared to take a view on (and assume liability for) a number of other issues including:

- Title – as the property is not vested in the receiver (given that they are acting only as agent for the owner of the property to affect the sale), the receiver will sell only with such right, title and interest as it may have in the property. There may be encumbrances or third party rights which the receiver is not aware of and the buyer must be prepared to rely on its own investigations.
- Planning obligations – in the absence of any warranty or indemnity from the seller as to whether there are any continuing breaches, the buyer will take on any such liability and should make its own enquiries of the planning authority.
- Environmental – the seller will not retain any liability for contamination – which will all pass to the buyer. If there is a risk that the property is contaminated, the receiver may insist that the buyer indemnifies the seller against any environmental liabilities arising prior to completion of the sale during the seller's period of ownership. An environmental survey should be carried out to confirm the position.
- Rental arrears – there may not have been active management of the property for a while prior to the sale, meaning that any rent arrears due from occupational tenants have not been pursued. The receiver is unlikely to agree to provide assistance to the buyer in pursuing such arrears post-completion. The buyer will need to consider the effect this may have on its potential income from the property.
- Voids – if the property has not been actively managed, there may be significant void areas. The buyer will need to consider the impact of the lack of rent, service charge and insurance contributions for any such areas up to the time that the buyer is able to secure new lettings. Receivers are unlikely to be amenable to entering into rental guarantees or similar as part of the contractual arrangements.
- Empty rates – a receiver is exempt from paying empty rates. A buyer should be aware that it will only be entitled to the balance (if any) of the relevant rate-free period (100% relief for the first six months for industrial premises and 100% for the first three months for office and retail) once it acquires the property. Once the rate-free period expires, the buyer will be liable for 100% of the rates.
- Rent deposits – poor records may mean that a buyer acquires a property without knowing how much (if any) money is held as security under any occupational leases. Frequently the receiver will not be in receipt of any rent deposit monies (which would have been held by the insolvent landlord) and, in those circumstances, none will be transferred to the buyer on completion.
- Employees – the receiver will expect the buyer to take responsibility for any employees whose employment will transfer under the TUPE regulations (for example, a building manager or security guard) without being able to provide much in the way of information as to who is impacted or the terms of their employment. Existing employment related debts or liabilities will pass to the buyer without any indemnity from the receiver.

- Acquisition of leasehold property – often the lease terms will provide that assignment to the buyer requires landlord's consent. The insolvency of the tenant seller may be used by the landlord as a ground to withhold consent to the proposed assignment if the landlord has its own plans for the property (such as redevelopment). The landlord may also seek to instigate forfeiture proceedings for insolvency or any subsisting breach of the terms of the lease.
- Tax – as no warranty or indemnity will be given, the buyer will need to take a view on any tax liabilities that may have arisen pre-completion. Additionally, the receivers may not know whether the property is subject to an option to tax and the buyer will have to make enquiries of HMRC in that regard.

SUMMARY

Purchasing property from a receiver requires a buyer to assume greater risk. A buyer can carry out its own due diligence to reduce the risk on some of these matters, but it should always ensure that the additional commercial risks which it will be assuming are reflected in the price it pays for the property.

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