Commercial property update

Landlords should ensure that rent accruing during an administrator's occupation is recovered as an expense to provide the highest rate of recovery possible, says **Magnus Hassett**

Magnus Hassett is a partner at Forsters. He is grateful to property litigation assistant Nikolas Ireland for his assistance
www.forsters.co.uk

The Court of Appeal delivered a judgment in February relating to the recovery of rent from a corporate tenant in administration where the administrators continue to make use of the premises after their appointment.

In *Pillar Denton Ltd and Ors v Jervis & Ors* [2014] EWCA Civ 180, commonly referred to as *Re Game Station Ltd*, the court ruled that rent relating to any period of occupation of premises, by an administrator for the purposes of the administration, will rank as an administration expense, meaning that such rental payments are payable in priority to claims of unsecured creditors.

This decision overrules the case of *Leisure (Norwich) II Ltd v Luminar Lava Ignite Ltd* [2012] EWHC 951 (Ch), which provided a legal loophole allowing administrators to avoid incurring rent as an administration expense simply by delaying their appointment until after the quarter day. Where rent is payable in advance and falls due before the appointment of an administrator, none of that rent is deemed to be payable as an administration expense. It is simply a provable debt that the landlord must attempt to recover as an unsecured creditor.

Goldacre (Offices) Ltd v Nortel Networks UK Ltd [2009] EWHC 3389 (Ch) has also been overruled. This case provided that where rent is payable in advance and falls due during the period of administration, the whole rent is payable as an expense of the administration and there will be no apportionment of that rent even if the administrator vacates the premises before the end of the quarter.

For now, *Game Station* boosts the chances of landlords recovering rent arrears from insolvent tenants by ranking the apportioned rent incurred during the administrator's occupation as an administration expense, giving it priority over other provable debts.

In addition, it will prevent administrators avoiding rent being treated as an administration expense by tactically delaying their appointment until after rent falls due in advance pursuant to the terms of a lease.

The decision also provides clarity for administrators and confirms that the administration will only incur the expense for the duration of the period it is in occupation. For example, it will not incur a full quarter's rent as an administration expense if it vacates during that quarter but instead the amount will be apportioned (with any balance being treated as an unsecured debt).

In essence, it means that an administrator will incur rent at a 'daily rate' while it occupies the premises and that the rent will be recoverable by

the landlord as an expense of the administration. And as an expense properly incurred by the administrator in performing their functions, it will be prioritised over other expenses of the administration, such as administrator's fees.

While it is likely that this case will go to the Supreme Court on further appeal, landlords should ensure that rent accruing during the administrator's period of occupation is recovered as an expense of the administration to provide the highest rate of recovery possible.

Although the case appears to be welcome news for landlords, one effect of the decision may be that administrators will act more quickly to decide which stores are underperforming and should be closed, which may be less welcome to landlords of premises in areas where re-letting is still proving difficult.

Conveyancing local searches

The Law Society's consultation on proposed amendments to the CON 29 and CON 290 enquiry forms, which aimed to inform the production of updated enquiries, has been published. Some proposed changes resulted from matters not currently dealt with on the forms, such as assets of community value and the community infrastructure levy. Others aimed to take account of recent legislative changes such as the Growth and Infrastructure Act 2013.

Ahead of the new forms being formally introduced on 1 October, the Law Society recommends that practitioners wishing to raise enquiries in relation to matters (CIL, etc) not covered on the current forms should follow the format of the enquiry on the proposed forms, to make it easier for the respondents to answer.

Rights of way

The recent Court of Appeal case of *Emmett v Sisson (Rev 1)* [2014] EWCA Civ 64 demonstrated the importance of clarity when drafting rights of way. The case about two neighbours also reminded developers and landowners that if they interfere with easements, they may need to persuade a court that insistence on the full right by the party enjoying the right is unreasonable.

Here, it was found that a party who had a right of way was entitled to access their land from any point along it and that any attempts to reduce this right would constitute an actionable interference.

The case concerned an access way owned by Emmett that ran adjacent to Sisson's property. Sisson had a right of way over this land to access his property. Emmett wanted to erect a wall along the access way with one specific point of entry through which Sisson could access his property.

Sisson opposed and sought to confirm that his right of way, which had been granted in the conveyance, should give him the right to enter his property from any point on the access way. He added that erecting any such wall, curtailing this right, would be an actionable interference.

There were two key issues, namely the extent of the right of way and whether the proposed wall would be an interference with that right of way. It was found that the conveyance entitled Sisson to enter his property at any point along the access way.

The courts are reluctant to alter the agreements made between parties and it was held that the drafting of the conveyance was sufficiently clear in that it did not expressly or impliedly limit the physical extent of the right of way and therefore it would not be appropriate for the court to reduce the right as such.

It was also found that the wall would amount to an actionable interference as it would restrict the use of the right that was granted in the conveyance. Despite the right granted being extensive and 'a relative luxury', this does not mean that a curtailment of the right would be reasonable or that an insistence of the full right is unreasonable.

In contrast with preceding case law, this case provides a precedent that access along a right of way is not necessarily deemed to be from a specified point. It also highlights the need to carefully consider the drafting of deeds granting rights of way and to expressly limit the right to avoid disputes regarding its extent.

Discharging commercial mortgages

Unlike residential conveyancing, there is no Law Society-endorsed code for completion about commercial property. But the City of London Law Society Land Law Committee (CLLS) published a protocol for discharging mortgages of commercial property in January. It had become aware that "there are a number of different procedures in the City for dealing with the discharge of mortgages of commercial property and it is concerned that an undue amount of time can be spent in negotiating completion mechanics suitable for a transaction that is acceptable to the various parties".

The protocol is not compulsory and is intended to be a guide to steps and procedures that conveyancers may wish to adopt and which the CLLS regards as being appropriate and fair to all parties. The CLLS recognises that is for the parties to any transaction to decide on a case-by-case basis whether to apply the protocol at all, or with such variations as they may agree.

The protocol sets out recommended steps for alternative completion scenarios and contains suggested provisions for contracts and completion undertakings. **SJ**

Go to www.solicitorsjournal.com/node/18942 for links to new conveyancing forms and the protocol

> **The decision in Game Station confirms that the administration will only incur expense for the duration of the period it is in occupation**