Magnus Hassett, **Tim Taylor** and **Jonathan Ross** consider the recovery of rent in a tenant administration, the pitfalls of best endeavours obligations, the National Planning Policy Framework and flood risk and buildings insurance

Commercial property update

Recovery of rent in a tenant administration

There have recently been various high-profile retail administrations – in particular arising after each rent quarter day. In many cases, administrators have continued trading from premises pending a sale of the business or to sell off remaining stock. The uncertainty as to whether landlords can recover rent in those circumstances, as an expense of the administration in priority to other creditors, has been settled in the judgment on 28 March 2012 in the claims made by X-Leisure against various companies in the Luminar Leisure Group to recover rent arrears totalling £220,000. The current legal position regarding recovery of rent where an administrator continues trading from a leasehold property is therefore as follows:

Where there are already rent arrears: administrators are not liable for rent arrears or to pay any sums that have arisen due before their appointment. This may explain why, for instance, Game Group was put into administration on 26 March 2012, the day after the March quarter day.

The administrator can continue trading for the remainder of the quarter without any liability to pay any rent at all as an expense of the administration. A landlord can still claim the rent but ranks only as an unsecured creditor and is unlikely to recover anything. A landlord's only remedy would be to urgently apply to court for permission to forfeit the lease but this takes time and then involves the landlord in rates liability if the premises cannot be re-let.

Where rent becomes due: administrators will be liable to pay the whole of a quarter's rent (or a month's rent if rent is payable monthly) if trading continues after rent becomes due. So, for example, if an administration order was made on 20 March 2012 and trading continued to 20 May 2012, the whole of the March quarter's rent would be recoverable as an expense of the administration. This is still the case even if the administrator only uses part of the premises.

> **"Practitioners will no doubt seek to avoid the use of best endeavours obligations in agreements to ensure that their clients are not in a position where they are bound to act contrary to their commercial interests"**

Where rent is payable in arrear: in the relatively unusual circumstance that rent is not payable in advance, but in arrear, then the administrators will be liable for the rent that has fallen due while the premises were being retained for trading purposes.

So, what steps should landlords take now? A landlord who appreciates a tenant is in financial difficulty, because rent is unpaid, may want to forfeit a lease by entering the premises and changing the locks before the tenant goes into administration. However, landlords may not be able to move quickly as leases generally allow at least 14 days from the due date before forfeiture can be effected, and, in any case, a landlord may not want to run the risk of being left with empty premises and rates liability.

It is not possible to provide in a lease that administrators should pay rent as an expense of the administration, even if it has fallen due before their appointment. Priority over other creditors cannot be secured by such a step. However, providing in a lease that rent becomes payable monthly, rather than quarterly, following an administration order may have the effect of limiting any rent-free period to no more than a month. It remains to be seen whether one outcome of the Luminar case is that landlords will become more willing to embrace monthly rents in commercial lease.

The National Planning Policy Framework

The National Planning Policy Framework was published by the coalition government on 27 March 2012. Amendments to the controversial early draft NPPF published in July 2011 appear, in early exchanges, to have appeased the two competing interests of the development industry and rural protection campaigners.

The NPPF is immediately in force. At a stroke, all planning policy statements, planning policy guidance, minerals planning guidance, policy statements and, notably, circular 05/05 (the planning obligations circular) have been revoked. What is left is a rather pithy 49 pages, plus three annexes, of high-level principles.

The much publicised 'presumption in favour of sustainable development' remains from the draft NPPF, albeit in fuller form, making clear for instance that there are economic, social and environmental roles within sustainable development, that the presumption applies to both plan making and decision taking and that the presumption does not operate so as to override key environmental designations or protections. "For decision taking," according to the NPPF, "this means approving development proposals that accord with the development plan without

delay and, where the development plan is absent, silent or relevant policies are out of date, granting permission unless any adverse impacts of doing so would significantly and demonstrably outweigh the benefits, when assessed against the policies in this framework taken as a whole, or specific policies in this framework indicate development should be restricted."

Although much has not, in substance, changed as a result of this document, its brevity and generality of expression will lead many observers to conclude that it may simply lead to more lengthy debate in council committee chambers, planning inquiry venues and the administrative courts. Arguably, it is easier now for either side of a planning debate to plead that the NPPF supports their case.

There will be an onus on councils to deal simultaneously with the potential for an immediate increase in the number of planning applications being made by developers looking to take advantage of the new presumption, and also with picking through existing development plan policies – whether they are up to date or not – to assess levels of conformity with the NPPF. Where conflict emerges, rapid amendments will be required to avoid seeing policies being swept aside.

Best endeavours obligations

A recent Court of Appeal case, *Jet2.Com Ltd v Blackpool Airport Ltd* [2012] EWCA Civ 417, is a reminder to practitioners that an obligation on their clients to use 'best endeavours' should be avoided, as it may require that party to act against its own commercial interests.

In 2005, Jet2 entered into a 15-year agreement with Blackpool Airport whereby Jet2 would operate low-cost flights to and from Belfast from the airport. The agreement involved substantial investment by Jet2 and, in addition to providing all the ground and other services required, the airport agreed to use its best endeavours to promote Jet2's low-cost services from the airport.

The agreement made no express provision as to what the operating hours of the airport were to be in relation to Jet2's flights. The normal opening hours were 7am to 9pm, but, as is the practice with low-cost operators, many of Jet2's flights are outside the normal hours.

No issue arose in this respect for over four years despite the fact that keeping the airport open after normal hours involved substantial additional costs. However, the airport has never made a profit and, by 2010, the airport was so concerned about the additional costs it was incurring that they told Jet2 they would no longer accept departures or arrivals outside normal operating hours.

Jet2 brought proceedings claiming that the airport was in breach of the best endeavours obligation to promote its services and it obtained an injunction to allow flights to continue outside normal hours pending the outcome of their claim.

The airport claimed that the best endeavours obligation was too vague and unclear to be enforceable and that it could not, in any event, require it to act contrary to its own interests.

The court accepted that best endeavours obligations can be too unclear to be enforceable when they are general in terms and provide no criteria to assess what is required to be done and whether there has been a breach or not. However, the court thought there was an important distinction between a clause whose content is too uncertain to be enforceable, and a clause that does give rise to a clear binding obligation but where the precise limits of that obligation are unclear. It was obvious that a low-cost airline would need to operate outside normal hours and the court construed the obligation as requiring the airport to do all it reasonably could to enable Jet2's business from the airport to succeed and grow.

The court accepted that it was relevant to consider the airport's own financial interests in determining the extent of its obligations but, in the context of the agreement entered into, it held that the airport could not refuse to continue operating outside normal hours just because this caused it a loss. Given that the ability of Jet2 to successfully operate its business depended so heavily on scheduling aircraft movements outside normal hours, the airport could not restrict such movements just because they were causing it losses.

If they were not already doing so, practitioners will no doubt seek to avoid the use of best endeavours obligations in agreements to ensure that their clients are not in a position where they are bound to act contrary to their commercial interests.

Exercising lease breaks

A number of recent cases have highlighted the pitfalls for tenants attempting to exercise breaks in leases. The courts continue to make it clear that tenants must rigidly adhere to any conditions attached to their breaks, and the latest case, *PCE Investors v Cancer Research* [2012] EWHC 884 (Ch) confirms that:

- tenants have to pay the entire quarter's rent to validly exercise a break where the break date falls within the quarter and the break is subject to paying "all rent";
- a landlord has no duty to alert a tenant to the need to pay the full sum rather than an amount apportioned up to the break date; and
- it is probably negligent for a tenant's solicitor to allow such a situation to arise: leases should provide that rent only needs to be paid for the period up to the break date or provide for full payment and then repayment of the amount overpaid once the break is effective.

Flood risk and buildings insurance

The record April 2012 rainfall and Environment Agency flood warnings are a reminder that June 2013 will see the expiry of an agreement between the Association of British Insurers and the government called the 'statement of principles', which to date has committed insurers to continue to offer insurance on certain properties at greater than usual risk from flooding.

From a practitioner's point of view, it is worth bearing in mind:

- the expiry of the statement of principles is likely to lead to risk-based pricing, i.e. an increase in premiums, for affected properties;
- the expiry of the statement of principles may start to have an impact on renewals pricing from June 2012, even though the statement of principles still has a year to run. Properties will be affected from this June because policies entered into or renewed after June 2012 will run over the end of the current arrangement;
- the impact on premiums may be softened by specialist insurers entering the market to take on liability for higher risk properties, although this remains to be seen;
- practitioners may wish to advise their clients to routinely consider flood risk searches before exchange; and
- buyers should be advised to check that insurance will be available (and affordable) before they exchange.

The Law Society is expected to release a practice note on flooding shortly.

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