

Good news for landlords in Game ruling

The decision of the Court of Appeal, on 24 February 2014, in [*Pillar Denton Limited and Others v Jervis and Others*](#) (“Game”) has brought welcome relief for landlords in confirming the extent to which they can recover rent when an insolvent tenant company enters administration (or liquidation).

Summary of the ruling in Game

The Court of Appeal held that rent would be payable by an administrator or liquidator (an “office holder”) for any period during which that office holder retains possession of (the insolvent companies) leasehold premises for the benefit of the administration or liquidation.

Background

Two earlier decisions of the High Court addressed the question of the extent of an administrator’s liability to pay rent, as an expense of the administration, under leases held by companies that had gone into administration.

The first of those cases was [*Goldacre \(Offices\) Limited v Nortel Networks UK Limited*](#) (“Goldacre”). That case concerned a lease in which the rent was payable quarterly in advance. The company had already gone into administration by the relevant quarter day when the rent fell due. The Court held that the entire quarter’s rent was payable by the administrator as an expense of the administration even if the administrator gave up occupation before the end of that quarter.

The decision in Goldacre left unresolved, the question of whether rent that had fallen due before the Company entered into administration was payable as an expense of the administration if the Company had occupied the premises over the period to which that rent related. That issue was considered in [*Leisure \(Norwich\) ii Limited v Luminar Lava Ignite Limited \(“Luminar”\)*](#). In that case the High Court decided that where a quarter’s rent payable in advance fell due before entry into administration none of it was payable as an expense of the administration, even if the administrator retained possession of the property for the purposes of the administration. The rationale for the decision being that rent payable in advance is payable in full on the due (quarter) date, so if the quarter day was prior to the date of the Company going into administration then the rent was not payable because it had fallen due before the administration had started.

The Game litigation

Game Stores Group Limited (“GSGL”) was the tenant of a large number of leasehold retail properties. In relation to most of those properties rent was payable quarterly in advance on the usual quarter days (25 March, 24 June, 29 September and 25 December). On 25 March 2012 approximately £10 million in rent became due under various leases. It was not paid and GSGL went into administration the following day. Whilst some of the stores were closed down immediately, trading continued in other stores.

The High Court was asked to consider whether the rent which had fallen due on 25 March 2012 (the day before administrators were appointed) was payable as an expense of the administration where the administrators had continued to occupy the premises after they had been appointed.

The High Court followed the earlier decisions of Goldacre and Luminar, to the effect that the quarterly rent which had fallen due before the administration was not payable as an expense of the administration. Equally the Court held that rent falling due following the appointment of administrators would be payable in full as an expense of the administration even if the administrators ceased using the premises before the end of the period (quarter) to which such rent related.

Given the importance of the issues in the Game litigation the High Court gave permission to appeal, to enable the Court of Appeal to rule on the issues.

The appeal in the Game litigation

The key issue on the appeal was the treatment of rent payable under a lease held by a company that enters into administration. In particular the circumstances in which that rent would be payable as an expense of the administration.

The decision

The Court of Appeal recognised that the decisions in Goldacre and Luminar had “left the law in a very unsatisfactory state”. The decision of the Court of Appeal in Game has now resolved that unsatisfactory state in making the following findings:

1. Goldacre and Luminar are both overruled;
2. an administrator must pay rent (as an expense of the administration) for the duration of any period during which he retains possession of the premises for the benefit of the administration and the rent will be treated as accruing from day to day for that purpose;
3. the proposition referred to in point 2 above is true whether the rent is payable in arrears or in advance under the lease in question; and
4. in circumstances where the date upon which a quarter’s rent becomes payable and whether that is before, during or after the period during which the property is used for the purposes of the administration, is irrelevant.

Implications of the decision of the Court of Appeal

The decision provides welcome clarity, in particular for landlords, where their tenant goes into administration (or liquidation). In effect the decision should see a “pay as you trade” policy. The administrator will have to pay rent for each day that they use the premises.

Furthermore, the decision of the Court of Appeal will put an end to the practice of administrators being appointed a day after a quarter day and then being able to use the premises for the remainder of that quarter, so almost 3 months, without paying rent as an expense of the administration.

The Court of Appeal decision will have a significant impact on numerous existing administrations as well as future administrations.

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