# THE POSITION OF A LANDLORD WHOSE TENANT IS IN ADMINISTRATION

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## Introduction

1. I start with some statistics. Since the modern regime for the administration of insolvent companies was introduced by the Enterprise Act 2002, over 23,000 companies have taken advantage of its protection. In the first 3 quarters of 2010, almost 2200 administrations were started, although this represents a welcome decline from more than 3300 in the corresponding period in 2009. The peak quarter recently was Q4 of 2008, when 2018 companies went into administration. Clearly, 3,000 to 4,000 administrations a year generate a lot of work.

2. In a high proportion of those administrations, the interests and liabilities of the company as tenant will be an issue. That is good for property lawyers because the interests of the landlord on the one hand and the tenant's other creditors on the other hand are rarely aligned. The administrator is of course supposed to be objective and impartial: see *Mourant & Co Trustees Ltd v Sixty UK Ltd* [2010] EWHC 1890 (Ch). Where the administration order was made by the court it will have been satisfied that the company is or is likely to become unable to pay its debts (Schedule B1 to the Insolvency Act 1986 (as amended), para 11(a)). The same applies where the company or

[1] I gratefully acknowledge the contribution made to this lecture by previous lectures given on the subject by Stephen Jourdan QC and Martin Rodger QC, colleagues in chambers, over the last 18 months.

its directors appoint the administrator (*ibid*, para 27(2)(a)). Issues are therefore likely to arise very quickly concerning the tenant's obligations under its leases, including in particular the payment of rent. Despite his objectivity and impartiality, in many cases an administrator may feel that there is a battle joined between him and the landlord. An administrator needs to act quickly, decisively and with the best advice.

3. Each administration has a purpose which, broadly speaking must be one of the following:

(a) To rescue the company as a going concern, or

(b) To achieve a better result for its creditors as a whole than would be likely to be achieved if the company were wound up, or

(c) To realise property in order to make a distribution to one or more secured or preferential creditors.

(Schedule B1, paragraph 3(1)).

4. Where the purpose is to rescue the company as a going concern it is possible, but by no means inevitable, that a landlord will experience only limited pain; where the purpose of the administration is to achieve a better result for all the creditors, or to realise property for a secured or preferential creditor (a position unlikely to be held by a landlord), the interests of the landlord and the objective of the administrators are likely to conflict. A landlord's main commercial interest is to be paid rent in full and on time, which on the face of it is unlikely to happen.

5. While the company seeks to achieve one of the statutory purposes, it is allowed a breathing space, or moratorium, with the following effects:

(i) No step may be taken to enforce security over the company's property except with the consent of the administrator or with the permission of the court (B1, paragraph 43(2));

(ii) A landlord may not exercise a right of forfeiture by peaceable re-entry in relation to premises let to the company except with the consent of the administrator or of the court (B1, paragraph 43(4)); and

(iii) No legal process (including legal proceedings, execution, distress) may be instituted or continued against the company or property of the company except with the consent of the administrator or of the court (B1, paragraph 43(6)).

So the landlord cannot levy distress, or sue for unpaid rent, or forfeit the lease (even though it provides for forfeiture on appointment of an administrator or on insolvency), unless either the court or the administrator permits it. In many cases permission is unlikely, since such action may undermine the purpose of the administration. The moratorium does not, however, prevent a claim by the landlord against a former tenant or a guarantor, even though it will result in a claim over against the company.

6. The statutory moratorium does not alter the substantive liabilities of the company or the substantive rights of its creditor, it simply suspends or postpones their enforcement: *Barclays Mercantile Business Finance Limited v Sibec Developments Limited* [1992] 1 WLR 1253. This moratorium is the bedrock of the administration regime and is significantly more comprehensive than the previous position under section 11 of the Insolvency Act 1986. In particular, although perhaps only as an afterthought by amendment in 2003, the prohibition on forfeiture of leases by peaceable

re-entry as well as by court action made administration a more attractive and protective environment for insolvent companies.

7. The administration regime created by the 2002 Act made the appointment of administrators simpler and cheaper, imposed clear duties on them by reference to the statutory purpose of the administration and, for the first time, identified a detailed list of administration expenses. The significance of administration expenses is, of course, that they fall to be paid in priority to the other liabilities of the company. Some even in priority to the administrator's remuneration. Identifying which, if any, of the tenant's liabilities under its lease are to be regarded as expenses of the administration is the difficult question which usually provokes immediate conflict between administrators and landlords: is the current or next quarter's rent to be paid in full, and if sow when; or will the landlord only be entitled to a dividend at a much later time?

8. To set the background for consideration of important recent developments on that topic it is necessary to go back to the clear guidance given by the Court of Appeal on the application of section 11 of the Insolvency Act 1986 to the treatment of administration expenses.

## Atlantic Computer Systems

9. In *Re Atlantic Computer Systems plc* [1992] Ch 505 a company had leased computers and sub-leased them to end-users. The sub-lease rents failed to cover the full amount of the computer leasing charges. When the company went into administration, the administrators paid the sub-lease rents

on to the computer owners, but there remained a shortfall. The owners contended that the administrators had made use of the computers for the purposes of the administration while they were seeking to dispose of the business as a going concern and that the amounts due under the headleases should therefore be paid in full as an expense of the administration, or leave to forfeit be given. The Court of Appeal refused the owner's request under section 11 that the administrators be directed to make payment in full. The guidance given by the court was clear and intended to be (and has been treated as) of general application. The relevant principles were said to be:

(i) that the person applying to lift the moratorium carried the burden of proof;

(ii) the moratorium was intended to assist the company under the management of the administrator to achieve the purpose for which the administration order was made;

(iii) if granting permission to a landlord or the owner of goods hired to the company to exercise their proprietary rights and repossess the land or goods is unlikely to impede the achievement of that purpose, leave should normally be given;

(iv) in other cases, when a landlord seeks possession, the Court has to carry out a balancing exercise, balancing the legitimate interests of the landlord and the legitimate interests of the other creditors of the company;

(v) in carrying out the balancing exercise, great importance is normally given to the proprietary interest of the landlord;

(vi) the underlying principle is that an administration for the benefit of unsecured creditors should not be conducted at the expense of those who have proprietary rights which they are seeking to exercise except to the extent that it is unavoidable, and even

then such interference will usually be acceptable only to a strictly limited extent; and

(vii) it will normally be a sufficient ground for the grant of leave if significant loss will be caused to the landlord by a refusal to grant leave.

What is said there about enforcement of proprietary rights is probably as valid today, under the new regime, as it was under the old regime.

10. But dicta of Nicholls LJ in that case went further in addressing the question of rent as an expense of the administration. Remember that this was under the old regime:

> "If this flexible approach is right, there is no room in administrations for the application of a rigid principle that, if land or goods in a company's possession under an existing lease or hire purchase agreement are used for the purposes of an administration, the continuing rent or hire charges will rank automatically as expenses of the administration and as such be payable by the administrator ahead (so it would seem) of the pre-administration creditors; nor even for a principle that leave to take proceedings will be granted as of course. Such rigid principles would be inconsistent with the flexibility Parliament must have intended should apply by giving the court a wide discretion."

11. While the principles in *Re Atlantic* prevailed, the interests of landlords were vulnerable to wider considerations of the interests of the administration as a whole. Moreover, the position of the landlord in each case was potentially different because the application of the principles was very fact specific.

The Lundy Granite principle and the Toshoku case

12. With the re-casting of the administration regime by the Enterprise Act, and in particular with the categorisation of administration expenses by rule 2.67 of the Insolvency Rules, doubt has been cast on the *Re Atlantic Computers* principles so far as they relate to claims for payment of rent. That doubt derives from the adoption into the amended Insolvency Rules of a system of administration expenses almost entirely aligned with the rules relating to liquidation expenses. In order to understand the significance of this change it is necessary to look briefly at the principles developed first under the 19th Century Companies Acts, which introduced the modern scheme for the liquidation of insolvent companies and led to the idea of an "expense of the liquidation".

13. The Judges recognised the significance of identifying expenses that were necessarily incurred as part of the process of liquidation and which ought to be paid in priority to the claims of secured and unsecured creditors, since they were incurred for the benefit of them all. Expenses of the liquidation included costs which the liquidator incurred after his appointment in getting in, preserving or realising the company's assets or as necessary disbursements. The status of rent, and the rights of landlords to distrain for rent created particular difficulty, then as now. Invariably the liability to pay rent arose out of contracts, leases, entered into by the company *before* the appointment of the liquidator. Where a landlord wished to distrain for rent, in circumstances where the liquidator proposed to carry on trading while seeking to dispose of the company's assets, the question whether the landlord should be given leave to proceed, or should be restrained, arose in an acute

form in the case *In Re Lundy Granite Co, ex p. Heavan* (1871) 6 Ch App 462.

14. In that case, a company quarrying granite on Lundy Island under a lease went into liquidation. The liquidator sought to continue the business and renegotiate the company's contracts, which were thought to be valuable. The liquidator paid the first instalment of rent falling due after his appointment but no further instalments. The landlord distrained on the quarried stone and quarrying equipment present on the island and the liquidator sought an order restraining him from proceeding with the distress. The Court of Appeal in Chancery permitted the distress to proceed. The liquidator had retained possession of the land for the purposes of the liquidation and that had important consequences in the view of the court. James LJ said:

> "… if the company for its own purposes, and with a view to the realisation of the property to better advantage, remains in possession of the estate, which the lessor is therefore not able to obtain possession of, commonsense and ordinary justice require the court to see that the landlord receives the full value of the property."

15. The *Lundy Granite* principle evolved and came regularly to be applied. It was summarised by Lindley LJ in the case of *In Re Oak Pits Colliery Company* (1882) 21 Ch D 322 as follows:

> "If the liquidator had retained possession for the purposes of the winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding up … but if he has kept possession by arrangement with the

> landlord and for his benefit as well as for the sake of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain."

The effect of the *Lundy Granite* principle is that rent falling due after the liquidation was *treated as* an expense of the liquidation even though strictly it was not, because the lease was entered into before the winding up.

16. The same principle obviously applied where the question was not whether the landlord could levy distress but whether the liquidator should be required to pay rent as a condition of continuing in occupation: as Lord Hoffmann later put it in *Toshoku Finance UK plc* [2002] 1 WLR 671 at para 24, "it was obvious to everyone that there could be no practical difference between allowing a landlord to levy a distress for rent falling due after the winding up and directing the liquidator that he should be paid in full".

17. *Toshoku* was also a case about liquidation expenses. The matter in issue was the liability of the liquidator to pay corporation tax which had fallen due after the commencement of the winding up. In *Toshoku* the House of Lords disapproved the Court of Appeal's view expressed in *Atlantic Computers* that post-liquidation expenses were something over which there was a discretion whether to pay or not. Lord Hoffmann made it clear that the effect of rule 4.28 of the Insolvency Rules 1986 was that if a claim was *or was deemed to be* a liquidation expense it had to be paid in priority and was not the subject of any discretion. (That observation was of course made without any reference to the administration regime, which was not in point.)

18. When the new regime of administration expenses was introduced by rule 2.67 of the Insolvency Rules, the language of rule 4.128, the liquidation

expenses rules interpreted by the House of Lords in *Toshoku*, was very closely followed. Rule 2.67 provides that:

> "The expenses of the administration are payable in the following order of priority –
>
> (a) expenses properly incurred by the administrator in performing his functions in the administration of the company;
>
> (b) the costs of any security provided by the administrator in accordance with the Act or the Rules;
>
> ……..
>
> (f) any necessary disbursements by the administrator in the course of the administration;
>
> ……."

The recent case law

19. The adoption of the language construed by the House of Lords in *Toshoku* gave rise to the question of whether a post-administration liability was to be treated automatically as an expense of the administration in the manner in which the House of Lords had held a post-liquidation liability should be treated. The answer given to this question by David Richards J in *Exeter City Council v Bairstow* [2007] 4 All ER 437 was "yes". He held that Parliament must have intended the effect of the classification of a liability as an administration expense to carry the same consequences as would classification as a liquidation expense. By adopting the same language Parliament must have intended the two rules to operate in the same way.

20. *Exeter City Council v Bairstow* was a case about rates rather than rent and it did not directly engage the *Lundy Granite* principle because the statutory liability for rates arose after the administration. It therefore remained a live question at that stage whether that principle (of deeming rent to be an expense of the liquidation) applied to administration as it did to liquidation, although landlords came to rely on it, and on rule 2.67, to demand payment from administrators while they used the premises. Administrators in turn asserted that they still had a discretion under the *Atlantic Computers* principles.

21. In *Innovate Logistics v Sunberry* [2009] 1 BCLC 145, it was conceded that a landlord did not have an absolute entitlement to be paid contractual rent and interest as an administration expense and that the court had a wide discretion exercisable according to the circumstances of the case in accordance with the *Atlantic Computers* guidance (the *Exeter City Council* case was not cited to the court). The issue of rent in *Sunberry* was highly peripheral. The real issue in *Sunberry* was whether the landlord should be entitled to recover possession. Moreover the court only required the administrators to pay to the landlord the sums they were *receiving*, under licence from a third party occupier, rather than sums due in full under the lease. So the critical question did not arise.

22. It did in *Goldacre (Offices) Limited v Nortell Networks UK Limited (in administration)* [2010] Ch 455. Goldacre was the landlord of a substantial office and industrial complex which had been purpose built for Nortell. Nortell went into administration in January 2009 and the administrators undertook to pay the rents under the lease of the site until further notice. The administrators slimmed down the company's activities at the site so that they

were only occupying a small part of the premises. The premises which the company continued to occupy, however, were vital for the achievement of the purpose of the administration since they housed its international data handling centre. Having achieved that contraction, the administrators notified the landlord that from the September quarter onwards they would only pay rent for the small portion of the premises which they were actually using. Goldacre, whose own solvency was threatened by the administrators' proposal, applied to the court for an order that the administrators be required to pay the rent in respect of the whole premises.

23. His Honour Judge Purle QC, sitting as a High Court Judge in Birmingham, directed the administrators to pay the rent in full. He applied the *Lundy Granite* principle and held that because the administrator had elected to retain the premises for the better achievement of the purpose of the administration he could only do so on the terms of the lease. He accepted that rule 2.67 gave him no discretion. He rejected the administrator's submission that payments under the lease should be limited by reference to the area employed as being contrary to the decision of the House of Lords in relation to contracts of employment in *Powdrill v Watson* [1995] 2 AC 394 (contract of employment could only be adopted as a whole and not in part). It was also impractical on the facts of the *Goldacre* case for the landlord to make any alternative use of the premises while part, albeit a relatively small part, was in the occupation of the administrators. For that reason, HHJ Purle QC held that, if he had been required to apply the *Atlantic Computers* balancing exercise, he would have concluded that it was fair for the administrators to pay the whole of the rent falling due.

24. The Judge made one further point of significance. He pointed out that the treatment of rent as a liquidation or administration expense was not necessarily determinative of the point in time at which the rent should be paid. In *Toshoku* Lord Hoffmann had recognised that if the sufficiency of the realisable assets was in doubt, the landlord might have to wait and see to what extent the assets would be enough to satisfy his claim even though it was properly treated as a liquidation or an administration expense.

25. *Goldacre* appears to establish a clear principle of considerable importance. An administrator making use of ("adopting") leasehold premises for the benefit of the administration can only do so on the terms and conditions contained in the lease, and any liability incurred while the lease is being enjoyed or retained for the benefit of the administration is payable in full as an expense of the administration. That outcome has been fiercely criticised by one leading commentator. In an article for Insolvency Intelligence (2010) 23(5) Insolve. Int. 76, Gabriel Moss QC considered that the judgment in the *Goldacre* case completely misunderstands the position and fails properly to distinguish between the rules applicable to liquidation and administration or to apply the binding ratio of the Court of Appeal in *Atlantic Computers*. The difficulty with that contention is that it requires that a different effect be given to the same statutory language in liquidation and administration cases and must overcome the conclusion of the House of Lords in *Toshoku* that payment of rent under the *Lundy Granite* principle was not discretionary and that *Atlantic Computers* was wrong to treat the question of whether debts should count as expenses as a matter for the discretion of the court.

26. *Goldacre* leaves a number of important questions unanswered. These are: (1) in what circumstances will an administrator be taken to have "adopted" the lease for the benefit of the administration? Unlike a liquidator, an administrator cannot disclaim it, so doing nothing, even for a long period, ought not to be treated as adoption. (2) If rent is already outstanding before the administration or before the administrator "adopts" the lease, is he required to pay it as a condition of continuing in occupation? (3) What about other sums falling due under the lease and other covenants? These are all practical questions of considerable importance, which are capable of arising in circumstances where the sums of money at stake may be too small to justify the expense of litigation. I therefore consider the applicable principles now, by reference to some liquidation cases.

**(1) When will the administrator be taken to have "adopted" the lease and become liable for rent as an expense of the administration?**

27. *Lundy Granite* itself shows, not unsurprisingly, that if an administrator keeps possession of the premises in order to carry on the business of the company the landlord should not be deprived of his right to recover the rent. *Goldacre* itself is another illustration of that principle.

28. The position is less certain where the administrator is not actively carrying on business from the premises but where valuable items belonging to the company remain on the premises while a buyer is sought. The blocks of granite on Lundy Island, for example; and that leading case shows that an administrator will be treated as retaining possession in those circumstances and so become liable for rent.

29. The position may not initially be clear, as is illustrated by two cases decided almost 90 years apart. In *Re Oak Pits Colliery Co* (1882) 21 Ch D 322, plant and machinery originally intended to be used to extract coal was left on the surface of tenanted land after a winding up order had been made against the tenant company. The liquidator took no action to take possession of the colliery or of the tenanted land itself and no further mining occurred. Later the liquidator sold the plant and machinery and the landlord argued that the company should pay all of the rent accrued due since the commencement of the winding up. The Court of Appeal rejected that contention, distinguishing *Lundy Granite* on the basis that:

> "No authority has yet gone the length of deciding that a landlord is entitled to distrain for or be paid in full rent accruing since the commencement of the winding up, where the liquidator has done nothing except abstain from trying to get rid of a property which the company holds as lessee."

If the liquidator had resisted an attempt by the landlord to forfeit the lease then the position might have been different. The same principle applies to an administrator. A similar consideration of the liquidator's motivation was undertaken by Plowman J in *Re ABC Coupler and Engineering Co Limited (No.3)* [1970] 1 WLR 702. It was held that while a liquidator was taking advice on the best method of disposing of a company's assets on leasehold premises he had as yet taken no active steps to sell the plant and machinery or take possession of the property, and so he had not assumed a responsibility to make payments under the lease.

30. If a liquidator or administrator does not occupy or use the premises but seeks a buyer for the lease, then he will be treated as having elected to retain the premises for the benefit of the winding up (see *In Re Downer*

*Enterprises Limited* [1974] 1 WLR 1460, in which Pennycuick V-C pointed out that the question of the liquidator's motivation was to be judged objectively by reference to what he did rather than by an inquiry into his subjective state of mind; see also *In Re HH Realisations Limited* (1975) 31 P&CR 249. This may not apply if the administrator is seeking advice from a valuer as whether or not the lease has value, since that, objectively, is doing nothing with the premises, no decision having yet been made.

31. It would seem therefore that an administrator who wishes to avoid being taken to have assumed liability for a lease should decline rent offered by sub-tenants, or at least pass it straight on to the landlord, at the same time encouraging the landlord to exercise its statutory rights under the 1908 Act.

32. If the landlord does not wish to recover possession of the premises it is not necessary for him to make an insincere application for permission to re-enter and forfeit the lease. The application made in *Goldacre*, for example, was for a direction that the administrators pay the rent due under the lease, rather than for permission to commence proceedings for forfeiture if they failed to make payment. Where the administrator wishes to make use of the premises for the benefit of the administration, the *Lundy Granite* principle does not require that the landlord should oppose the retention of possession in order to become entitled to rent as an administration expense (see *Goldacre* at paragraph 12). In many cases, a landlord may be well advised to seek such a direction (for payment of rent) and permission to re-enter in the alternative. But if the administrator may shortly assign the lease and the rent is a good rent likely to be paid by the assignee, the landlord will usually be well-advised not to forfeit, at least not yet.

**(2) What about rent that is already outstanding at the date when the administrator is appointed, or before the lease is "adopted"?**

33. The status of rent which fell due before the appointment of an administrator (or liquidator) is still uncertain. In the Victorian cases decided under the Companies Act 1862, the accepted position was that rent which accrued due before liquidation could be proved for, but could not be an expense of the liquidation (or now of an administration). For example Lindley LJ said in *In Re Oak Pits Colliery Co*: "if the liquidator has retained possession for the purposes of the winding up … the landlord will be allowed to distrain for rent which has become due since the winding up …" (at page 330). However, in those cases the rent tended to be payable in arrear so that a quarter's rent falling due before the commencement of the winding up would be wholly referable to a period of the lease when it could not be said that the lease was being retained for the purposes of the liquidation. In modern times, rent now routinely being payable in advance, the position may be more complex. Suppose, e.g., that a quarter's rent falls due the day before the appointment.

34. The obligation to pay rent under the *Lundy Granite* principle can be seen as a *quid pro quo* for the imposition of a moratorium on the landlord's proprietary right to forfeit the lease; in the interests of the administration as a whole the landlord's right cannot be exercised but, if so, it is only fair that the landlord be paid for the use being made of the premises for the benefit of the administration. It is only the statutory moratorium which ensures the administrator's ability to trade from or preserve the premises. In those circumstances it can be argued to be immaterial at what point in a particular quarter the administrator was appointed. It ought logically to be a condition

of the administrator's retention of the lease that that quarter's rent be paid, or at least apportioned in respect of the period after the appointment. On the other hand, where leave to forfeit is not being sought, the decision in *Goldacre* strongly implies that rent should not be apportioned, so that the whole of a quarter's rent falling due before the administration is not an expense of the administration.

35. It is certainly hard to regard an instalment of rent which fell due 6 months before the administration as an expense of the administration. Nonetheless there is authority in some of the Victorian cases which might support such an approach. In *Re Silkstone and Dodworth Coal and Iron Company* (1881) 17 Ch D 158, a landlord obtained the consent of the court to distrain for rent due in respect of the whole period of 5 months prior to the presentation of the winding up petition, and this was even though the rent, payable in arrears, could have been apportioned under the Apportionment Act 1870. Fry J held that the landlord had a right to forfeit the lease and, by electing to continue in possession of the property, the liquidator had prevented the landlord from exercising that right. He considered that in those circumstances it was only equitable that "if he keeps the lease as an asset of the company and for the purposes of the liquidation, that he should satisfy those conditions upon which the asset remains his; in other words, he should pay the rent in full".

36. It remains to be seen whether a rental liability which would have to be discharged in order to avoid a forfeiture can be classified as a "necessary disbursement by the administrator in the course of the administration" so as to fall within rule 2.67(f) of the Insolvency Rules and to qualify as an expense of the administration having priority over other claims. I think that

may be going too far. If *Goldacre* remains the law, none of the rent falling due as a debt before the administration is an expense of the administration, and all of the rent falling due on a quarter day just before the administration is concluded will be an expense. On the other hand, if in due course the Court prefers the *Atlantic Computers* discretionary approach, apportionment is much more likely to be directed, at both ends of the administration.

**(3) Service charges, insurance and other payments due under the lease not being rent**

37. Rent is not the only financial obligation which may have to be met by a tenant after the appointment of an administrator. Service charges may be due, either as a continuing contribution to the costs of services provided or as a balancing charge that has accrued in respect of services provided in an earlier period. Payments of both sorts may fall due after the appointment of an administrator and different considerations may arise.

38. The continuing cost of electricity, cleaning of common parts, security and other ongoing services provided by a landlord to its tenants is just as much a cost of the tenant's continuing occupation of premises as the rent. There seems no reason to distinguish between such payments falling due after an administrator has decided to retain a lease for the benefit of the administration. But where a payment is referable to a period before the commencement of the administration, such as a balancing charge payable after the total cost of services provided in an earlier year has become known, the position is less clear cut. The landlord will argue that the obligations of the lease must be met in full as the price of defeating the landlord's right to forfeit, or that the strict *Goldacre* principle applies. The administrator would

point to the unfairness to other creditors if a debt which relates to a period before the administration is given priority over their claims simply because of the date on which it falls due for payment.

39. The decision of the House of Lords in *Powdrill v Watson* [1995] 2 AC 394, concerning the treatment of employees' holiday pay after the appointment of an administrator, gives some support to the administrator's argument. The question in *Powdrill* was whether holiday pay which an employee became entitled to during the period after an administrator had adopted his contract, but which had accrued in respect of periods of employment before the administration, was a liability "incurred while he was administrator" so as to be an expense of the administration. The House of Lords held that, although the obligation to pay arose after the administration, the basic liability arose as a result of employment for periods before the administration, and the liability ought not to be regarded as having been incurred by the administrator after his appointment. I am not sure, however, that the same principle would apply to a debt arising under a lease, at least as long as *Goldacre* is regarded as the right approach.

**(4) Other obligations to be performed under the lease: repairs**

40. The administrator or liquidator who elects to retain leasehold premises is bound not only by the obligation to pay rent but also by the other covenants in the lease. Does that mean that a landlord would be given permission to forfeit a lease on the ground of an administrator's failure to comply with the repairing obligation, or an administrator could be directed to pay for repairs that are needed? See the case of *Re Levi & Co Limited* [1919] 1 Ch 416. The circumstances of that case were perhaps exceptional in that a

tenant company remained in liquidation for the last 7 years of a 21 year lease of an office building in the City of London. The premises had been sub-let at a profit rent and the liquidators elected to continue in possession collecting that rent. At the end of the term the landlord sought an order that the company should pay in full the cost of remedying breaches of the repairing covenants in the lease. The liquidators argued that the landlord could only prove in respect of the dilapidations claim. The court rejected the liquidators' argument holding that it would be inequitable to allow the liquidators to enjoy the benefit of the lease while disregarding the covenants. It was immaterial, the court considered, that some part of the dilapidations may have accrued before the commencement of the liquidation because the covenants in the lease included an obligation on the tenant to deliver the premises up in good repair at the expiry of the term.

41. The position might be different if a liquidator or administrator retained possession for a relatively short period of time before the expiry of a lease. Once again it is hard to see why a liability that built up before the appointment of administrators should be discharged in preference to other creditors. The different here is that a liability to pay damages for breach of covenant is not a debt that becomes due at a single point in time; disrepair and therefore breach of covenant and liability for breach is continuing. There is the additional question of whether or not an obligation other than an obligation to pay money can be construed as an expense incurred or a necessary disbursement under the Insolvency Rules, notwithstanding the decision in *Re Levi & Co Ltd.*.

42. *Goldacre* did not go to the Court of Appeal, perhaps because the trial Judge indicated that he would have come to the same conclusion, ordering

the administrators to discharge the whole of the rent, even if he had been required to apply the *Atlantic Computers* guidelines. For the time being it must be assumed to represent the law although it leaves significant questions hanging in the air. I have identified some of these and given you some indication of how they might be decided. In the current climate, it seems likely that some of them will be before this conference is repeated in 2012.


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