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## THE NEXT INSTALMENT

### Rents payable as an expense in administration

1. On 28 March 2012 Judge Pelling QC, sitting as a Deputy Judge of the Chancery Division, delivered an *ex tempore* judgment in several applications made by a number of landlords against administrators of tenants in the Luminar Group, in *In Re Luminar Ignite*. Luminar went into administration in October 2011, and these applications were concerned firstly with permission to forfeit, and secondly with the payment of rent as an expense of the administration.
2. The decision is of interest because of its application of the High Court decision in *Goldacre (Offices) Ltd v Nortel Networks UK Ltd* [2010] Ch. 455, an important decision regarding the payment of rent by administrators under the Insolvency Rules, as amended following the enactment of the Enterprise Act 2002.
3. Goldacre Offices Limited was the landlord of commercial premises which were let under two long leases to Nortel. Nortel went into administration and the administrators, following their appointment, occupied and used a relatively small part of the premises for the more efficient conduct of the administration. Goldacre claimed that the rents were payable as an expense in the administration, so that its claim to the rent ranked in priority to Nortel's creditors and had to be paid in full by the administrators. At the time the case was heard and decided the administrators had in fact made payments in respect of past rent, and so the decision of the court was focussed on future payments and the future conduct of the administration.
4. The Insolvency Rules 1986 2.67(1), and as amended following the passage of the Enterprise Act 2002, 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.*

....

(f) *any necessary disbursements by the administrator in the course of the administration (including any expenses incurred by members of the creditors' committee or their representatives and allowed for by the administrator under Rule 2.63, but not including any payment of corporation tax in circumstances referred to in sub-paragraph (j) below*".

5. Judge Purle QC, sitting as a Deputy Judge of the Chancery Division, found in favour of Goldacre. He accepted that the matter was to be determined exclusively by reference to the rules, and that if the liability for rent fell into these categories then its payment was not a matter of discretion either on the part of the administrators or of the court. In deciding whether rent did fall within rule 2.67 he relied on the decision of the House of Lords in *In re Toshoku Finance UK plc* [2002] 1 WLR 671. That case concerned the equivalent rules relating to liquidators (r.4.218 of the Insolvency Rules 1986). Lord Hoffmann (with whose speech the other members of the House of Lords agreed) considered the history of the *Lundy Granite* principle (named after the decision in *In Re Lundy Granite CO., ex p Heaven* (1871) 6 Ch. App 462), under which liquidators are held liable to pay rent as a liquidation expense where the liquidators make use of or retain leasehold premises for the benefit of the liquidation. This was applied by David Richards J. in *Exeter City Council v Bairstow* [2007] 2 BCLC 455, who held that the expenses regime in the rules is mandatory in the case of administrators and liquidators. He held that the rates were payable by administrators as an expense of the administration. This was applied, in *Goldacre*, to rent payable under a lease.
6. Judge Purle QC considered that rent in respect of premises occupied by the administrator could fall within rule 2.67(1)(a) or (f), whilst acknowledging that this did not find favour with David Richards J. in *Exeter City Council v Bairstow*. However, in *Goldacre*, it was not necessary for a decision to be made between paragraphs (a) and (f) (which would only

be relevant if there were insufficient funds to meet paragraph (f) expenses), since the subparagraphs of 2.67(1) set out the priority of payment of expenses of the administration.

7. In *Goldacre*, a question arose as to whether the administrators are entitled to apportion rent payable in advance under the lease in circumstances where they cease to use or occupy the premises during a rent period. The Judge accepted the landlord's submission that the quarter's rent, in those circumstances, was payable in full and would not fall to be apportioned if the administrators were to vacate during the quarter. This was based on the application of the principle, established in *Powdrill v Watson* [1995] 2 AC 394 and *Re Levi & Co Ltd* [1919] 1 Ch. 416, that a liquidator electing to hold leasehold premises can do so only on the terms and conditions in the lease. This was held to apply equally to liquidators.
8. A possible stumbling block in *Goldacre* was the decision of the Court of Appeal in *Sunberry Properties Limited v Innovate Logistics Ltd* [2009] 1 BCLC 145, where the Court of Appeal refused permission, after balancing the interests of the landlord and the administrator, to bring proceedings requiring the administrators to terminate an occupational licence granted in breach of the lease. It was conceded by the landlord, in that case, that there was no automatic right to be paid the rent during the period of the licence and therefore the Court of Appeal exercised a discretion and ordered the administrators to pay the sums passing under the licence from the third party. However, since this decision of the Court of Appeal was based on a concession that the discretion existed, it did not constrain the first instance court in *Goldacre* to reach the same decision. Moreover, none of the principal authorities on the issue were considered by the Court of Appeal in *Sunberry*.
9. In *In re Luminar Lava Ignite*, the principle that rent was payable as an expense of the administration was not in issue (the court being bound by *Goldacre*), but the court was asked to determine whether the rent which had fallen due in advance for the quarter during which administrators were appointed was also payable as an expense.

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10. Rent had fallen due on 29 September 2011 but had not been paid. The administrators were appointed on 28 October 2011, and thereafter allowed a new company into occupation, in the hope that the landlord would give consent to assign the lease to that company. However, the landlord refused to consent unless the administrators complied with the conditions in the alienation covenant for giving consent. The landlords therefore sought the administrators' consent to forfeit under paragraph 43 of Schedule B1 to the Insolvency Act 1986. The administrators refused to consent until the day of the hearing, 26 March 2011, the judge commenting that had they not done so he probably would have given permission to forfeit himself and ordered costs against the administrators.
11. The administrators did not dispute that the quarterly rents which had fallen due after 28 October 2011, including all the rent for the quarter commencing on 25 March 2012 were payable as an expense. They did however contend that they were not liable for the September quarter's rent, which fell due just over a month before their appointment. The landlords argued that where a landlord wishes to forfeit, and is prevented from doing so, all the rent which the lease requires to be paid as a condition of avoiding forfeiture is an expense.
12. The Judge decided as follows:
- (a) Where rent is payable in advance and falls due on a date before the commencement of an administration, although it is provable, no part of it is payable as an expense of the administration. That is so even though the administrator, once appointed, retains the premises for the purposes of the administration for the whole or part of the period of occupation for which the rent is payable, and even though the landlord wishes to forfeit but is prevented from doing so.
  - (b) Where rent payable in advance falls due on a date during the period when the property is being so retained by the administrator, the whole of the rent is payable as an expense. That is so even if the administrator gives permission to forfeit or vacates before the expiry of that period. This follows from *Goldacre*.

(c) Where rent is payable in arrear and becomes due after the commencement of the administration, at a time when the administrator is using the premises, with part of the rent due in respect of a period prior to the commencement the rent falls to be apportioned under the Apportionment Act 1870 (which does not apply to rent payable in advance). That part which relates to the period after the commencement of the administration is payable as an expense. The Judge declined to decide whether that part of the rent payable in arrear which fell due prior to the administrator's appointment is also payable as an expense, but expressed the view that this is unlikely and that *In Re Silkstone & Dodworth Coal & Iron Company* (1881) 17 Ch.D 158 remains good law.

13. One effect of this decision is that leases which make provision for monthly rather than quarterly payment of rent provide better prospects of recovering rent from the administrators if an administrator is appointed shortly after what would have been a quarter day, allowing the administrators less scope to delay their appointment until immediately after a quarter day and thereby avoid having to pay that quarter's rent even if they make use of the premises for the purposes of the administration almost immediately after their appointment.