

# INSOLVENCY NEWSFLASH

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In this update we report briefly on a recent case of interest to insolvency and restructuring professionals:

- ***Innovate Logistics Limited (in administration) v Sunberry Properties Limited***
- **Administrator's power to grant a licence to occupy - Judgment given on 18 November 2008**

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It is often vital for a buyer to remain in occupation of leasehold premises for a period of time after it has acquired a business as a going concern from administrators. It is almost always the case that this will be a breach of the terms of the lease. The Innovate case confirms that providing the administrators can demonstrate that granting a licence to occupy to the buyer is necessary to achieve the purpose of the administration they will be permitted to do so, and the landlord will not be able to remove the unwanted occupier. The landlord's rights will be sufficiently protected by payment to it of the licence fee charged under the licence providing that fee is equivalent to the rent accruing, even if the terms of payment are varied.

The circumstances of the case are not unusual. Innovate went into administration on 30 June 2008 and the administrators immediately completed a pre-pack sale of the business of the Company as a going concern. As part of the transaction they granted the buyer a licence to occupy the Company's leasehold premises for a period of 6 months, notwithstanding that in doing so the administrators were causing the Company to breach the terms of the lease under which it occupied the premises. It was considered necessary for the buyer to occupy the premises for a short period of time in order that it could distribute stock held there and so continue the business as a going concern. Continuity of the business was vital to enable the administrators to collect the Company's book debts, which were excluded from the sale. The buyer was not interested in taking an assignment of the lease. The administrators charged the buyer a monthly licence fee equal to the rent accruing under the lease and agreed to pass the licence fee paid onto the landlord.

The landlord applied to the court for permission to commence proceedings against the Company seeking an order to terminate the licence to occupy.

It was conceded that in granting the licence the Company was in breach of the terms of the lease. It was also common ground that rent had not been paid. However the administrators argued that despite this the court should still carry out the balancing exercise referred to in the *Atlantic Computer Systems* case and weigh the legitimate interests of the landlord in removing the occupier from the premises against the legitimate interest of the other creditors of the Company in allowing the buyer to occupy the premises for a short period of time. The Court of Appeal agreed with the administrators and rejected the landlord's argument that the purpose of the administration had been achieved on completion of the sale of the business. It was necessary for the administrators to collect the Company's book debts in order to achieve the purpose of administration; that required continuation of the business as a going concern; in order to achieve a continuation of the business the licence to occupy was necessary in order that the buyer could deal with the considerable amount of stock held in the premises. The balancing exercise weighed in favour of the creditors, and the licence to occupy would be

permitted notwithstanding that it was a breach of the terms of the lease.

The court also rejected the landlord's further submissions that the Company should pay contractual rent accruing under the lease on the usual quarter days from the date of the administration to the date on which the buyer vacated the premises. It simply ordered the administrators to pay across to the landlord the licence fee paid by the buyer during the period of its occupation.

This case does not give administrators carte blanche to grant rights of occupation to third parties in breach of the terms of a lease. For example it would be interesting to see what weight the court would give to the necessity of continued trading in order to enable the buyer to pay deferred consideration for the business, especially if this was over a protracted period. It does however provide a clear example of circumstances in which such a licence will be upheld and gives very useful guidance to both administrators and landlords.

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