

# GB Property Team

LEGAL UPDATE

Spring 2009



Tughans  
SOLICITORS



From left to right: Rebecca Licence, David Jones, Fionnuala Flanagan, Tracey Schofield, Peter McGrath, Anna-Marie McAlinden and David McDonnell

## Introduction

As head of the GB Property team, I am delighted to launch our legal update, aimed at giving commercial clients guidance on topical subjects relevant to landlords,

tenants, investors and developers alike in the current economic climate. It is our intention to produce quarterly updates to keep our clients up to speed with the latest developments in property law within England, Wales and Scotland. Efficient asset management is always key and in this challenging marketplace the subjects

covered in this update reflect the type of legal advice being sought by clients.

Tracey Schofield  
Partner

## Did you know?

- Since January 2009 an Energy Performance Certificate (EPC) will be required for all new and existing residential and commercial properties in England & Wales, N.Ireland and Scotland on sale, purchase or leasing. An EPC is valid for 10 years. A lease renewal or extension is not considered to be a sale or letting to which the duty to provide an EPC applies.
- In England and Wales, a landlord and tenant can agree to contract out of the Landlord and Tenant Act 1954 so that the tenant will forego its statutory rights to renew the lease at the end of the contractual term. This is not possible in Northern Ireland and in Scotland there are no statutory rights to the renewal of a lease.
- Landlords and tenants need to be aware that if the terms of a lease are varied in order to extend the term or add on additional premises, the variation takes effect as a surrender of the existing lease and the grant of a new one (*Friends Provident Life Office –v- British Railways Board* (1995) 2 EGLR55).
- The standard rate of VAT was reduced from 17.5% to 15% on 1 December 2008. This temporary reduction will remain in place until 1 January 2010.

## The Scottish Connection

The GB Property Team was delighted to welcome Fionnuala Flanagan who joined Tughans in May 2008. Fionnuala qualified at Smith and Valentine in South Ayrshire as a Scottish Solicitor in May 2006. She has experience in advising on the sale and purchase of commercial property, development projects and Landlord and Tenant law both in Scotland and Northern Ireland.

# Tenant In Administration – Understand What It Means



**By David Jones**  
Associate Director  
Commercial Property

Unfortunately in the current economic climate there are an increasing number of companies going into administration. This article provides a brief overview of the process from a landlord's perspective, when a tenant company is involved.

A company may only go into administration if one of the

following purposes is likely to be achieved:

- rescuing the company as a going concern (the primary objective);
- achieving a better result for the company's creditors as a whole than would be likely if the company were wound up (without first being in administration) (the secondary objective); and
- realising property in order to make a distribution to one or more secured or preferential creditors (the third objective).

Once a company goes into administration a moratorium is imposed, effectively placing a freeze on creditors (including landlords) taking action against the company. This allows the administrator time to restore the company to profitability or realise as

much capital as possible from the company's assets.

If a landlord wishes to forfeit a lease or bring or continue any other proceedings against a tenant that is in administration, the consent of the administrators or the court is required.

The Court of Appeal provided the following guidance on the balancing exercise to be conducted by the courts when considering applications to commence legal proceedings against a tenant in administration:

- the proprietary interests of the landlord should not be prejudiced by the administration except to the extent that it is unavoidable (in a strictly limited sense);
- the burden is on the landlord to show that it is inequitable for it

to be prevented from commencing legal proceedings;

- the court must balance the legitimate interests of the landlord and the legitimate interests of the other creditors;
- the financial loss suffered by the landlord must be compared with the loss suffered by the other creditors; and
- account must be taken of any compensation paid to the landlord by the administrators.

It can often be difficult for a landlord to convince the court that it should be allowed to take proceedings against a tenant in administration. However, as the primary objective of an administration is to rescue the company as a going concern, administration may prove to be a good option from the landlord's perspective in the long run.

For further information on any of the issues raised in this article, please contact David on 028 9055 3300 or by e-mail, [david.jones@tughans.com](mailto:david.jones@tughans.com)

## Ready and willing but unable . . .

The property market has borne the brunt of the economic slowdown in Great Britain and, increasingly, Contracts for the sale of property are falling through. The normal expectation is that where the fault lies with the buyer, the deposit paid on exchange of Contracts will be forfeited; however, uncertainty can arise because the Court has an unqualified discretion to order the return of a Deposit to the buyer.

The extent of the Court's discretion was tested in the recent case of *Midill (97PL) Limited –v- Park Lane Estates Limited ("Midill")*. The parties had agreed the sale of a property for £4,000,000.00.

The buyer paid a deposit of £400,000.00 on exchange, but failed to complete and the seller rescinded the Contract. The seller subsequently sold the property to a third party for £4,300,000.00 and the buyer asked the Court to return its deposit because the seller had made a profit.

The Court concluded that the ordinary contractual expectations of parties to a contract should only be overridden if there is something special or exceptional to justify it. A subsequent higher sale price paid by a third party was not exceptional in the property market at that time, so there was no reason why the buyer

should obtain the benefit of the increased sale price when the seller had borne the risk and cost of holding the property in the intervening period.

This case shows a strong presumption that the seller will have the right to retain any deposit should the buyer fail to complete the purchase of a property. Even if the buyer is able to prove that a profitable re-sale is possible following breach of Contract, that in itself will be insufficient to warrant the return of the deposit. At least for now, developers can breathe a sigh of relief...

For further information on any of the issues raised in this article, please contact Anna-Marie on 028 9055 3300 or by e-mail, [anna-marie.mcalinden@tughans.com](mailto:anna-marie.mcalinden@tughans.com)



**By Anna-Marie McAlinden**  
Associate Director  
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# Landlords: protecting your position when a lease is disclaimed

A landlord, along with the majority of a company's creditors, is unlikely to be aware of a tenant's true financial position and its inability to meet its debts as they fall due until the tenant has entered administration or insolvency and notice is served to this effect on the unsecured creditors. Landlords will need to identify which insolvency regime has been applied to the tenant company as each have differing effects on the landlord's rights and interests.

Unlike an administration, if an administrative receiver has been appointed the landlord's rights to sue for unpaid rent or forfeit the lease are **not** affected. In the case of compulsory winding-up, the tenant's liquidator may disclaim liability under the lease whereas an administrative receiver cannot.

The property interests held by the company remain vested in it until disposed of by the administrator or liquidator. Until the company is dissolved, the lease is determined or disclaimed, the company's liability as tenant under a lease remains.

A liquidator is entitled to disclaim "onerous property". In practice and particularly in the current economic downturn, a liquidator will give the landlord the opportunity to forfeit the lease for non-payment of rent or may attempt to surrender the lease by returning the keys of the property. If following a disclaimer the landlord takes back possession of the premises, the disclaimed lease

is treated as surrendered and all third party interests will fall away. It is therefore imperative that a landlord considers the position of third parties before accepting a surrender. A landlord is not obliged to take back the premises on a disclaimer and in a depressed market may prefer the liabilities for outgoing associated with the premises, such as business rates to remain with the tenant's estate (albeit insolvent).

Whilst a disclaimer brings to an end the insolvent company's liabilities in the property, the interest and rights of third parties such as guarantors and subtenants do not automatically cease.

**Original tenant:** If the disclaimed lease was granted before 1 January 1996, the original tenant (and any guarantor) will remain liable for outstanding rent and past breaches of covenant as well as for future rent and other obligations until the disclaimed lease expires or is determined. If the disclaimed lease was granted after 1 January 1996, the original tenant (and any guarantor) would have been released from all liability when the lease was assigned except where the assignment took place in breach of the terms of the lease, most commonly where the landlord's consent to the assignment was required but not obtained at the time. In these circumstances, the original tenant will remain liable until the next assignment, provided of course there is no further breach of the terms of the lease.

**Guarantor:** it will come as no surprise to any surety that the landlord will seek to call in the guarantee on a disclaimer of the lease. The landlord should check the guarantor provisions carefully in the lease as clever draftsmen may have included a discharge of obligations on the part of the guarantor following a disclaimer.

**Subtenants:** this is the most complex position once a lease has been disclaimed. The insolvent tenant is released from its liabilities in relation to the property and that will include obligations in its capacity as landlord in a sublease. In turn, the subtenant's obligations to its now insolvent landlord are extinguished. If the head landlord had forfeited the lease, any existing sublease would automatically have come to an end but following a disclaimer, the subtenant's interest in the property has not been determined. The subtenant can remain in possession of the property for the term of the sublease provided that the subtenant complies with the covenants in the headlease, including payment of the headlease rent. A subtenant may have entered into a direct covenant with the landlord in a licence to sublet to comply with the terms of the headlease, however the obligation to pay the headlease rent is normally excluded. The landlord is unlikely to have given a similar covenant for the benefit of the subtenant. The landlord and subtenant are then left in the unfavourable position of not being able to directly enforce obligations against each other.



**By Tracey Schofield**  
**Partner**  
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A headlease which is disclaimed is still treated as remaining in existence between the landlord and the subtenant in order that the subtenant can remain in possession of the property. The landlord will still retain the right to forfeit the headlease for non-payment of rent or breach of any of the other covenants in the headlease but cannot enforce the other covenants in the headlease, unless a licence to sublet was entered into by the parties on the grant of the sublease. This means that the landlord cannot, for example, recover the cost of any dilapidations liability from the subtenant.

To help alleviate these issues, the court may grant a vesting order in favour of any party with an interest in the property; this will include a landlord, subtenant, former tenant, guarantor and mortgagee.

For further information on any of the issues raised in this article, please contact Tracey on 028 9055 3300 or by e-mail, [tracey.schofield@tughans.com](mailto:tracey.schofield@tughans.com)

# Recent Developments: GB Property Case Law

## Stamp Duty Land Tax-Fifth Anniversary-Turnover Rent

1 December 2008 marked the fifth anniversary of the introduction of stamp duty land tax (SDLT). Tenants whose rent is based on turnover will need to submit a return to HMRC within 30 days of the rent for the first five years of the term becoming certain. The good news is that if, following a recalculation, it transpires that the tenant overestimated its projected gross profit and paid too much SDLT, it can reclaim the overpayment together with interest from HMRC.

## Material Change under Insurance Policy-Insurer Avoids Liability

In a recent Court of Appeal case *Ansari v New India Assurance Limited 2009*, the Court found that turning off an automatic sprinkler system for an indefinite period amounted to a *material* change under the policy and should have been notified by the owner; enabling the insurer to avoid liability under the buildings insurance policy.

## Bringing forfeiture proceedings against a tenant in administration

A landlord cannot exercise its right to forfeit the lease by peaceable re-entry or bring proceedings to forfeit the lease unless the administrator has consented to the proceedings or, the court has given its permission. In *Metro Nominees (Wandsworth) (No 1) and others v K Rayment and others, 16 October 2006 (High Court)* the judge gave permission. The administration process gives a company in financial difficulty breathing space by preventing creditors from bringing proceedings against the company.

The Administrator sought consent to assign the Lease of the Unit and did not disclose the fact the purchaser of the business was already in occupation and trading from the Unit in breach of the terms of the Lease. The rent was over £8,000 in arrears. The landlord sought an immediate surrender of the Lease, refusing consent to the proposed assignment on the basis of the covenant strength of the purchaser which had only just been incorporated and the rent arrears. The Administrator argued that the Unit was still required for the purposes of the administration and the landlord's position was not prejudiced because the administrator was at this point willing to pay rent.

The court disagreed; to give the landlord permission to bring forfeiture proceedings would not disadvantage the creditors. The tenant had ceased trading and no longer needed the premises for that purpose, the realisation of its assets had been achieved and the lease had been effectively sold to the purchaser for a pound.

The case indicates that the balance may now be tipped more in favour of the landlord where administrators do not disclose details of the party in occupation and could have been more open in their dealings with a landlord where there is a clear potential benefit for the landlord and no harm for the creditors. The mere fact that the Administrators had offered to pay the rent did not mean that they could force the landlord to take a tenant that it regarded as unsatisfactory.

## Nuisance: fear of imminent danger unfounded

Birmingham Development Co Limited sought an injunction requiring an adjoining land owner to carry out remedial works to a flank wall that appeared to be posing an imminent danger to workers on the developer's site. The developer claimed that the condition of the wall constituted a nuisance and that the fear of the wall collapsing was interfering with its use and enjoyment of its land. The Court of Appeal found that in order to successfully claim a nuisance had arisen, the developer had to show, on a balance of probabilities, that the fear of the wall collapsing was well founded. In this instance the developer had not and the court ordered the developer to pay the adjoining land owner's legal costs. This decision demonstrates the importance of obtaining detailed specialist advice **before** seeking an injunction.

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