

Administration sales involving property—process and options for a buyer

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Real estate often forms part of the assets of an insolvent company to be sold by an administrator and can frequently be key to a potential buyer so it can continue the business after completion. However, a buyer does need to be aware that there are a number of significant differences in the acquisition of a property from an insolvent company and the buyer will need to take a different approach from when a company is solvent. This Practice Note highlights the key differences in approach between acquiring property from a solvent company and one that is in administration, typically in the context of leasehold transactions, although freehold transactions are also covered.

Difference in approach compared to a solvent seller of property

Due diligence and timescales

Contracts for the sale and purchase of land are founded on the legal principle of caveat emptor (buyer beware) which means it is the buyer's responsibility to carry out as much due diligence as it needs in order to satisfy itself that it wants to proceed with the acquisition of a property. Ordinarily a buyer would be afforded the requisite amount of time properly to satisfy itself but in the context of a sale of a property owned by an insolvent company, timing is key, especially in a pre-pack situation. The administrator will want to sell the business as quickly as possible and therefore in respect of the property, a buyer will need to carry out as much due diligence as is possible within a tighter timescale.

The due diligence that a buyer would usually undertake would consist of the following:

- searches
- title investigation
- replies to enquiries
- site visits and surveys

On an insolvent sale, a buyer will undoubtedly have to take a view on some or all of the above. For example, there may not be sufficient time to receive the results of searches: protection in the form of indemnity insurance may be an alternative. Additionally, the administrator may not have any information on the property and although a registered title is easily obtained from HM Land Registry, there may not be any more information available. This lack of information would also impact on replies to enquiries: even if it is

possible for a buyer to raise limited enquiries of the administrator, the replies given are unlikely to provide the levels of detail and assurance that would hope to be expected in a solvent sale. Inspection of the property will prove invaluable where a buyer might be able to speak with any remaining employees of the insolvent company or occupiers of nearby land to supplement the title information obtained.

A buyer will need to bear in mind that although it may be prepared to proceed with the acquisition on the limited information available, any incoming lender may not be prepared to take the same view. To avoid any risk where the buyer requires acquisition funding, it should not proceed without having discussed and agreed the approach with its lender.

Warranties/Title guarantee

Usually, a buyer of property will have the benefit of title covenants that are implied by the **Law of Property (Miscellaneous Provisions) Act 1994 (LP(MP)A 1994)** (see Practice Note: **Covenants for title**). Additionally, in the event of property which is linked to a corporate transaction, property warranties will be provided by a seller. However, an administrator will not offer any warranties or title covenants which mean that there is no protection afforded to a buyer at all.

Registration formalities

In order to register a transfer of land from an administrator, HM Land Registry has some specific requirements relating to the appointment of the administrator, see: **Practice guide 36: administration and receivership**.

Sale of leasehold land

In practice, it is more likely that an administration sale will involve leasehold rather than freehold property. A major challenge when it comes to dealing with leasehold land in this context is that leases generally contain restrictions against an assignment of the lease without the consent of the landlord. This would restrict the ability of the administrator to freely assign the lease to a buyer of the business and necessitates the involvement of a third-party landlord, which can introduce some or all of the following issues:

- timing—the landlord may not respond to the request for assignment quickly, and will not be under the same time pressures as the seller and buyer of the business
- confidentiality—it may be necessary to get the landlord to commit to keeping the insolvency sale itself confidential before entering into negotiations over the consent to the assignment; and
- obtaining the consent itself—it may be that the landlord has other intentions for the property and will refuse to give its consent to the assignment

Occupation under a licence

A common solution to the complications highlighted above is that the buyer will be allowed occupation of the property by the administrator under a licence to occupy, pending a formal consent to the assignment of the lease being provided by the landlord. This allows the wider business sale to complete earlier than the assignment and without having to involve the landlord pre-completion. For an example of a licence to occupy property, see Precedent: **Licence to occupy property—letter format**.

It should be noted that the grant of such a licence will often be in breach of the terms of the lease as leases usually contain restrictions on sharing of occupation and the grant of any licences. Occupying under a licence is risky for a buyer as the licence will

References: [Innovate Logistics Limited \(in administration\) v Sunberry Properties Limited \[2008\] EWCA Civ 1261, \[2008\] All ER \(D\) 163 \(Nov\)](#)

allow for it to be terminated in the event that a landlord finds out about the occupation of the buyer and demands that the licence be terminated. However, the courts have shown that they are willing to allow these types of agreements to continue. In the case of *Innovate Logistics Limited (in administration) v Sunberry Properties Limited*, the Court of Appeal found that the landlord did not have the right to require the tenant to terminate a six-month licence granted in breach of the terms of a lease. In coming to its decision, the Court of Appeal considered that the interests of the landlord, as a creditor in the insolvency proceedings, needed to be balanced against the interests of the other creditors and the grant of the licence was an important part of the sale of the insolvent business.

The terms of the licence are generally non-negotiable but the buyer should bear in mind the following:

- rent—payment of the rent will remain the responsibility of the administrator as tenant under the lease until the completion of the assignment and is payable as an administration expense. In practice, the fee payable under the licence will therefore be equal to the rent due under the lease and the administrator will simply pass the licence fee to the landlord. Following *Pillar Denton Ltd v Jervis* (commonly known as the ‘Game’ case), rent is deemed payable as an administration expense for each day of use of the property, assuming that the property is used for the benefit of the administration. Permitting a buyer to occupy under licence is likely to be treated as such. For further reading, see Practice Note: **Pre-packs—landlords’ issues and remedies**
- indemnity—the administrator will expect the buyer to provide a widely drafted set of indemnities to protect it against any potential losses arising from the grant of the licence and the buyer’s use of the property
- occupation as a licensee only—care must be taken that the licence does not grant a lease rather than a licence. If a lease is granted inadvertently then the buyer could obtain valuable rights under the **Landlord and Tenant Act 1954**, including security of tenure. For this reason, a licence should not last for a period longer than six months
- compliance with the lease—the licence will oblige the buyer to comply with the terms of the lease, even though the assignment of the lease has not yet taken place
- relief from forfeiture—a buyer will want to be able to require the administrator to seek relief in the event the landlord has forfeited the lease. This may be acceptable to the administrator if the buyer provides an indemnity in its favour

References: [Pillar Denton Ltd v Jervis \[2014\] EWCA Civ 180, \[2014\] All ER \(D\) 212 \(Feb\)](#)

What happens when the landlord grants consent?

As soon as the landlord’s consent has been obtained, the administrator will ideally want the buyer to be contractually obliged to proceed with the assignment. At that point, the licence to occupy will fall away. However, it is common for a buyer to want to decide after it has entered into occupation whether or not it takes an assignment of the lease. This happens particularly in the retail sector where a buyer wants to see how profitable a store is before committing to taking on the lease.

It is therefore typical to see in a sale and purchase agreement for a buyer to have the right to elect, within an agreed period, which of the properties it wishes to take an assignment of. For example, the licence to occupy may be for a period of six months but the buyer must decide after four months which leases it will take an assignment of. If the buyer does not want to take an assignment of a particular lease, then it has two months to vacate the premises.

What happens if the landlord refuses consent?

As mentioned above, a landlord may not want to give its consent. For example, the landlord may have redevelopment plans and might use the tenant's insolvency as a reason to withhold consent. Alternatively, although the landlord is restricted by the statutory moratorium, the landlord may apply to the court for leave to lift the moratorium and thereby permit the landlord to exercise the forfeiture provisions within the lease. In this situation, a court will undertake a balancing exercise and apply the principles set out in *Re Atlantic Computer Systems Plc*. These principles and other cases have made it clear that the courts will grant leave to allow a landlord to forfeit, on the basis that the forfeiture would not impede the overall purpose of the administration. Therefore, and when acting for a buyer seeking an assignment of any lease, common practice is to try and negotiate with the administrator to have some of the consideration paid as deferred consideration, which becomes payable on completion of the assignment. This way, there is a clear lost benefit to the administration if leave were to be granted ie the deferred consideration is not triggered and therefore reduces the risk of the landlord succeeding on any leave application to forfeit. For further reading, see Practice Notes: **Pre-packs—landlords' issues and remedies** and **Lifting the administration moratorium—for forfeiture**.

If a landlord does withhold consent, then the buyer's right to occupy the property will cease at the end of the licence term, when the buyer will have to move out. Leases typically state that a landlord is not permitted to unreasonably withhold or delay consent to an assignment. Therefore, a buyer may want to seek to include within the sale and purchase agreement a provision obliging the administrator to apply to the court for a declaration that the landlord is in breach of its duties; this is especially the case where it will often be possible to demonstrate that the landlord will be in a stronger position with the lease vested in the buyer than in the current (insolvent) tenant.

Sale of freehold land

Freehold properties could form part of the assets being sold by an insolvent company, however this is less usual in a 'pre-pack' sale where any property included will more likely be leasehold. However if the sale does include freehold property, a buyer will want to make sure that any mortgage or charge over the freehold property is released.

An administrator can sell property subject to a fixed charge but only if there is a court order allowing him to do so. If there is no court order then the buyer will want to see evidence that the holder of the fixed charge will release the property at the time of the sale in the usual way. In contrast, administrators are able to dispose of other property subject to a floating charge without the consent of the relevant secured creditor, so a buyer does not need to see evidence in the same way as with a fixed charge.

Considerations when drafting the sale and purchase agreement

The property provisions often form a separate schedule to the business sale agreement and will include basic clauses that apply to the property or properties and, in the case of leasehold property, contain further provisions relating to obtaining the landlord's consent. Consider the following when reviewing the property provisions:

- there will be an acknowledgement that the buyer is not relying on any representations or warranties made by or on behalf of the administrator or the seller
- the buyer will not have the benefit of any of the title covenants that would otherwise be implied by **LP(MP)A 1994**

References: *Re Atlantic Computer Systems plc* [1992] 1 All ER 476, [1992] Ch 505

- in the case of leasehold property, obligations will be imposed on both the administrator and the buyer to progress the application for landlord's consent with all reasonable speed. Frequently the buyer will be obliged to provide such financial and other information that a landlord may reasonably require in order to consider the application for consent but if the buyer does not want to be obliged to provide a guarantor or other security (for example, a rent deposit) to the landlord then it will need to specifically state this
- a buyer should consider further protection in the event that consent to the assignment has been refused by the assignment. In these circumstances, and as described above, the administrator should be obliged to seek a declaration from the court that a landlord has acted unreasonably. If an administrator is to accept this, it will have to be at the buyer's cost
- if there are multiple properties, consider if the buyer wants to seek the right to elect which properties it does or does not want to take on within a specified period after completion
- the administrator will include a limitation of liability so that he/she is not personally liable to the buyer following completion of the transaction. This will be non-negotiable. For further information, see Practice Note: **Managing the risks—excluding personal liability for administrators**
- a buyer may want to defer part of the consideration payable to make it difficult for the landlord to gain permission from the court to forfeit the lease

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