

## Case report

### Innovate Logistics Limited (in administration) v Sunberry Properties Limited (2008) EWCA Civ 126

#### Background: Atlantic Computers decision

In this case, the Court of Appeal held that where a person seeks leave to exercise proprietary rights against a company in administration, the following principles are applicable:-

- It is for the person seeking leave to make out the case for him to be given leave
- The statutory moratorium is intended to assist the company in administration to achieve the purpose of the administration.
- If granting leave is unlikely to impede the purpose of the administration, therefore, leave should normally be given.
- If, however, granting leave is likely to impede the purpose of the administration, the Court must carry out a balancing exercise, balancing the interests of the person seeking leave on the one hand and the interests of the company's other creditors on the other.
- In carrying out that balancing exercise:-
  - The Court must compare the financial loss suffered by the person seeking leave, if leave is refused, as against the loss suffered by the company's other creditors, if leave is granted.
  - The Court will need to take into account money to be paid by the administrators to the person seeking leave.
  - Although the Court will attach great weight to the proprietary interests of the person seeking leave, if substantially greater loss will be caused to the company's other creditors by the grant of leave or loss which is out of all proportion to the benefit that will be conferred on the person seeking leave, that may outweigh the loss caused to the person seeking leave.

#### Facts:

Innovate Logistics Limited ("the Company") operated a frozen food warehousing and distribution business from its leased premises ("the Property"). On 30 June 2008, immediately following the making of an administration order in relation to the Company, the Company's administrators sold the Company's business and assets to Yearsley Holmewood Limited ("the Purchaser"). The Purchaser was not interested in taking an assignment of the lease and so the lease was excluded from the sale. However, it was considered commercially necessary for the Purchaser to have a short period of occupation so that the Purchaser could distribute and re-locate customers' stock held there (approximately £20m worth of frozen food was stored on 25,000 pallets at the Property), which would better enable the administrators, through the agency of the Purchaser, to collect the Company's book debts (which had also been excluded from the sale). In the circumstances, an occupational licence was granted to the Purchaser for 6 months on terms that the Purchaser pay to the administrators a monthly licence fee equal to

one month's rent due under the terms of the lease. The administrators agreed to pass the licence fee on to the landlord.

The landlord subsequently issued proceedings under paragraph 43 Schedule B1 Insolvency Act 1986 for leave to commence proceedings against the Company for the immediate termination of the occupational licence, it being common ground that this had been granted in breach of the terms of the lease.

### **The first instance decision:**

The Judge granted the landlord permission to bring the proceedings, holding that the purpose of the administration (to achieve a better result for the Company's creditors as a whole than would have been likely if the Company had been wound up) had been achieved "very quickly" on the first day of the administration by the sale of the Company's business and assets as a going concern to the Purchaser. Given that the purpose of the administration had been achieved, it was therefore appropriate, following the Atlantic Computers guidance, to give the landlord leave to exercise his proprietary rights and the Court did not need to carry out any balancing exercise between the interests of the landlord and the interests of the Company's other creditors.

The Company appealed.

### **Court of Appeal decision:**

Allowing the appeal, the Court held as follows:-

- The Judge had wrongly concluded that the purpose of the administration would not be impeded by the commencement of proceedings. He had failed to appreciate that one of the main purposes of the administration was a continuation of the collection of the Company's book debts for the benefit of the Company's creditors. If the application for leave were granted, this would frustrate the Purchaser's ability to carry out the Company's contracts with its customers for the storage and distribution of their goods and would inevitably lead to customers seeking to set off their resulting losses from the debts they owed the Company. In other words, the Purchaser's retention of the Property to enable it to complete the Company's contracts was in the interests of the Company's creditors and would promote the achievement of the purpose of the administration.
- Having concluded that the purpose of the administration would be impeded by the commencement of proceedings, the Judge ought to have carried out a balancing exercise in accordance with the Atlantic Computers guidance. The Judge ought to have asked himself whether the landlord had shown that it was inequitable to prevent him from commencing the proceedings.
- When weighing the loss to the landlord resulting from refusing leave as against the potential or likely loss to the Company's creditors if permission were given, the result was obviously in favour of refusing permission.
- The immediate termination of the occupational licence would put in jeopardy the ability of the administrators to collect the Company's outstanding book debts, which amounted to some £8.9m. The landlord was an unsecured creditor of the Company and would benefit from the collection of the Company's book debts. The landlord would also benefit from the Company's continued occupation of the Property. It was obvious from the fact that the landlord was not seeking to forfeit the lease that the

rent payable under the lease was higher than the current market rent whereas for its occupation of the Property, the Purchaser would pay a monthly licence fee equal to the one month's rent due under the terms of the lease. Apart from its so-called "bargaining position", therefore, all that the landlord would lose if the Court refused leave would be the difference between interest on the lease rent if it were paid quarterly in advance (in accordance with the terms of the lease) and interest on the licence fee paid monthly in arrears (in accordance with the agreement reached between the administrators and the Purchaser).

- In the circumstances, the landlord should be refused permission to commence the proceedings but on terms that the administrators pay to the landlord as an administration expense the monthly licence fee that the Purchaser was required to pay to them pursuant to the occupational licence together with any interest earned by the Company on that licence fee.