

International Corporate Rescue



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CASE REVIEW SECTION

Innovate Logistics Ltd (In Administration) v Sunberry Properties Ltd **[2008] EWCA Civ 1261 (Mummery, Wall and Stanley Burnton LJ)**

Blair Leahy, Barrister, 3-4 South Square, Gray's Inn, London, UK

Innovate Logistics Limited ('the Company') was the lessee of a substantial cold store premises in Derbyshire ('the Property') under a lease dated 18 December 1998. The term was 30 years from that date at a basic annual rent of GBP 1,225,230 and the landlord was Sunberry Properties Limited ('the Landlord'). The Property was used by the Company to store customers' goods, pending distribution, in frozen, chilled or other conditions.

On 25 June 2008, an administration application was presented to the Court and on 30 June administrators were appointed ('the Administrators') and the business and assets of the Company (but not the Company's book debts) sold to Yearsley Holmewood Limited ('YHL') on a pre-packaged basis.

At the date of the administration order, GBP 20m worth of frozen foods was stored on 25,000 pallets at the Property. The Administrators feared that if the stored goods were not distributed in accordance with customer contracts, the value of the Company's substantial book debts would be depleted by cross claims. Accordingly, the sale to YHL was on terms that YHL fulfilled the outstanding customer contracts. For that purpose, the Company granted an occupational licence of the Property to YHL for 6 months.

The granting of the licence was in clear breach of the covenant against alienation contained in the lease. When YHL refused to take an assignment of the Lease, the Landlord sought permission under paragraph 43(6) of Schedule B1 to the Insolvency Act 1986 to commence proceedings for an injunction to terminate the licence and thus put right the Company's breach of covenant.

The application came before HHJ Simon Brown QC on 15 July 2008 on an urgent basis. Granting permission under paragraph 43(6), the learned Judge held that the purpose of the administration had been achieved 'on the very day of the administration order' by reason of the pre-pack going concern sale to YHL. As the granting of permission would not impede the achievement of the purpose of the administration it was unnecessary to carry out the exercise of balancing the interests of the Landlord against the interests of the Company's creditors in accordance with the Court of Appeal guidance in *Re Atlantic Computer Systems Plc* [1992] Ch 505 (CA).

The Administrators appealed. Their appeal was heard urgently on 1 August 2008 and at the end of oral argument, the Court announced its unanimous decision to allow the appeal. The reasons for the decision were handed down on 18 November 2008.

The Court of Appeal held that one of the main purposes of the administration was a continuation of the collection of the Company's book debts which could only be achieved if YHL continued to occupy the Property. Accordingly, the learned Judge was wrong to conclude that the purpose of the administration would not be impeded by the granting of permission because the mandatory injunction would, if granted, terminate the ability of YHL to carry out the contracts and to assist in getting in the book debts owed by customers. The learned Judge ought, therefore, to have carried out the balancing exercise in accordance with the *Atlantic Computer* guidance. When that exercise was carried out, i.e. when the loss relied upon by the Landlord was weighed against the potential loss to the creditors of the Company, the result was obviously in favour of refusing permission.

The primary loss identified by the Landlord if it were refused permission was the loss of its so-called 'bargaining position'. The bargaining position consisted of the threat of the mandatory injunction requiring the Company to terminate YHL's licence with the object of obtaining an agreement under which YHL would take an assignment or a new lease of the Property on terms that would be more beneficial to the Landlord than could be obtained on the open market. Stanley Burnton LJ doubted whether the loss of such a bargaining position was in fact a relevant consideration for the Court to take into account on an application under paragraph 43 of Schedule B1 and concluded (at [68]) that:

'I certainly do not think that the court should view an application by a lessor in such circumstances sympathetically. In a case such as this, where [the Landlord] contends that it is indisputably entitled to an injunction if it is permitted to bring proceedings, the court's principal, if not only, focus must be on the consequences of the grant of that injunction rather than on what [the Landlord] might obtain by the threat of those proceedings.'

International Corporate Rescue

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