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narator

in this issue

chairman's welcome
Daniel Hardy
safe as houses – with the right insurance
Steven Padley
insolvency and business rates: eight case studies
Gordon Heath
powers of receiver
Doug Robertson
in the eyes of the law – the receiver
Eleanor Temple
spotlight on TUPE
Jessica Evans
scam alert – letting to a company in liquidation
Gordon Heath
pause for break clause
Mark Routley
property management agreements for the receiver
Philip Collis
don't cry about CRAR
Mark Routley
making a living from leisure
Chris Tucker

training day edition

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The Association of Property and Fixed Charge Receivers

chairman's welcome

Daniel Hardy,
Chairman of NARA

Welcome to the Training edition of Narator, which summarises the Training Days held in November when around 180 members assembled in London or Rochdale to benefit from the skills of a wide variety of experts. Despite improvements in the market, we are still in a challenging economic environment in which membership of NARA is ever more valuable. Diversification of skills and adaption to change is at the forefront of all of our minds.

The training and skills development opportunities that NARA provides support our 400 members, underpinning professionalism and best practice. The programme is designed to cover the whole range of a receiver's experience, beginning with the Fundamentals of Receivership Course, and progressing through RPR exam training to the Training Days which are designed as CPD for, in the main, qualified RPRs. In addition, the May Conference provides an excellent opportunity to network and expand on CPD.

NARA is proud to be the pre-eminent provider of training and competitively priced CPD for all those involved in receivership. Our programmes will continue during 2015 and I look forward to meeting as many of you as possible at these events.

A second pillar of professionalism for Fixed Charge Receivers is regulation. It is of paramount importance that we work together as an industry to offer trust and accountability in what can be a very high profile sector and one in which government can take an interest. The new Joint Regulation Committee, which regulates RPRs, has now been established for nearly 2 years and NARA has developed a good working rapport and mutual understanding with the JRC. By the time you read this a new Services Agreement, which cements the relationship between JRC and NARA, should have been completed.

I should take this opportunity to announce an important change in the NARA executive. Paul Batho, who became NARA's first Chief Executive in 2010, has decided to retire from this role after 5 years, during which time he has overseen some significant changes to the Association's function and services to members which have reflected NARA's expansion and growing relevance. I would like to thank him for his hard work and commitment during this period.

In succession to Paul, I am very pleased to welcome Julian Healey as NARA's new Chief Executive. Julian is a prominent RPR and Chartered Surveyor, and will be best-known to NARA members as Chairman from 2011-2013. His wealth of experience and knowledge of Receivership work will be invaluable as NARA continues to develop.

We look forward to celebrating NARA's 20th year in 2015, in particular at the May Spring Conference and the House of Commons reception in June. Full details of these and other events will be available on our web site and I look forward to seeing you all during the course of the year.

safe as houses – with the right insurance

People buy comprehensive insurance for their cars to protect themselves against the actions of others. Structural defects insurance expert, Steven Padley explains why the same care should be taken with buildings.

A lack of an insurance-backed structural warrantie can have a significant impact on the value of a new residential or commercial property.
Latent defect insurance provides asset protection to the owner should a defect in design, workmanship or materials be discovered after completion of the building. Despite innovations in building design and materials and a greater emphasis on quality control, building defects remain a common occurrence – placing owners, funders and advisers at risk.

Key facts about Latent Defect insurance

- It transfers risk to an insurer
- It indemnifies the policyholder, that is the owner, against faults discovered in the insurance period.
- The insurance period is normally 10 years
- It covers the cost of complete or partial rebuilding or rectifying work to a property affected by major damage attributable to defects in design, workmanship or materials.
- An excess applies: standard for residential is up to £1000 and up to £50,000 for commercial
- It is also known as Structural Warranty Insurance, Structural Guarantee, or Building Guarantee. It may also refer to an NHBC type warranty (National House Building Council).

The Latent Defect insurance market is driven by demand from the customer and the customer's funder or mortgage provider, plus an increasing number of developers and contractors. Many parties can ask to see evidence of a structural warranty, including the purchaser, mortgage valuation surveyor, purchaser's mortgage provider or development funder, their credit teams and the purchaser's solicitor.
Mainstream lenders usually accept the majority of structural warranty providers. A list is provided in The Council of Mortgage Lenders Handbook.

Residential Developments
When a mortgage is required for a newly built or converted property, lenders ask for evidence of a 10-year structural warranty or "balance of cover". Failure to source and manage the right warranty solution can have a significant impact on the property's saleability and price.

Commercial Developments
Latent Defect cover can be applied to almost any commercial property, from offices to sport stadiums.
However, in contrast to the residential sector, lenders tend not to ask for it. Instead, they rely on collateral warranties, professional indemnity insurance and the Third Party Rights Act.
But, while collateral warranties are popular with solicitors, they are costly and offer only limited assignability, retaining liability with the parties involved. Steven Padley said he had never seen a successful claim under a collateral warranty.
Latent Defect Cover is usually more effective for commercial properties, offering cover for 10 to 12 years after practical completion (PC) and first party cover. It does not rely on architect's certificates, collateral warranties or professional indemnity. Beneficiaries include owners, tenants, funders and lenders.

What if there is no Latent Defect insurance?
Without suitable cover, re-instating a property that has suffered a defect can be drawn-out and costly, with the need to prove negligence by one or more parties involved in the construction contract, to and negotiate a settlement or to sue, should they deny liability.
In addition, the parties may no longer be trading, the third party's limit of indemnity may not be sufficient or the policy may be out of date and claims inevitably take a considerable time to settle. For a small business or factory, a two to four-year wait could force closure.
Some types of claim are seen on a regular basis:

- failure to include wall ties, resulting in failure of the walls
- failure of a damp proof course
- failure of the foundations

As an example, a major retail group had to fix a new superstore at its own expense. Within weeks of completion, the floor had failed and the store had to be shut down. The retailer had been reliant on the contractor's collateral warranty to put it right – but the contractor had gone out of business.

Taking Possession
Any funder taking possession of a site completed or under construction without a suitable structural warranty risks a reduction in asset or development value. Collateral warranties and professional indemnity insurance are of no use if those involved have ceased operations or have moved on.
While it is possible to get Balance of Cover insurance at this stage, retrospective cover can be costly. It is essential to select an insurer with the right product for the circumstances and to meet the insurer's technical requirements.

Steven Padley is account manager of insurance services for the Vinden Partnership. He is an expert in insurance for structural defects and has worked with major financial organisations such as National Australia Bank, Axa, Groupama and Capita as well as insolvency practitioners, asset managers, developers and contractors.

Case Studies

These three scenarios illustrate the importance of Latent Defect insurance.

1. Problem: A receiver was appointed over a house built in 2007. There was no technical specification or warranty in place. The receiver put in place a programme to get the building finished before sourcing a warranty provider. A buyer was found but a structural warranty was required by the mortgage lender.

Solution: A Balance of Cover Solution was sourced, subject to initial audit. This would take the cover to 2017, when it would have been covered with a full warranty. The cover was with an A-rated insurer with no exclusions. The customer was able to get the mortgage and buy the house. The initial audit cost was relatively low – about £600– and the premium not payable until the certificate was needed.

2. Problem: Warranty cover was needed for seven out of eight units in a development where one was already sold and the seven remaining were valued at £780,000.
Zurich, the original insurer for the developer, had been unable to provide a solution.

Solution: After an initial acceptance audit costing £1,000, an A-rated insurer was able to offer cover under its mainstream mortgage product. A few remedial works were required for the insurer's technical audit. Most of the units are now sold.

3. Problem: A substantial commercial distribution centre built in 2007 was placed in the hands of a receiver. When constructed, the unit had a value of £25m. Its value dropped significantly, however, when the collateral warranties in place were deemed inadequate by the appointed solicitor. They had not been completed correctly and the companies involved – the architect, main contractor and engineer – were no longer trading.

Solution: A Balance of Cover quote was obtained from an A-rated insurer for £400,000, subject to completion of the insurer's technical audit. The insurer's limit of indemnity was sufficient to cover the rebuild cost of the unit.

Steven Padley,
The Vinden Partnership

Insolvency and business rates:

Independent rates expert Gordon Heath uses cases of liquidation, administration and receivership to illustrate the receiver's position with regard to business rates.

1. Who is the rateable occupier?

Southwark BC v Briant Colour Printing Co. Ltd 1977

Briant Colour Printing was in voluntary liquidation. The employees had been dismissed but staged a "work-in" and excluded the liquidator, who agreed to pay for work.
The argument that the rates were a trading expense was dismissed by the High Court.
The proposition that either the liquidator or the company were in rateable occupation was dismissed by the Court of Appeal. In fact the trespassers or workers were rateable.
There is no statutory definition of a rateable occupier. Judge Buckley LJ said: "It is the person sought to be rated who must be shown to be in actual occupation."

2. Liability for empty rates

Re: Leigh Estates (UK) Ltd 1999

The City of London obtained a liability order regarding empty rates worth £70,983. It entered a petition to wind up the company, which at the time was in administrative receivership with liabilities of £544m and assets of £56m.
The only charges over the property were floating charges, all of which had been crystallised. The petition was opposed by receivers, the lending bank and other companies in the same group.
The City of London argued that if the winding up order was made, the receivers or the banks would be liable.
The Court said it did not necessarily accept that but if correct, the amount would be either the receiver's costs or secured debt. It would be recovered at the expense of secured creditors and therefore achieve a preferential status not enjoyed by rates since 1986.
For that reason, the petition for winding up was dismissed.

3. Liability for rates

Eliades v City of London 1995

Two properties had rate liabilities of £3,768 and £152,531 respectively, due by instalments. Part payments were made and the company went into voluntary liquidation on 29 October 1990 but the liquidator continued to trade to 30 June 1991. There was no argument that the rates from April to June 1991 were the liquidator's trading expenses.
The council argued that rates to 29 October 1990 must be proved in the liquidation and subsequent rates were a trading expense.
The liquidator felt that all rates to 31 March 1991 should be proved in the liquidation and applied to the court for directions.
The answer was not as expected. It was held that the instalments due before 29 October 1990 were part of a non-preferential claim. If the council had served a reminder and seven days without payment had elapsed before 29 October 1990, all the rates for 1990 to 1991 would be part of a non-preferential claim.
As no reminder had been served regarding the instalments due after 29 October 1990, they were to be paid in full as liquidation expenses. There was no apportionment to 29 October 1990 as some might expect.

4. Liability Orders

Re: Bydland Ltd 1997

A winding up order had been granted but an application made to rescind the order. There was a dispute over accuracy and the application to rescind was refused.
The court said there had been at least two properly served summonses and the statement that the tenant was willing to pay was not an offer of payment in itself.
The authority's representation in court did not deny that the court had jurisdiction or invalidate the liability order. The law allows unqualified magistrates to make liability orders.
The petition clearly specified non-domestic rates. There was an indisputable element of £2,723, more than the minimum of £750 required for winding up.
The existence of other proceedings with the County Council was not deemed an improper motive for winding up.
When a liability order has been made against a company, the amount shall be deemed to be a debt for winding up purposes.
The Insolvency Act 1986 s123 requires a creditor to show a company is unable to pay its debts. Obtaining a liability order removes any doubt as to whether the local taxes outstanding are debts for the purposes of a winding up petition.

5. Receiver's liability for rates

Ratford and Hayward v Northavon DC 1986

There company executed a debenture granting a floating charge. The bank had appointed joint receivers and managers, who were deemed to be agents of company.
The billing authority sent a bill for occupied rates in the receivers' names. A distress warrant was granted in the Magistrates Court and then confirmed in the High Court.
The Court of Appeal reversed the decision and held that the receivers were not liable.
The judge said: "Save for those cases – where the terms of the receiver's appointment have effected or required dispossession of the company – no case has been cited to us in which a receiver has ever been held to be in rateable occupation of occupied premises. Any occupation – enjoyed by him – will be enjoyed solely in his capacity as an agent for some other party."

6. Receiver's agency status

Boston BC v Rees and Bennett ((Receivers); Re Beck Foods Ltd 2001

The bank had appointed administrative receivers under a mortgage debenture in February 1997. The receivers were agents of the company, which was in part closed and in part running. It entered creditors' voluntary liquidation in April 1997 and the receivers' agency under debenture ended. The business continued and was managed by the receivers.
Both the High Court and the Court of Appeal said the receivers were not liable as the receivers had not dispossessed the company. The end of agency status did not create a liability change and the receivers could still exploit the assets.

7. Rates as an expense of administration

Exeter City Council v Trident Fashions 2007

Following an application by Exeter City Council, it was declared that non-domestic rates while the company was in administration were payable as expenses of the administration.

8. Empty rates liability

Re: Brown and Gerold (Joint Receivers) and another v City of London 1995

Two companies bought the freehold of adjoining office blocks, financed by banks, secured by debentures. Receivers were appointed with

eight case studies

the power to take possession on behalf of the company or on their own behalf.

The debenture said the receiver should pay rates in priority to his secured obligations as the receiver was the agent of the company concerned. The Law of Property Act 1925 says rates and taxes should be paid.

The offices were empty in July 1993, the lease to tenants expired in November 1993 and the buildings were not sold until February 1995.

There was a question over who was liable for the empty rate of £3,492,516 from November 93 to February 95. The City of London held the receivers liable as the "person entitled to possession" according to the Local Government Finance Act 1988 s65 (1). The City of London argued that the debenture required payment by the receivers in priority to secured obligations, that rates were payable as a receivership expense and that they must pay or it would be fraudulent trading. The receivers and banks applied to the court for directions.

The court held that:

- the receivers were not the "person entitled to possession" because they were appointed as agents of the company
- the power to act on their own behalf had no effect until that power was exercised
- it was not enough to have the right to exercise a power to displace the company
- there was no reason to pay the rates. It was not an expense of receivership and there was no fraudulent purpose.

Gordon Heath is an independent rating consultant and chairman of the Law and Research Committee of the National Council of the Institute of Revenues Rating and Valuation (IRRV). He has advised the Government on business rates and co-written the books "Business Rates – Your Guide" and "Rating Law and Practice" for the IRRV.

Previously Gordon worked in local government for two decades, heading up the revenues and benefits departments at two London borough councils.

Gordon Heath, Independent Rating Consultant

powers to the receiver

It can be very frustrating for the receiver when a solicitor is unable to issue a contract for sale by them on behalf of the borrower due to a problem encountered with their powers to sell. Here is a quick guide by insolvency expert and partner at Irwin Mitchell solicitors, Doug Robertson, to the problems surrounding the issue.

Summary of Powers of Receivers to sell

- According to the Section 109 of the Law of Property Act 1925, there is no implied power of sale for the receiver.
- The Act gives the receiver the powers to collect rent, pay interest and pay the banks and to exercise any powers that have been delegated to him or her by the mortgagee under this act.
- Section 99 (19) Section 100 (13) allow the powers of leasing and accepting surrenders to be delegated to the receiver.
- If the charge refers only to the 1925 Act, the receiver only has the power to collect rent.
- However, most modern mortgage deeds contain an express power of sale. It is worthwhile to note older mortgage deeds, particularly pre-2000 (although there is no fixed rule), fail to extend powers in this way.
- The Land Registry now agrees that the powers of a receiver to sell as contained in a mortgage deed constitute a security power of attorney. There are specific powers of attorney for the mortgagee as well as the receiver.

The Land Registry

The Land Registry takes the stance that the specific Power of Attorney contained in a mortgage is not a security power and will be revoked by winding up or bankruptcy.

However, the powers to hold and dispose of the property as contained in the receiver's powers section will survive as a security.

According to Section 127 of the Insolvency Act 1986 ("IA"), disposal after commencement of winding up or bankruptcy is void unless sanctioned by the court.

The Land Registry now follows the judgements from Sowman v David Samuel Trust Limited (1978) and Barrows v Chief Land Registrar (1977): as the mortgage was created before the commencement of winding up or bankruptcy (and the Land Registry considers while these cases relate to company property they will by analogy apply to bankruptcy), the powers are also created prior and therefore are not automatically void and do not require such sanction.

It is important to note that if the receiver is aware of a challenge on the basis of a transaction at undervalue or preference (sections 238 to 241 or 244 and 245), the Land Registry may serve notice to the liquidator allowing for objections under Section 73 of the Land Registry Act (LRA) 2002. Similar considerations apply for bankruptcy (Sections 339, 340, 343 or 423). Any challenge must be disclosed.

Executing under Power of Attorney

The Land Registry considers that if a receiver is executing under a power of attorney (this usually appears as a separate paragraph in the charge conditions), this can be revoked by winding up or bankruptcy. A certificate of non-revocation must be provided.

However, if the mortgage confers a right to sell (and to execute a transfer in the name of and on behalf of the mortgagor), it creates a general power of agency and this amounts to a security power which will survive the winding up or bankruptcy.

It is sufficient if the disposition is expressed to be executed by the receivers on behalf of the borrower. No certificate of non-revocation is then required.

Practical Problems

The following are key considerations:

Joint Proprietors of Land

- When a trustee is appointed in bankruptcy, then pursuant to Section 306 of IA 1986, the property is vested in the trustee.
- There is no divisible estate in the legal title, therefore if there are joint proprietors the legal title is held on trust for the bankrupt and the other proprietors. A property held on trust for a third party is excluded from estate Section 283(3)(a) IA and does not vest.
- The entire legal title of the sole registered proprietor can vest and therefore will be subject to bankruptcy entries. The jointly held legal estate as trust property does not vest but only the bankrupt's beneficial interest does.

Bankruptcy notice

- The petition is registered at the Land Charges Department (LCD).
- Section 86(2) LRA 2002 Land Registrar ("Registrar") must

in the eyes of the law – the receiver

Kings Chambers Barrister Eleanor Temple recently represented her client receiver in the High Court. She uses the decision from this and from a 2004 Court of Appeal hearing to summarise key points about the position of the LPA receiver.*

1. Silven Properties Ltd v Royal Bank of Scotland plc [2004] 1 WLR 997 (CA), paras 21-29

The 2004 Silven Properties case, which deals mainly with the Law of Property Act, stresses that the receiver does not have the right to remain passive if, by taking that course, the interest of the mortgagor or mortgagee is damaged. A receiver must be active in the protection and preservation of the charged property over which he or she is appointed.

This does not always sit easily with a receiver's duty to obtain the best price reasonably obtainable (not necessarily the best price.)

The case also recognises that the agency relationship between the LPA and the mortgagor is real while highlighting that receivers are primarily the agents of the borrower, not the bank. If there is evidence – such as a paper trail – that negotiations have taken place between the receiver and mortgagor without consultation with the borrower, it could be argued that there has been interference by the bank and that this relationship has been interfered with.

There is no contractual relationship owed in tort by the receiver to the mortgagor. Equitable duty designed to be fair and just is owed to both mortgagee and mortgagor and derived from case law.

The primary duty of the receiver is to exercise his or her powers of management to repay the secured debt. There is sometimes a tension between this primary duty and the role of agent to the borrower.

2. McClearly v Allied Irish Bank - EWHC July 2014

An application for injunctions were made in this case to prevent Allied Irish Bank (AIB) via the receiver from selling the residual part of the portfolio.

Normally, if a borrower says a receiver has sold for too little, it's a complaint against the receiver not the bank. If a bank sues for shortfall, the borrower must make a claim against the receiver for professional negligence, if he believes him to have undersold – not the bank.

But in this case, it was argued that there had been interference in the borrower and receiver's agency relationship and the bank could be challenged.

register a bankruptcy notice against the title of a sole proprietor affected by the petition.
- Section 86(4) LRA Registrar must register the bankruptcy restriction once a bankruptcy order has been made.

Sole Proprietor of Land
Once a sole proprietor of registered land is bankrupt, the only person entitled to be registered as a proprietor or to sell property is the trustee. Then the question arises: 'Can the receiver execute TR1 and overreach?' Based on the judgement in Sowan v David Samuel Trust Limited and Barrows v Chief Land Registrar:
- the power to sell was given before bankruptcy
- the Land Registry accepts the power survives, it is not a Power of Attorney that is revoked

What happens in the case of a disclaimer, bona vacantia and escheat
- On disclaimer, the property goes to the Duchys or Treasury
- if no value, the Duchys or Treasury may themselves disclaim
- freehold title comes to an end and the property forms Crown lands.
- In the case of SCHMLLA Properties Limited v GESSO Properties (1995), the charge and receiver's Powers of Sale survives the disclaimer(s)
- But what happens on the sale – is there a new title or a resurrection of the old title?

Disclaimer of leaseholds
When there is a charge over a long leasehold title:
- if the liquidator has disclaimed, the situation is complex. The leasehold title effectively ends but the position of third parties is as if lease had continued.
- consider sub-tenants and mortgagee. It is long-established that sub-tenants can continue to occupy if the terms of the head lease are complied with (Re Levy, ex p Walton (1881)).
- the charge holder's position is similar. However, the right to forfeit is exercisable.
- consider whether there is a mortgagee protection clause?
- are the covenants in the head lease being complied with?
- consider position if the mortgagee is not aware and there is no mortgagee protection clause, the leasehold and therefore the security could be brought to an end.

Form of execution

Signed as a deed by [name of borrower]

by [name of receiver] as receiver pursuant_____

to the power granted to him/her [name of borrower by its receiver]

by clause [_____] of a [debenture/_____]

Mortgage] dated [_____] in favour of [name of lender]

in the presence of: _____

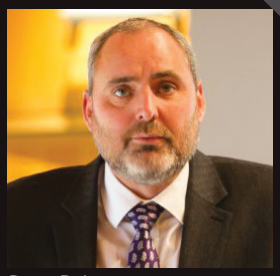
Witness Signature _____

Witness Name _____

Witness Address _____

Witness Occupation _____

Doug Robertson has a wide experience of all aspects of insolvency with a specialism in property insolvency. Doug acts for insolvency practitioners, banks and businesses as head of a large practice that deals with bulk LPA receivership and property recovery instructions from high street banks and other lenders.



Doug Robertson, Irwin Mitchell

The application was to prevent the receiver from selling properties because the agreements said to be relevant to the security under which he had been appointed was arrived at as a consequence of an alleged fraud by bank officials.
Following various undertakings the application was not pursued, but it threw up the question of a receiver's duty and the origination of his or her powers.
The court took the view that the receiver must conduct himself within the boundaries of a "duty of good faith". If there is an allegation that the receiver's appointment is subject to fraud, the receiver does not need to go further than to recognise the allegation has been made, consider his position and act reasonably. If there was powerful forensic evidence, such as a forged signature, it would be unreasonable if the receiver did not consider his position void.
In this case, the judge laid the marker that is not appropriate for the receiver to ignore these kinds of allegations. It might have been the general view that the allegations were a problem only for the bank, but the AIB case shows there is an obligation for the receiver to consider his or her position in those circumstances.
It is therefore good sense for receivers to get an indemnity from the bank in case a charge is found to be invalid so any responsibility for losses as a consequence are deemed invalid from the point the receiver is aware of the allegation.

Eleanor Temple's commercial and chancery practice specialises in insolvency, corporate restructuring, director disqualification, company and partnership law.

* Comprehensive notes from the Silven Properties case on Receivers, Administrators, Liquidators and Fraudulent Charges/Transactions by Eleanor Temple are available from the Nara office, PO Box 629, Oldham, OL1 9HH

Eleanor Temple, Kings Chambers

spotlight on TUPE

Transfer of Undertakings (Protection of Employment) Regulations 2006, more commonly known as TUPE, often come into play in the work of an LPA receiver. Specialist and associate of TLT LLP, Jessica Evans, sets out key considerations.

TUPE regulations apply in two situations: in business transfers (that is a transfer of a business, undertaking or part of a business or undertaking where there is a transfer of an economic entity by way of an asset sale and the undertaking retains its identity) and service provision changes (such as in-sourcing, outsourcing or retendering).

Unlike in some insolvency cases, the rules in relation to TUPE are not relaxed on the appointment of a fixed charge receiver.

The involved parties are known as follows:

- Transferor – the seller or former contractor
- Transferee – the buyer or new contractor
- Employees
- Employee representatives
- Fixed Charge Receiver

The appointment of a fixed charge receiver does not terminate contracts of employment.

Fixed charge receivers should take care that if they adopt the contracts, including by causing a company to retain an employee, the fixed charge receiver will be personally liable for all liabilities that the company (seller) owes the employee.

A frequently encountered example of where TUPE will apply where a fixed charge receiver has been appointed, is the case of a property where there are security guards directly employed by the seller. In this scenario, the directly employed security guards will transfer to the new owner under TUPE on the sale provided that there is a transfer of an entity that retains its identity following the sale.

Where TUPE applies, employees retain their existing terms and conditions, excluding occupational pension rights. Employee-related liabilities are transferred, with employees protected against dismissal, unless there is an economic, technical or organisational (ETO) reason entailing changes in the workforce.

In addition, there are obligations to inform and consult the employees, with joint and several liability of up to 13 weeks gross pay per employee for failure to do so. There is an obligation on the seller to provide the transferee (buyer) with Employee Liability Information (that is, information about the transferring employees). Employee-related liabilities include employment claims, personal injury claims, discrimination and equal pay issues. It is also important to note that transferring employees will include any employees employed immediately before the transfer even if dismissed pre-transfer and those absent due for example, to ill health or maternity / paternity.

If TUPE does apply, the next question is which employees should transfer. Those employees who are assigned to the transferring undertaking will transfer. The following questions are relevant to determine who is assigned:

- The amount of time spent in the part of the business
- The amount of value given to the part
- The Terms of employee's contract
- How the cost of employee's services have been allocated

A seller, and in turn the fixed charge receiver, will want to ensure that all relevant employees transfer so that the business is not left with employees that it will need to make redundant following the sale. A buyer will want to check carefully which employees the seller is claiming are assigned to the undertaking. During the sale process, the buyer is therefore likely to consider carefully the list of transferring employees to ensure that it does not include any employees who should not be there and there has been no "dumping" of employees into an undertaking or "cherry picking" of employees in order to move them out of an undertaking.

If a seller does move the employees prior to the sale, the receiver should be aware that if there is no contractual right to do so by way of a mobility clause and/or the mobility clause is not exercised reasonably, there is a risk of constructive dismissal claims by the employees.

To protect against sellers dumping and/or cherry-picking employees, the buyer may want to include terms to ring fence the employees that are agreed as assigned to the undertaking up to the point of sale. Such terms are also frequently seen in outsourcing contracts where the second limb of TUPE will apply.

scam alert – letting to a company in liquidation

The Insolvency Service has warned insolvency practitioners against the following "scam"

Gordon Heath, Independent Rating Consultant

practice that attempts to avoid unoccupied rates.

The practice involves setting up a new company to sign leases on empty properties, shortly after which the company goes into members' voluntary liquidation and claims exemption from empty rate charges.

In 2011, the Insolvency Service's Company Investigations applied successfully to court for the winding up of 13 companies involved in this practice, which the court deemed "contrary to the public interest". The Insolvency Service concluded: "The Service is of the opinion that in cases where a practitioner takes an appointment in a members voluntary liquidation, in which the main aim of the arrangement is to facilitate the non-payment of rates, such an arrangement would also be contrary to the public interest."

"As such, if The Service is made aware of practitioners participating in these types of arrangements, it will consider reporting the matter to his/her Recognised Professional Body."

Note – when a company is wound up, if the leases have not been disclaimed they remain and revert to the Crown as bona vacantia. However, nobody is liable for the rates. The billing authority will ask the Treasury Solicitor, Bona Vacantia Division to disclaim the leases quickly, although they will disclaim the leases within 12 months in any event, after which liability reverts to the landlord or owner.

For more information visit: www.insolvencydirect.bis.gov.uk/solvencyprofessionandlegislation/dearip/dearipmill/chapter26.htm#3

The Terms of the Sale Agreement

This should widely define which employees are to be transferred to ensure that no employees are left in the business following the sale. It should also include indemnities from the buyer for employee liabilities and protection for the seller. The seller should take care to avoid providing detailed warranties in relation to the employees. Details of apportionments of pay and holiday up to completion could also be included.

Property Management Company

In many cases, there will be employees based at a property but rather than being employed by the seller, they are employed through a property management company. In such cases does TUPE apply under either the first limb (business sale) or second limb (service provision change)?

Service Provision Change

The second limb of TUPE applies where there is in-sourcing, outsourcing or re-tendering. The requirements are that immediately before the service provision change takes place there is (1) an organised grouping of employees who are situated in Great Britain (2) who have as their principal purpose the carrying out of activities on behalf of the client (3) the client intends that the activities will be carried out by the transferee and (4) the activities must not consist wholly or mainly of the supply of goods for the client's use.

Change of Client

In the case where a property management company employs the employees (for example, security guards) at the property, is there a service provision change when their services are terminated on the sale and a new property management company is brought in? The following cases confirm not. Where both the client and the service provider change, there is not a service provision change:

McCarrick v Hunter

Activities carried out by different contractors before and after the change are on behalf of different clients. There is no service provision change where there is second-generation outsourcing and client changes.

Taurus Group Ltd v Crofts and Onr

The Buyer terminateds Reliance's contract and contracts with Taurus Group. The security officer employed by Reliance did not transfer as client had changed from the seller to the Buyer.

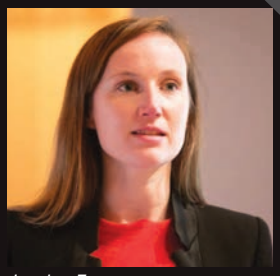
Horizon Security Services Ltd v Ndeze and another

The contract to provide security at a business centre was terminated by the management company on behalf of a local authority owner. The local authority engaged a different security company to guard the site for an interim period. The new provider was engaged directly by the local authority. Again there was no service provision change as the client was not the same.

In cases where there is a change of ownership and management at the same time (which regularly occurs in commercial property transactions), the above cases now make it clear that there will not be a service provision change. This will impact on whether the costs of redundancy and employment transfer or remain with the outgoing provider. Many facilities providers now factor in the risk that employees may remain with them and there will be redundancy costs when pricing contracts. It should be noted that the above cases did not consider whether there is still a "business transfer" in these scenarios. This may arise in future cases although it is doubtful that a court or tribunal will conclude that the business transfer scenario applies.

In summary, when appointed, a fixed charge receiver should carefully consider whether there are any employees undertaking services at the property. This will include both employees based at the property and those who are not based there but are "assigned" to the building. Those directly employed should be addressed under any sale purchase agreement. Those employed through a property management company will also need to be considered but, given recent case law, it is unlikely that TUPE will apply if the property management company changes at the same time as the sale.

Jessica Evans is an associate with TLT solicitors LLP with a broad knowledge of employment law. She has expertise in advising HR on redundancy, contract change and senior exits and extensive experience of employment litigation in Employment Tribunals.



Jessica Evans, TLT Solicitors

pause for break clause

Break clauses – what may seem like minor points for lawyers to argue over may have huge consequences for both tenant and landlord. Mark Routley, property litigator and partner at TLT solicitors, illustrates the point with recent cases.

If a tenant fails to exercise a break clause properly, the lease will run to the end of the term or to the next break, if any. And tenants regularly get it wrong – through poor leases rather than any fault of their own. From the landlord's perspective, this is good news.

Two recent Court of Appeal decisions on Break Options

Marks & Spencer plc v BNP Paribas Securities Services Trust Company (2014)

The Background

The property was the Point in Paddington and the break date was 24 January 2012. It was conditional on serving notice, paying rent and paying a break penalty. There was no apportionment provision in the break clause and the break notice had been served and conditions complied with. Marks & Spencer asked for a refund.

Court of Appeal decision 2014

The Court of Appeal disagreed with M&S. To imply a term into a lease such as an entitlement to a refund, the Court considers the intentions of the parties to the lease taking into account the context including the background facts. The term must be so obvious that it goes without saying. That was not the case here. The parties could have included an entitlement to a refund but did not do so. It was not appropriate to imply a term and the company should have included a clause in the lease had it wanted it.

Lessons to Learn

- Include an apportionment provision in the break clause
- Include a reimbursement provision in the break clause
- Consider the break date carefully

Friends Life Limited v Siemens Hearing Instruments Limited (2014)

The Background

The lease required the break notice to contain specific wording but the notice was served without this wording so the landlord argued invalidity.

The First Instance Decision was that the notice was valid. There was no explanation in the lease as to the effect of failing to include the wording but the purpose of the wording was achieved.

Court of Appeal decision 2014T

The Court of Appeal ruled the break notice requirements must be strictly complied with. The Court was concerned that the earlier decision could result in other undesirous litigation, and the obligation was "must".

Lessons to learn

- It is vital that a tenant complies with the requirements of the break option
- Otherwise, there is a risk of invalidity or arguments of invalidity

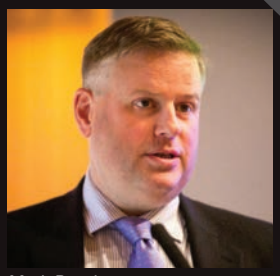
The following cases further demonstrate how strictly conditions must be applied with:

Avocet Industrial Estate LLP v Merol (2011)

The tenant of units on a Stroud business park had failed to pay the default interest due. Although only £146 was owed, the break had not been validly exercised and the lease continued for another five years at a cost of £67,500 per annum.

PCE Investors v Cancer Research UK (2012)

Here the break clause fell on the quarter day and the tenant did not pay the rent that fell due on the quarter day itself. The Court decided that the break had not been validly exercised. The lease therefore continued.



Mark Routley, TLT Solicitors

property management agreements for the receiver

Most receivers will have entered into a Property Management Agreement in respect of receivership assets at some point. Secured lending and recovery specialist for TLT LLP, Philip Collis, lists their potential pitfalls and how to avoid them.

This is a brief guide to the issues for receivers arising out of Property Management Agreements.

Overview of key elements

- Scope of Services (what the manager will do for you)
- Scope of manager's Authority (including level of expenditure)
- Remuneration
- Indemnity Insurance, Compliance & Service Standards
- Termination (steps to be taken, expectations)

Important considerations:

1. Manager Fees and Expenses

Consider:

- are they recoverable under the service charge?
- will they fall as expenses of receivership? – check the charge provisions
- there will always be the indemnity from assets of receivership in last resort

2. Who exactly is the "Client"?

Is it the borrower or the receiver? Preferably it is the borrower acting by the receiver. If the receiver is the client there is potential personal liability for the receiver. The receiver should consider an indemnity from the lender if personal responsibility is unavoidable.

3. Employees

Ensure there is no power for the manager to employ staff on behalf of receiver. The receiver could end up as an employer and be personally liable for wages and employer obligations.

4. Warranties and Indemnities

Avoid giving warranties or indemnities, watch for standard forms. If unavoidable, reduce scope & obtain indemnity from lender

5. Control and Oversight

Consider:

- Spending limits
- Reporting obligations & provision of information
- Codes of practice
- Complaints likely to fall back on receiver & lender
- Treating Customers Fairly observance
- Controls on sub-contracting

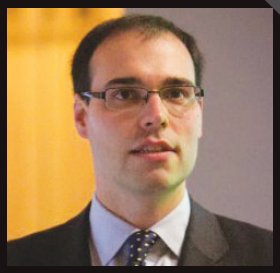
6. Termination

Consider:

- insolvency of the manager
- breach of agreement. Issue notice to remedy procedure?
- length of notice to be given on sale. Is there ability to pay compensation instead?
- Consequences of termination. Consider handover and accounting for monies

7. Exclusion of Personal Liability

This is non-negotiable in all circumstances and must be covered.



Philip Collis, TLT Solicitors

Philip, based at TLT's Bristol office, specialises in commercial property work relating to secured lending and recoveries. He deals with all aspects of recoveries work for lenders and office holders, including fixed charge receivers and administrators.

His extensive experience includes lending, mortgage book transactions, commercial landlord and tenant work, acquisitions and disposals.

don't cry about CRAR

CRAR – or Commercial Recovery of Arrears of Rent – may cause a headache but there's no need for tears, thanks to advice from property litigation field leader and partner at TLT solicitors, Mark Routley.

Before the recent introduction of CRAR, landlords had relied on the Law of Distress to recoup rent arrears legally. With parts of this law dating back to 1284, it was felt it was no longer fit for purpose. In particular, the Middles Ages legislation did not sit well with the European Union rules, such as the Convention on Human Rights.

Key elements of CRAR :

- uses the Tribunals Courts and Enforcements Act 2007
- came into play on 6 April, 2014
- the lease or tenancy must be in writing (previously this was just for distrain)
- refers only to "possession and use"
- requires a minimum of seven clear days' notice
- requires a minimum of seven days of net rent outstanding
- requires that various notices are issued at various points
- Bailiff now called Enforcement Agent/Officer

There was concern in the property industry that the new legislation would weaken the position of landlords to claw back their money. In particular, would the requirement to give tenants a week's advance warning before entering the property give them an opportunity to clear the property or leave?
Feedback suggests, however, that in contrast to these fears, the new notice period appears to be working to the advantage of the landlord – prompting payment in some cases and improving recovery rates. The simplification of fees has been welcomed.
(Source: The Sheriffs Office "Overview of the New Regulations" 11 June 2014)

Some CRAR scenarios

Q1: If the Landlord owns a building that is part commercial and part residential, will he or she be able to use CRAR to recover the rent?

No. CRAR exclude premises that are let or occupied wholly or partly as a dwelling. This has led some to suggest a landlord grants two leases in such circumstances (although this has other drawbacks).

Q2: The landlord has granted a tenancy where the "rent" reserved is not just the annual rent but includes payments towards gas, electricity and service charge. Can he or she recover that total sum under CRAR?

No. *"Rent"* does not include rates, council tax services, repairs, maintenance, insurance or other ancillary payments, whether or not reserved as rent.

Q3: The monthly payment of rent fell due five days ago and the tenant has not paid. How quickly can the Landlord act?

Consider these elements:

- Need for minimum seven days net rent outstanding
- Need for minimum seven clear days Notice of Enforcement
- Court order needed for shorter notice period
- Can only be dealt with by an Enforcement Agent
- Notices can be served by post, fax or by hand

Q4: The seven day Notice of Enforcement has expired. What does the Enforcement Agent do now?

Consider:

- Enforcement Agent can take control of goods
- Any day of the week, between 6am-9pm
- Need to secure the goods
- Enforcement Officer can remove the goods and secure elsewhere
- Copy of Controlled Goods Agreement to be given to tenant

Q5: What if some of the goods at the premises are owned by a third party?

Remember:

- Only the tenant's goods can be taken
- Tools of trade are exempt, up to £1,350
- A third party can make application to Court

Q6: The Enforcement Agent has seized the tenant's goods. Can the landlord go ahead and sell them?

- Wait a minimum seven clear days
- Get a valuation
- Minimum seven clear days Notice of Sale
- Sale by public auction
- If there is a shortfall, auctioneer's fees and some of Enforcement Agent's fees are paid before the debt

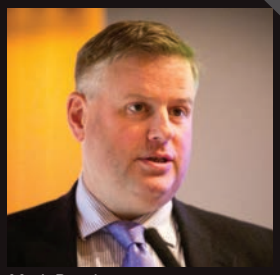
Q7: What if the tenant or third party disposes of some of the goods once the Enforcement Agent has taken control of them?

It is a criminal offence to obstruct an Enforcement Agent or without lawful excuse to interfere with the controlled goods. This brings a maximum sentence of 51 weeks in prison and/or a maximum £2,500 fine.

Q8: The tenant has sublet the premises. Can the Landlord pursue the subtenant for the rent due to the tenant under the subtenancy?

Yes. The landlord has a right to exercise CRAR against the tenant. He or she must give a minimum of 14 clear days' notice. The subtenant must then pay his rent directly to the landlord.

Mark Routley is an experienced property litigator and advises a broad client base, with a particular interest in clients working in the leisure, retail, telecommunications and financial sectors.
Mark has contributed to the Estates Gazette and Property Law Journal and is recognised by Chambers Guide as a "Leader in the Field".



Mark Routley, TLT Solicitors

make a living from leisure

The business of caravan parks is popular and lucrative – but not always straightforward. With more than 30 years' experience and 3,000 inspections under his belt, Chris Tucker guides us through the industry.

Industry Overview

There are approximately 5,000 parks in the UK, with three-quarters classed as holiday parks and the rest residential parks that provide permanent homes for tenants. Despite activity from some large equity groups in recent years, most caravan parks are small and privately run. This model is likely to continue as, due to planning restrictions and the nature of the business, opportunities for growth or consolidation are limited.

What is a caravan?

The answer to this can surprise. The statutory definition, according to the Caravan Sites and Control of Development Act 1960, is "***any structure designed for human habitation... capable of being moved... excluding any part of a railway system or any tent.***"

Further definition is found in the Caravan Site Act 1968 that includes the concept of a "twin unit". This must be composed of not more than two sections and capable of being moved, provided the overall dimensions do not exceed 60' x 20' or 20m x 6.8m.

Within these definitions, there is a wide range of caravan types:

1. traditional touring caravan commonly seen on our roads.
2. static holiday caravan, which arrives on a lorry and provides a semi-permanent holiday accommodation.
3. timber clad holiday caravan, known in the industry as a "lodge", usually a twin unit that arrives in two parts and is assembled on site. Once in place, this can look like a permanent structure but, provided it is not fixed to the ground, it is a caravan. Not to be confused with a brick and mortar chalet or apartment that cannot be classified as a caravan, even when located on a caravan park.
4. park home, a rendered residential twin unit that arrives in two pieces, is usually skirted in brick and look much like a bungalow. Supplied factory-furnished with carpets, kitchens, bathrooms and furniture, they are popular with retired people who often buying for cash. A park new home can sell for around £100-£150,000.

Four Types of Park

1. A ***touring park*** is a typical 'caravan park', where people bring caravans or campervans and pay nightly or weekly fees, typically £10 to £30 per night. Customers may also leave their caravans on the park for the whole summer, paying around £1,500 per season and known as 'seasonal pitches'. Another common source of revenue for park owners, with added environmental benefits, is year-round storage of touring caravans in a dedicated area of the park.
2. ***Park with private units***. These are parks where the caravans are sold to individuals as a holiday home. They operate a 'closed shop' whereby caravans are accommodated only when purchased through the site owner. These types of holiday homes can sell for anything from £10,000 to £50,000 and offer an affordable equivalent of a cottage in the country. Once purchased, the caravan owner pays an annual pitch fee, service charges plus commission on any re-sale.
3. ***Park with units to let***. Known in the industry as a 'hire fleet', these parks use a different business model, where income comes from letting the caravans on a self-catering basis. In addition to the letting fees, they have subsidiary businesses such as bars, leisure centres and shops. Letting fees range from £100-£700 a week, depending on the size of caravan and the time of year.
4. ***Residential parks.*** These are privately-owned residential estates, where each park home is sold to individual owners. As with holiday homes, residents must buy their homes from the park owner and are charged a ground rent known as a pitch fee. Commission is also charged on the re-sale of home. The Mobile Homes Acts of 1983 and 2013 give a high degree of protection to residents, provided their unit is their main home. These parks are considered stable investments as pitch fees are paid monthly by direct debit and can increase annually in accordance with RPI inflation.

Two Ways to Value a park

1. ***Comparable Method.*** This method, often used by park operators, provides a ready reckoner and crosscheck if accounts are poor. It can, however, be subjective and backward-looking and should be used in conjunction with a profits valuation of the current business.

As every park is unique, there is a need to identify the constituent parts: the number and type of pitch, the facilities buildings, any outdoor recreation areas, accommodation, undeveloped pitches and other assets.

Planning permission is highly relevant when carrying out a comparable valuation. Parks are effectively dual-controlled through planning consent regarding:

- change of use and physical development
- site licences, issued by environmental health departments, concerned with safety.

Although a site licence may often be found pinned to the wall of a park office, it is important for valuers to examine the park's planning history to ensure there has been compliance with required permissions.

It is worthwhile scrutinizing planning history for hidden value. For example, parks that pre-date 1960, when caravan parks had no direct planning control, may enjoy unrestricted and beneficial consent.

When preparing a comparable valuation, the pitch value is calculated according to the type of pitch, based on evidence from previous sales. For example, our review of sales in 2014 reveals touring pitch values of between £4,000-£11,000, static pitch values of £8,000-£21,000 each, while residential pitches made between £17,000-£30,000. The most expensive touring park can be worth more than the least expensive holiday home and similarly with holiday or residential homes.

2. ***Profits Method.*** This uses the park's trading accounts to assess the profit on the basis of EBITDA (Earnings before interest, tax, depreciation and amortisation). The value is then calculated by capitalising the profit using the appropriate multiplier to arrive at a value for the business. It is important to use both the profits method and the comparable method. Using only the profits method may not tell the whole story or reflect freehold value.

It is important to examine the accounts for the sustainability of earnings – for example, a high level of profit from the sale of new caravans on a new development may not continue year on year. A valuer needs to consider items to be excluded, such as the provision for depreciation. But if depreciation is excluded, the cost of replacing aging fleet caravans must be taken into account to avoid over-valuation. Some businesses may try to hide capital improvement as "repairs".

If there are no reliable accounts, it may be necessary for an experienced valuer to create estimated accounts based on the performance of a typical park.

For more information on valuation methodology, see Chapter 4 of Law and Valuation of Leisure Property by John Ridgewell, published by the Estates Gazette in 1996.

Possession and Disposal

Generally, caravan and holidays parks are resilient businesses with relatively few business failures. Reasons for failure include an ill-timed change in business model or a park's use as a security for an unrelated business.

A receiver taking possession should consider these issues:

Type of business

- A caravan park can range from a field with a gate classed as a 'touring park' to a residential park fully occupied by rent-paying tenants with a legal right to stay. If the park has privately-owned caravans, what is their security and can the park be closed? Is it an investment business with secure tenants or a trading business?
- Security must be maintained and improved if necessary
- Website and domain name, if covered by the receivership, should be secured.

When it comes to disposal, advice should be sought from industry experts with specialist knowledge of valuation and method of sale. Most sales are made to existing park operators so this knowledge is key to getting the word out to the right people.

Market Overview

The value of caravan and holiday parks dropped in 2009 and remained subdued through to 2012. However, this was due to a lack of funding and fewer buyers, rather than because the businesses themselves were in a poor state.

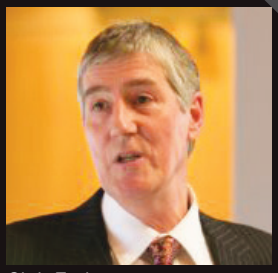
2013 saw significant industry improvement with values returning to 2006 levels. There were many more deals with first-time buyers, typically for businesses up to £1.5m and there have also been some multi-million pound deals. Caravan park businesses are traditionally asset-backed with a strong cash flow and therefore usually represent a sound investment. However, issues still hindering the market are some unsupportive banks, the requirement for bigger deposits, unresolved swap deals and disagreement between buyer and seller on value.

As a guide, the average values per pitch at the end of 2014 were:

- touring park £8,500
- static unit park £16,000
- residential caravan park £24,000

Forced sales will tend to see a markdown on these values of between 20% and 40%.

Chris Tucker is a chartered surveyor, RICS Registered Valuer and partner at Edwards and Partners, a division of Sanderson Weatherall LLP, specialising in the caravan and leisure park industry.
Edwards and Partners has offices in Easingwold, North Yorkshire and Tiverton, Devon but provides national coverage.



Chris Tucker,
Edwards and Partners

dates for your diary

Don't forget to note the following dates in your diary:

29th January 2015
Part 1 – Intro of RPR

15th May 2015
Part II RPR Exam Revision

20th May
Spring Conference

17th June 2015
RPR Exam

Members networking drinks in London, Leeds, Manchester and Birmingham

4 and 11th November
Training Days

Further details and booking forms of these events are published on the nara website

Many thanks to our sponsor of the 2014 Training Days

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