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narator

in this issue

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The Association of Property and Fixed Charge Receivers

Daniel Hardy, Chair nara

review of 2013

We continue to be in a challenging economic climate and this, coupled with ever increasing demands in terms of legislation from lenders and the risk from the litigious world within which we operate means that training and learning has become of paramount importance.

Broadening our understanding and increasing our depth of knowledge needs to be at the forefront of our minds and the purpose of nara's training days is to assist you in fulfilling those needs. A good knowledge base coupled with practical experience will hopefully enable you to perform your duties to a high standard, minimise risk and in doing so enable you to make more economic use of your time.

2013 has been a busy and successful year for nara.

We look forward to welcoming another large batch of Fellows who passed their RPR examination in June; 28 are now in the process of undertaking their peer reviews and I would like to wish them every good fortune in this final test. Nara's total membership now stands at 397 and in current market conditions, interest in membership continues to be strong, with encouraging attendances at this year's 'Fundamentals' courses run during the year.

Nara continues to work hard for both its existing and new members, in order to reinforce the nara qualification as a badge of excellence in the property recovery sector. Nara's achievements during the year have included:

- Successful discussions with HMRC over VAT treatment by Receivers, clarifying a position that has been uncertain for more than 20 years
- Publication and distribution to members and others, of the new 'nara Guide to Receivership' – a valuable introduction as well as an excellent marketing and publicity tool
- Working with RICS and IPA to establish a new Joint Regulation Committee to ensure continuing effective regulation of Registered Property Receivers
- Launch of a new-look, larger house magazine 'narator'
- A successful educational, training and conference programme, of which this is one, attracting large audiences and sponsored by major firms associated with receivership work
- A revised management and governance structure incorporating a smaller and more focussed Council supported by specialist committees
- A series of regional networking events organised by the Training and Support Committee. Moving into the forthcoming year. Plans include:
- A series of presentations to major lenders
- The launch of a new website in late 2013
- A campaign to raise the profile of nara within the media
- Proposals to extend the RPR scheme into Northern Ireland and the Republic of Ireland.

Dealing with Distress: the banks

It's been a while coming but there are signs that banks are beginning to speed up the disposal some of their distressed non-corporate real estate portfolios. Senior manager at accounting firm KPMG, Jitka Roberts, explained.

Many lenders in the UK have been overexposed to corporate real estate (CRE) lending since the banking collapse. The good news now is that many of the British and foreign banks have separated their CRE loans into core and non-core and are therefore in a position to dispose of their non-core portfolios. With money coming in from non-traditional sources in the UK and from further afield, change appears to be in the air.

"Banks are looking to dispose of their non-core CRE either as part of sale of the debt or by working out individual assets, whichever is appropriate." said Jitka Roberts, who works with KPMG's Leeds-based restructuring team.

In 2012, the estimated volume of non-core CRE in the UK was about £121bn. Recapping on the history of the current financial crisis, Jitka said the situation this time was different from the property crash in the early 1990s. Instead of adopting the "slash and burn" approach taken then, when properties were realised relatively quickly and cheaply, in 2008/09 the banks mostly adopted a hold policy, unless forced to do otherwise.

Since the crash, lenders have had to strengthen their in-house property expertise with some

dilapidations

Peter Beckett, partner at landlord and tenant consultancy Beckett and Kay, warned of the difficulties facing a Receiver in a dilapidations claim. With knowledge and care, though, such a claim can be successful.

What is a dilapidations claim?
As a receiver you might encounter a claim in three ways: a claim against you as Receiver of a leasehold property; while acting for a landlord during the term of a tenant's lease; or when pursuing a terminal dilapidations claim once the lease is over. Almost always, it will involve commercial not residential property.
The lease needs to be examined to determine what term of covenant has been breached, and a building surveyor must define the required remedial action and its cost. This information will be brought together in a Scott Schedule. Any repair claim is capped by the diminution of value in the property.

Receiver for tenant, ongoing lease
In this case, there are four possible ways for the landlord to proceed against you – but Peter explained that none of the options was reliable, and that claims against tenants were precarious.
1. Damages. But repair claims are capped by the diminution in value, the landlord is not losing because reversion is a long way off, and therefore breaches can be rectified in time.
2. Forfeiture – but the landlord wants a rent-paying tenant?
3. Specific performance – the court will only impose in exceptional circumstances
4. Jervis v Harris –the work is done and charged as a debt to the tenant. Near impossible against a hostile tenant.

Receiver for landlord, ongoing lease
Now the Receiver faces the four problems set out above, this time as landlord.

Receiver for landlord, lease has expired
Once a lease has ended – the only option is to sue for damages. That is for money, not physical restitution.
Except where Section 18(1) of the Landlord and Tenant Act 1927 is relevant, damages behave normally: the measure is the proven landlord's loss.
s18(1) says where the breach is of a covenant to repair, in no case will the landlord be able to recover more than the loss in value of his freehold.
There is much talk about s18(1) but the majority of most dilapidations claims is not about repair. The term "diminution valuation" would better serve than the "s18 valuation" phrase often used.

The Problem for the Receiver
While dilapidations claims are simple in principle, they are expensive in practice because the litigation that follows involves people taking polar positions on painstaking detail.
"You are entering a vale of tears," warns Peter. "You have got to bring benefits to your appointer and know when to say 'let's leave it alone'."

Diminution in value as cost of works
As a rule of thumb, the diminution in value is usually roughly equal to the value of those works and no valuer is necessary.
Claims rarely get to court but when they do, valuations must be done by a precise analytical process for the court – not like most other valuations. The margins of error are enormous but may not be built in. Any assumptions made must be constant and values precisely compared.
If it is known that a future owner is going to demolish a building element, the obligation to repair it is superseded by that intention.

Type 1 and 2 Valuations
A Type 1 Valuation is the normal measure - more or less cost of works. This would represent 90% of dilapidation claims.
A Type 2 Valuation involves cost of works less supersession (work that makes the dilapidations item unnecessary).
Type 3 and 4 Valuations are much more complex but thankfully rare.

General Advice:
- Beware: the combined costs of a fully-fought claim usually exceed the award.
- Take very full advice as Receiver before embarking on a claim.
- A claim against a Receiver for dilapidations as tenant will be a grave distraction but is unlikely to succeed.
- If you feel like taking over a dilapidations claim, lie down until the feeling passes!

**Examples of Scott Schedule and list of cases available from Nara office*


Peter Beckett, Beckett & Kay

having little previous experience of distressed loans. For example, Aviva had, until this crisis, never had an insolvent client. It had now created a "bad book" team which is further supported by six secondees, comprising two lawyers, two accountants and two valuers.

2013 - Turning the Corner
As stated, most of the lenders have now completed the split of their core and non-core real estate. To ensure best returns, the lenders and their advisers must think "out of the box" to come up with innovative solutions which reflect the current challenging market. Assignments nowadays tend to be complex, multi-solution, multi-layer and multi-adviser lead. "There's limited space for a one-stop shop receivership," said Jitka.
However markets have been recently improving. Some assets which were difficult to sell for years are now becoming sellable; in particular London prime assets but increasingly also some secondary properties in regional cities such as Leeds, Newcastle and Manchester. Values and yields are improving, which is encouraging more lenders to go to market.

Other Matters to Consider
Other factors impacting on the current position include:
- Mis-selling of interest rates, hedges and swaps – loans are unlikely to be enforced until compensation issues have been resolved;

continued overleaf

- key personnel changes – from the appointment of the new Governor of the Bank of England, Mark Carney to the mass internal shake-ups taking place among lenders
- the political climate, including a real drive by Government to find a solution for RBS in next 18 months
- the cost of capital and returns, which will impact heavily on decisions
- market sentiment – the feeling is upbeat and there's a willingness to sell

The bank's drivers in 2014

"There's a real drive forward," said Jitka, highlighting that Lloyds has been leading the way with the most frequent sales of both individual assets and portfolios. Like other lenders, its focus is on non-core CRE, which is due for disposal by the end of 2014.

"Lloyds and RBS is really driving the deleveraging process but all key large investors such as Deutsche Bank, Barclays, the Irish banks, Nationwide, UBS and National Australia Bank have implemented a spread between core and non-core and have plans for disposal between now and 2017."

Jitka said increased interest from alternative investors in North America and other parts of the globe now represented a serious "wall of money" – with her department's last few sales all being made to US hedge funds. The future opportunities for advisors are likely to come from other lenders such as Lone Star and Apollo. These should not be overlooked, as they provide new opportunities at a completely new place in the market, "As they are buying large number of investments, they will need advisers," said Jitka.

Two other issues may affect the banks' decision-making. Firstly implementation of new banking regulations, under which banks must assign different risks to each loan and create capital reserves between 50% and 250% of the value of the loan. This could make disposal of some loans more attractive.

Secondly, in 2017, new environmental rules affecting commercial property may require investment to ensure compliance prior to disposal. These rules may increasingly impact on the realisable value of these assets.

"Banks are willing to sell but not at any price. That's the main change," said Jitka.

Lloyds

Government-owned Lloyds has £15bn of non-core CRE and has been the most active player in the market. The bank hascompleted disposals worth £2.8bn across four portfolio sales of mainly secondary and tertiary properties the last two years.

"Timewise, they spaced the sales and created a real buzz. Everyone else started selling afterwards thanks to Lloyds' really clever marketing." said Jitka.

The Irish Banks

Bank of Ireland

Driven strongly by the Irish Government, the Bank of Ireland was the first to sell a large portfolio worth $1.8bn, including a prime London asset. It's now left with about €3bn of granular assets to be sold mainly individually.

Irish Bank Resolution Corporation (IBRC)

IBRC has £6bn of UK non-core CRE. It has a "real drive" to realise these assets in parcels by 2017.

NAMA

With £19bn of non-core CRE remaining, Nama has a lot of work to do to achieve disposals between now and 2017.

Allied Irish Bank (AIB)

AIB, with assets worth around £0.5bn, attempted a sale but aborted it, showing that "while there is a willingness to sell you need to find the right price." It has only completed on one portfolio sale - a loan secured on UK-based airport hotels.

National Australia Bank (NAB)

Working its way through the portfolio, in particular through Clydesdale and Yorkshire Bank, NAB realised its first £1bn last in October and has £4 billion to go, mainly in granular assets.

Outside the Box

In the last 12 to 24 months, Jitka has worked on asset sales as well as group restructures, helping companies to consolidate and improve the bank's position.

She referred to the need for much innovative and complex work to improve assets – for example by creating a new property management company to sell off a larger portfolio of properties piecemeal, followed by the sale of the company after the last asset is gone.

As a further example, she worked with an asset manager unit by unit through a shopping centre, which included improving a food court and dealing with anchor tenants .

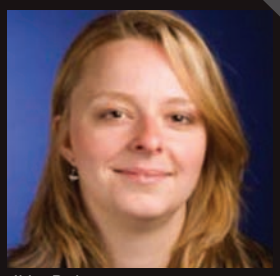
"I'm an accountant, but I had to learn pretty quickly. We needed to think about the end game – getting the best return for the creditors, of course. In some cases, we worked for three years before an asset was saleable."

"It should be no different for receivers – assignments are getting more complex and the need to work with other advisers becomes more prevalent."

"At KPMG we are unlikely to do standard receiverships ¬– we can't compete on price with receivership specialists, but we could do the tax planning and disposal strategy while receivers drive the value out of rent and security. I don't think we should do this on our own any more."

She concluded by commenting that, in her opinion, professional partnerships would be required when dealing with lenders, and she highlighted retail, hotels, care homes, student accommodation, universities, schools and the NHS as particular areas to watch.

**figures from KPMG research unit*



Jitka Roberts, KPMG

Input on Input at last

Earlier this year Nara was able finally to issue guidelines on accounting for VAT for receivers. Former Nara chairman Philip Edwards, led this important work.

Battle for clarification on VAT for LPAs has been underway for two decades. While the war is not yet won, real progress has been made in the last year with a practical approach to VAT accounting agreed with HMRC.

Philip Edwards explained that the heart of the problem lay in how to recover input VAT: if a receiver had spent money on the property and has thus incurred VAT, they should get the VAT back. But it is the borrower, not the receiver, who is the registered party. From a legal point of view, VAT recovered should therefore be paid to the borrower. HMRC had suggested this money should then be paid over to the receiver by the borrower. In practice, however, the receiver would hardly ever receive this payment.

Philip explained that after much wrangling with HMRC, Nara was able in March this year to email to members guidance clarifying a practical procedure agreed with HMRC for the recovery of input VAT.

The new position, agreed with HMRC, is that receivers:

- must account for VAT using Form VAT 833
- cannot themselves register in their own name
- must use borrower's registration
- can offset input VAT in accounting for output VAT ie accounting can be on a net basis

The selection of the accounting period was free for the receiver to decide; this should therefore be designed to maximise VAT recovery.

Philip added there could be no recovery of input VAT where it exceeded output. "But at least we can reduce the money we hand over to them" he said.

Receivers are required to collect the VAT where the property is elected or where VAT is mandatory. Philip highlighted the frustrations of dealing with unknown registrations and unknown elections and warned of the automatic application of VAT in car parking charges and storage rents, for example.

Philip reported that some members who had previously received legal advice against the setting-off of input VAT requested that HMRC formally validate the guidance Nara had issued – but said that HMRC had not been able to do such a specific validation.

However, the advice on input VAT accounting had been semi-formalised by HMRC with a change in the key point on VAT for receivers in VAT Notice 756, which now confirms the net accounting basis. This is available to see on the HMRC website.

Other problems experienced by members since the March email alert included a lack of communication by the HMRC policy-makers to those handling accounts who continued to withhold necessary information from receivers.

A further email was sent to Nara members in October, reiterating the guidance given in March, answering members' queries where possible, and pointing to the revised VAT Notice 756 to emphasise the net accounting agreement.

Phillip added: "I've never accounted for VAT on any basis other than a net basis.

It's not without risk but becoming a receiver has its risks anyway. To my mind, this is just another one of those risks."

Next steps

"Nara needs to continue pressing for some proper rules," urged Philip. "We need to go back to the question of registration. Our Counsel's opinion has indicated there was a route that could be used, which would require a tweaking of regulations. It just needs some willingness."

Separate registrations would enable receivers to carry out developments and full refurbishments which could be significant in some receivership situations.

He said it was vital to keep talks going with HMRC now that they recognised Nara spoke for a significant proportion of receivers dealing with VAT.

Philip Edwards
Independent Property Consultant

TCF and the Receiver

There is an increasing political focus on reputational issues for banks in complying with the guidelines set out by the FCA (Financial Conduct Authority) in order to ensure fair outcomes for their consumers.

Treating customers fairly (TCF) remains central to the FCA's expectation that the well-being of customers is at the heart of how they run their businesses. This not only includes lenders but extends to any party acting in an advisory capacity.

With this in mind, nara's advice is that any party dealing with recovery work should have a full understanding as to the minefield of challenging issues faced by lenders and themselves.

It is important that any party acting on behalf of a lender in advising or dealing with a recovery strategy can demonstrate that they are suitably qualified to deal with the management of the process and also ensure a suitable calibre of expertise in the case of any party acting under their instruction.

Lenders are becoming increasingly focused on Management Information, 'MI', to monitor effectively the outcomes that they are achieving for customers. This may comprise a range of information of different types, both numeric and descriptive, but it is important that it is forward-looking (enabling management to identify risks to customer outcomes rather than dealing only with known issues) and that it is acted upon when necessary.

It is important that in these challenging times the quality of overall service is maintained to a standard which does not compromise the position of a lender or the borrower.

Practically VAT

A former HMRC senior officer with over 25 years experience in indirect tax, Billy Cairns, partner and VAT specialist at accountancy firm BDO, explained some specifics of VAT accounting.

Land and Property

With property, there are four different rates for VAT. Transactions can be exempt, standard, reduced or zero rated. An LPA receiver must identify what type of property he or she has and which VAT rate will apply.

1. Exempt – the default treatment
2. Standard Rated – examples are the freehold sale of a new (less than 3 years old) commercial building or a freehold sale of new civil engineering works
3. Zero Rated – examples are the construction and sale or long lease of new dwellings, sale or long lease of new converted dwellings or listed buildings there had been a recent change to the rules on listed building: until 1 Oct, 2012, if it was an approved alteration on a residential listed building, a zero rating could apply on cost. That relief has been withdrawn, with a transition period to Sept 2015. If work started or a contract was signed before 21 March 2012, zero rating can still apply.
4. Reduced Rate (5%). This may apply when incurring refurbishment costs. Examples are urban regeneration, conversion of non-residential to residential and conversion to a greater or lesser number of 'single household dwellings'.

Points on Options to Tax

- converts an exempt supply into a standard rated supply
- there is a set procedure (several forms, depending on which type of option)
- belated notification is permitted (someone can charge VAT as long as they finally notify HMRC)
- permission is required in some cases (eg changing from exempt rental to charging VAT)
- Can be revoked after 20 years with the first opportunity being 2009. After the six month cooling-off period, the option lasts 20 years.
- New rule: if there is no interest on the property after six years, the option disappears. Overage is considered interest, the 6 years doesn't start until after overage has been received.

VAT on Building Services

Zero rating applies to new build when it is

- dwellings
- relevant residential such as a hospice or student accommodation
- charity, for use as charitable non business

Conversion costs (non-residential to residential) are:

- zero rated: for housing association
- 5%: non housing association
- 5%: when changing number of units
- 5%: empty premises (two years)

When a developer sells a new property at a price plus VAT to a landlord who wants to let it, the only way to get VAT back on the purchase is to opt to charge VAT on rent to tenants.

Disapplication

An Option to tax is disapplied if:

- the occupier is a developer, grantor, financer or connected party
- the property is a capital item according to Capital Goods Scheme
- Property is wholly or mainly used for ineligible purpose
- Intended usage is assessed at the time of grant

Capital Goods Scheme (CGS)

Capital Items under CGS apply to all non-residential property costing £250,000 (ex VAT) or more. The value has not changed since the scheme's 1984 introduction, despite inflation and property price rises. Therefore nearly all new properties are caught by CGS which can apply to:

- land/building
- construction of building
- certain extensions/alterations
- civil engineering
- refurbishments (capital) within the last 10 years. It is prudent to monitor taxable use every year during that decade. If the taxable use drops, it may be necessary to repay part of the VAT originally claimed.

Summary:

The option to tax applies only if property does not fall under CGS and is not to be used for non-VATable purposes by a grantor, financer or connected party, within the CGS adjustment period.

Misconceptions

- A building is NOT registered for VAT – it is the interest in the property
- Option to tax is not automatic - this is a decision the owner of the interest must make
- Opting is not always beneficial
  - input VAT may not be at risk
  - extra SDLT costs may be incurred (see later)
  - Registration might reduce marketability
- A residential developer may refuse to accept a property subject to the option.

Beware the CGS "Elephant trap"

Scenario: A company buys or builds a new commercial building for £5m plus VAT in 2005 and an IP is appointed in 2007.

The IP sells the building in 2008. No VAT is charged because the building is not opted.

Due to the 10-year monitoring period for CGS, there is a 50% reclaim on the initial VAT recovered that would amount to paying £612,500 to HMRC in this case.

It is therefore essential to remember and review CGS before a sale.

Another trap

If a property is sold for a lower price than it was bought for, plus VAT, unless the price can be justified HMRC will use the CGS regulation to claw back the shortfall between the VAT reclaimed and paid. For example, on a property purchased in 2005 for £5m, VAT reclaimed was £875,000. If then sold in 2008 for £4m plus VAT (£700,000). HMRC will claw back £175,000.

Transfer of Business as Going Concern (TOGC)

The beauty of TOGC is that there is no VAT cash-flow and there is a reduced SDLT cost.

Points to watch on TOGC:–

- there are extra rules in relation to property:
- option to tax (fully tenanted building - selling on - VAT on rents, to be TOGC the seller must make sure purchaser opts to tax to make it work),
- relevant date – there must be no break in trading.
- new commercial buildings (less than 3 years old)
- Capital Goods Scheme
- Robinson Case (this case changed a longstanding HMRC ruling. Now, in the case of a 125-year leasehold, where VAT is charged on rent and the leasehold is sold to somebody else who takes on the property and tenants, and opts to tax, this is now considered a TOGC.)

Basic conditions for a TOGC are that it is the same kind of business, transfers are immediate and consecutive, there is VAT registration, no significant break in trading, part transfers must be able to operate alone.

VAT and insolvency property

What are the differences between LPA Receivers and Administrative Receivers and what are the differences for VAT? How does HMRC view LPA Receivers?

- Administrative Receivers are treated as the taxable person under regulation 9
  - The LPA Receiver is treated as an agent of the borrower
- An Administrative Receiver is liable to submit VAT returns and is entitled to recover input tax relating to his taxable supplies
  - LPA Receivers have no entitlement to reclaim input tax
- A receiver appointed under the

Law of Property Act 1925 is unlikely to be allowed to register separately for VAT.
  – The directors / traders retain responsibility for their own VAT registration and all taxable supplies made by the business or the receiver must be accounted for on the businesses registration.
- An LPA Receiver's appointment may only cover certain assets and the receiver has no control over the remaining assets or affairs of the company.
- An LPA Receiver is therefore expected to make arrangements with the registered person so that tax is accounted for under the existing VAT registration.

Disappeared

If the person has 'disappeared', it is possible to amend the existing registration to: c/o Receiver.
Also, in exceptional circumstances, or where the registration has been cancelled, new registration is permitted, in the form of borrower company c/o the Receiver

In either case the receiver must be aware of risks in accepting too much responsibility for the borrower's affairs

Input VAT

If the LPA receiver is treated as an agent, supplies are made to and by the receiver, input tax is reclaimed through the receiver's own VAT returns and recharged with output tax on same return. Bad debt relief then claimed after six months.

Bad debt relief is applicable where the proceeds of sale are insufficient to cover all or part of the costs. The order of attribution follows normal rules ie allocate to the earliest supply but the mortgage comes first.
Basic attribution rules fall under Law of Property Act 1925 s105 (which requires proceeds to be first allocated to the selling costs).

Arrangements apply to VAT on following costs:

- Legal and estate agency fees relating to sale
- LPA Receivers charges relating to sale (but not where VAT on costs recovered through borrowers VAT return)
- Build-out costs, where VAT not previously recovered

Capping rule

There is a four-year capping rules on input tax claims, so it is recommended that regular input tax claims are made to avoid missing out.

CAPITAL ALLOWANCES

Capital allowances are the only form of tax relief against expenditure in property and can be a good negotiating tool. They can be written off against profits or can be carried forward. They are:

- General plant and machinery 18%
- Long life assets 8%
- Integral features 8%

- Long life assets – defined as useful life over 25 years
- Integral features
  - Kitting out costs
  - Lifts
  - Escalators
  - Central heating
  - Air conditioning
  - Electrical lighting
  - Power and water systems
  - External solar screening

Billy concluded: "Yes, it's complicated! Seek expert advice early and while HMRC will sometimes refuse to give you an official nod, they'll accept your action if you go with the solution and give them fait accompli"."

Billy Cairns, Partner BDO

freehold reversions and management companies

Freehold reversion is another complex area for receivership. Peter Kimpton, head of the residential team and partner at TLT solicitors, gave an overview.

Sale of freeholds of flat developments and discharge consents

A common scenario: pre-receivership, block of 30 flats, freehold charged in favour of lender. 15 flats are sold off by way of long leaseholds by developer. Form DS3 (DS3 is the name of the discharge form sent to the Land Registry) is used by the lender for part discharge of charge of the 15 flats.

Post-receivership. The receiver sells 15 flats by way of long lease. Then the lender stops using the DS3 form and applies consent for grant of lease instead ie agrees the lease can be granted but says nothing about discharging the charge.

Result: the freehold interest is still subject to the charge, the first 15 sold are free from the charge while the remaining flats are subject to the charge.

The receiver now wishes to sell the freehold reversion but what happens when he or she sells the whole thing? If he or she sells the freehold the buyer cannot actually be sold the right to collect rent in respect of the discharged 15 flats.

Solution: Do not give up.

Scrutinise the wording of the legal charge, which may contain wide powers in favour of the lender and receiver.

e.g. "sell other if any property of the Borrower" or "sell, transfer, assign, lease the Charged Property and the Property as originally charged by the Borrower."

Next steps

- With this information to hand, it is advisable to return to the Land Registry and request a letter stating the receiver can deal with the whole of the freehold reversion.
- Landlord & Tenant Act 1987 – do not forget Section 5 here – the tenants may have the right to acquire the freehold
- Realise value – sell the freehold at full market value.

Fixing the freehold of a block of flats

A frequent scenario: pre receivership, block of 10 flats – four flats charged to the borrower, six flats in other ownership. The landlord company owning the freehold reversion is dissolved and the freehold reversion vests bona vacantia in Treasury Solicitor (or Duchies of Lancaster or Cornwall).

Post-receivership – a mess has resulted. There is no management, insurance or collection of service charges. It is difficult or impossible to sell the four flats for a fair value.

Solution 1

Try to "repair the wheel". But the charge may only be over the flats, not the freehold. Check the detail of the charge.

If the Charge allows it may be possible for the other six flat owners (or as many as possible) and the receivers for the other four flats to enter into an agreement to reacquire the freehold from the Treasury Solicitor. The receivers take the benefit of the agreement, not the burden, and the freehold is then vested in NMC.

Solution 2

It is not possible to "repair the wheel" because the charge powers are insufficient. It may, however, be viable to orchestrate the acquisition of the freehold by the other six flat owners by way of agreement.

The receivers take the benefit of the agreement, in their personal capacity, but not the burden. The risk here is acting as principal. The rest is as in Solution 1.

With both solutions, receivers have the benefit of:

- Proper management and insurance
- Issue of shares or membership certificate to ultimate purchasers
- Contribution of share of costs of "repairing the wheel"
- Realise value by selling flats at market value.

Recreating management companies pending disposal of remaining flats

Scenario: Pre-receivership, block of 30 flats, freehold landlord, charged by borrower, management company to become freeholder on sale of all flats 15 flats are sold off with three-part lease with the management company, management company dissolved.

Post receivership Problems – there is little or no management, insurance and/or collection of service charges. It is difficult or impossible to sell the remaining 15 flats for a fair market value.

Possible solutions

- The "missing link" could be recreated by receivers forming a new management company (NMC) and acting as officers of that company.

There are however risks here. Receiver's powers are limited under the charge and they must therefore act in their personal capacity. Proceed with caution.

- halfway house solution – an NMC can be formed by Receivers but kept "on shelf" while insurance, management and service charges are managed and collected by the receivers under powers contained in the charge. Sale agreements of flats must govern the link to NMC and the exit procedure for receivers

• Sale Agreement (with general indemnities in favour of receivers) provides an exit procedure:

- Receiver to transfer freehold reversion to NMC on sale of last flat
- Buyers to be appointed as directors or officers of NMC (and must deliver form AP01)
- Delivery of NMC documentation and address
- Transfer of trust funds and cancellation of insurance
- Resignation of receiver as director/officers of NMC.

Whilst not a perfect solution, the result of this is that the value of the flats is realised, the transfer of freehold to NMC achieved, the receiver's risk is limited (but will always be an issue), the "missing link" is in place.

Foreign corporate freehold issues

Pre-receivership

Scenario: A block of 100 flats. The freehold of the flats is charged by the foreign company borrower. Sale of flats by proposed grant of long leases.

50 flats are sold off, the foreign company is then dissolved.

Result:

- Freehold does not vest with Treasury Solicitor as bona vacantia because the company is not formed/registered under the Companies Acts
- Freehold escheats to the crown.

Definition of "escheat"

- English law based on tenure system
- "Freeholder" not absolute owner but "tenant" of Crown
- If "tenancy" comes to end, land may become subject to escheat which means the land vests in the Crown
- English, Welsh or Northern Ireland freeholds of dissolved foreign companies do vest in the Crown.

Peter Kimpton, TLT Solicitors

Assets of Community Value

It may be new but it already needs attention. Julian Mant, commercial real estate specialist and partner at solicitors TLT, talked us through the background to the legislation surrounding Assets of Community Value (ACVs).

ACVs form part of the Government's big society agenda, explained Julian. They are designed to 'empower' local communities by making them aware of the potential sale of an ACV and providing the community with an opportunity to bid for it.

The legislation is poorly drafted. TLT solicitors have already published on this and have been liaising with Government about suggested amendments. Effective since 21 September 2012, the main problem for fixed charge receivers is that they are not adequately catered for by the exemptions to the legislation.

What does ACV legislation do?

Brought in as part of the Localism Act 2011 (and operated in England under the Assets of Community Value (England) Regulations 2012), the legislation gives communities the right to bid for an ACV. Crucially, it gives the ability to slow down a disposal for up to six months – during which time value can erode. Contrary to what many believe to be the case, the legislation does not force property owners to sell ACVs to community bidders, or give them any right of first refusal or restrict at what price an ACV may be sold. Likewise, it does not prevent an ACV from being sold on the open market. What it does do is allow time for a community group to prepare and submit a bid before the ACV is sold.

What can be an ACV?

Some examples of ACVs are: village halls, local parks, sports grounds, pubs, buildings or land of local historical value.

Three criteria must be fulfilled for a building or land to qualify as an ACV:

1. The ACV must be "land" within the meaning of the Localism Act 2011. This includes a building (or part of a building), land (covered in water or otherwise) part of any other structure, mines and minerals and "any estate, interest, easement, servitude or right in or over land".
2. The ACV's primary current use must further the social well being or the social interests of a local community.
3. It must be realistic to think that the continuation of the primary use will further social well being or the social interests of the local community.

Julian described the second and third points as "completely subjective" with "lots of room for argument."

In addition – and to cater for properties which may already be boarded up – any land not covered by the above could still be an ACV if:

- There was a time in the recent past when the actual primary use of the building or land furthered the social well being and interests of the local community; and
- It is reasonable to think that in the next five years there could be a primary use that furthers the social well being and interests of the local community.

What are "social interests"?

These are defined as:

- Cultural Interests
- Recreational Interests
- Sporting Interests

These are wide subjective terms. Manchester United supporters, for example, have recently had Old Trafford listed as an ACV. The owners lost their appeal against the ACV listing and must now give the supporters appropriate notice before they can undertake a "relevant disposal" of the ground. It is unlikely that the legislation was designed to cater for scenarios such as this.

ACV Nominations

Not surprisingly, only 'local people' can nominate a property as an ACV. This is presently done by way of a Community Nomination which could come from a:

- Parish Council (England) or Community Council (Wales); or
- Voluntary or community body with a local connection to the land. This could be a neighbourhood forum, an unincorporated body of at least 21 members, a charity, a company limited by guarantee, an industrial and provident society or a community interest company.

Property owners should receive a letter from the local authority (LA), who informs the Parish Council, the freehold owner, the leasehold owner and any lawful occupant of the nomination.

A property owner may challenge the listing.

So what's the problem?

No "relevant disposals" of an ACV can take place unless a prescribed procedure is followed – if it is not, the transaction will be "ineffective" (which is taken to mean void).

Relevant disposals catch:

- Freehold sales with vacant possession.
- The grant of a lease for more than 25 years with vacant possession.
- The assignment of a lease with vacant possession which when granted was for more than 25 years.

The Seven-Step Process to dispose of an ACV

1. LA receives notification of relevant disposal from property owner.
2. Six-week interim moratorium starts.
3. LA notifies nominator and publishes to community.
4. Community group expresses interest in bidding.
5. Six-month full moratorium.
6. Community group prepares business plan and seeks finance.
7. End of full moratorium – at which time property owner can sell to whom they want. There then follows an 18 month protected period in which sales can take place without reference to the legalisation.

Problem: exemptions and fixed charged receivers

A number of categories of "relevant disposal" are exempt from the ACV legislation: Gift, death, intra family

or intra group transfers, transfer of a business as a going concern (TOGC), insolvency proceedings and sales under security. Exemptions which may be considered by fixed charge receivers:

TOGC: Under section 95(5) of the Localism Act 2011, a TOGC is exempt if the disposal is of an estate in land on which a business is carried on and the business at the property is sold as a going concern at the same time and to the same person as the property.

Sale under security: Schedule 3(6)(i) of the ACV Regulations 2012 says that a disposal which takes place where the seller exercises a power of sale and that power arises by way of security for a debt is an exempt sale. This does not help fixed charge receivers as it is the lending bank that has the power of sale under the security documents and not the fixed charge receiver. However, if the sale is with vacant possession, fixed charge receivers can rely on Schedule 3(6)(i) if the bank goes into possession and signs the contract and transfer. This solution is only advisable where there is a simultaneous exchange and completion and so is not available for auction sales.

Insolvency proceedings: Schedule 3(7)) of the ACV Regulations 2012 state that a disposal pursuant to insolvency proceedings is also exempt from the ACV legislation. This exemption does not help fixed charge receivers as their powers do not come about due to the Insolvency Rules 1986 but rather the Law of Property Act 1925.

Advice in Summary:
Check if the property is an ACV. If it is, are you in the protected period? If not, is there an exemption to the legislation that can be relied on in order to conduct a quick sale?

Julian Mant, TLT Solicitors

If there is not, do not try to get around the legislation because your contract will be void.

when to wade in and trade?

Traditionally there has always been a nervousness around trading in receivership but Abigail Hadfield, corporate recovery specialist and associate with solicitors TLT, put forward a strong case for giving the option more thought.

"In many cases, issues of concern can be managed away so you can offer trading as a credible option to lenders to enhance value, whether we're talking about an individual borrower or corporate," said TLT associate Abigail Hadfield as she gave a step by step guide to doing it.

Minimise the risks

Power to trade? – Before doing any other preparation, ensure first that you have the power to trade the borrower's business. The security of many institutional lenders, but not all, now includes such a power. You could ask for a copy of the security review, which may have been prepared for the lender, to check this point.

Which assets? – Check which assets comprising the business would need to be transferred on a going concern sale. Is there a contractual right to deal with them within the charge document? Check carefully as there are huge discrepancies in the lender documentation in relation to these powers. Generally the older the charge, the less likely the relevant powers will be included.

Solutions when no power to deal with business assets

If the charge only contains a power to trade, all is not lost, said Abigail – there are still plenty of actions you can take.

If you want to transfer the business of the borrower together with the property, however, a power to trade will not be enough. Your options will very much depend on the type of business and the mix of assets involved but:

- You could ask the borrower to sign the sale agreement and sell the assets for you.
- If the borrower refuses to co-operate or has disappeared, there may be a power of attorney in the charge granting rights to the lender (or its receivers). This might allow the receiver to complete various acts in the borrower's name. Take advice.
- On a more practical level, you might be able to minimise the assets that need to be transferred to a purchaser. For example, you might be able to run down stock prior to completion in co-operation with the purchaser, who would build up stock on his own account so that he could take over the business seamlessly on completion. Without a transfer being necessary.
- You may have to simply remove from site any problem assets not essential to trading.

It is important to act within your powers under the charge, otherwise you may face personal liability for your actions and such liabilities may not be picked up by your statutory indemnity.

Duties

When you decide to trade, you take on additional duties and may be dealing with assets in which a number of other parties have an interest.

It is vital therefore to be clear on your duties and to be able to justify everything that you do. You must have a reasonable belief that trading will enhance the outcome for your appointor; don't trade speculatively. Evidence this decision and keep records in your file. If you do decide to trade (and you are not obliged, as receivers, to do so), you must take reasonable steps to trade profitably, with appropriate care and diligence.

Trading liabilities

The level of trading liabilities may be a potential barrier to trading in receivership. Liabilities incurred in a receivership are either unsecured liabilities of the borrower or personal expenses of the receiver. Due to the receiver's statutory indemnity, his personal liabilities in the receivership will be paid out of the lender's pot of realisations. Understandably, therefore, lenders are keen that personal liabilities are minimised.

Ransom demands

The receiver is at risk of enforcement action and ransom demands from other creditors. Unlike administration, there is no statutory moratorium or other protection from creditors, such as utility companies.

It is vital, therefore, to familiarise yourself with the company accounts at the pre-appointment planning stage to get to know the creditor profile of the borrower to ascertain where the risks lie.

If you are going to pay a ransom payment (thereby paying a particular unsecured liability ahead of other creditors), make sure you are justified in doing so.

Abbey Hadfield, TLT Solicitors

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A glance at the London area option will show how a profile is incorporated against the member's name.

Should you wish to add a profile against your name, please e-mail to teresa@nara.org.uk using no more than 250 characters (including spaces).

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Members and other readers of narator are reminded that any change in contact details should be notified to the nara office as soon as possible.

Other than making sure this newsletter and other mailings are received, this is particularly important for members as any e-mail alert may be lost and any lender enquiry may be provided with the incorrect personal details.

You can also alter your own details, including adding geographical regions to your practice area, via the members area of the website.

Have you thought that what you are now reading might be of interest to someone else?

If so we can add the name and contact details to the nara mailing list. An e-mail to the nara office (teresa@nara.org.uk) advising us of the name and address of the requested recipient(s) is all that is required.

nara would like to thank the sponsors of the 2013 Training Days

dates for your diary

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

22 April
Part II RPR Exam Revision

29 April - Manchester / 30 April - Leeds
6 May - London / 7 May - Birmingham
Trainee members networking drinks in London, Leeds, Manchester and Birmingham

21 May
Spring Conference

6 and 19 November
Training Days

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

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