

COMMERCIAL PROPERTY LEASES CONFERENCE

Tenant Default

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Tenant Default

- Introduction
- Case Study

Oops' options against Highly Geared

- Commercial Rent Arrears Recovery (“CRAR”)
- Rent Claim
- Forfeiture
- Notice under s.81 Tribunals, Costs and Enforcement Act 2007
- Surrender
- Rent Reduction
- Rent Deposit
- Statutory Demand/Winding Up

Commercial Rent Arrears Recovery (“CRAR”)

- What assets are there to be seized?
- Goods must be on premises and belong to Highly Geared.
- Can only be used to recover rent
- CRAR will waive right to forfeiture based on current arrears

Rent Claim

- CPR Part 7 Claim
- Judgment in default/summary judgment
- Enforceable against any of Highly Geared's assets
- Court Fees
- Opportunity for spurious defences/counterclaims
- Will amount to a waiver of the right to forfeit based on current arrears

Forfeiture

- Available following expiry of grace period and if no waiver
- Will end the lease absolutely
- By service of proceedings or by peaceable re-entry
- Sub-lease will also terminate
- Relief from forfeiture
- Oops will lose any future rights against Optimistic Factoring Co Ltd and Mr Getty and Mr Gates

Surrender

- Significant advantages if Oops wants possession
- Sub-lease will be unaffected
- Oops will lose the benefit of any future rights against Mr Gates and Mr Getty

Notice Under s.81 Tribunals, Costs and Enforcement Act 2007

- Statutory right to require Going Under to pay rent direct
- Must be arrears due under the headlease
- Notice requires Going Under to pay specified arrears until notified amount paid
- Once arrears have been cleared Oops will have to service fresh notice
- If Going Under fails to pay Oops is entitled to use CRAR

Rent Reductions

- Concessions agreed with Highly Geared may result in release of Mr Gates and Mr Getty and probably also the Optimistic Factoring Co Ltd
- Safest course is to get third parties to sign up to variations

Rent Deposit

- What are the terms of the deposit agreement?
- Who provided the rent deposit?
- Remedy of last resort

Statutory Demand/Winding Up

- Notice requiring payment of an undisputed debt within 21 days
- Sum due in excess of £5,000 for individuals; £750 for companies
- If not paid a presumption of insolvency arises
- Quick, easy, cheap process if it leads to payment of rent
- Is it in the creditor's interest to petition to wind up?

What steps might Oops take against third parties

- Optimistic Factoring Co Ltd
 - Does the Optimistic Factoring Co Ltd have any continuing liability to Oops?
 - Service of s.17 notice necessary
 - Right to call for an overriding lease

- Mr Getty and Mr Gates
 - Services of s.17 notice not necessary for current guarantors
 - No right to call for overriding lease

What steps might Highly Geared take?

- Company Voluntary Arrangement
 - Informal binding agreement
 - CVA binds anyone entitled to vote at the creditor's meeting
 - Guarantors not automatically released
 - Right to forfeit
 - Right to rent

- Creditors Voluntary Winding Up
 - Right to forfeit
 - Right to rent

Administration

- Liability for rent?
 - *Pillar Denton Ltd & Ors v Jervis & Ors [2014]*
EWCA Civ 180
- What if the Administrator finds a potential assignee?
- What if the Administrator assigns or parts with possession in breach of the terms of the lease?

What steps might other creditors take?

- Compulsory Winding Up
 - Right to rent
 - Right to forfeit
 - Disclaimer
 - Recoveries from Directors
 - Breach of duty/misfeasance
 - Fraudulent trading
 - Wrongful trading
 - Antecedent Recoveries
 - Preferences
 - Transactions at an undervalue

Last thoughts