Corporate Rescue and Insolvency Journal/2017 Volume 10/Issue 1, February/Articles/Tenant troubles: a minefield for the receiver landlord - (2017) 1 CRI 11

Corporate Rescue and Insolvency

(2017) 1 CRI 11

1 February 2017

Tenant troubles: a minefield for the receiver landlord

Features

Mark Prior

is a director in the restructuring and insolvency practice based in Squire Patton Boggs' Manchester office.
Email: mark.prior@squirepb.com

* * * * * *

KEY POINTS

· Managing tenanted property can be a challenge for receivers. In many cases it is necessary to maximise the potential realisations to the appointing bank or financier.

· We look at five key considerations that a receiver needs to be aware of when asked to manage residential tenanted property: (i) his or her powers; (ii) understanding the occupational arrangements; (iii) collecting rent and other monies from the tenant; (iv) understanding the actual property itself; (v) and the impact of the changing statutory regime.

* * * * * *

SUFFICIENT RECEIVER POWERS

Section 109 of the Law of Property Act 1925 (LPA 1925) sets out the statutory powers of a receiver. These are limited and in the main deal with the collection of rental income. If, for example, the receiver is to grant a lease (or accept a surrender) under LPA 1925, he or she would need the sanction of the court. Most bank charges supplement and/or amend the powers contained in LPA 1925 with an additional bolt-on list of powers. In most circumstances, this combination of powers will allow the receiver to act as landlord

generally, but the range of powers and any limitations need to be established at the outset.

The receiver needs to discuss the requirements of his or her appointor at the start. Will the receiver need to issue further leases? Are there issues with the property that need to be addressed to improve sales value? Is there a problem tenant who needs to be removed and how difficult will that be? Tenants have been known to go to serious lengths to remain in a property they do not want to vacate. For example, the recent case of *McDonald v McDonald* [2016] UKSC 28 confirmed that a private tenant cannot rely on the Human Rights Act 1998 in an attempt to retain possession. It took the receiver over eight years to obtain possession in that case.

Whilst it may be impossible to address every angle, the more due diligence that is handled early on, the better it is for the receiver and his/her advisers to ensure that the instruction can be managed efficiently.

Receivers should also consider how their day-to-day operations will be affected if a trustee in bankruptcy, administrator or liquidator is appointed, and whether and what indemnities may be required in the course of the receivership. It is commonplace for a receiver to ask for advice on his or her agency position and any required indemnities at the start of the receivership, or if an insolvency practitioner is subsequently appointed to the borrower.

OCCUPATIONAL ARRANGEMENTS

The receiver needs to understand what the tenant's duties are, how rent is paid, how insurance and service charge is dealt with, and how the contractual provisions actually correlate with the reality (for example, does the insurance policy cover the agreed set of insured risks? Are the services being provided in accordance with the lease?) It is important to understand what rights the landlord must observe, and what obligations the landlord has, to ensure that the lease is complied with on both sides (since claims could be brought by tenants for non-compliance).

We regularly encounter situations where the formal term of the lease has come to an end and the receiver needs advice on the tenant's rights of occupation, for example where there is a lease over only part of the property when a greater area is actually occupied, or where there may be other tenancies in place, such as agricultural tenancies. Other issues include receivers assuming the landlord's role in leases that were registrable at the Land Registry but were not in fact registered. Failure to register a registrable lease can cause some issues, mainly for a tenant, but these wrinkles can affect marketability and saleability.

The receiver must understand quickly who is in occupation and how that occupation is governed to enable him or her to obtain legal advice on the position and address the situation accordingly.

COLLECTING RENT/SERVICE CHARGE

As one of the most important duties of a receiver landlord, the receiver should be completely clear what the property arrangements are and the rental position. It is critical that before the receiver accepts a rent payment, he or she is clear that it is correctly due under the correct tenancy document. There have been instances where rent has been collected from someone whose occupation had not been regularised but the receiver's collection has 'rubber stamped' the occupation. A clear line of communication with the tenant is also important so they understand the rent is due to the receiver.

The calculation of service charge in a lease, particularly where there are multiple tenants, can be extremely complex and is often handled by managing agents. The receiver should decide whether those agents should be retained (in our experience this is often the case) to enable the smooth running of this collection.

UNDERSTANDING THE PROPERTY

It is worth considering whether to commission a Report on Title to understand what issues there are with a

property and whether it makes sense financially to rectify any issues to improve marketability and saleability. It could help increase the value and speed with which a sales transaction can take place. This, of course, needs to be weighed against the individual circumstances of each property (eg value/condition/any obvious issues on inspection) and the appointor's exposure (ie is the cost and time involved in this report likely to be worthwhile or viable?).

Early analysis can also help to understand if there is environmental exposure or issues, and

ensure that the receiver does not do anything else to compromise or prejudice the position.

THE STATUTORY REGIME

This article cannot highlight every statutory provision that can affect receivers as landlords, but receivers need to be aware that the law in this field is continually undergoing changes and it is important to be up to speed on legal developments.

WELSH LEGISLATION STARTS A NEW ERA

The Renting Homes (Wales) Act 2016 is a significant new piece of legislation that updates how residential property is let in Wales. The new regime has its origins in a Law Commission report, which made recommendations for implementation of such legislation in both England and Wales (the recommendations were rejected in England).

The Act overhauls old legislation in Wales and creates a standard occupation contract (based on standard AST contracts) and a secured occupation contract (based on secured tenancy contracts). Most types of residential occupation will become an occupation contract and tenants are likely to receive the new legislation most positively. Landlords will have to ensure the property is fit for habitation, and also provide a written statement setting out their rights and responsibilities to the tenant. There is a minimum occupation period of six months. The regime only allows changes to the terms of the tenancy where the variation would improve the position of the tenant, and contains strict timescales and conditions that landlords need to comply with when faced with any application for consent under the occupation contract. The legislation does include some provisions which landlords will find helpful, such as introducing provisions which allow landlords to repossess a property without the need for a court order. Any receiver involved or asked to become involved in dealing with residential properties in Wales needs to become familiar with the new regime.

Since 23 November 2015, the Housing (Wales) Act 2014 has imposed a requirement for the majority of domestic landlords operating in Wales to register themselves with Rent Smart Wales, and provide and keep certain details updated. Furthermore, landlords must obtain a licence if they directly collect rents, or are involved in property management or lettings; otherwise they must use and declare a registered agent. A licence will be granted subject to conditions, which if breached, could lead to a revocation of the licence. Receivers acting as landlord should register and obtain any licence, to ensure they do not risk incurring a fine or other penalty.

CHECKLIST FOR RENTING IN ENGLAND

As noted, England does not yet have any similar consolidation legislation and there are growing calls for this to happen. In the meantime, piecemeal additions to English legislation have continued. For example, from 1 October 2015 new requirements derived from the Housing Act 1988 required landlords to serve the most up-to-date version of the *How to rent: checklist for renting in England* at the commencement of a tenancy or a renewal tenancy, along with the deposit paperwork (if a deposit has been given), gas safety and energy performance certificates.

Notice to quit cannot be served until these have been provided. If they are not provided, and notice to quit is served, then it is invalid. There could be a number of pitfalls here which could invalidate many notices to quit, and receiver landlords, especially those who might need to recover property from tenants, will need to ensure and maintain compliance with this.

ENERGY STANDARDS

Many residential tenants can already request their landlord makes energy efficiency improvements (such consent not to be unreasonably withheld) pursuant to the Energy Efficiency (Private Rented Property) (England and Wales) Regulations 2015. Over the next few years, the regime will widen so that, for example, from April 2018, it will be unlawful for any new lettings of residential or commercial properties whose energy rating is less than 'E' (this may change over the years) to be made whilst they are below this standard. In the future all residential and commercial lettings, new or existing, will have to comply with certain energy standards.

Receivers should consider at an early stage whether these regulations could have an impact on the job they have been instructed to do.

STATUTORY PROTECTION

Various legislation is in place to protect tenants, including the Landlord and Tenant Act 1954 for business tenants, the Housing Act 1985 (public sector landlord) and the Housing Act 1988. If agricultural land is involved, the Agricultural Tenancies Act 1995 or Agricultural Holdings Act 1986 might apply. Tenancies granted before 15 January 1989 are governed by the Rent Act 1977.

For business tenancies a receiver will, if possible, want to exclude the protection in the grant of any new tenancy by way of a simple notice procedure. A receiver who inherits business tenancies already protected needs to understand and take advice about the tenant's rights, since the business tenant may be able to obtain a new lease, and even an expired contractual tenancy continues and can be assigned. In practice, it may be helpful to any ultimate sale by a receiver to have business tenants in place -- so it may be far from a disaster -- but it is important to understand the position so it can be dealt with appropriately.

Residential tenants will often be in occupation on assured shorthold tenancies under the Housing Act 1988. There is regulation about when, and in what circumstances, the tenancy can be ended and specific grounds for possession so it is important to understand the current statutory position in this respect.

CONCLUSION

Managing property as a receiver landlord requires the requisite powers to enable execution of the appointor's wishes, knowledge of the property, an understanding of the terms of occupation and the position inherited, and knowledge of the statutory regime. With good preparation and planning, this minefield can be successfully navigated.

* * * * * *

Further reading

- Should lenders with security over leases be concerned? (2014) 3 JIBFL 160

- LexisPSL Restructuring and Insolvency: Practice notes: Effect of appointment of LPA receiver on property

· Real Estate developments in insolvency (2014) 3 CRI 116

* * * * * *