

Rent as an administration expense – a second victory for landlords!



In a decision well received by Landlords last year the High Court held in *Goldacre (Offices) Limited v Nortel Networks UK Limited (in administration)* [2009] EWHC 3389 (Ch) that if an administrator occupies premises for the benefit of an administration then rent for the period of occupation is automatically treated as an expense of the administration pursuant to Rule 2.67 of the Insolvency Rules 1986.

The decision in *Goldacre* undoubtedly strengthened the position of landlords at the expense of the concept of “rescue culture” previously adopted in *Re Atlantic Computer Systems* [1990] EWCA Civ 20. Nonetheless many commentators believed that there would be a subsequent return to the “common sense” approach of allowing the court to exercise its discretion.

Goldacre has however been followed by the Scottish Courts in the case of *Cheshire West and Chester Borough Council -v- Springfield Retail Limited (In Administration)* (decided by the Outer House of the Court of Session in Edinburgh on 13 August 2010). The facts of the case are as follows:

On 25 March 2008 administrators were appointed. They traded the business from the landlords’ premises until 2 May 2008. On 19 May 2008, they sold the business to Art Retail Ltd (“ARL”) and granted ARL a licence to occupy the premises (despite a provision in the lease that the tenant covenanted not to underlet, charge, part or share possession of the premises) until the earlier of (a) the date of a formal assignment of the lease, or (b) 18 November 2008.

This arrangement was conveyed to the landlords’ agents by letter after the event. The agents requested further information in relation to ARL to enable them to consider the grant of the licence. No information was ever provided and no assignment of the lease was ever agreed. No executed draft licence was ever received by the administrators, or anyone else,

and no rent for the period of occupation was ever paid by the administrators.

On 20 November 2008 the administrators wrote to the landlords’ agents advising that the licence had terminated. In May 2009 the landlords changed the locks bringing the lease to an end.

The landlords petitioned under Paragraph 74 of Schedule B1 to the Insolvency Act 1986 for an order that the administrators pay all sums due under the lease from 2 May 2008 until 1 April 2009 as an expense of the administration of the company.

Whilst being attracted to the position adopted by the Court of Appeal in *Re Atlantic Computer Systems* Lord Menzies followed the decision in *Goldacre* that the court did not have any discretion in deciding what is or is not an expense of the administration. He held the matter should be considered exclusively by reference to the insolvency legislation and that if a rental liability fell within the Insolvency Rules it would be payable as a matter of mandatory obligation.

Lord Menzies outlined the factors to which he had regard in the event that he was wrong in his judgment and the court did have a discretion when deciding whether or not rent falls to be treated as an administration expense. Those factors included:

- The fact that the administrators permitted a third party to occupy the premises in breach of the terms of the lease;
- The fact that they did so without giving the landlords prior notice of their intention;
- The fact that they allowed this occupation to take place without having received an executed licence;
- The fact that even in terms of the unexecuted licence there was no mechanism for enforcement of payment of rent; and

- The failure of the administrator to respond to the reasonable request for information by the landlords.

This case marks a second victory for landlords and a warning to all pre-appointment administrators to give very careful consideration to whether they intend to occupy trading premises before they are adopted as tenants, and if so when and how long for.

If you require any further information please contact Keith Maboney on 0117 926 4121 or by email at kwm@meadeking.co.uk

Happy Christmas!

Welcome to our Christmas edition of *The Detail*.

There is one New Year’s resolution which you might consider making. In our centre spread, our new tax-planning solicitor, Mary McCartney, has provided some helpful advice on typical questions which confront family businesses. We have devoted a significant part of our newsletter to this issue. How about considering the need for some forward thinking an ideal way to start the New Year?

In line with tradition, we have included our quiz with this festive edition of *The Detail*. We hope that you will have fun testing your knowledge of 2010 and try and win a prize!

Wishing you all a Happy Christmas and a prosperous, happy and fulfilling 2011!

Best wishes

Adam Chivers

Estate Planning

In these challenging financial times it is even more important to review regularly the structures that you have in place for effective estate planning, particularly if you own a business. In this article our fictional entrepreneurs Alan and Barbara ask us some questions about their own estate planning.

Alan and Barbara have three adult children, Colin, David and Elizabeth and a number of young grandchildren. Their business is a company Alan's Ark Limited ("AAL") supplying pet products. They do this in a number of ways, through a variety of shops, via catalogue and they now of course do business on line as well. Alan and Barbara each own 38% of the shares in Alan's Ark Limited with a family trust for their three children owning the other 24%. Alan and Barbara are the trustees of this trust. They come to our office armed with questions.

We last made wills when the children were young when we needed to appoint guardians for them. Do we need to review our wills now?

Wills are particularly useful for asset protection and inheritance tax mitigation, often using trusts. There were radical changes to trusts in the last few years which almost certainly affect the provisions in your current wills. We advise clients to review their wills every five years. This is particularly important now because of the changes to trust law and the tax treatment of trusts in the last five years.

None of our adult children have wills, They all have children and Colin is not married to his partner. Surely everything will pass to their partner or spouse. Do they need to do wills as well?

Without a will you are reliant upon the intestacy provisions which often do not provide for the people that you want to benefit on your death. In addition, they can result in cumbersome trusts for the family, thereby increasing the cost of administering the estate. Depending upon the size of their estates, it is by no means certain that David's wife and Elizabeth's husband will receive all of their estates and Colin's partner would receive nothing under the intestacy provisions.

Can our wills make provision for what will happen to our company shares after our deaths?

From what I know of your company the shares will qualify for Business Property Relief (BPR) on your death which means that 100% of the value of the shares will be exempt from inheritance tax. It would be sensible however to consider a discretionary trust in the wills for the shares in AAL ensuring continued control of the company for as long as possible by the right people. It would also be possible to include some form of plan for what would happen to the company if the driving force (in your case Alan) dies suddenly. Who would run the company, what would happen to the key staff, is key man insurance in place so that the family are not put into a forced sale position?

What would happen if either of us loses mental capacity at some point in the future?

Unless you have either Enduring Powers of Attorneys (EPAs) or the new Lasting Powers of Attorneys (LPAs) in place then, if you lose mental capacity either temporarily or permanently, due to an illness or an accident, you will also lose control of your assets. An EPA or LPA is particularly important for owners of a business.

We have a number of pension and life insurance benefits. Presumably we do not need to worry about these in terms of estate planning?

It is important to review all of these benefits to make sure that they are all written in trust in some form or another. Sometimes something as simple as a nomination or letter of wishes is required but it is worth considering whether you should set up private trusts to receive these benefits after your deaths. Not only will this mitigate inheritance tax within the family but the benefits would be paid out much more quickly after the death. Some pension trustees will not for example pay benefits under a nomination or letter of

wishes to trustees unless a formal pilot trust is in place to receive those benefits. A discretionary trust to receive the benefits is the most flexible arrangement and can keep value out of the families' respective estates for as long as possible, whilst still giving them access to those benefits. Your children will be wealthy in their own right and some forward estate planning on their behalf would be sensible.

You mentioned Business Property Relief (BPR) in the context of AAL.

100% relief from IHT is given if, for example, the value of the shareholding consists of unquoted shares in a company. This includes preference shares as well as ordinary shares. You should bear in mind that directors' loans to the company would not normally qualify for relief. You will also obtain 50% relief from IHT on the value of any land used wholly or mainly for the purposes of the business as you have voting control of the company. You do not need to have a majority holding. You have owned the business assets for two years so you will qualify on that score, and clearly you are a trading company if you look at the profile of the company "in the round". Take care however, if you have a substantial amount of cash in the company. If it is considered not to be required at the time for the trade BPR will not be available in respect of that cash.

I believe we have some agreements in place which provide for the sale of the shares on the death of a shareholder. Is this going to be a problem?

Indeed it would. If at the time of your death you have a contract to sell the shares you will lose BPR because effectively you have cash at that stage. You will need to look at those agreements again carefully and restructure them to provide for options rather than binding contracts.

Is there anything further that we can consider in our life times about the shares in AAL?

You might want to consider separating control of the company from its value, at the same time protecting the assets from future financial or other difficulties within the family. I am thinking here of the possibility of matrimonial breakdown or bankruptcy in the case of any of your children. A trust, set up in your lifetimes, with you as trustees (like the existing family trust) can maintain this control and provide this protection.



Mary McCartney,
Meade King's
Private Client
expert

Health Check

Would Capital Gains Tax (CGT) not be a problem here as we have held the shares in AAL for some time now and they have increased in value?

Fortunately, you do not need to worry about CGT in this situation because of the availability of hold over relief. There are, however, conditions for this and I would want to advise you in more detail before committing you to this course of action.

Would we face an IHT charge if we put some of the shares in trust now?

Again, you need not worry about IHT at this stage because of the availability of BPR, as I mentioned earlier.

We have a fair bit of cash sitting on deposit which we would like to pass down to the grandchildren to help with school fees. We also have a bit more income than we need at the moment and would like to pass that down to them as well. Is there an easy way to do this?

A Grandchildren's Trust Fund would be a very useful vehicle for these gifts. Because you will be giving away cash CGT will not be a problem. IHT would only be payable if you died within seven years of giving away those gifts. You can also use the normal expenditure out of income exemption for the gifts out of income if you were doing this on a regular basis.

Alan's mother died in the last year leaving a substantial estate to Alan. Is there an easy way to pass this down to the children tax free?

Yes indeed. Thankfully you are still within the two year time limit to execute a Deed of Variation of Alan's mother's will. You can then pass some or all of that inheritance down to the children either outright or in trust, in a tax neutral way. The gifts will simply be treated as a re-writing of grandma's will and not as gifts by you.

Barbara is not in very good health at the moment. Is there anything we should be considering in the event that her illness becomes terminal?

There are strategies that you can put in place to take advantage of BPR and also the uplift in value that assets achieve for capital gains tax purposes on a death. If you are able to make some forward planning in this area it would make a significant difference to the family's estate planning as a whole.

We also own an investment property. Is there anything we can do here in terms of estate planning?

Unfortunately, it will not qualify for BPR but there is a scheme which you might want to consider which would exchange part of the value of the property for a debt which you would then transfer into a trust for the children or grandchildren. This, however, is a complex scheme and we would need to look at all the tax consequences of it very carefully.

For further information on estate planning please contact Mary McCartney on 0117 926 4121 or email her mm@meadeking.co.uk.



Working families and flexible working: **handle with care**

The former government promised, among other things, not only to unify the provisions for equality (hence the new Equality Act 2010) but to continue to assist working families and carers to achieve more choice in the balance of work and family life.

Since 2003 parents of children under the age of 6 (or if disabled under 18) have had the right to request flexible working. In April 2007 this right was extended to parents of children under the age of 17 and to carers of adults. Unfortunately this has also seemingly widened the scope for potential complaints.

As the majority of flexible working requests are granted by employers however there is a relatively small body of case law on the subject. The claims that have emerged have involved issues arising from sex, age and or disability discrimination.

In *Starmer v British Airways* [2005] a female pilot brought a claim for indirect sex discrimination after BA refused her request to work part-time. In 2007 the EAT upheld the tribunal's decision that BA had discriminated against her on grounds of sex, as a requirement to work at least 75% of a full time post was a 'provision, criterion or practice' that was to her detriment, and would be to the detriment of a considerably larger proportion of women than of men. BA could not establish justification as a defence.

In *Walkingshaw v The John Martin Group* Mr Walkingshaw claimed direct sex discrimination on the basis that his employer refused his application to work part-time in order that he could spend more time with his son. The Tribunal found that the employer had always granted requests from female employees for reduced hours for family reasons. Employers should ensure that all such applications receive equal consideration.

In 2008 in *Coleman v Attridge Law* the European Court decided that 'discrimination by association' could be unlawful. Mrs Coleman claimed she was discriminated against and harassed because of her child's disability. The argument was accepted. Direct discrimination is prohibited even if it is not against the disabled person him or herself.

With these matters in mind requests for flexible working should be handled with care. To avoid some of the pitfalls employers should ensure that:

- there are procedures in place for handling flexible working applications;
- they scrutinise the reasons for rejecting any request;
- they consider whether there are any potential claims for discrimination or any equality issues before turning down the request;
- they consider whether a trial period could be offered before making any final decision.

There is a detailed statutory procedure to follow upon which further advice may need to be sought but as a broad guide here is a checklist on Flexible Working

Checklist:

Who can make a request?

Employees who have been continuously employed for at least 26 weeks, and who care for either a child or an adult.

For a child

- A child under the age of 17, or 18 if the child is disabled. (From April 2011, the right will be extended to cover all children under the age of 18.)
- The employee must have responsibility for the child's upbringing and be either: the mother, father, adoptive parent, guardian or foster parent, OR the spouse, civil partner or partner of the child's mother, father, adoptive parent, guardian, or foster parent.

For an adult

- a person aged 18 or over who is in need of care; and is
- one of the following: married to, the civil partner or partner of your employee, a relative of your employee OR falls into neither category but lives at the same address as your employee.
- Care giving activities are likely to include: Help with personal care (for example, dressing or bathing), help with mobility (for example, getting in and out of bed) and or giving or supervising medicines.

What kind of change can be applied for?

Firstly, an employee will need to make a written request for flexible working and can ask to change the hours they work, the times they work and or the location in which they work (including for example, by asking to work from home).

In doing so, the employee must set out the proposed working pattern and how they believe the business can accommodate it.

The employer can request evidence of your employee's relationship with the person they are caring for before agreeing to your request.

Procedural points

Within 28 days of receiving the request, the employer must arrange to meet the employee to discuss the application.

Within 14 days after the meeting the employer must write to the employee to either agree to the new work pattern and set a start date, or to provide grounds for the rejection of the application and set out the appeal procedure.

Rejecting or refusing the request

The right is to make the request, not to a new flexible working pattern. Employers may have legitimate reasons for being unable to accommodate the request.

In rejecting a request, employers should identify one or more of the following grounds as the reason for doing so:

- It would have a detrimental impact on the quality of the business' product or service.



- There is insufficient work available during the times when the employee wants to work.
- There are plans for structural changes to the organisation of the business.
- The work cannot be re-organised among existing staff.
- There would be a detrimental impact on business performance.
- There is an inability to recruit the additional staff that the employee's proposal would require.
- There would be a detrimental impact on the business' ability to meet customer demand.
- The burden of additional costs that would be incurred.

Complaints and Remedies

The remedies for failing to comply with the Flexible Working provisions themselves are still relatively limited the real problem lies in the fact that most complaints are coupled with a complaint for one (or more) of the various strands of discrimination, now under the Equality Act 2010. Compensation in discrimination cases is unlimited.

If you require further information please contact Nicola W Hughes on 0117 926 4121 or by email at mwb@meadeking.co.uk

Meade King charity quiz

Friends and clients of the firm joined partners and staff in October for Meade King's inaugural Charity Quiz, which this year was in aid of The Julian Trust, our charity of the year.

The event was a great success and not only did those attending have a thoroughly enjoyable evening, but we also managed to raise a total of over £1,000 for the charity.

Many thanks to all of you who supported this event, either attending or donating money or prizes for the raffle, and in particular a mention for our sponsor, Melanie East Photography, whose sponsorship of the event meant that every penny raised went to charity.