

WHEN DOES A LANDLORD HAVE PRIORITY RIGHTS IN AN ADMINISTRATION?

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For the past few years there has been much in the news about the use of administrations as the favoured route for saving businesses and jobs. Administration has been designed to give a greater say to a business's ordinary creditors, and, hopefully, to enable them to receive a dividend out of the failed business assets even where there is a bank or other secured creditor involved.

This article is not intended to cover the benefits and pitfalls of the administration process. The key point is that once a company begins the administration process, which is often set up by the directors, there will be a temporary block (known as a moratorium) placed on all enforcement action by secured creditors including the Landlord.

The moratorium prevents suppliers exercising their rights (known as retention of title) to come into business premises and recover the stock which has not been paid for. It also prevents lessors of hired equipment from recovering that equipment or the Landlord from recovering items from the inventory

All this is intended to give the Administrator sufficient breathing space to find a buyer for the business and install the buyer in the business premises without the risk of forfeiture of the lease or seizure of moveable assets to satisfy arrears of rent

Once the Landlord has been notified of the start of the administration process it cannot exercise these usual remedies without obtaining the consent of the Administrator or of the Court. The Administrator is unlikely to consent if he expects to find a buyer of the business as a going concern and needs to keep trading, and the court will normally allow the Administrator to carry on with his task if there is a reasonable prospect of success.

Successive court actions brought by Landlords to test the limits of the moratorium and the powers of the Administrators have now firmly established a number of principles as follows:-

1. Any rent which falls due for payment after the date of the Administrator's appointment, whilst those premises are being used by the business, must be paid as a priority out of the assets collected by the Administrator. This will be treated as "an expense of the administration" which must be paid before liability to other creditors.
2. Rent which falls due before the date of appointment will not be treated as an expense of the administration.
3. Rent which would be covered by the first principle above will still be treated as an expense of the administration even if the business has been sold by the Administrator to a buyer without obtaining the Landlord's licence to assign the lease to the buyer. In such a case, the Administrator typically grants the buyer a temporary licence to occupy the business premises whilst Landlord's consent to assign is obtained.

When granting a temporary licence to the buyer, the Administrator may seek security for future rent which he will have to pay to the Landlord but which must be funded by the buyer. This could be by taking a cash deposit or seeking a personal or parent company guarantee.



Whilst there is no evidence that Landlords have been acting unreasonably in seeking to protect their position, it is clear that the Courts accept that Landlords are entitled to a degree of priority because of the impact of the moratorium, by not allowing Administrators to “freeload” at the cost of the Landlord.

For further advice, contact Nigel Cook by telephone on [01306 502294](tel:01306502294) or by email: n.cook@downslaw.co.uk.

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