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naratOr

in this issue

training day edition

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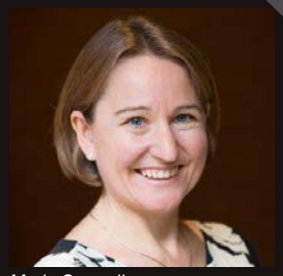
The Association of Property and Fixed Charge Receivers



Maria Connolly
Chair

Welcome to the Spring edition of narator and in which we report on our successful training days held in London and Rochdale. As ever we explored both the latest developments affecting our everyday work, as well as addressing specific issues raised by you as being problematic or where practical guidance is required. We welcome your feedback and input into the focus of our training days in order that they are relevant to your case load. Many such items were included in these training days and I encourage you to continue to raise issues – whether as a practitioner or as an appointer – with us in order that we can continue in this vein.

Indeed, one of the very practical operational points arising from the sessions relates to the applicability of the Rent Smart Wales scheme to receivers. Julian has been sent off to Cardiff with instructions to come back with answers on whether receivers will be treated as landlords under the legislation with consequent obligations around registration and licensing: more on this no doubt over the coming months.

Our May conference is being finalised and I recommend you note your diaries now.

I encourage our members to take the opportunity to bring along guests, not only for the purpose of hearing our quality speakers, but also to demonstrate the high quality technical skills training, strategic thinking and commitment offered by you the practitioner.

Stop complaining – and protect your PI cover

It is stressful to be on the receiving end of a claim against you; it costs time, goodwill, reputation and a lot of money. Bond Dickinson Partner Hannah Cane sets out the best protective measures.

Prevention is always better than cure and the protection of one's Personal Indemnity cover was no exception, advised Hannah Cane. Receivers should therefore look first to their risk management while being adept at handling a complaint or claim wisely in the event one came up. As receivers often had two masters with conflicting interests – the borrower and the lender – they were vulnerable to complaints of breach of duty.

First, receivers should scrutinise your contract with the lender.

"It is absolutely essential that you check the details of the terms of the appointment document in minute detail... challenge any requirements you are not happy with," she said.

Next it is imperative to communicate to the borrower your unique role from the outset, using the Nara booklet written for that purpose if appropriate.

In particular, it helps to clarify that you are not obliged to incur expense in order to get the best price, only to take reasonable steps to do so.

Hannah also suggested receivers consider carefully whether they have the expertise for the job before them and to keep up with their professional development training.

Internal systems were a vital part of risk management, which should include a robust diary system, peer review, internal reporting structure and a no-blame culture within the organization.

"Appoint a senior person to be responsible for insurance, claims and complaints so that you have a joined-up procedure and someone in overall control," she said.

In addition, file maintenance could prove crucial at a later date. Complete and accurate records should be kept in neat and tidy file system. It was advisable to keep handwritten notes as well as to archive emails and typed-up attendance note.

Attendance notes should be specific – what was advised to whom, when, where, for what reasons and what was the response? The Golden rules are:

- Be specific and detailed
- Contemporaneous is best
- Illegible file notes do not help
- Do not be tempted to "reconstruct" a file note

Bear in mind that the full disclosure requirements mean that clients are likely to have access to everything in the file, so take care not to make admissions, except when contacting lawyers for advice.

The file needs to be kept for a minimum of six years.

A complaint is made

If a borrower makes a complaint, always treat it seriously, says Hannah. Something as simple as returning a phone call or arranging for a more senior colleague to return a call could nip a potential claim in the bud.

The following steps should also be taken:

Legal Round Up - Changes to Lettings in Wales

The first of two new laws to affect landlords of Welsh domestic properties came into affect last November. Philip Collis, partner at TLT, highlighted key elements to watch out for.

The House (Wales) Act 2014, commonly known as "Rent Smart Wales" requires private landlords to be either registered, licensed or both in a scheme introduced by the Welsh Assembly to ensure they are "fit and proper" and that rented homes are up to standard.
Philip noted that the new legislation had not been drafted with "any understanding or regard" for receivers, whose duties were therefore not always clear. It would be prudent in most cases to assume the same obligations as the landlord.
The five-year registration is for all landlords, whereas licensing is for those engaged in letting or property management activities.
It is likely receivers would need to do both unless they outsource all management activity.

There is, however, a 28-day period of grace for newly acquired properties or for landlords who have taken steps to obtain possession within 28 days of acquiring the property.
The cost of registration is £33.50 online or £80.50 on paper.
Penalties for non-compliance include rent stopping orders, rent repayment orders, a prohibition on serving s.21 notices or fines of up to £1,000.

Renting Homes (Wales) Act 2016

Despite having no commencement date, it is worth looking ahead to this new law, which introduces two new tenancy contracts for domestic lettings, advised Philip.
These will be the Standard Contract, similar to an AST and a Secure Contract, which is similar to existing secure tenancies.
The changes will not apply to holiday lets, care institutions, temporary occupations of up to two months, tenancies over 21 years or associated with farm businesses.

As well as being required to keep properties habitable and in repair, landlords will have to adhere to some strict deadlines. These include providing a written statement of occupation within 14 days, without which a tenant may apply to court and win compensation from the landlord of up to two months' rent.

Philip Collis
TLT

• Train your staff to recognise and respond to complaints
• Follow your internal complaints procedure to the letter
• Carry out a full investigation
• Do not be obstructive or defensive
• Think commercially and pick your fights
• Notify insurers before referring a complaint to an independent third party
• Don't make any admissions without involving your insurers

Furthermore, do not rely on a claimant or complainant's description of something as a claim or complaint. While the two often overlap, a complaint signifies dissatisfaction with service while a claim refers to financial loss due to error or omission and a demand, in writing or verbal, for a remedy.

The most common types of claim are for failing to obtain the highest sale price, inadequately managing properties, acting under the lender's direction and for questionable valuation evidence.
"Your policy will contain specific requirements about the notification of claims," says Hannah. "It may stipulate a time period or just require prompt or immediate notification. If you fail to comply, the consequences could be catastrophic, ranging from complete rejection of the claim as a result of late notification, to refusing to meet costs or settlement payments that insurers have not authorised in advance... Use the expertise of your broker."
Finally, Hannah highlighted a situation known as "circumstance", where a claim has not been lodged but a discovery made within the organisation of an error that may lead to a claim. In this case, the insurance policy should immediately be checked, as some require immediate notification.
"You need to evaluate the situation and consider whether a reasonable person would decide that at some stage in the future, it may give rise to a claim.
"However, I would be very cautious about adopting a wait and see approach, because of the risk that you could prejudice your position under your policy if you delay."
In any case, it's a good idea to introduce a system of declaration by senior staff of "no known circumstances" on a quarterly basis to avoid any being overlooked. A declaration of circumstances would need to be made on renewal.

Hannah Cane
Bond Dickinson

Right or wrong: the case files

In an interactive session, Anthony Salata of Avison Young and a Nara council member exposed some of his recent decisions to audience scrutiny.

1.

Can a receiver accept an appointment by email? 77%: No (Rochdale); 78%: Yes (London)

"I accept them by email several times a week. They're usually for smaller buy-to-lets. I have a system set up, in which I confirm acceptance of the receivership with the date, time, property address, borrower's details and the mortgage number. I follow up with a hard copy to the lender and a standard letter to borrowers," said Anthony.

2.

The borrower of a small unit up for sale wishes to spruce up the property free of charge because he believes it will add value. The receiver is advised that the work is unnecessary. Should the borrower, threatening to take action, be allowed to go ahead? 87%: No

"I agree, I think it could be really dangerous. It is difficult enough to get possession when borrowers are occupying and you could waste months if not years in litigation."

3.

A redundant school is occupied by the borrower. A solicitor advising the lender say they must litigate for possession and that the receiver should therefore stand down. Should the receiver resign? 77%: No

"There's no reason why the possession proceedings and receivership shouldn't continue," said Anthony, "The receivership is already in place, the bank account already open, so it seems a waste of effort and unnecessary to resign, but it's surprising how many lawyers get that wrong."

4.

A £2m business park is let to a food company – but would be worth 35% more if vacant. There is a break in 12 months' time. Should the receiver wait until then? 59%: No

"There is a significant potential uplift here so I would wait 12 months," said Anthony. He acknowledged other relevant factors raised by the audience, such as a possible market downturn ahead and the level of interest charged on the debt. "Making these decisions is a difficult balancing act," he added.

5.

A residential development, of which a sale has been agreed, is bounded by a listed wall attached to a listed house. A few days before exchange, the surveyor for the listed house informs the receiver the wall is collapsing. Should the receiver tell the purchaser? 70%: No

"I disagree, as I didn't want to take a personal risk by not disclosing relevant information to the purchaser," said Anthony. "I didn't want difficult contract negotiations between the exchange and completion, so I told him. It turned out he knew about it already."

This course of action was also recommended by Doug Robertson, partner with law firm Irwin Mitchell.

6.

A receiver has been appointed over the freehold of an office and showroom building. An administrator has been appointed over a business holding a lease that is subject to rent review. The administrator suggests the rent should not be increased because he and the receiver are "on the same side" and an increase may affect the business he is trying to sell. The receiver insists the rent be reviewed – is he right? 99%: Yes

"Yes, my appointment is a discreet legal entity and I feel I should serve notice and review the rent."

7.

A development site requires a road to be made on the existing right of way and for it to be joined to the public highway. Only the landowner can enter into the necessary s387 agreement for the connection to the highway. The landlord does not want to co-operate but is he able to obstruct? 61%: Yes

"I would say no, the benefit of the right of way should not be frustrated – it includes the right to make good the access. The owner must enter into the s378 agreement for it to join the public highway," said Anthony.

Two members of the audience, however, quoted instances in which legal counsel had advised the intensification of use was a breach of the right of way and therefore would not be allowed. The wording of the deed should be carefully checked.

Anthony acknowledged that he had decided to strike a deal with the landowner anyway.

8.

A receiver is appointed over an office building and shortly afterwards, an administrator is appointed over its business owners, who are under investigation. The receiver requests that the administrator gives him permission to continue but the administrator refuses, due to the particular circumstances of the appointment. Can the administrator force the receiver to stand down? 76%: Yes

"Yes, an administrator has the power to make a receiver stand down but can also give you permission to continue, except where it is a single asset company, which this was. You can't have two people being responsible for it," said Anthony.

Doug Robertson challenged this advice arguing the single asset point was irrelevant and that under certain circumstances the administrator may have discretion.

9.

A receiver is appointed over Properties A and B, of which Property A is the more valuable. The borrower wishes Property A to be sold first in the hope it will yield sufficient funds to buy back Property B. The receiver, however, decides to sell Property B first as it will be easier to sell. Is the receiver right to sell the property of lower value? 74%: Yes

"Yes, if I believe Property B will sell more readily and have doubts about Property A, I feel it would be hard to challenge my decision to sell Property B, though I recognise someone could complain," said Anthony, "I don't think TCF (Treating Customers Fairly) reaches that far."

10.

A receiver exchanged contracts at auction on an HMO with multiple problems including a rat infestation. He accepted the appointment knowing that the local authority had already served notices on both the building society lender and the original receiver, who has resigned. He has persuaded the lender to grant an indemnity and has an exemption from the council to complete improvement works. However, this has expired before the work has been completed.

In addition, a former tenant with a history of antisocial behaviour is demanding to have his room back, which has since been let to someone else.

a) Should the receiver have accepted the appointment? 91%: Yes

Lawyer Doug Robertson recommended receivers have built into their appointment the ability to request removal from the appointment if necessary.

b) Should the tenant be allowed to return? 100% No.
"No, of course not, I have contracted to sell it and cannot allow him back in," said Anthony.

11.

Anthony is appointed over a building that consists of a restaurant with a residential upper. There is a first and a second charge-holder, both based overseas. The first charge holder has been paid and there are surplus funds to distribute. Should Anthony try to deal with this by himself or hand it to solicitors? 88%: Instruct a solicitor
"Yes that is what I did as I didn't want to start paying people out when I wasn't' completely sure about the situation."

12.

Part of a residential building has for several years been used unlawfully for offices. The borrower claims he could obtain a Certificate of Lawful Use within 10 months, which would add significant value. Does the receiver wait to get the extra value? 82%: No
"No, I didn't think it right to allow illegal use for another 10 months. In any case, the property was going to be marketed and it was likely the local authority would discover the misuse."

13.

Some appointments come with multiple complications, including the bankruptcy of the borrower. Do receivers arrange for their solicitors to check for bankruptcy at the outset? 85%: Yes
"Yes, it's good practice to require your validating lawyer to check for bankruptcy on appointment," said Anthony. "If the borrower is bankrupt, you become agent for the lender instead and effectively act on their instructions."

14.

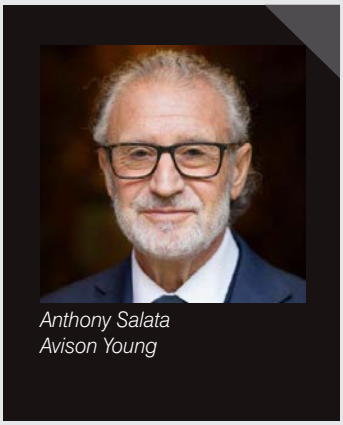
An excellent offer has been made on an office building that proves to be 10% higher than the value quoted in an independent valuation. The receiver, however, is hesitant to sell the property without first exposing it to the market. Should he or she go ahead with the sale? 71%: Yes

Anthony replied: "It's true most of us like to have the comfort of knowing we've exposed a property to the market. But in some situations it's not appropriate, for example with a semi-completed development when there are a limited number prepared to take on the associated problems.
"In this case, I think it was ok to sell off-market with the protection of the valuation," he added.

15.

Possession has been gained of a 250-acre country estate. However, a trespassing farmer has planted the fields with carrots, potatoes and barley, which will harvest for significant value. Can the receiver take the benefit of these crops on his land? 75%: No

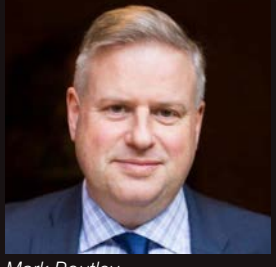
"No, legally I cannot – the crops, when harvested, become property belonging to a third party," said Anthony. " But the farmer could not harvest them either as he wasn't allowed on the land.
"In the end I had to do a deal with him. We got him to enter into an agricultural tenancy for a strictly limited period and instead of getting a share of the crops, I got the equivalent in rent."


Anthony Salata
Avison Young

Legal Round-up: Right to Evict?

The Supreme Court recently put minds to rest about the impact of the European Convention on Human Rights on evictions. Mark Routley of law firm TLT was involved in the case.

In a high profile case, the Supreme Court ruled human rights law could not be used to dismiss a possession order made in Oxfordshire.
The hearing attracted widespread interest and representation from parties including the charity Shelter, the Residential Landlords Association and the Government – because of its potential effect on the lettings market.
The case McDonald versus McDonald (2016) saw a tenant appeal against a possession order instigated by receivers, on the grounds of her right to a "private life and to the peaceful enjoyment of possessions", as set out in the European Convention on Human Rights.
The tenant, who suffered health problems, was the daughter of the property owners, who had gone into arrears on their mortgage.
The tenant's council argued that the eviction was disproportionate and should therefore be dismissed.
The court ruled it had no choice but to grant the possession order, a decision later upheld by a Court of Appeal, which highlighted the contracted right of the lender to get its money back.
The case was reviewed by the Supreme Court, which examined case law from Strasbourg's European Court of Human Rights and UK housing policy since 1977.
It concluded there were no grounds for a dismissal: the parties involved had provided in their contract for a particular outcome; the Housing Act legislation was clear and could not be read any differently; the intention of Parliament was also clear, it had consistently set out the balance between the interests of landlord and tenant.
The Supreme Court said to hold otherwise would have made the convention enforceable between private citizens, when it was designed instead to be enforced against public authorities.
Mark noted a different decision could have seriously affected the buy-to-let market, which relies on swift recovery of possession where necessary.
He added that Brexit may see a move towards the removal by Parliament of the human rights convention, which has been brought into ill repute by cases such as this.


Mark Routley
TLT

Major changes to insurance law

The biggest change in non-consumer insurance law in a century came into force last year, in the form of the Insurance Act 2015. Ed Brittain, head of restructuring and recovery at broker JLT Specialty, explained what it means to property receivers.

The new law covering property insurance offers benefits to those insured, said JLT's Ed Brittain, who deals with receivership placements, but they must understand what's required of them.

In essence, the law has changed on the disclosure of information on opening a policy and in the insurer's response to any breach. Previously, insurers had the right not to pay any part of a claim if there was evidence of any breach constituting a failure to declare a material fact.

"The new Act which came in on August 12 will affect every single insurance placement that you make in your role as property receiver," Ed warned.

The Insurance Act 2015 has replaced the Marine Act 1906, created at a time when insurance dealt principally with marine insurance. It needed to change, he explained, as the insurance industry developed to include classes such as professional indemnity and cyber risks and it became unclear to those arranging insurance what constituted a material fact.

In addition, insurers found the option of paying a claim in full or not paying the claim at all a disproportionate remedy.

Ed advised property receivers of four key changes: the abolition of basis of contract clauses, changes to the way a warranty and a condition under a policy could be applied and most relevantly, the new requirement for "Fair Presentation" of the risk.

A provision was also made for a "proportional claims response" by insurers to any failure to comply.

Fair Presentation

The requirements for a Fair Presentation are likely to raise the most queries for receivers, warned Ed, but are set out as follows:

- **Clear and accessible disclosure without material misrepresentation**
- **Disclosure of every material circumstance which the insured knows/ought to know**
- **Failing that disclosure of sufficient information to put a prudent insurer on notice that it need to make further enquiries to reveal the material circumstances.**

He added that the law goes on to specify a requirement to disclose the knowledge of senior managers, the insurance team, including internal risk management brokers, and any information that would be revealed by a "reasonable search".

As the Act does not include a one size fits all definition of what constitutes a "reasonable search" and a "fair presentation" Ed said it would likely take seberal test cases before the law's disclosure requirements were absolutely clear. He acknowledged it would be difficult for receivers, in particular, to know what would constitute a "reasonable search" to obtain "material circumstances" to make a "fair presentation", or indeed put insurers on "enough notice". He recommended the following considerations:

- Get written clarity from insurance broker on his or her responsibility for helping with compliance with the requirements of the Act
- Make the insurer aware of your role, duties and limitations as a receiver
- Consider health and safety legislation, such as fire risk assessments
- Outline plans for property to insurer – short or long-term?
- Communicate to insurer what you have or have not done in undertaking a "reasonable search"
- Get written understanding of what happens in the event of a breach – insurers are taking different approaches

"You want to avoid a scenario whereby after each claim, the insurers review a placement to identify how much information they may consider a material circumstance that they were not aware of, and how any failure to disclose a material circumstance will affect the amount of the claim," he said, "If it happens, the lender or debtor who has then incurred a loss might make a professional negligence claim against you on the basis the policy was not put in place correctly."

Finally, in the event of a failure to comply with requirements of the Act, cover can only be cancelled completely if the failure to make a "fair presentation" is deliberate or reckless. Instead, insurers now have the option to make a "proportional" response. At the insurer's choice, they may apply a higher premium and or amend the terms of cover, if they can demonstrate this would have been the case had all material circumstances been known from the start.

Ed added that it was also possible to opt out of parts of the Insurance Act 2015, but this may not be easy to achieve for a receiver due to the requirement that opt-out terms must be agreed before the insurance contract begins.

The above article should not be relied upon as advice in regards of any specific insurance placement, or advice in respect of compliance with the requirements of the Insurance Act 2015 by any party in any circumstance.

Ed Brittain
JLT

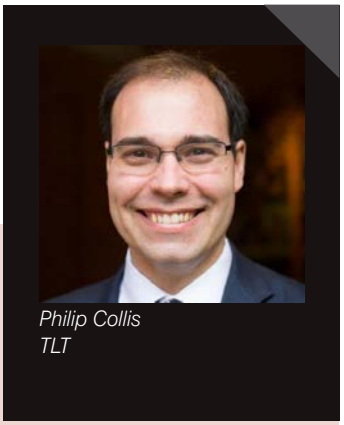
2017 dates for your diary

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

23 February – Part I Intro to RPR Exam
26 April – Part II RPR Exam Revision
17 May – Annual Spring Conference
21 June – RPR Exam
October – Fundamentals Course
November – Northern Training Day (TBC)
22 November – London Training Day

Further details and booking form are available to download from the website www.nara.org.uk

Energy Rating Hots Up



Philip Collis
TLT

Important changes regarding the energy efficiency of buildings are taking place. Philip Collis, partner at law firm TLT unpicks MEES for the receiver.

Regulations that came into practice in April last year mean receivers must heed requests by residential tenants to make energy efficiency improvements to a property – but do not have to pay for them.
Furthermore, the Minimum Energy Efficiency Standards (MEES) Regulations 2015 will make it unlawful from April 2018 for landlords – and therefore receivers – to let both domestic or non-domestic premises that fall below energy efficiency standards. Significant fines could be imposed.

Tenant's Right to Improve
"If a tenant requests consent to make efficiency improvements to a property you are appointed over, you cannot unreasonably withhold consent, even if the lease includes a prohibition on the alterations – it overrides the terms of the tenancy," warned Philip.
The right applies only to domestic assured and regulated tenancies and to some agricultural tenancies, with the following exceptions: tenancies set up after 1 April 1990, with rent greater than £100,000 or less than £1,000 in London or £250 elsewhere; tenancies set up before 1 April 1990, with a rateable value of less than £1,500 in London and £750 elsewhere; holiday lettings, leases granted to a company and houses used as a second home.
To qualify, energy efficient improvements should fall within the schedule to Green Deal (Qualifying Energy Improvements) Order 2012. They include such improvements as air, ground and water source heat pumps, biomass boilers, room heaters, micro-wind generation, photovoltaics, solar water heating, and some installations of piped gas.
Funding for the work must be arranged and evidenced by the tenants who may pay for it themselves or get finance from a utilities provider, central or local government.
In addition to funding, tenants must show details of planned improvements, a surveyor's recommendation report, consent from necessary third parties and a quote from a suitable installer.
Vexatious tenants are unlikely to use MEES as a stick against receivers, as no request can be made after notice on tenancy has been served or if possession proceedings are underway.
Requests are also void if the improvement would devalue the property by more than 5%.

Prohibited: letting of sub-standard properties
The MEES regulations require private landlords to bring their domestic and commercial properties up to energy efficiency standards by April 2018.
"These rules are going to impact on the receiver's work more and more," said Philip, "While there is no duty in law at the moment for a receiver to improve a property, that would not be an excuse under this regime. If a receiver wants to let the building, there is an obligation to carry out efficiency improvements if required and this should form part of future strategies."
He added that poor energy ratings had already caused some property deals to fall through.
The rules apply to domestic and non-domestic private rented properties only and are as follows: where a property is sub–standard, a landlord may not grant, extend or renew a tenancy after 1 April 2018, continue to let a domestic property after 1 April 2020 or continue to let a non-domestic property after 1 April 2023.
The regulations will not apply to premises with no EPC requirement, lettings of less than six months without the right to renew, or to premises with leases longer than 99 years.
Therefore, a landlord wishing to let a substandard property – with an EPC efficiency rating of less than an E – must undertake relevant improvements, as set out in the Green Deal or an independent surveyor's recommendation report.
Relevant improvements to non-domestic properties are listed in table 6 of the Building Regulations Approved Document L2B, with required payback within seven years or less.
Improvements made to any property will render it compliant for five years. It should also be highlighted that letting a substandard property does not invalidate or affect the enforceability of a lease.
Receivers would however bear in mind that they would in that case be subject to enforcement, bringing with it risks to reputation as well as remedial and penalty costs.
Of further note to receivers is the fact that it is not prohibited to recoup costs either via a service charge or rent rise.
"So there's a bit of scope for interesting strategies which may involve carrying out works in exchange for a re-gearing of leases," said Philip.

Exemptions
The following exemptions exist but active steps must be taken to place the property on the exemptions register, yet to be created by the Government.
Consent Exemption – if the landlord has been unable to make improvements in the last five years due to a lack of third party consent or a tenant's refusal, which may include a lender's refusal.
Devaluation Exemption – where an independent surveyor report says improvements will cause a reduction of more than 5% of market value
Temporary Exemption – this is available for up to six months following acquisition in certain listed circumstances that mainly involve non-voluntary acquisitions.

The penalties for non-compliance will come via the local authority in the case of domestic properties for, for non-domestic premises, from Trading Standards, which currently enforces for failure of EPC provision.
In the first instance, a compliance notice would request information, followed by an enforcement or penalty notice if a breach is found. Penalties may include naming and shaming miscreants in a public list or financial penalties. If remedial action is taken within three months of the enforcement notice, the fine for homes would be no more than £4,000 or, for non-domestic buildings, no more than £10,000 or 20% of rateable value, to a maximum of £150,000.
"For receivers, the key thing would be to establish is the EPC position on the property at the earliest stage," said Philip.

Belligerent borrowers, surplus funds and long leases are some of the topics raised in for our panel members Doug Robertson, partner with Irwin Mitchell, Anthony Salata, consultant with Avison Young, Colin Jennings, director of Lambert Smith Hampton and Nara vice-chair and Nara chief executive, Julian Healey.

Q1: Can the fixed charged receiver retain surplus funds from the borrower, when the borrower is challenging the outcome of the receivership?

Doug: Yes, hold onto the proceeds or an element of them. If, for example you're holding £2m and the borrower is only claiming loss of £50,000, you should send some back but save an element for any post-match issues. It may appear harsh to the borrower (and I've been accused of extortion, denied of course) but you are entitled to do it. The proceeds of sale are charged to the bank and the receiver's cost can be taken from those. If you don't know what those costs are, keep enough to pay them.

Colin: On a practical point, when I repay surplus funds, I ask the borrower to sign a letter, along the lines of: "I accept this. You've done a right and proper job and I won't make any claims against you."

Anthony: On a related point, inexperienced lenders don't like it at all when we hold back some money because we're unsure about future payments.

Doug: I got an agreement from one lender, albeit not a high street bank, by saying: 'if you want to give the receiver an indemnity, he'll pay you all the proceeds. But you don't want to give indemnity, so it's reasonable for him to say he'll hold onto these funds."

Q2: I'm instructed on a three-storey, freehold property. The ground floor is a commercial open market letting and the two upper floors are separately let on long residential leases. Can I simply sell the property at auction or do I need to offer the residential leaseholders a freehold interest first?

Anthony: I've got something like this at the moment. We have a single long leaseholder with the upper part, who has granted sub-long leases on other floors, so doesn't really control the upper part. I believe she is not therefore entitled to claim but she should have first refusal.

Doug: I agree, this is about superior titles. If she's got one long lease and then rented three long leases out of it, it would be the sale of her Reversion or Head lease that would trigger the Section 5 down to the three sub-tenants. The sale of the freehold above it does not require s5 notices to be served because the tenant below the freeholder isn't a qualifying tenant. (To qualify, there needs to be two or more long leases taking up 50% or more of the floor space) Because the Reversion lease is a single tenant, then that wouldn't be a qualifying tenant.

Q3: I've closed off the case and resigned, having waited six months for any extra, unknown invoices. Now another bill turns up which appears valid. Am I obliged to pay it and if so, from where?

Anthony: It seems to me the receivership has come to an end, there are no funds available.

Doug: Assuming the borrower is not in liquidation, bankrupt, dissolved or deceased – you are still acting as the agent of the borrower who is principally liable. So, in the first instance, it's back to the borrower.

Can you revert to the lender? Let's assume there is no indemnity. Some lenders will pay, particularly if there has been no surplus. If you send a surplus back to the borrower, you'll find it difficult to justify to the lender why they should then dip into what was a full recovery.

Strangley enough, if there's a shortfall, a bank may take the view that they'd have had to pay it anyway and will occasionally pay out. But technically and practically speaking, revert to the borrower.

Colin: The other practical thing is that often at that stage – six months after the event – the lender has closed their book and they haven't got anywhere to pay it from either.

Doug: Are there any professional obligations, in terms of receivers incurring costs and then not paying creditors, even though technically borrowers are liable? Would you get a complaint to the RICS in that situation?

Julian: If the receiver were deliberate, reckless or sought to mislead people, then it would be a justifiable complaint – but not if it were genuine.

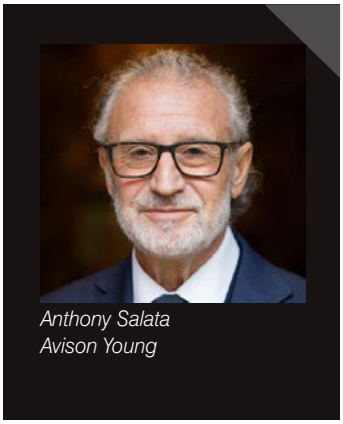
Q4: The borrower is hostile in the extreme. I have no VAT information. I think, but I don't know and can't find out, that it is opted to tax. What can I do?

Anthony: We've had that situation. We collected the VAT and put it into a suspense account, pending further information from HMRC.

Doug: You probably can't collect it unless the borrower has given you the VAT number needed for a valid VAT invoice.

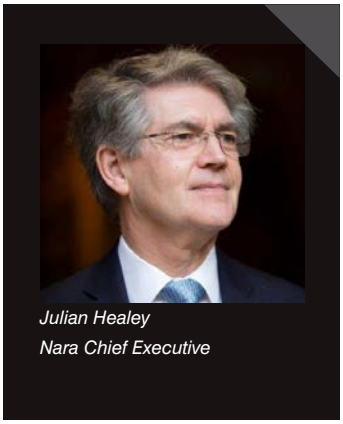
And the buyer's solicitor wouldn't advise him to pay it.

The safe option is to keep the VAT in a suspense account but there may be a difficulty with how long it stays there. What all receivership lawyers' contracts should provide for is a sales price exclusive of VAT. If we become aware of a VAT election as against a valid VAT invoice, the buyer will pay VAT on or after completion. Try for the suspense account, if not, you

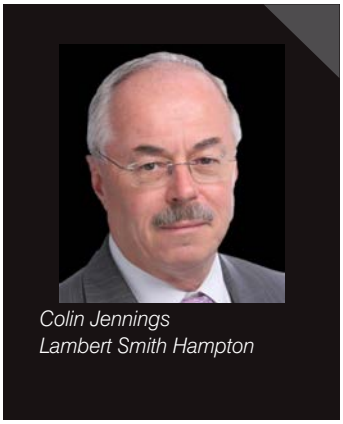


Anthony Salata
Avison Young

Doug Robertson
Irwin Mitchell



Julian Healey
Nara Chief Executive



Colin Jennings
Lambert Smith Hampton

Q&A

should have it covered off (subject to the buyer remaining solvent).

Colin: If you have a hostile borrower and there's a tenant, always ask the tenant for the last printed demand and note the VAT number.

Julian: This is a VAT minefield and Nara is working with counsel and HMRC on it.

Q5: The borrower keeps interfering while I'm trying to complete a part-finished residential scheme. It's causing real problems on-site. What legal options do I have to keep him off-site and away from buyers, operatives and the new occupiers?

Anthony: I deal with belligerent borrowers by threatening to bring in the police. In reality, however, they don't like to be involved.

Doug: The solution is part practical and part legal, though legal remedies are not cheap. Assuming the charge under which you are appointed empowered you to get possession, ultimately you would warn him off, gather evidence of interference using, for example, CCTV, and apply for an injunction to restrain him from coming onto the property. If he persisted, a penal notice would follow and if he still continued, the police would arrest him with a warrant.

Deemed energy: it's no gas

A tenth of the country's energy is supplied on deemed contracts. Ian Whitlock, property specialist for utility management company Noveus, explains how receivers can avoid hefty gas and electricity bills by knowing more about them.

If they don't want any "nasty shocks" in the form of large energy bills for the building they've just taken charge of, receivers better get wired into deemed contracts without delay, warned Ian Whitlock, who has more than 30 years' experience in property energy management.

Deemed energy contracts automatically come into being after a formal contract has ended – and they currently represent 10% of supply in the UK.

More expensive than a negotiated contract by far, deemed contracts are designed by the energy industry to ensure the flow of revenue to its long supply chain of suppliers, networks, metering providers and Government levies. Rates per kWh on a deemed contract are typically double or treble those of a negotiated contract.

If a receiver does not gain control of the building's energy supply immediately, he or she could be landed with a high deemed contract bill, said Ian. "If you're not getting any bills, there are enquiry lines to call to find out who the supplier is and how to contact them. In this case, ignorance is not bliss."

And for Building Network Operations (BNOs), the networks have started to shift responsibility for the legal requirement to supply power to tenants to the landlords – and therefore to receivers.

The first thing to do is carry out a meter audit: gather billing history, meter serial numbers and meters readings, including those of tenants. Take care to distinguish between revenue meters and sub-meters. Note where meters are advancing which indicate power is in use.

Examples of surprise energy usage in Ian's experience include electrical equipment such as immersion heaters, site security lighting, a roof-top mobile telephone base station and someone tapping into power for an illegal cannabis operation.

When reading bills, the electricity MPAN and gas MPRN unique identifying numbers contains information that will help receivers measure the risk of high bills.

Most importantly, the numbers gives a profile class, which in turn reveals size of supply. In the case of MPANs, class 00 is generally for larger buildings, with more than 100 kW of demand, 01 to 02 is for domestic use, 03 to 04 for small businesses type (up to 70 kW of demand) and 05 to 08 indicates medium-sized businesses with up to 100 kW of demand.

Capacity Charges

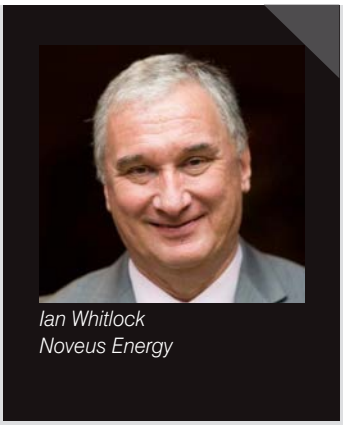
Ian drew awareness to the existence of capacity charges, which can be applied whether energy is in use or not.

"You may find there is a pre-contracted amount of power – or a capacity charge –associated with the building," he explained, "Even if you are not using electricity or gas, you could still get another nasty shock when this bill comes through. Recently, suppliers have increased capacity charges dramatically and, as with the deemed contracts, they are keen to apply them by hook or by crook because they get billed for it by the networks."

The legal aspects of this area are hazy, said Ian, though supported in principle by law. However definitions from the regulator Ofgem of "energy supply" date back to 2010 and differ from the relevant laws – the Utilities Act 2000, Electricity Act 1989 and the Gas Act 1986.

It is clear, though, that should a receiver wish to transfer a deemed contract to a different supplier, they cannot be prevented from doing so on the grounds of debt or contract, as in the case of negotiated contracts.

Once evidence is gathered, the receiver will be in a strong position to consider if de-energising the building is the most appropriate course of action, while bearing in mind the cost of re-instating it.



Ian Whitlock
Noveus Energy

NARA ADVICE

HOW TO AVOID A DEEMED CONTRACT

Practically, if the receiver is to avoid a deemed contract he has two main options:

- Continue any existing contract held by the borrower in his agency capacity
- Establish a new contract – bearing in mind the liabilities that may attach to that and the potential for a deposit request where the supply is large and the covenant offered (an otherwise unknown receiver) is weak.

Appropriate advice must be taken.

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