

# Property Views

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A NEWSLETTER FOR LENDERS AND PROFESSIONALS  
EXPLORING THE CHALLENGES AND OPPORTUNITIES FACING  
THE DISTRESSED REAL ESTATE SECTOR

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## We are delighted to welcome you to the 2013 Winter edition of Property Views

The real estate market certainly seems to have turned a corner with recent survey results suggesting that house prices have risen to their highest level in 7 years and with the introduction of the Governments Home Loan Guarantee Scheme, economists are even predicting that we could see a property bubble by 2014.

Equally the commercial market seems to be making a strong recovery with the outer regions seeing some improved activity. The market has continued to see an increase in international investment particularly in the capital as investors seek solid assets.

Over the last quarter Moorfields have seen an increase in distressed property portfolios particularly in the Leisure and Healthcare sectors, but improvement in the purchaser market means many of the assets are seeing accelerated turnaround times.

We are continuing to work with a number of lenders who are dealing with their under-performing property loans and our focus remains on maximising the returns through innovative and proven strategies.

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We hope you find this issue interesting and informative. If you wish to discuss any of the matters in this newsletter please do not hesitate to contact us 0207 186 1143 or call:

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# The treatment of rental receipts when dealing with distressed property

When considering work-out strategies in respect of a distressed property debt, a lending bank may seek to enforce its security by appointing an Administrator or a Fixed Charge Receiver to collect rent and service charge monies, as well as to dispose of the property assets.

The procedural and legal differences between Administration and Receivership are an article in themselves but there are some key points to note:

- a Receiver is appointed to the asset only whereas an Administrator is appointed over the whole company and acts in order to achieve a statutory purpose;
- a Receiver's powers will be limited to those set out in the Law of Property Act and the security document but will typically include the power to take possession of and sell the asset to which they are appointed, the power to collect rent, the power to enter into contracts and the power to trade or manage the asset under their control;
- an Administrator can use statutory powers to assume control of a company and its assets, records, employees and directors (forcing cooperation if need be) and they enjoy a wide range of powers not within a Receiver's remit;
- an Administrator has the benefit of a moratorium against proceedings which might otherwise frustrate the outcome.

All of these factors will influence the commercial outcome of an enforcement strategy and one of the key issues to consider in that regard is whether the property assets are income generat-

ing and the degree to which any of that income might "leak" out of the lender's security net.

A fixed charge Receiver is likely to be empowered to recover rental receipts and distribute them to the appointing lender under their fixed charge without deduction, other than the direct costs of realisation. However, an Administrator appointed by the same lender, benefiting from the same security instruments, may be obliged to realise rental income as a company receivable, subject to the lender's floating charge with, potentially, dilution as a consequence of payments to preferential creditors, the prescribed part (the fund carved out for the benefit of unsecured creditors) and tax liabilities. The prescribed part alone may amount to as much as £600,000 and, where the rental income stream has given rise to a profit, it is likely a tax liability will be payable from funds held that might otherwise be payable to the bank. Clearly, where there are no other considerations at play, the lender would choose the Receivership route.

The basis of this apparent contradiction can be found in the well reported case of *National Westminster Bank Plc vs. Spectrum Plus Limited*, which discusses the treatment of book debts and ownership/control of the receipts derived from them. The decision reached was that a charge over book debts which requires the proceeds to be paid into an account with the bank, but where the chargor could freely draw on that account, would only establish a floating charge.

Conventional legal wisdom suggests the same treatment should be applied to rental proceeds in an Administration scenario, which means that to enforce a fixed charge over rental income in an Administration, funds received must not be capable of being removed or dealt with by the borrower in the ordinary course of business.

Furthermore, for a lender to effectively control rental income under its fixed charge, it must be shown to have exercised control prior to the company entering Administration.

It is therefore considered that for a fixed charge security over rental proceeds to be in place in an Administration scenario, one of the following must be satisfied:

- the borrower's ability to deal with the rental income must have been prevented by an assignment of the rent to the lender and the funds must have been paid directly into an account controlled by the lender;
- the borrower's ability to deal with the rental income has been prevented by requiring proceeds to be paid:
  - to the lender to discharge the debt; or
  - into a blocked account; or
  - into an account at a third party bank over which the lender then has a fixed charge.

Even when a lender has taken an assignment of the rent (combined with a purported fixed charge), that may not be sufficient to capture receipts if the appropriate level of control cannot be demonstrated.

This is clearly an issue which should be considered by any lender prior to making a decision as to whether to appoint a Receiver or Administrator. At first glance it would appear that where rental income is a factor and the lender has not exercised the required level of control, appointing a Receiver would be the most appropriate course of action. However, it is important to consider the broader picture and the wider benefits of Administration.

**“A fixed charge Receiver is likely to be empowered to recover rental receipts and distribute them to the appointing lender”**

The appointment of an Administrator provides a much more effective recovery tool where control is needed over a group of companies or assets. An Administrator will have a broader range of powers and duties allowing them to assert greater control over the situation and, of course, an Administrator is able to realise floating charge assets particularly relevant in goodwill properties, which may significantly enhance recoveries for the secured lender and creditors as a whole. An Administrator is also in a much stronger position to recover VAT, despite recent guidance issued by HMRC to Receivers. On the flip side, a Receivership might be more appropriate for single asset enforcement strategies where their restrictive powers would be sufficient to deal with the legal and practical considerations of realising the assets.

In some cases borrowers are appointing fixed charge receivers prior to appointing administrators to get the best of both worlds, obviously this is an area which requires careful consideration when deciding upon the optimum recovery strategy.

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# UK Hotels the ‘theory’ of valuation versus the ‘practice’ of worth

We continue to see a hotel world where the theory of value versus the practice of market sentiment defines an asset’s worth.

In the good old days of the boom between 2002 and 2007, pricing was all too often based on the potential to trade, with values underpinned by the real estate value, compared to today’s market where valuers and banks wish to rely heavily on the current trading performance of a business as a means of assessing value.

Where buyers are reliant on third party funding, the current viability of the business is paramount. However, where the percentage availability of funding is modest, the values are often determined more by the ability and desire of a buyer, particularly when competing with other buyers in the same boat. As a consequence, the basic market forces of supply and demand will still, in many cases, determine what something is worth, particularly in the case of ‘high quality’ or ‘trophy assets’.

In terms of what defines ‘high quality’ and ‘trophy’, it is most often but not entirely a reflection of location. Equally, although the word “potential” is less frequently used with reference to buyer sentiment, we can see from our active involvement in UK hotel brokerage that the buyer still has “potential” at the heart of their decision making process.

The “upside” is often there and an experienced hotelier at any price level can see how to exploit it and use it to improve the value for years to come.

In addition to a trading “upside”, in London we continue to see the security of purchasing an asset being considered a safe haven by many international buyers, together with those who can, through creative means, look at an alternative use angle, as was evidenced in the sale of Parkes Hotel where we worked alongside our colleagues in our residential division to extract added value from buyers who considered the alternatives in their assessment of the value to them.

Although some of the driving forces experienced in London can apply to provincial opportunities, the level of actual or reconstituted profit is initially used by most buyers as a means of calculating the extent of their initial interest. However, once into a process and competing alongside others, it then comes down to their ability and desire to proceed. Contrary to popular belief there are still plenty of examples where the almost scientific multiple of EBITDA methodology is ignored and a price is achieved based purely on the level a buyer is willing and able to pay.

The type of buyer is much the same as in recent years. Those with existing hotel connections are in play for viable hotel businesses and there is still a flow of “new to the business” lifestyle buyers looking at smaller hotels in locations where they would like to reside.



There continue to be outside the box examples of the type of buyers referred to above:

- Private equity seeing value in the sector where the real estate value is in the back of their mind and where a hotel operating company has highlighted trading growth potential.
- Institutional investors attracted by a better rate of return than in previous years.
- Companies looking to diversify and enter the hotel market, attracted again by the perception of property value and the belief they can extract greater trading value when introducing their own business disciplines.
- High net worth individuals attracted to a sector they think they know a bit about, either to run themselves or to have a management company who can run a hotel for them.

**“In terms of what defines ‘high quality’ and ‘trophy’; this is most often but not entirely due to location.”**



- Alternative use buyers looking at a development angle, albeit such deals are often constrained by the need for a deal to be subject to some form of planning which needs to be carefully handled prevent actions having a detrimental effect on trade.
- International buyers, focused principally on London but also at other high profile destinations including Edinburgh, Oxford and Cambridge. A smaller number are attracted to the likes of National Parks and areas of natural beauty.

The psychology and methodology of a sale also play a major factor in determining the result. We have clients who ask us to quietly go about selling using the hard ball and who will only sell if the price and timing is right. However, many buyers prefer to concentrate on open sales, where the perception is that the need to sell on the part of the vendor will often result in a price in the purchaser's favour and greater certainty that a deal will proceed. This perception can be misconceived as other buyers with the same view will help take the price to its rightful level, often substantially in excess of where a typical multiple of profit level would take the anticipated value.

In simple terms the market remains hard to determine. There continues to be good news, surprises and disappointments and without the involvement of experienced hotel brokers and valuers, these generally result in less good news and more disappointments.

To sum up, 2013 continues to be similar to 2012 where the 'quality' of the business and location will play a major part in determining value and demand. However, the actions of a buyer and a seller can often break the mould and result in the 'theory' of a value being replaced with 'practice' of what something is worth.

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# A lesson in character

Investing in a unique residential or commercial property may seem like an attractive proposition to a borrower. However, whilst listed status or being situated in a conservation area might satisfy a purchaser's aesthetic imperatives, such factors can create a raft of risks for the lending bank.

An event of default in respect of property loan for a listed building might give rise to a challenging and drawn out asset realisation strategy and a lender looking for a quick exit may struggle to achieve a sale without accepting a significant price reduction. The lesson here is that the sale of apparently desirable property can sometimes be frustrated by the very characteristics that provide the property with its appeal and charm.

A common theme linking the issue of listed or special interest buildings in Receivership or Administration is holding costs which will generally be higher than one might otherwise expect, particularly when the property is vacant.

An insurer may only agree to provide vacant property cover on condition that twenty-four-hour manned security and fire prevention measures are put in place, as opposed to far cheaper alternatives like live-in guardians. Even when protection measures are in place, the insurance premiums for older listed buildings - especially those with features like timber frames or thatched roofs - tend to be high, and cover is often subject to endorsements.

The consequence is that a long term hold strategy can be compromised by costs that might rapidly erode any upside from seeking a higher value sale over a longer timescale.

## Changes to listed buildings

English Heritage is responsible for monitoring all listed buildings in the United Kingdom and there are some important considerations when an insolvency office holder takes possession of a listed building.

Whilst a Receiver or Administrator may not intend to make any adjustments to a listed building's interior or exterior, the rules and restrictions - even for seemingly minor cosmetic changes - will be a consideration for potential purchasers. At the very least a new owner would need to apply for Listed Building Consent for any proposed work that would affect the special architectural or historic interest of the building. Should it become necessary to repair or alter a listed building, the process of applying for consent can take between eight weeks, for minor proposals, and thirteen weeks for larger schemes, to include a statutory 21 day consultation period where objections can be lodged from local stake-holders. The requirement for consent may therefore impact on demand, pricing and the speed with which a disposal can be achieved, leading to additional holding costs and lower net realisations.

## Maintenance and repairs by an insolvency office holder

It is unusual for a listed building to be found in market ready condition and, when a borrower has defaulted, it is likely that funding for ongoing repairs and maintenance will have been restricted. Older listed properties tend to suffer from timber rot, roof damage, drainage problems, damp penetration and general decay.

Should it become necessary for an insolvency office holder to repair or alter a listed building, the process of applying for consent, as described above, must be observed. Indeed, it is a criminal offence to undertake such work without consent and possible for a planning authority to insist that all work undertaken without consent is reversed at the cost of the responsible individual. As a consequence of these rules, the prospects of selling a property that has been subject to repairs or alterations but which has not been granted Listed Building Consent will be severely compromised.

Obtaining full details of the listing from English Heritage, discussing the implications of the listing with the local authority prior to possession and insisting that insurers, contractors and agents are aware of the listing (and any significant restrictions imposed) can make the enforcement and sale process much easier. Selling a listed building need not be an ordeal if key risks are managed in the correct way.

#### Conservation and environmental issues

An Administrator or Receiver has to be prepared for the unexpected, as we found out during a recent fixed charge receivership when a roost of Lesser Horseshoe Bats - one of the rarest species in the British Isles - was discovered in the roof void of an historic building.

Bat species and their roosts are legally protected in the UK and any structure used by bats for shelter will be protected from damage or destruction, even if it is not currently occupied by bats. Before any repair or maintenance can be carried out, a bat survey has to be undertaken and a mitigation plan prepared by an experienced ecological consultant. The same principles apply if other rare or endangered species are discovered in a property (or at a development site) with one common theme: more expense and more delay for the insolvency office holder and the lending bank looking to realise its fixed charge security.

The presence of Japanese Knot weed is another issue often encountered – a seemingly innocuous plant capable of causing huge damage to the fabric of a property. Recognised as the single most invasive species of plant growing in the UK today, the presence of Japanese Knotweed will deter most lenders from offering terms to a potential purchaser of a property. This will limit the market to those buying for cash and willing to take a risk, and only then at a significant discount to the market. Where knotweed is found following an enforcement event, it must be eradicated by a professional clearance company who will issue a 3 year warranty against re-growth. Only then would it be feasible to market the property for sale. Again, more expense; more delay.

#### Listed and historic properties: tips for a successful enforcement strategy

The issues described give a flavour of the challenges that may be encountered by a lender when enforcing their security over a listed or historic property. Preparation is key and the more property specific information that can be gathered prior to enforcement the better. Cooperation with the borrower can be very useful in this regard; equally, a lack of cooperation can be very unhelpful.

It is essential to seek expert advice, be that from an agent and valuer familiar with the property, a builder who specialises in listed building work (and one who is duly approved by the Federation of Master Builders), an ecological or conservation specialist, a planning specialist or a solicitors familiar with the vagaries of listed buildings.

Ultimately the process need not be an ordeal if key risks are managed in the correct way.

#### Author:

Simon Thomas, Partner  
Jack Jones, Administrator  
Moorfields Corporate Recovery



“it would be unusual to achieve a quick fire-sale without having to overcome a series of problems.”



“Our commitment to Price Transparency means we operate on a fixed and capped fee basis to ensure no surprises for our clients.”





# Taking a Careful Approach

## Healthcare Lenders

The Government and the Care Quality Commission (CQC) last month took the first steps to introduce their new consultation plan. Whilst certain provisions of the plan are significantly diminished from earlier drafts, some of its content may leave care home lenders feeling concerned over the value of their security. At a time when the chairman of the CQC is reported as saying that one-third of care homes are below standard, the care sector remains firmly in the spot light.

The demise of Southern Cross Healthcare and dangerous quality failings at Winterbourne View and Stafford Hospital have had far reaching implications within the care industry. As a result, over the last couple of years, both the government and CQC have reviewed regulations and have this year issued tough new guidelines, including provisions for unannounced inspections and financials reviews.

Going forward the CQC will be able to request regular financial and performance information and, where necessary, instruct Independent Business Reviews to assess financial covenant strength and to ensure that suitable and sustainable plans to mitigate financial risks are in place. Whilst current measures are focused on the larger providers it is likely they will be rolled out more widely. Ultimately, CQC has the power to issue enforcement notices and to close failing care homes guilty of non-compliance.

There are various ways that lenders can manage the risk of a care home borrower failure, including engaging in regular

communication, monitoring CQC compliance reports, ensuring financial information is shared at least every quarter and, where necessary, commissioning Independent Business Reviews or Operational Reviews. However, given the inevitable fact that some borrowers will fail, it is important to ensure appropriate contingency and enforcement plans are in place.

One of the fundamental challenges faced by a care provider ("provider") in financial distress is a lack of funding for working and capital expenditure. This, in turn, is likely to erode standards of care and result in further deterioration of the building and facilities. In some instances the steady decline will have been identified during routine CQC inspections, resulting in an embargo being imposed upon new service users being taken on by the home. The decline in service standard may also give rise to a decline in the number of existing service users – especially private clients – as they seek alternative accommodation, thereby eroding income and increasing losses. The decline in income will further compromise the provider's ability to remedy compliance breaches.

Where a provider seems likely to fail, the CQC has the power to share that information with the local Clinical Commissioning Groups (formerly known as Primary Care Trusts) who are responsible for overseeing local authority care provision. They, in turn, may take steps, including the removal and re-assignment of service users to ensure their primary care needs are being observed and respected in accordance with the legal framework and best practice. There are also recent examples of information on standards of care being released to the media, ostensibly to draw attention to a home's shortcomings for the benefit of prospective service users within the local community.

Successfully dealing with the restructuring, trading administration or managed wind-down of a care home involves a delicate balance between commercial considerations and the needs of some of our more vulnerable members of society.

The insolvency office holder (or proposed office holder) will need to plan a smooth transition by working with existing management and staff, operational management specialists, the CQC and the local authorities to ensure compliance breaches are addressed and standards of care maintained, even during a managed wind down.

The scope for adverse publicity is significant and lenders will appreciate the need to deal with the situation sensitively. This often means making available emergency funding, even though there is unlikely to be a legal obligation to do so. That said, there is (fortunately) a commercial rationale in that overall realisations following the sale of a trading care home in Administration or Receivership are likely to exceed realisations of the same assets on a forced sale basis.

Throughout the enforcement process the support of the CQC and local authorities will be vital to maintain occupancy levels and to ensure minimal operational disruption. A regular dialogue – often facilitated via the appointment of an operational management specialist – can be key as CQC will sometimes agree to defer the requirement for immediate and expensive remedial work if they are consulted regularly. This can, of course, give rise to a request from a potential purchaser for a price reduction (on the basis they will have to complete the deferred work themselves) but, from a cash-flow perspective, may be advantageous.

Once an enforcement process has been instigated and the operations of the home brought under control, the success of the asset realisation strategy will rely upon the appointment of an experienced sales agent and the provision of relevant information for prospective purchasers. Experienced purchasers will seek to invest in the potential upside to be gained by

applying their knowledge and experience to the distressed assets. Where financial accounting records are inadequate it can be helpful to trade for a period of time in Administration in order to gather management information which demonstrates the ability of the home to generate a surplus. That said, the overheads of a care home are significant, particularly where the needs of service users result in an inefficient staffing model (for instance, where a small number require expensive specialist around the clock nursing care) and any upside from continued trading may soon be eroded by the ongoing funding requirement. The key to managing this risk is careful and regular monitoring.

Ultimately, if losses are unsustainable or the lender is unwilling to provide funding, hard decisions may have to be made regarding the cessation of trade. In that instance, it is important to manage the wind down process with sensitivity and tact, ideally via the appointment of an insolvency practitioner experienced in dealing with care homes.

At Moorfields we have significant experience of both trading administrations and the managed wind-down of care homes across the UK. If you are confronted with a home in distress, we would be happy to share our thoughts with you on the most suitable strategy for a successful outcome

Author:  
Paul Zalkin  
Head of Property Solutions  
Moorfields Corporate Recovery



“Working together with providers now can have a significant impact. However it is equally important to maintain standards and communication in a distressed situation”



# Selling a Care Home 'in Administration'

**Anita Allen, Director of DC Care, comments on how very different the sales process is when an operational care home is being marketed following a formal insolvency appointment.**

When acting for private vendors of an established care home all business transfer firms are mindful that an element of confidentiality and discretion is required when marketing and then throughout the sale. Few vendors want staff, residents or relatives to be aware of their intention to sell – staff may get nervous of a change of ownership, some may even leave. Plus residents and relatives may feel unsettled and there are also reputational considerations which can affect the care home's occupancy and profitability. Care homes are therefore often advertised very discreetly and only when a formal sale has been agreed would all parties including the regulatory authority, the Care Quality Commission (CQC), be informed.

There are in fact several aspects of a care home sale which vary when the business is being sold "upon the formal instructions of an Insolvency Practitioner" – let us consider a few in more detail.

## Marketing

There is no requirement for confidentiality. Following the Legal Appointment all staff, residents, relatives, local authorities and regulatory bodies would be informed immediately. The appointment is a matter of public record. In most circumstances it is a financial institution with a mortgage and a first legal charge over the freehold property which instructs the insolvency firm and they will be legally obliged to sell the asset for the

best possible price. All efforts have to be made to maximise the financial outcome - all other creditors and the mortgagee can query and challenge all actions of all professional parties involved in the appointment.

## Market Pressures

During the last 5 years there have been major financial pressures within the long term care sector with Local Authorities giving low or no increases to weekly care fees due to ongoing austerity measures. Furthermore there is a clear government drive towards keeping elderly people in their own homes with minimum domiciliary care packages providing daily support. Many care homes have experienced reduced placements, low occupancy and higher dependency levels; all of which impact on the business' fee income stream and profitability. These 'cuts' coupled with increases in the minimum wage and utilities charges have been further compounded by the requirement of care operators to adhere to ever more onerous levels of regulation, inspection and audits by various regulatory bodies.

The purchasers of care provision can be very demanding, whether they are private fee payers or local authorities. The marketplace prefers single bedrooms, ideally with an en suite WC and much of the older style care homes cannot reconfigure their buildings even if they could afford to.

Whilst it is hard to obtain funding for new build schemes there are some being established and these state of the art schemes can command higher fees and often threaten the viability of older style homes locally.

Many of the older style facilities will therefore fail unless they have a very specific USP. The financial pressures often result in operators making cutbacks re staffing and other overheads which can impact on the delivery of care. The regulators then step in, quite rightly, imposing restrictions or embargos

on referrals. This of course further impedes the business.

#### Post Appointment

During an Administration it is usual that a management company will oversee the day to day workings at the care home, liaising with the Administrator and staff, as well as the various local and regulatory authorities. In the months following the appointment of Administrators and management companies, businesses can be stabilised, with systems and the environment seeing measurable improvements. This can enhance the asset and make it a more attractive proposition for buyers, and just as importantly, the banks that would fund the purchase.

In some circumstances the business will have been poorly managed, staff may have been badly treated and there may have been little by way of reinvestment in the property for years.

A clear marketing strategy must be agreed with the Administrators, the businesses for sale will be advertised and regular reports issued to the Administrator who in turn will report to their client – usually the bank.

#### Buyers

So who buys a care home like this? Purchasers in the current economic climate are keen to acquire a bargain and as such most businesses being sold 'In Administration' gain good levels of interest. That being said the banks are even more cautious about supporting these business acquisitions. Any offer received must be well documented and evidence of funding provided. The vendor client (The Administrators) will seek to exchange ASAP and will expect prospective purchasers to expedite all legal and regulatory transfers in a timely manner.

Making a formal insolvency appointment in respect of a care home facility has to be carefully considered by the creditors – any business involving children or the elderly requires experienced, expert, professional firms to liaise closely; with the care of these vulnerable service users being of paramount importance. Throughout the sales process all parties including the Administrators, the management company, the regulatory authorities, the agents and all the staff must remain committed to maintaining the 'home' for the residents. It is after all 'their home'.

In some circumstances care homes do have to close and the properties are sold with vacant possession for redevelopment however the closure has to be handled tactfully and formal procedures adhered to.

Author:

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## Moorfields Property Solutions

Our specialist property team is dedicated to supporting secured lenders in handling some of the complex issues arising in property insolvency. Unlike many other firms our property team dedicate 100% of their time to property assignments so are constantly up to date with the latest developments and market related issues.

Our expert knowledge and understanding of different types of property mean we can readily identify the most appropriate strategy.

Our focus is to offer a dedicated service with straight forward options and realistic solutions to ensure we maximise the financial outcome for our clients and business stakeholders.

## Want to find out more?

To find out more about Moorfields' restructuring and insolvency services contact: Simon Thomas on 0207 186 1143.

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