

Defaulting Tenants: What are a Landlord's Remedies?

A landlord of commercial premises has several options available when faced with non-payment of rent. The COVID-19 pandemic has seen government intervention that seeks to protect tenants by restricting the ability of landlords to rely on some of these remedies for a period of time. The table below provides an overview of each potential remedy. It also sets out some of the advantages and disadvantages of each remedy from the point of view of a landlord. Where government restrictions are currently in force or are planned they are also outlined. The remedies set out below are not always available, or viable. Often the appropriate action will involve consideration of the specific circumstances. If you are concerned about one of your commercial tenants and want to discuss the potential options available to you, please get in touch with our Property Litigation Team.

Remedy	Overview	Advantages include...	Disadvantages include...	COVID-19 government restrictions?
Forfeiture	A landlord's right to end the lease where the tenant is in breach of any of its obligations under the lease or on the occurrence of certain events specified in the lease.	<ul style="list-style-type: none"> The landlord may be able to re-let the premises on more favourable terms (probably not the case at present) or develop them. Some leases include contractual rights for landlords to call on guarantors to take a new lease for the residue of the term. 	<ul style="list-style-type: none"> It may not be in the landlord's commercial interests to take the property back. The tenant or any sub-tenant may be able to claim relief from forfeiture. The risk of inadvertently waiving the right to forfeit. The landlord has the premises back and so becomes liable for costs (such as rates, void services charges, etc.) and loses the right to claim for sums that would have fallen due in the future under the lease. 	<p>Suspended from 26 March 2020 to 25 March 2022 (this period may be extended).</p> <p>Landlords cannot waive the right to forfeit in respect of a failure to pay rent in this period unless expressly doing so in writing.</p>
Commercial Rent Arrears Recovery (CRAR)	A landlord instructs an enforcement agent to take control of a tenant's goods and sell them in order to recover an equivalent value to any rent arrears.	<ul style="list-style-type: none"> If a landlord is unsure about its tenant's assets and liquidity, CRAR is a good method to recover, at least, the principal rent that is in arrears. 	<ul style="list-style-type: none"> CRAR is only exercisable against arrears of principal rent (so not service charges, insurance rent, or other sums due under the lease). Exercising this remedy may be an issue whilst social distancing rules are in force. Controlled goods must be sold at public auction which, again, is an issue in the current climate. 	<p>For CRAR actions started after 24 April 2020 until March 2022, the minimum arrears necessary before CRAR can be initiated is 554 days rent from 24 June 2021.</p>
Court proceedings	A landlord issues court proceedings against its tenant to recover rent or other sums due under the lease.	<ul style="list-style-type: none"> A tenant should have no defence to a claim. The landlord should be able to claim interest and costs. It would give the tenant more time to pay (as it is not obliged to pay until the court orders it to do so). This may mean the landlord/tenant relationship is preserved. 	<ul style="list-style-type: none"> The process can be expensive and protracted. Judgments do not guarantee payment and must be enforced. 	<p>None</p>
Statutory demand and insolvency proceedings	Where there is no dispute as to the amount of the debt, a landlord serves a statutory demand on its tenant. If this remains unpaid after 21 days, and it is more than £750 for commercial tenants, then this may be deemed evidence of inability to pay a debt and, therefore, gives grounds to present a bankruptcy or winding-up petition.	<ul style="list-style-type: none"> The threat of insolvency proceedings may be enough to produce payment by the tenant. 	<ul style="list-style-type: none"> Forcing an otherwise solvent individual or company into insolvency, where they might have survived if they had been given time, may reduce a landlord's chances of recovering the debt in full. It is potentially also bad PR for a landlord to push a tenant to the wall at this time. 	<p>There is no longer any restriction on sending statutory demands. However, the issue of a winding up petition (WUP) is prohibited where the debt owed is respect of rent or any other payment (e.g. insurance and/or service charges) due under a business tenancy, where COVID-19 has had financial effect on the company. A minimum of £10,000 will also need to be owed in all circumstances before a WUP can be presented.</p>
Taking action against a former tenant/their guarantor	A landlord recovers rent arrears and other sums due under the lease from a former tenant or their guarantor.	<ul style="list-style-type: none"> A succession of section 17 default notices, each relating to a different rent payment, can be served on the former tenant/their guarantor, so long as the notices are served within six months of the rent falling due. 	<ul style="list-style-type: none"> There must be an ongoing obligation, e.g. an authorised guarantee agreement, still in place. Section 17 default notices must be served within 6 months of the sum falling due. This could be complicated by agreements between the landlord/tenant to delay payment of rent. 	<p>None save that the restrictions on the service of statutory demands/presentation on WUPs also apply to corporate guarantors.</p>
Taking action against the current tenant's guarantor	The current tenant may have provided a guarantor who can be pursued.	<ul style="list-style-type: none"> The guarantor should have no defence to a claim. Government restrictions do not presently restrict action against guarantors. 	<ul style="list-style-type: none"> The guarantor may no longer be solvent. If the landlord pursues insolvency and the guarantor is wound up/declared bankrupt, the landlord may not recover payment. 	<p>None save that the restrictions on the service of statutory demands/presentation on WUPs also apply to corporate guarantors.</p>
Rent deposit	A landlord draws down from a rent deposit to recover the rent arrears.	<ul style="list-style-type: none"> This can be a quick and simple method of recovering the rent (and other monies due). This may preserve the landlord and tenant relationship given that there is no impact on the tenant's cash reserves. 	<ul style="list-style-type: none"> The rent deposit deed will often include a notice process that the landlord has to follow before the monies can be withdrawn, which can slow down recovery of the monies. If there is a risk the tenant may collapse into insolvency then there can be dispute with the insolvency practitioners and others over who the money belongs to, even for a well-drafted rent deposit deed. Once the deposit monies have been used, the tenant is often unlikely to have the funds to be able to replenish the deposit, even though it is obliged to. 	<p>None</p>
Bank guarantee	The tenant provides a bank guarantee that can be claimed against.	<ul style="list-style-type: none"> A quick and relatively straightforward way to secure payment. 	<ul style="list-style-type: none"> Usually it is for a fixed or capped amount and may be time limited. 	<p>None</p>