

Property leases: insolvency - how does it affect your lease?

WHAT ACTION CAN A LANDLORD TAKE IF A TENANT CAN'T PAY ITS RENT?

The key issue for a landlord is usually the loss of rental income, which can often lead to breaches of its banking arrangements. A landlord therefore will consider its options as to how to deal with an insolvent tenant and a brief summary of these is set out below.

Rent deposits: If a rent deposit was provided by the tenant, then a landlord will be able to use it to offset any unpaid rent or other arrears, such as service charge and insurance. It can also use the rent deposit to offset any other losses it may have, such as having to repair the property due to a tenant not having done so. Drawing on deposits can allow the landlord to maintain its income stream whilst perhaps seeking a new tenant or exploring other options.

Guarantors: If a guarantor was provided for a tenant, a landlord will often be able to call on it. Guarantors include not only traditional guarantors (given, for example, by a director or owner) but also in relation to most leases made after 1 January 1996, any former tenant, assuming the tenant of a company entered into an 'authorised guarantee agreement'. Complex rules apply in relation to authorised guarantee agreements and, to avoid losing the right to recover, formal notice must be served on each guarantor within six months from the date the arrears first became due.

Forfeiture: Depending on the market, forfeiture (i.e. the landlord bringing the lease to an end and requiring the tenant to vacate the property) can be an unappetising prospect for a landlord, although it can be useful where a new tenant is likely to be found quickly. Where forfeiture is available, it is worth noting that relief against forfeiture (whereby the courts have discretion to 'cancel' retrospectively forfeiture action taken by a landlord) may be available but generally, relief by a tenant or an insolvency supervisor will not be sought if a tenant is in financial difficulty unless the property is integral to the tenant's business and the business is ongoing.

Commercial rent arrear recovery: This replaces the old remedy of distress and provides that in certain circumstances it is possible for a landlord to instruct an enforcement agent to remove goods from the premises to cover monies due to the landlord. This can be a valuable remedy depending on the nature of the tenant's business. However, certain conditions must be met and various notices must be served before action can be taken.

WHAT HAPPENS IF A LANDLORD BECOMES INSOLVENT?

If you are a tenant whose landlord becomes insolvent, the key issues are likely to be practical ones. The landlord is likely, at least in the short term, to cease providing any services, which may be a significant concern if your lease is of part of a building, or of a unit at an estate or shopping centre. It is also likely to be significantly more difficult to obtain any landlord's consents, which could interfere with alterations or a proposed disposal of the lease. Taking proceedings against a landlord for breach of its obligations may not be possible should any statutory moratorium be imposed (e.g. while the landlord is in administration). The various insolvency regimes have different rules so before taking any action against an insolvent landlord, legal advice should be sought.

Rent deposits: Where its landlord is insolvent, a tenant can be exposed to the risk of losing any monies held by the landlord as a rent deposit (or, at least, ranking as an unsecured creditor and typically securing the return of only a small portion of the deposit). Whilst it is possible to prevent this by structuring a rent deposit deed carefully when it is entered into, some tenant's solicitors are not aware of this risk and, in any event, some landlords will not accept any such amendment.

SUMMARY

- Many insolvency remedies require formal legal notices to be served, or other formal procedures to be followed. Take advice at an early stage (ideally before any formal insolvency process begins) to ensure your rights are preserved.
- As a landlord, think carefully before taking back occupation of premises, which can prejudice claims against guarantors and sub-tenants.

If, having considered this guide, you would like to know more or to discuss your own circumstances in greater detail, please speak to your usual contact at Stevens & Bolton or a contact listed at the end of this guide.

CONTACT US

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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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