

## **A Guide to Recovering Commercial Rent Arrears**

Commercial Landlords – information to take into account

It has been a difficult time for Landlords and Tenants due to the recent Corona Virus Pandemic. Landlords cannot currently “forfeit” the Lease for non-payment of rent.

There is currently a moratorium in place to prevent Landlords of commercial properties from being able to evict Tenants for not paying rent. This measure will be in place until the 25th March 2022.

The moratorium makes it more difficult for Landlords to take steps to recover commercial rent owing from Tenants but it is still possible for Landlords to issue Court proceedings to recover outstanding debt.

If the rent accumulated before March 2020 you will be able to take steps to recover the debt.

The Government has indicated that it will introduce a new arbitration process that will be underpinned by law, which will provide commercial Tenants and Landlords with a means of settling Covid 19 related debts fairly and with finality.

At the present time, the Government has not produced a white paper on the arbitration process and this is expected in Autumn 2021.

If your debt is over six years old then it may be too late to recover it. You may be statute barred from recovering the debt.

You will be unable to present a winding up petition to the Court as there is a temporary restriction on winding up petitions being presented until the 30th September 2021. This has been brought in under the Corporate Insolvency and Governance Act 2020.

A creditor may not present a winding up petition during this period unless it has reasonable grounds to believe that Covid 19 has not had a financial affect on the debtor.

The moratorium on forfeiture and presenting a winding up petition on companies restricts Landlords in relation to recovering debt from commercial Tenants.

It is now more important than ever to communicate with your Tenant and try to reach a settlement to any rent arrears before taking any further action.

### **Court Proceedings**

If your Tenant is a sole trader or an individual you can still look to potentially bankrupt them if they do not pay your rent arrears.

Does the Pre-Action Debt Protocol apply? It does where any business is claiming payment of a debt from an individual (and this includes a sole trader).

It sets out various steps that you have to take, and certain information that you have to put in your letter of claim.

It aims to encourage early communication and exchange of information to help clarify any issues in dispute, to enable the parties to resolve the dispute without the need for proceedings and, where proceedings cannot be avoided, to assist with the efficient management of the claim.

If proceedings are issued, the court will expect you to have followed it and will look at non-compliance when making directions for the claim.

In all other cases you have to follow the Practice Direction Pre-Action Conduct and Protocols.

Court action can be more costly, and take longer, than some other forms. If however there is a substantial dispute it may well be the right route to take. If you start, but then stop a case you may have to pay the defendant tenant's costs.

You have to serve a letter before action demanding payment within a certain number of days and will likely be penalised in costs by the court if you do not do this.

You can then issue a claim form and particulars of claim on the tenant who then has either 14 or 28 days to serve a defence, depending whether an acknowledgment of service is filed or not.

Without a defence you can ask for judgment in default, which is most often dealt with on paper without a hearing. If a defence is put in but the case is simple you can apply for judgment. That hearing should take place within a few months.

If you get a defence that is not frivolous, decide not to ask for one of these types of judgment (or do and fail) then the court will give directions setting out the steps to take to exchange evidence and prepare for trial.

This usually happens where there is a defence and or counterclaim from the tenant. Consider BEFORE issuing whether there is a potential counterclaim.

Once judgment is obtained a landlord then has to take steps and incur further costs to enforce the judgment. If the tenant has no funds, income or assets to enforce against, there is little point in obtaining a judgment.

Good practice before issuing proceedings is to take steps to view the financial standing of the potential defendant. There is no point suing a defendant who will never pay you.

### **Using a Rent Deposit**

You can, if you follow the notice requirements, take the rent deposit. Check: Should you keep this to protect against other, more awkward liabilities in the future, like damages for dilapidations

That the paperwork allows you to deduct what you are thinking you might deduct!

This is usually a simple process, but you do dwindle the fund for the future unless you can get the tenant to top it back up, as the modern Wilson Browne Solicitors deposit deeds that the commercial property team prepare do. Does the deed have a penalty clause if the tenant does not top it up? Forfeiture is the remedy you want in there at the outset (otherwise what is the point?)!

### **Statutory Demands**

Often (over) used as a quick debt recovery tool they can frighten a debtor into paying up. It puts pressure on a tenant by raising the real possibility of bankruptcy (in the case of an individual) or liquidation (in the case of a company).

You can serve a statutory demand if the debtor owes at least £750 (company) or £5,000 (individual) AND the debt is crystallised and undisputed. If a landlord serves a statutory demand that does not meet these requirements they should expect the tenant to apply for the statutory demand to be set aside and recover its costs of doing so.

If you serve a Statutory Demand on a company you will be unable to proceed to present a winding up petition to the Court as there is currently a temporary restriction under the Corporate Insolvency and Governance Act 2020.

A winding up petition cannot be presented until the 30th September 2021 unless you have reasonable grounds to believe that Covid 19 has not had a financial affect on the debtor or the debtor would have been unable to pay its debt even if Covid 19 had not had a financial affect on the debtor.

Again, it is worth considering any potential counterclaim, since this could also lead to the demand being set aside.

After service, the debtor has 21 days in which to pay. After that you can present a bankruptcy or winding-up petition to the court. You have to think really carefully about doing this because this is when it gets expensive.

Is the tenant good for it? You will only be an unsecured creditor in any bankruptcy or liquidation. Usually, you get back very little, so is there another commercial imperative that you help by winding them up or making them bankrupt?

Trustees in bankruptcy and liquidators are entitled to step away from, or “disclaim” onerous property, which is a definition that includes leases. If that happens then the obligations under the lease end. It is doubtful that there would be much left to pay the landlord at the end.

### **Previous Tenants?**

Can you look backwards up the chain? What about former tenants (or their guarantors)? If the lease pre-dates 1 January 1996, you can go to:

- Current tenant
- First tenant

- a former tenant who has given a promise (“direct covenant”) to be liable
- any guarantors of any of the above

For those leases dated 1 January 1996 or after, you can go to

- Current tenant
- Anyone who assigned (or guaranteed) under an authorised guaranteed agreement (AGA) with the current tenant
- a prior tenant who assigned under an excluded agreement

There are very tricky notice periods and steps to be taken to preserve your rights here. You must serve a particular notice within six months after the due date to comply with s17 of the Landlord and Tenant (Covenants) Act 1995.

### **Interest on Late Payment of Rent**

If you are chasing rent from a commercial Tenant then the [Late Payment of Commercial Debts \(Interest\) Act 1998 \(LPCD\(I\)A 1998\)](#) creates rights for businesses (also public sector organisations) to claim interest for late payment and also to recover reasonable debt recovery costs when each party is acting in the course of business.

You can also use it to challenge certain commercial payment terms if the remedy for late payment in the contract is not harsh enough.

You will have to get over a few hurdles to argue that the rent is due in return for a ‘contract for the supply of services’, and there are some other steps too, but it is worth bearing in mind if you do not have proper interest clauses in your lease.

### **Commercial Rent Arrears Recovery – Tenant**

The previous regime of the common law remedy of distress for arrears of rent was replaced by the Commercial Rent Arrears Recovery (CRAR ) scheme on 6 April 2014.

CRAR is a ‘self help’ remedy and does not need the court to be involved very much. As Landlord you instruct ‘enforcement agents’ (formerly bailiffs) to collect the rent or take control of goods.

CRAR DOES NOT apply to mixed use or residential premises. It is only available only to landlords of leases of commercial premises.

“Rent” has a narrow definition and only payments for ‘possession and use of the demised premises’ (including any interest and VAT on that amount) can be claimed, not others e.g. rates, council tax and service charges even if they are treated “as rent” in the lease.

The rent must be overdue by a minimum of 7 day’s worth of rent, be due and payable before the notice is given, and constant checking of the calculation (because you can get installments or other recoveries) is needed.

Typically the process involves one of:

- a controlled goods agreement (formerly 'walking possession')
- securing goods on the premises or on a public highway, or
- removal from the premises

Notice must be served first, unless the Court's permission has been obtained, which may happen if there is a risk the goods will be disposed of. The enforcement agent may use reasonable force to enter and re-enter the premises.

The Government introduced measures to protect Tenants during the Covid 19 pandemic. The Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Corona Virus) Regulations 2020 prevented Landlords from using CRAR unless an amount equal to at least 90 days rent was overdue (it had previously been 7 days).

The current position is that there must be at least 554 days rent due on 24th June 2021 or CRAR cannot be used. It is currently unknown if this will be increased further but it is likely that the Government's intention to protect Tenants from the use of CRAR will possibly be moved in line with the forfeiture provisions and will apply to arrears until the 25th March 2022.

### **Commercial Rent Arrears Recovery – Sub-Tenants**

The landlord can also use this act to force a subtenant to pay directly to the landlord rather than to the defaulting tenant. Be careful that you don't want to forfeit the sub-lease though! You can only have one notice under the scheme at any one time, but you can withdraw and serve another one on another tenant or sub-tenant.

Code of Practice for commercial property relationships during the Covid 19 pandemic  
The Government has introduced a code of conduct for the commercial property sector.

This code of conduct is designed to support businesses to come together to negotiate affordable rental agreements.

The code of practice provides the following principles which underline it:-

- Transparency and collaboration.
- A unified approach.
- Government support.
- Acting reasonably and responsible

[Code of conduct](#)

Updates July 2021