

AVAILABILITY OF LANDLORD REMEDIES FOR UNPAID RENT

23 June 2021 (update from 12 March 2021)

Measures first announced at the start of the initial lockdown in 2020 to protect tenants from enforcement action in relation to unpaid rent have once again been extended. Some measures will remain in place until 25 March 2022. The Government has also announced new legislation to help those businesses that have accrued rental arrears during period of enforced closure during lockdown. This briefing summarises the updated position in relation to landlord remedies.

Insolvency processes including the [new moratorium procedure](#) may restrict the use of the remedies below. The Government's (temporary) [code of practice](#) for commercial leases remains a voluntary code, but one which the Government has emphasised it expects landlords and tenants to follow. The Government has made it clear that any businesses that can pay all or any of their rent should do so. The Government has reiterated its intention to launch a review of commercial landlord and tenant legislation (the Landlord and Tenant Act 1954), which will consider different models of rent payment and evaluate the impact of COVID-19 on the property market in general, later this year.

It remains the case that none of the measures removes or reduces the obligation to pay amounts due under a lease. Instead they defer the payment obligation or opportunity to enforce it. But it remains to be seen how the Government's proposals for a system of binding arbitration may change that position in future.

Remedy	Status
Interest	Late payment of amounts due under a lease usually results in an obligation to pay interest. This has not been affected by the measures introduced to date.
Rent deposit	<p>It will generally be possible to draw on a rent deposit where relevant amounts are overdue albeit those are now likely to exceed any deposit held in most cases. Landlords will need to check the terms of the specific deposit deed for detailed requirements and limitations.</p> <p>Where a landlord draws on a rent deposit, ordinarily the tenant will be obliged to replace the amount withdrawn. The ability of landlords to enforce that obligation will be limited by some of the points below. Note, however, that if a tenant goes into administration and the premises are used for the benefit of the administration (e.g. if a head office continues to be occupied and used for the tenant's business), rent for the period of such use would be</p>

Remedy	Status
	<p>an expense of the administration and would be payable in priority to unsecured creditors, among others. The obligation to replace a deposit would not be prioritised in this way.</p>
<p>Guarantee / letter of credit</p>	<p>A landlord will remain free to seek payment of rent and other sums under a guarantee or letter of credit directly, where applicable. However, this is subject to the restrictions on enforcement action detailed below, which may make this remedy ineffectual in practice.</p>
<p>Forfeiture</p>	<p>Following the most recent extension, the Coronavirus Act 2020 prevents forfeiture for non-payment of rent until 25 March 2022 in both England and Wales. Action by a landlord in that period will not result in a waiver of a right to forfeit for non-payment of rent unless it is express and in writing. The right to forfeit will be available again if rent remains unpaid when this restriction is lifted.</p> <p>Rights to forfeit for other breaches of the lease remain unaffected.</p>
<p>Commercial rent arrears recovery (CRAR)</p>	<p>CRAR allows for seizure and sale of a tenant’s goods to recover arrears. It applies only to principal rent plus interest and VAT (and not to service charge or insurance rent). From 25 December 2020 to 31 March 2021, CRAR will only be exercisable if at least 366 days’ rent is overdue. From 25 March to 23 June 2021, this will be 457 days’ unpaid rent and from 24 June 2021 to 25 March 2022, it increases to 554 days’ unpaid rent.</p>
<p>Recovery from a subtenant</p>	<p>Where premises are underlet, it is possible for a landlord to require a subtenant to pay its rent directly to the landlord to discharge arrears of principal rent (plus VAT and interest) owed by the intermediate tenant. This applies only if CRAR is exercisable and the unpaid rent must therefore be at least the number of days’ rent set out above.</p>
<p>Statutory demand</p>	<p>A statutory demand is a formal written demand for payment of a debt (such as rent) within 21 days which, if not complied with, may be used as grounds to present a winding-up petition. The Corporate Insolvency and Governance Act 2020 (“CIGA 2020”) currently prohibits presentation of a winding-up petition based on a statutory demand served between 1 March 2020 and 30 September 2021 (extended from 31 March 2021).</p>
<p>Winding-up petition</p>	<p>Creditors (including landlords) are able to petition for the winding-up of a company that owes them money in certain circumstances, including if they are able to show that the company is unable to pay its debts. CIGA 2020 prohibits the presentation of a winding-up petition unless the creditor has reasonable grounds for believing that COVID-19 has not had a financial effect on the company, or that the company’s inability to pay its debts would have</p>

Remedy	Status
	arisen anyway. This currently applies with retrospective effect from 27 April 2020 to 30 September 2021 (extended from 31 March 2021).
Administration	Landlords are not prohibited from applying to place a company in administration, albeit such applications have not been common to date. As with winding-up petitions, a lack of information about the tenant company will often prove a serious obstacle to successfully applying to place a company in administration.
Debt claim	As confirmed by the award of summary judgment in <i>Commerz Real Investmentgesellschaft mbH v TFS Stores Ltd</i> and <i>Bank of New York Mellon (International) Ltd and v Cine-UK Ltd and others</i> , landlords can continue to issue court proceedings to recover sums due under the lease as a debt. Although not caught by the restrictions affecting forfeiture, CRAR and statutory demands, debt claims can be protracted and expensive and enforcement may still present some practical challenges even as “lockdown” restrictions ease.

If you would like further information about the impact of COVID-19 on your business, please speak to your usual Slaughter and May contact.



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