



Advice Note:

“Solving the Issues of Tenant Insolvency”

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Legal Director Phil Parkinson and Associate Katie Edwards offer guidance on the issue of tenant insolvency, providing practical advice on some of the most pressing and frequently asked questions.

Within the complex landscape that landlords, their advisors and agents are operating, the issue of insolvent tenants is becoming more frequently encountered. Complicated legal and practical questions arise as the required action depends on a number of variable factors, including the form of insolvency and whether the lease is encumbered with a legal charge.

Any form of tenant insolvency imposes various restrictions on enforcement remedies available for a landlord, which presents an issue within a block that may be suffering from cash flow issues due to a lack of service charge funds. A review of the legal position a landlord may be in, together with which remedies are available, is set out in the following pages, within which four key questions are considered.

Bankruptcy

Can Court proceedings be issued for recovery of rent/service charge?

Not without permission of the Court due to the restrictions contained at s285(3) of the Insolvency Act 1986 ("IA 1986"). An application can be made for permission to issue and serve recovery proceedings but the Court will need to be persuaded that there is good reason to do so.

Can Guarantors be pursued for recovery of rent/service charge?

Yes. Bankruptcy of a direct tenant provides no restriction on pursuing their Guarantor. Accordingly, a landlord ought to verify whether any Guarantors exist in relation to situation involving tenant insolvency.

Can a rent deposit deed be called upon?

Yes. There is no restriction on calling on a rent deposit deed – on the strict basis that no specific contractual provisions are engaged due to the insolvency event.

Can forfeiture proceedings be issued?

Yes, pursuant to s285 of the Insolvency Act 1986 and the Court of Appeal authority of *Sharples v Places for People Homes* [2011] EWCA Civ 813. A restriction does exist preventing a landlord from being unable to plead recovery of any arrears as a debt.

Individual Voluntary Arrangement (IVA)

Can Court proceedings be issued for recovery of rent/service charge?

During the initial moratorium, not without leave of the court as per s252 IA 1986. Once the IVA has been approved, proceedings can only be issued for claims not governed by the IVA.

Can Guarantors be pursued for recovery of rent/service charge?

Yes, unless released by the wording of the IVA.

Can a rent deposit deed be called upon?

Yes, but only with leave of court pursuant to s252 IA 1986.

Can forfeiture proceedings be issued?

During the moratorium, not without leave of the court. Upon approval of the IVA proceedings can be issued in certain circumstances – see *Thomas v Ken Thomas Ltd* [2006] EWCA Civ 1504.

LPA Receivers

Can Court proceedings be issued for recovery of rent/service charge?

Yes.

Can Guarantors be pursued for recovery of rent/service charge?

Yes.

Can a rent deposit deed be called upon?

Yes.

Can forfeiture proceedings be issued?

Yes, following *Transag Haulage Ltd v Leyland DAF Finance plc* [1994] 2 BCLC 88.

Administration

Can Court proceedings be issued for recovery of rent/service charge?

Not without leave of court or administrator's consent under Schedule B1, paragraphs 43 and 44 IA 1986.

Can Guarantors be pursued for recovery of rent/service charge?

Yes.

Can a rent deposit deed be called upon?

Only with permission of the court or administrator's consent and only where the deposit is a financial collateral arrangement.

Can forfeiture proceedings be issued?

Only with permission of the Court or with the administrator's consent.

Liquidation (Creditors/Members Voluntary Liquidation)

Can Court proceedings be issued for recovery of rent/service charge?

Yes, although the liquidator can apply for the proceedings to be stayed under s112 of IA 1986.

Can Guarantors be pursued for recovery of rent/service charge?

Yes.

Can a rent deposit deed be called upon?

Yes.

Can forfeiture proceedings be issued?

Yes, although the liquidator can apply for the proceedings to be stayed under s112 of IA 1986.

Company

Voluntary Arrangement (CVA)

Can Court proceedings be issued for recovery of rent/service charge?

During the moratorium, no proceedings can be issued without leave of the court Schedule A1, paragraph 12 IA 1986. Following approval of the CVA, only for claims not governed by the CVA following Prudential Assurance Co Ltd v PRG Powerhouse Ltd [2007] EWHC 1002 (Ch).

Can Guarantors be pursued for recovery of rent/service charge?

Yes, unless the wording of the CVA releases a Guarantor's liability.

Can a rent deposit deed be called upon?

During the moratorium, the consent of the Court is required. Following the finalisation of the CVA no such consent is required.

Can forfeiture proceedings be issued?

During the moratorium, not without leave of the court. Following the approval of the CVA, only for rent as modified by the CVA, or not within its terms, or on the ground of insolvency if the lease permits as per Thomas v Ken Thomas Ltd [2006] EWCA Civ 1504.

In Summary

Deciding on specific action and a way forward when dealing with an insolvent tenant takes detailed consideration and, usually, specialised legal advice – in particular in advising on situations where a discretionary application is required to be made to the Court for consent to pursue a particular option. It should be noted that the issues and implications can be severe and involve consequences for the landlord, tenant and other third parties.

Should you wish to discuss any of the issues and points discussed in this article, please contact us:

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