

# Options for Landlords

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# 1 TENANT IN LIQUIDATION

## My tenant is in liquidation. What is this?

Liquidation is the process of a liquidator winding up a company's affairs and realising its assets for the benefit of the creditors, the company having ceased to trade. Liquidation can either be instigated voluntarily (by the company) or compulsorily (by the court). If instigated by the company then it can either be done on a solvent basis (a members' voluntary liquidation "MVL") or an insolvent basis (a creditors' voluntary liquidation "CVL").

## What can I do in respect of the rent arrears?

In respect of compulsory liquidation you cannot peaceably re-enter the premises, distrain for rent (seize tenant's goods to the value of the rent arrears) or deduct funds from a rental deposit without the consent of the court or the liquidator. The rent arrears will be a claim in the liquidation. Action still can be taken against guarantors and previous tenants and notice can be given to sub-tenants to pay rent directly to you (a section 6 notice).

In the case of voluntary liquidation you may peaceably re-enter the premises (but a liquidator may apply to court for relief), distrain for rent and deduct funds from a rent deposit. Action can also be taken against guarantors, previous tenants and sub tenants by serving a section 6 notice.

## I have heard an insolvency practitioner can disclaim the lease, can he in this situation?

Yes. Disclaimer is the renunciation of a liability by the liquidator. You may require the liquidator to decide whether or not to disclaim. The liquidator must respond within 28 days. If he fails to do so the lease cannot be disclaimed and it can be argued that the rent is payable as an expense in the liquidation. This means that you will be paid after fixed charge holders but before floating charge holders and unsecured creditors. If it is not paid then the action noted above can be taken.

## What about the accrual of arrears between the date of liquidation and disclaimer? What about after the lease has been disclaimed?

The company remains liable for the rent up to the date it is disclaimed. The rent will fall as an unsecured claim in the liquidation. Ascertaining the liquidator's intentions is therefore essential. After the lease has been disclaimed the company is not liable for the rent. However the lease remains in existence. You may take the actions identified above and terminate the lease.

## Tenant in Liquidation – Summary

Type of liquidation	MVL/CVL	Compulsory liquidation
Remedy		
Peaceable re-entry	Yes but liquidator can apply for relief	Not without the liquidator's or court's consent
Distrain for rent	Yes	Not without the liquidator's or court's consent
Pursuit of guarantors and/or previous tenants	Yes	Yes
S6 notice to sub tenants	Yes	Yes
Deduction of funds from rent deposit	Yes	Not without the consent of the court
Disclaim the lease	Yes	Yes

## **2 TENANT IN ADMINISTRATION**

### **My tenant is in administration. What is this?**

Administration is a process of corporate recovery whereby an administrator is appointed for the purposes of rescuing a company or achieving a better result for the creditors than would otherwise be achieved were the company wound up or realising property in order to make a distribution to secured or preferred creditors.

### **What can I do in respect of the rent arrears?**

For the duration of administration (usually 1 year) a "moratorium" exists which prevents any legal process being commenced against the company. You cannot therefore peaceably re-enter the premises, distrain for rent or deduct monies from a rent deposit without the consent of the administrator or the court. The rent arrears will be a claim in the administration.

If a notice of intention to appoint an administrator has been filed at court then an interim moratorium of 10 business days (from the date of the notice) comes into effect with the same consequences as above.

Action can be taken against guarantors and previous tenants who do not benefit from the moratorium. A notice can be served on sub-tenants requiring rent to be paid to you (a section 6 notice).

### **What about the accrual of arrears post administration?**

If the company remains in possession post administration then the rent is arguably payable as an expense of the administration. Legal proceedings cannot be commenced without the consent of the administrator or the court. If the administrator refuses to pay the rent an application can be made to court seeking an appropriate remedy including forfeiting the lease. Ascertaining the administrator's intention with regard to the premises is therefore crucial.

### **I have heard an insolvency practitioner can disclaim the lease, can he in this situation?**

No. Unless the administrator vacates the property he is bound by the lease terms and should pay the rent as an expense in the administration.

## **3 TENANT IN RECEIVERSHIP**

### **My tenant is in receivership. What is this?**

The term receivership is used to describe both administrative receivership (receivership) and the Law of Property Act receivership (LPA receivership).

Receivership is the process of the appointment of a receiver by a creditor who has security (a mortgage or debenture) over a particular asset or assets of the company. The receiver is empowered to realise the asset(s) for the benefit of the security holder and not the benefit of all creditors as in the case of administration. Given that it is common to take security over all the assets of a company receivership often results in insolvency and ultimately liquidation.

LPA receivership is the appointment of a receiver (who is not necessarily an insolvency practitioner) under the Law of Property Act 1925 to realise fixed charge assets on behalf of the security holder.

### **What can I do in respect of the rent arrears?**

You can peaceably re-enter the property, distrain for rent and deduct funds from a rent deposit. You can pursue guarantors, previous tenants and give notice to sub-tenants to pay their rent to you directly (section 6 notice).

### **What about the accrual of arrears after receivership?**

Your right to peaceably re-enter the premises, distrain, pursue guarantors, serve a section 6 notice and deduct funds from a rent deposit is unaffected.

### **I have heard an insolvency practitioner can disclaim the lease, can he in this situation?**

No. The tenant's obligations under the lease are not affected.

## Tenant in Administration – Summary

Type of Administration Remedy	Administrative receivership/Law of Property Act receivership	Administration	Notice of intention to appoint administrator
<b>Peaceable re-entry</b>	Yes	Not without the administrator's or the court's consent	Not without the administrator's or the court's consent for period of interim moratorium (10 business days from date of notice)
<b>Distrain for rent</b>	Yes	Not without the administrator's or the court's consent	Not without the administrator's or the court's consent for period of interim moratorium (10 business days from date of notice)
<b>Pursuit of guarantors and/or previous tenants</b>	Yes	Yes	Yes
<b>S6 notice to sub tenants</b>	Yes	Yes	Yes
<b>Deduction of funds from rent deposit</b>	Yes	Not without the administrator's or the court's consent*	Not without the administrator's or the court's consent for period of interim moratorium (10 business days from date of notice)*
<b>Disclaim the lease</b>	No	No	No

\* Please note effect of Financial Collateral Arrangements (see section 7)

## 4 TENANT IN COMPANY VOLUNTARY ARRANGEMENT

### My tenant is subject to a company voluntary arrangement ("CVA"). What is this?

A CVA is a statutory form of binding agreement between a company and its creditors. A proposal is made whereby creditors usually only receive a percentage of what is owed over the term of the CVA. The proposal is binding on all creditors if accepted by  $\frac{3}{4}$  in value of them at a creditors' meeting.

### What can I do in respect of the rent arrears?

Small companies can obtain a 28 day "moratorium" when the CVA proposal is being considered by creditors. No action to re-enter the premises, distrain for rent or deduct funds from a rent deposit can be taken. Guarantors can still be pursued and notice to sub-tenants can be given to pay their rent to you directly (section 6 notice).

During the CVA you can only re-enter the premises in certain circumstances, you cannot distrain for rent but you can deduct monies from a rent deposit. Guarantors can be pursued and a section 6 notice can be given to sub-tenants.

### What about debts incurred after the CVA has been entered into?

Your right to peaceably re-enter the premises, distrain, pursue guarantors, serve a section 6 notice and deduct funds from a rent deposit is unaffected.

### I have heard an insolvency practitioner can disclaim the lease, can he in this situation?

No. Unless a variation in the terms is agreed with you as part of the CVA then the lease and all its terms continue to bind the tenant.

### Tenant in Company Voluntary Arrangement – Summary

Stage of CVA	CVA – During moratorium small companies only (28 days)	During CVA approved by creditors (all companies)	Post CVA new debt
Remedy			
Peaceable re-entry	Not without the consent of the court	Yes, in certain circumstances	Yes
Distrain for rent	Not without the consent of the court	No	Yes
Pursuit of guarantors and/or previous tenants	Yes	Yes	Yes
S6 notice to sub-tenants	Yes	Yes	Yes
Deduction of funds from rent deposit	Not without the consent of the court	Yes	Yes
Disclaim the lease	No	No	No

## **5 TENANT IN BANKRUPTCY**

### **My tenant is bankrupt. What does this mean?**

Bankruptcy is the process whereby an individual as a result of being insolvent is declared bankrupt by order of the court upon presentation of a petition by either the bankrupt or a creditor. A trustee in bankruptcy is appointed to realise the bankrupt's assets for the benefit of the bankruptcy creditors.

### **What can I do in respect of the rent arrears?**

You can re-enter the premises and take possession. You can distrain on goods (but only in respect of 6 months rent arrears pre-bankruptcy). You may deduct funds from a rental deposit. Action can also be taken against guarantors and previous tenants. A notice can be served on sub tenants requiring them to pay their rent directly to you (a section 6 notice).

### **I have heard an insolvency practitioner can disclaim the lease, can he in this situation?**

Yes. Disclaimer is the renunciation of a liability by the trustee in bankruptcy. You may require the trustee to decide whether or not to disclaim the lease. The trustee must respond within 28 days. If he fails to do so the lease cannot be disclaimed and the rent will be payable as an expense in the bankruptcy. If it is not paid then the action noted above can be taken. Action can also be taken against guarantors and previous tenants and a section 6 notice can be served.

### **What about the accrual of arrears between the date of bankruptcy and disclaimer? What about after the lease has been disclaimed?**

The rent will fall as an unsecured claim in the bankruptcy. Ascertaining the trustee's intentions is therefore essential. After the lease has been disclaimed neither the tenant nor trustee are liable for the rent. However the lease remains in existence. You may take the actions identified above and terminate the lease.

## **6 TENANT IN AN INDIVIDUAL VOLUNTARY ARRANGEMENT**

### **My tenant is subject to an individual voluntary arrangement ("IVA"). What is this?**

An IVA is a statutory form of binding arrangement between an individual and his or her creditors. A proposal is made whereby creditors usually only receive a percentage of what is owed over the term of the IVA. The proposal is binding on all creditors if accepted by  $\frac{3}{4}$  in value of them at a creditors' meeting.

### **What can I do in respect of the rent arrears?**

A debtor may apply to court for an interim order which creates a "moratorium" preventing any legal proceedings being commenced for 14 days whilst the debtor puts together a proposal to the creditors. During this period you can only re-enter the premises, distrain for rent or remove funds from a rent deposit with the consent of the court. Guarantors can still be pursued and notice to sub-tenants can be given to pay their rent to you directly (section 6 notice).

When the IVA is approved you can re-enter the premises in certain circumstances, you cannot distrain for rent but you can deduct monies from a rent deposit. Guarantors and previous tenants can be pursued and a section 6 notice can be given to sub tenants.

### **What about the accrual of arrears after the IVA has been entered into?**

Your right to peaceably re-enter the premises, distrain, pursue guarantors, serve a section 6 notice, and deduct funds from a rent deposit is unaffected.

### **I have heard an insolvency practitioner can disclaim the lease, can he in this situation?**

No. Unless a variation in the terms is agreed with you as part of the IVA then the lease and all its terms continue to bind the tenant.

### Tenant in Bankruptcy/Individual Voluntary Arrangement - Summary

	<b>Bankruptcy</b>	<b>IVA – During moratorium 14 Days</b>	<b>IVA – After moratorium when IVA approved by creditors</b>	<b>Post IVA new debt</b>
<b>Peaceable re-entry</b>	Yes	Not without the consent of the court	Yes, but exceptions	Yes
<b>Distrain for rent</b>	Yes for the 6 months rent due before the bankruptcy order	Not without the consent of the court	No	Yes
<b>Pursuit of guarantors and/or previous tenants</b>	Yes	Yes	Yes	Yes
<b>S6 notice to sub tenants</b>	Yes	Yes	Yes	Yes
<b>Deduction of funds from rent deposit</b>	Yes	Not without the consent of the court	Yes	Yes
<b>Disclaim the lease</b>	Yes	No	No	No

## **7 DEDUCTING RENT FROM RENT DEPOSITS**

Whether you can deduct money from a rent deposit depends upon who holds the deposit, upon what terms it is held and whether you need to take court action to enforce the contractual terms of the deposit. For example the tenant may have created a floating charge which affects the deposit.

The Financial Collateral Arrangements (No 2) Regulations 2003 apply to security arrangements (including charges) over cash where the cash is held by or is under the control of the person with the benefit of the security. Both parties must both be non-natural persons. In relation to such security arrangements, the moratorium and interim moratorium on enforcement of security in an administration do not apply.

## **8 DISTRESS FOR RENT**

Distress for rent allows a landlord to distrain i.e. seize goods that are at the leased premises and retain them until the rent is paid or the goods can be sold and the proceeds set off against the rent arrears.

Distress may be carried out either by the landlord in person or by an authorised bailiff acting as the landlord's agent.

Whilst the law in respect of distress currently remains in force the Tribunals, Court and Enforcement Act 2007 ("the Act") introduces new statutory provisions in relation to the recovery of rent arrears. As of February 2009 there is no implementation date and therefore these rules do not yet apply. The same are however summarised below for future reference.

Under the Act the common law right of distraint will be abolished. Instead the Act creates a new statutory right for landlords of commercial premises to take control of tenant's goods in order to recover rent arrears under the Commercial Rent Arrears Recovery ("CRAR").

The landlord will no longer be able to seize goods personally unless it is a certified enforcement agent. If it is not it will have to instruct bailiffs in writing. It is worth noting that under the CRAR rent is restricted to the sum payable by the tenant in relation to the use and possession of the premises. The landlord can no longer claim VAT.

Perhaps most significantly the landlord will be required to give notice of his entitlement to seize goods to the value of the rent arrears.

For further information please contact Damon Watt on 0845 074 2466 or email him at [damon.watt@emwph.com](mailto:damon.watt@emwph.com) Damon is a member of the Insolvency Lawyers Association and is a full member of R3 (The Association of Business Recovery Professionals). He is also an accredited mediator with CEDR (Centre for Effective Dispute Resolution).

Damon advises in respect of a wide range of insolvency related matters, including:

- advising in respect of strategic options for companies and creditors, advising on court applications, restructuring and re-organisation;
- reviewing securities and documentation for enforcement of security; and
- advising insolvency practitioners, companies and creditors on protection and recovery of assets, validity of creditors' claims, retention of title, lien and set off issues, MVs and CVs.



He also advises on liability for wrongful and fraudulent trading, directors' duties and director disqualification.

