

Landlords' options for tenant default (30 September 2020)

*Landlords' remedies have been impacted by temporary measures/legislation implemented in response to the COVID-19 pandemic. These measures are indicated in red in the table below

Remedy	Description	Advantages	Disadvantages	Practical tips
 Rent deposit draw down	Drawing down funds from a rent deposit to satisfy rent arrears, usually with a requirement for the tenant to top up the deposit	<ul style="list-style-type: none"> Inexpensive, swift procedure Minimal reputational/relationship damage Depending on the terms of the rent deposit, it may also be used to cover dilapidations and costs 	<ul style="list-style-type: none"> Tenant unlikely to top up in the current climate Might waive landlord's right to forfeit for rent arrears 	<ul style="list-style-type: none"> Check notice requirements before drawing down Preserve the rent deposit for as long as possible by pursuing any solvent guarantor/former tenant first Certain types of deposit may be protected from drawdown where tenant is subject to the new "statutory moratorium" under the Corporate Insolvency & Governance Act 2020 (CIG Act 2020)
 Pursue a former tenant or guarantor	Pursuing a former tenant or guarantor for "fixed charges" due under the lease	<ul style="list-style-type: none"> More than one party to pursue for arrears 	<ul style="list-style-type: none"> Must serve a section 17 notice on former tenant/guarantor within 6 months of the arrears falling due Payment can lead to an overriding lease with the former tenant/guarantor Might waive landlord's right to forfeit for rent arrears 	<ul style="list-style-type: none"> Landlord should investigate the financial strength of the former tenant/guarantor before deciding whether to serve a section 17 notice In the current climate, landlord should diarise to track rent arrears to ensure that notices are served in time
 Pursue a guarantor under the existing lease	Pursuing a guarantor under the existing lease for sums due in the event of tenant default	<ul style="list-style-type: none"> More than one party to pursue for arrears No need to serve any notice to preserve or pursue a claim 	<ul style="list-style-type: none"> Only effective if the guarantor is solvent There may be enforcement issues depending on the guarantor's jurisdiction Might waive landlord's right to forfeit for rent arrears 	<ul style="list-style-type: none"> Landlord should investigate the financial strength of the guarantor, and investigate any corporate relationship between the tenant and guarantor that could have an adverse "knock on" effect on the prospects of future recovery from the tenant
 Court proceedings	Issuing debt proceedings in the County or High Court against the tenant to recover the arrears	<ul style="list-style-type: none"> Puts pressure on the tenant to pay arrears to avoid a judgment debt Currently no restrictions on landlords issuing proceedings in either the County Courts or the High Court to recover arrears of rent from tenants 	<ul style="list-style-type: none"> Can be a protracted and expensive process If proceedings are withdrawn at any stage, landlord may be liable for costs 	<ul style="list-style-type: none"> Prior to commencing proceedings, landlord should check if the tenant has any assets for the purpose of enforcing a judgment Where a tenant is subject to the new CIG Act statutory moratorium or any insolvency regime, there are restrictions on court proceedings against the tenant
 Insolvency*	Threatening bankruptcy or winding up by serving a statutory demand or 7 day letter on tenant *CIG Act 2020 has imposed temporary restrictions on serving statutory demands and issuing/presenting winding up petitions in respect of companies (not individuals) ¹	<ul style="list-style-type: none"> Relatively inexpensive and effective method of recovering arrears if the tenant is solvent 	<ul style="list-style-type: none"> Likely to cause reputational and relationship damage Ineffective if the tenant is already insolvent or on the cusp of insolvency No priority for a landlord in an insolvency regime 	<ul style="list-style-type: none"> In the case of a tenant company, consider a 7 day letter rather than statutory demand (21 days) Ensure that arrears are undisputed, otherwise could lead to expensive court proceedings Currently significant restrictions on winding up (not bankruptcy) Separate restriction on winding up if tenant subject to CIG Act 2020 statutory moratorium




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Statutory demands served on or after 1 March cannot form the basis of a winding-up petition presented at any point after 27 April 2020 (effectively voiding them). This measure will be in place until **31 December 2020**.

Where no statutory demand has been served, creditors cannot issue or present a petition against a company (**on or after 27 April until 31 December 2020**) on the grounds that it is unable to pay its debts, unless the petitioner has reasonable grounds for believing (and can persuade the court) that:

- (i) COVID-19 has not had a 'financial effect' on the company; or
- (ii) the company would have been unable to pay its debts regardless of the financial effects of COVID-19

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 CRAR*	<p>Statutory regime whereby commercial landlord takes control of tenant goods at leased premises, and sells them if arrears remain unpaid</p> <p>*There are temporary restrictions on the exercise of CRAR²</p>	<ul style="list-style-type: none"> • Puts tenant under pressure to pay • Initial CRAR enforcement notice provides landlord with a buffer period of 12 months to enforce • Can also use CRAR to require subtenant to pay rent direct to landlord (see below) 	<ul style="list-style-type: none"> • Tenant has prior warning of procedure when initial CRAR enforcement notice served • Can only exercise CRAR to recover "pure" rent (not service charge, insurance and other ancillary charges, even if reserved as "rent") 	<ul style="list-style-type: none"> • Procedure is only effective if tenant has assets of value situated at premises • Currently significant restrictions on CRAR • Separate restriction on CRAR if tenant subject to CIG Act 2020 statutory moratorium
 Notice on subtenant to pay rent to superior landlord *	<p>Exercising the right to require a subtenant to pay the rent that it owes directly to the superior landlord rather than the intermediate tenant, by the service of a "section 81 notice" on the subtenant</p> <p>*The temporary restrictions on exercising CRAR are also applicable to section 81 notices³</p>	<ul style="list-style-type: none"> • More than one party to pursue for arrears • Once a section 81 notice has been served on a subtenant, it is treated as an immediate tenant of the landlord for the purpose of enforcement remedies for non-payment of rent. Therefore, the usual methods of enforcement will be available, including CRAR 	<ul style="list-style-type: none"> • Landlord can only serve a valid section 81 notice on the subtenant where it is entitled to exercise CRAR against its immediate tenant (all of the provisions concerning CRAR, including the type of rent and the amount of rent outstanding, apply) 	<ul style="list-style-type: none"> • Current restrictions on section 81 notices (see footnote 3 below)
 Forfeiture*	<p>Exercising a landlord's right to terminate a lease (during the term) and take back possession of the premises</p> <p>*There is a temporary ban on forfeiting commercial leases⁴</p>	<ul style="list-style-type: none"> • Option to re-let the premises to a stronger covenant, potentially for a premium 	<ul style="list-style-type: none"> • Business rates liability for empty premises • Uncertainty of relief application by tenant • Difficulty finding new tenant in the current market • Easy to waive the right to forfeit 	<ul style="list-style-type: none"> • Current moratorium on forfeiture for non-payment of rent until 31 December 2020 (but can forfeit for other breaches) • Separate restriction on forfeiture if tenant subject to CIG Act 2020 statutory moratorium

² On 16 September 2020, the Taking Control of Goods (Amendment) (Coronavirus) Regulations 2020 increased the minimum net unpaid rent that must be outstanding before CRAR can be exercised, to an amount equivalent to **276 days' rent** where CRAR is exercised between 29 September 2020 and 24 December 2020, and **366 days' rent** where CRAR is exercised between 25 December 2020 and 31 December 2020 (the threshold for exercising CRAR is usually 7 days' rent arrears).

³ The new CRAR regulations require that **276 days' net rent** must be outstanding by the tenant if a section 81 notice is served on the subtenant before 24th December 2020, and **366 days' net rent** must be outstanding by the tenant where a section 81 notice is served on a subtenant between 25th December 2020 and 31 December 2020.

⁴ From 26 March 2020, section 82 of the Coronavirus Act 2020 prevented forfeiture of business leases, during the "relevant period", whether by proceedings or peaceable re-entry, of the vast majority of commercial leases for non-payment of any sums due under the lease. Those sums nevertheless remain due, and only an express waiver will waive the right to forfeit when the relevant period ends. On 16 September 2020, the relevant period was extended to **31 December 2020**.