

Summary of commercial landlords' remedies for unpaid rent

Option	Description	Available?	Practical tips
Forfeiture due to rent arrears	Terminating lease and taking back possession either by landlord changing the locks or by court proceedings provided lease sets out conditions to allow you to do so (which most do).	Not available for unpaid rent until 30 June 2021. Update 16.6.21 – Government announced proposal to extend until 25 March 2022. Arbitration system to be established to assess burden of closure impact as between landlord and tenant. Further details awaited from Government.	Do not seek to forfeit by changing locks until moratorium is lifted as otherwise tenant can make an urgent application to court seeking access and claim loss of earnings for the period they have not been allowed entry as well as their legal costs. Note – Landlords cannot waive their right to forfeit during the moratorium period unless they expressly record so in writing.
Forfeiture for other breach of lease terms	Terminating lease and take back possession provided the lease terms reserve such a right.	Available	To forfeit and seek possession for breaches other than rent arrears landlords must first serve a s.146 notice on their tenants giving them reasonable notice to remedy the breach. An alternative in the case of disrepair may be to exercise an option (if the lease provides for it) for the landlord to carry out the work, failing that it depends on what the breach is to how much time is given. From 21 September 2020 the courts are now hearing possession claims although there is a long back log of hearings to get through so do not expect one this year. If the lease permits and there is a clear breach of terms, the landlord could peacefully re-enter and change the locks if able to do so without using force against anyone present in the building and there is no sign of residential use.

Option	Description	Available?	Practical tips
Commercial Rent Arrears Recovery (CRAR)	This is when bailiffs are appointed to serve notice and then seize tenants' goods to recover the arrears. Only applies when the property is used for commercial purposes only and against rent arrears (inc interest and VAT) and not service charge or insurance (even if defined as rent in lease).	Available but with restrictions: The amount of days rent arrears required have been increased several times. From 24.06.21 554 days rent arrears are required in order to rely upon CRAR	Serving notice may encourage tenant to prioritise repaying landlord's debt so long as there are assets worth seizing at the premises. If there is a chance the tenant could start trading again and pay rent, seizing goods may prohibit them making profit to pay the debt. Update 16.6.21 - Ministry of Justice have confirmed restrictions on CRAR will continue but will remain at 554 days.
Debt Claim	Obtain a court judgment for the rent arrears.	Available	Option worth exploring to pursue the tenant through the court to recover the arrears. Can be expensive as court fees for debt between £10k-£200k are 5% of the claim value. If undefended a quick default judgment could be obtained within 3-6 months. If a weak defence is filed, a summary judgment application could be made where the defendant has no real prospect of defending a case resulting in judgment being entered a lot quicker than a trial and determined in less than 6 months. Before pursuing this route check tenant has any assets/ability to pay debt to you? Consider obtaining pre-sue report.

Option	Description	Available?	Practical tips
<p>Lease term about to expire – serve s.25 notice?</p>	<p>Most commercial leases are protected by the Landlord and Tenant Act 1954 which means tenants are entitled to a new lease. In certain circumstances a landlord can serve a hostile notice opposing renewal on one or more of the available statutory grounds such as the tenant being in breach of covenant, or the landlord wanting to redevelop or use the property for its own business.</p>	<p>Available (if no more than 12 months until lease expiry date) but cannot oppose the grant of a new lease based on the grounds of rent arrears or persistent rent arrears where those arrears arose during the COVID-19 pandemic.</p>	<p>This can be a good alternative route to forfeiture. Generally speaking a court will be more inclined to refuse renewal of a lease as a result of a persistent breach of, for example, repairing covenants or payment of rent than it would be to grant forfeiture.</p>
<p>Surrender</p>	<p>Agree to bring lease to an end.</p>	<p>Available</p>	<p>Consider if tenant is unlikely to ever be able to pay rent or trade to a standard that would allow them to meet liabilities. Tenant may welcome agreement to an early surrender or indeed may have abandoned property altogether already if there is no sign of anyone being on site for a while. Business rate liability is at the forefront of landlords' minds if there is not a new tenant ready to move in.</p>

Option	Description	Available?	Practical tips
Statutory Demand	Notice served on tenant demanding debt is paid within 21 days failing which may be used as grounds to present a winding up petition if tenant is a company or bankruptcy proceedings if individual.	Available with restrictions.	<p>Not recommended against companies if debts have arisen between 1 March 2020 to 30 June 2021 (expected extension until 30 September 2021) as you will not be able to serve a winding up petition. Any statutory demands served during this time cannot be relied upon.</p> <p>If you have served a statutory demand prior to the above you must ensure that the debt is undisputed and you have extensive evidence to prove that repayment of this debt has not been affected by the Coronavirus pandemic. If there is any doubt, it is likely that the court will side with the debtor. Given the current circumstances, this could result in expensive court action without the desired results.</p> <p>For individual tenants, no restrictions here. It is a relatively inexpensive and effective method to recover sums due provided the tenant is solvent, has ability to pay and the debt amount is undisputed.</p>
Winding up Petition	Landlords apply to wind up tenant company if can show they are unable to pay debts.	<p>Restricted - Winding up Petitions issued between 27 April 2020 and 30 June 2021 will not be entertained by a court unless satisfied that the tenant's inability to pay its debts was for reasons unrelated to COVID-19.</p> <p>Update 16.6.21 Government announced proposal to extend restrictions until 30 September 2021.</p>	<p>There is no restriction on petitioning against a tenant company which has not in fact been financially affected by COVID-19, but that would obviously be almost impossible for a landlord to prove. In practice, therefore, to petition successfully a landlord needs to show that the debtor's inability to pay would have arisen anyway, even if COVID-19 had not had a financial effect on the tenant company.</p> <p>This still requires cogent supporting evidence from the landlord and a court would likely consider the grounds at a non-attendance review hearing so even if approved it would not be formally issued and listed for hearing for some time. If the landlord is adjudged to have filed a petition for issue without having had reasonable grounds according to these criteria, attempting to do so might be considered an abuse of process so this is not a step to be taken lightly.</p> <p>So far, the only successful petitions we have seen under the new rules were based on 2019 statutory demands and long history of non-payment in goods and services contracts. We have not (as at 31 December 2020) yet seen a successful petition by a commercial landlord.</p> <p>For more information on this topic read our article (NB this was written before the restriction timescale was extended but is otherwise accurate).</p>

Option	Description	Available?	Practical tips
Rent Deposits	Landlords can deduct the deposit from the arrears if deed allows usually with requirement for tenant to top up the deposit.	Available	<p>Read the terms of the rent deposit deed carefully to make sure it is possible to do so. Tread carefully if tenant is likely to go into administration as rent and other expenses may be classed as a priority and debt of the administration ranking in front of other creditors. The administrator is unlikely to be obliged to pay any rent deposit.</p> <p>Tenant is also unlikely to be able to top up in the current circumstances so you are essentially moving the debt from one place to another. If likely to forfeit due to arrears once moratorium is lifted and unless cash is required now, there is an advantage to leaving deposit untouched so arrears count towards the amount needed to be in debt in order to support forfeiture action.</p>
Recovering rent from sub-tenant	When tenants have underlet property to a third party, landlords can seek for rent to be paid directly to them.	Available but same conditions as CRAR as set out above.	Recommend pursuing if conditions met. Landlords would need to serve a valid section 81 notice on the subtenant requiring them to pay its rent directly to them and not their own landlord for the amount of arrears due.
Enforcing against Guarantor	This is when a third party has guaranteed tenants terms, often done when an assignment of lease has taken place by former tenant or when landlord has required a third party backing when tenant is a new company with no assets. Applies to leases post 1996.	Available	First check wording of the guarantee agreement to make sure that the liability has been triggered and what steps need to be taken. Normally you would expect notice to have to be given to the guarantor to pay the sums due. If unpaid can pursue debt claim against them (see above).

Option	Description	Available?	Practical tips
Recover against former tenant and or former guarantor	Applies to leases dated prior to 1 January 1996. Permits landlords to recover from any former tenant who has given a direct covenant to be liable for the remainder of the term, their respective guarantors or the original tenant.	Available	A Section 17 notice in the prescribed form must be served within six months of the arrears, including service charges and any other sums under the lease becoming due. This means that for rent not paid on the June quarter date, the notice must be served on or before the 23 December 2020. Failing to serve the notice means that the landlord's right to pursue them falls away.



David Eminton, Partner
Head of Dispute Resolution
m: **07764 218896**
t: **023 8048 2284**
david.eminton@parissmith.co.uk



Nicola Davies, Associate
Property Litigation
m: **07384 151869**
t: **023 8048 2212**
nicola.davies@parissmith.co.uk



1 London Road, Southampton
Hampshire SO15 2AE
t: **023 8048 2482**
e: info@parissmith.co.uk
www.parissmith.co.uk

9 Parchment Street, Winchester
Hampshire SO23 8AT
t: **01962 679 777**
e: info@parissmith.co.uk
www.parissmith.co.uk

