

Tenant Default: What are your options?

September 2009

In these challenging times, the risk of defaulting tenants is a real concern for landlords and their lenders. Whilst the first thought as a landlord might be to evict a problem tenant, this may lead to criminal charges against you plus the payment of compensation to the tenant. So what options are there? We have identified some key points that, as a landlord, we think you should consider.

The Tenant won't pay

What if my tenant is able but unwilling to settle rent arrears (and an amicable agreement cannot be reached)?

In this situation it may be possible to:

- Forfeit the lease for breach of the lease terms and take back possession;
- Sue your tenant for the outstanding rent;
- Distrain on goods at the property;
- Take advantage of other security (rent deposits, guarantees, etc).

However, eviction processes and other court action can be lengthy, costly and acrimonious, often generating bad publicity. Furthermore, the longer a tenant remains in occupation of the property, the bigger your financial loss is potentially going to be.

The Tenant can't pay

What if my tenant is effectively insolvent and unable to settle rent arrears?

In these circumstances your options as a landlord depend on the situation of the insolvent tenant when you become aware of their difficulties, as follows:

- **Tenant not yet insolvent or subject to any petitions or actions**

If your tenant is not yet (as a company) in liquidation or (as an individual) bankrupt, your remedies are largely the same as where the tenant won't pay- see above. However, the amount you can recover is

fundamentally limited to the assets your tenant has available and negotiation of a rental compromise or lease surrender on amicable terms may still be suitable. There is also always the possibility of lodging a petition against the tenant at the courts yourself.

- **Tenant (as a company) in a Company Voluntary Arrangement (CVA) or (as an individual) in an Individual Voluntary Arrangement (IVA)**

This is effectively a collective bargaining agreement that settles the debts of your tenant to its creditors. A "moratorium" is often imposed in such circumstances, which is a period of time enabling a restructuring plan to be agreed. During this period creditors cannot enforce their rights and your tenant may be able to remain at the property without paying rent. As a landlord you may be able to take action to recover rents whilst a CVA or IVA application is pending, but it is important to act quickly.

- **Tenant is already in liquidation or is bankrupt**

In these circumstances your potential remedies as a landlord become more limited. In particular, a liquidator or administrator may be able to disclaim the lease, leaving you with a vacant property and no prospect of recovering the rent. As a landlord you may still be able to take some action against your tenant and to protect yourself (distrain, drawdown of rent deposit, etc) but most options can only be actioned with the leave of the courts. If proceedings have reached this stage you should seek professional advice as quickly as possible.

Investigating your Tenant

How can I find out NOW whether my tenant is solvent or not?

Be aware of early warning signs. Low morale, consistent delays in paying bills (particularly rent), market rumours, etc, may all be an indication of troubled times for your tenant.

Failing this, there are many more formal ways to investigate the financial position of your tenant, including (but not limited to):

- Searches at the Royal Courts of Justice;
- Searches of the Central Registry of Winding Up Petitions;
- Searches at Companies House; and
- Details on business correspondence should show if a company has been placed into a formal insolvency process.

All of the above are publicly available. If you have cause for concern about the finances of your tenant and are uncertain how best to approach this, you may wish contact a suitable professional who can investigate on your behalf.

Other issues

What else should I be considering?

- As a landlord it is important to be aware that if peaceable re-entry of the Property for breach of lease terms, such as

non-payment of rent, is not an option (i.e. your tenant refuses to leave), it is a criminal offence forcibly to evict a tenant without a court order authorising this.

- If your tenant won't pay rent, but appears financially secure, direct contact with the tenant to discuss this may resolve or at least clarify the issue. In particular, if your tenant is unhappy with the repair of the property, or there is a delay in a housing benefit claim, disputes may be resolved by other means.
- Above all else, it is important to act as quickly as possible, as your options as a landlord inevitably become more limited the longer you hesitate before taking action.

Contact

Our **Property Insolvency Team** have experience in advising on the many issues that arise in the circumstances outlined above. If you have a problem tenant, are concerned about the ability of your tenants to pay their rent in the future, or simply wish to discuss these issues in greater detail, please do get in touch.

Property Insolvency Team



Richard Bedford
Real Estate Litigation

Tel: +44(0)117 902 2798

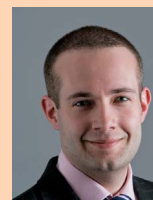
richard.bedford@burges-salmon.com



Colin Ligman
Real Estate Insolvency

Tel: +44(0)117 902 2798

colin.ligman@burges-salmon.com



Roger Cotter
Real Estate Litigation

Tel: +44(0)117 902 2709

roger.cotter@burges-salmon.com

Disclaimer: This briefing gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

© Burges Salmon LLP 2009. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged.

Data Protection: Your details are processed and kept securely in accordance with the Data Protection Act 1998. We may use your personal information to send information to you about our products and services, newsletters and legal updates; to invite you to our training seminars and other events; and for analysis including generation of marketing reports. To help us keep our database up to date, please let us know if your contact details change or if you do not want to receive any further marketing material by contacting marketing@burges-salmon.com.