

Options Available to Landlords Post Statutory Demand as of 1 June 2020

June 2, 2020

KEY POINTS

This advisory outlines the various options available to landlords after service of a statutory demand on a tenant and the tenant does not pay the debt. It also summarises the general processes, costs, advantages and disadvantages of each option. These options include:

- Present a winding-up petition (where the tenant is a company) or bankruptcy petition (where the tenant is an individual) in Court;

- Issue debt recovery proceedings in the County or High Court;

- Negotiate an alternative arrangement or settlement, such as a payment plan, with the tenant;

- Write off the rent owed by the tenant; or

- Do nothing to maintain ongoing commercial relationship with the tenant.

The expected new [Corporate Insolvency and Governance Bill 2020](#) (the 'Bill') will introduce a number of temporary measures to support businesses navigating the challenges presented by trading during COVID-19. These measures include a ban on winding-up petitions (see below), a new statutory moratorium process, a new restructuring plan procedure and invalidating contractual termination clauses in some circumstances where termination is purportedly triggered by the company's entry into insolvency proceedings. Once the Bill comes into effect, landlords may find that there are fewer options available and should, therefore, carefully consider any next steps with their legal advisors.

OPTIONS	DESCRIPTION	GENERAL PROCESS	FIXED COSTS	TIME LIMITS	ADVANTAGES	DISADVANTAGES	DEFENCES	POINTS TO NOTE
Winding-up Petition (where the tenant is a company) or bankruptcy petition (where the tenant is an individual)	A legal action taken by a creditor or creditors against a company or individual that owes them money.	<p>Start by issuing a petition at Court.</p> <p>The Court will decide whether to make a winding-up/bankruptcy order.</p> <p>If an order is made, an independent insolvency practitioner (liquidator) will be appointed to realise the tenant's assets and distribute the proceeds to its creditors, including the landlord.</p>	<p>Court fee of £1,880 – comprising a £280 court fee and a £1,600 petition deposit.</p> <p>Process server fee – £75 to £100.</p> <p>Advertisement fee in <i>The Gazette</i> – £79.40 plus VAT.</p>	<p>A petition can only be presented three weeks after service of the statutory demand but not more than four months after service of the statutory demand.</p> <p>If there is a gap of more than four months between service of the statutory demand and presentation of the petition, the landlord must provide a witness statement, explaining the reasons for the delay.</p>	<p>This can put considerable pressure on the tenant to pay debt due and has major implications on the tenant's reputation and ability to continue trading.</p> <p>It is a quick method of recovery rather than commencing full on litigation.</p>	<p>It is relatively expensive and may not be appropriate for very low value debts.</p> <p>The landlord will rank as an unsecured creditor.</p> <p>The dividend paid to unsecured creditors is often only a few pence in the pound.</p> <p>The landlord may be liable to pay the tenant its costs, if it receives payment from the tenant after a petition has been presented and a winding-up/bankruptcy order made.</p>	<p>The tenant may discharge part of the debt to reduce the outstanding debt to below £750 for a company, or £5,000 for an individual, in order to prevent the petition from being presented.</p> <p>The tenant may dispute the debt and apply to the court to have the petition set aside.</p> <p>The tenant may make a counter-claim against the landlord for any debts owed by the landlord.</p> <p>The tenant may enter into voluntary liquidation to give it time to implement a full strategy to deal with various liquidation ramifications, such as redundancies.</p> <p>The tenant may apply for an injunction to prevent the presentation of the petition.</p>	<p>Once a petition is issued and served, a notice has to be advertised in <i>The Gazette</i> within seven working days from the date of service.</p> <p>Once the tenant's bank sees this advertisement, it will freeze its account, stopping all trading.</p> <p>The new Bill is expected to put a temporary ban on the service of statutory demands and presentation of winding-up petitions between 1 March and 30 June, or one month after the Bill comes into effect, whichever is later (the 'relevant period'), where a company cannot pay its debts due to COVID-19.</p>

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Court proceedings	Issue debt proceedings against the tenant to recover the arrears.	<p>Involves commencing proceedings in the County or High Court.</p> <p>The County Court deals with claims under £100,000.</p> <p>The High Court deals with claims above £100,000.</p>	The court fee depends on the amount the landlord is claiming, plus interest, but ranges from £35 to £10,000.	<p>As a general rule, the limitation period for bringing contractual claims, such as debt recovery, is six years from the date the cause of action accrued i.e., six years from the date the tenant failed to pay its debt.</p> <p>Where the contract is signed as a deed rather than under hand, the limitation period would be 12 years.</p>	The tenant is under pressure to avoid having judgment made against it.	<p>Can be a costly and slow procedure.</p> <p>Once a claim is served, it cannot be withdrawn unless the landlord pays the tenant's costs.</p> <p>Where the claim is stopped by agreement, however, the landlord may not be liable for the tenant's costs.</p> <p>The landlord may not recover any sums, even if it receives judgment in its favour, if the tenant has no assets against which it can enforce.</p>	<p>The tenant may argue that "pre-action" steps were not taken before issuance of the debt proceedings (for example, an attempt to negotiate a settlement).</p> <p>Note that some contracts may require a particular dispute resolution escalation process, for example, requiring that mediation or negotiation is attempted before litigation is commenced.</p>	<p>The landlord should check whether the tenant has any assets against which it can enforce the judgment (for example, any property, bank accounts etc.), but note that there may be other charges against the tenant's assets, which may take precedence over the landlord's claim.</p> <p>Where the claim includes an allegation of wrongful trading, the courts will ignore the relevant period when assessing the amount of compensation payable by a director who is found liable for wrongful trading.</p>

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Negotiate an alternative arrangement	Negotiate a settlement with the tenant (for example, a payment plan).	This may involve discussions between the landlord's and tenant's solicitors. May also require the lender's consent.	There are no fixed costs to negotiation but should be minimal other than time costs.	There are no time limits to this option, as it depends entirely on the landlord and the tenant.	Comparatively lower in cost than court proceedings and winding-up/bankruptcy petition.	May result in landlord not receiving all of the money owed.	—	<p>Terms of the negotiation should be recorded in a side letter or variation of the lease, otherwise there is a risk that the tenant may claim that the landlord has lost its right to the debt by a waiver or estoppel.</p> <p>If the landlord accepts part payment of the rent and does not forfeit the lease, it will waive its right to collect the remainder of the rent unless otherwise recorded in writing.</p>
Write off the debt	Write off the rent owed.	This may involve discussions between the landlord's and tenant's solicitors and may require the lender's consent.	There are no fixed costs to this option.		Maintains the ongoing commercial relationship between the landlord and the tenant.	Loss of revenue.	—	If the debt is written off, it cannot then be recovered at a later date.
Do nothing	—	—	—	—	Maintains the ongoing commercial relationship between the landlord and the tenant.	Loss of revenue if debt is ultimately never collected or tenant later becomes insolvent.	—	If the debt is not written off, this option reserves the possibility of it being pursued at a later stage, subject to limitation period and estoppel.

QUERIES

For more information, please contact Katten's [Real Estate](#) or [Litigation](#) practices or any of the following attorneys :



[Gavin Vollans](#)
+44 (0) 20 7776 7645
Gavin.vollans@katten.co.uk



[Joe Payne](#)
+44 (0) 20 7776 7638
Joe.payne@katten.co.uk



[Amanda John](#)
+44 (0) 20 7770 5244
Amanda.john@katten.co.uk

Katten

katten.com

Paternoster House, 65 St Paul's Churchyard • London EC4M 8AB
+44 (0) 20 7776 7620 tel • +44 (0) 20 7776 7621 fax

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