

Number 14

## Commercial Solutions for Landlords where a Tenant Becomes Insolvent

As soon as a landlord becomes aware that a tenant company is in financial difficulties, immediate proactive measures should be followed to take control of the situation in order to avoid rental voids and maintain continuity of occupation of the premises.

In some cases it may be possible to obtain a rent deposit but often the tenant will not be able to provide this. Another option is to consider serving a notice under section 6 of the Law of Distress (Amendment) Act, requiring any subtenant to pay the sub-rent direct to the head landlord.

Intermediate arrangements may be reached with potential new tenants provided they are treated as licencees of the existing tenant and rent is accepted from them as agent for the current tenant. Any such arrangements must be carefully documented so as to avoid any suggestion that the landlord has treated the current lease as being at an end, otherwise the landlord's rights against any guarantors or sureties to the lease will be lost.

Disclaimer releases an insolvent tenant from liability under the lease, but not others such as guarantors, original tenants and assignees who have given direct covenants to the landlord and who will normally remain liable for future rent as if the lease had continued.

In the absence of careful handling, negotiations with a third party could create an enforceable agreement for lease and/or constitute the taking of possession of the premises by the landlord.

Throughout any intermediate arrangement or negotiations the landlord must make it clear to all concerned that the current lease is continuing. Once a liquidator is appointed he should be informed of the landlord's intention in this regard and be involved in the negotiations as agent for the tenant company in liquidation. The mere fact of his subsequent disclaimer of the lease will not be sufficient to establish that the lease was actually continuing at that date.

Particular clarity is required where the intermediate arrangement involves a variation of the terms of the current lease. The landlord may offer incentives to a third party to encourage them into interim occupation such as reducing the rent. However, this could allow a guarantor to argue the initial lease is at an end.

Whether the landlord can be deemed to have taken possession will depend on the individual facts and circumstances.

With the right approach the landlord can benefit from maintaining continuity of occupation and rental income in the short term and preserving his options to grant a lease to the interim occupier, as well as reserving his rights and remedies against the guarantor, including requiring him to take a new lease in the event the negotiations with the interim occupier do not prove successful.

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However, the appropriate options will vary from case to case depending on the factual circumstances, and it is therefore important to review these as soon as there is any indication of tenant default or financial difficulty.

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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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