

Lockdown and Tears: A Landlord's Guide to Tenant Administrations

The devastating impact of UK lockdown on the high street has been put into sharp focus, as the Arcadia Group (which owns brands including Topshop, Burton and Dorothy Perkins), has confirmed that it has filed notice to appoint administrators. Arcadia follows Debenhams, Cath Kidston, Jaeger, TM Lewin and a long list of other household names who have taken similar action since March this year.

First reports are that Arcadia's 444 stores will continue to trade over the Christmas period, with unprofitable or unsold shops being closed in the New Year. Arcadia Group was the biggest concession operator within Debenhams stores, and the decision is reported to have prompted the withdrawal of JD Sports from its bid to buy Debenhams. Debenhams is now likely to move from administration into liquidation, unless a new buyer can be found.

The Arcadia Group administration has taken place, despite the fact that a raft of emergency legislation and guidelines introduced over the course of the year has afforded them (and other tenants) significant protections from landlords looking to recover unpaid rents.



Many more retailers and restaurant chains can be expected to follow suit in the months to come, especially once the emergency measures are lifted.

What is the impact of a tenant's administration on a landlord, and what impact do the Coronavirus Act 2020 and the Code of Practice have on the position? We answer some frequently asked questions below:

WHAT IS ADMINISTRATION?

Administration is a "rescue" procedure, where the primary statutory objective is to allow a company to carry on trading as a going concern. In practice, most administrations do not achieve this objective and result in a sale of certain assets and the liquidation of the remainder – the original company rarely survives.

Administration works by imposing a moratorium on legal action against the company by creditors: thus allowing the company breathing space to reorganise its affairs. Once appointed, administrators will have the power to deal with the company's property and assets. They will often sell off parts of the business to third parties, and may grant third parties the right to occupy the premises.

"WHAT I PARTICULARLY RESPECT IN FORSTERS IS THEIR GENERAL COMMERCIALITY AND PRAGMATISM: IT'S CULTURAL. FORSTERS GIVES ME SOLUTIONS THAT CAN BE ACTIONED."

Chambers UK, 2019

ADMINISTRATION FAQ'S

WILL RENT BE PAID?

If the administrators continue to use the premises for the purposes of the administration- for example, by trading from it or allowing others to trade from it – then they will be liable to pay the rent and other sums due under the lease in respect of that period as an expense of the administration. This means the sums are payable as a priority, before sums owing to the majority of creditors. They will be payable at a daily rate, for the period that the administrators use the property.

Administrators may try to argue that they have not been using premises for the purposes of the administration (and therefore should not have to pay rent) for the period(s) in which business are or have been shut during lockdown or as a result of the restrictions of the “Tier” in which the premises are based.

They may also seek to use the guidelines set out in the recently introduced Code of Practice for the Commercial Property Sector in order to seek rental concessions. Landlords are likely to have grounds to resist arguments along these lines, and should insist on full disclosure of documentation governing the occupation of the premises (particularly where a third party has been granted a licence to occupy) before reaching a decision.

Rent and other sums which have fallen due for payment in respect of a period either before the administrators are appointed, or once they have stopped using the premises, are unlikely to be paid immediately or in full.

WHAT IS THE EFFECT ON ANY GUARANTEE OR OTHER SECURITY?

The administration of a tenant will not have any impact on a guarantee given by a third party company or individual, unless there are specific provisions governing this in the guarantee agreement. We recommend that you check the terms of any guarantee as soon as you can, and ensure that you understand what steps need to be taken in order to make a claim from the guarantor. If the guarantee is in the form of an authorised guarantee agreement (“AGA”) given by a former tenant, or the guarantor of a former tenant, you will need to serve notice (under s17 of the Landlord and Tenant (Covenants) Act 1995) on the guarantor within 6 months of the sums falling due. This time limit is strict, and the right to recovery will be lost if it is not met.

The impact of the administration on any rent deposit will depend on how the rent deposit deed has been drafted, and how the deposit is held. Again, we recommend that you check the terms of the rent deposit deed as soon as possible, and ensure you understand what needs to be done in order to withdraw sums. It is usually possible to withdraw sums to settle any outstanding liabilities of the tenant under the lease. The administrators' prior consent for this is often required, and is usually given.



ADMINISTRATION FAQ'S

CAN THE ADMINISTRATORS BRING THE LEASE TO AN END WITHOUT MY CONSENT?

No. Unlike some other insolvency procedures such as liquidation, administrators do not have the power to disclaim leases.

If the administrators do not want to use the premises you may find you are offered a surrender early on. You should consider any such offer very carefully, since accepting it may bring forward your liability for business rates or limit your ability to recover unpaid arrears or claim for dilapidations.

**CAN I TERMINATE THE LEASE AND RE-LET THE PREMISES?**

Any surrender of the lease requires the agreement of both parties, in the usual way.

Whilst a tenant is in administration, the usual position is that a landlord may not forfeit the lease without either the consent of the administrators or the permission of the Court. The Coronavirus Act 2020 adds a further layer to this and means that, even with consent, forfeiture for non-payment of rent is impossible until 30 December 2020 at the earliest. It appears likely that this deadline will be extended further.

Once the restrictions imposed by the emergency legislation have been lifted, or where there are breaches of the lease which do not relate to unpaid rents, a landlord may request the administrators' consent to forfeit. If the administrators refuse, their reasoning should be examined carefully- the Court may take a different view.

"CLIENTS APPRECIATE THE TEAMS KNOWLEDGEABLE BUT UNSTUFFY APPROACH."

The Legal 500, 2020

ADMINISTRATION FAQ'S

THERE IS A THIRD PARTY IN OCCUPATION: WHAT ARE MY RIGHTS?

Administrators often let third parties into occupation of premises- often in breach of the terms of the lease! This is usually done as part of a sale of the company's assets, by which the administrators permit the purchaser to occupy pursuant to a licence pending a formal application for landlord's consent to assign. While the moratorium makes it harder to take action against the administrators, such action will usually be a breach of the tenant's covenant not to assign without consent and the usual rules and the provisions of lease will apply to any subsequent application for consent that is made. You should check your rights under the lease carefully as this may be an opportunity to insist on the provision of additional security for the new tenant's covenants and/or payment of any arrears as a condition of the assignment – most modern leases will contain provisions that entitle the landlord invoke such conditions.

When dealing with such applications, it is worth remembering that the landlord's duties under the lease and statute are owed to the tenant, not the proposed assignee.

If your preferred course is to recover the premises, it may be possible to pursue a forfeiture strategy based on the breach of the tenant's covenants but this will require the court's permission if the administrators will not consent to it. It may not be possible to convince the Court to grant consent to forfeit where the occupation of the premises by the third party is helping to achieve the aims of the administration, and rent is being paid.

"THEY ARE VERY GOOD AT WHAT THEY DO."

Chambers UK, 2021

HOW DO I GET THE COURT'S PERMISSION TO FORFEIT OR ENFORCE THE ADMINISTRATORS' DUTY TO PAY RENT?

The administration will be listed in the High Court and, like most creditors, landlords can make applications in the administration for the Court to determine. These applications are governed by the insolvency legislation, so the Court will consider your application in the context of the whole administration process and, if successful, its impact on other creditors. These additional considerations can sometimes see one creditor's rights not enforced even though there appear to be clear grounds for doing so on a purely contractual level. That said, many applications can and do succeed, so it is important to take stock early and execute any strategy with the benefit of expert advice.



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