



Property Council New Zealand
welcomes you to

“WHEN GOOD TENANTS GO BAD”





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**WHEN GOOD
TENANTS
GO BAD**

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**Your options when the rent
stops...**

Do a deal

- ✓ **Management tools such as concessions, payment plans**
- ✓ **Get it documented!**
- ✓ **Include provision for full amount to be payable if plan not adhered to**
- ✓ **Admission of claim?**

Get formal...

- Re-enter and cancel the lease
- Statutory demand (if Tenant is a company)
- Personal guarantor demand
- Bank guarantee call
- Liquidation/bankruptcy
- File proceedings
- Debt collection agency

What to use when?

❶ What do you want to achieve? How bad have things become?

✓ Are you ready to accept lights out yet?

✓ Are you focused on keeping the rent coming in or recovering the debt?

✓ We are seeing most Landlords wanting to be able to retain the Tenant but wave a stick to get the rent coming in, but sometimes things have gone way beyond that

**So how do you get the rent
coming in and keep the lights on
too?**

Statutory demands

- ✓ **Ideal for Tenants with more than one asset in the same company name**
- ✓ **A notice is issued to the Tenant giving it 15 working days to pay the demanded amount failing which the Landlord will commence proceedings to wind up the company**

- ✓ **Tenant continues to trade in the meantime**
- ✓ **Requirement is that there must be no dispute on the debt**
- ✓ **Effective leverage but not to be used lightly**

● Call on the bank guarantee

- ✓ These are great – instant payment of arrears while Tenant continues to trade
- ✓ Caution required when putting the guarantee in place

✓ **The terms of guarantee must work for the Landlord**

✓ **Key terms:**

- **Expiry date (if you agree to have one)**
- **Assignability (for Landlord)**
- **Correct Tenant named**

- ✓ **Caution also required in administering the guarantee**
 - **A new guarantee is required each time the lease is renewed or the tenancy rolled over**
 - **Arrears to be kept within the amount of the guarantee**
 - **You and the Tenant cannot agree to vary/extend the guarantee – the Bank must agree!**

**What if you're past that
point?**

(now the real fun begins...)

● **Re-entry and cancellation – taking the premises back**

- ✓ **The Property Law Act 2007 has changed the rules here**
- ✓ **But don't panic – it's not the bogey you think it is!**

- ✓ **Probably changed for the better in that it clarifies and codifies the process**
- ✓ **However, get it wrong and you may be liable to more than just the Tenant**

- ✓ **Notice of intention to cancel is required in all cases (whether default for failure to pay rent or for other breach) but notice can now be given the day after the rent is due – no longer do you need to wait for the arrears period to expire before issuing**
- ✓ **Notice period is 10 working days for rent, on expiry without remedy you can re-enter, which cancels the lease and allows you to take back the premises**

- ✓ Notice form is prescribed, setting out what the Tenant must do, consequences of not doing it and providing timeframes for satisfaction
- ✓ Rent is differentiated from other breaches, but are outgoings or other payments due to be treated as rent?

- ✓ **Different forms of notice are required for the 2 types of default, default for non-payment of rent requires 10 working days notice but other breaches require ‘a reasonable period’ within which to remedy.**

- ✓ **Our general practice is to issue one notice detailing the 2 types of breach and to provide a 10 working day period as the 'reasonable' time within which to remedy**
- ✓ **But each case is different – some performance obligations may require longer than 10 working days**

- ✓ **Good news – you can now safely accept rent during the notice period without waiving your right to re-enter if the full amount isn't paid by the expiry of the notice**
- ✓ **Conduct can still catch you out though**

- ✓ **The Tenant retains its right to apply for relief but generally will need to pay immediately or within a short time (eg by sale of business)**
- ✓ **You can still look to any assignors and guarantors to cover the debt too**

● Liquidation/bankruptcy

- ✓ Liquidation for a company, bankruptcy for individual tenant/guarantor
- ✓ Process started with the statutory demand or letter of demand on the individual (eg personal guarantor)

- ✓ **Can be costly, so more effective with larger debts, companies with more than one store (especially where other stores are trading well) or Tenants with money sitting in trusts**
- ✓ **Bear in mind clawback issues – payment of arrears may be an insolvent transaction under s.292 of the Companies Act 1993**

● Debt collection agency

- ✓ Debts that are too small to be pursued through the courts are ideal for putting with a debt collection agency

● File proceedings

- ✓ **New District Court procedures replace previous Summary Judgment procedures**
- ✓ **Starts with Notice of Claim but full details don't get filed until:**
 - **Claim is disputed**
 - **Parties have swapped information (takes up to 90 working days)**
 - **Further 90 working days has then expired without parties settling**

✓ **This process can lead to determination by way of:**

- **Disputes Tribunal**
- **Judicial settlement conference (mediation in front of a judge)**
- **Simplified trial (limits on time and other matters to minimise cost)**
- **Short trial (very short timeframes, similar to defended summary judgment but with cross-examination of witnesses)**
- **Full trial**

- ✓ **Once you have judgment, you still need to get the money**
- ✓ **Liquidation/bankruptcy filing may still be needed**
- ✓ **Attachment orders (to assets) are also an option**
- ✓ **Court proceedings are always costly so best suited to larger debts with a good chance of recovery**

● Disputes Tribunal

- ✓ For use only when there is a “dispute” but valuable where the Tenant has raised some dispute on a payment
- ✓ No lawyers allowed!

What if the Tenant takes matters into its own hands...?

• Voluntary Administration

- ✓ Part 15A of the Companies Act 1993
- ✓ Freezes the tenancy for the duration of the Administration

- ✓ **Landlord cannot re-enter/cancel**
- ✓ **Administrator (but not company) has 7 days free of rent**
- ✓ **Administrator must pay after first 7 days have expired unless he issues a notice of non-use**

- ✓ **Administrator must determine the company's position & future within 25 working days**
- ✓ **Courts can extend that period (and have done so)**

✓ **At the end of the administration period the administrator can:**

- **Hand the company back to the directors**
- **Put the Company into liquidation**
- **Procure a Deed of Arrangement with the creditors (needs a majority of the creditors holding at least 75% in value of the debts)**

✓ **Can co-exist with a receivership**



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