

Commercial Rent Arrears Recovery – an end to effective rent recovery?

Distress is a self help remedy frequently used by landlords for the recovery of arrears of payments reserved as rent under a lease. As it uses the element of surprise, it is a cheap and effective way of recovery as a landlord can seize goods to settle those arrears without giving prior notice to his tenant.

Following the implementation of the relevant part of the Tribunals, Courts and Enforcement Act 2007 (**the 2007 Act**), distress is being abolished on 6 April 2014, replaced by commercial rent arrears recovery ("**CRAR**"). Although where the distress process has already been started, this will still be available.

As some leases provide that items such as service charges, insurance payments and interest are reserved as rent, landlords could use distress to recover these sums even if the sums claimed were disputed. Distress is being abolished because it is felt that landlords gained an unfair advantage over non secured creditors and the process was open to abuse if used in this way.

CRAR provides a more balanced approach, but the process will be slower and more expensive. The key points are as follows:

- CRAR only applies to most tenancies but not to licences or tenancies at sufferance.
- It only applies to commercial premises, which includes agricultural holdings. CRAR cannot be used at mixed use premises i.e. premises in which are both commercial and residential such as shops with flat above. Landlords should consider granting separate leases in these circumstances so that CRAR can

be used to recover rent from the commercial part.

- CRAR can only be used to recover arrears of rent. It cannot be used to recover items such as service charges, insurance premiums, rates or other payments reserved as rent in a lease. Inclusive rents must be apportioned since CRAR can only be used to recover those sums "reasonably attributable to the possession and use of the land". Without a clear apportionment, disputes as to the apportionment of the relevant sum are likely and may result in landlords charging a higher basic inclusive rent in lieu of collecting a separate variable service charge.
- There must be a minimum amount of at least 7 days rent arrears (excluding VAT and interest) before CRAR can be used.
- A landlord must give 7 clear days' notice (excluding Sundays and Bank Holidays) of its intention to seize goods. In theory, this is designed to give the tenant the opportunity to pay the arrears. However, the reality is that many tenants may simply remove goods from the premises during the 7 day period;
- In order to avoid abuse, a tenant can apply to Court to set aside a CRAR notice served by a landlord, although the grounds for making such an application have not yet been specified.
- CRAR can only exercised between 6am and 9pm or at anytime the business is open for trading. Landlords must use "enforcement agents" who must be authorised in writing. In practice, this will involve instructing certified bailiffs.
- The goods seized must be owned by the tenant and not a third party. This can be difficult for the landlord or his agent to

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establish. Further, the tools of the tenant's trade are exempt from CRAR up to an aggregate value of £1,350.

- Only goods to the value of the debt plus enforcement costs may be seized by the enforcement agents. The agent's fees are set down in regulations.
- Goods can be seized by securing them on the premises, removing them and controlling them elsewhere, or entering into a "controlled goods agreement" setting how the goods will be secured and when the enforcement agent can collect them.
- If the landlord wants to sell the goods (whether at auction or otherwise) then 7 clear days' notice must be given by the enforcement agent of the date, time and place of the sale of the goods. If there are surplus sale proceeds, they must be returned to the tenant.
- A landlord can still require a sub tenant to pay rent under a sub lease to a landlord directly until the rent arrears have been cleared. However, any notice takes effect 14 days after service. Therefore it is important that any details of sub tenants in occupation are up to date to avoid any delay in serving notice

The sweeping changes to this useful remedy will create serious issues for landlords. CRAR is more complicated and time consuming than distress and the requirement for the prior notice has weakened its effectiveness. It is also possible that CRAR will spell the end for inclusive rents or, alternatively, result in landlords demanding higher inclusive rents.

This article is not intended to be a substitute for specific advice and is for general guidance only. It is based upon our understanding of the legal position as at March 2014 and may be affected by subsequent changes in the law.

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