

## Commercial Rent Arrears Recovery By Distress

The Government is in the process of updating the procedure that allows landlords to recover rent arrears by distress. Distress is a remedy that enables landlords to recover rent arrears without having to go to court, by taking goods from commercial tenants and either holding them until the arrears are paid or selling them.

The changes have been proposed in Part 3 of the Tribunals, Court and Enforcement Act 2007 ("TCEA") which received Royal Assent on 19 July 2007 but is yet to be brought into force by the Lord Chancellor.

Landlords should note that the proposed changes do not affect other remedies such as peaceful re-entry, forfeiture and recovery of rent by statutory demand or Court proceedings. The purpose of the proposed Act is to abolish the common law remedy of distress replacing it with a statutory procedure known as commercial rent arrears recovery ("CRAR")

The Act is a lengthy document and highlighted below are the most relevant provisions.

### **Sections 62-70 – Procedure:**

The above sections provide for a new procedure to replace various procedures for enforcement by taking control of goods

One significant difference between the new procedure and the law of distress is the requirement to **serve a notice before seizing goods**. Under the law of distress, there is no requirement to serve a notice. Under the new procedure, regulations will specify the minimum period of notice to be given (to be confirmed but expected to be 7 calendar days). There has been concern and criticism from the property industry that tenants will use the notice period to dispose of goods which might otherwise have been seized.

Under the new procedure, **only an enforcement agent may take control of and sell goods**. The new Act provides that to act as an enforcement agent an individual must hold a certificate issued by a judge. However, when the new procedure comes into force, an individual who holds a certificate to act as a bailiff under section 7 of the Law of Distress Amendment Act 1888 he will be authorised to act as an enforcement agent under the procedure in Schedule 12 until their certificate expires.

### **Sections 71 and 86 – Abolition of Right of Rent Distress**

The TCEA 2007 provides for the abolition of the common law right to levy distress for rent arrears. The Act also repeals all statutory rights to levy distress for both rent arrears and non-payment of a rentcharge.

As a transitional measure, section 66 of TCEA states that the new procedure for taking control of and selling goods will not affect any power to distrain where the goods were distrained against **before the new procedure came into force**.

### **Sections 72-80 - Commercial Rent Arrears Recovery**

The TCEA creates a statutory right for the landlord of a lease of commercial premises to use the enforcement procedure set out in Schedule 12 to the TCEA 2007 to recover rent arrears. This power is known as commercial rent arrears recovery (CRAR). CRAR has a narrower scope than the right of distress

#### **1. Who is the landlord?**

**Only the landlord can exercise CRAR.** The TCEA 2007 defines "the landlord" as the person entitled to the immediate reversion to the lease.

If the landlord's interest is mortgaged, the mortgagee will be entitled to exercise CRAR if both of the following apply:

- The mortgagee has given notice of its intention to take possession or enter into receipt of rent and profits.
- The lease is binding on the mortgagee.

If a receiver has been appointed by a court in relation to the landlord's interest then the receiver can exercise CRAR in the name of the landlord.

Unless the landlord (or mortgagee or receiver) satisfies the criteria for being an enforcement agent, the landlord (or mortgagee or receiver) will need to **authorise an enforcement agent to carry out CRAR on its behalf**. The authority must be given in writing and comply with any requirements to be prescribed by regulations.

## **2. To which leases does CRAR apply?**

CRAR applies to all leases of commercial premises (including tenancies at will), whether the lease is legal or equitable. However, a lease **must be in writing** for CRAR to apply.

CRAR does not apply to a tenancy at sufferance. A tenancy at sufferance arises when a tenant remains in occupation of premises after its lease has expired, but the landlord has not confirmed that it is willing for the tenant to remain i.e. an excluded tenant holding over after a lease has come to an end.

TCEA does not expressly refer to licences to occupy commercial premises, but, by definition, a licence to occupy cannot be a lease. On this basis, **CRAR does not apply to licences to occupy**.

## **3. When a lease has ended**

When a lease has ended, CRAR is only exercisable in one of the following two circumstances:

- (a) In relation to goods, where control of the goods was taken before the lease ended.
- (b) In relation to rent due and payable before the lease ended, if all of the following conditions are satisfied:
  - o the lease did not end by forfeiture;
  - o not more than 6 months has passed since the lease ended (or any continuation of it under statute or under a rule of law);
  - o the rent was due from the person who was the tenant at the end of the lease;
  - o that person remains in possession of any part of the demised premises;

- o any new lease under which that person remains in possession is a lease of commercial premises (even if the new lease is not in writing); and
- o the person who was the landlord at the end of the lease remains entitled to the immediate reversion.

CRAR applies only to leases of commercial premises.

#### **4. What rent can be recovered under CRAR?**

For the purposes of CRAR, "rent" is the amount payable under the lease for the possession and use of the premises (together with any interest on that amount and any VAT chargeable on that amount or on the interest).

**Rent does not include any sum in respect of rates, council tax, services, repairs, maintenance or insurance even if these amounts are reserved as rent in the lease.**

The apparent aim of limiting recovery to the basic rent only is to protect tenants, given that the CRAR procedure can be exercised without the landlord having to go to court.

Where a lease provides for an inclusive rent, only the proportion that is reasonably attributable to the possession and use of the premises is recoverable under CRAR. This may be difficult to ascertain in practice. To minimise uncertainty, it would be prudent going forward when negotiating a lease with an inclusive rent to **record how the inclusive rent has been calculated**, for example, in the heads of terms.

#### **5. Conditions to be satisfied before CRAR can be exercised**

Under section 77 of the TCEA, each of the following conditions must be satisfied before CRAR can be exercised:

- The tenant must be in arrears of rent before notice of enforcement is given.
- The amount of the arrears must be certain or capable of being calculated with certainty.
- The "net unpaid rent" equals or exceeds a minimum amount to be prescribed in the regulations (see below)

Until the regulations are in place it is difficult to know whether the "net unpaid rent" requirement will have an impact on the availability of CRAR.

#### **6. Calculation of the net unpaid rent**

The "net unpaid rent" is the amount of rent in respect of which CRAR is exercisable, less any interest or VAT included in the rent arrears and any deductions or set-off that the tenant would be able to claim

It is worth noting that, although CRAR is exercisable in respect of interest and VAT, these amounts are excluded from the calculation of the net unpaid rent. The TCEA allows for regulations to be made to waive this exclusion in specific cases.

The "net unpaid rent" test must be satisfied both when the notice of enforcement is given and **when control is taken of goods pursuant to that notice**. The landlord must therefore recalculate the "net unpaid rent" immediately before it takes control of goods. **If the recalculated figure is less than the prescribed minimum amount (to be confirmed) then the landlord must not take control of the goods.**

Amendments to the Bill were proposed in the House of Lords to remove the need to satisfy the test at the second stage, on the basis that this would delay the CRAR process. In addition, the landlord would have already incurred costs in the initial stages of the CRAR procedure but would be left without a remedy. The deletion of this provision was rejected on the basis that the requirement was necessary to stop the pursuit of unduly small arrears.

As of today's date (27 February 2008) the new procedure is still to be brought in to place by the Government. Please keep an eye on our website for further announcements.

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