

From 6 April 2014 the law of distress had a large overhaul

Property litigation

On 6 April 2014, the government abolished the common law right known as “distress”, no longer allowing a landlord to seize a tenant’s goods and sell them to recover outstanding rent arrears.

The ancient law of distress has existed since before the Magna Carta, but a new statutory regime is coming into place known as Commercial Rent Arrears Recovery (“CRAR”). Provided for by the Tribunal Courts and Enforcement Act 2007, the Regulations (Taking Control of Goods 2013) have only recently come in.

Seizure of a tenant’s goods remains in principle, but CRAR has some key changes, which potentially affect its usage and effectiveness. The key changes are:

- A requirement for a notice to be served on the tenant before goods are seized;
- Removing the ability for a landlord to seize goods from mixed use premises; and
- Preventing a landlord from taking control of goods if the tenant’s arrears fall below a new minimum level.

In addition, some other important points to note are that:

The Lease: Distress only applied to commercial leases. That has not changed. However, CRAR has an additional requirement that the lease has to be in writing so it cannot be exercised in relation to oral tenancies and nor can it be exercised in relation to licences (whether in writing or not).

The Premises: CRAR applies only to premises let and used solely for commercial purposes. However, a lease will still fall within the scope of CRAR if the residential occupation is in breach of the terms of the lease.

Recoverable Rent: the use of distress, historically, was for all sums reserved as rent under the lease. CRAR has significantly limited this and not all sums in respect of service charges, rates, repairs or insurance are recoverable, even if reserved as rent

under the lease. However, you can use CRAR to recover VAT and interest due on rent.

Notice of Enforcement: One of the Landlord positive features of distress was that there was no requirement to serve notice of the intention to seize goods. Many a Landlord managed to recoup goods in lieu of monies owing to them by way a “midnight swoop”. Now the enforcement agent must give the tenant written notice at least seven clear days before exercising CRAR. CRAR must be actioned within 12 months of the date of the notice, or if a repayment-agreement is reached, which the tenant subsequently breaches, within 12 months of the date of that breach. This clearly gives some tenants the chance, during this seven-day period, to remove the goods and frustrate the Landlord’s recovery efforts. In those circumstances, the Court does have power to shorten the period but they would have to be satisfied that this is a likely risk.

Amount of Outstanding Rent: The Act has introduced a number of conditions relating to the level of arrears, each of which must be satisfied before exercising CRAR. The most notable are:

- You cannot exercise CRAR if the rent arrears are below the minimum amount, set at an amount equal to seven days’ rent. You can use CRAR to recover VAT and interest on rent, but do not consider these amounts when calculating the minimum.
- The tenant must be in arrears of rent equal to or exceeding the minimum level before giving notice of enforcement.
- when taking control of any goods, the tenant must have been in arrears for at least the seven-day minimum (meaning that the landlord will have to recalculate the level of arrears immediately before the enforcement agent takes control of the goods).

Note the potential here for a tenant to pay a proportion of the arrears, following receipt of an enforcement notice, to bring the



outstanding amount below the statutory minimum, thereby preventing the landlord from taking control of the tenant's goods.

Whether tenants utilise this potential and whether this will be a useful enforcement tool, who knows; speculation is that rent deposits will become more important and their level may increase to balance this.

If you have any queries on the above or wish to discuss wider landlord and tenant matters, please contact us.

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