



Commercial Rent Arrears Recovery ('CRAR')

Distress for rent is an ancient common law remedy. It enables a landlord to enter leased premises without notice in order to seize a tenant's goods and sell them so as to recover arrears of rent. Despite its confrontational nature, which may have a negative impact on landlord-tenant relations, distress forms an important part of the landlord's suite of remedies when a tenant is struggling to make payments due under its lease.

However, as part of a wider reform of bailiff law and the rules relating to the enforcement of civil judgments, the government has long been intending to replace the current rules on distress for rent with a new statutory procedure known as Commercial Rent Arrears Recovery or CRAR.

The basic procedure for CRAR is set out in the Tribunals, Courts and Enforcement Act 2007 and the Taking Control of Goods Regulations 2013 which the government introduced at the end of July 2013. The Regulations provide further detail on the mechanics of the new CRAR procedure and are due to come into force on 6 April 2014.

Key aspects of CRAR

- Lease must be in writing
- Commercial Premises only
- Only applies to rent
- Landlord must give seven clear days' notice in writing before entering the Premises to seize goods;
- Notices to sub-tenants to redirect rent will only take effect fourteen days after service.

The Regulations confirm that CRAR will provide a considerably more limited remedy to landlords than the current rules on distress for rent. Some of the key aspects of the new regime are highlighted in the box and described below.

Lease must be in writing

CRAR applies to all leases (whether legal or equitable) of commercial premises, including tenancies at will. The lease must though be evidenced in writing.

CRAR will not therefore apply to licences to occupy, and is expressly stated as not applying to tenancies at sufferance, which arise when a tenant continues to occupy premises after its lease has expired, but without confirmation from the landlord that it is willing for the tenant to remain.

Commercial premises only

CRAR only applies to commercial premises. The Act is quite restrictive in its interpretation of what will constitute commercial premises and CRAR will not be exercisable if all or any part of the premises is lawfully let, under-let, or used as a dwelling. Landlords should be particularly careful with mixed-used premises demised under a single lease. For example if a tenant occupies a shop premises with a residential flat above the lease will not be of commercial premises.

If a tenant or a sub-tenant uses all or part of the premises as a dwelling in breach of the terms of the lease or a superior lease, then CRAR will still apply. This is designed to prevent tenants from attempting to avoid CRAR by allowing a third party to live in, in breach of the headlease.

Only applies to rent

The landlord can only exercise CRAR against rent (plus any VAT and accrued interest). This represents a significant change from the old rules, in which distress could be exercised against any payments reserved as rent under the terms of the lease. Therefore, it will no longer be possible to exercise distress in respect of other sums such as service charges or insurance.

The amount of arrears must be capable of being calculated with certainty and must be equal or greater than a minimum amount of seven days' net unpaid rent. The 'net unpaid rent' is the amount of rent in respect of which the landlord intends to exercise CRAR, less any VAT and interest and any deductions or set off that a tenant may be able to claim.

It is important to note that the minimum amount of net unpaid rent must be present both when the landlord serves notice of its intention to exercise CRAR (see .4 below) and also when entry is made onto the premises to take control of the tenant's goods. The landlord must therefore ensure that the net unpaid rent remains above the minimum level before entering the premises.

Landlords must give notice in writing before entering tenant's premises

A landlord must give the tenant not less than seven clear days' notice in writing if it intends to visit the premises and take control of any goods belonging to the tenant. Once the notice period has expired, entry into the premises can be affected on any day of the week, but only between the hours of 6am and 9pm (the current rules allow entry onto the premises at any time).

The requirement to give notice may prove to be the most controversial aspect of CRAR, as the current rules on distress for rent allow landlords to enter leased premises without any prior notice. The seven clear day period could give some tenants the opportunity to remove goods from the premises and, in practice, may mean that CRAR will only be truly effective against tenant's running single site operations or with business models which prevent the quick movement of goods to alternative locations.

If a landlord considers that a tenant may deliberately remove or dispose of goods during the notice period, a landlord can apply to Court for an order that shorter notice of period can be given, but the mechanics of how such an application will work are as yet unclear (presumably it would be made without notice to the tenant). Regardless, applying for a reduced notice period will impose a considerable administrative and cost burden on the landlord.

New procedure for redirecting rent from sub-tenants

As opposed to seizing a tenant's goods, where premises are sub-let a superior landlord can also seek to recover arrears of rent under Section 6 of the Law of Distress (Amendment) Act 1908. Section 6 allows the superior landlord to serve notice on any sub-tenant(s) requiring them to redirect rents to it whilst its immediate tenant remains in arrears.

Landlords will be relieved that CRAR preserves this useful remedy, but it will introduce a new notice procedure. Importantly, a notice to pay rents directly to a superior landlord will only take effect 14 clear days after it is served on the sub-tenant, as opposed to immediately as is now the case. A landlord will need to consider the implications of this where rent payments under a sublease are structured differently and/or made at different times to those under the headlease.

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