

COMMERCIAL RENT ARREARS RECOVERY – A NEW REMEDY

On 6th April 2014, the common law right of distress was replaced with the remedy known as commercial rent arrears recovery ('CRAR').

Although CRAR continues to allow a landlord to enter the tenant's premises and seize goods, the circumstances in which the remedy is available and the mechanism to put it into practice have been significantly altered.

Background:

Distress for rent was an ancient common law remedy that allowed a landlord to recover arrears of rent without obtaining a court order. It allowed a landlord to seize goods from premises that it had let and to sell them to raise money to cover the arrears. There was no need to give the tenant any notice.

CRAR: principal provisions:

- **Commercial Premises**
The ability to use CRAR is only available for commercial premises. If the premises under the lease include any area let or occupied for residential purposes, such as shops with flats above, or public houses, CRAR is not an available remedy if the residential element is included in the same lease as the commercial. Our advice is to let the residential and commercial elements under separate leases.
- **Outstanding rent**
CRAR is only available as a remedy to recover the principal rent, regardless of whether the lease reserves other sums as rent. It cannot be used to recover service charges, insurance and other non-rent payments, even if these are reserved as rent in the lease. If there is an inclusive rent (including service charge etc), CRAR is only available for that part of the rent "reasonably attributable" to possession and use of the premises. It only applies to rent that has become due and payable before the advance notice referred to below is given and that is certain, or capable of being calculated with certainty.
- **Requirement to give notice**
Before CRAR can be exercised, 7 days' clear notice (excluding Sundays and Bank Holidays) must be given to the debtor in a prescribed form by an enforcement agent. This is one of the major disadvantages of CRAR because the surprise element, which was available when levying distress, is removed. Landlords have the opportunity to apply to court to have this notice period shortened where it can be shown to be likely that goods will be removed by the debtor.

Further notice must be given before the goods are sold and the effect is that, usually, at least 16 clear days' notice must be given to the tenant before the goods can be sold. This is contrasted with 5 days' notice that was previously required for distress.

- **Minimum amount due**
CRAR is only available where the sum of the debt exceeds 7 days rent.
- **Enforcement Agent**
Only an enforcement agent, certified under CRAR, may take control of goods and sell them under an enforcement power.
- **Time restrictions on when CRAR can be used**
CRAR can be exercised between 6am and 9pm on any day of the week. CRAR can also be exercised outside those hours if the premises are open for trade.
- **Goods available for seizure**
They have to be goods owned by the tenant. Goods owned by a sub-tenant or other third party are not available. Tools of the tenant's trade are exempt from CRAR up to an aggregate value of £1,350 - beyond that, CRAR can apply to such tools. In this respect, CRAR is more favorable to landlords than distress where all tools of the tenant's trade were exempt. Broadly with CRAR, an enforcement agent may not take control of goods whose aggregate value is more than the amount outstanding, and an amount in respect of future costs.
- **Administration**
If the tenant is in administration, there is a moratorium on instituting or continuing legal process. This includes CRAR. This is no different from the previous position – distress was not available as a remedy if the tenant was in administration.
- **Subtenants**
CRAR can be used to recover rent direct from sub-tenants, subject to 14 days' notice to the sub-tenant. This is discussed in more detail below.

Procedure in practice

With CRAR, to "take control of" goods, an enforcement agent must secure the goods on the premises on which he finds them; remove them and secure them elsewhere; or enter into a controlled goods agreement ('CGA') with the tenant. A CGA is an agreement under which the tenant is permitted to retain custody of the goods, acknowledges that the enforcement agent is taking control of them, and agrees not to remove or dispose of them, nor to permit anyone else to, before the debt is paid.

If an enforcement agent takes control of goods, he must provide the tenant with an inventory of them as soon as reasonably practicable. The enforcement agent may not take control of goods after 12 months have expired from the date of the notice of enforcement.

If the CGA is breached, at least two clear days' prior notice must be give before the enforcement agent can re-enter. The notice period also excludes Sundays, Bank Holidays, Good Friday and Christmas Day. Once again, this prior notice requirement for CRAR gives the tenant the opportunity to put the goods beyond the enforcement agent and the landlord.

At least seven clear days' notice must be given by the enforcement agent of the date, time and place of the sale of the goods. There are certain exceptions where a shorter period applies, for example, where the goods may perish. The minimum period before sale is seven clear days from removing the goods for sale. If the seven days' notice is not given, the goods are deemed to be abandoned by the enforcement agent and they have to be returned to the tenant.

Any notice must be given within 12 months beginning with the day on which the enforcement agent takes control of the goods, otherwise the goods are treated as abandoned and they have to be returned to the tenant.

Right to recover rent from sub-tenant

A superior landlord previously had a right to recover rent from a sub-tenant (if the superior landlord's tenant was in arrears) under section 6 of the Law of Distress Amendment Act 1908.

This right was also replaced on 6 April 2014 by a similar right. The right applies where CRAR is exercisable and, to exercise the right, the superior landlord must serve a notice on sub-tenants stating the amount of rent that the superior landlord has the right to recover from its tenant by CRAR.

When it takes effect, the notice served on the sub-tenant transfers to the superior landlord the right to recover, receive and give a discharge for any rent payable by the sub-tenant under the sub-lease, until the notified amount has been paid, or the notice is replaced or withdrawn. Rent means principal rent, VAT and interest, but does not include service charge, insurance premiums, rates or other payments reserved as rent therefore the new right catches fewer payments by the sub-tenant.

A problem for the superior landlord is that the notice does not take effect immediately (unlike the previous position), but instead the superior landlord has to wait for 14 clear days after the notice is served. The problem with the 14 days' delay is that if the superior landlord's tenant recovers the rent from the sub-tenant during those 14 days, the notice will not catch the sub-tenant until it becomes liable for its next rent instalment, which can lead to significant delays if the rent is paid quarterly in advance. This 14 day delay undermines the effectiveness of this remedy for superior landlords.

If the superior landlord is entitled to be paid rent by the sub-tenant and the sub-tenant fails to pay, the superior landlord can use CRAR against the sub-tenant.

For any amount that a sub-tenant pays to the superior landlord, he may deduct an equal amount from the rent that would be due to his immediate landlord under the sub-lease.

This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.

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