

Update: Abolition of the Remedy of Distress – the New Regime for Commercial Rent Arrears Recovery “CRAR”.

What is CRAR?

Part 3 of the Tribunals, Courts and Enforcement Act 2007 (TCEA), which received Royal Assent on 19th July 2007, will abolish the remedy of distress and introduce CRAR, a new regime for the recovery of commercial rent arrears. Part 3 of TCEA is not yet in force and no commencement date has been set.

Who can Exercise CRAR?

CRAR can only be exercised by the landlord, which is defined as the person entitled to the immediate reversion.

In respect of which premises?

CRAR only applies to leases of commercial premises including, with some modifications, agricultural holdings. The lease must be in writing. If any part of the property is let as a dwelling, CRAR cannot be used unless this use is a breach of the lease.

Which sums are recoverable?

Rent, VAT and interest where provided for. Rent does not include sums in respect of rates, council tax, services, maintenance and insurance even if reserved as rent by the lease.

Is there a minimum sum required?

Yes. First, the amount of rent must be certain, or at least capable of being calculated with certainty, and second, the net unpaid rent (less VAT and interest) must equal or exceed a minimum amount to be prescribed by regulations, which have not yet been published.

What is the procedure?

Landlord must first serve a Notice of Enforcement. The regulations, which have not been published, will detail the requirements for the Notice and any time limits. Following this, an enforcement agent may take control of the goods. They then must be sold for the best price.

What if the lease has ended?

CRAR is only exercisable if either:

1. Control of goods was taken prior to the end of the lease; or
2. The rent fell due before the end of the lease; and
 - The lease did not end by forfeiture;
 - No more than 6 months has passed since the lease (including statutory continuations) ended;
 - Rent was due from the person who was the tenant at the end of the lease;
 - That person remains in possession of any part of the demised premises;

- Any new lease pursuant to which that person remains in possession, is a lease of commercial premises (no writing requirement); and
- The person who was landlord at the end of the lease remains entitled to the immediate reversion.

What if the Tenant disputes the Notice of Enforcement?

The old remedies for wrongful distress will be replaced. The Tenant can apply to Court to have the notice set aside and/or seek an order that no further steps be taken under CRAR without a further order in relation to the rent claimed. The regulations will provide further details.

Comparison to Distress

The Landlord will no longer have the element of surprise when intending to seize a tenant's goods in satisfaction of rent arrears. Further, the types of liability in relation to which CRAR can be exercised have been limited, although contractual interest on rent is recoverable even where not reserved as rent. CRAR can also be used after the lease has ended, provided the conditions are met, which gives the landlord a longer period to recover the arrears than was previously available.

What if there are subtenants in occupation?

A right to recover against a sub-tenant in similar terms to the old regime (Sections 6 & 8 of the Law of Distress Amendment Act 1908) has been preserved. If the landlord has the right to exercise CRAR against its tenant, it may serve a notice on a subtenant and require the subtenant to pay rent directly to the landlord. The form of the Notice and any time frames will be prescribed by the regulations. The subtenant can deduct the amount paid to the landlord from the rent due to its landlord. If the subtenant fails to pay pursuant to this notice, CRAR may be used.

Conclusion

A landlord's ability to recover outstanding sums has been materially curtailed. The 'ambush' element will go. Landlords will no longer be able to recover anything other than outstanding rent, VAT and interest, and until the regulations are published there is uncertainty as to how cumbersome the procedure will be and what minimum rent figure will be applied. Where other sums are also in arrears, albeit reserved as rent in the lease, CRAR will be a less useful remedy than distress.

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