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Distress for Rent

Commercial Litigation
Business Brief



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Distress for rent allows a Landlord to distrain i.e. seize goods that are present at the demised premises and retain them until the rent arrears are paid or the seized goods are sold to off-set the rent arrears. Distress for rent is only available if the tenant is in arrears with the rent.

The Tribunals, Court and Enforcement Act 2007 ("the Act") introduces new statutory provisions, although there is no date as yet for their implementation. These rules do not therefore apply at present.

These proposals are as follows:

- 1 the Common Law right to distrain will be abolished
- 2 a new statutory right for a landlord of commercial premises will be created allowing the landlord to recover rent arrears by using the new statutory procedure (CRAR);
- 3 there will be new procedures to enable landlords to recover rent arrears directly from sub-tenants;
- 4 a new personal insolvency procedure will be introduced.

Abolition of Common Law right to distrain

Currently at common law, landlords of residential and commercial premises seek to enforce distress for rent.

have a right to distrain by virtue of the landlord and tenant relationship. **Commercial Rent Arrears Recovery (CRAR)**

The new regime only allows landlords of commercial premises to distrain, although residential landlords cannot The Act creates a statutory right for a landlord of commercial premises to take control of the tenant's goods

in order to recover rent arrears. This regime, called Commercial Rent Arrears Recovery or CRAR, will replace the existing right of distress for rent.

Unless the landlord is a certified enforcement agent, he will have to instruct such an agent in writing in the form to be prescribed by the legislation. If any part of the premises is let or occupied as a dwelling, then the lease will not be classed as a commercial lease for the purposes of this new statutory right. However, if the occupation as a dwelling is in breach of the terms of the lease, then CRAR will be available.

Under CRAR, rent is restricted to the sum payable by the tenant for the possession and use of the premises under the lease, including any interest and VAT. This would exclude things such as Service Charges, etc.

Certain conditions need to be met for the landlord to be able to use CRAR:

1. the tenant is in arrears before notice of enforcement is given;
2. the amount of arrears owed is certain or capable of being calculated with certainty;
3. the "net unpaid rent" equals or exceeds a set amount to be prescribed in regulations before the landlord gives notice and before he takes control of the goods.

The "net unpaid rent" is unpaid rent less interest or Vat and after any permitted deductions the tenant is

entitled to under statute, common law or in equity.

Procedure for CRAR

The enforcement agent cannot take control of goods unless the tenant has been given notice of enforcement, although this raises concerns that this gives the tenant an opportunity to remove goods from the premises so that the landlord cannot take control of them! The Act prescribes the process to be followed by enforcement agents, goods exempt from CRAR and remedial action available to the tenant.

CRAR will cease to be available when the lease ends except:

1. where the landlord has already taken control of the goods before the lease comes to an end but has yet to sell them;
2. where the tenant remains in occupation after the lease has ended, in which case the landlord can use CRAR any time up to 6 months after the end of the lease. This is provided that the lease has not ended by forfeiture, that the landlord and tenant remain the same and that if a new lease has been granted it is for commercial premises.

A landlord who is entitled to use CRAR against his tenant, can serve notice on the any sub-tenant requiring him to pay his rent directly to the landlord instead until the amount of arrears is satisfied.

