Commercial Rent Arrears Recovery replaces distress

Landlords will mourn the passing of distress as their rights are diluted under the new regime, say **Paul Greatholder** and **Peter Dawson**

Landlords benefit from a legal remedy not available to other creditors: distress. Subject to a number of important qualifications, where a tenant owes a landlord money under the terms of a lease, a landlord can seize the tenant's goods, either to compel a tenant to pay up in return for release of the goods, or, less often, a landlord can sell the goods at auction to try to recoup the arrears.

Tenant friendly

This right for landlords will be abolished entirely from 6 April 2014 and will be replaced by an apparently similar but more tenant-friendly remedy of 'Commercial Rent Arrears Recovery' (CRAR).

CRAR has been introduced by the Tribunals Courts and Enforcement Act 2007 ('the Act') and the Taking Control of Goods Regulations 2013 ('the Regulations'). Landlords and their advisers used to exercising a right of distress need to understand the new regime.

The essential points under the new law are as follows.

- CRAR will only apply to rent, VAT and interest due under the lease. Other sums in respect of rates, council tax, services or repairs are not 'rent' for the purposes of CRAR, notwithstanding the terms of the lease. Where there is not a clear separation of payments towards particular items, there can be an estimation of what amount is 'reasonably attributable' to possession and use.
- A landlord will not be able to exercise any rights under CRAR where any part of the demised premises are let or occupied as a dwelling, except if occupation is in breach of the terms of the lease.
- The relevant lease must be in writing.
- A defined minimum amount of rent must be due before CRAR can be exercised, being an amount equal to seven day's rent.
- Rights under CRAR, including service of the several notices required under the Act and the Regulations, are largely exercisable by enforcement agents (effectively bailiffs under another name).
- Very importantly, prior to enforcement of a right to CRAR by a landlord, a minimum of seven days written notice must have been given by an enforcement agent, unless the landlord has applied to a court for an order permitting a shorter period of notice on the basis that the goods will be removed in order to avoid seizure. Detailed information about the content of the notice is set out in the Regulations. In calculating seven days Sundays, bank holidays, Good Friday and Christmas Day are excluded.
- Enforcement taking place within 12 months of the notice of enforcement.
- There is a presumption that enforcement will take place between 6am and 9pm, although there are exceptions, including if the premises are open for business outside those hours.
- An alternative to immediate removal of goods is for the tenant to sign a 'Controlled Goods Agreement' (CGA), whereby the enforcement agent takes an inventory of the relevant goods, and gives the tenant a fixed period to pay the debt. If the debt is not paid, the enforcement agent can re-enter and remove the goods, although the enforcement agent has to give at least two clear days notice of this re-entry.

Landlords are likely to regard the rights they enjoy under the law of distress as having been very severely diluted. Of particular concern will be the requirement that written notice must be given before CRAR can be exercised. For many landlords, it is the element of 'surprise' in being able to seize goods before a tenant can put them out of reach, which makes distress so effective.

Larger landlords, particularly those with tenants with a history of arrears and/or putting goods out of reach, might make an application to court as a matter of course to shorten the relevant notice period from the seven-day minimum.

However, until reported decisions have emerged, we will not know how the courts are likely to exercise their discretion to abridge or not. **SJ**

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