



PainSmith Solicitors Legal Update

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Commercial Rent Arrears Recovery

For commercial landlords with tenancies created under the Landlord and Tenant Act 1954, the imminent introduction of the Tribunals, Courts and Enforcement Act 2007 (“the Act”) is set to have an effect on the way in which they recover any rent arrears. The new procedure which has been introduced in order to comply with the European Convention on Human Rights can be found under ss 71 to 87 of the Act and is known as Commercial Rent Arrears Recovery (CRAR).

The provisions are anticipated to come into force later this year and they are firstly set to abolish the well recognised common law right to distrain¹ for arrears of rent. In its place will be CRAR which replaces the traditional remedy with a clear modern day system which will allow commercial landlords to instruct enforcement officers (i.e bailiffs) to collect arrears of rent. If a landlord seeks to utilise this statutory remedy they will be required to follow a more stringent procedure which involves the satisfying of some strict pre-requisites including the service of notices and the obtaining of a Court Order.

Definition of Landlord

The first pre-requisite for anyone seeking to implement the CRAR procedure is to satisfy the definition of a landlord under s73 (3) of the Act which requires him to be “entitled to the immediate reversion” in the property comprised in the lease. Joint landlords, mortgagees in possession and receivers also fall under the definition. An important exclusion to the provisions is found under s 74 (2) of the Act which states that for a landlord to be able to utilise the CRAR remedy they must have a written agreement. Verbal agreements will not be sufficient in permitting a landlord to distrain goods via CRAR. A further important exclusion affects mortgagees who may only utilise CRAR where the lease has been created with their knowledge and not contrary to the provisions of the mortgage.

Lease

Under s 74 the provisions stipulate that they will not apply unless there is a lease. Where circumstances can be interpreted to have created a mere licence the CRAR procedure will not be available. It entails that unless exclusive possession has been granted with a clear landlord and tenant or lessor and lessee relationship, alternative remedies will have to be considered. Other forms of agreement can

¹ The common law remedy which can enable a commercial landlord to seize or hold goods to compel payment of arrears.

give rise to CRAR, such as a tenancy at will²; however, this is subject to certain conditions. A tenancy at sufferance³ is excluded under s 74.

Commercial Premises

The provisions do not apply where some part of the premises is let as a dwelling and will only apply to premises used solely for business purposes. If the premises are used as a dwelling, the only way the CRAR procedure can be exercised is if the lease or any superior lease prohibits this and therefore by using the property for residential purposes the tenant has committed a breach of the lease or superior lease.

This particular condition which is found under s 75 is likely to cause some landlords a problem with mixed use of a property meaning that CRAR cannot be employed. Whilst this is not unfamiliar when using distress, it is essential that landlords seek to preserve the remedy of CRAR by inserting a strict user clause in their lease. For example: *“The Tenant must not use the Premises for any purpose other than as offices connected with the business of marketing, selling and letting residential properties.”*

It is important to note that the new Act prohibits any form of variation or modification of the provisions which Landlords may try and implement to extend their rights. Under s 85, any clause within a lease which goes beyond that set out under the Act, such as to allow the application of CRAR in premises used partly for residential use, will not be enforceable.

Recovery of Rent Only

The provisions do not operate for recovery of anything else other than rent. Unlike with distress, the definition of rent is solely those sums payable, in advance or in arrears, for possession and use of the demised premises. This definition under the Act cannot be altered via the lease as is commonly done in a commercial lease and so arrears of rates, service charges, council tax, insurance, maintenance and repairs will not allow use of the CRAR process. For these types of arrears, a landlord will have to use court proceedings to recover their losses.

In addition to the above, the rent recoverable must be “due and payable”; it must be calculable with certainty; and net unpaid rent must be no less than the minimum amount as dictated by the regulations. It is this last condition which could have a detrimental effect on whether the landlord may utilise CRAR since to calculate the net amount interest, VAT and permitted deductions must be considered. Consequently, this could mean that set off for permitted deductions such as where a landlord has breached a term of the lease or where compensation is payable to the tenant for improvements this may result in the landlord not satisfying the minimum amount and not being able to use CRAR. Should this occur an alternative remedy will have to be considered such as issuing court proceedings.

After the end of lease

Subject to exceptions, s 79 permits the use of CRAR after a lease has ended. Some of the conditions under s79(4) which preclude CRAR being used include where forfeiture has been utilised; the tenancy has ended more than six months ago; and

² A tenancy which permits the use of premises for a limited period but where the tenant cannot assign their rights under such an agreement and the landlord maintains the right to re-occupy the property on limited notice.

³ Such a tenancy is the equivalent to a periodic tenancy and it occurs after a tenancy has expired but before a landlord has served notice to recover possession.

the tenant has not given vacant possession. Landlords who have assigned their interest in the let property are also not able to use CRAR, nor are the assignees; because to allow this would be inconsistent with the definition of a landlord.

Sub Tenants

Much like distress, under s 81 of the Act landlords can require sub tenants to pay rent directly to them following service of a Notice. In comparison with the pre-existing common law procedure, CRAR is far more restrictive in that it only applies to commercial properties and, unlike the law of distress, CRAR cannot be used where the premises are of mixed use or purely residential.

In summary, the introduction of the CRAR procedure will not have too much of a unfavourable effect on Landlords. Aside from the loss of some of the flexibility which has been introduced via some strict requirements relating to rent and the use of the premises, generally, Landlords will still have a valuable remedy available to them. Whilst the requirement for a court order is still not required in all cases, the service of notices in some circumstances may encourage both landlords and tenants to attempt to negotiate a settlement without the need for heavy handed tactics to be implemented or, alternatively, court costs to be incurred.

As for tenants, the impetus for such reforms being a Human Rights Act - compliant system clearly benefits tenants who have in the past suffered abrupt and illegal attempts of enforcement. The opportunity which is open to tenants to make applications to the court following the service of a notice of enforcement is something which has, to a degree, been there before; however, the setting out of these provisions has leant clarification to exactly what a tenant's rights and remedies are.

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