

Property Litigation Update – November 2013

RENT ARREARS RECOVERY- CHANGES TO DISTRESS

After much debate and consultation the long anticipated reform of the self help remedy of Distress will come into effect from 6 April 2014. Distress is a common law remedy arising out of a landlord and tenant relationship which allows a landlord to instruct a bailiff to recover rent arrears. The bailiff is permitted to seize, impound and sell goods from the premises demised to the tenant, of an equivalent value to the rent arrears.

From 6 April 2014 the common law remedy of distress will be abolished. In its place landlords will be able to utilise the Commercial Rent Arrears Recovery ("CRAR") procedure.

Various conditions must be satisfied before a landlord can enter the demised premises and seize goods. The main differences between Distress and CRAR are:

- CRAR can only be used in respect of commercial premises. If the premises are mixed use (e.g. commercial premises on the ground and residential premises on the first floor) CRAR will not be available to landlords.
- CRAR can only be used for commercial rent arrears. Previously it was possible to distrain for rent arrears, service charge and insurance provided they were payable as rent, but this will no longer be the case.
- CRAR can only be used where the landlord and tenant relationship is evidenced in writing, and will not therefore be available if the lease is oral.
- CRAR can only be used where there is at least 7 days rent arrears outstanding.
- CRAR can only be commenced once the landlord has served the tenant with a written enforcement notice, at least 7 days before the bailiff attends the demised premises.

CRAR has been widely criticised by landlords for many reason, most notably the requirement to give 7 days notice prior to any action. There is obvious concern that these notice requirement will result in tenants removing items from the premises or commencing insolvency proceedings before their goods can be seized. The regulations do provide for an application to be made to court to shorten the notice period, but there are concerns over how effective this will be in practice.

Landlords of mixed use premises may now be more inclined to consider separating the premises, and entering into two separate leases, one for the commercial space and the other for the residential element, thereby preserving the landlord's ability to use the CRAR option in future should rent arrears arise for the commercial premises.

Alternatively landlords may wish to consider taking greater security at the outset. Only time will tell whether, in the current climate, tenants will be willing and able to provide it.

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