THE INTRODUCTION OF COMMERCIAL RENT ARREARS RECOVERY -CRAR

by Eirlys Lloyd Barrister.

Many doubted the day would ever arrive, but it did. On 6th April 2014 part 3 of The Tribunals, Courts and Enforcement Act 2007, was implemented and a landlord’s common law right to distrain for rent was abolished. In commercial premises, it was replaced by commercial rent arrears recovery (CRAR). With that, no longer could a landlord without warning, enter leased premises, seize the tenant’s goods and without further reference to the tenant, proceed to sell them. Distress had no regard for the tenant’s circumstances, and was completely at odds with the modern approach to debt enforcement. It has no place in the 21st century.

The threat of this harsh procedure, certainly effective from the landlord’s prospective, could in the hands of the unscrupulous, be summed up as bully boy tactics. The tenant, forced into a corner, had little option but to find payment. The effect of a potential misuse of these powers, including the intrusion into the tenant’s premises and a sale at an undervalue, caused frequent concern to those involved in insolvency, restructuring and business rescue.

The new legislation does not apply to Scotland or Northern Ireland, whose existing law of enforcement remains unchanged. Distress was a common law remedy applicable to England and Wales.

In this article Eirlys Lloyd considers the effect of these changes on commercial tenancies. The procedural aspects of the legislation, as set out in part 3 and schedule 12 of the Tribunals, Courts and Enforcement Act 2007, are summarised in Eirlys Lloyd’s earlier article titled, The Modernisation of the Law Relating to Corporate Debt Enforcement. Reference to the Ministry of Justice’s publication, Taking Control of Goods: National Standards – April 2014, is also made. The procedural detail is not repeated in this article.

THE AVAILABILITY OF CRAR

CRAR can only be carried out by an authorised (certificated) enforcement agent. No longer can an unlicensed agent or indeed the landlord in person, take control of a tenant’s goods. There does not need to be a formal lease but the tenancy must be current and evidenced in writing. It is the written document, which gives the landlord his power to take enforcement action, without recourse to the court.

CRAR also applies to equitable leases. These may arise out of a contract, tenancies at will or an informal writing, as for example, heads of agreement. An oral variation of the lease does not exclude the lease from CRAR. However CRAR does not apply to a licence to occupy which merely gives a right to possession. Also excluded is a tenancy at sufferance, which arises when a tenant remains in occupation after the expiry of a lease, without the landlord’s agreement.

CRAR is excluded, if any part of the let premises is let as a residential dwelling. This is relevant, for example, in mixed use premises. However, if the tenant is using any of the property let as a dwelling in breach of a commercial lease, CRAR will still apply. In the future, it is likely that a landlord will look to issue separate leases to cover individually, the residential and commercial aspect of mixed use or semi commercial, let premises.

CRAR is available not only over goods at commercial premises as described in the lease, but also over vehicles belonging to the tenant on the public highway.
CRAR AND TOOLS OF TRADE

The writer would like to clarify that the exemptions referred to in The Taking of Goods Regulations 2013, which includes tools of trade to the value of £1,350, applies only to residential or mixed use premises. This is made clear by regulation 5 of The Taking of Goods Regulations 2013. CRAR only applies to commercial premises, therefore these exemptions, including those relating to tools of trade to the value of £1,350, do not apply.

THE RENT APPLICABLE TO CRAR

The Act defines rent, for the purposes of the exercise of CRAR, as the rent payable under a lease for ‘possession and use’ of the leased premises, including VAT chargeable and any interest payable. Therefore only pure rent reasonably attributable to the ‘possession and use’ of the premises, plus VAT and interest, can be recovered through CRAR. The Act also states that a landlord must allow for rent deductions and any set off that the tenant may be entitled to.

Previously, distress enabled a landlord to recover all sums, described as rent in the lease. This could have included service charges, rates, insurance, utilities, repairs or maintenance. CRAR is not available for those related costs. This is the case even if these costs are described as rent in the lease or if a separate contract is drafted in respect of these additional charges. These charges can, of course, be pursued separately through the courts but CRAR is not available for them.

A landlord may encounter difficulties where a lease includes all-inclusive terms or, for example, a turnover rent. For CRAR to be utilised, the Act provides that rent must be due and payable before the notice of enforcement is given and must be certain or capable of being calculated with certainty. As only pure rent is attributable and therefore recoverable through CRAR, for enforcement purposes, a landlord may find that he has to prove what proportion, of the all-inclusive rent, is pure rent.

Landlords will require to review the wording of their leases, to ensure that the rent attributable to ‘possession and use’ can be clearly identified. Tenants should be aware that this may present a negotiating opportunity for them, especially as a review date or break date in the lease approaches.

THE CRAR THRESHOLD

Previously, distress could be invoked the moment rent fell into arrears. This is not the case with CRAR which only applies if the net unpaid rent is at least 7 days in arrears. The net unpaid rent is, again defined as rent payable under a lease for ‘possession and use’ of the leased premises. However, the minimum threshold is calculated as the pure rent but, on this occasion, less any interest, VAT, permitted deductions or set off.

This minimum amount must be calculated twice and be due immediately before each calculation. This is, firstly at the time when the notice of entitlement is given and, secondly, when control is taken of the goods. Therefore, in circumstances where a tenant makes a payment, after receiving a notice of entitlement, but prior to enforcement, and reduces the arrears to below the seven day threshold, CRAR will not apply.
TENANT’S REMOVAL OF GOODS.

Seven clear days’ notice must be given of an enforcement officer’s visit. An obvious concern of the landlord is that the tenant might remove goods, during the notice period, from the let premises, in order to frustrate the enforcement process.

If the landlord suspects that goods may be removed, he can apply to court to seek a reduction in the 7 day notice period. However, he will require to show reasonable grounds for believing that a tenant might move or dispose of the goods in question. The Act gives no guidance in this regard. The court is unlikely to grant the landlord’s application on a mere suspicion. In addition, the landlord will require to establish, that the intention to remove or dispose of the goods is to avoid them being taken by the enforcement officer.

SUB-TENANT

Distress permitted a landlord, whose rent was in arrears, to serve a notice of distraint on a sub-tenant, requiring the subtenant to pay his rent direct to the landlord. This is still the case with CRAR. However, in the case of CRAR the notice only takes effect 14 days after service. At that stage the mezzanine landlord loses his rights to recover, receive and give a good discharge for rent against the sub-tenant in favour of the superior landlord.

If the sub-tenant fails to make payment in terms of the notice to the Superior landlord, the superior landlord may exercise CRAR against him. However he cannot exercise CRAR down the chain to a tenant of the sub-tenant.

If a landlord serves a notice to recover on a sub-tenant, he can only recover the amount which he would be entitled to recover from the mezzanine tenant in arrears.

THIRD PARTY

Neither removal nor control of goods, owned by a third party, should be taken in exercise of CRAR. Eirlys Lloyd’s article on The Modernisation of the Law Relating to Corporate Debt Enforcement refers to this in some detail. In the event that CRAR is exercised over disputed, third party goods, the third party is entitled to receive an inventory of goods removed or of which control has been taken.

CRAR can only be exercised over goods in which the tenant has an interest and will include goods over which there is an uncrystallised floating charge.

PROPERTY REPOSSESSION.

The existence of CRAR does not prevent landlords from seeking repossession of a property. They could raise a county court claim re the arrears of rent along with an application for repossession. Alternatively, they could seek the common law remedy of forfeiture of the lease. This procedure is usually adopted when the rent falls into arrears but also applies when the terms of the lease have been breached.

In the event that a landlord has forfeited the lease, CRAR can no longer be used as the lease has ended, the landlord having repossessed the property. This is also the case when the arrears of rent relate to the period before the lease was forfeited. It should be noted that the landlord must allow
access to the tenant, to the property, to remove any goods and equipment. The landlord can raise a county court claim to recover the arrears of rent.

If the former landlord of a forfeited lease threatens disposal of the tenant’s goods, the tenant can apply to court for an order, to prevent either removal or disposal of these items, in order to permit the tenant’s collection, within a reasonable time.

**SUMMARY**

Distress was a harsh remedy capable of destroying a business which might otherwise have been saved or restructured. Unscrupulous landlords could use the threat of distress to force payment and so obtain considerable priority over other creditors. In an insolvency procedure, a tenant’s goods are often the main asset and so of interest to insolvency practitioners if the business is liquidated.

There was no apparent justification for that priority. CRAR seeks to bring landlords into line with other creditors. Undoubtedly, landlords are unlikely to treat the loss of their privileged position, with any enthusiasm. Although the costs of enforcement under CRAR, should be recoverable from the tenant, landlords will now experience delay as a result of compliance to time limits under CRAR.

From the landlords’ prospective, they must comply with a procedural bureaucracy and its transitional problems, to which they are not used. Many will find themselves taking steps to renegotiate elements of a lease, in the light of CRAR. This will apply, in particular where a lease is over mixed used premises or the rent in the lease, is not pure rent.

This is likely to result in landlords, in an attempt to strengthen their position, seeking greater security. This could be in the form of rent deposits and guarantees, whether personal or by third parties.

Landlords have openly greeted the requirement to give 7 days’ notice of the enforcement procedure with suspicion, fearing that the tenant may use this notice period to remove goods from the premises. The reality is that few are likely to do so as such action would be difficult without damaging their ability to trade.

Unless a landlord has an alternative agenda, it is rarely in his interests to damage the tenant’s business. It is usually in both parties’ interests that the tenant remains as such, and an agreement reached between parties, as to the payment of rent. Thereafter, the tenant can continue to trade uninterrupted and the landlord does not risk finding himself with a vacant tenancy with all the implications, including exposure to payment of rates. CRAR, through sensible use of its notice periods, provides an opportunity for the tenant in arrears, who may be undergoing a restructuring, to reach a constructive agreement without the potential interruption to business, by the levying of distress.

From the tenant’s prospective, when restructuring or insolvency is an issue, the notice period alerts the tenant to the landlord’s intentions. This gives the tenant a breathing space to consider his position and seek professional advice, when alternatives to liquidation might still be possible. In circumstances where a restructuring is well advanced the tenant could apply to the court for an order to set aside the notice of entitlement so as to halt further steps being taken under CRAR.

The writer believes that such an application would be unlikely to be successful unless the process is well advanced. For example in the case of a company voluntary arrangement, the filed proposal document produced or, in the case of administration, a notice of intention to appoint
administrators, which once filed at court, would create a moratorium and frustrate the CRAR process.

It cannot be denied that the new procedure will allow for transparency and will restore the balance between creditors. Distress provided landlords with an extra-judicial remedy, with little opportunity for the tenant to challenge the landlord’s claim. Distress has no place in a modern legal system or modern commerce. The changes will be welcomed by tenants. Distress provided a landlord with excessive power. It is hoped that CRAR has redressed that position.

Eirlys Lloyd
8th August 2014

The information contained in this article is for information purposes only. It does not constitute and is not for the purposes of legal advice. In all cases legal advice should be sought to ensure compliance with current law.