

CAUSE FOR DISTRESS?

The remedy of distress is being abolished from 6 April 2014

WHAT IS DISTRESS?

Levying Distress means "sending in the bailiffs" to seize a tenant's goods in order to recover arrears of rent. It allows a Landlord to take possession of the tenant's goods on the let premises and either hold them pending payment of the arrears or to sell them and keep the proceeds in lieu of payment. Distress is an ancient remedy which is incidental to a lease and the relationship of Landlord and Tenant. The government has now decided to abolish it.

WHAT'S CHANGING?

Distress is being replaced by Commercial Rent Arrears Recovery ("CRAR"). Under the new regime, commercial Landlords (or their mortgagees) will have a statutory right to recover arrears using a prescribed enforcement procedure.

KEY FEATURES

The key differences between Distress and CRAR are as follows:

- CRAR will only apply to "commercial premises". This means that Landlords will not be able to use the process to recover arrears of rent in respect of premises which are occupied or let as a dwelling. The effect of this will be to exclude mixed use premises from the scope of CRAR;
- For CRAR to apply, a tenancy must be evidenced in writing. Therefore, CRAR can be used in relation to leases and written tenancies at will but not in respect of licences to occupy;

- CRAR can only be exercised if the outstanding sums exceed a minimum of 7 days' rent (following the deduction of interest, VAT and set-off);
- The CRAR procedure provides for the recovery arrears of "basic rent" only (see below for further information);
- A 7 day minimum notice period must be observed prior to the seizure of goods; and
- CRAR can only be carried out by an "enforcement agent" e.g. an authorised bailiff. Landlords will therefore no longer be able to levy distress themselves.

WHAT DOES THIS MEAN FOR LANDLORDS & TENANTS

Tenants are likely to be in favour of the new system, particularly the notice period which will prevent bailiffs turning up at premises unannounced.

For Landlords however this is likely to be an unwelcome change. The scope of CRAR is narrower than that of distress. In particular, the definition of "basic rent" is strict and only relates to the amount paid for "possession and use of the premises". CRAR cannot be used to recover arrears of service charge, rates, insurance, etc.

In addition, landlords may be concerned that the notice period will simply provide tenants with time to remove goods, thus limiting the usefulness of CRAR. While the Court will have the power to order a lesser notice period where it is likely that goods will be removed to

avoid enforcement, such an order would first require an application to the Court.

While the legislation will widely reform distress as a remedy, it will retain the Landlord's ability to recover arrears via a sub-tenant following service of a notice stating that it should pay rent directly to its Superior Landlord. The sub-tenant may then deduct the amount paid from the rent which is due to its own Landlord. This is similar to the existing notice procedure under section 6 of the Law of Distress Amendment Act 1908.

Given the additional hurdles that Landlords will have to get over to use CRAR, it seems likely that landlords will seek additional comfort such as rent deposits and guarantees from tenants at the inception of the lease.

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