

The Abolition of Distress and the new statutory regime of CRAR

Distress as we have known it for centuries has been abolished. In its place a new regime introduces concepts of controlled goods and enforcement agents, hedged about with statutory procedure and what is now revealed to be a lengthy set of regulations: the Taking Control of Goods Regulations 2013,¹ which regulate the operation of CRAR under the Tribunals Courts and Enforcement Act 2007 (“the 2007 Act”); and the Taking Control of Goods (Fees) Regulations 2014,² which deals with recovery of fees of enforcement agents from the debtor and the proceeds of sale of the debtor's goods when the procedure provided by Schedule 12 of the 2007 Act is used. The question in the minds of many in the commercial property market is whether the replacement remedy, presented as preserving rights (albeit limited) to recover arrears through the seizure and sale of goods, hides by means of its lengthy regulations the dark truth that landlords have in effect lost any practical, meaningful possibility of doing any such thing. This paper sets briefly out the historical context, and identifies why change was deemed necessary, before considering the provisions of the Act itself, in order to assess its likely effectiveness in the hands of commercial landlords.

History

Distress is an ancient remedy whereby the goods of a tenant in arrears were liable to be seized by the landlord in order to pressurise the tenant into paying the overdue rent. The doctrine arose from earliest times at common law as a necessary incident to every rent-service, which included rent due from a tenant to a landlord. Even ancient commentators disclaim knowledge of its precise source: “*From whencesoever the name or ... the notion came, the remedy obtained so early in our law, that we have no memorial of its origin with us*” (Gilbert, *The Law and Practice of Distresses and Replevin* (3rd ed, 1794) pg 2). There could be no distress in respect of payments due under a licence or, indeed, any arrangement which does not establish the

¹ SI 2013/1894

² SI 2014/1

relationship of landlord and tenant (whether at law or in equity). The doctrine derived (probably) from ancient feudal law, providing the landlord with a substitute for the forfeiture of the tenant's estate and a remedy which did not require any recourse to the court.

The power to distrain became the means of great oppression in the hand of the barons and successive enactments were passed up to 1554 for the protection of tenants. Thereafter, the tide turned again and was for a long time wholly for the benefit of landlords (as in the right to sell goods in satisfaction of overdue rent enacted under the Distress Act 1569, where previously the taking of goods provided only security for the tenant's pledge, the goods being returned if and when the overdue rent was paid). However in the late 19th century, a series of Acts was passed limiting the rights of the distrainer (for example, preventing the seizing of goods of a lodger, protecting railways rolling stock, and protecting the use of distraint in agricultural holdings), culminating in the Law of Distress Amendment Act 1908 which repealed and replaced the protection given to lodgers under the earlier Act and extended protection to under-tenants and persons not having any beneficial interest in any tenancy in the premises.

During the 20th century, distress had fallen into relative disuse. However, in the latter part of the century, the practice enjoyed a resurgence of popularity amongst landlords, leading to a Law Commission Report ((1991) Law Com No 194) which decided that distress was a thoroughly bad thing: total abolition was proposed. The recommendations of the Law Commission, followed up by a Government review of distress in 1998, have taken in excess of 20 years to be implemented in the form of the 2007 Act, which, whilst avowedly abolishing distress, nonetheless retains partial and limited rights to seize and sell goods, re-named as "commercial rent arrear recovery" (universally referred to by its statutory acronym under section 72(2) as "CRAR").

What was wrong with distress?

The Law Commission's view on distress was unequivocal and damning. It was "*wrong in principle because it offers an extra-judicial debt enforcement remedy in circumstances which*

are, because of its intrinsic nature, the way in which it arises and the manner of its exercise, unjust to the debtors, to other creditors, and to third parties.”

Four characteristics of distress to which particular objection was taken were identified. Firstly, the levying of distress affords priority to landlords over other creditors. Secondly, the availability of the remedy renders third party goods vulnerable. Thirdly, distress causes harshness as a result of the limited opportunity for the tenant to challenge the landlord’s claim, the scope for the rules of distress to be abused, the unexpected intrusion into a tenant’s property and the possibility of the sale of goods at an undervalue. Fourthly, distress involves disregard of the tenant’s circumstances, which demonstrates its general lack of recognition of a modern approach to debt enforcement.

These characteristics troubled not only the Law Commission. The academic legal establishment was largely of like mind, and the inherent characteristics of distress were sufficiently worrying to lead one prominent commentator to call distress “*an archaic, feudal survival, which has no place in a mature legal system. ... It is an arbitrary, high handed and summary process. ... Its very existence as a legal remedy besmirches the fabric of English civil justice*” (Sir Jack Jacob, *The Fabric of English Civil Justice* (1987), pg 179).

Interestingly the effectiveness of distress was not doubted: such figures as were available (albeit they were not particularly reliable) suggested not only that distress is highly effective but that in the large majority of cases the mere threat of its use intimidates the tenant into paying without the need for the landlord to resort to the levy of distress. However, the Law Commission was firm in its view that the decision whether to retain a remedy should not be made solely on results; whilst results are a major consideration the means of achieving those results cannot be ignored, particularly where they are “*harsh*”. The harshness objected to revolved around the lack of opportunity for the tenant to challenge the distress; the scope of the rules to be abused; the intrusiveness of the remedy; and the sale of goods at an undervalue.

The prevailing view seemed to be that distress had no place in the modern debt enforcement regime where it is “*widely recognized that a debt enforcement process which subjects the debtor to coercion, fear, shock and humiliation is not socially acceptable, even in those cases where tenants are merely using the landlord as a cheap source of finance.*” The Law Commission rejected the case for retaining distress for a limited class of landlord as being tantamount to singling out any such class for particular privilege. In the absence of evidence that one class of landlord was particularly vulnerable, there was no justification for offering special treatment.

Thus, was the abolition of distress recommended unreservedly (and, indeed, contracting into distress was to be forbidden). Before going on to consider how CRAR is designed to avoid what were regarded as the unacceptable features of distress, I pause to note that the arguments rehearsed above, though well made, fail to acknowledge the arguably unique relationship between landlord and tenant, arising out of the special characteristics of real property interests as opposed to interests in personal property (or payment for services). In few other commercial relationships does the arrangement between the parties involve the co-existence of rights (albeit arising out of differing interests) in the subject matter of the contract (the Law Commission mentions hire purchase agreements as an example of such a relationship and sees no reason to accord rights to a landlord which exceed those of providers of goods under hire purchase). Further, where applicable, the existence of statutory protection in respect of both commercial and residential occupation, albeit ultimately vulnerable in the face of continuing non-payment of rent, tips the scales in the tenant’s favour at least in the short to medium term whilst the creditor landlord spends time (and a substantial percentage of irrecoverable costs) navigating the relevant statutory regime and the civil procedure system.

These considerations were not enough to trouble the Law Commission, not even to the point of considering, as opposed to abolition, changes to the current distress regime designed to safeguard against the abuses and simplify the intricacies. Notwithstanding its unequivocal

recommendations, the Report failed to generate any legislative response until the passing of the 2007 Act which while purporting to abolish distress creates in CRAR a modern hybrid combining some of the superficial characteristics of distress with a new regime of court control.

CRAR

Under s.71 of the 2007 Act, *“the common law right to distrain for arrears of rent is abolished”*, except in Scotland. Thus, have nearly ten centuries of law been swept aside in a single sentence leaving no room for doubt. As well as the notable simplicity with which such a radical result has been achieved, it would seem to follow that the regime introduced under Part 3 of the 2007 Act must be regarded as a new species of remedy, to be interpreted and applied by reference only to its legislative embryo, and specifically not relying on any past law, custom or practice related to distress as was, which is now well and truly buried. Indeed section 62 expressly provides that the common law rules (including but not it would seem limited to rules distinguishing an illegal, irregular and excessive exercise of a power, remedies available to the debtor, rules of replevin and rules about rescuing goods) are *“replaced”*.

The Government's intention according to the White Paper is that *“the new regime will be accessible and fairer, and set out more clearly actions landlords and agents are legally entitled to undertake”*. To this end the new regime provides for limited circumstances in which a *“landlord under a lease of commercial premises”* may *“take control of goods to recover rent payable under the lease”*. The statutory remedy is paramount and exclusive: section 85 prevents any attempt by a landlord to contract into a greater private right of distress than is provided by the 2007 Act. The architecture of the new regime is presented in Part 3 of the 2007 Act, whilst the mechanics of enforcement are contained in Schedule 12 to the 2007 Act, which itself whilst containing an abundance of detail refers on numerous occasions to *“regulations to be made”*.

The body of the 2007 Act is drafted with elegant simplicity. Each of the relevant terms is defined. Under section 73 a *“landlord”* is the person for the time being entitled to the immediate

reversion in the property comprised in the lease. Forestalling disputes as to the reversioner's title, it is provided that where there is a tenancy by estoppel the person is "*the landlord*" if he is entitled to the immediate reversion "*as between himself and the tenant*". In the case of joint tenants who jointly fulfill the criterion "*the landlord*" means any one of them and it is further provided that CRAR may be exercised to recover rent due to all of them. If the reversionary interest is mortgaged "*the landlord*" means the mortgagee if the mortgagee has given notice of his intention to take possession or enter into receipt of rents and profits; otherwise it means the mortgagor.

Under section 74 "*lease*" is given a broad and practical meaning, including tenancies in law and in equity, as well as tenancies at will; tenancies on sufferance are however excluded. In order to qualify leases must be evidenced in writing, though leases varied whether in writing or not are expressly included.

Perhaps one of the most significant restrictions lies in the types of premises to which the right of the landlord to take control of goods attaches. Under section 75 these are referred to as "*commercial premises*" and (again at one fell swoop) the residential landlord is excluded from the ambit of the remedy. "*Commercial premises*" is defined negatively to exclude premises any part of which³ is occupied as a dwelling, whether (1) lawfully under the relevant lease, or (2) under a sub-lease or (3) otherwise, unless in the latter two of these possibilities such occupation is in breach of the relevant lease or any lease superior to it. The restriction in this definition may it is thought by some (including the RICS) cause confusion in mixed use leases though the words are tolerably clear; it is considered that the effect will be to limit (fairly dramatically given the numbers of mixed use premises) the number of leases to which CRAR applies rather than to create confusion as such. This restriction may be felt particularly in the agricultural sector, to which CRAR is available under section 80, but only if the commercial criteria are satisfied.

³ Including anything on the premises as demised, no doubt to take account of premises which were originally let as a bare site but which have subsequently been built on, in order to meet an argument on any given facts that the demised premises as defined in the lease do not include the subsequent buildings

Many if not the majority of agricultural leases include living accommodation as well as farm land and buildings; perhaps the inevitable outcome will be that agricultural (and other currently mixed use) premises will come in the future to be let on separate leases distinguishing the commercial parts from the residential.

“*Rent*” (whether in advance or in arrear) is dealt with in section 76 and means the amount payable under a lease for possession and use of the demised premises and includes any interest payable on that amount and any value added tax chargeable on that amount or the interest payable thereon. Specifically excluded from the definition of rent is any sum in respect of rates, council tax, services, repairs, maintenance, insurance or other ancillary matters whether or not such sums are identified as “*rent*” in the lease. With perhaps an excess of foresight express provision is made for the case where what is said to be “*rent*” in the lease in fact comprises part payment for use and occupation and part payment in respect of other matters; it is provided that what is to be regarded as “*rent*” properly so called is “*so much of the total amount payable under the lease as is reasonably attributable to possession and use*”, a formula which it may be thought will provoke more disputes than it prevents. There is a perception in the market that this narrow definition of “*rent*” means that landlords will in effect be required to accept greater levels of risk (if they cannot distrain for other sums owing such as service charge even where such sums are reserved in the lease as “*rent*”), and a fear that this could have serious consequences on the supply of commercial property. A further disadvantage is that landlords may have to resort to a two tier recovery process utilising enforcement agents for rent collections and legal process for other amounts.

Under section 77 further conditions are imposed in terms of when “*rent*” may be recovered using CRAR. The rent must be due and owing before any notice of enforcement is given; and it must be certain or capable of being calculated with certainty. Further CRAR is exercisable only if the net unpaid rent is, both at the time the notice of enforcement is given AND the first time that goods are taken control of after that notice, “*at least the minimum*

amount". The minimum amount is to be calculated in accordance with Regulation 52 which provides: "*The minimum amount of net unpaid rent for the purposes of section 77(3) of the Act is an amount equal to 7 days' rent.*"

In the initial proposals in 2001 it was suggested that the minimum amount would be calculated as one quarter of the annual rent. However, the government appears to have backed off from this approach; in debate at the committee stages of the draft bill on 22 March 2007, the following indication was given by Mrs Vera Baird, Parliamentary Under-Secretary of State for Constitutional Affairs:

"We will take care to ensure that the conflicting needs of landlord and tenant are managed by setting the minimum at an appropriate level. Our initial thinking suggests a trigger sum of something like one week's rent or £200—whichever is the smaller—or four weeks' arrears if the rent is less than £50. Currently those are, in our minds, perhaps appropriate minimums to apply for CRAR purposes. We are open to suggestions, but it seems to me that we are starting at a reasonable point. If we set the level at around that margin, we will not be allowing too onerous a penalty for too small a debt on the tenant and will not be cheating the landlord unless he has serious financial problems himself."

In deriving the minimum amount, landlord must subtract any "*permitted deductions*", that is to say, any deduction, recoupment or set-off that the tenant would be entitled to claim in law or in equity in an action by the landlord for that rent. The question arises whether contractual anti-set off provisions commonly found in commercial leases are overridden by this section.

So much for definitions, important though they are in limiting the scope of the new statutory remedy. What does CRAR actually allow a landlord to do? A landlord under a lease of commercial premises may use the procedure set out in Schedule 12 to the 2007 Act to recover from the tenant rent payable under the lease by taking control of goods and selling them to recover that sum in accordance with Schedule 12 and regulations made under it. The goods in question are confined to goods of the tenant in distinction to the remedy of distress which could be levied over a far wider range of goods. If a tenant company allows a subsidiary company to trade from the premises the ability to use CRAR will be lost. If a non limited/partnership/

individual is the tenant but trades as a limited company from the premises the ability to use CRAR will be lost. If the tenant has sold the goodwill of the business to a third party without the landlord's consent the ability to use CRAR will be lost as the third party trading from the premises is not the tenant.

Regulation 4 provides categories of exempt goods. For the purposes of enforcement against commercial tenants, the most important category is found in Regulation 4(1)(a): *"items or equipment (for example, tools, books, telephones, computer equipment and vehicles) which are necessary for use personally by the debtor in the debtor's employment, business, trade, profession, study or education, except that in any case the aggregate value of the items or equipment to which this exemption is applied shall not exceed £1,350"*.

The process of taking control of the goods must no longer be done by the landlord himself, but only by an enforcement agent (new speak for a bailiff) who is required to be certified. The enforcement agent cannot take control of the goods unless the debtor (i.e. the tenant) has been given a notice of enforcement. Regulation 6 stipulates the minimum period of notice. *"Notice of enforcement must be given to the debtor not less than 7 clear days before the enforcement agent takes control of the debtor's goods"*. Sundays, bank holidays, Good Friday and Christmas Day do not count for the purposes of calculating the notice period. *"The court may order that a specified shorter period of notice may be given to the debtor"* but only in circumstances where, *"if the order is not made, it is likely that goods of the debtor will be moved to premises other than relevant premises or otherwise disposed of, in order to avoid the goods being taken control of by the enforcement agent"* (Regs 6 (3) and 6 (4)).

Regulation 7 provides that the notice must be in writing and must contain certain prescribed information. Regulation 8 provides that the notice must be given *"by the enforcement agent or the enforcement agent's office"*. It specifies the appropriate method for giving notice, and provides a number of alternatives.

The court has power under section 78(2), on the application of the tenant, to make an order setting aside the notice or that no further steps may be taken under CRAR without further

order; the principles governing the court's exercise of these powers are not yet set out (but may yet be by regulations to be made), begging the question of what criteria should guide the court's consideration of any such application by the tenant. Thus, an application to set aside a notice of enforcement gives rise to an unencumbered discretion. The relevant considerations remain at large. Needless to say, this will lead to uncertainty, which could, at least in the early stages of CRAR, be exploited by tenants to (at least) create delay. The more open ended the tenant's rights, the fewer teeth in the remedy.

Once notice has been given, and subject to any order by the court pursuant to such an application, the goods are "*bound*" for the purposes of the 2007 Act. The enforcement agent cannot take control of goods until they are bound; further under Regulation 12 he must then take control of them within a period of 12 months from the date the goods are bound.⁴ Regulation 12 provides that the enforcement agent can take control of goods on any day of the week.

However, Regulation 13 limits the hours during which goods may be taken to between 6am and 9pm. The enforcement agent may take control of goods outside those hours only if: he applies to the court and the court orders that he may; goods are located on premises used for a trade or business and are open for the conduct of that trade or business during prohibited hours; or the enforcement agent has started to take control of goods during permitted hours and to complete taking control of goods it is reasonably necessary for the enforcement agent to continue to do so during prohibited hours, provided the duration of time spent in taking control of goods is reasonable.

⁴ The court may extend this period once by a further period of 12 months if the applicant (either the creditor or enforcement agent) had reasonable grounds for not taking control of the goods in the first period. If a repayment arrangement is agreed after the giving of the enforcement notice, the 12 month period starts to run from the date of breach of the repayment agreement.

Once goods are bound their status cannot be affected should they be assigned. However, bona fide purchasers of the goods without notice of the enforcement notice are protected. The enforcement agent can take control of the bound goods and exercise powers of sale in relation to them. There are a number of ways in which the enforcement agent can take control of the goods: by securing the goods on the premises on which they are found; removing the goods from the premises and securing them elsewhere; or pursuant to paragraph 13(1)(d) of Schedule 12 of the 2007 Act entering into a controlled goods agreement with the debtor under which the tenant is permitted to retain custody of the goods, acknowledging that the enforcement agent is taking control of them, and agreeing not to remove or dispose of them, nor to permit anyone else to do so, before the debt is paid.

Regulation 15 provides for formalities which must be satisfied in order to enter a controlled goods agreement. It must be in writing signed by the enforcement agent and the debtor or the debtor's representative. It must contain prescribed information and at the time of entering the agreement the enforcement agent must give a copy to the person signing it. If the debtor did not personally sign it, there is further provision for providing him with a copy by leaving the notice in a conspicuous place in specified ways. Regulation 25 deals with the situation where a controlled goods agreement has been entered into but the enforcement agent proposes to re-enter the premises to take control of the controlled goods. Not less than 2 clear days' notice must be given to the debtor of re-entry, again not including Sundays, bank holidays, Good Friday or Christmas Day. The court may make an order shortening the notice period if the same condition as under Regulation 6 is satisfied. Regulation 27 provides that such notice must be given by the enforcement agent (but not, presumably, his office, as under Reg 8) and specifies a slightly different list of acceptable methods of giving notice.

Regulations 37 and 38 provide that the minimum period before sale of controlled goods, and the minimum period of notice of that sale for the purposes of paragraphs 39 and 40 of Schedule 12 of the 2007 Act is 7 clear days. However, this may be shortened to allow sale the day after removing controlled goods for sale where the goods would be unsaleable or their value

would be substantially reduced if 7 days elapsed due to the nature of those goods (i.e. the goods were perishable).

Implementation

Regulation 53 provides: “A notice served on any sub-tenant under section 81(2) of the Act takes effect **14 clear days** after the notice is served on that sub-tenant.” The original notice period proposed was 72 hours and this was lengthened to 7 days in the White Paper. The recommendation of the RICS was that the notice period should be no longer than one working day. In 2008 I observed that the effectiveness of CRAR depends crucially on what decision is taken on this point. The 14 days gives a clear answer to this conundrum and it is not one which landlords are going to find reassuring since the sub-tenant may in the intervening 14 days pay its rent to the tenant.

Once an enforcement notice has been given, in theory the goods can still be taken into control and sold even if the tenant removes them from the premises. However, there will surely be practical problems for any landlord and/or enforcement agent in terms of knowing what was on the demised premises when the enforcement notice was given, and also in locating such goods if the tenant removes them. This would complicate enforcement, and on being given 7 days’ prior notice a given tenant may attempt to remove goods falling within its ambit and sell them or simply hide them. Although it will be a criminal offence intentionally to interfere with controlled goods without a lawful excuse this sanction applies only where the enforcement agent has taken control of the goods.

This suggests that, in practical terms, the new regime may well provide the defaulting tenant with advance warning to permit him to frustrate the intended exercise of CRAR, apparently with impunity. It remains to be seen whether this feature will rob CRAR of any real efficacy, and whether as a result commercial landlords will prefer to exercise their rights to peaceable re-entry, for which no warning is necessary and which provides the probability of recovering the arrears as a condition of relief, rather than risk the tenant using the protection

offered by the notice period under CRAR to protect the targeted goods thus depriving the landlord of any realistic remedy.

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