

Commercial Rent Arrears Recovery – New Coronavirus Measures

By

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1. As is by now well-known, s.82 of the Coronavirus Act 2020 (in force 25 March 2020) imposes a moratorium on the termination of commercial leases by forfeiture for arrears of rent during “the relevant period” (26 March 2020 to 30 June 2020).
2. But s.82 – which is the subject of an article elsewhere on this website by my colleague Martin Dray – does not abrogate the tenant’s obligation to pay rent. Nor does it apply to other remedies for the recovery of rent arrears, which landlords therefore remained free to pursue, notwithstanding the section. This has led to accusations that some landlords, as an alternative to forfeiture, have been making use of “aggressive debt recovery tactics” putting “undue pressure” on tenants to pay their rent.
3. As a result, on 23 April 2020, the Government announced it would introduce legislation temporarily banning the use of statutory demands and winding-up petitions against companies struggling financially due to the coronavirus restrictions. At the same time, the Government revealed it would introduce secondary legislation preventing landlords using Commercial Rent Arrears Recovery (“CRAR”) unless they were owed 90 days of unpaid rent.
4. The changes to insolvency law must abide another occasion. The purpose of the present note is to explain and discuss the changes to CRAR.
5. The secondary legislation in question – the Taking Control of Goods and Certification of Enforcement Agents (Amendment) (Coronavirus) Regulations 2020 (“the 2020 Regulations”) – was laid before Parliament on 24 April 2020, and came into force the next day. The 2020 Regulations amend the Taking Control of Goods Regulations 2013 and the Certification of Enforcement Agents Regulations 2014 (respectively “the 2013 Regulations” and “the 2014 Regulations”). The 2020 Regulations introduce a key new defined term into both the 2013 and 2014 Regulations, namely “the emergency period”. This is defined to mean, in England, any time during which a restriction or requirement is in place under regulation 6(1) of the Health Protection (Coronavirus. Restrictions) (England) Regulations 2020 (or, in Wales, the Welsh equivalent). The restrictions and requirements

in regulation 6(1) combine to create what is known colloquially as “the lockdown”, introduced on 26 March 2020.

6. To explain the amendments made by the 2020 Regulations requires a quick refresher course on CRAR itself.
7. CRAR was introduced by Part 3 of and Schedule 12 to the Tribunals, Courts and Enforcement Act 2007, in force from April 2014, to replace the landlord’s common law right of distress, which was abolished at the same time. CRAR applies to “purely” commercial premises (ie premises of which no part is lawfully let or occupied as a dwelling). This includes premises comprising an agricultural holding, albeit with certain modifications set out in s.80 of the 2007 Act. Rent for the purposes of CRAR means rent in the strict sense (plus interest and VAT thereon). CRAR cannot be used to pursue other sums, such as service charges, even if reserved as rent under the lease. CRAR applies only if the amount of rent in arrear is at least the “minimum amount” prescribed by regulations, both when the notice of enforcement is given, and when control of goods pursuant to the notice of enforcement is first taken (see below).
8. A landlord wishing to use CRAR must do so through an “enforcement agent”, certified by the County Court. The first step is service of a “notice of enforcement” on the tenant, giving a minimum of 7 days’ notice that the agent intends to take control of the tenant’s goods. A notice of enforcement binds the property in the tenant’s goods (other than those falling within a list of exempt goods in para. 4 of the 2013 Regulations), except in favour of a purchaser for value without notice.
9. After expiry of the notice, the agent may enter without a warrant upon the demised premises and take control of the tenant’s goods thereon to the value of the arrears and costs. Control may be taken by securing the goods on or off the premises, or on the highway (if found there), or by entering into a “controlled goods agreement” with the tenant (the analogue of the old “walking possession” agreement under the common law of distress). The landlord’s right to take control of the goods terminates if not exercised within a period prescribed by regulations.
10. The enforcement agent must provide the tenant with a notice of entry on to the premises, as well as an inventory of the goods of which control has been taken. Sale of the goods must usually be by way of public auction. The enforcement agent must provide the tenant with a valuation of the goods within 7 days of removing the goods from the premises for sale. The sale itself may not take place before the end of the same 7 day period, and then

only after the tenant has also been given 7 days' notice of the date, time and place of the sale. The enforcement agent must sell the goods for the best price reasonably obtainable, and the proceeds must be used to meet the arrears and costs. Any surplus must be returned to the tenant.

11. The main change to CRAR under the 2020 Regulations is to increase the “minimum amount” of rent that must be in arrear before CRAR becomes available. The amount is increased from a sum equal to 7 days' rent to an amount equal to 90 days' rent. The plain object of this change – which applies where a notice of enforcement is given between 25 April and 30 June 2020 - is to give tenants the “breathing space” many may need to weather the current situation. The change will doubtless be welcomed by tenants for that reason.
12. Another change made by the 2020 Regulations is for the benefit of landlords. Prior to the 2020 Regulations, the ability of an enforcement agent to take control of goods on behalf of a landlord terminated if not exercised within 12 months of the date of the notice of enforcement: see 2013 Regulations, reg. 9(1). Under the 2020 amendments, if the date which is one month before the expiry of that period – referred to in the 2020 Regulations as “the relevant day” – fell between 26 February 2020 and the start of the emergency period (above), or within the emergency period itself, then the period in reg. 9(1) instead begins one month after the relevant day.
13. A further change applies to the requirement that an enforcement agent be in possession of a certificate from the County Court. Such a certificate usually lasts 2 years from the date of issue: see 2014 Regulations, para. 7. The 2020 Regulations amend para. 7 of the 2014 Regulations, so that if the date which is 3 months before the expiry of the certificate (“the relevant day”) falls between 26 December 2019 and the start of the emergency period, or during the emergency period itself, the certificate will continue for 9 months from the relevant day. The evident object of this amendment is to avoid burdening the courts and enforcement agents with the job of renewing certificates that are about to expire – a task made more difficult during lockdown.
14. The “headline” change to the minimum amount of rent that must be in arrear before CRAR becomes available to a landlord seems bound to result in a reduction in its use. Combined with s.82 of the 2020 Act, and the restrictions on the use of statutory demands and winding-up petitions, landlords' options to protect their income streams have obviously diminished considerably, even if the tenant's obligation to pay rent itself

continues unaffected. It seems that landlords' options in respect of rent arrears are in many cases likely now to be limited to: debt proceedings; possible recourse to a rent deposit (if there is one, and depending on the terms of the rent deposit deed); or (in a few cases, perhaps) where a tenant is paying a concessionary rent under a side agreement, the ending of the concession where an instalment of rent is not paid in full (as a bartering chip).

15. Unsurprisingly, this situation is likely to be of concern to landlords generally, and particularly those who rely on rent payments to service their own borrowings. Doubtless in acknowledgement of this anxiety, the Government's announcement on 23 April included the following:

“while landlords are urged to give their tenants the breathing space needed, the government calls on tenants to pay rent where they can afford it or what they can in recognition of the strains felt by commercial landlords too”.

16. Many reputable tenants – the majority, no doubt - will answer that call. For others, enlightened self-interest will come into play. After all, the rent remains due, and there will come a point where the full range of landlord's remedies becomes available once more – possibly before tenants' own cash flows have picked up again. A little goodwill from tenants at this stage might go a long way at a later date.
17. But there will be other tenants – a minority, one hopes - who may take advantage even if they can afford to pay in whole or in part. That is life, lockdown or not. All that can be said now is that the numbers in each of these various camps may yet help to determine whether we truly are “all in this together”.