Maples Teesdale LLP
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NEWSLETTER
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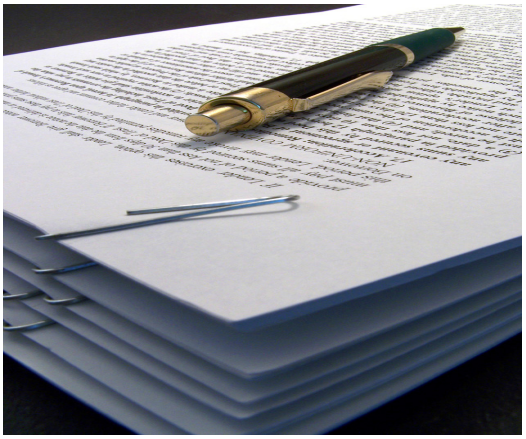
A Landlord's distress

Commercial Rent Arrears Recovery ("CRAR") to come into effect on 6th April 2014.



On 6 April 2014 the common law right to distrain for arrears of rent will be abolished. In its place, a new statutory regime known as Commercial Rent Arrears Recovery ("CRAR") will come into effect.

Under CRAR, a landlord must follow the procedure set out in the Tribunals Courts and Enforcement Act 2007 ("the 2007 Act") to recover arrears of rent. The days of a landlord being able to instruct a bailiff to distrain for sums reserved as rent as soon as they fall into arrears will soon be over.

So what are the key changes under CRAR?

- A landlord will only be able to exercise CRAR in respect of the principal rent (and any VAT and interest on it) despite the fact that other sums such as service charge and insurance may be reserved as rent in the lease. Where the rent is an inclusive rent, the landlord will only be able to recover a proportion of the rent attributable to the possession and use of the premises;
- At least 7 clear days notice of enforcement must be given by the bailiff who must be a certified enforcement agent prior to them attending at the premises;
- A minimum sum equivalent to 7 days' rent (exclusive of VAT and interest) must be outstanding when the notice of enforcement is served and when the bailiff attends the premises to take control of the goods;
- CRAR can only be exercised at commercial premises unless the residential use of the premises is in breach of the lease;
- CRAR can only be exercised by a bailiff who has been authorised in writing;
- Certain goods are exempt from CRAR, including tools of the trade up to the value of £1,350 and domestic items;
- Where a superior landlord seeks to recover payment of arrears of rent directly from an undertenant, notice pursuant to s81 of the 2007 Act must be served on the undertenant. The undertenant is not obliged to pay rent directly to the superior landlord until a period of 14 clear days has passed from service of the notice.

As a result of the changes introduced by the 2007 Act, landlords are likely to find CRAR a much less effective means of rent recovery than they previously enjoyed under the common law remedy of distress. The 7 day notice period prior to the bailiff attending at the premises means that a tenant will have an opportunity to remove items. Whilst this period can be shortened by an application to Court, this will have the effect of increasing the time and costs.

Chattels and fixtures – a useful reminder of the differences

The recent case of Peel Land and Property (Ports No 3) Ltd v TS Sheerness Steel Ltd helpfully restates the tests used to distinguish chattels from fixtures, and landlord fixtures from tenant (or trade) fixtures.

In 2012, TSS took an assignment of a long lease of the Sheerness Steel Works in Kent. TSS then decided to sell a number of bulky items of equipment that they found there, including furnaces, casting machines, transformers, cranes and weighbridges.

The landlord claimed ownership of those items and sought an order restraining the tenant from selling and removing them from the property.

The court refused to grant such an order, agreeing with the tenant's argument that most of the items were either chattels or tenant fixtures.

A chattel is an item that can be easily removed by a seller or departing tenant without damaging the item itself nor damaging the fabric of the property. A chattel may still be a chattel even if it is fixed to land. The legal test turns on the degree and purpose of annexation.

If a chattel has been fixed to land for a temporary purpose, to facilitate its enjoyment as a chattel, and not with a view to effecting a permanent improvement, then it will not normally be held to have become a fixture.

A fixture is something that used to be a chattel, but is now fixed to land in such degree and purpose that it has become a part of the land itself.

If the land is let, then a fixture may either be a landlord fixture or a tenant (or trade) fixture.

A landlord fixture must not be removed by the tenant at the end of the term (even if the tenant has had to replace it during the term).

A tenant fixture is an item that the tenant has attached to the property for the purposes of its trade, or as an ornament for convenience, which can be removed without being seriously damaged or losing its essential character and utility, and without causing substantial damage to the fabric or structure of the property.

Tenants are entitled to remove tenant fixtures, unless their lease expressly prohibits them from doing so (but need not do so, unless their lease states otherwise).

Charity rates scam busted

The case last year of Public Safety Charitable Trust v Milton Keynes Council exposed a charity rates scam and confirmed that it was invalid.

Some landlords had been granting leases of vacant shops to charities, to mitigate hefty bills for business rates. (Charities are automatically allowed 80% rates relief, with the remaining 20% at the local authority's discretion.)

But some charities were not trading from the shops. Instead, they were merely putting up posters or installing bluetooth equipment to send crime prevention and public safety messages to the phones of passers-by. In return, the charities asked their landlords for a "charitable donation"

However, the High Court has now ruled that such activity is not entitled to charitable relief.

The judge found in favour of three local authorities in test cases involving Public Safety Charitable Trust Limited, which occupies 1,500 buildings across the UK offering free WiFi and broadcasting bluetooth messages.

The judge acknowledged that the provision of such services were charitable in nature, but the equipment took up a minimal amount of physical space in the premises.

The Charity Commission has issued a warning to charities about the risks (including potential personal liability for charity trustees) of getting involved in such scams.

Landlords beware of losing a guarantor

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In 2001, Topland bought the freehold of a property in Morecambe, Lancashire that was let to Payless DIY and guaranteed by Smiths.

The lease had been granted in 1981. The tenant went into administration in 2011 and was subsequently dissolved. Topland therefore sued Smiths, as guarantor, for all future amounts falling due under the lease.

The court agreed with Smiths that Smiths had been released from the guarantee at the point at which the tenant entered into a licence for alterations in 1987.

Smiths had not been a party to the licence for alterations, nor had it consented to it.

The common law rule in Holme v Brunskill (1877) says that a guarantor is released from all liability arising from the underlying contract (in our case, a lease) if that underlying contract is varied (unless it is self-evident that the variation is insubstantial or one which cannot be prejudicial to the guarantor).

The Court of Appeal upheld the decision of the High Court which said that the licence for alterations had amounted to a variation of the lease. The lease contained an absolute covenant against alterations, but the licence nevertheless permitted the tenant to carry out substantial works, subject to reinstatement at the end of the term.

Such a variation had the effect of releasing the guarantor under the rule in Holme v Brunskill. The alterations authorised by the licence increased the scope of the repairing obligations and other general burdens on the tenant under the lease, which necessarily increased the risk of default and the burden on the guarantor.

A well-drafted guarantee clause should avoid this by including wording that makes it clear that a variation of the lease does not release the guarantor from liability. But the guarantee clause in Topland contained no such wording.

Lease lengths fall to historic low

Lease lengths in commercial property have fallen to an historic low, says the Investment Property Databank (IPD).

The average length of a new lease is now 5.8 years. This is down from 7.8 years in 2003 and from 6 years in 2009.

Over 80% of all UK leases completed in the year to June 2013 were for less than 5 years.

Also, rent-free periods now stand at 9.5 months on average.

Rates relief for empty shops

In his 2013 Autumn Statement, the Chancellor announced that he will introduce a 50% rates relief for 18 months for businesses that move into retail premises that have been empty for a year or more.

To be eligible for this relief, businesses must move into the retail premises between 1 April 2014 and 31 March 2016

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Energy Act 2011

Compulsory energy efficiency levels for lettings - landlords should note

Once the Act comes into force on 1 April 2018, a landlord of a property which falls below a prescribed level of energy efficiency will not be able to let that property until certain prescribed energy efficiency improvements are made. It is not clear whether the Act would catch the grant of a long lease.

The level of energy efficiency will be demonstrated by the property's Energy Performance Certificate (EPC) and the threshold will be set by regulations. Earlier this year the Department of Energy and Climate Change released a press release suggesting that this will be set at an "E" rating. Therefore a property with only an F or G rating cannot be let until relevant improvements have been made.

The improvements do not necessarily have to be financed by landlords up-front. They may be financed through the Green Deal scheme or in some other way to be provided for in the regulations. The Green Deal is a policy that will enable energy efficiency improvements to be made to properties using finance from accredited providers.

The types of improvements which are eligible for the Green Deal will be set out in secondary legislation. They may include measures for increasing the amount of energy generated at a property, as well as measures for reducing energy consumption.

Landlords should start to review their investment portfolios to assess which properties currently have EPC's and examine the energy performance ratings.

There is a recommendation report which accompanies an EPC and this sets out measures which would improve the energy performance of the building and the impact that such measures would have on the building's rating. These could be a useful indicator of how buildings which may fall below the prescribed threshold could be brought up to standard and likely costs.

The question of recovery of improvement costs from the tenants will need to be checked on a case by case basis.

Land Registry crackdown on attempts to keep sale prices confidential

The Land Registry is cracking down on attempts to keep sale price information confidential

The Land Registration Rules 2003 say that the Land Registry must enter the price paid for a property in the register "whenever practicable".

Up until now, the following rules have (on the whole) worked to keep price information confidential and off the register:

- Stating in the transfer that the price is as set out in the agreement for sale.
- On the application to the Land Registry, stating the price bracket for fees, rather than the exact price.

The Land Registry is now saying that:

"If we receive an application without the price paid or value stated information where we would expect this to be available we will ask the applicant to provide this. We may cancel the application if we consider that the information is readily available and this is not supplied."