

“ Plain speaking legal advice ”

A New Approach to Distress and Forfeiture

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Is this the introduction of yet more red tape or the long overdue reform of outdated and draconian measures of enforcement in the hands of the Landlord?

The law surrounding commercial Landlord and Tenant matters is complex and often involves legal principles, which have been established for many years. In these days of constant awareness in respect of human rights some of these “long established principles” are regarded as being not politically correct. We are currently faced with two examples of government proposals to make the relationship of commercial Landlord and Tenant a little more user friendly.

If a tenant is in arrears of rent the Landlord has for hundreds of years had a self help remedy in the law of distress. The law as it currently exists allows a Landlord or a bailiff acting on its behalf to enter the premises of a Tenant in arrears of rent in order to seize goods to the value of the debt and subsequently to sell them to raise the money to satisfy the debt. The benefit of the current law is that there were no procedural aspects to be dealt with and so it is considered by Landlords to be a readily available and effective remedy.

It is proposed to abolish this Landlords right and replace it with a new regime. The draft Bill before Parliament is the Tribunals Courts and Enforcement Bill. The Bill does of course cover many other aspects of court procedure and is part of a general review of the enforcement of civil judgments and the law relating to bailiffs.

The Bill proposes a new regime known as commercial rent arrears recovery (CRAR). Whereas the law of distress has been available for domestic or commercial arrears of rent, it is proposed that CRAR will only be available for commercial arrears. Also where as in many instances distress has been available in respect of service charge arrears it is proposed that CRAR will only be available for pure rent.

Landlords instead will have to recover service charge arrears through court proceedings. It is also proposed that the net unpaid rent will need to be equal to or exceed a set minimum amount.

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Essentially CRAR is a statutory right for the Landlord of commercial premises to use the enforcement procedure set out in the Bill. In order for CRAR to be used the defaulting Tenant must be given a notice of enforcement.

Over the last few years the law of distress has become somewhat technical but it is a strong threat. Your attitude to CRAR thus depends on whether you regard the law of distress as draconian and outdated or as simple and effective and free from red tape.

In a similar vein Landlords have for many years had as part of their armoury the law of forfeiture. Once again however this common law right has been the subject of scrutiny over the last few years and in 2004 the Law Commission stated that the law of forfeiture is “complex, it lacks coherence and it can lead to injustice”.

The Bill being proposed in this respect is the Landlord and Tenant (Termination of Tenancies) Bill. This Bill seeks to simplify the system by which Landlords may determine leases following default by tenants. The Bill also tries to give the Court flexibility to make determinations proportionate to the individual case.

The new concept, which is introduced by the Bill, is that of tenant default. The regime laid out by the Bill is that where a Tenant default has occurred the Landlord may serve a notice on the Tenant setting out the breach, any remedial action required and the date by which it should be completed.

The main purpose of the Tenant default notice is to ensure that the Tenant complies with the obligations under the tenancy. In order also to give time for negotiation, the Landlord may not take any further step for a minimum of seven days, or until the date for remedy set out in the notice expires.

The Landlord and Tenant (Termination of Tenancies) Bill does retain a summary procedure which is intended to be used when the Tenant has no realistic prospect of persuading a court not to make a termination order or when the premises have been abandoned. The summary

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procedure commences by service of a summary termination notice on the Tenant and if the Tenant fails to respond the tenancy will terminate one month later.

Clearly there are comparisons to be drawn between the new regime to replace forfeiture and CRAR. In both instances the Tenant is given the opportunity to put the situation right. In both cases it could however be said that the availability of the speedy remedy has gone to be replaced by the “more moderate” approach. In both instances the courts are going to be involved along with the expense that is a natural consequence thereof. In both instances however there is a definite design towards a proper landlord and tenant working relationship. As ever only time will tell whether these reforms (if implemented) will lead to a more effective way of dealing with tenant default but if nothing else they are indicative of a different approach.

If you wish to discuss the issues above further in relation to your particular circumstances please contact Martin Buckeldee or Ken Sutton on 01276-686222.

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