



Bailiffs and distress for rent

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Under the common law remedy of Distress for Rent, certified bailiffs can enter the leased commercial premises of a defaulting tenant and remove and sell goods owned by the tenant up to the value of the rent arrears. In effect, this right to distrain for rent permits a landlord to recover rent arrears, without initiating court proceedings. This note considers the remedy of Distress for Rent and what goods can be seized by the bailiff. It also considers a tenant's possible redress if the remedy has been used inappropriately.

The *Tribunals Courts and Enforcement Act 2007* (TCEA 2007) received Royal Assent on 19 July 2007. Part 3 of this Act will introduce a new statutory procedure, 'Commercial Rent Arrears Recovery' (CRAR), to replace the current remedy of Distress for Rent. However, Part 3 has yet to be brought into effect; an order of the Lord Chancellor is required to bring Part 3 into force. It is understood that the Government intends to implement the provisions for CRAR in April 2012. This note also briefly explains the effects of Part 3 of the TCEA 2007 on the law relating to recovery of commercial rent arrears.

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1 What is Distress for Rent?

Distress for Rent is a common law remedy. It allows a landlord (or more likely, a certificated bailiff acting as his agent) to distain (i.e. seize) goods that are present at the premises and retain them until the rent arrears are paid or the seized goods are sold to off-set the rent arrears. Distress for Rent is only available if the tenant is in arrears with the rent and certified bailiffs can only collect unpaid commercial rents; bailiffs are not allowed to levy distress on residential tenants. A certificated bailiff is a bailiff certificated in the County Court.

The landlords' common law right to distrain has been modified by statute. As a consequence, certain conditions must be satisfied before the remedy of distress can be exercised, they include:

- There must be an existing demise whereby a landlord and tenant relationship is created. However, where a landlord gives his consent for the tenant to hold over on the same terms after the expiration of the tenancy, the landlord still retains the right to distrain.
- The amount for which the distress is to be made must be certain. That is to say, the landlord must be able to specify, in accordance with the terms of the lease or agreement, the exact amount of arrears, the date on which they fell due and the period they cover.
- The rent must be in arrears. In most commercial leases the rent falls due on 'Quarter Day', so that the following day the rent is in arrears and the landlord can proceed with the distress.

For landlords, the main advantage of this remedy of Distress for Rent is that there are no procedural aspects to be dealt with; it is a readily available and effective remedy. For levying Distress for Rent on behalf of a landlord the bailiff charges the Statutory Levy Fees, these are due and payable by the commercial tenant once distress has been levied. In the event that distress is not levied for any reason the 'reasonable costs and charges' of the visit would normally be paid by the person or company instructing the bailiff.

2 What goods can be seized?

The basic common law rule is that if the rent is in arrears the landlord can seize and distrain all the goods and chattels in the property from which the rent is due, regardless of their ownership. However, this rule has been modified by statute and as a consequence some goods are privileged (i.e. protected) from distress. The exceptions comprise goods absolutely privileged and goods conditionally privileged (known as qualified privilege).

2.1 Absolute privilege

Items given absolute privilege are exempted completely from seizure. They include:

- perishable items;
- things in actual use (including clothes being worn);
- household goods and tools of the trade (e.g. tools of the trade can include items hired);
- goods held in the course of business on trade premises as a direct part of the tenant's business (e.g. items left for repair, customers' clothes in a dry cleaners, furniture held in store, goods on pawn or at an auctioneer's and goods held by a sale agent acting on commission). It follows from this that goods held by a shopkeeper on 'sale or return' may be protected but goods purchased by a retailer from a wholesaler will not;
- goods on hire purchase or conditional sale subject to a default notice, a suspended delivery order or a termination notice;
- hired and leased goods are exempt from distress for rent because they cannot be regarded as the tenant's property;
- a third party's goods (e.g. the property of lodgers, sub-tenants, strangers and other unconnected third parties is absolutely privileged).¹

2.2 Qualified privilege

The items granted qualified privilege can only be taken if there are insufficient other goods. The landlord may be sued for seizing goods with qualified privilege unless s/he genuinely believed that there were no alternatives items. Qualified privilege mainly concerns tools of the trade, in excess of those already protected by absolute privilege.

2.3 No privilege

Certain categories of goods are specifically excluded from protection (i.e. can always be seized)². From a practical point of view the most important of these are:

- goods belonging to the tenant's spouse or partner;
- goods lent to the tenant (i.e. goods on 'permanent loan' with no conditions attached would be seizable);
- goods belonging to the tenant's business partner;

¹ This statutory exemption is provided by the *Law of Distress Amendment Act 1908*

² Section 4, *Law of Distress Amendment Act 1908*

- goods in the possession in any bill of sale or hire purchase agreement [except those which are subject to a default notice served under the *Consumer Credit Act 1974*]

After 5 days from, but not including, the date of the distress, if the arrears remain unpaid or replevin has not been commenced, the landlord may sell the items seized for the best price that may be obtained. The period of 5 days can be extended to 15 days at the tenant's request, in order to allow replevin. Replevin is a court action to recover goods that have been illegally seized (see below).

Often debtors are aggrieved that the value of the items taken by bailiffs from the commercial premises far exceeds the debt owed. Unfortunately, public auctions raise very little, so bailiffs often seize a lot in order to ensure the debt will be repaid in full from the sale proceeds. However, if more money is raised from the sale than is needed to repay the debt plus costs (including the bailiffs' charges), the excess must be returned to the tenant.

3 Possible redress

3.1 How to complain about a Bailiff

Certificated bailiffs are sometimes called 'enforcement officers'. A certificated bailiff is a bailiff certificated in the County Court under the *Distress for Rent Rules 1988*. This is specifically for commercial rent arrears or local authority taxes, etc.

Complaints may be made about the behaviour of bailiffs, for example if they have been unduly aggressive, rude or threatening. A complaint about a certificated bailiff should be addressed either to the firm the bailiff works for or the organisation that employed the bailiff to act on its behalf. Some of these organisations (for example, HM Revenue and Customs and local authorities) have complaints procedures in place and information on how to complain about debt enforcement can be obtained from them. A complaint could also be made to the Enforcement Officers Association (EOA) or the Association of Civil Enforcement Agencies (ACEA) which is responsible for promoting higher standards within the profession.

The EOA can be contacted at:

The Chairman Complaints Committee
High Court Enforcement Officers Association
P.O. Box 180
Winsford
Cheshire
CW7 2WP
Email: complaints@hceo.org.uk
Website: www.hceo.org.uk

The ACEA can be contacted at

The ACEA
Chesham House
150 Regent Street
London W1R 5FA
Tel: 0207 432 0366
Email: sec@acea.org.uk
Website: www.acea.org.uk

3.2 Possible court actions

Complaints may also be made if the certificated bailiffs have levied illegally. This means that they have levied on goods which cannot be seized. Where a bailiff has levied illegally, the debtor, or owner of goods, may be able to sue to recover compensation. Such claims will often be in the County Court, and could involve claims for:

- trespass to land, where a bailiff entered the property unlawfully; or,
- trespass to, or wrongful interference with, goods, where there has been a direct, forcible seizure of goods. The main claims relating to wrongful interference will come under the tort of conversion (briefly, misappropriation of another's goods constitutes conversion). These include an illegal sale of goods; an illegal detention of goods depriving a person of their use or possession; and, wrongful destruction, where there has been a negligent loss or destruction of goods.

Other remedies that may be open to the debtor, or owner of goods, are to apply for an injunction (for example, preventing the bailiff from selling goods) or to apply for replevin (which is an obscure remedy to recover goods that have been illegally seized).

Complaints can also be made if bailiffs have levied irregularly, or excessively. A bailiff levies irregularly where he seizes the correct goods, but the procedures followed were not correct (e.g. the bailiff sells the goods after the debtor has paid the debt). A bailiff has levied excessively if the value of the goods seized is obviously more than the amount of the debt. There would not be a claim if there were no other goods for the bailiff to take. As mentioned above, if more money is raised at auction than the amount of the debt (including bailiff fees and the cost of removing and selling goods) the balance should be returned to the debtor.

Before commencing any court proceedings, the debtor should seek independent legal advice from a Citizens Advice Bureau, Law Centre or solicitor.

4 Proposed reform of Distress for Rent under the TCEA 2007

The *Tribunals Courts and Enforcement Act 2007* (TCEA 2007) received Royal Assent on 19 July 2007. Part 3 of this Act will introduce a new statutory procedure, the 'Commercial Rent Arrears Recovery' (CRAR), to replace the current remedy of Distress for Rent. However, Part 3 of the TCEA 2007 has yet to be brought into force; an order of the Lord Chancellor is required to bring Part 3 into effect.

The new CRAR procedure for recovering rent for commercial properties will have many similarities to the current remedy of Distress for Rent. Landlords will still be able to enter leased premises and remove and sell goods owned by the defaulting tenant. However, the procedure will only be available for 'pure' rent arrears; arrears of other payments, for example, service charges or insurance contributions, cannot be recovered by this procedure. Under the CRAR procedure, a landlord must first serve an enforcement notice on the defaulting tenant. Following the expiry of a notice period, only an enforcement agent can then enter the leased premises to remove goods. CRAR will only be available where a minimum amount of rent remains unpaid. Details such as the minimum level of arrears, the form of notice and the required notice period will be contained in regulations which have yet to be drafted.

On 17 March 2009, the Justice Minister made an announcement in Parliament on bailiff and enforcement law, but the announcement made no reference to CRAR.³ This has been

³ Ministry of Justice, *Tighter regulations for bailiffs announced*, 17 March 2009, <http://www.justice.gov.uk/news/newsrelease180308a.htm>

apparently been queried informally with the Ministry of Justice which has advised that the Government intends to implement CRAR and the provisions for commercial rent arrears recovery in April 2012⁴.

Since Part 3 of the TCEA 2007 is not yet in force, the common law remedy of Distress for Rent still remains an option for landlords.

⁴ <http://www.publications.parliament.uk/pa/cm200809/cmhansrd/cm090317/wmstext/90317m0001.htm>