

# **ENFORCEMENT OF COMMERCIAL RENT ARREARS AND FORFEITURE OF LEASE**



**HIGH COURT  
ENFORCEMENT  
GROUP®**

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Disclaimer: Please note that this guide does not constitute legal advice. The author has used his best endeavours to make this guide as accurate and complete as possible, but requests that the reader be aware that the law of England and Wales frequently changes. The author strongly advises the reader to take legal advice before embarking on any enforcement action.

# Guide to the enforcement of commercial rent arrears and the forfeiture of lease

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## Introduction

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### CRAR (Commercial Rent Arrears Recovery)

If the rent is not paid by the due date, the landlord may recover the arrears using CRAR – Commercial Rent Arrears Recovery – which was introduced in April 2014 under the Tribunals Courts and Enforcement Act 2007, Part 3.

CRAR does not require a court order. It may only be used for the recovery of rent (and VAT) in purely commercial premises. It cannot be used to recover any other charges due, such as service charges or insurance.

There must be a written rental agreement or lease in place to use CRAR, and the lease may not have been terminated.

Whilst this did add some constraints that were not in place under the previous Common Law regime of distress for rent, CRAR remains an extremely effective method for recovering commercial rent arrears.

### Forfeiture of lease

When a landlord wishes to regain possession of commercial premises prior to the expiry of the lease, he can forfeit – or terminate – the lease.

The breach of the terms by the tenant must be due to non-payment of rent (other breaches require that the landlord give the tenant time to remedy the breach). There must also be a clause within the terms of the lease which permits forfeiture.

Forfeiture entails the peaceful re-entry to the unoccupied property by a certificated enforcement agent, normally assisted by a locksmith.

Once they have secured access to the premises, the locks will be changed and the tenants', and any sub-tenants', rights to the property will end.

## The Commercial Rent (Coronavirus) Act 2022

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Please check our [enforcement legislation updates page](#) for the latest details on changes to legislation relating to the enforcement of CRAR and the forfeiture of a lease.

The Commercial Rent (Coronavirus) Act 2022 covers protected rent arrears incurred by tenants during the pandemic. It came into force on 24<sup>th</sup> March 2022.

It prohibits landlords from using any recovery method, including a court judgment, to recover protected rent arrears, other than arbitration.

### Which arrears are protected?

The new legislation relates to protected rent arrears; the criteria are:

- A business tenancy, as defined by Part II of the Landlord and Tenant Act 1954
- Where the business and/or premises were required to fully or partially close under Coronavirus regulations. It is immaterial if some limited activities were permitted despite the obligation to close
- The arrears related to the “relevant period” which is beginning at or after 2pm on 21<sup>st</sup> March 2020 and ending at or before 11:55pm on 18<sup>th</sup> July 2021 (in England) or 6am on 7<sup>th</sup> August 2021 (in Wales)

In the Act, the protected arrears relate to rent, service charges, including repairs, maintenance, management costs and insurance, as well as interest on the unpaid amount.

### Which recovery methods are not permitted?

The Act prevents a landlord who is owed a protected rent debt from using the following remedies to recover this debt during the moratorium period (which begins the day the Act is passed and ends either when arbitration has concluded or when the six months arbitration application period has passed):

- Making a debt claim in civil proceedings
- Using the commercial rent arrears recovery power (CRAR) and the protected debt is to be disregarded when calculating the net unpaid rent for CRAR
- Give notice of enforcement in relation to the protected debt
- Enforcing a right of re-entry or forfeiture
- Using a tenant’s deposit

If payment had been lawfully taken out of the tenant’s deposit before the moratorium period, and that rent owing is deemed to be protected, the debt will be deemed to be unpaid protected rent and the tenant is not obliged to top up the deposit during the period.

Any debt claims for protected rent arrears, including court judgments or a bankruptcy petition based on a statutory demand, issued between 10<sup>th</sup> November and when the Act comes into force will be stayed. Landlords will not be able to issue debt claims for these arrears until either the end of the arbitration application period or the arbitration process.

## Arbitration

This is the only option available to the tenant and landlord should direct discussions between the parties fail to produce an agreement. The arbitration body used must be approved by the Secretary of State.

Either the tenant or the landlord may start the arbitration process, provided they do so within six months of the date when the Act is passed (the application period).

The arbitrator's guiding principles will be preserving the viability of the tenant's business and the landlord's solvency.

Relief from payment can mean one or more of:

- Writing off the whole or part of the debt
- Giving time to pay, including via instalments
- Reducing the interest on all or part of the debt

Arbitration is, however, not an option should the tenant be subject to:

- A company voluntary arrangement which relates to any protected rent debt that has been approved under section 4 of the Insolvency Act 1986
- An individual voluntary arrangement which relates to any protected rent debt that has been approved under section 258 of that Act
- A compromise or arrangement which relates to any protected rent debt that has been sanctioned under section 899 or 901F of the Companies Act 2006

## What if the tenant defaults?

If the tenant defaults on the payments needed in the award, the arbitration award can be used as the basis for enforcement. The Bill has been drafted with the aim of enabling the landlord to enforce any default under the award by the tenant in the same way as a default on rent under the lease.

It will be for the landlord to decide what method of enforcement to use in respect of the default. However, one option would be to seek the leave of the court to enforce the award in the same manner as a judgment or order of the court (under section 66 of the Arbitration Act 1996).

## Extension

The Act allows for the Government to extend the timescales under a statutory instrument, should this prove necessary.

## CRAR – for non-protected arrears

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### How CRAR works

#### *No court action*

CRAR allows the landlord to instruct certificated enforcement agents to enter the premises to take control of the tenant's goods to sell at auction to recover the outstanding rent, should payment not be forthcoming. Court action is not required.

#### *Certificated enforcement agent only*

CRAR may only be enforced by a certificated enforcement agent (all the enforcement agents at HCE Group are certificated). Under CRAR, the landlord is no longer permitted to act himself.

#### *Commercial premises only*

The premises must be purely for commercial use, there must be a written lease in place between the landlord and tenant, and the rent must be overdue by 7 days or more (please see [section 2](#) for details during COVID)..

#### *Rent only*

CRAR may only be used to recover the actual rent that is owed and cannot include other unpaid charges such as service charges or insurance.

To recover those, court action would be required to obtain a county court judgment (CCJ) and then a writ of control if enforcement is required. Please read our [guide to the enforcement of writs of control](#) for further details.

#### *Notice of enforcement*

A notice of enforcement will be sent, giving the tenant 7 clear days (excluding the day of despatch, Sundays and bank holidays) in which to pay in full to prevent enforcement action. The tenant does have the right at this point to apply to court for a stay of execution.

It is possible to ask the court for permission to shorten the notice period if there is a strong likelihood of the tenant removing assets during the notice period.

At High Court Enforcement Group, we will issue the notice of enforcement required under the regulations within 24 hours and often, depending on the timing of instruction, on the same day.

#### *Sub-tenants*

If there are sub-tenants in the premises, the landlord must give them 14 days' notice that, while there are still arrears, the sub-tenants must pay their rent directly to the landlord until the arrears have been cleared or the notice withdrawn.

## Quarter days and CRAR

In England and Wales, commercial rent is normally payable quarterly in advance. Traditionally these are known as “quarter days” and have been in use for centuries.

The dates they fall on are – 25th March (Lady Day), 24th June (Midsummer Day), 29th September (Michaelmas) and 25th December (Christmas Day).

Whilst many commercial landlords still use these dates, others have moved over to set the first day of the month for January, April, July and October as the due date for rent.

## Enforcement of CRAR

The certificated enforcement agent (EA) will enter the premises through a door or any other normal method of entry, such as a loading bay.

In a process not dissimilar to that of the execution of a writ of control, the EAs will take control of the tenant’s goods, up to the value of the rent plus costs owing, and provide the tenant with a valuation of the goods taken. If agreeable to the landlord, the tenant is permitted to enter into a payment arrangement.

The goods may either be removed for sale or left in situ under a controlled goods agreement where a payment plan has been agreed. The controlled goods agreement will remain in place until the arrears have been paid in full.

If payment is not forthcoming and the goods do need to be sold, the tenant must be given 7 days’ notice of sale.

## Controlled goods agreement

A controlled goods agreement is used to secure the debtor’s goods when the enforcement agent leaves them at the debtor’s premises during enforcement.

It was previously known as a walking possession agreement and was amended as part of the Taking Control of Goods Regulations 2013 and Part 3 of the Tribunals, Courts and Enforcement Act 2007.

### *Leaving controlled goods at the debtor’s premises*

When an enforcement agent (EA) attends a debtor’s premises, his objective will be to obtain payment in full; however, that is not always possible and the EA may take partial payment and an arrangement for payment of the balance in one or more installments.

When this happens, the EA will take a detailed inventory of the goods he will take into control, which he estimates are likely to raise sufficient funds when sold at auction to pay the debt, judgment interest, court fees and enforcement fees.

If the EA has reason to believe that the goods are in jeopardy, he may remove them, but in many cases, he will leave them with the debtor. If this is the case, the debtor will be required to sign the controlled goods agreement.

Under the controlled goods agreement, the debtor agrees to not remove or dispose of the goods, or to allow anyone else to do so. It is a criminal offence to interfere with controlled goods.

### ***The details of the controlled goods agreement***

The controlled goods agreement must be in writing and containing the:

- Name and address of the debtor
- Reference number and date of the agreement
- Name of the persons entering into the agreement
- Contact details for the EA and hours when he, or his office, may be contacted
- Detailed inventory
- Terms of the payment arrangement agreed between the EA and the debtor

The agreement must be signed by the EA and either:

- The debtor
- A person authorised by the debtor
- The person in apparent authority

A minor under the age of 18 cannot sign the agreement. If the person who signs is not the debtor, then the EA must also provide the debtor with a copy of the agreement.

### ***Re-attendance to inspect or remove***

Once a controlled goods agreement is in place, the EA may re-attend the property to inspect the goods or to remove them for sale, if the agreement has been breached. The debtor cannot prevent the EA from entering the premises to inspect or remove the goods covered by the agreement.

The agreement will remain in place until the debt, and associated judgment interest and fees, has been fully discharged.

## **Third party claims under CPR Part 85**

If there is a claim by a third party that the controlled goods belong to them rather than the tenant, for example items left with the tenant for repair or sale on a commission basis, then they will need to make a third party claim.

Third party claims, formerly known as interpleader claims, are governed by CPR Part 85 (Civil Procedure Rules).

### **Step 1 – claim**

The third party claiming ownership of the goods must give written notice to the enforcement agent within 7 days of the enforcement agent taking control of the goods.

The third party, known as the claimant to controlled goods, must provide their name and address (for service of court documents), details of the goods they are claiming and the grounds for their claim, item by item.

### **Step 2 – creditor's response**

The HCEO must send the claim to the creditor within 3 days, giving the creditor 7 days to respond. The creditor will admit or dispute the claim, either in whole or in part.

Creditor admits claim

- If the creditor accepts the validity of the claim, then the EA will release the goods to the claimant to controlled goods as soon as is practicable (if they had been removed) and enforcement power will no longer apply against those specific items. The creditor will only be liable to pay for the EA's fees and expenses incurred before the claim was made.

Creditor does not respond

- If the creditor does not respond to the EA, he will seek direction from the court and will apply for an order that will prevent a claim from being brought against them.

Creditor disputes claim

- If the creditor disputes the claim, the EA will send notice to the claimant to controlled goods that the creditor disputes the claim

### **Step 3 – hearing**

The claimant to controlled goods then applies to the court that issued the writ, providing details of the goods, evidence of ownership and a signed witness statement.

The claimant may be required make a payment into court equivalent to the value of the goods claimed. As this might be financially onerous, he may apply to court for permission to pay a proportion.

If there is a disagreement between the claimant to controlled goods and the EA as to the valuation of the goods in question, then an independent valuation will be carried out.

### **Step 4 – ruling**

The case will be listed for a hearing, normally either by a Master or a District Judge, who may award costs against the losing party.

### **How CRAR differs from distress for rent**

On 6<sup>th</sup> April 2014, CRAR completely replaced the old common law right to levy on goods known as distress for rent.

The key differences are:

- Notice must be provided to the tenant – 7 clear days
- Only rent may be recovered - insurance and service charges must be recovered by other means and Section 85 prevents any attempts to bypass the regulations with secondary contractual agreements
- The fee structure has been simplified and is governed by the Taking Control of Goods (Fees) Regulations 2014
- Pound breach has been removed
- The Landlord and Tenant Act 1904 no longer applies

Although pound breach has been abolished, if the tenant interferes with the process or the secured goods, they commit an offence under para.68 of Sch. 12. There is a further offence where a person intentionally interferes with controlled goods without lawful excuse.

Under Sch.12, enforcement agents may take control of goods 'only if they are goods of the tenant'. Landlords have lost the advantage they enjoyed in relation to the wide range of goods that could be taken under the Law of Distress Amendment Act 1908.

### **Cost of using CRAR**

The service is completely free (unless you instruct the enforcement agent to withdraw) as the tenant pays the costs of enforcement.

## Forfeiture of lease for non-protected arrears

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Commercial landlords have two options, should their tenant breach the terms of their lease due to non-payment of rent.

They can obtain an order for possession or use the common law remedy of forfeiture.

### Mixed use premises

If there are residential premises attached to the commercial premises, for example a flat upstairs that shares a communal entrance, then the landlord must go to court to obtain an order for possession.

Forfeiture may not be used for mixed use premises.

### Forfeiture

For the majority of landlords, forfeiture will be the more attractive option, as it does not require going to court and can be undertaken very quickly once the time period specified in the lease has elapsed. This is commonly 21 days.

Forfeiture entails the peaceful re-entry to the unoccupied property by a certificated enforcement agent, normally assisted by a locksmith.

To avoid potential conflict, forfeiture will normally be carried out early in the morning before the tenant has arrived for the working day.

Once they have secured access to the premises, the locks will be changed and the tenants', and any sub-tenants', rights to the property will end.

### Notice

Notice does not need to be given to the tenants when forfeiting the lease due to non-payment of rent. This will include any items reserved as rent under the terms of the lease such as service charges.

If there are any other breaches to the lease, the landlord must give notice to the tenant to allow them time to remedy the breach. Once remedied, the landlord may not then forfeit the lease.

### Waiver

If the landlord demands or accepts rent payments, or exercises his right to recover rent arrears under CRAR, this will waive his right to forfeit the lease.

The landlord will only regain the right to forfeit if the tenant goes into arrears on a subsequent occasion.

### ***Relief from forfeiture***

The tenant and sub-tenant does have the right to apply for relief. This should be done “without delay”, normally within 6 months. If their application is successful, the tenancy will be restored.

### ***Forfeiture during administration***

There is a moratorium on legal action, including enforcement, when a business is in administration. The landlord will need permission from the administrator or the court to forfeit the lease during this time.

### **Cost of forfeiture**

The charges for forfeiture are not covered by regulation, so the landlord will be quoted for the forfeiture of the lease, according to the requirements of each case, by the certificated enforcement agent undertaking the forfeiture.

If using a company, such as High Court Enforcement Group, employing certificated enforcement agents, they should have the necessary health and safety procedures in place, as well as the required insurance cover to protect themselves and the landlord.

If instructing an individual EA, we strongly recommend that you ask for copies of their insurance policy and operating procedures.

### **Torts on goods left behind during forfeiture**

When the lease has been forfeited by peaceable re-entry, the tenant’s fixtures revert to the landlord and the tenant has no right to remove them. This was established in the case of *Re Palmiero* (1999).

However, it is a different matter when it comes to goods left behind in the premises. The tenant remains the legal owner, so the landlord could be sued by the tenant if he sells or disposes of them.

It is unlikely that this would apply to perishable or disposable goods, although the landlord would be wise to ensure that there is a clause in the lease that permits him to do this.

The landlord has become an “involuntary bailee”. He can sell or dispose of them if they have been abandoned, which means not only that they have been physically abandoned, but also that the owner intended to abandon them. Given that the lease was forfeited, this is unlikely.

### ***Torts (Interference with Goods) Act 1977***

Under this Act, the landlord must serve notices on the tenant in order to deal with these goods. The first is notice that the goods need to be collected within a reasonable time period, and the second is notice that the landlord intends to sell the goods if they are not collected within that time period.

In the case of commercial property, if the tenant's address is not known, the landlord can place these notices prominently on the premises.

***If the tenant sues***

To avoid being sued by the tenant for the disposal of the goods, it is advisable to include clauses within the lease of what the landlord may do under these circumstances.

It is also best practice right after forfeiture to capture an inventory and photographic record of all the goods in situ, ideally taken by a third party.

If the tenant does sue, they can only do so for the value of the goods, not for their replacement value (another good reason for a photographic record).

## Applying both CRAR and forfeiture

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Given that there are rent arrears to permit forfeiture, the landlord may also seek to recover those under CRAR before deciding to forfeit the lease, in which case any goods of value may be removed for sale.

Because the lease must be valid to use CRAR, a landlord wishing to recover the property after recovering the arrears should forfeit the lease the day after CRAR or at a later date, provided the tenant remains in breach of the lease at that point.

However, to recover rent arrears under CRAR, the landlord will need to provide seven clear days' notice of enforcement and complete the entire rent recovery process whilst the lease is still in place, before going on to forfeit the lease, if that is still appropriate.

This may negate any tort considerations if all the goods left behind are of saleable value (and their combined value does not exceed that of the arrears). On the other hand, the notice period may be used by the tenant to remove goods.

If the landlord is more concerned about recovering the property than the rent arrears, he can forego the CRAR notice period and forfeit the lease once the rent becomes overdue – this date will be stipulated in the lease and is often set at 21 days.

## About High Court Enforcement Group Limited

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We are the largest independent High Court enforcement company in the country. We are privately owned, with more authorised and experienced officers than anyone else. This allows us to build and manage our business in a way that puts our clients first.

Clients trust us to deliver and our service level is paramount – we are committed to meeting and exceeding their expectations. Transparency and ethical behaviour are also at the heart of our business, both with our clients and their debtors.

We achieve this by recruiting excellent people and investing in their development, allowing us to ensure quality, transparency and ethical behaviour – firm but fair enforcement.

Our highly skilled enforcement agents are recognised for their impressive local knowledge and their steadfast commitment to upholding the values of responsibility and accountability. Ensuring exemplary professionalism through time-honoured dedication to firm but fair enforcement.

We are committed to educating as well as enforcing. We believe that an informed decision is a correct decision and that our clients should also understand the processes associated with enforcement. We believe in sharing our knowledge and expertise with our clients, to help them make informed choices.

### To instruct us or find out more

Should you wish to instruct us on a current case, then simply click through to our [online CRAR instruction form](#) or our [online forfeiture instruction form](#).

If you would like any further information, please click through to our [website](#).

Should you wish to discuss a case, please do not hesitate in calling our dedicated possession team on **08450 999 666**

Remember, we are here to help.

## Useful links

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### *Instruction forms*

<https://www.hcegroup.co.uk/commercial-rent-arrears-recovery-crar-instruction-form/>

<https://www.hcegroup.co.uk/forfeiture-instruction-form/>

### *Tracing services*

<https://www.hcegroup.co.uk/debtor-tracing/>

### *Possession Claim Online*

<https://www.possessionclaim.gov.uk/pcol/>

### *Tenant Referencing*

<http://www.landlordreferencing.co.uk/>

### *National Landlords Association*

<http://www.landlords.org.uk/>

### *Ministry of Justice Civil Procedure Rules*

<http://www.justice.gov.uk/courts/procedure-rules/civil/rules/part-83-writs-and-warrants-general-provisions>

### *Insolvency Service*

<https://www.insolvencydirect.bis.gov.uk>

### *Companies House*

<https://www.gov.uk/government/organisations/companies-house>

### *Registry Trust*

<http://www.trustonline.org.uk/>

### *Further reading*

<https://www.hcegroup.co.uk/articles/>

## To find out more or instruct us

If you have any questions or wish to instruct High Court Enforcement Group then please contact us on **08450 999 666** or visit our website at **[hcegroup.co.uk](https://www.hcegroup.co.uk)**, go to the instruct us page and select the service you require from the menu.

-  [property@hcegroup.co.uk](mailto:property@hcegroup.co.uk)
-  [@HCEGroup](https://twitter.com/HCEGroup)
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