Commercial property update

Magnus Hassett looks at the forthcoming changes to the rules on recovery of commercial rent arrears, the introduction of a period of temporary rates relief for empty new build commercial property, and HMRC's recent clarification of last year's VAT changes, affecting landlords who let out property for storage purposes

Magnus Hassett is a partner at Forsters. Forsters lawyers Peter Selwyn and Tina Heathcote assisted with this article. www.forsters.co.uk

The common law remedy of distraint for arrears of rent will finally be abolished on 6 April 2014, when the commercial rent arrears recovery procedure, originally proposed by the Tribunal Courts and Enforcement Act 2007, is brought into effect by The Taking Control of Goods Regulations 2013.

The right of a landlord to instruct bailiffs to seize goods (and sell them after five days if rent arrears are not settled) has been criticised by occupiers for many years, given that there is no requirement to give notice to a defaulting tenant and that it allows landlords who suspect a tenant may become insolvent to seize goods, outflanking other creditors. Landlords, on the other hand, see distraint as a quick and effective remedy, available within 24 hours, often with the intention of 'shaming' tenants (particularly retail tenants) into settling arrears.

Commercial rent arrears recovery – abolition of the common law right to distrain

From 6 April 2014, landlords will be obliged to follow a statutory process if they want to seize goods to satisfy rent arrears. Some of the key points of this process are as follows:

- the process can only be used where the lease is of commercial property only – it cannot be used for properties held under a mixed-use lease;
- a landlord must give a tenant at least seven clear days' notice of is intention to seize goods;
- the process applies only to arrears of principal rent, interest and VAT – not insurance, service charge and/or other sums due under the lease in question. In addition, the tenant must have at least seven days' arrears of principal rent, calculated after setting off any sums the tenant is due;
- entry to commercial premises will be possible between 0600 and 2100 (unlike distraint, which was available only between sunrise and sunset) by authorised "enforcement agents";
- goods must then be secured – either at the premises or at a place within a reasonable distance of the premises (where there is a significant risk they may be removed by the tenant) and cannot be sold until seven clear days following removal from the premises;
- a landlord can serve notice (a "section 6 notice") on a subtenant of its tenant, requiring payment of rent directly to the landlord; but this will not be effective for 14 clear days . The effect is that a subtenant which has already paid rent to its landlord (e.g. by cheque) will not be required to reverse that payment.

The legislation contains some key practical issues for landlords and tenants:

- landlords will be concerned that tenants will use the notice period to remove all goods from the premises – particularly where a tenant operates from several locations;
- it is not clear how "inclusive" rents, including payment of service charge, insurance and rates (for instance) will be treated – it may be that the procedure cannot be used if it is not clear how the rent is split;
- tenants might be concerned that there is no requirement to serve notice at the premises – simply at one of the places where the tenant carries on business – so the immediate occupiers may not be aware of the landlord's intention to seize goods;

It remains to be seen how the process plays out

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in practice and whether landlords will turn to other remedies, ending the seizure of goods from tenants' premises.

Empty rates relief on new build "non domestic" buildings

With effect from 1 October 2013, a new empty property rate relief scheme has been available for newly built "non domestic" buildings. The relief is available for non domestic buildings "wholly or mainly comprised of qualifying new structures" and completed between 1 October 2013 and 30 September 2016. The purpose of the measure is to help stimulate construction – the government is of the view that if construction appraisals do not have to take into account the risk of paying empty property rates on newly built commercial property, this may result in some commercial property projects proceeding which otherwise might not.

To qualify for the relief, the building needs to be unoccupied for the first 18 months after completion.

An additional 15 or 12 month relief period is available but which is at the discretion of the relevant local authority. The benefits of the relief claimed by a rate payer may not exceed relevant state aid limits, which are 200,000 euros over a three year period.

It is worth noting that the relief attaches to the property so, if it is sold, the new owner may also benefit.

VAT on storage rent – implications for landlords and their advisers

In August 2013 HMRC issued updated guidance (VAT Information Sheet 10/13) relating to the VAT treatment of rents and licence fees charged in respect of providing facilities for the storage of goods. The guidance essentially clarifies that HMRC sees no distinction between "storage" i.e. letting a warehouse for B8 storage purposes at a rent, and providing self storage facilities to the public.

This clarification is particularly relevant to landlords letting property which is not opted to tax for VAT purposes, whose supplies in land are normally exempt from VAT unless the supplier has opted to tax the property. On 1 October 2012, HMRC introduced changes which were intended to close a loophole by which a licence to occupy land for storage was exempt from VAT under the property exemption, whereas, traditional storage companies were subject to the VAT regime as they do not allocate a discrete area to the customer.

To regularise the position, VAT is now chargeable on all forms of storage lease provided the storage space is:

(a) in a building or unit, container or other structure that is fully enclosed and static; and
(b) is used for the storage of goods by a customer or tenant or a third party with the tenant's permission.

If goods are physically stored in a relevant structure the new rules will apply, regardless of any

agreement between, or indeed the intention of, the parties. Similarly if, by the nature of the premises or the commercial documentation, the use of the property is storage then the supply will be standard rated even whilst the property is empty.

Implications for those advising landlords

- Landlords letting property for the purpose of storage will have to account to HMRC for VAT regardless of whether they have opted to tax the property.
- Some landlords will have to register for VAT where previously they were below the threshold.
- Landlords will be responsible for accounting to HMRC for VAT since the rules changed on 1 October 2012. It may be possible to charge this to the tenant retrospectively depending on the terms of the lease agreement.
- It is the landlord's responsibility to establish the use to which the property is being put and regular monitoring of such use is therefore advisable.

CHANCEL REPAIR AFTER 13 OCTOBER 2013

The ten-year deadline to register chancel repair interest expired at midnight on 12 October 2013. In the flowchart below, Forsters PSL Miri Stickland summarises what practitioners should now be doing in relation to chancel repair