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DISTRESS FOR RENT

INTRODUCTION

Distress for rent has been described as "an archaic remedy which has largely fallen into disuse".[1] While certainly archaic, the remedy has remained in use in the Australian jurisdictions in which it has been retained: South Australia and Tasmania.[2] If anything, the frequency of its use has increased in the present economic climate where self-help remedies for landlords are popular. The fact that many tenants of commercial premises who cannot pay their rent may also be insolvent makes a remedy which can give a landlord's claim for rent priority over other creditors a very useful one.

The origins of the remedy are feudal and it is arguable that it is still feudal in its operation. Occasionally, there are calls for its abolition, and it probably is inevitable that South Australia eventually will follow the lead of the other mainland states and abolish distress. In the meantime, it offers practitioners an opportunity to engage in debates over an always complex, always fascinating, remedy.

In this article I will first consider the rules and procedure governing the availability of the remedy of distress. I will then consider the situation where the tenant is insolvent, and the effect that insolvency has on the availability and effectiveness of the remedy.

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1 *Abingdon Rural District Council v O'Gorman* [1968] 2 QB 811 at 819, per Lord Denning MR.

2 In South Australia the right to distrain for rent payable under a residential tenancy agreement has been removed by s60 of the *Residential Tenancies Act* 1995 (SA). The remedy therefore is available in non-residential tenancies only.

RULES AND PROCEDURE

A Common Law Right

The right to distrain is a common law right. It has been modified by statute in the United Kingdom and in Australia, but it has not been codified. Thus, most of the common law rules remain relevant. Those rules were conveniently summarised by Lord Denning MR in *Abingdon Rural District Council v O'Gorman*:

> At common law the rent issued out of the land. The landlord was entitled to distrain on any goods or chattels that were on the premises, to whomsoever they belonged. As soon as he seized the goods, he had immediately to remove them from the premises and put them into a pound ... But he could not sell them. He could only keep them in the pound until the arrears were paid, or the goods were replevined.
>
> On the way to the pound, and whilst in the pound, the goods were in the custody of the law. If they were taken by the owner or anyone else, the taker was guilty of a misdemeanour called rescous (if taken on the way to the pound)[3] and pound-breach (if taken after being out inside the pound).[4]

In South Australia, the statutory modifications of the common law position are contained in Part II of the *Landlord and Tenant Act* 1936 (SA). It is clear that the statute reinforces the common law position; it does not remake it. Section 13, the definition section, with its references to rights which clearly are already established, illustrates the fact that Part II adopts all of the common law rights. The types of rent that may be distrained for, the goods which may be distrained, and who may levy a distress have been defined and determined by the courts prior to the enactment of Part II.

The Right to Distrain

At common law, the right to distrain need not be expressly reserved by the lease, although it may be removed by an express term. Pursuant to

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3 Also known as "rescue" - see *Landlord and Tenant Act*, 1936 (SA) s39.

4 [1968] 2 QB 811 at 819.

s125(1) of the *Real Property Act* 1886 (SA), it is implied in every lease that the lessor has "power to distrain according to law".

Landlord and Tenant

The relationship of landlord and tenant, both at the time of the rent falling due and at the time of the distress being levied, is required for distress to be available as a remedy. This means that a landlord cannot distrain before the relationship of landlord and tenant is complete, or after the lease has terminated and the relationship is at an end. A licensor cannot distrain against a licensee because there is no relationship of landlord and tenant, and because any payment made for the use of the premises is not rent.

Rent

At common law, rent issued out of the land and, therefore, any rent for which distress may be made must be rent reserved out of lands and tenements, and not out of any incorporeal hereditaments (such as tithes, easements or *profits à prendre*). Only rent may be distrained for, and not outgoings and other charges connected with the tenant's occupation of the premises. It is submitted that clauses in leases which either define such charges as 'rent', or provide that they may be 'recovered as rent' by the lessor are not sufficient to overcome this rule.[5] Similarly, the definition of "rent" for the purposes of Part IV of the *Landlord and Tenant Act* 1936 (SA) (which arguably is broader than the common law notion of rent) cannot be used to expand a landlord's right to distrain because Part II of the Act limits "rent" to that "for which a distress may lawfully be levied".

In Arrear

The rent distrained for must be in arrear (whether payable in advance or in arrears). This means that a landlord cannot distrain for rent until after midnight on the last day on which it is payable. It is common for written leases to provide that rent is due and payable on a certain day of each month, and to confer on the landlord a right to re-enter the premises and terminate the lease if the rent remains unpaid for, say, fourteen days. It is

5 See also McLoughlin, *Commercial Leases and Insolvency* (Butterworths, London 1992) pp57-58, where he suggests that such clauses could not create valid rights to distrain to the extent that they may infringe "statutory provisions imposing special requirements in respect of creditors' rights to take goods for debts due" - such as the requirement that a bill of sale be registered under the *Bills of Sale Act* 1886 (SA), or a charge be registered under the *Corporations Law*.

sometimes argued that, because of such a clause, the landlord cannot levy a distress for rent due on the first day of the month until the fifteenth of the month. It is submitted that the days of grace relate only to landlords' rights to re-enter and do not affect their rights to distrain. This period of grace should be borne in mind, however, if the landlord wishes to terminate the lease immediately after distraining.

Who may Distrain for Rent ?

At common law, any holder of a reversion may levy a distress. Thus, a tenant who sub-lets the premises may distrain against their sub-tenant. If the lessors are joint tenants, any one of them may distrain for the whole of the rent due by the tenant.[6]

What may be Distrained ?

At common law, prima facie all goods and chattels found on the demised premises could be distrained, regardless of their ownership. Both the common law and the *Landlord and Tenant Act* 1936: s31 (SA) have created so many exceptions to this, however, that the statement is virtually meaningless.[7]

The common law classified some goods as being absolutely privileged from distress, namely:

- goods of the Crown;
- fixtures;
- perishable articles, including crops;
- money which was not in a receptacle; and
- animals.

The *Landlord and Tenant Act* 1936 (SA) has removed or reduced some of these privileges. For example, cattle may be distrained, as may corn and hay - s31. The Act also supplements the classes of privileged goods by providing further exemptions from distress as set out in ss43-46 inclusive.

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6 Lord Hailsham of St Marylebone (ed), *Halsbury's Laws of England* Vol 13 (Butterworths, London, 4th ed 1975) paras[213] - [215].

7 At para [227].

These exemptions can be classified as being in the nature of trade exemptions and the 'necessities of life'. The exemptions themselves are so antiquated and so limited by reference to the value of goods which may be exempted that they offer no protection to a modern tenant.

Statute law has also encroached on the common law rules by providing a procedure whereby certain classes of goods may be protected from distress or sale. The most significant class of such goods, in practice, is goods of a stranger to the lease, including an undertenant or lodger of the tenant. As I have said, at common law prima facie all goods may be distrained, regardless of ownership. The *Landlord and Tenant Act* 1936 (SA), however, engrafts onto this statement a procedure whereby strangers may apply to have their goods released from the distress. The procedure for undertenants and lodgers is set out in s19 of the Act and the procedure for strangers other than those coming within s19 is in s22. In essence, the procedure gives a stranger a right to serve on the landlord a declaration setting out that the immediate tenant has no right of property or beneficial interest in the goods distrained as listed in an attached inventory. The declaration and inventory may be served on the landlord at any time up to the time when the goods are sold. If a landlord accepts the declaration, the goods are released to the stranger owner. Conflicting claims are to be determined by the process set out in ss24-26 of the Act.

A landlord who receives a declaration of ownership must take care to balance the obligation owed to the tenant with that owed to the stranger serving the declaration. These obligations are often in conflict, and it is at this point that the otherwise efficient and effective remedy of distress can become complicated, expensive and ineffective. Unfortunately for landlords, challenges by strangers to the distress are both very common and impossible to predict with certainty before distress is levied. Perhaps the most common claims are claims by strangers that they are the owners of the tenant's stock pursuant to retention of title clauses.

The landlord's duty to the stranger is set out in s23: if the landlord proceeds with a distress on the goods set out in the inventory and it is later established that the tenant had no legal or beneficial interest in the goods, the landlord is deemed guilty of an irregular distress. Exactly what action the landlord will be liable for is not specified by the Act. Presumably the stranger's action will be in trespass to goods, conversion or detinue.[8]

8 An action in trespass may include an award of aggravated damages. In conversion and detinue, the aggrieved person will recover the value of the goods, together with any special loss suffered as a result of the wrongful

The landlord's duty to the tenant can be found in the corollary to the above situation: if a landlord releases to a stranger goods which are in fact the legal or beneficial property of the tenant, the tenant will have an action against the landlord for their value.

Obviously, a landlord should require proof of ownership before releasing any goods, and should not accept a declaration at face value. In the absence of a stranger providing conclusive proof of ownership, a landlord should insist on the statutory procedure for resolving disputed claims being followed.

The Procedure for Levying a Distress

This procedure is set out in the *Landlord and Tenant Act* 1936 (SA). The most significant modification of the common law is that the Act confers upon landlords a power to sell the goods impounded and not merely to hold them as a security pending payment by the tenant.

Distress is levied by serving a warrant in the form set out in Schedule 1 to the Act. Section 14 requires the distress to be levied by the landlord personally, or by another authorised by the landlord in writing. The warrant is executed in duplicate, with one copy being served on the tenant or left at the premises when the distress is levied.

Distress must be levied between the hours of six in the morning and six in the afternoon.[9] In the United Kingdom a landlord cannot distrain on a Sunday. This does not appear to be the case in South Australia.

At the time of distraining, an inventory of goods must be made in the form in Schedule B to the Act. Again, a copy of the inventory must be served on the tenant or affixed to the premises. If the tenancy is not terminated following the distress, the landlord must find a secure place to impound the goods. The goods may be removed and stored (usually at an auctioneer's premises pending sale) or they may be stored in a secure and discrete part of the premises.[10] Less often, a landlord may agree with the tenant that the goods are to be the subject of a 'walking distress' whereby the goods are impounded but remain on the demised premises, with the

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distress. Exemplary damages may also be awarded. An action in detinue may also result in restitution to the stranger. Obviously, this will not be possible if the goods have been sold.

9 *Landlord and Tenant Act* 1936 (SA) s17.

10 As above, s32.

tenant still in occupation and free to use and deal in the goods. Thus, while the tenant may not remove the goods, they may be sold to a stranger who is free to remove them. Accordingly, this type of distress is most suitable where the goods distrained are large items of plant and are not likely to be removed in the period before sale. It is not unusual for the lease to be terminated after distress has been effected, in which case the goods may be distrained on the premises.

Section 30 confers on a landlord a power to sell the goods distrained if they are not replevied within five days after the distress. The sale is required to be by public auction[11] and no appraisal of the goods is required.[12] At any time up to the actual sale, the tenant may pay to the landlord the rent distrained for and the expenses of the distress and thereby avoid the sale.

In the absence of any express statutory provision, it appears that the landlord may bid at the auction, but may not purchase any of the goods distrained.[13]

Section 37 of the *Landlord and Tenant Act* 1936 (SA) sets out the penalty for levying a wrongful distress, namely that the tenant or the owner of the goods may recover from the landlord twice the value of the goods distrained and sold, plus costs on a solicitor and client basis. However, this section only relates to the levying of a distress when in fact no rent was due. It does not apply where only part of the rent distrained for was due, or where the distress was otherwise illegal, irregular or excessive. Thus, while the procedural requirements in Part II of the Act are all expressed in mandatory terms, the penalties for any breach of those requirements are unclear.

It is also unclear what rights a landlord has over goods distrained which do not sell at auction. Section 33 sets out how the proceeds of any sale shall be applied, namely: first, in payment of the costs of distress and sale (including legal costs);[14] and secondly, in payment of the rent distrained for. Any overplus is paid to the tenant. Presumably, therefore, if the landlord's claim has been satisfied in full, any unsold goods will also be

11 Section 34.

12 Section 36.

13 See generally *The Australian Digest* Vol 11 (Law Book Co, Sydney, 2nd ed 1968) p518. It appears that if the landlord does purchase any of the goods distrained, the distress will be irregular, but not illegal. The owner would have an action in trover (conversion).

14 *Landlord and Tenant Act* s35.

returned to the tenant. The question of the landlord's rights over any unsold goods in the event of a shortfall remains.

As can be seen, the levying of a distress is a complicated procedure, and the mandatory wording of the Act means that a tenant is entitled to insist on strict compliance with that procedure. A tenant is often able to defeat a distress through technical objections to such things as the form and mode of execution of the warrant, the method or time of its service, the authority of the agent, the mode of entry of the premises, the completion of the inventory, and so on. A tenant can also 'undermine' a distress by advising all stranger owners of the fact of the distress, and actively encouraging them to remove their goods before a distress is levied, or to lodge declarations of ownership with the landlord.

Alternatives to Distress

Abandoned Goods

The *Landlord and Tenant Act* 1936 (SA) was amended in 1991 to include s67A, which confers on a landlord a right to deal with goods abandoned by a tenant on the demised premises after the termination of the tenancy. It is not a substitute for distress, as it does not give the landlord any express rights over the goods in priority to the tenant. Like the provisions relating to distress, however, the section fails to prescribe whether a landlord acquires property in any unsold goods and, if not, what is to be done with them.

If a landlord has the option of distraining, it is in their interest to distrain and not merely rely on their rights under s67A. The s67A procedure should only be resorted to, in my opinion, where the lease has already been terminated and the right to distrain has been lost.

Express Clauses in a Lease

Some leases purport to confer on a landlord a right to seize and sell a tenant's goods if rent is in arrears. It is not clear whether such a clause can be interpreted as doing any more than confirming a landlord's right to distrain. Any landlord purporting to exercise powers conferred by such a clause would be advised to follow the statutory procedure for distress. It is also arguable that the priority afforded by the courts to a distress would not be available to a landlord who was exercising a contractual right only.

INSOLVENT TENANTS: LANDLORDS AS SECURED CREDITORS

Where solvent tenants are in arrears with their rental payments, distress can be a persuasive threat and an effective remedy if followed through. The goods threatened with distress or in fact distrained usually will be essential to the carrying on of the tenant's business, and a solvent tenant will have a strong incentive to pay the arrears distrained for.

It is not unlikely, however, that if a tenant is not paying their rent they are not paying their other debts either. By distraining, the landlord potentially can obtain a security interest over the goods of the tenant which the landlord would not otherwise have, and thereby avoid ranking as an unsecured creditor on the bankruptcy or winding up of the tenant. The corresponding disadvantage to the landlord is, however, that the inevitable debates that follow the levying of a distress will not be with a tenant who wants to continue in business, but with the tenant's trustee, liquidator or receiver, an agent for the mortgagee in possession, or the holder of a charge over the tenant's property. Such debates will not be only about the procedural aspects of the distress, but also the priority or otherwise of the landlord over the claims of the respective creditors or officers. Rather than having a strong incentive to pay on the levying of the distress, these third party administrators will have a strong incentive to oppose the distress on any grounds. The remedy of distress can become expensive and ineffective.

The arguments usually turn on whether the goods seized are or are not the "property of the tenant" within s22 of the *Landlord and Tenant Act* 1936 (SA), and on the particular terms of the *Bankruptcy Act* 1966 (Cth) and the *Corporations Law*. As the success of these arguments often turns on the category of person asserting a priority over the landlord, it is worth considering each category in turn.

The Holder of a Bill of Sale

The existence of a registered bill of sale over goods which are the subject of a distress does not prevent the levying of the distress or the sale of the goods. The *Bills of Sale Act* 1886 (SA) does, however, limit according to the length and type of the tenancy the amount of rent that may be distrained for.[15]

15 *Bills of Sale Act* 1886 (SA) s31.

The landlord's right to distrain is not lost even when the holder of the bill of sale has gone into possession of the goods and set a date for their auction under the bill of sale. Indeed, in *London and Westminster Loan and Discount Company v London and North Western Railway Company*,[16] the defendant landlord successfully levied a distress on the morning of the auction of the goods pursuant to a bill of sale.

The right to distrain is unaffected by a bill of sale because a bill of sale, even when registered, does not pass property in the goods. The goods remain the property of the tenant and are therefore liable to be distrained notwithstanding a registered charge or bill of sale.

> If the tenant has given a mortgage bill of sale it would seem to be flying in the face of all equity learning to hold that the goods are the "property" of the mortgagee. It would appear to follow that the goods mortgaged would not be exempt from seizure under distress.[17]

The Holder of a Registered Charge

The position of the holder of a registered charge is analogous to that of a holder of a bill of sale only to a point. Whether a landlord levying distress has priority over a charge holder may depend upon whether the charge is fixed or floating. A floating charge, like a bill of sale, does not pass any property in the goods charged. Therefore, it is likely that a landlord may distrain notwithstanding a floating charge over the goods. In *Re Roundwood Colliery Co*,[18] a distress was levied one day prior to the tenant company going into voluntary liquidation, and two days prior to a receiver being appointed by the debenture holders under a floating charge. The case is principally an authority for the priority between a landlord and a liquidator, but the question of the priority between the landlord and the debenture holders was also dealt with by Lindley LJ. The answer to that question turned on whether the charge was still floating or had become fixed at the time when the landlord distrained. Lindley LJ held that the goods had been seized by the lessor before the debentures had ceased to be floating securities, and before the receiver had been appointed. The goods, therefore, had not ceased to be the property of the tenant company, and the distress was effective.[19]

16 [1893] 2 QB 49.
17 Sykes, *The Law of Securities* (Law Book Co, Sydney, 4th ed 1986) p756.
18 [1897] 1 Ch 373.
19 At 393.

It is not clear, however, whether a landlord may distrain goods which are the subject of a fixed charge or of a floating charge which has crystallised (and the levying of a distress is often defined by the charge to be a crystallising event). It appears from the dicta of Lindley LJ in *Re Roundwood Colliery Company,*[20] and from the writings of some commentators[21] that the right to distrain will not take priority over a fixed charge.

Where a Receiver has been Appointed

There is authority that if a chargeholder appoints a receiver, (or a mortgagee an agent) to take control of a company's assets, a landlord's right to distrain is not affected. Again, the reason is that the goods remain the property of the tenant company, and are not transferred to the chargeholder or mortgagee: the receiver or agent acts as the agent of the tenant company. Any goods distrained by the landlord, therefore, are seized in priority to the charge.[22] An important Australian case on the priority accorded to a distress is the High Court's decision in *Purcell v Public Curator of Queensland.*[23] The question for the Court was whether a landlord's right to distrain was affected by the appointment of a receiver over the assets of the tenant company by the holders of a debenture creating a floating charge. The receiver had taken control of the assets pursuant to the terms of the debenture at the time of the distress. It was argued that, in considering this question, the Court should have regard to s18 of the *Insolvency Act* 1874 (Qld) which established the preferential status of certain creditors in priority to claims under a floating charge. This section was the precursor to s331 of the *Companies Code*, now s433 of the *Corporations Law*. As a landlord's entitlement to rent was not mentioned by this section, it was argued that a landlord could not otherwise be entitled to priority over debenture holders. In the leading judgment, Higgins J held that s18 did not adopt the scheme of distribution of assets appropriate to a winding up or a bankruptcy; nor did it have any reference to the rights of creditors inter se. He concluded that the landlord's right to distrain was not affected by the section.

> Whatever privileges the landlord has, they do not come to him under the provisions of the *Companies Acts* but by the

20 As above.
21 See generally Blanchard, *The Law of Company Receiverships in Australia and New Zealand* (Butterworths, Sydney 1982) pp16-18.
22 At pp102-104.
23 (1922) 31 CLR 220.

> common law ... [T]here is not, so far, the slightest indication of any intention to interfere with the landlord's right of distress at common law. He stands, as to his right of distress, aloof from other creditors, in a position similar to that of a mortgagee who holds a specific security.[24]

During a Voluntary Administration

Part 5.3A of the *Corporations Law* was introduced by the *Corporate Law Reform Act* 1992. It provides for "administration of a company's affairs with a view to executing a deed of company arrangement", and the objects of the Part are set out in s435A. The part limits the actions that certain persons, including landlords, can take against a company during the period that the company is subject to a voluntary administration. The actions which are prohibited, however, are actions by those persons in respect of their own property. In effect, a landlord may not re-enter premises during the period of the administration,[25] but the right to distrain the goods of the tenant or others on those premises is not affected.

There is one way, however, in which the placing of a company under a voluntary administration may affect the right to distrain. If a company which is under administration is ordered by the Court to be wound up in insolvency or on other grounds, that winding up is taken to have commenced on the day when the administration began.[26] In turn, s468(4) provides that: "Any ... distress ... put in force against the property of the company after the commencement of the winding up by the Court is void". The proceeds of any distress during the period of an administration therefore will be liable to recovery proceedings by a liquidator, in the event that the tenant company subsequently is wound up.

On a Winding Up

Commentators such as Blanchard[27] make general statements to the effect that a distress commenced prior to a winding up may be carried through. A landlord's right to distrain, however, depends very much on the circumstances of each case. The cases draw a distinction between a voluntary winding up and a winding up ordered by the Court. The

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24 (1922) 31 CLR 220 at 230, per Higgins J.
25 See ss440C, 440F, 441F, 447(4) and (5).
26 *Corporations Law*, ss513A, 513C.
27 Blanchard, *The Law of Company Receiverships in Australia and New Zealand* (Butterworths, Sydney 1982).

Corporations Law also has specific provisions which affect the right to distrain.

Members' Voluntary Winding Up[28]

The *Corporations Law* does not contain any express provisions governing the levying of a distress where the company has been or is in the process of being wound up voluntarily. In particular, there is no equivalent to s468(4) which renders a distress put in force after the commencement of a Court ordered winding up void. But s511 enables a liquidator, a creditor or a contributory in a voluntary winding up to apply to the Court to exercise any of the powers that the Court may exercise if the company were being wound up by the Court. This would include the power of the Court under s467 to order a stay of proceedings, which is discussed below.

Compulsory Winding Up

A winding up by the Court is now taken to commence, in general, on the date on which the winding up order is made.[29] This is a significant restriction on the operation of s468(4), which previously applied to any distress levied after the filing of an application to wind up a tenant company.[30]

It is clear from s468(4) of the *Corporations Law* that a distress levied after the commencement of a winding up by the Court is void. (An exception is a distress for rent accruing after the winding up). The question is whether the words "put in force" will apply to avoid a distress which is only partly completed at the time when the winding up order is made. In other words, is a distress "put in force" when it is levied, or only when the goods are sold? The cases which consider this question all deal with voluntary windings up, but they are applicable on this point. They indicate that a distress is "put in force" when the warrant is served, and the distress levied, and not at some later time. The courts in both *Re Roundwood Colliery Co*[31] and *Herbert Berry Associates Ltd v Inland Revenue*

28 Due to legislative amendments, the position on a creditor's voluntary winding up is equivalent to that on a compulsory winding up: s500 of the *Corporations Law* corresponds to ss468(4) and 471B. The only significant difference is that s500 operates from the time when the resolution for voluntary winding up is passed.

29 *Corporations Law*, s513A.

30 Because of the definition of the commencement of the winding up in s465, now repealed.

31 [1897] 1 Ch 373.

Commissioners[32] considered the validity of a distress levied but not completed by sale before a company was wound up. In both cases, it was held that a distress is put in force when it is levied.

This may not be the end of the matter, however. A landlord's rights also depend on whether a distress is a "proceeding" within s467 of the *Corporations Law*. Section 467 operates in the period of time between an application for winding up being filed and the order being made, and provides:

> (7) At any time after the filing of a winding up application and before a winding up order has been made, the company or any creditor or contributory may, where any action or other civil proceeding against the company is pending, apply to the Court to stay or restrain further proceedings in the action or proceeding, and the Court may stay or restrain the proceedings accordingly on such terms as it thinks fit.

Section 467(7) has not been changed by the *Corporate Law Reform Act* 1992. But that Act did affect the operation of s468(4), as mentioned above, and also repealed s471(2) and replaced it with s471B. Before these amendments, the combined effect of the three sections was as follows:

- Section 468(4) declared any distress levied after the filing of an application to wind up a company to be void;
- Section 467(7) also operated in the period between the filing of an application to wind up and the making of a winding up order. If a distress was a "proceeding", the completion of any distress during this time period could be stayed by the Court on the application of the company, a creditor or a contributory;[33]
- Section 471(2) operated after the making of a winding up order. Again, provided a distress was a "proceeding", a landlord could

32 [1977] 1 WLR 1437.

33 Special circumstances must exist for a stay to be granted. The special circumstances must be equivalent to fraud, such that it would be inequitable for the Court to allow the distress to proceed. See *Re Roundwood Colliery* [1897] 1 Ch 373; *Venner's Electrical Cooking and Heating Appliances Ltd v Thorpe* [1915] 2 Ch 404; and *Re G Winterbottom (Leeds) Ltd* [1937] 2 All ER 232.

> apply to the Court for leave to commence or proceed with a distress after a winding up order had been made.[34]

Under the law as it stood prior to the *Corporate Law Reform Act* 1992, the argument that distress was a "proceeding" within ss467(7) and 471(2) was a double-edged sword for a landlord. On the negative side, a distress levied between application and order could be stayed by the Court under s467(7). On the positive side, a landlord could apply for leave to commence or proceed with a distress after a company had been wound up by virtue of s471(2).

The amended operation of s468(4) following the *Corporate Law Reform Act* 1992 has already been explained. The same Act also repealed s471(2) and replaced it with s471B, which operates once a company is in the process of being wound up, and provides:

> While a company is being wound up in insolvency or by the Court, or a provisional liquidator of a company is acting, a person cannot begin or proceed with:
>
> (a) a proceeding in a court against the company or in relation to property of the company; or
>
> (b) enforcement process in relation to such property;
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> except with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

Distress is not an "enforcement process".[35] Nor is it "a proceeding in a court". The enactment of s471B means that any advantage which a landlord may have obtained by defining distress as a "proceeding" within s471(2) has now been lost. A landlord is not entitled to obtain leave to commence or proceed with a distress after a tenant company is in the process of being wound up.

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34 Again, special reasons are required, and must be such as would render it inequitable for leave to be refused. See *Re Roundwood Colliery* [1897] 1 Ch 373 at 331; *Daemar v Opeskin* (1985) 3 ACLC 743.

35 Section 9 of the *Corporations Law* 1992 defines "enforcement process" in relation to property as meaning:

(a) execution against that property; or

(b) any other enforcement process in relation to that property that involves a court or a sheriff".

The question that remains is whether a distress levied between the filing of an application to wind up and the making of an order is a "proceeding" within s467(7), and thus capable of being stayed, although it would not otherwise be void under s468(4). Cases which considered the question of whether distress is a "proceeding" in the context of either s467(7) or s471(2) (or their equivalents) are relevant here.

The decision of Cotton LJ in *Re Lancashire Cotton Spinning Co; ex parte Carnelley*[36] dealt in part with s87 of the *Companies Act* 1862 (UK).[37] In that case, Cotton LJ was asked whether s87 should be read together with s163 of the *Companies Act* 1862[38] to the effect that a distress commenced after the commencement of a winding up could be proceeded with by the leave of the Court.

> To my mind, it is doubtful whether, having regard to the express words of section 163, which says, "That any distress shall be void", it was right to say that section 87 included distress among the "proceedings which the Court might allow". There are other proceedings in the nature of actions and modes of enforcing claims against the company which undoubtedly would satisfy section 87 without including in the word "proceeding" a distress, which is in terms dealt with under section 163.[39]

However, his honour was constrained by an earlier decision to hold that the distress was a "proceeding" and, therefore, that the landlord could apply for leave under s87 to be relieved from the consequences of s163.

In *Re Bellaglade Ltd*[40] a case involving the UK equivalent of s467(7) of the *Corporations Law*, Oliver J expressed surprise at the line of cases which Cotton LJ had felt compelled to follow:

> Perhaps somewhat surprisingly it appears to have been assumed in a good many cases that a distress by a landlord is a proceeding within this section which can be stayed and

36 (1887) 35 Ch D 656.
37 The UK equivalent of s471(2).
38 Equivalent to s468 of the *Corporations Law* as it operated prior to the *Corporate Law Reform Act* 1992.
39 (1887) 35 Ch D 656 at 661.
40 [1977] 1 All ER 319.

> it has, so far as one can trace through the cases, been treated in the same way as an execution on a judgment.[41]

As that case concerned a voluntary winding up, however, his honour was not called upon to decide the point, and his comments were obiter. They have gained significance, though, by their adoption (again obiter) by two members of the House of Lords in *Re Herbert Berry Associates Ltd.*[42] In my opinion, there is real force in the argument that a distress is not a "proceeding" within s467 of the *Corporations Law*. Should an Australian court have the opportunity to consider the question, it is to be hoped that *Re Lancashire Cotton Spinning Co* will not be followed.

In summary:

- If a distress is a "proceeding" within s467 of the *Corporations Law*, a landlord may distrain during the period between application and order, or proceed with a distress "put in force" earlier, but subject always to the company, a creditor or a contributory applying for a stay of the "proceeding".

- If a distress is not a "proceeding", then a landlord may commence a distress at any time up to the making of a winding up order, and proceed at any time with a distress "put in force" before the making of a winding up order, without fear of the distress being stayed on the application of the company, a creditor or contributory.

- In either case, after a winding up order has been made, any distress for rent accrued prior to winding up will be void, and the Court has no jurisdiction to grant a landlord leave to commence a distress.

General

The right to distrain the property of strangers on the demised premises is unaffected by a tenant company's liquidation (whether voluntary or compulsory) as the provisions of the *Landlord and Tenant Act* 1936 (SA) apply only to the "property of the company". Therefore, a landlord is free to distrain the goods of strangers, which will not form a part of the assets of the company for the purposes of the liquidation. The presence of a debenture charge over the assets of a tenant company can have an

41 At 320.

42 [1977] 1 WLR 1437, per Lord Simon of Glaisdale at 1446, and Lord Russell of Killowen at 1448.

interesting effect here. If the value of the debenture exceeds the value of the assets charged, then beneficial ownership of those assets will vest in the holders of the charge. The company will have no interest in the property, and will not be entitled to intervene in any attempt by the landlord to seize those assets as part of a distress.[43]

Similarly, if a company in liquidation is the stranger leaving goods on the demised premises, the landlord may distrain the company's goods together with those of the tenant, without regard to the *Corporations Law*. This principle would, at first, appear to be contrary to the express wording of s468(4). The principle, however, is not to be found in the words of the section but in "the reason, the spirit and the meaning of the Act".[44] The purpose of the sections of the *Corporations Law* under discussion (and their predecessors under the *Companies Acts*) is to regulate the relationship between a company and its creditors, and between those creditors inter se. Section 468 should not have an application to persons who are not creditors of the company, such as the landlord in the above situation.

> [W]here the right of the landlord against his own tenant, not being the company, is not the right of a creditor of the company, but is simply the right to take the goods, whosesoever they happen to be, the ... section has no application ... [I]f it were not so, you would destroy the right of the landlord, and you would give him nothing in return.[45]

A landlord in such a situation does not have the creditor's remedy of filing a proof of debt and ranking equally with other unsecured creditors.

Bankruptcy

Under the *Bankruptcy Act* 1966 (Cth) the right of a landlord to levy or proceed with a distress for rent against the property of a debtor is lost on the happening of any of the following events:

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43 *Re Harpur's Cycle Fitting Company* [1900] 2 Ch 731.

44 *Re New City Constitutional Club Co* (1887) 34 Ch D 646 per Kay J at 653.

45 As above, citing Sir George Jessel MR in *Re Traders' North Staffordshire Carrying Company* (1874) LR 19 Eq 60. See also *Re Harpur's Cycle Fittings Company* [1900] 2 Ch 731, which suggests that the right to distrain will be lost if the landlord has a right to prove for the rent in the winding up.

- The making of a sequestration order against the debtor on a creditor's petition - ss43(2) and 58(4);

- The making of a sequestration order on the debtor's own petition - ss57A and 58(4);

- The execution by the debtor of a deed of assignment - ss231(2) and 58(4);

- The execution by the debtor of a deed of arrangement - ss237(2) and 58(4).

The *Bankruptcy Act* 1966 (Cth) differs from the *Corporations Law* in three important respects:

1. Section 58(4) prohibits a distress from being "levied or proceeded with" after bankruptcy. This differs from the *Corporations Law* formula of "put in force" in s468(4). The clear implication is that a landlord cannot take any steps after bankruptcy in respect of a distress which was commenced before bankruptcy, but not completed.

2. Section 58(4) prohibits the levying of or proceeding with a distress after bankruptcy "whether or not the bankrupt is a tenant of the landlord by whom the distress is sought to be levied". Clearly, a landlord cannot distrain the property of a bankrupt even where the bankrupt is a stranger to the lease, and where the landlord has no other remedy against the bankrupt because the landlord is not otherwise a creditor of the tenant. This is in direct contrast to the position of a landlord under the *Corporations Law*.

3. As with a winding up by the Court, a bankruptcy on a creditor's petition commences when the sequestration order is made. Like s467(7) of the *Corporations Law*, s60(1)(b)(i) of the *Bankruptcy Act* 1966 (Cth) operates in the period between the filing of the petition and the making of the order, and entitles the Court to order a stay of "any legal process ... against the ... property of the debtor ... in respect of the non-payment of a provable debt...". The reference to "any legal process" in s60(1)(b)(i) is clearly broader than a "proceeding" in s467(7) of the *Corporations Law*. There is, therefore, an even stronger argument that a distress levied or proceeded with in the period between the presentation of a creditor's petition and the making of a sequestration order may be

stayed by the Court under s60(1)(b).[46] The requirement that the legal process must relate to the non-payment of a provable debt, however, means that only a distress levied against a debtor as tenant could be stayed by the Court under this section. A distress levied against the goods of a stranger debtor, where the landlord is not a creditor of the debtor, could not be the subject of an order under s60(1)(b).

CONCLUSION

In the absence of reform to bring the remedy up to date, distress will remain a very technical procedure: one which presents a tenant or owner of goods with numerous opportunities to challenge the procedure and, potentially, to obtain significant damages from a landlord who has not strictly complied with the law. Where the tenant is insolvent, the procedure can become even more complicated (although not always less effective) by the intervention of claims by a larger category of third parties, together with strong resistance by receivers, trustees and liquidators. The procedures, and their attendant complexities, must always be borne in mind when advising landlords to resort to the remedy of distress.

46 See *Smith (A Bankrupt) v Braintree District Council* [1990] 2 AC 215 at 230. But compare *Re Fanshaw and Yorston; ex parte Birmingham and Staffordshire Gas Light Company* (1871) LR 11 Eq 615 at 618.