CPD TALK: ISSUES ARISING IN LANDLORD AND TENANT LITIGAITON

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- Second, recent UK case concerning relief from forfeiture in the context of a licence agreement.

- Third, the issue of rates and section 32 of the Local Government Reform Act 2014

Rights of Mortgagees and Mortgagors to Enter Into Leases

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- Conveyancing Act 1881:
  - Section 18 gave mortgagors and mortgagees a statutory power to enter into leases that could bind all interested parties.
  - Section 18(13) and 18(14) provided that the parties to a mortgage could exclude the statutory power to enter into leases.
  - Standard for a mortgagee to exclude the statutory leasing power.

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- The charges contained standard covenants requiring Mr Naughton to obtain the prior written consent of the bank before leasing any of the properties.
- In April 2005, without prior written consent, Mr Naughton leased the properties to N17 Electrics Limited.
- In January 2011, a receiver was appointed over the properties and N17 Electrics Limited was placed into liquidation.

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- Case determined on the basis of the Conveyancing Act 1881, as the mortgage was pre 1 December 2009 and, therefore, the provisions of the 2009 Act did not apply.
- At paragraph 24, Dunne J set out what was required in order for a mortgagee/receiver to be bound by a tenancy granted to a third party by a borrower:

N17 Electrics

“It is open, however, to the mortgagee and the tenant by agreement, express or implied, to create a new tenancy; and the question which always arises is the mere question of fact, whether such an agreement has been made in the particular case. If the mortgagee enters into the receipt of the rents and continues to take them from the tenants, this is almost conclusive evidence of an agreement between the mortgagee and the tenant for a new tenancy from year to year on the terms of the old tenancy; or, if the mortgagee serve notice on the tenant, requiring him to pay his rents direct to the mortgagee, and the tenants do not dissent, these are facts from which a jury may, and probably ought, to infer the existence of such a contract of tenancy”

N17 Electrics

- Since the N17 decision, there have been countless decisions applying it (Maloney v O'Shea [2013] IEHC 354, National Asset Loan Management Ltd and Others v Southlodge Inns Ltd and Another [2015] IEHC 109, Havbell Dac. v Dias [2018] IEHC 175, and Tyrell v Wright [2017] IEHC 92 and McCarthy v McCarthy [2021] IEHC 115).

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- The *Tyrell v Wright* decision mentioned above is an interesting case, as it involves a tenant successfully arguing that a mortgagee was bound on the basis of *N17 Electrics* and that a fund who purchased the mortgage was subsequently *not* bound.

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- The *Tyrell v Wright* decision mentioned above is an interesting case, as it involves a tenant successfully arguing that a mortgagee was bound on the basis of *N17 Electrics* and that a fund who purchased the mortgage was subsequently *not* bound.
- The critical takeaway from all of those cases is that they relate to pre 2009 mortgages and, therefore, the old law applies.

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  - Second, is granted on the best terms that can reasonably obtained and accord with good commercial practice.
- Therefore, it seems that sections 112 and 113 exhaust the circumstances in which a lease will be considered voidable or void.

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  - The original 2006 Bill *did* include an equivalent section, but this was ultimately removed in the 2009 Act.
  - Section 96(3) of the 2009 Act provides that the powers and rights contained within Chapter 3 of the 2009 Act shall take effect subject to the terms of any mortgage.
  - Critically, the powers and rights concerned are contained within Chapter 4 of the 2009 Act.
  - Wylie states: "*the result is that the provisions of Chapter 4 remain mandatory and cannot be contracted out of* ."

2009 Act

- Proposition:
  - The 2009 Act may have increased a mortgagor's right to lease mortgaged property without the mortgagee's prior written consent.
  - If this correct, then it is clearly of immediate relevance to mortgagees/banks/receivers, in that terms in post December 2009 mortgages which purport to restrict a mortgagor's right to enter into leases with third parties might be ineffective.
  - One of the difficulties is that the Oireachtas has not used normal language.
  - Look Back at the N17 decision in light of this. At the very least, a mortgagee's right to blankly refuse to considering consenting to a lease being created is expressly limited by section 112.

AIB v Fitzgerald

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- Simons J gave a decision in relation to the interaction between a lease granted which was contrary to a negative pledge clause in the context of a pre-2009 mortgage. While the old law applied, it is notable that Simons J in an *obiter* comment strongly indicated that the law had substantively changed. At paragraphs 50-54 he stated:

AIB v Fitzgerald

*"For completeness, it should be noted that the position of a tenant holding under an unauthorised lease granted by a mortgagor/landlord has been improved as a result of amendments introduced under the Land and Conveyancing Law Reform Act 2009 (" **the 2009 Act**"). (These amendments do not apply in the case of mortgages created prior to 1 December 2009)...*

...The implication of these provisions is that a mortgagee will be bound by a lease entered into without consent unless they can establish actual knowledge on the part of the lessee. It should be noted, however, that a lease will be void if granted other than for the best rent which can reasonably be obtained. See section 113 of the 2009 Act."

Relief From Forfeiture

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- Whether or not relief from forfeiture is available can be a very important question. In many instances, if it is available, then there will be a strong basis upon which it should be granted. For example, in the case of a commercial lease where there is only a small amount of rent outstanding that can be paid immediately, it is highly likely that relief from forfeiture will be granted.

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- In 1962, therefore, Vauxhall purchased a small rectangle of land near the proposed plant and built a water treatment plant on it. In order to transfer the water from the water treatment plant to the Manchester canal, Vauxhall needed to cross a small sliver of land owned by Manchester Canal Company.
- In October 1962, Vauxhall and Manchester entered into a licence agreement to allow Vauxhall to discharge the treated water by way of pipes over the small sliver of land and into the Manchester canal. The licence agreement was to last in perpetuity and the annual fee was £50 per annum. It contained a forfeiture clause in the event of Vauxhall's non-compliance.

Manchester Canal Company v Vauxhall Motors [2019] UKSC 46

- Due to sheer oversight, Vauxhall forgot to pay the £50 licence fee and also failed to respond to Manchester's forfeiture notice threatening to forfeit the licence for non-compliance. Ultimately, Manchester did so and Vauxhall instituted proceedings seeking relief from forfeiture.

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- Due to sheer oversight, Vauxhall forgot to pay the £50 licence fee and also failed to respond to Manchester's forfeiture notice threatening to forfeit the licence for non-compliance. Ultimately, Manchester did so and Vauxhall instituted proceedings seeking relief from forfeiture.
- The sole issue in the proceedings was whether relief from forfeiture was available in the context of this licence agreement, which the parties agreed was not a lease and did not create the relationship of landlord and tenant.

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- The sole issue in the proceedings was whether relief from forfeiture was available in the context of this licence agreement, which the parties agreed was not a lease and did not create the relationship of landlord and tenant.
- The UK Supreme Court said that relief from forfeiture was available as there was a sufficient possessory interest that Vauxhall had in the land. The fact that Vauxhall had a right highly analogous to a proprietary right, which was to last perpetually was important to the court.

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- The practical consequences for Vauxhall were significant: if relief from forfeiture was available, then they had an extraordinarily strong case for it, as all it would involve was paying the outstanding nominal licence fee. If relief from forfeiture was not available, however, then it did not matter how compelling a case it had, as there was simply no jurisdiction to grant relief. This would significantly inhibit its ability to operate from the manufacturing plant.

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- The case is somewhat fact specific, however, which should be noted when attempting to apply its reasoning. The Supreme Court noted:

Manchester Canal Company v Vauxhall Motors [2019] UKSC 46

- *"I would acknowledge that a recognition that equity may relieve against the forfeiture of possessory rights over real property, falling short of a proprietary interest, means that the simple assumption of the editors of Gray and Gray that relief may never be granted from the forfeiture of a licence calls for re-examination. There will be many licences which only grant rights falling short of possession, for which that simple proposition will still hold good. As will appear, the Licence granted in the present case was a very unusual one, both because it granted an element of virtually exclusive possession, coupled with a high degree of control over the locus in quo, and because it was granted in perpetuity. It by no means follows from a conclusion that the rights conferred by this Licence are within equity's jurisdiction to relieve from forfeiture, that licences in relation to land will fall generally within that same boundary"*

Irish Position

- Interestingly, the Irish courts have had no problem granting relief from forfeiture in this context. In *Whipp v Mackey* [1927] IR 372 and *Judd v McAlinden* [1980] IEHC 1194, the Supreme Court and High Court granted relief from forfeiture in the context of licence agreements.

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- It is important to bear this in mind when advising occupants of land. Anecdotally from discussions with practitioners, it may seem that there is a lack of understanding of this point. The practical consequences are enormous.

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  - A charge over shares (see: *Cukurova Finance International* [2013] UKPC 2)

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  - Second, the object of the agreement will generally have to involve someone granting someone else rights over that property generally for some sort of payment. In the event that there is a forfeiture clause which has the object of securing payment of the rent, then forfeiture should generally be allowed provided that reasonable compensation is possible (see: *Peachy v Duke of Somerset* (1721) 1 Str 447)

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  - Second, the object of the agreement will generally have to involve someone granting someone else rights over that property generally for some sort of payment. In the event that there is a forfeiture clause which has the object of securing payment of the rent, then forfeiture should generally be allowed provided that reasonable compensation is possible (see: *Peachy v Duke of Somerset* (1721) 1 Str 447)
  - Once those two core aspects are met, then it seems to be more sensible to ask the question of whether equitable relief from forfeiture cannot apply rather than whether it should. If it can apply, then the consequences for a user of property can be significant. Whether or not equitable relief from forfeiture *should* be granted in any case is of course entirely fact dependent.

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- The law surrounding rates is compiled from a series of antiquated statutes, some more more modern legislative amendments and both English and Irish caselaw. As with any area of law compiled in such a way, it lends itself to incoherence at times.
- One recent legislative measure was intended to change the law in this area for the better and for the assistance of conveyancers. This is section 32 of the Local Government Reform Act 2014.

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  - First, in general terms, whoever occupies a rateable property is responsible for the payment of rates. This is set out in section 71 of the Poor Relief (Ireland) Act 1838. In order to define the concept of occupation, the Supreme Court in *Telecom Eireann v Commissioner for Valuation* [1994] 1 IR 66 held that there were three criteria relevant to this analysis:
    - The occupation must be exclusive
    - The occupation must be of benefit to the occupier
    - The occupation must not be temporary

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  - Second, a fundamental aspect of the old rates regime was that subsequent occupiers were liable for a previous occupiers' rates bill if it was not paid. As such, it became necessary to account for the payment of rates when conveying a property to ensure that a party subsequently in occupation did not incur an unintended liability.

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- There are a few fundamental principles of rating law that should be briefly set out before section 32 is analysed.
  - Third, despite its apparent simplicity, anyone with a practical understanding of property law and how it is structured could quickly see how disputes could arise in respect of who is liable for a particular rates bill. For example, at any one time there could be one legal entity in occupation, but another entity in practical operation. It is often the case that third parties interact with the land, sometimes in a powerful and authoritative way (e.g. a receiver). Due to the fact that a rates bill in respect of a prominent commercial unit can become quite big quite quickly, it is important that people know where they stand.

Section 32

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- Section 32 of the Local Government Reform Act 2014 was not included in the original bill. It was introduced in the Seanad as a government amendment. It is a reasonably brief statutory section. In the Seanad Debate concerning the section, Deputy Phil Hogan explained what it was all about:

Section 32

- He said:

"*The legislation underpinning many aspects of commercial rates dates from the 19th century. A large body of case law is well established and local authorities and ratepayers are in the main very familiar with and generally accepting of the operation and practice of the rating system, notwithstanding what we discussed earlier….I have been concerned with an aspect of rating legislation that in my view could give rise to an unfair burden on new occupiers of rateable property, be they companies that wish to expand, relocate or indeed start up. The subsequent occupier provisions contained in the Poor Relief (Ireland) Acts 1838 and 1849 determine that occupiers can held liable for up to two years for the unpaid commercial rates of the previous occupier….*

Section 32

- He said:

"*...I am taking this opportunity in amendment No. 142 to repeal those provisions and eliminate this financial burden for new occupiers to ensure that any possible barriers to enterprise development are removed. Removing this liability offers the possibility that property that may otherwise have remained vacant and unoccupied can now be re-let, thus improving opportunities in the property market and reducing the instance of vacant commercial properties…I am taking the opportunity with amendment No. 28 to introduce a new duty to inform the local authority of the transfer of rateable property, be it a change of ownership or tenancy, in order that the local authority is in a position to ensure liability can be established as soon as it falls due. The amendment details the nature of these requirements and the penalty for non-compliance…*"

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- In addition, there are two definitions of relevance:
  - An “occupier” is defined as every person in immediate use and enjoyment of the property
  - An “owner” is defined as: “*a person (other than a mortgagee not in possession) who, whether in that person’s own right or as trustee or agent for any other person, is entitled to receive the rent of the property or, where the property is not let, would be so entitled if it were so let*”.

Section 32

- Section 32(2) in total says as follows:

"*Where relevant property, or an interest in relevant property, is transferred from one person to another person in circumstances that render that other person liable for rates on the property so transferred* **('Triggering Provision'):**

(a) it shall shall be the duty of the owner of the property (being the owner of the property prior to transfer) … to notify, in writing, the rating authority … of the transfer not later than 2 weeks after the date of the transfer **('Notification Obligation')**

(b) it shall be the duty of the person transferring the property being either the occupier or the owner, to discharge all rates for which he or she is liable for at the date of the transfer of the property or of an interest in it" **('Payment Obligation')**

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- In order to analyse section 32, it is helpful to imagine a hypothetical example. Suppose that there is a large commercial unit which is leased to a tenant by a landlord. The landlord has a mortgage on the commercial unit with a bank. The bank appoints a receiver over the landlord's interest pursuant to the mortgage and exercises a power of sale and sells the landlord's interest to a third party.

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- What is the situation in relation to the payment of rates by the landlord or the receiver?
- From the perspective of the landlord and the receiver, in my view neither are in occupation of the premises. The landlord clearly is not and there is a set of caselaw that states that a receiver is not either (see: *Ratford v Northavon DC* [1987] QB 357 and *Rees v Boston BC* [2002] 1 WLR 1304])

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- In respect of section 32, however, the key point is that the Triggering Provision has not been met. For that reason, it is hard to see how the Notification Obligation or the Payment Obligation arise. This is often overlooked when parties are considering the import of section 32.

Charges and Penalties

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- First, there is the Payment Obligation which has been dealt with and set out at section 32(2)(b). Section 32(2)(3) states that if this is unpaid then it shall remain as a charge on the property.
- Second, there is an additional provision set out in section 32(2)(4) which provides that an "owner" shall be liable for a charge to no more than 2 years outstanding rates owed by the previous occupier where:

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  (a) the owner has not complied with the Notification Obligation ***and***

  (b) the Payment Obligation has not been complied with

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  - Second, if the Triggering Provision is engaged, then the Notification Obligation and Payment Obligations are engaged. The Notification Obligation is quite straightforward as it requires the owner to notify the local authority. The Payment Obligation is not quite as straightforward as it places an obligation on:

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  - Second, if the Triggering Provision is engaged, then the Notification Obligation and Payment Obligations are engaged. The Notification Obligation is quite straightforward as it requires the owner to notify the local authority. The Payment Obligation is not quite as straightforward as it places an obligation on:
    - "*The person transferring the property*"
    - Who can be "*either the occupier or the owner*"
    - To discharge all rates *"for which he or she is liable"*. This last provision is critical, as it involves an analysis from first principles of whether someone is liable for rates in the first place.

Analysis

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  - Third, the provision that a lot of people are scared of is the charging provision in section 32(4) which can make the owner of a property liable for outstanding rates due from a previous occupier. The easy way to avoid section 32(4) is to ensure that the Notification Obligation is complied with, as section 32(4) requires that both the Notification *and* Payment Obligations are not complied with. In addition, it seems implicit in the wording of section 32(4) that the Triggering Provision must have been engaged in the first place for it to apply. A particular unfairness could arise in circumstances where an owner does not know of an assignment of property which leads to a new occupant being liable for rates, and where outstanding rates are *not* dealt with.

Analysis

- The interpretation of section 32 is complicated by a variety of overlapping conveyancing practices and also other statutes. For example, in relation to the example previously given, while the receiver could not be said to be in rateable occupancy of the premises, section 24(8) of the 1881 Act states that a receiver shall apply the proceeds of sale to discharge *"all rents, taxes, rates and outgoing whatever affecting the mortgaged property"*. These obligations can depend on whether a receiver is appointed pursuant to a statutory or contractual power to do so, and whether the mortgage deed purports to vary section 24(8) or not. This highlights the complexity of advising accurately in this area as there are often different statutes pulling in different directions.

Conclusion