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The hypothetical remedy: Landlord's hypothec after the BAD Act

At common law the landlord had a hypothec over the contents of certain rented subjects for the rent. Very little about this was entirely clear.

The majority view was that it was for one year's future rent although I have done sequestrations for rent for both arrears and future rent without anyone objecting. It applied to the *invecta et illata* which was basically everything moveable in the premises. S 208(8) provides that the hypothec is security for rent due and unpaid only and subsists so long as the rent is unpaid. This may have implications for the remedy of requiring the tenant to plenish and furbish the premises (since it no longer applies to future rent) but in most cases this will be dealt with in the commercial lease anyway.

The remedy was available for only certain types of property. It applied to commercial premises and agricultural holdings less than 2 acres in size. In terms of s208 (3) dwellinghouses, agricultural land and crofts are all excluded. It did not apply to the possessions of the debtor's family but could affect the property of others. In *Scottish & Newcastle Breweries Ltd-v-Edinburgh City Council* 1979 SLT 11, for example the Council were able to sell the kegs of a tenant's pub and an attempt by the brewers who owned the kegs to stop this by interdict was unsuccessful. This has also been changed by s208 (4) which provides that the hypothec no longer applies to property belonging to anyone other than the tenant and subsection (7) which provides where it is owned in common with someone else only applies to the tenant's interest.

The key part to the remedy of landlord's hypothec was the ability to apply to the Sheriff and get a warrant to sell the goods to set off against the rent. In their helpful "notes" to the BAD Act the Scottish Executive commented that this was a very rarely used diligence. The basis for this statement was apparently the lack of reported cases. I for one have never had an action for sequestration for rent defended, let alone come to a judicial decision. I think this is just another example of the sort of ignorance that has done so much damage to our rules of diligence in recent times.

The Bankruptcy and Diligence etc (S) Act 2007 abolished the right to apply for the warrant to sell. Very curiously, however, it did this but retained the landlord's right of hypothec in various circumstances and clarified the extent of the remedy. We are thus left with a right without any obvious remedy.

It is worth noting that even before the 2007 Act insolvency practitioners had been able to defeat the hypothec in some situations. In the slightly doubtful decision of *Cumbernauld Development Corpn-v-Mustone Ltd* 1982 SLT (Sh Ct) 55 a Sheriff who was

referred to minimal authority held that the hypothec did not rank ahead of a receiver appointed under a floating charge because it was not a completed diligence at the time of appointment. Given that it is no longer possible to "complete" the diligence this case remains of potential interest.

On the other hand we have s33(2) of the Bankruptcy (S) Act 1985 which still provides that the vesting of the estate in the bankrupt did not affect the right of hypothec of the landlord thus giving it a similar preference in a sequestration to that of a heritable creditor.

S208 (2) provides that the remedy of landlord's hypothec exists subject to the following subsections and "ranks accordingly". This means that the old law is still relevant. There may be circumstances where that ranking is uncertain, not in sequestrations but in administrations where the principle of *Mustone* might still apply.

This does not seem to have been thought of either. It may be enough now to complete the diligence that it is asserted to the Insolvency Practitioner that has been appointed.

Before we get to the question of what happens then we need to consider a further complication for the landlord. S 64(1) of the Taxes Management Act 1970 provides as follows:

(1) If at any time at which any moveable goods and effects belonging to any person (in this section referred to as "the person in default") are liable to be taken by virtue of any [...] diligence whatever, or by any assignation, [the person in default is in arrears in respect of any such sums as are referred to in subsection (1A) below, the goods and effects may not be so taken unless on demand made by the collector] the person proceeding to take the said goods and effects pays [such sums as have fallen due at or before the date of pointing or, as the case may be, other diligence or assignation.]

I think this section raises a whole range of questions:

- Is a hypothec without a sequestration for rent a "diligence"
- Is it an "assignation"
- Can the goods be "taken" when there is no remedy of sequestration for rent?
- How does the landlord "proceed" to take the goods?
- Do the people who write this stuff know anything about our law?

Putting the last point aside it is apparently a problem for a landlord that if they seek to assert the hypothec they can become liable for the tax and in the all too frequent circumstance where the petitioning creditor is HMRC the threat of this may result in a landlord backing off.

I also suggest that this provision may be something for IPs to think about. As I understand it, it is not too uncommon for IPs and landlords to come to a deal by which they are given the ability to sell the goods otherwise caught in exchange for the Landlord getting a share of the proceeds of that sale as a preference. This is the sort of arrangement that needs to be made when our law is modified by incompetents. I would suggest, however, that where HMRC is a creditor in the insolvency (and when are they not?) the IP should be careful about coming to any such arrangement without consulting them. It may be capable of being argued that where such a deal is come to s64 does not apply, indeed it is arguable that s64 does not apply at all anyway following the BAD Act, but it might be better if this was argued about by someone else rather than the IP.

So what can a landlord do? The Scottish Executive expressed the view that they could exercise their rights by an attachment order which has basically replaced poinding. There are some obvious problems with this such as the banning on diligence against Administrators and the provisions of s of the Bankruptcy (S) Act 1985 which provides:

- (4) No arrestment, money attachment, interim attachment or attachment of the estate of the debtor (including any estate vesting in the trustee under section 32(6) of this Act executed—
 - (a) within the period of 60 days before the date of sequestration and whether or not subsisting at that date; or
 - (b) on or after the date of sequestration,
 shall be effectual to create a preference for the arrester or attacher; and the estate so arrested or attached, or any funds released under section 73J(2) of the Debtors (Scotland) Act 1987 (c.18) (automatic release of funds) , or the proceeds of sale thereof, shall be handed over to the trustee.

So Attachment is not the answer.

It is still possible to obtain an interdict against the removal of the invecta et illata and it may be possible to obtain an order requiring furnishing and plenishing depending upon the terms of the lease but it seems to me that the best the landlord can hope for is a

standoff whereby he gets to hold onto stuff that he cannot sell or give good title too and which will presumably be preventing the re-letting of the premises. It is a deeply unattractive option and it is made worse by s208 (5) of the BAD Act which gives good title to anyone the goods are sold to so long as they acquire them in good faith. So in a closing down situation even if the landlord had got an interdict he has no remedy against those who acquire the goods.

Basically, from a landlord's point of view this is a right without a remedy. It seems increasingly unlikely to me that a landlord is going to be able to convert that right into cash unless he gets the co-operation of the IP and it is not that obvious to me why the IP should co-operate. It has been suggested that it might have been better simply to abolish the right altogether¹ or at least simplified (surely the application of hope over experience) but so far these pleas have fallen on deaf ears. I think and almost hope that the Scottish Parliament has got bored with reforming diligence and I think we may be left with this problem for some time to come.

David Logan

¹ "The Landlord's hypothec; Down but is it out?" by Angus McAllister 2010 Juridical Review, p65;"The Landlord's hypothec: difficulties in practice Andrew Steven 2010 SLT news p210

Appendix

208 Abolition of sequestration for rent and restriction of landlord's hypothec

(1) The diligence of sequestration for rent is abolished and any enactment or rule of law enabling an action of sequestration for rent to be raised ceases to have effect.

(2) Notwithstanding that abolition, the landlord's hypothec—

(a) continues, subject to subsections (3) to (9) below, as a right in security over corporeal moveable property kept in or on the subjects let; and—

(b) ranks accordingly in any—

(i) sequestration;

(ii) insolvency proceedings; or

(iii) other process in which there is ranking,

in respect of that property.

(3) The landlord's hypothec no longer arises in relation to property which is kept—

(a) in a dwellinghouse;

(b) on agricultural land; or

(c) on a croft.

(4) It no longer arises in relation to property which is owned by a person other than the tenant.

(5) Property which is acquired by a person from the tenant—

(a) in good faith; or

(b) where the property is acquired after an interdict prohibiting the tenant from disposing of or removing items secured by the hypothec has been granted in favour the landlord, in good faith and for value,

ceases to be subject to the hypothec upon acquisition by the person.

(6) Subsection (5)(b) above does not affect the tenant's liability for breach of the interdict.

(7) Where property is owned in common by the tenant and a third party, any right of hypothec arises only to the extent of the tenant's interest in that property.

(8) The landlord's hypothec—

(a) is security for rent due and unpaid only; and

(b) subsists for so long as that rent remains unpaid.

(9) Any enactment or rule of law relating to the landlord's hypothec ceases to have effect in so far as it is inconsistent with subsections (2) to (8) above.

(10) Subsections (1) to (3), (8) and (9) above do not affect an action of sequestration for rent brought before this section comes into force.

(11) Subsection (3) above does not affect a landlord's right of hypothec which arose before and subsists on the coming into force of this section.

(12) In subsection (2) above, "insolvency proceedings" means—

(a) winding up;

(b) receivership;

(c) administration; and

(d) proceedings in relation to a company voluntary arrangement, within the meaning of the [Insolvency Act 1986 \(c.45\)](#).

(13) In subsection (3) above—

"agricultural land" has the same meaning as in [section 1\(2\) of the Agricultural Holdings \(Scotland\) Act 1991 \(c.55\)](#);

"croft" has the same meaning as in [section 3\(1\) of the Crofters \(Scotland\) Act 1993 \(c.44\)](#); and

"dwellinghouse" includes—

(a) a mobile home or other place used as a dwelling; and

(b) any other structure or building used in connection with the dwellinghouse.

Annotation

Section 208 Introduction

The Scottish Government's Explanatory Notes (see General Note: [Explanatory Notes](#)) say as follows:

"729. Under the common law a landlord has a right in security over certain moveable property situated in land or buildings which the landlord has let. The security is known as the landlord's hypothec and it secures 1 year's rent due from a tenant. Before the coming into force of this section it would last for 3 months after the last due date for payment of that rent. The security could be enforced by an action of sequestration for rent provided it were raised before the end of that 3 months. The action attached the goods secured by the hypothec and permitted the landlord to obtain warrant to sell the goods in satisfaction of the rent. This action was available to a landlord in addition to any other diligence such as attachment or arrestment which would also be available to the landlord as a creditor of a tenant.

"730. Section 208(1) abolishes the diligence of sequestration for rent and subsections (2) to (9) and (11) make various changes to the law relating to the landlord's hypothec as a consequence.

"731. The abolition of sequestration for rent does not affect any action for sequestration for rent brought before this section comes into force but the provisions in subsections (4) to (7) limiting the property which is subject to the landlord's hypothec and therefore attachable by sequestration for rent will apply to existing actions (subsection (10)).

"732. Subsection (2) preserves the landlord's hypothec and makes clear the nature of the security it confers. It continues as a real right in security over corporeal moveable property and as a result it gives the landlord an appropriate ranking relating to property over which it confers a security. 'Insolvency proceedings' for the purposes of subsection (2) are defined in subsection (12).

"733. Subsection (3) clarifies the limitations on the landlord's hypothec and abolishes it as a security over property kept in a dwellinghouse, on agricultural land or on a croft. A 'dwellinghouse' for this purpose includes a mobile home, caravan or houseboat used as a dwelling.

"734. Under subsection (4), the hypothec will no longer arise in relation to property owned by a person other than the tenant.

"735. Subsection (5) provides that the hypothec does not affect any property which is acquired by a third party from the tenant in good faith or, where a landlord has interdicted a tenant from disposing of property subject to the hypothec, any property bought in good faith and for value by a third party from a tenant. But if property is sold by a tenant in breach of an interdict, the tenant remains liable for the breach despite the property no longer being subject to the hypothec due to subsection (5)(b).

"736. Where property is in the shared ownership of the tenant and a third party, the hypothec can secure only the tenant's interest in the property (subsection (7)).

"737. Subsection (8) provides that the landlord's hypothec is security for any rent for which the date for payment has passed and payment has not been made (so it cannot be

security for future rent due) and that it continues as long as the rent remains unpaid. This overrides the common law rule that the hypothec secures 1 year's rent and lapses if not enforced by sequestration for rent within 1 month of the date the rent was due (see subsection (9)). The change made by subsection (8) will apply to any pre-existing hypothec.

"738. Subsections (2) to (9) (but not subsection (3)) affect a landlord's right of hypothec which arose before this section comes into force and which subsists on that date (see subsection (11))."

Subsection (1)

See General Note: [Enactment](#).

See General Note: [Rule of Law](#).

Subsection (2)

Insolvency proceedings — s.208(12).

Subsection (3)

Agricultural land — s.208(13).

Croft — s.208(13).

Dwellinghouse — s.208(13).