LANDLORD'S RIGHT TO SUE A TENANT

Thekweni Properties sued its tenant for payment of arrear rentals owing in terms of an agreement of lease. In a special plea the tenant alleged that the landlord had divested itself of the power to sue for rental by virtue of a cession *in securitatem debiti* in favour of a bank. The Durban High Court dismissed the plea and granted judgement in favour of the landlord. The tenant lodged an appeal.

In Picardi Hotels Limited vs Thekweni Properties (Pty) Limited (680/07) (2008) ZASCA 128, the Supreme Court of Appeal upheld the appeal and ruled that "*It is settled law that unless otherwise agreed, a cession in securitatem debiti results in the cedent being deprived of the right to recover the ceded debt, retaining only the bare dominium or a "reversionary interest" therein.*"

The Court went on to state that "*An effective and unconditional transfer of rights occurred when the cession in securitatem debiti was executed. The consequence is that the landlord was divested of the power to sue the tenant in respect of the unpaid rentals. In order to sue for the recovery of the ceded debt the landlord should have taken recession of them from the bank.*"

The Court found that the phrase "*cedes, transfers and assigns*" amounted to a transfer of rights even though the bank had agreed to suspend the right to act and would do so only if the landlord breached a term of the loan. The suspension of the right did not alter the fact that an effective cession had taken place.

Most mortgage bonds have a clause which grants a cession of rentals to the mortgagee subject to a proviso that the cession will not be acted upon by the mortgagee unless the mortgagor has failed to comply with the terms or conditions of the loan for which the mortgage bond provides security.

On the obvious question of whether a landlord would still be entitled to collect rentals which were not in arrears (without reference to the bank), the Appeal

Court ruled that there was nothing to prevent the landlord from "*continuing to collect the rentals, the cession notwithstanding. This is a question of mandate. It is not unusual for a creditor to permit a debtor to collect ceded debts. If however the landlord wished to sue for unpaid rentals it would have to obtain a recession of the ceded claims from the bank.*"

Following a line of cases handed down over the past decade or so, this judgement underlines the blurring of the distinction between an out and out cession and a cession in security or *in securitatem debiti*. The only residual distinction is that in the latter instance the cedent is entitled to a reversion of the ceded right upon settlement of the cedent's indebtedness to the creditor.

The judgement gives rise to a number of practical issues. As the cession *in securitatem debiti* was contained in the mortgage bond, it would seem that the bank and landlord would be required to enter into an agreement of variation of the terms of the bond in order to effect a recession of the ceded debt. Would it not be simpler for the variation agreement to provide for the cancellation of the cession and the deletion of the clause containing the cession? However a bank would be reluctant to cancel the cession or agree to a recession in a multi-tenanted building as the bank would lose the security provided by the cession of rentals owing by the remaining tenants in the building.

A bank which agreed to a recession of the rentals to the landlord or to the cancellation of a cession would insist upon a replacement cession of rentals once the litigation between the landlord and tenant had been completed. However litigation can take twelve months or more. During that period the bank would have no rights of action against the defaulting tenant or other tenants of the landlord. Most commercial loans are granted against the security afforded by a mortgage bond registered against the title deeds of immovable property. The security is enhanced by the rentals payable by the tenants of the property and by the quality of those tenants. A lender must be assured of a guaranteed rental stream to service the loan. A cession of rentals is therefore fundamental to a decision to advance a loan. Would it not be preferable for a bank, as cessionary, to institute legal proceedings against a defaulting tenant?

Banks may have to remove from their standard mortgage bonds the clause which automatically cedes rentals in security, notwithstanding the proviso that the bank will not act upon the cession unless the landlord breaches the terms of the loan or of the mortgage bond. It may be more practical for the bank to take a separate cession of rentals from the landlord. In a multi-tenanted building the landlord could sign separate cessions of rentals for each tenanted area. The tenant would not be named otherwise the bank would be obliged to obtain a replacement cession whenever a change of tenant occurred. The bank would not necessarily know when changes took place.

To preserve the ability to take effective and speedy action against a defaulting tenant, a landlord should seek a written assurance from a mortgagee bank that, on request, the bank will re-cede the rentals to enable the landlord to institute legal proceedings against a tenant. It is doubtful whether a bank could agree that a request by a landlord for recession would be deemed to amount to a recession.

What to the Appeal Court was a clear-cut legal issue of interpretation has given rise to a number of imponderables for both landlords and creditors of landlords. The decision will also impact on the right of a creditor to sue a debtor where the debt has been ceded in security to a third party such as a bank.

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