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The limited rights of residential licensees in Ireland: A case for carefully targeted legal reform

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Abstract

Increasing numbers of people live under residential licences as a result of pressure on the housing market. Residential licences arise in disparate circumstances, including in house shares, under the rent-a-room scheme and where people live in their parents' home. This paper outlines the legal construct of licences: at base, a permission to reside. It sets out factors that distinguish licences from tenancies, in particular the absence of exclusive possession. While licences are subject to minimal regulation in comparison to tenancies, this paper presents licensors' and licencees' rights in their constitutional, common-law and statutory context, including standards of accommodation and 'packing-up' periods. It reflects on the constitutional position presented by a licensee under a licensor's tenancy obtaining the right to become a tenant under the Residential Tenancies Act, 2004–16. In particular, it probes whether constitutional rights to the inviolability of the dwelling may be balanced in favour of augmenting licensees' rights. In this context it posits potential for reform while highlighting the regulatory challenge presented by heterogeneous forms of licences.

Keywords: Residential licences, standards, packing up periods, constitutional rights to property, inviolability of dwelling

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Introduction

People living under licence arrangements constitute a significant group in Ireland. Comprising a broad category of people in disparate situations, licensees tend to be the result rather than the focus of policy, regulations and circumstances. Pressure on the housing market has led to the promotion of the rent-a-room scheme, by which people can rent rooms in their home up to certain tax-free thresholds; the proliferation of house-sharing arrangements (some suffering from significant overcrowding); and the 'boomerang generation' returning to live in their parents' homes. Each represents a response to housing scarcity which is predicated on a different form of licence arrangement. While tenure is precarious and standards of licensees' accommodation are difficult to guarantee under current regulations, the variety of licence arrangements undermines extrapolation of any unitary regulatory approach.

This article first outlines the core characteristic of licences as conferring permission to reside, rather than affording any legal estate or stake in land. Key factors distinguishing licences from tenancies are distilled through case law, noting areas of convergence. Common forms of licences within the residential sector and groups of people commonly living under various types of licence arrangement are described. Notice (or 'packing-up') periods in licence revocation, curtailment of licensors' rights of revocation though equitable doctrines, and implicit, statutory or contractual standards potentially applicable to licensees' accommodation are then set out. The constitutional rights of resident licensors are highlighted in the context of equality legislation and through examination of licensees' rights under the Residential Tenancies Act to apply to their licensor's landlord to become a tenant. Constitutional and drafting fault lines of this mechanism are explored. With those fault lines in mind, this article concludes by suggesting routes and requisite caution to legal reform to better protect a larger cohort of people living under licence arrangements.

Distinction between legal nature of licences and tenancies

At base, a licence is a permission to do something which would otherwise be unlawful. The legal device appears in many spheres, including: permitting dog ownership under the Control of Dogs Acts, 1986–92; permitting the operation of a potentially polluting factory

subject to regulations under the Environmental Protection Agency (Industrial Emissions) (Licensing) Regulations, 2013 (SI 137/2013); and being the legal basis for the permission to enter a cinema to watch a film, having bought a ticket. A licence always has a permissive quality; however, it may also possess regulatory characteristics. Thus, a factory may be permitted to emit particulates up to a certain level and subject to monitoring; a cinema-goer obtains permission to occupy a cinema seat while watching a film (but is prohibited from using recording devices in the auditorium); a person may be permitted to reside in a licensor's property as long as they abide by particular house rules. Media reports of such house rules include living rooms being off limits and requirements for the licensee to vacate at the weekends (Sweeney, 2016).

In distinction, a tenancy is an interest or estate in land (see Wylie, 2014). This is a property right that imparts exclusive possession, rather than merely a permission to do something in respect of a property (including the generally non-exclusive permission to occupy it). In Ireland, pursuant to Section 11 of the Land and Conveyancing Reform Act, 2009, only two forms of legal estates in land may be created or disposed of. These are freehold and leasehold. Within the definitions section of that Act, a 'lease' is an instrument that creates a tenancy, and a 'tenancy' means the estate or interest which arises from the relationship of landlord and tenant however created, though not including a tenancy at will or sufferance (Section 3). Interests in land may also be created and disposed of; these are exhaustively listed at Section 11(4) of the 2009 Act. While including easements, incumbrances and profit à prendre, the list does not include licences. Modern statute therefore confirms the common law position that a licence does not create any estate or legal or equitable interest in the property to which it relates. That common law position has some longevity. In *Thomas v Sorrell* (1673) Vaugh 330, at 351, it was stated:

> A dispensation or licence properly passeth no interest, nor alters nor transfers any property in any thing, but only makes an action lawful which without it had been unlawful. As a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions, which without licence, had been unlawful.

Somewhat sullying this neat distinction was the acceptance in *Hempenstall v Minister for the Environment* [1994] IR 20 that taxi licences amount to constitutionally protected property rights. The

plaintiffs argued that taxi deregulation devalued property rights in their licences. Costello J. held that adherence to the law was a condition of the licence; it was implicit that the law might change. A change in legal position was not an attack on property rights unless some other reason, other than an impact on property value, was given. No such reason for invalidity (or indeed evidence of devaluation of the licences) was established. Coming to similar conclusions in respect of the law's ability to alter the conditions under which a statutorily conferred licence is granted, Carroll J. in *State (Pheasantry) v. Donnelly* [1992] ILRM characterised a licence as 'a privilege granted by statute and regulated for the public good'. While *Hempenstall* raises questions over the potential that a licence constitutes a property right, the doctrinal basis for arriving at the same end point appears to have better basis in the *Donnelly* decision.

The constitutional nexus is discussed further below. However, at this juncture it is worth noting that a licence can be at least a gateway to accessing further constitutionally protected rights. In *Hempenstall* it was accepted that a licence was a property right. In respect of residential licences, whether this property right imparts any constitutional protection to a licensee's dwelling is a thorny question.

Characteristics of licences as distinct from tenancies

What constitutes a lease, as opposed to a licence, has been the subject of considerable case law, not least because agreements dressed up as licences have been found by the courts to in fact be tenancies, often with the intention of limiting occupants' rights to those of licensees rather than tenants. As such, most cases discussing the nature of licences in a residential context do so in comparison to tenancies.

In essence, a residential licence is a permission to occupy a dwelling, which falls short of affording exclusive occupation or possession of the premises to the licensee. This key characteristic often debars licensees from tenants' statutory rights to standards, notice periods and other securities associated with exclusive occupation of a dwelling.

Rather than parties' stated intention or use of terms such as 'licence fee' instead of 'rent', the substance of the agreement is examined to determine whether it creates an agreement to occupy as a licensee or as a tenant. As Lord Templeman stated in *Street v Mountford* [1985] 2 All ER 289, at 294:

> If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade.

Deriving from that case, the primary indicator of a tenancy is exclusive occupation or possession of the property, for which payment is made (often periodically). Such occupation may be subject to restrictions and may be time-limited. However, as a tenancy is an estate in land, the tenant has the power to exclude all others from it, including the landlord (unless exercising limited rights which may be reserved under the tenancy agreement). This is the sense in which occupation or possession of the property is exclusive. In commercial leases, Irish courts have accepted the licence/lease distinction posited in *Street v Mountford* (*Smith v Irish Rail* (unreported, High Court, 9 October 2002, Peart J.); *Esso Ireland Limited v Nine One Limited* [2013] IEHC 514). As *Street v Mountford* related to a residential context, it is reasonable to assume Irish courts will follow it in that sector also. Certainly, Residential Tenancy Board tribunals apply principles consistent with *Street v Mountford* when determining whether a licence (over which they have no jurisdiction) or a tenancy applies: *Stankiewicz v Darcy* TR0515–001156, 26 August 2015; *O'Driscoll v Mulvaney* TR0915–001354; *Duke v Stapleton, Matthews and McGovern* TR115–000996, 27 May 2015.

Albeit exclusive possession is the primary indicator of a tenancy as opposed to a licence, exceptional circumstances may negative the intention to create a tenancy even where exclusive possession is conferred. In those circumstances a licence will prevail. Examples include where the parties did not intend to create legal relations at all with their arrangement (for example, a family arrangement or temporarily facilitating); where the parties' primary relationship is of vendor and purchaser; or if occupation is contingent on employment. A further exceptional circumstance mentioned as creating a licence in *Street v Mountford* was where a licensor/landlord did not have power to grant a tenancy. However, in *Bruton v London and Quadrant Trust Housing* [2000] 1 AC 406, the House of Lords held that the key factor was that the contract devolved exclusive possession to the occupant: this was not referable to any outside third party and a tenancy was thereby created.

The facts of *Street v Mountford* are useful for illustrative purposes. Mrs Mountford entered an agreement with Mr Street to occupy furnished rooms at a weekly rate subject to a fourteen-day period of written notice. The agreement was dubbed a 'licence'. It stated that no person but the licensee could reside there without prior permission, that the licence was not assignable and that the occupant was not to cause nuisance or annoyance to other occupiers. The owner reserved the right to enter the rooms for limited purposes, such as inspecting, carrying out repairs or collecting monies from meters.

Mrs Mountford applied for registration of a fair rent under the then applicable legislation in England: her landlord argued that she held a licence rather than a tenancy. It was agreed that Mrs Mountford had exclusive possession of the rooms, in that she could exclude anybody, and this exclusion encompassed the owner (except while exercising the limited rights granted under the lease). However, Mr Street argued a licence prevailed because the parties clearly intended to create a right of personal occupation only, and this right was not assignable.

Reviewing the relevant case law, Lord Templeman highlighted cases illustrating that the substance of an agreement was more determinative than the label it was given. The substance of an agreement to permit premises' use for limited purposes (i.e. holding events on particular days) while the landlord retained possession did not create exclusive possession and was thus a licence rather than a lease: *Taylor v Caldwell* (1863) 3 B&S 826 [1861–73] All ER Rep 24. Turning to residential accommodation, Lord Templeman stated (at page 293):

> An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own. In *Allan v Liverpool Overseers* (1874) LR 9 QB 180, at 191–2, Blackburn J. said:
>
> > 'A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own

> servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.'
>
> If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant.

The court determined that Mrs Mountford was a tenant, applying the primary factor of exclusive possession when analysing whether a person has a mere permission to use a room or dwelling, or whether a stake (or estate) in that room or dwelling had passed to them. That the landlord reserved the right to enter for limited purposes (rent collection and inspection) served to emphasise the exclusivity of the tenant's possession. This is consistent with Irish residential tenancies. The landlord's right to inspect is conferred by Section 16(c) of the Residential Tenancies Act, 2004–16 (hereafter 'the RTA'), and the obligation to repair is imposed by Section 12(1)(b). These rights sit alongside the landlord's obligation to afford the tenant 'peaceful and exclusive occupation of the dwelling' – Section 12(1)(a). Reserving rights to repair or inspect therefore cannot negative the exclusive possession of a tenancy.

The substance of the obligations and rights in agreements must be the focus of analysis of parties' true intention; surrounding circumstances and ancillary rights and responsibilities may assist. As such, exclusive possession of a room in a nursing home was granted by the agreement in *Abbeyfield (Harpenden) Society Ltd v Woods* [1968] 1 All ER 352, but attendant services such as a live-in housekeeper and the provision of services such as meals indicated a licence, not a tenancy.

On the other hand, restrictions on the use of a room, albeit onerous, may remain consistent with exclusive possession. In *Camelot Property Management Limited v Roynon* (County Court at Bristol, 24 February 2017, HHJ Ambrose), restrictions on smoking, limiting the occupant from having overnight guests, not allowing more than two guests at the same time, and not permitting pets and monthly

inspections did not defeat a claim of exclusive possession of rooms allocated to a 'property guardian' to whom keys to those rooms were furnished. There was shared access to common areas such as a kitchen and living room in the former council-run nursing home. The agreement's reservation of the landlord's right to move the occupant from one room to another was held to potentially defeat the claim of exclusive possession. However, this right was never exercised. A tenancy was found to subsist.

The notion that occupation could amount to a licence due to the nature and quality of possession as a personal permission rather than granting a stake or estate in the lands was discounted by Lord Templeman in *Street v Mountford.* In essence, the judge opined that the primary factor in determining the nature and quality of the occupation was to analyse the agreement: if it conferred exclusive possession for a rent, it was a tenancy. However, courts must be cognisant of sham agreements. Lord Templeman criticised *Somma v Hazelhurst* [1978] 2 All ER 1011 in this regard. That case wrongly (according to Lord Templeman) found that a licence prevailed where two people had individual 'licences' to inhabit a room, with the right reserved to the landlord to select other people to live there in place of the current licensees. There was no reality to this happening: the 'licensees' were a couple who would not consent to share their space with any other person. Following Lord Templeman's logic, where a person genuinely agrees to their landlord selecting others to inhabit their space, this creates a licence arrangement.

It does not necessarily follow that a licence is created where a landlord selects others to inhabit other rooms in the dwelling but exclusive possession of one room is maintained by the occupant. This raises the question of whether exclusive possession of the whole can be shared or parcelled out. In England it has been held that a flat occupied by four people under separate agreements who moved in at different times on different terms did so under a licence. As the four unities of interest, time, title and possession did not coincide, no joint tenancy arose – *AG Securities v Vaughan* [1988] 3 All ER 1058. Yet this decision admits the possibility (which did not arise on the evidence presented) that there could be individual tenancies of each room and a tenancy in common of shared spaces (for which only unity of possession is required), thus allowing for a mixed form of tenancy (per Lord Oliver at 1073J–1074C).

Unity of possession implies that all tenants (whether as joint tenants or tenants in common) have the undivided right to possess the

whole of the premises. They do not have the right to exclude any other tenant from any portion of the premises: an action in trespass could not be maintained if another tenant encroached on 'their' space. Until the tenancy has come to an end, the ownership of the whole operates as if it is undivided (see Wylie, 2013, ch. 8).

As Lyall notes, an obvious problem arises where each tenant in common claims or operates as if they have exclusive possession of a bedroom or portion of the dwelling (Lyall, 2000, p. 426). Pragmatically, Irish courts have found that while all share exclusive possession, co-occupants simply respect each others' privacy in a particular room. *Lahiffe v Hecker* (unreported judgment of Lynch J., 28 April 1994) held that a tenant in common (A) could not exclude other tenants in common (B, C and D) from a house which they had inherited, but equally the other tenants in common B, C and D could not use the house in a manner which would defeat A's right of residence. In this case a specific right of residence had been bequeathed to A and, though a tenant in common, this allowed her (the court held) the right to a bedroom for her exclusive use. As such, it appears that the Irish courts have been prepared to find that a tenancy in common, while theoretically allowing for unity of possession, still allows for some exclusivity of spaces in a residential context.

The RTA specifically recognises 'multiple tenants' as including joint tenants, tenants in common and tenants under other forms of ownership (Section 48). Further, a Part Four tenancy may avail one of the multiple tenants who has resided in the dwelling for more than six months, notwithstanding the fact that the other tenants have not attained that duration of occupation. This indicates a lack of unity in time, interest and potentially title between tenants which can run alongside a statutorily recognised tenancy.

Common examples of residential licences in Ireland

Despite nuance which can contradict the generality, the following groups of people are normally residential licensees.

For the most part, lodgers are contractual licensees – *Street v Mountford; Allan v Liverpool Overseers*. A resident landlord may own a house or have rented the whole dwelling from its owner, their landlord. The RTA expressly provides for tenants allowing others to reside in the dwelling as their licensees: Section 49(1)(b). In this circumstance a resident landlord will be a tenant benefiting from the

protections of the RTA, whereas their lodger or licensee will have no automatic protection under that legislation. This is because tenants' protections afforded by the RTA do not avail a licensee (as a house-sharer or a lodger in this situation would be) who lives with a landlord. While this is due to the generality of the RTA's application being to landlord and tenant situations only, Section 3(2)(g) of the RTA specifically excludes its application to dwellings in which 'the landlord also resides'.

A partner or spouse who has moved into property which his or her partner already owns or rents (whether privately or from a local authority or approved housing body) is generally a licensee of the owner or tenant, unless steps are taken or circumstances arise to alter that position. This arrangement often gives rise to a gratuitous or bare licence in circumstances whereby money or money's worth is not exchanged for the permission or invitation to occupy. Partners or spouses who delegate responsibility to the other partner or spouse to negotiate and sign a tenancy agreement may find themselves in the position of a licensee rather than a tenant. Pursuant to Section 5 of the Married Women's Status Act, 1957, spouses are treated as two persons (rather than a unit) for the purposes of acquisition of any property. Unlike other civil (and some common) law jurisdictions, there is no concept of 'community of property' or 'matrimonial property' under Irish law: *M v M* [2001] 6 JIC 1801. However, it should be noted that under Section 5 of the RTA a tenancy may arise orally, in writing or implicitly. Thus, a spouse could forcefully argue that while his or her name is not on a tenancy agreement, he or she was at all times accepted and treated as a tenant equal to his or her spouse, and thus an implicit tenancy in his or her favour arose.

Children, including minor children, who live in a parent's home are licensees (except if they are or become an owner or tenant, which is unlikely but not impossible prior to a child turning eighteen and obtaining the age of legal majority pursuant to Section 2 of the Age of Majority Act, 1985). The position of a child resident in their parent's house was described in *Metropolitan Properties Co Ltd v Cronan* [1982] 1 EGLR 104:

> In the case of an adult child, he or she is correctly described as a licensee in the parents' home and such a licence can be withdrawn. Although the court is especially slow to grant an injunction which will exclude even an adult child from that home, there is power to do so: see *Waterhouse v Water-*

> *house* (1905) 95 LT 133, *Stevens v Stevens* (1907) 24 TLR 20 and *Egan v Egan* [1975] 1 Ch 218. I cannot think, and at the least we were shown no authority to the contrary, that the legal nature of a child's position in the parents' home changes from one of status to that of licensee so soon as the child obtains his or her majority. As at present advised, I think that in law a licence to remain in the parents' home can be withdrawn even in the case of a minor child, though of course one hopes that this would occur only in very special cases.

On this premise, a licensee was found to have been wrongly named as party to RTB proceedings as she was fifteen at the time of taking up occupation in a dwelling and not named on the tenancy agreement – *Perse v Khan* TR1014–000904, 25 January 2015.

Each resident of a nursing home or emergency accommodation is likely to reside there as a licensee (as in *Abbeyfield (Harpenden) Society Ltd v Woods,* cited above). Occupants of transitional accommodation provided by an approved housing body can be tenants or licensees: if they are tenants, their rights to security of tenure under Part Four of the RTA are curtailed if their lease is for less than eighteen months (Section 25(6), RTA). People whose accommodation is supplied by their employer or who live in purpose-built student accommodation are in a similar situation: they are most likely licensees, but if their situation amounts to a tenancy, their right to security of tenure under Part Four of the RTA may nonetheless be curtailed (Section 25(4), RTA).

A bed for a night or a short period in a hotel or hostel is granted on the basis of a contractual licence. Where a person rents one bed in a room with a number of others who similarly have access to that room to use their own bed, and they do not share control over when others may be offered bed spaces, the underlying legal arrangement is a licence rather than a tenancy. The occupant's lack of control precludes exclusive possession.

As is clear from the above, residential licences are disparate and may co-exist or operate in a comparable fashion to tenancies, notwithstanding their distinct legal bases. Much has been written about residential tenancies in Ireland (see, for example, Cassidy & Ring, 2010). Very little has been written about specifically residential licences, though licences as a device in land law receive good analysis in, for example, Wylie (2013) and Furber & Moss (2017). Analysis of licensees' rights commonly found in a residential context in Ireland follows below.

Types of residential licences and licensees' rights

Two main forms of licence are in common use residentially in Ireland. These are bare licences and contractual licences. The former is a non-contractual permission; the latter is a permission grounded on contract. Licences supporting an interest in land (i.e. fishery or turbary rights) have limited application in the residential context. Service licences, whereby a person's employment confers a right of residence, are not expressly discussed in this article. Rights of residence as a legally enforceable right (through, for example, equity or wills) are not within the scope of this article as they fall outside the permissive nature of a pure licence agreement.

Non-contractual bare licences are permissions granted with (generally) no fee, consideration or rent charged. An example would be an adult child moving into a parent's home with no monies (other than perhaps a contribution towards household costs), or offering a friend use of a property at extremely low or no cost (as occurred in *Duke v Stapleton,* cited above). It has been held that where a trespasser is charged an occupancy fee by a housing authority in acquiescence of their occupation, this arrangement is a bare licence revocable at will rather than a contractual licence or tenancy – *Northern Ireland Housing Executive v Duffin* [1985] NI 210. Thus, some form of fee payable does not prevent the arrangement being classed as a bare licence rather than a contractual licence. Some other element crucial to a contract (i.e. offer, acceptance and agreement of terms) may be absent. While it is possible to contextualise this as a *Street v Mountford* exception due to the lack of intention of the licensor to create a legal relationship, exclusive possession does seem to have been conferred. As it predated *Street v Mountford, Duffin*'s conclusions may be doubted.

Offering licences for accommodation

As a licence is permission bestowed by the licensor, the licensor is generally free to offer that accommodation to whomever they choose. Limited incursions into the licensor's power to select licensees are found in Section 6(1)(c) of the Equal Status Act, 2000, which prohibits discrimination in the provision of accommodation. However, the legislation carves out two significant exceptions impacting on a multitude of potential licensees.

First, the anti-discrimination provisions do not bind those providing (or ceasing to provide) accommodation in a part of their home (unless in a self-contained part of their home), or where the provision of such accommodation 'affects the person's personal or private life or that of any other person residing in the home' – Section 6(2)(d). This accords with the safeguard of inviolability of the (licensor's) dwelling, which is protected from forcible entry (save in accordance with law) under Article 40.5 of the Constitution. In *DPP v O'Brien* [2012] IECCA 68, Hardiman J. described the strong constitutional protection afforded by this provision as:

> [presupposing] that in a free society the dwelling is set apart as a place of repose from the cares of the world. In so doing, Article 40.5 complements and re-inforces other constitutional guarantees and values, such as assuring the dignity of the individual (as per the Preamble to the Constitution), the protection of the person (Article 40.3.2), the protection of family life (Article 41) and the education and protection of children (Article 42). Article 40.5 thereby *assures the citizen that his or her privacy, person and security will be protected against all comers*, save in the exceptional circumstances presupposed by the saver to this guarantee [Emphasis added].

While the licensor is afforded the full weight of this constitutional protection by allowing them to select who they live with without regard to equality legislation, licensees residing with the licensor do not benefit from similar statutory rights. While seeking accommodation, it is difficult to see how any claim on the inviolability of a dwelling not yet secured could be claimed. However, if a conferred licence is a property right (as suggested by *Hempenstall* cited above), it appears that the Oireachtas posited such rights as less significant than the resident licensor's right in the context of the Equal Status Acts, enabling the licensor to revoke without inhibition. Conceptually, this is consistent with a licence amounting to a permission which may be withdrawn by the licensor, rather than providing any interest or stake in the dwelling to the licensee. The limited nature of the licensee's rights is apparent.

The second significant exception in the Equal Status Acts is the enabling of the provision of accommodation made available solely to people in particular categories (such as homelessness, disability, as a refuge or a nursing home – Section 6(5)), or made available solely to

one gender where provision of that accommodation to people of the other gender would cause embarrassment or infringe privacy – Section 6(2)(e).

Use of dwelling and its conveniences

The oral or written contract underlying the licence agreement generally indicates the extent of the right to reside in a property. It may be agreed that the licensor will afford the licensee exclusive use (falling short of exclusive possession) of a particular bedroom to sleep in and store their possessions, the agreement may restrict the storage of possessions elsewhere in the property, and it may limit use of spaces to particular times or restrict certain behaviours that cause noise or disturbance.

Under a bare licence to reside in a property, or if the agreement is silent as to the extent of occupation, it appears from ancient case law that lodgers are entitled to use the general conveniences of the house. In *Underwood v Burrows* (1835) 7 C & P 26, those general conveniences included the doorbell, the door knocker, the toilet and skylight to the stairs: a right of legal action was found to lie on deprivation of access to those conveniences.

Certainly, use of such facilities accords with the general understanding of a lodger residing in a licensor's home, or a family member (for example) availing of a relation's permission to accommodate them. Yet limiting these rights is possible through the terms of a licence agreement.

Standards

Standards that apply (sometimes tangentially) to dwellings subject to residential licences stem from two sources: statute and common law. Enforcement by licensees is problematic, as reliance on statutory standards does not protect against the licence's revocation, and under common law a breach in the standard owed to the licensee only becomes actionable where damage (i.e. injury or loss of possessions) arises.

The regulations which provide a baseline of standards in the private rental sector – the Housing (Standards for Private Rented Houses) Regulations (SI 17/2017) – do not provide obvious protection to all licensees. This is because their application is to 'every house let or available for letting for rent or other valuable consideration solely as a

house'. The regulations expressly exempt holiday lets and houses let by the Health Service Executive or an approved body with communal sanitary and cooking facilities and moveable structures let by local authorities (Regulation 3). Obviously, gratuitous or bare licensees cannot avail of these regulations as they pay no valuable consideration or rent for their accommodation. Further, the system created by the regulations more logically applies to a whole house which is 'let' (with certain facilities for that house's exclusive use, such as a bathroom under Regulation 7), rather than a licence to use a room and access the potentially shared facilities of a house (which may or may not in its totality be let). Indeed, it is questionable whether a licensee benefits from a space which is 'let': more accurately they gain permission to occupy a space in return for a licence fee (see in this regard *Twomey (Inspector of Taxes) v Hennessy* [2009] IEHC 627, at pp. 35–6). On these readings all licensees are excluded from the baseline standards of the 2017 regulations.

However, some licensees occupy a room in a house which is wholly let by a licensor/tenant, and should theoretically benefit from the whole dwelling coming under the 2017 regulations. This clearly does not apply where the whole house is not let, as in an owner-occupier renting a room to a lodger.

Further, enforcement mechanisms stymie licensees under the 2017 regulations. Private residential landlords are obliged to ensure the dwellings they rent under the RTA regime meet regulations made under Section 18 of the Housing (Miscellaneous Provisions) Act, 1992, (which includes the 2017 regulations) under Section 12(b) of the RTA. Tenants may bring a dispute to the RTB if landlords do not meet this obligation. Licensees have no dispute resolution mechanism to bring complaints about the standards of their accommodation. They might, however, make a complaint to the local authority under Section 18 of the 1992 Act that the rented house in which they have a room does not adhere to the regulations. It is then in the local authority's discretion whether to investigate.

Housing authorities have powers to require owners of 'houses which are not fit for human habitation in any respect' to effect works to render them fit, pursuant to Section 66 of the Housing Act, 1966. Section 2 of that Act provides an expansive interpretation of 'house' and 'housing', which is not limited to rented dwellings or those which are 'let'. In considering whether a house is 'unfit', the housing authorities must have regard to matters set out in the Second Schedule of the Act. These matters include its stability; resistance to the spread

of fire; safety of common areas and spaces appurtenant to the house; resistance to moisture, heat, infestation and sound; the water supply and ventilation; lighting; and facilities for preparing, storing and cooking food. If the house is considered incapable of being rendered fit for human habitation, following consultation with the owner and other interested parties but failing to obtain undertakings for works to be done, the housing authority may issue a prohibition or demolition order on the property (Section 66(6)). Thus, while a licensee could theoretically seek a housing authority's assistance in compelling works to be done on an unfit house, they do so while risking the unattractive prospect that their licence could be revoked, or that the housing authority could issue a prohibition order in respect of their home. Similar considerations apply to licensees seeking to avail of fire safety legislation.

Under common law, the general law of negligence prevails. Therefore, a licensor has a duty of care to maintain a property in which a licensee lives to a reasonable standard such that injury would not occur. If injury or damage does occur, the licensee may sue the licensor for damages due to negligence.

Under these principles, in *Allen v Counahan* [1966] 100 ILTR 58, a lodger, Mr Allen, who had lived in a property for some time (and thus had familiarity with it), sued when he fell on the stairs on the way from his bedroom to the toilet, a light switch having failed. He claimed that the premises were unsafe on account of defective lighting and one stair's nosing having been loose. On the evidence of the case, the licensor was not found to be liable. However, in *Graham v Northern Ireland Housing Executive* [1986] NI 72, a trespasser was accepted in occupation by a housing authority pursuant to a policy extant at the time, which permitted squatters to remain in houses illegally occupied pending investigation of their circumstances, and on payment of an occupation fee. The occupant injured himself on the stairs, which were in an obvious state of bad repair. The court held that the occupant was a bare licensee, and the licensor (the housing authority) had a duty of care to him as a visitor under the Occupier's Liability Act (Northern Ireland), 1957, in force at the time. The court rejected the argument that, as the licensee had entered as a trespasser, he had to take the premises as he found them. The occupant had moved from being a trespasser to that of visitor when he was given a licence to remain in the house.

Where a landlord is aware that a tenant resides with licensees, the duty and standard of care owed to the tenant, including the statutory

rights, can be claimed to be the baseline standard that the licensee can expect under the laws of negligence. Therefore, while media reports contain scant detail, it appears that a personal injuries claim concerning a tenant's child (thus licensee) who had contracted bronchitis was grounded on an alleged breach of a landlord's duty to ensure adequate ventilation (under what is now Regulation 8 of the Housing (Standards for Rented Housing) Regulations, 2017), in *Swafirowski v Long and Ray Cooke Auctioneers* (Managh, 2017).

Revoking residential licences – Under contract's terms or with adequate packing-up periods

A contractual licence for occupation of a dwelling often sets out the relevant notice period. In this instance the contract terms prevail. The advantage here is that the parties have clarity on how long the licensee has to leave the premises. A disadvantage (from the licensee's point of view) may be that this notice period may be unreasonably short having regard to the situation in which they find themselves.

On the other hand, a bare licence is revocable at will and subject only to a 'reasonable' packing-up period. Similarly, a contractual licence may be silent as to applicable notice periods, in which case two possibilities arise. First, and extremely unusually, the other terms or circumstances of the licence agreement may confer a situation of permanence, rendering the licence irrevocable – *Llanelly Railway & Dock Co. v. London & North Western Railway Co*. (1875) LR 7 HL 550. In that case the agreement reflected a right which the licensee could have otherwise applied for and obtained statutorily.

More commonly such licences will, like bare licences, be revocable at will and with notice. For example, in *Minister for Health v. Bellotti* [1944] 1 All ER 238, wartime evacuees were given contractual licences to occupy flats and install their families and furnishings there. Upon differences arising, a seven-day notice issued. The Court of Appeal made several significant observations. First, when a licence is revocable, it may be revoked at any time. However, though the licence has come to an end, a reasonable period for removal must be afforded to the licensee. Where a reasonable period is not afforded by the licensor, he or she is liable in damages and, until such reasonable time has elapsed, may not succeed in an action to recover possession. Varying contexts render it difficult to establish the duration of 'a reasonable period'. As Sir James Munby stated in *Gibson v Douglas* [2016] All ER (D) 67 (Dec), at para 21:

> At one end of the spectrum, the unwanted visitor who presents himself at the front door is asked in but then told to go, must leave immediately, taking the quickest route back to the highway and not delaying; so his period of grace may be measured in minutes: see *Robson v Hallett* [1967] 2 QB 939. On the other hand, a period measured in years may in some cases be appropriate: see, for example, *Parker v Parker* [2003] EWHC 1846 (Ch), where the Earl of Macclesfield was held entitled to two years to leave the ancestral home, Shirburn Castle, which he had been occupying as a licensee for some ten years.

The reasonable period afforded to a licensee to vacate before they are deemed a trespasser was considered in *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1947] 2 All ER 331, per Lord McDermott at 344:

> the assessment of what is reasonable may depend on a great variety of factors and cause considerable difficulty in particular instances. This period of grace can, of course, be the subject of agreement, but it exists for gratuitous as well as for contractual licensees and, on that account, must, I think, be generally ascribed to a rule of law rather than to an implied stipulation.

As such, a bare licensee is in a similar situation to the contractual licensee with whom there is no express agreement as to the 'period of grace' to quit. Clearly, the licensee must be given notification of the revocation for it to take effect – *Aldin v Latimer Clark, Muirhead & Co* [1894] 2 Ch 437. The bare licensee is entitled to a 'packing-up period' as a rule of law – *E & L Berg Homes v Grey* [1980] 1 EGLR 103. In that case, a seven-day notice period to remove a family's caravan (and thereafter mobile home), which had been permitted under a bare licence to remain on a site for twenty-six years, was found to be unreasonable. The court balanced the amount of time the defendants had resided on site with the plaintiff's rights to move on with their plans for the land. A twelve-month packing-up period was deemed reasonable. Jonathan Hill (2001) deduced that this rule of law must derive from a tortious relationship, given its lack of contractual basis, citing in particular *Winter Garden Theatre (London) Ltd v Millenium Productions Ltd*.

Equities preventing revocation of licence

Where a licensee has acted to their detriment on foot of a gratuitous licence to access land, the licensor may be prevented from revoking the licence under the equitable doctrine of proprietary estoppel. Such a scenario occurred in *Cullen v Cullen* [1962] 1 IR 268. The context was a family dispute: a father owned lands and sought to exclude his sons from them. Previously, he had permitted one of his sons to install a mobile home on his lands. As a consequence, the son constructed the home on his father's, instead of his own, lands at a cost which would substantially increase if he had to relocate the mobile home. In the father's action against his sons, the judge awarded damages for trespass, but refused an injunction restraining trespass for reasons including that it would prevent the sons from visiting their mother. The judge further held that while he could not compel the conveyance of the land on which the mobile home was situated, the father was estopped by his conduct from asserting his title to that parcel of land. As such, this case illustrates two points in respect of bare licences. First, the revocation of a licence to remain on a property renders the former licensee a trespasser. Second, where a person has been permitted or encouraged to act to their detriment in respect of land or property which they have been permitted to access, the law may intervene to prevent or curtail the licensor's right to revoke the licence.

However, it should be noted that in such cases the gratuitous bare licence is supplemented by what eventually becomes an equitable interest in the land by virtue of proprietary estoppel. For this to arise, an actual representation, inducement or promise has to issue from the licensor, which alters the behaviour of the licensee to their detriment. It is important to note that the rights do not flow from the licence itself; instead they flow from the promise of further or ancillary rights ascertainable from the attendant circumstances.

In the residential realm, such attendant circumstances may arise in cases whereby partners, relations or friends of the owner of a house may expand on the permission which a bare or contractual licence affords them to reside in a particular place by, for example, acting as a carer to the owner (see for example *Jennings v. Rice* [2003] 1 P&CR 100) or forgoing a particular career or opportunity at the behest of the licensor in order to live in the dwelling, and on an inducement or promise that they will acquire some form of interest in the dwelling. In *Pascoe v Turner* [1979] 1 WLR 431, Turner moved into Pascoe's house

initially as his housekeeper (presumably under a service licence), but a relationship developed between them. Pascoe made a declaration that he had gifted the house to his erstwhile housekeeper, who then expended money on the property. Some years later Pascoe had an affair with another woman and issued a two-month notice to quit to Turner. The court held that Turner was entitled to rely on proprietary estoppel to perfect the gift of the house; she had changed her position to her detriment and with the acquiescence of the plaintiff.

As an equitable remedy, the courts will go as far (but no further) as is required to meet the equitable interest made out: it is unusual that this would amount to transferring the whole of the property to the person benefiting from the estoppel. In *Sledmore v Dalby* (1996) 72 P & CR a right of residence (by way of an irrevocable licence) rent-free for life was held to be sufficient to meet the equitable interest of a widower who had put monies into significantly improving a dwelling owned by his parents-in-law and in which he and his wife lived. This work was undertaken on the understanding that it would be made over to the couple, but in fact was left by will to his wife only, who predeceased the plaintiff.

Spouses, civil partners or co-habitees residing in their partner's dwelling as licensees may acquire certain rights under legislation, including the Family Home Protection Act, 1976, and the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010. An examination of such rights goes beyond the scope of this article – Crowley (2013) contains useful chapters on marital and non-marital family rights in this regard.

Enlargement of a licensee's rights to that of a tenant under the RTA

Where a licensee resides in a dwelling subject to a Part Four tenancy under the RTA, Section 50 provides means to enlarge that licensee's rights into those of a tenant. It appears that two routes arise, despite the poor drafting of Section 50.

The first potential route is under Section 50(3). This avails any person who the 'landlord accepts as a tenant of a dwelling' where another tenant already has Part Four security of tenure (based on their six-month occupation). The newly accepted tenant shall 'benefit from the protection of that tenancy' after their own occupation exceeds six months. As such, in *O'Fulluin v Ring* TR0713–000388, the wife of the original tenant signed a subsequent tenancy agreement

naming her as a tenant. She was deemed to have been 'accepted' by the landlord as a tenant pursuant to Section 50(3), RTA, apparently as a replacement to her husband on the tenancy agreement. Section 50(4) sets out that a person may be accepted as a tenant in replacement of another multiple tenant, as an additional tenant, and in circumstances which include that person being a 'lawful licensee' prior to becoming a tenant.

Clearly, naming a person as a tenant on a tenancy agreement is evidence of a landlord accepting that person as a tenant. However, the RTA gives little indication of other sufficient forms of acceptance. Acting in a manner consistent with a person being a tenant may arguably suffice for acceptance. Such behaviour may include taking rental payments from that person, rendering them responsible for others' behaviour in and around the dwelling, or accepting that person as able to communicate complaints or issues in respect of the tenancy to the landlord. A broad interpretation of acceptance of a person as a tenant accords with the definition of 'tenancy' in Section 5(1) of the RTA, which allows tenancies to be 'implied'. More expressly, communications from a landlord (through notices or otherwise) which refer to a person who is otherwise a licensee as a tenant may be good evidence that the landlord has accepted them as a tenant.

Strangely, while Section 50(3) refers to any person who the landlord accepts as a tenant (implying that no express request is required), Section 50(8) refers to a person conferred with rights under Section 50(3) as a 'requester' in its reiteration that such a requester obtains the same rights as arise in the subsisting Part Four tenancy. However, licensee requests to become a tenant are expressly dealt with in Section 50(7), which appears to create a distinct route to tenancy from being simply 'accepted' per 50(3).

Section 50(7) allows a licensee to request a landlord to allow them to become a multiple tenant; Section 50(8) primarily prevents a landlord unreasonably withholding his or her assent. An acknowledgement in writing that the person has become a tenant suffices to illustrate such acceptance – Section 50(8)(a), RTA. The requester then holds the tenancy on the same terms as the existing or multiple tenant who gave rise to the subsisting Part Four tenancy rights.

Potentially, the link between Section 50(3) 'accepted' tenants and Section 50(7) 'requested' tenants is Section 50(6), which states that 'for the purpose of, among other things, ensuring that the distinction that exists between licences and tenancies does not operate to

frustrate the objectives of this Part in cases to which this Chapter applies, subsections 50(7) and 50(8) are enacted'. Picking this apart does not clarify. The distinction between licences and tenancies is that the former constitutes a permission to reside absent of exclusive possession; the latter is an interest in land, which benefits from exclusive possession. The objectives of the 'Part', being Part 4 of the RTA, is to provide for security of tenure. Chapter 6 of Part 4 sets out rules applying to multiple occupants of tenancies. This sheds no light on why a Section 50(3) 'accepted' tenant is referred to as a 'requester' in Section 50(8).

While Section 50 clearly gives licensees rights to become tenants, it is curious that the permission or acceptance required under the statute comes from the landlord with no input from the tenant/licensor who initially permitted their occupation. As recognised by Section 49(1)(b), RTA, the occupants to whom the relevant chapter of the Act applies include the licensee of the tenant; tenants are conferred with exclusive occupation of the dwelling pursuant to Section 12(1)(a). It is difficult to reconcile this loss of control 'against all comers' with the constitutional Article 40.5 protections as trenchantly expressed by Hardiman J. in *DPP v O'Brien.* In this regard it is noteworthy that the judgment in *Heeney v Lord Mayor of Dublin* [1998] IESC 26 expressly proceeded on the basis that tenants had rights to the inviolability of their dwelling, which encompassed corollary rights to their meaningful enjoyment of it.

There may be good reasons why a tenant would not permit their licensee to be elevated to the status of a tenant. Equally, there may be no good reason; in accordance with the concept of 'exclusive possession', no good reason is necessary. Where the licensee becomes a tenant, the original tenant loses the ability to withdraw the licensee's permission to remain in occupation. Absent any consultation with sitting tenants, it is difficult to reconcile the elevation of the licensee's rights, and the attendant dilution of the original tenants' rights, with a proportionate balancing of the tenant's constitutional right to the inviolability of their dwelling with any permission-based property right the licensee holds (particularly in cases of gratuitous licensees). While, in *Hempenstall*, licence-based rights were accepted as constitutionally protected private property rights, diminution of those rights were deemed acceptable on the basis of licence conditions. It is more difficult to argue that a tenancy, a legal estate affording 'peaceful and exclusive occupation', can be subject to conditionality which allows a third party to diminish the exclusivity of occupation.

However, it appears that statutorily licensees' six-month occupation can lever enlargement of their licences to tenancy rights. If the constitutional concerns outlined above are unwarranted (and they might be addressed by express consideration of proportionality and balancing of licensor's and licensees' rights), it must follow that it is permissible to legislatively provide for licensees (particularly contractual licensees making periodic payments) to accrue further rights in the home of an owner-occupying licensor (for example, by ensuring access to certain facilities, requiring minimum standards and the codification of applicable notice periods).

Conclusions: The potential for reform

Reform to address the precarious tenure and standards of licensees' accommodation suffers three main hurdles. First, the heterogeneous nature of residential licences renders a one-size-fits-all approach inappropriate. Regulations must be tailored to, for example, contractual licensees who pay the equivalent or close to market rent, or who live in accommodation falling under the rent-a-room scheme. Problematic impacts could arise if the same regulations applied to the children of licensors or other gratuitous or bare licensees. This issue can be resolved by way of tight definition, specifying either an exhaustive list of licensees governed by regulations affording them protections, or by expressly excluding some categories of licensees from some or all of the proposed protections.

Second, any regulation for standards or notice periods requires an effective enforcement mechanism. This is not unassailable. Certification of applicable standards could be a precondition of the rent-a-room tax relief scheme. The small claims court procedure or existing residential tenancies dispute mechanisms could be adapted to hear licensee disputes arising from either a failure to adhere to standards or failure to afford appropriate notice periods.

Third, any reform should consider a proportionate balance between the constitutionally protected rights of a resident licensor to exclusive possession of their dwelling with any rights of the licensee. This is not to suggest that improvement of standards and notice periods afforded to licensees cannot be contemplated. Rather, a clearly formulated rationale for lawful and proportionate incursion into a licensor's property rights should be elaborated in order to withstand constitutional challenge.

It does not appear that, outside the scope of 'rented houses' (which, as set out above, may not include houses subject to licence agreements), any statute directly empowers a minister to regulate for standards in dwellings occupied by licensees (other than to further elaborate how such houses are fit for human habitation under Section 66 of the Housing Act, 1966). Where a tax relief is granted under the rent-a-room scheme, it may be possible to link the availability of such relief to the accommodation meeting certain standards and ensuring access to basic facilities.

However, in respect of both standards outside the rent-a-room tax relief sphere and the regulation of notice periods, primary legislation may have to be introduced. The advantage of this would be the ability to create broad rights for certain categories of licensees, which might be extended or refined by ministerial order. In respect of the notice periods, as set out above, the common law already provides some contours in respect of a reasonable 'packing-up' period. As such, codification of what is reasonable by reference to length of occupation (subject to potential exclusions in respect of, for example, antisocial behaviour) seems a logical step to garner greater legal certainty.

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