

Subletting and the Roman law of letting and hiring Interpreting C.4.65.6

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Introduction

Subletting is not a topic that is commonly raised in discussions of the consensual contract of letting and hiring in Roman law¹. The main reason for the lack of scholarly attention is that it is generally regarded as being one of the least controversial aspects of *locatio conductio*. Accordingly, when the issue is raised, it is often mentioned merely in passing that subletting was seemingly generally permitted in classical Roman law, unless the parties excluded the possibility in their contractual negotiations². Support for this statement is found in C.4.65.6, an Imperial enactment dating from the first half of the third century AD in which the issue is addressed.

¹ The origins and pre-history of *locatio conductio* remain disputed, see Th.MOMMSEN, *Die römischen Anfänge von Kauf und Mieth*e, 1885 ZSS 6 (rA) 260ff; M.KASER, *Das altrömische Ius*, Göttingen 1949, 297ff and comprehensively H.KAUFMANN, *Die altrömische Mieth*e, Cologne 1964, §§ 1-5; 6-27. Letting and hiring as a consensual contract in Roman private law is conventionally presumed to have arisen in the second half of the second century BC, if not before, see A.WATSON, *The Contract of Mandate in Roman Law*, Oxford 1961, 9f.; A.WATSON, *The Law of Obligations in the Later Roman Republic*, Oxford 1965, 100f. where the author postulates that *locatio conductio operis* was probably the earliest form of letting and hiring in Roman private law to be distinguished, followed by *locatio conductio operarum* and *locatio conductio rei*.

² See, for example, B.W.FRIER, *Landlords and Tenants in Imperial Rome*, Princeton, N.J. 1980, 61f. and R.ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (revised edition) Oxford 1996, 353, note 80.

C.4.65.6

Imp. Alexander A. Lucilio Victorino. Nemo prohibetur rem quam conduxit fruendam alii locare, si nihil aliud convenit. PP. v.k. Mart. Iuliano et Crispino cons. [a.224].

While this is not the only Roman legal text in which subletting features, it is by far the most unambiguous statement about the issue and it introduces what appears to be a general rule about the permissibility of subletting in the Roman law of letting and hiring. Since the legal rule expressed in C.4.65.6 is supported by other legal texts from earlier in the classical period, it was clearly not meant to effect a change in the law³. But if it was not meant to introduce a change, then what was its purpose? This is the central question that will be addressed in this article. To answer this question, the context of C.4.65.6 has to be established. To that end a distinction must be drawn between the original or pre-Justinianic and Justinianic context of C.4.65.6. Since Imperial enactments generally did not have the status of *leges generales* until the sixth century AD, the original context of this enactment must have been more limited in scope⁴. It must either have been drafted to resolve a legal dispute based on a specific set of facts or to give clarity on an unresolved point of law *in abstracto*. Unlike the original context, however, the Justinianic context of this text is self-evident. There can be little doubt that it was inserted to convey a general statement concerning the permissibility of subletting in the law of letting and hiring in the classical period as perceived by the drafters of Justinian's Code. This article will focus primarily on the original context of C.4.65.6. The following

³ Digest texts on urban lease in which the issue of subletting is mentioned include e.g. D.9.3.5.1-2; D.9.3.5.4; D.13.7.11.5; D.19.1.53pr; D.19.2.7; D.19.2.8; D.19.2.9pr; D.19.2.9.6; D.19.2.13.1; D.19.2.24.1; D.19.2.30pr; D.19.2.35pr; D.19.2.52; D.19.2.58pr; D.19.2.60pr. For a survey of the sources, see G.CARDASCIA, *Sur une fonction de la sous-location en droit romain* in *Studi Biscardi II*, Milan 1982, 365-388. Subletting is less frequently mentioned in agricultural tenancy, see D.19.2.24.1 and, in general, PW.DE NEEVE, *Colonus: Private Farm-Tenancy in Roman Italy during the Republic and the Early Principate*, Amsterdam 1984.

⁴ Rescripts were initially classified as *leges speciales* and were therefore not regarded as being generally binding. In the fourth century AD, however, a dispute arose regarding the general applicability of rescripts (see CTh.1.2.2-3; CTh.1.2.11; C.1.14.3) which was finally resolved by the sixth century AD when the general applicability of Imperial enactments was accepted. See J.HARRIES, *Law and Empire in Late Antiquity*, Cambridge 1999, 26-31.

methodology will be used. As with most texts from the Code of Justinian, individual enactments provide little information about their original context and this has to be assembled from other indirect sources. This article will therefore examine the wording of the text in context of developments in the law of letting and hiring in the third century AD.

1. *Periphery*

The first set of issues to be addressed relate to the nature of the text itself. The wording suggests that it was a *rescriptum* resulting from a petition, possibly in the form of a *libellus*, addressed to the Emperor⁵. Owing to the brevity of the statement and the lack of context, it is impossible to ascertain whether the question of law arose on appeal from an actual case or whether it were brought *in abstracto* by a jurist seeking clarification on a point of law. The date of the *rescriptum* is not particularly informative. It has been calculated as the 25th February 224 AD which places it in the early years of the reign of the Emperor Alexander Severus (222-235 AD)⁶. The reign of this emperor is noteworthy, among other things, because of the involvement of the classical jurist Ulpian in the Imperial bureaucracy. A survey of the Code shows that there are seven recorded rescripts prepared by the secretariat *a libellis* under Alexander Severus during the month of February 224 AD. None of these are, however, connected in topic to the text in question. In fact, C.4.65.6 is the only one dealing with letting and hiring⁷. The name of the petitioner also does not yield much information. The rescript is addressed to a certain Lucilius Victorinus. The name suggests that the petitioner had

⁵ A.M.HONORÉ, *Emperors and Lawyers* 2nd edition, Oxford 1994, 101f. controversially postulates that this text was drafted by an unnamed secretary *a libellis* (number 8).

⁶ On the life of Alexander Severus, see generally R.V.NIND HOPKINS, *The life of Alexander Severus*, Cambridge 1907; *Cambridge Ancient History Series: the Imperial crisis and recovery AD 193-324* vol. XII, Cambridge 1939, and C.BERTRAND-DAGENBACH, *Alexandre Sévère et l'Histoire Auguste* (Latomus Collection) Brussels 1990.

⁷ The possibility exists, of course, that the number of rescripts given during this month was far higher. Since these are no longer in existence, arguments must be based on recorded rescripts that were included in the Code of Justinian.

freeborn status, but the absence of a *praenomen* complicates matters⁸. It occurs only in this text in the *Corpus Iuris Civilis* and there is little extraneous information upon which to base any further conjecture⁹. The fact that the text was addressed to a person without rank could be used as evidence that the question of law probably arose on appeal from an actual case, but since nothing is known about the individual it would be perilous to speculate about the matter.

2. *The res*

A notable point about C.4.65.6 is the generality of its wording. The text merely refers to subletting of an object (*res*). The use of this term indicates that the *rescriptum* was in fact only concerned with one form of letting and hiring, namely *locatio conductio rei*¹⁰. The prevalence of subletting in this form of letting and hiring is supported by earlier sources. There is evidence that it occurred in *locatio conductio rei* as early as the first century BC. In agricultural tenancy, Cicero mentions a practice in Sicily whereby state-owned lands held by large-scale tenants (*aratores*) were sublet to smaller tenants (*coloni*), while in urban lease a distinction attributed to the Republican jurist Servius Sulpicius Rufus envisages subletting of urban property (spaces within an *insula*)¹¹. But the fact that subletting occurred in practice in this form of letting and hiring in the late Republic does not necessarily mean that it was already enshrined in law at this point. There is insufficient information to ascertain whether subletting was a component of the Roman law of letting and

⁸ Since this text was produced shortly after the promulgation of the *Constitutio Antoniniana* of 212 AD, it may be “cautiously” assumed that the petitioner had Roman citizenship.

⁹ The name Lucilius Victorinus appears in one funeral inscription in the *CIL* 6, II nr. 9927, but it seems unlikely, given the context of the inscription, that it was the person referred to in C.4.65.6.

¹⁰ The reason for this could either be that the facts on which the rescript were based only dealt with this form of letting and hiring or, if the rescript was delivered *in abstracto*, because the drafters purposely did not wish to include the remaining two forms of letting and hiring (services and work). Subsequent changes by the drafters of Justinian’s Code cannot be ruled out. Note that the context of this provision was narrowed even further in the *Basilica* where the text is reproduced with the word *fundus* instead of *res*, see G.E. HEIMBACH, *Basilicorum Libri LX*, vol 2, Leipzig 1840, on Bas.20.1.68 (C.4.65.6) (Heimbach II 370).

¹¹ Agricultural tenancy - Cicero *In Verrem* II.3, § 55; Urban lease - D.19.2.35pr.

hiring as early as the first century BC or whether it was merely a concession allowed by a *locator* in individual cases. It is therefore plausible that the purpose of this text may have been either to provide a foundation in law for an existing commercial practice or to clarify the permissibility of subletting in *locatio conductio rei*.

The scope of C.4.65.6 also raises questions about subletting in the remaining two forms of letting and hiring (services and work). There may have been another reason for not mentioning them in this rescript, since it is by no means settled that subletting was generally allowed in all forms of letting and hiring in classical Roman law. *Locatio conductio operarum* is a prime example. The *locator operarum* let his services to a *conductor* in return for the payment of rent. If the reasoning used in C.4.65.6, namely that a *conductor* could not be prevented from subletting unless the matter had been excluded by the parties, were applied to the context of *locatio conductio operarum* it would lead to a *reductio ad absurdum*, since a *conductor* of another's services would hardly wish to substitute himself for a third party. Furthermore, it would be equally illogical for the *locator* in this scenario to sublet his own services. Although this would be possible, it would be detrimental to the interests of the *conductor* who had rented the services of a specific individual for a circumscribed purpose. It is therefore hardly surprising that none of the extant Roman legal texts mentions subletting in the context of *locatio conductio operarum*.

The issue of subletting seems even more muddled in the case of *locatio conductio operis*, as the texts present a conflicting picture on the position in classical Roman law¹². Some texts suggest that the *conductor operis* could freely sublet the completion of a task to a third party, which is suggestive of a general rule on the matter, while others impose various restrictions on his ability to sublet the completion of the task. In a recent article on the subject, Professor Metro has persuasively argued that subletting was not generally permitted in *locatio conductio operis* in classical Roman law¹³. The legal texts which show that subletting occurred in this form of letting and hiring

¹² See e.g. Pliny *Ep.* II, 14; D.14.2.10.1; D.19.2.13.1; D.19.2.25.7; D.19.2.48pr; D.45.1.38.21; D.46.3.31.

¹³ See, in detail, A.METRO, *La sublocazione dell'opus faciendum* in *Collatio Iuris Romani* I (Mélanges H.Ankum), Amsterdam 1995, 339-347.

in classical Roman law do not point to the existence of a general rule on the issue. In fact, they show that the jurists of the classical period approached the issue of subletting in *locatio conductio operis* on a casuistic basis¹⁴. Whether subletting would be allowed in a given case appears to have been determined by factors such as the nature/complexity of the task to be completed and the level of skill/expertise involved.

Two final issues on the use of the term *res* in C.4.65.6 deserve mention. They provide strong evidence for the proposition that this rescript may not have been based on a specific set of facts, but rather on an unresolved legal matter addressed to the Emperor *in abstracto*. First, the use of a generic term meant that the enactment theoretically could have dealt with any one category out of the entire spectrum of objects capable of private ownership that could constitute the object of lease¹⁵. In classical Roman law it included movable and immovable as well as corporeal and incorporeal property. Letting and hiring of the former category readily occurred from early on in the history of *locatio conductio rei*, but that of the latter (especially incorporeal objects such as usufruct) was a feature peculiar to classical Roman law. The fact that the texts on the letting of usufruct are attributed to Ulpian, a jurist who played a major role in the Imperial administration of Alexander Severus, suggests that an extension of the object of lease to include incorporeal things may have occurred during this period¹⁶, but there is insufficient evidence to prove that this may have been the reason for the use of the generic term in C.4.65.6. Secondly, by not specifying the type of *res*, C.4.65.6 potentially could have dealt either with urban or agricultural tenancy. This undermines modern scholarly opinion on the perceived divergence and increasing specialisation of these two branches of *locatio conductio rei* in classical Roman law. The only qualification to the use of the generic term *res* in C.4.65.6 seems to be the use of the word *frui*. The significance of this term will be discussed below.

¹⁴ *Idem* at pp. 342-343.

¹⁵ For a survey of the objects of *locatio conductio rei* in classical Roman law, see I.MOLNÁR, *Object of locatio conductio*, 1982 (85) *BIDR* 127-131.

¹⁶ See J.A.C.THOMAS, *Locare usumfructum*, 1972 *IJ* 367-371 for a survey of the texts.

3. *Conducere rem fruendam*

In *locatio conductio rei*, the contract was founded on a type of reciprocity. The *locator* granted the *conductor* undisturbed use and enjoyment of an object for an agreed period of time in return for the payment of an amount of rent¹⁷. The Latin phrase *uti frui*, which describes the *conductor*'s use and enjoyment of the object of letting and hiring, commonly occurs in legal texts on the subject¹⁸. Although the general meaning of this phrase seems self-evident, it is unclear whether the individual words: use (*uti*) and enjoyment (*frui*) had distinct meanings to the Roman jurists¹⁹. This is an important point, since an answer to this question may illuminate the apparently specific use of *frui* (without *uti*) in C.4.65.6.

There is sporadic evidence, spanning the entire classical and post-classical period, that the terms *uti* and *frui* was used with some precision in legal texts on *locatio conductio rei* both in Roman private and public law. One of the earliest pieces of evidence is a passage from the *Lex Iulia Municipalis* of 45 BC on letting and hiring in Roman public law²⁰. The passage mentions two types of state leases,

¹⁷ “... Pomponius ait nihilo minus eum teneri ex conducto ei qui conduxit, ut ei praestetur frui quod conduxit licere. ...” - D.9.2.9pr (Ulpian); “... Sed an ex locato teneatur conductor, ut pro rata temporis quo fructus est pensionem praestet, ...” - D.9.2.9.1 (Ulpian); “... : oportere enim agrum praestari conductori, ut frui possit.” - D.19.2.15.2 (Ulpian). Failure to grant a *conductor* undisturbed use and enjoyment constituted grounds for the *actio conducti*, see D.19.2.15.1. On the content of the obligation *praestare*, see in detail R.CARDILLI, *L'Obbligazione di praestare e la responsabilità contrattuale in diritto romano*, Milan 1995.

¹⁸ The phrase *uti frui* also occurs with some frequency in legal texts on usufruct (see e.g. D.7.6.5pr; C.3.33.10). This institution, which arose during the 3rd century BC, predates the supposed genesis of letting and hiring in Roman private law. Analogies are frequently drawn in legal texts between the position of the usufructuary and that of the *conductor* of agricultural land. For the purposes of this discussion, the analysis of the meaning of these terms has been restricted to texts on letting and hiring.

¹⁹ According to the Oxford Latin Dictionary, the primary meaning of *utor-uti-usus sum* is *to make use of, to employ*, while that of *fruo-frui-fructus/fructus sum* is *to derive enjoyment of a thing*.

²⁰ *Quibus locis ex lege locationis, quam censor aliusve quis magistratus publicis vectigalibus ultrove tributis fruendis tuendisve dixet, dixerit, is qui ea fruenda tuendave conducta habebunt, ut uti frui liceat aut uti ea ab eis custodiantur, cautum est: ei quo minus iis locis utantur fruuntur ita, uti cuique eorum ex lege locationis iis sine dolo malo uti frui licebit ex H.L. nihilum rogatur - Lex Iulia Municipalis [T.H.], lines 73-76 in S.RICCOBONO et al., *Fontes Iuris Romani Antejustiniani* (FIRA) I p.146 [also in M.CRAWFORD et al., *Roman Statutes* I, London 1996, 365 (text); 375 (translation); 382 (commentary)].*

vectigalia (tax-farming) and *ultra tributa* (a comprehensive category)²¹. It shows that a *conductor* of *vectigalia* was entitled to its use and enjoyment (*uti frui liceat*) whereas the *conductor* of *ultra tributa* was merely entitled to its use (*aut uti*)²². The distinction appears to be based on the expectation of profit in the case of *vectigalia*. A second piece of evidence is Iavolenus' second-century epitome of Labeo's first-century statement in D.32.30.1. This text, which deals with the renting of public gardens from the state, also shows that the terms *uti et frui* were used with precision²³. A man had rented public gardens from the state. He died before the end of the term of letting and hiring and left the "fruits" of the contract of letting and hiring in his will to a third party (Aufidius) by way of a legacy with the instruction to his heir to transfer it (the lease) to said person and to permit the new *conductor* of the gardens both use and enjoyment. As in the previous example, the notion of economic profit from the public gardens appears to underlie the concept of *frui* in this text. The final piece of evidence, a passage from Justinian's Institutes dating from the sixth century AD, reinforces the notion of a semantic distinction²⁴. The passage, which deals with the difference between letting and hiring and exchange of services, distinguishes between use and enjoyment given to a *conductor*. This is the only text where the context does not point to an economic element underlying the concept of *frui*, but it is

²¹ Letting and hiring of the right to collect taxes (*vectigalia*) was apparently seen as a type of *locatio conductio rei*, see MOLNÁR 1982 (85) *BIDR* 129.

²² This distinction is supported by actual practice. Tax-farmers often sublet the collection of taxes in smaller regions, see E.BADIAN, *Publicans and Sinners: Private Enterprise in the Service of the Roman Republic*, Oxford 1972, Chapters. 1, 4. The entitlement of the *conductor* of *vectigalia* to the enjoyment is also mentioned in *Lex Agraria*, §§ 85; 87; 88-89 in *FIRA I*, p. 119. See more recently, A.TRISCIUOGGIO, *Sarta tecta, ultratributa, opus publicum faciendum locare*, Turin 1998, *passim*.

²³ D.32.30.1 *Labeo libro secundo posteriorum a Iavoleno epitomatorum Qui hortos publicos a re publica conductos habebat, eorum hortorum fructus usque ad lustrum, quo conducti essent, Aufidio legaverat et heredem eam conductionem eorum hortorum ei dare damnaverat sinereque uti eum et frui. Respondi heredem teneri sinere frui: hoc amplius heredem mercedem quoque hortorum rei publicae praestaturum.*

²⁴ Inst.3.24.2 - *Praeterea sicut vulgo quaerebatur, an permutatis rebus emptio et venditio contrahitur: ita quaeri solebat de locatione et conductione, si forte rem aliquam tibi utendam sive fruendam quis dederit et invicem a te aliam utendam sive fruendam acceperit. ...*

clear from the use of *sive* that the drafters of this text wanted to distinguish the terms.

Having demonstrated that these terms were used with precision in Roman legal texts on *locatio conductio rei*, the meaning of *frui* in C.4.65.6 needs to be established in context. The first point to make is that although there can be no doubt that the term could be used to denote a *conductor*'s personal enjoyment of the object of lease, it is not used in this sense in Roman legal texts. Where letting and hiring occurred purely for personal (as opposed to commercial) purposes such as habitation, different terminology was used and the term *frui* does not feature²⁵. There can be little doubt that a semantic link existed between the deponent verb *fruor-frui-fructus/fruitus sum* and the noun *fructus*²⁶. In the early history of *locatio conductio rei*, *fructus* primarily referred to the natural fruits of agricultural land to which the *conductor* was entitled upon gathering²⁷. This remains the primary meaning of the term throughout classical Roman law²⁸. So central were fruits to agricultural tenancy that a *conductor* of agricultural land was contractually obliged to cultivate it to preserve its fertility and failure to do so constituted grounds for the termination of the contract²⁹. Since the sale of the fruits often generated the income necessary to pay the rent, agricultural tenancy had an added economic element not found in leases for personal use such as rooms in a tenement³⁰. Thus, the term *frui* was predominantly used in Roman

²⁵ See L.AMIRANTE, *Locare habitationem* in *Studi in onore di Biondo Biondi I*, Milan 1965, 457-465 for a comprehensive survey of the terminology used in letting and hiring for habitation.

²⁶ See Varro *De lingua Latina* V, 104. line 4: *Fructus a ferundo, res eae quas fundus et eae quae in fundo ferunt ut fruamur. Hinc declinatae fruges et frumentum, sed ea e terra; etiam frumentum, quod ad extra ollicoqua solet addi ex mola, id est ex sale et farre molito.*

²⁷ See comprehensively, R.LEONARD, on *fructus* in G.WISSOWA and W.KROLL, *Pauly's Real-Encyclopädie der classischen Altertumswissenschaft* vol. 7(1), Stuttgart 1910; H.GEORG, on *fructus* in K.ZIEGLER and W.SONTHEIMER, *Der kleine Pauly - Lexicon der Antike* vol. 2, Stuttgart 1967; D.SCHANBACHER, on *fructus* in H.CANICK and H.SCHNEIDER, *Der neue Pauly - Enzyklopädie der Antike* vol. 4, Stuttgart/Weimar 1998.

²⁸ See D.19.2.15.2; D.19.2.24.5; D.19.2.33; D.43.3.16.

²⁹ See D.19.2.51pr; D.19.2.54.1.

³⁰ This explains the distinction drawn by Gaius in D.19.2.25.1 *Qui fundum fruendum vel habitationem alicui locavit, si aliqua ex causa fundum vel aedes vendat, curare debet, ut apud emptorem quoque eadem pactione et colono frui et inquilino habitare*

legal texts in the context of agricultural tenancy to refer to the *conductor's* right to draw fruits from the property. From the second century AD, however, the term also appears in urban lease, especially in the context of middlemen renting entire tenement blocks with the purpose of subletting spaces within them at a profit³¹. This is indicative of an extension of the meaning of the term *frui* and its correlative *fructus* to other forms of *locatio conductio rei* apart from agricultural tenancy where the economic capacity of the object could be exploited to the *conductor's* advantage. Ulpian's statements that rent of urban and agricultural property should be classed as fruits seem hardly surprising in this context³².

The final issue to be addressed is whether the phrase *conducere rem fruendam* may have been a technical phrase used in certain types of leases with an expectation of economic profit. The use of *fruor* in the gerundive to qualify the type of exploitation envisaged for the object of letting and hiring occurs with some frequency in legal texts on *locatio conductio*. In the majority of cases, however, it is used with the verb *locare*. So, for example, in D.19.2.25.1 Gaius states: “*qui fundum fruendum... locavit...*”. Similarly in D.19.2.35pr African observes: “*...qui et suum praedium fruendum locaverit ...*” and in D.24.3.7.1 Ulpian, in a statement attributed to Papinian, mentions: “*...qui fundum fruendum locaverit...*”³³. These texts are all concerned with the economic exploitation of the object of letting and hiring. The use of *fruor* in the gerundive with the verb *locare* suggests that it was used by the Roman jurists to refer to those cases where the *locator* had let out the object of letting and hiring in such a way that it enabled the *conductor* to exploit the economic capacity of the object of letting and hiring, or in other words, where the parties had agreed that the lease had a commercial aim. This does not mean, however,

liceat: alioquin prohibitus is aget cum eo ex conducto. On *locare habitationem*, see comprehensively AMIRANTE, *Locare habitationem*, (as in note 25) pp. 463-65.

³¹ See the second-century jurist African in D.19.2.35pr.

³² See D.5.3.29 and D.22.1.36.

³³ See also Livy, *A.U.C.* 27.11.8 “*ii censores ... agrum Campanum fruendum locarent ...*”; Livy, *A.U.C.* 32.7.3 “*ii censores ... portoria venalicium Capuae Puteolisque, item castrum portorium, ... fruendum locaverunt.*”; Livy *A.U.C.* 42.19.1 “*M. Lucretius tribunus plebis promulgavit ut agrum Campanum censores fruendum locarent...*”. There is only one text, D.6.3.1.1 on *emphyteusis*, where the phrase “*...fundum fruendum conduxerunt...*” occurs.

that the term *frui* was used in this sense by anyone other than the Roman jurists. None of the extant *negotia* on letting and hiring, especially those with a commercial element, indicates that it featured as a term in contracts or notices of letting and hiring³⁴.

4. *Si nihil aliud convenit*

The final point to be addressed concerns the nature of the rule. Although the third-century drafters of this rescript probably did not envisage that it would acquire the status of a *lex generalis*, its inclusion in the *Codex Iustinianus* suggests that it had acquired this position by the sixth century AD³⁵. A notable point is that subletting was permitted *si nihil aliud convenit*. Thus, as an implied contractual term, it was left to the parties themselves to exclude it if they did not wish for it to form part of their *lex locationis*. In the absence of such an agreement, however, subletting was possible³⁶. Like any rule of law, C.4.65.6 is bound by its wording, but it is unclear whether the rule operated as a concession from the *locator* to the primary *conductor* or as an element of the *conductor's* contractually agreed enjoyment of the leased property. This is a significant point, for if subletting was merely a concession from the *locator*, his knowledge and consent would always be required and the rule expressed in C.4.65.6 would consequently have limited application. On the other hand, if subletting functioned as a component of the *ius conductoris*, i.e. without requiring the knowledge or consent of the *locator*, it could potentially have a wide scope of application that could be detrimental to the latter's interests. This argument is not as implausible as it may seem, especially when read with the clause *si nihil aliud convenit*. A *conductor* was a *detentor* in Roman law, who received use and enjoyment from the *locator* for a fixed period of time in return for the payment of rent³⁷. As long as he did not abuse the object of letting and hiring, which was a ground for justifiable expulsion in terms of

³⁴ See, for example, the notice concerning the letting of the tenement building "Arriana Polliana" that envisages the commercial exploitation of the tenement through subletting as cited in S.RICCOBONO *et al.* *FIRA III* (V.ARRANGIO-RUIZ, ed.) Florence 1943, 453f.

³⁵ See note 4 above.

³⁶ An example of such an exclusion which predates C.4.65.6 occurs in the *lex horreorum* cited in *FIRA III*, p. 456.

³⁷ See e.g. D.40.7.14pr.

C.4.65.3, or exercise his contractually agreed enjoyment of it in such a way that would cause damage to the object itself, there seems to be no reason why this entitlement could not be transferred to third parties. By doing so, a *conductor* would not be transferring more rights than he had and it is conceivable that it could be done without the *locator*'s knowledge or permission, especially if the *locator* had not been astute enough to insist that the parties specifically regulate the matter in the *lex locationis*. Owing to the paucity of evidence, however, the questions about the drafters' conception of the nature of the rule must remain speculative, but some information may be obtained from subsequent interpretations of this text.

The nature of the right to sublet was a popular topic in the works of the medieval jurists. One of the most lucid accounts on the issue is that of Azo, whose commentary on C.4.65.6 formed the basis of the Accursian gloss on the subject. Although Azo's view on the nature of this rule cannot be used as evidence of the Roman jurists' views on the matter, his creative use of other texts from Roman legal sources to argue the issue raises a few interesting points. Azo transformed the statement in C.4.65.6 into a general rule founded on the *conductor*'s entitlement to use and enjoy the leased object in return for an amount of rent³⁸. The right to sublet was a component of the *ius conductoris* that could be freely exercised without the *locator*'s knowledge or consent. The author saw a connection between the right to sublet and the ability to let out a usufruct. Both were concerned with the ability to draw fruits from the object. Owing to the extensive nature of this right, however, and its potential detrimental impact on the interests of the *locator*, certain restrictions were imposed. Thus, in *locatio conductio operis*, subletting could not occur against the will of the owner where the parties had specifically agreed that a certain craftsman would complete the task. If such an agreement had not been

³⁸ *Et ideo si pro pecunia certa data re tua utar vel fruar, similiter alii locare potero: unde ususfructus locari potest, id est quod aliquis fructum percipiat: ius tamen remanet apud alium. Quod si faciendam rem vel reficiendam conduxit: numquid locare potero alii te invito? Non videtur, quia inter artifices magna est differentia. Si tamen specialiter non fuit conventum ut ego faciam, et ego alii aequo bono locare velim, possum, ut [D.46.3.31]. Intellige ergo quod hic dicit, quod alii aequo bono locare possit. Quod enim si Bononienis locavit mihi domum, et ego volui garamantibus locare vel meretricibus? Et certe non licet arg. [D.7.1.13.8]. Nisi aliud conventi puta. ... - Azo *Lectura super Codicem* [Anastatic reprint of a Paris edition 1577] in *Corpus Glossatorum Iuris Civilis III* (Turin 1966) on C.4.65.6.*

made, however, the completion of the task could be sublet freely provided that the substitute was equally skilled. A similar set of restrictions applied in *locatio conductio rei*. Generally a *conductor* of urban property could sublet freely without the knowledge or consent of the *locator*, but owing to the potential impact of this right on his interests and those of the neighbours (an important consideration in medieval law), he could not sublet to socially unsuitable persons or through subletting change the use of the leased property without the *locator*'s consent³⁹.

Conclusion

An examination of the wording of C.4.65.6 against the backdrop of developments in the law of letting and hiring in the third century AD yielded the following information about its original context. First, it demonstrated that the peripheral information contained in the text, such as the name of the petitioner and the date of the petition, did not contribute to the contextualisation of the text. At most, this information showed that C.4.65.6 was a rescript (probably a *libellus*) produced during the reign of Alexander Severus in whose Imperial bureaucracy the jurist Ulpian played an important role. Secondly, it showed that the use of the generic term *res* in C.4.65.6 may have been deliberate. Although it is possible that the wording of the rescript could have been altered by the compilers of Justinian's Code, there is no evidence of this in the text. The text was only concerned with *locatio conductio rei*, since subletting was not generally permitted in the two other forms of letting and hiring in classical Roman law. Furthermore, the use of this term effectively meant that the rescript could have applied to the letting and hiring of incorporeal objects such as usufruct. The fact that Ulpian's statements on this very issue date from the same period suggests that an expansion of the concept "the object of lease" occurred during this period to include incorporeal things, but whether there was any link with the wording of C.4.65.6 remains unproven. Thirdly, the use of the term *frui* in C.4.65.6 may have been specific. While it cannot be denied that the

³⁹ Succinctly distilled by Accursius into his Gloss on [*Alii*]: *atque idoneo et ad eundem usum arg. [D.7.1.13.8; D71.15.1; D.7.8.7] ...* - Accursius *Glossa in Codicem in Corpus Glossatorum Iuris Civilis X* (Turin 1968) on C.4.65.6. This context could not be traced in the Basilica's rendition of C.4.65.6 (Bas.20.1.68) or in the comments of the two later scholiasts on it.

term meant “enjoyment” in a general sense, it was employed in a particular sense by the Roman jurists to refer to those types of leases concluded for commercial purposes where the object of lease had an inherent economic capacity that could be exploited by the *conductor* by drawing fruits from it. Thus the legal rule in C.4.65.6 did not apply to all types of *locatio conductio rei*, but only those concluded for commercial purposes where the expectation of drawing fruits from the object of letting and hiring existed. Finally, subletting was only permitted when the parties had not specifically excluded the possibility in the *lex locationis*. Although it is impossible to ascertain what the drafters’ conception of this rule was, medieval jurists classified subletting as a component of the *ius conductoris* that could be exercised without the knowledge or permission of the *locator*. Owing to the potential detrimental effect this could have on the interests of the *locator*, however, certain restrictions were imposed. Whether these restrictions existed in classical Roman law is impossible to speculate. They certainly do not appear in any of the extant legal texts on *locatio conductio rei* in Roman law.