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**CONSULTATION PAPER**

**ON**

**GENERAL LAW OF LANDLORD AND TENANT**

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**(LRC CP 28 – 2003)**

**IRELAND**

**The Law Reform Commission**  
**35-39 Shelbourne Road, Ballsbridge, Dublin 4**

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## THE LAW REFORM COMMISSION

### Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the 1975 Act.

To date, the Commission has published 69 Reports containing proposals for reform of the law; 11 Working Papers; 27 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 24 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained in the Appendix to this Consultation Paper.

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## **Landlord and Tenant Law Working Group**

In July 2001, the Law Reform Commission established the Landlord and Tenant Project aimed at reform and consolidation of Landlord and Tenant Law. It engaged the services of Professor JCW Wylie as expert consultant and leader of a Working Group comprising legal practitioners with knowledge and experience of this area of the law and representatives of the Department of Justice, Equality and Law Reform and the Department of the Environment, Heritage and Local Government. Professor Wylie is the author of several standard texts on Irish property law, including *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998). The other members of the Working Group are:

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Mark O’Riordan was Secretary and Legal Researcher to the Group for most of the period during which the subject matter of this Consultation Paper was under consideration. He was replaced by Trevor Redmond in June 2003.

The Law Reform Commission wishes to record its appreciation of the indispensable contribution which the members of this Working Group have made and continue to make, on a voluntary basis, to the Commission’s examination of this area of the law.

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## INTRODUCTION

1. This is the second Consultation Paper to be published by the Law Reform Commission arising out of the deliberations of the Landlord and Tenant Working Group. The first, on Business Tenancies (LRC CP 21–2003), was published in March 2003. Unlike that Paper, which concentrated on a discrete area of the law, this Paper deals with the general law relating to the relationship of landlord and tenant. This law applies to all categories of the relationship, whether residential, business or agricultural. Much of this law is based on the common law, as developed by centuries of judicial decisions,<sup>1</sup> but it is important to note that there is much legislation of general application which has been superimposed on the common law. The most striking example of such legislation is the statute universally known as “*Deasy’s Act*”,<sup>2</sup> namely, the *Landlord and Tenant Law Amendment Act, Ireland, 1860*.<sup>3</sup> Another important example is the part relating to leases to be found in the *Conveyancing Acts 1881-1911*. It must be emphasised that such statutes are only the more important examples of numerous pre-1922 Acts of both the old Irish and British Parliaments still in force in the State.

2. The Commission has reviewed both the common law and statutes governing the general law of landlord and tenant. In doing so

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<sup>1</sup> See generally Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998).

<sup>2</sup> Sergeant Deasy was the Attorney General for Ireland who piloted the Bill which became the 1860 Act through the Westminster Parliament. In fact it was based substantially on a Bill drafted and introduced at Westminster in 1852 by earlier Irish law officers (Napier and Whiteside), which lapsed with the fall of Lord Derby’s Government: see Dowling, “The Genesis of Deasy’s Act” (1989) 40 NILQ 53.

<sup>3</sup> The standard reference work on this Act was Cherry *The Irish Land Law and Land Purchase Acts 1860 to 1901* (3<sup>rd</sup> ed John Falconer 1903). The later standard work was Deale *The Law of Landlord and Tenant in the Republic of Ireland* (Incorporated Council of Law Reporting for Ireland 1968).

it has been guided by the principles adopted by the Commission and set out in the *Consultation Paper on Business Tenancies*.<sup>4</sup> It may be useful to reiterate the objectives, namely:

- (a) Removal of obsolete provisions, including ancient legislation;
- (b) Removal of legislative provisions which militate against commercial practice and operation of free market choice, so as to facilitate creation of agreements free of unintended and unforeseen consequences;
- (c) Recasting legislative provisions which create uncertainties or have proved to be ambiguous;
- (d) Introducing new provisions to meet what are perceived to be gaps in existing law;
- (e) Consolidating existing legislation (together with any new provisions to be introduced) in order to make the law much more accessible and easily understood.

3. The ground covered by this Paper relates to a vast range of topics. Every effort has been made to deal with them in a manner which makes the discussion reasonably digestible. Chapter 1 deals with, perhaps, the most fundamental issue, namely the relationship of landlord and tenant. One of the unique<sup>5</sup> features of Irish law was the legislative attempt to revolutionise this concept some 150 years ago.<sup>6</sup> The essence of this was that the relationship was no longer to be based upon the ancient feudal notion of tenure, but rather on the contract or agreement entered into by the parties. Chapter 2 deals with the formalities for creation of the relationship in the first place and subsequent dealings by the parties with their interests, such as assignments and surrenders. Chapter 3 deals with the position of

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<sup>4</sup> LRC CP 21–2003 Introduction paragraph 5.

<sup>5</sup> It did not remain entirely unique, in that some of the Canadian provinces adopted this feature of *Deasy's Act*: see paragraph 1.10 below.

<sup>6</sup> In section 3 of *Deasy's Act*. This was, of course, contained in an Act passed (for Ireland exclusively) by the British Parliament, but no equivalent has ever been enacted for England or other parts of Britain (section 3 does still apply also in Northern Ireland). It has been left to the English courts to develop, albeit only in very recent times, some of the principles enshrined in section 3: see paragraph 1.14 below.

successors in title to the original landlord and tenant, following such dealings. Chapter 4 deals with the discrete topic of fixtures, which is nonetheless very important in practice. Chapter 5 deals with the subject of obligations in general, in particular with the issue of how far legislation should impose some obligations on the parties or provide “default” provisions to operate where the parties fail to make express provision in the lease or tenancy agreement. Chapter 6 then deals with the landlord’s obligations. Chapters 7-11 deal with the tenant’s obligations, including such matters as rent, service charges, repairs and insurance, and enforcement of obligations. Chapters 12-16 deal with the various methods of determining the relationship, which also relate to remedies for enforcement of obligations. Chapter 17 deals with the subject of new legislation, including the need for consolidation and recasting of old legislation (particularly pre-1922 statutes) in modern language. Chapter 18 provides a summary of the Commission’s preliminary recommendations.

4. This Consultation Paper is intended to form the basis of discussion and the recommendations in it are provisional only. The Commission will make its final recommendations following further consideration of the issues and consultation with interested parties. This will probably take the form of a Final Report covering all aspects of the Landlord and Tenant Project, including those covered by other Consultation Papers such as the one on Business Tenancies published in March 2003. Submissions on the recommendations contained in this Consultation Paper are welcome, as they will greatly assist the Commission in its further deliberations. To that end, those who wish to do so are requested to make their submissions in writing by **31 May 2004**.



## CHAPTER 1     THE RELATIONSHIP OF LANDLORD AND TENANT

### A            Historical Background

1.01        The relationship of landlord and tenant is a concept with a somewhat confused history. At first sight it might appear to have some connection with the old feudal relationship of landlord and tenant, which was based on the concept of tenure.<sup>1</sup> Such feudal concepts did become part of Irish law as the common law was imposed after the twelfth century and finally established here during the seventeenth century.<sup>2</sup> However, the tenure recognised by the feudal system was confined to what is referred to in modern times as “freehold” tenure. The relationship of landlord and tenant as it has been recognised in more recent times was never part of the feudal system. Indeed, when landowners began centuries ago to permit other parties to occupy and use their land, usually in return for payment of a rent, no form of tenure was regarded as being created. Rather the arrangement was considered to be a purely contractual one between the parties, the grantor and the grantee. The grantee was not regarded as having any “estate” or “interest” in the land, so that it could not be assigned to another person or inherited by a successor on the grantee’s death.<sup>3</sup>

1.02        As the popularity of such arrangements increased it came to be recognised that, notwithstanding their essentially contractual nature, they did involve features bearing similarity to the feudal concepts of tenure and estates. The usual requirement of the grantee to pay rent to the grantor had obvious similarity to the feudal notion of “service” to be provided by a tenant to his lord. Of even greater

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<sup>1</sup>        See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) Chapter 3; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 2.

<sup>2</sup>        See Wylie *op cit* Chapter 1.

<sup>3</sup>        See further Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 1.

significance was the recognition by the courts on both sides of the Irish Sea<sup>4</sup> that the grantee under such a contractual arrangement was entitled to protect it by action in court. In particular, protection from eviction by either the grantor or by any third party could be obtained by bringing an action to recover possession of the land. This came to be known as an action of ejectment,<sup>5</sup> which remains to this day a fundamental feature of our landlord and tenant law.<sup>6</sup>

1.03 The consequences of such developments may be summarised as follows.<sup>7</sup> Since the tenant was entitled to protect the possession of the land granted by an action of ejectment against any person dispossessing the tenant, the tenant came to be regarded as having an “estate” or “interest” in the land.<sup>8</sup> Eventually it came to be recognised that the rights and obligations created by the original grant (lease or tenancy) attached to the estates or interests of the original parties (the landlord and tenant) and could pass, under the doctrine of “privity of estate”, to their respective successors in title.<sup>9</sup> Rather more controversially,<sup>10</sup> it was also recognised that the relationship of landlord and tenant involved a form of tenure, albeit different in some respects from the old feudal (freehold) tenure, namely leasehold tenure.<sup>11</sup> Thus the rent paid by a leasehold tenant was also regarded

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<sup>4</sup> In England this development occurred in the second half of the fifteenth century: see Megarry and Wade *The Law of Real Property* (6<sup>th</sup> ed Sweet & Maxwell 2000) Appendix. It was extended to Ireland with the establishment of the common law system in the seventeenth century: see authority cited in footnote 2 above.

<sup>5</sup> See Furlong *The Law of Landlord and Tenant as Administered in Ireland* (2<sup>nd</sup> ed Edward Ponsonby 1869) Volume II Book VI Chapter II; Harrison *The Law and Practice relating to Ejectments in Ireland* (Hodges Figgis 1903) Chapter 1. See also Dowling *Ejectment for Non-payment of Rent* (SLS Legal Publications (NI) 1986).

<sup>6</sup> See Chapter 15 below.

<sup>7</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 1.04.

<sup>8</sup> See further paragraph 1.15 below.

<sup>9</sup> See Chapters 2 and 3 below.

<sup>10</sup> *Cf Coke Upon Littleton* (19<sup>th</sup> ed 1832) paragraph 63a (in favour of application of the notion of tenure) and Challis *The Law of Real Property* (3<sup>rd</sup> ed Butterworths 1911) at 65 (against application).

<sup>11</sup> See Megarry and Wade *op cit* paragraph 3-015. Recognition of this position was given by the Westminster Parliament so far as Ireland was

as a rent “service” to which the feudal remedy of distress applied automatically.<sup>12</sup> However, the analogy with the feudal concept of tenure was not pushed too far and the original concept of a lease or tenancy being essentially a contractual arrangement was also recognised.<sup>13</sup> Thus for the purposes of succession to property on death, a leasehold estate was categorised with personalty rather than realty (with which freehold estates were categorised).<sup>14</sup> Hence the hybrid name ascribed to a leasehold estate – “chattel real”.<sup>15</sup> Nevertheless, a tenant was still regarded as entitled to possession of “land”<sup>16</sup> or, as it is often put, for the relationship of landlord and tenant to exist there must be a “demise” of land. This is what distinguishes a lease of land from “leases”<sup>17</sup> of other kinds of

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concerned by the express reference to tenure in section 3 of *Deasy’s Act*: see paragraph 10 below.

<sup>12</sup> *Ie* without having to be expressly contracted for or conferred by statute: see further paragraph 8.18 below.

<sup>13</sup> See further on this “contractual” aspect paragraph 1.13 below.

<sup>14</sup> This distinction was vitally important until succession to realty and personalty was assimilated by modern legislation: see section 10 of the *Succession Act 1965*. Leasehold property may still devolve separately from freehold property, *eg*, where a testator by his or her will uses expressions such as “realty” and “personalty”, “real estate” and “personal estate” or “land” and “personal property”. Unless the will has been drafted by a professional person, a court may not necessarily adopt the definition of “real estate” (which is expressed to be for the “purposes of this Act”) in section 4 of the 1965 Act (which “includes chattels real”): see Brady *Succession Law in Ireland* (2<sup>nd</sup> ed Butterworths 1995) paragraph 5.19. *Cf* section 92 of the 1965 Act, which raises a presumption that leasehold interests are included in a general devise of “land”: see Keating *Probate Law and Practice* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2002) paragraph 6-10.

<sup>15</sup> See Lyall *op cit* at 1.

<sup>16</sup> In Ireland, at least since *Deasy’s Act*, in the sense of both corporeal and incorporeal hereditaments (*eg*, minor rights in the form, for example, of profits à prendre like fishing and other sporting rights): see paragraph 1.12 below.

<sup>17</sup> This terminology is often used in different senses. The word “demise” is often used as a synonym for “lease”. Both are often used to refer to the document containing the parties’ agreement, but can also refer to the estate granted. They can also be used as a verb to describe the process of creating the relationship of landlord and tenant or of granting the estate, as in “demising” or “leasing” land. Further complication is added by use of



properties, such as commercial or industrial machinery. Such leases usually involve some form of “hiring” or similar contractual arrangement, but because no land is involved there is no demise or creation of the relationship of landlord and tenant.<sup>18</sup>

## **B Importance of the Relationship**

1.04 It may be useful at this point to identify why it is important to determine in any particular case whether an arrangement, whereby a landowner permits another person or body to occupy or use the land, creates the relationship of landlord and tenant between the parties. This is an issue which has caused much litigation in recent decades and is one which the courts have struggled to resolve.<sup>19</sup> One reason is that the courts have recognised that such arrangements may often create some other relationship which lacks one or more of the attributes of the landlord and tenant relationship.<sup>20</sup> Examples are the various categories of licences to occupy land which are commonly created.<sup>21</sup>

1.05 There are several aspects of the landlord and tenant relationship which render it important to determine whether it exists in any particular arrangement concerning occupation or use of land. One is that a tenant, unlike other persons or bodies permitted to

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expressions like “letting” and “landlord” and “tenant” instead of “lessor” and “lessee”. Arguably much confusion would be avoided if the expressions “landlord”, “tenant”, “tenancy” and “letting” were regarded as the widest, generic expressions, covering all cases where the relationship of landlord and tenant has been created, *ie*, whether or not some written document (“lease”) has been used. See further on oral tenancies paragraph 2.15 below.

<sup>18</sup> See the discussion in the Supreme Court in *Munster and Leinster Bank Ltd v Hollinshead* [1930] IR 187. See also *Irish Shell & BP Ltd v Costello Ltd* [1981] ILRM 66, 72-73 (*per* Kenny J).

<sup>19</sup> See the discussion in Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 2.

<sup>20</sup> For discussion of such other relationships see *ibid* Chapter 3.

<sup>21</sup> Apart from licences strictly so-called, various other arrangements may be regarded in substance as falling within the categories of licences, *eg*, a caretaker’s agreement, agreements relating to lodgers and guests, hiring of premises and, in the context of agricultural land, conacre and agistment agreements: *ibid*.

occupy or use someone else's land, has a property interest in the land separate from the landowner's. As discussed earlier,<sup>22</sup> technically that interest is classified as an "estate" (a leasehold estate) as that concept is understood under our land law system. As such it can be dealt with by the tenant, *ie*, it can be assigned to someone else and, upon the tenant's death, can be succeeded to by the tenant's successors in title.<sup>23</sup> As a property interest in land it is subject to legal formalities attaching to such interests. For example, a contract to grant a new tenancy or for an assignment or surrender of an existing tenancy must be evidenced in writing as required by section 2 of the *Statute of Frauds (Ireland) 1695*. Furthermore, the actual grant, assignment or surrender of a tenancy may be subject to further formalities.<sup>24</sup>

1.06 Linked to the notion of the tenant holding an estate in the land, independent of the estate held by the landlord, is the principle that the rights and obligations attaching to those estates pass along with them. This principle was first recognised by the courts and then confirmed by statute.<sup>25</sup> Thus the various covenants usually entered into by the original parties, particularly by the tenant, bind their respective successors in title. It is also important to note that various obligations are implied into leases or tenancy agreements both under the common law and, most particularly nowadays, statute.<sup>26</sup> Neither of these aspects of the relationship of landlord and tenant apply to other relationships, such as that of licensor and licensee.

1.07 Perhaps the most significant feature of the landlord and tenant relationship in modern times has been the conferral on tenants, as opposed to other occupiers of land, of substantial statutory rights. The *Consultation Paper on Business Tenancies* published by the Commission in March 2003<sup>27</sup> dealt with the various rights, such as the

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<sup>22</sup> Paragraph 1.03 above.

<sup>23</sup> A key characteristic of most, if not all, other types of arrangements, such as licences, is that they create personal rights in the licensee only, which cannot be assigned or passed on to someone else.

<sup>24</sup> This subject, including the distinction between a contract for a grant and the actual grant itself, is dealt with in Chapter 2 below. Again such formalities do not apply to licence arrangements.

<sup>25</sup> See further Chapter 3 below.

<sup>26</sup> See further Chapters 6–11 below.

<sup>27</sup> LRC CP 21–2003.

right to a new tenancy on expiration of an existing tenancy and rights to compensation for disturbance and improvements, enjoyed by business tenants under the *Landlord and Tenant Acts*. Residential tenants have long enjoyed statutory protection, originally under the old *Rent Acts*, later under the *Housing (Private Rented Dwellings) Act 1982*.<sup>28</sup> Following the *Report of the Commission on the Private Rented Residential Sector*,<sup>29</sup> the *Residential Tenancies Bill 2003* is designed to increase security of tenure and introduce many new provisions to protect residential tenants.

1.08 Another aspect of the landlord and tenant relationship is that the law provides special remedies for enforcement of obligations, which are not necessarily available to parties to other arrangements. Mention was made earlier of the fact that from early times it was held that a landlord could invoke the ancient remedy of distress for non-payment of rent.<sup>30</sup> The special form of ejectment for non-payment of rent now enshrined in section 52 of *Deasy's Act* is available only to the landlord.<sup>31</sup>

## **C Identification of a Tenancy**

1.09 The previous paragraphs outlined the reasons why it is often important to determine whether the relationship of landlord and tenant exists in respect of a particular parcel of land. The question then arises as to how that determination can be made. This is an issue which has caused the courts much difficulty over the years and so the possibility of legislation to clarify matters must be considered.

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<sup>28</sup> See Wylie *op cit* Chapter 29.

<sup>29</sup> Department of the Environment, Heritage and Local Government, July 2000.

<sup>30</sup> The exercise of this remedy was prohibited in respect of any premises let solely as a dwelling by section 19 of the *Housing (Miscellaneous Provisions) Act 1992* and its continued availability in respect of business premises is controversial: see paragraph 8.18 below.

<sup>31</sup> See generally on the operation of this remedy Dowling *Ejectment for Non-payment of Rent* (SLS Legal Publications (Northern Ireland) 1986). See also paragraph 15.04 below. Note that other forms of ejectment may be available to landowners to recover possession from non-tenants: see, *eg*, section 86 of *Deasy's Act* ("servant, herdman or caretaker"): see paragraph 15.06 below.

However, before that issue is addressed it is important to review how the Irish courts have dealt with the matter in the past.<sup>32</sup>

#### **D        *Deasy's Act*, section 3**

1.10        At first sight an attempt to provide statutory guidance as to when the relationship of landlord and tenant arises was made nearly 150 years ago. This was section 3 of *Deasy's Act*, an Act passed at Westminster for Ireland. No equivalent was enacted for England and Wales, but this provision is not entirely unique. A similar provision, apparently based on *Deasy's Act*, was enacted in 1895 in the Canadian Province of Ontario,<sup>33</sup> but not in other provinces.<sup>34</sup> It is worth quoting section 3 of *Deasy's Act* in full:

“The relation of landlord and tenant shall be deemed to be founded on the express or implied contract of the parties, and not upon tenure or service, and a reversion shall not be necessary to such relation, which shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent.”

1.11        Notwithstanding its apparently revolutionary language, particularly for the time of its enactment, section 3 does not seem to have had as much impact on the development of Irish landlord and tenant law<sup>35</sup> as might have been expected.<sup>36</sup> Indeed in the decades

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<sup>32</sup> For more detailed discussion of this subject see Wylie *op cit* paragraph 2.06 and following.

<sup>33</sup> Section 4 of the *Landlord and Tenant Act* (c 26). This, as subsequently amended, became section 3 of the *Landlord and Tenant Act*, RSO 1980 (c 232). Section 3 reads:

“The relation of landlord and tenant does not depend on tenure, and a reversion in the lessor is not necessary in order to create the relation of landlord and tenant, or to make applicable the incidents by law belonging to that relation; nor is it necessary, in order to give a landlord a right of distress, that there is an agreement for that purpose between the parties.”

<sup>34</sup> But *cf* section 35 of the British Columbia *Landlord and Tenant Act*, RSBC 1979 (c 207): “For the purposes of this Part, the relationship of landlord and tenant is one of contract only, and a tenancy does not confer on the tenant an interest in land”.

<sup>35</sup> It would appear that the Ontario equivalent (see footnote 33 above) has

after its enactment there were numerous judicial statements emphasising its limited effect on the law.<sup>37</sup> What is even more striking is the fact that there is so little reference to the section in the case law of the past century.<sup>38</sup> This raises the issue of whether the provision should be retained, whether as it stands or in some modified form. What follows is a summary of what appear to have been the practical consequences of the section and an assessment of its continued worth.

1.12 Some practical consequences were clear from the language of the section and have had a substantial impact on the law. In earlier times the removal of the need for the landlord to retain a “reversion” facilitated so-called “middlemen” grants, *ie*, sublettings made by landlord’s agents for the whole of the unexpired term of the head-tenancy.<sup>39</sup> This blurring of the distinction between an outright assignment of a tenancy and the grant of a subtenancy is much less common nowadays, if it ever occurs. Of more lasting significance was the removal of the need to retain a reversion. This gave impetus to the making of fee farm grants which became so common in the past 150 years and remain so in modern times. Most such grants create the relationship of landlord and tenant between the grantor and grantee, even though the grantee holds a freehold (fee simple) estate. Also of lasting significance is the fact that *Deasy’s Act* also facilitated the granting of tenancies of minor rights, such as fishing, shooting and other sporting rights.<sup>40</sup> This was because section 1 of the Act defined

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had, if anything, even less impact: see Ontario Law Reform Commission, *Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1976) at 5. See also footnote 37 below.

<sup>36</sup> For detailed discussion of this see Wylie *op cit* paragraph 2.07 and following.

<sup>37</sup> *Eg* Christian J in *Bayley v Marquis of Conyngham* (1863) 15 ICLR 406, 417 and in *Chute v Busteed* (1865) 16 ICLR 222, 244. See also O’Hagan J in the latter at 235-236. *Cf* the views of the judges on the Ontario provision (footnote 33 above): *Kennedy v Agricultural Development Board* [1926] 4 DLR 717, 59 OR 374; *Royal Bank v Lambton Loan and Investment Co* [1941] 2 DLR 643, [1941] OR 56.

<sup>38</sup> For examples of the very few references to the section in relatively modern times see *Levingston v Somers* [1941] IR 183 and *Irish Shell & BP Ltd v Costello Ltd* [1981] ILRM 66.

<sup>39</sup> See *Seymour v Quirke* (1884) 14 LR Ir 455.

<sup>40</sup> See *Bayley v Marquis of Conyngham* (1863) 15 ICLR 406.

“lands” as including lands of every tenure “whether corporeal or incorporeal”, *ie* the tenancy does not necessarily have to confer possession of the land to which it relates.<sup>41</sup> It also seems clear that the founding of the relationship on the agreement of the parties meant that the Irish courts did not have to concern themselves with the need for so-called “certainty of duration”.<sup>42</sup> The English courts ultimately concluded that it was a common law requirement of a lease or tenancy that it should be for a term of certain duration<sup>43</sup> (*ie*, there is a definite date when it will end) or a term capable of being rendered certain.<sup>44</sup> Leases involving terms of uncertain duration have long been recognised by the Irish courts, such as the leases for the periods of people’s lives once so common – leases for lives renewable for ever<sup>45</sup> and leases for lives and a period of years combined.<sup>46</sup> *The*

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<sup>41</sup> Such possession usually exists and, indeed, is often said to be a primary characteristic of a tenancy (see paragraph 1.19 below). Note also that special legislation may rule out rights attaching to tenancies of incorporeal hereditaments: see *Brittas Fly Fishing Club Ltd v Aimitheor Deantoreacht Teoranta* High Court 30 March 1993 (Cir App) (sporting club holding lease to stock and fish a reservoir and to shoot game and wild-fowl not entitled to a sporting lease under the *Landlord and Tenant Acts*).

<sup>42</sup> Another consequence of founding the relationship on the parties’ agreement was probably that the common law doctrine of *interesse termini* (*ie*, that the tenant did not acquire an interest until entering into possession) ceased to apply: see Furlong *The Law of Landlord and Tenant as Administered in Ireland* (2<sup>nd</sup> ed Edward Ponsonby 1869) Volume 1 at 27; Wylie *op cit* paragraph 2.24. The doctrine was abolished in England by section 149(1) and (2) of the *Law of Property Act 1925*.

<sup>43</sup> See the House of Lords decision in *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, approving *Lace v Chantler* [1944] KB 368. This ruling has proved to be controversial: see Bright, “Uncertainty in Leases – Is it a Vice?” (1993) LS 38; Sparkes “Certainty of Leasehold Terms” (1993) 109 LQR 93. See also *Canadian Imperial Bank of Commerce v Bello* (1991) 64 P & CR 48.

<sup>44</sup> The typical example of which is a periodic tenancy, *eg* a weekly, monthly and yearly tenancy. Note, however, that the House of Lords in the *Prudential* case overruled earlier decisions involving uncertainty as to when a notice terminating a periodic tenancy could be served, *eg*, *Re Midland Railway Co’s Agreement* [1971] Ch 725; *Centaploy Ltd v Matlodge Ltd* [1974] Ch 1; *Ashburn Anstalt v Arnold* [1989] Ch 1.

<sup>45</sup> For detailed discussion see Lyne *Leases for Lives Renewable for Ever* (Hodges and Smith 1837); also Wylie *op cit* paragraph 4.45.

<sup>46</sup> See Wylie *op cit* paragraph 4.46.

*Commission's preliminary conclusion is that such practical consequences of section 3 of Deasy's Act have been beneficial and so should be retained as part of the law in Ireland.*

1.13 There may have been other consequences of section 3 of *Deasy's Act*, but they are not so clear. One upon which there has been some controversy is whether the founding of the relationship upon the agreement of the parties means that principles of contract law apply. In reviewing the equivalent provision in that part of Canada,<sup>47</sup> the Ontario Law Reform Commission suggested that it could be construed as incorporating into landlord and tenant law contractual principles hitherto of at least doubtful application.<sup>48</sup> One was the doctrine of frustration of contract which until recently was thought not to apply to leases.<sup>49</sup> In more recent times the courts on both sides of the Irish Sea have come round to the view that there is no reason, in principle, why it should not apply.<sup>50</sup> Another was the principle that a party to a contract seeking damages for breach of contract is obliged to mitigate the loss suffered. The traditional view has always been that a landlord is not obliged, for example, to take action to recover possession from a tenant in order to minimise the damage which may occur if the tenant continues to ignore repairing obligations.<sup>51</sup> Perhaps the most interesting principle raised by the Ontario Commission was the notion that contractual obligations are

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<sup>47</sup> See paragraph 1.10 and footnote 33 above.

<sup>48</sup> *Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1976) at 5. For further discussion of the Ontario Report see the Northern Ireland Land Law Working Group's *Landlord and Tenant Discussion Document No 3* (HMSO 1982) at 9-19 and *Final Report* (HMSO 1990) Volume 1 at 253-263.

<sup>49</sup> See the doubts expressed by Black J in *Groome v Fodhla Printing Co Ltd* [1943] IR 380, 413-414; note also the mixed views of the House of Lords in *Cricklewood Property & Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221.

<sup>50</sup> *Neville & Sons Ltd v Guardian Builders Ltd* [1995] 1 ILRM 1, approving (without reference to section 3 of *Deasy's Act*) the views of the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675. See further on this contractual doctrine Clark *Contract Law in Ireland* (4<sup>th</sup> ed Round Hall Sweet & Maxwell 1998) at 439; McDermott *Contract Law* (Butterworths 2001) Chapter 20.

<sup>51</sup> This may not apply once the tenancy has expired: see *Watkins, Jameson & Pim Ltd v Stacey & Harding* (1961) 95 ILTR 122.

“bilateral” in nature, *ie* they are regarded as mutually dependent upon each other.

1.14 The most significant aspect of the bilateral nature of contractual obligations is that it leads to the principle that if one party breaches an obligation which is regarded as fundamental, or engages in what amounts to a repudiation of the contract, the other party may treat this as excusing further performance of the contract, *ie*, without resort to court action the latter may act as if discharged from the contract.<sup>52</sup> Yet according to traditional landlord and tenant law the parties’ obligations are independent, so that, for example, a breach by the landlord of repairing obligations does not discharge the tenant from the obligation to pay rent.<sup>53</sup> Thus it was held in 1996 that a tenant could not withhold his rent because of a breach of obligation by the landlord.<sup>54</sup> This is a matter which is taken up in a later chapter, in the context of enforcement of obligations.<sup>55</sup> In passing it may be noted that the English courts, without the benefit of *Deasy’s Act*, have recently been taking the view that a lease or tenancy should be regarded as essentially a contractual relationship in this respect.<sup>56</sup> Thus they have been prepared to hold that a tenant may “disclaim or rescind” (*ie* act as discharged from) the tenancy where the landlord sufficiently derogates from the grant, or is guilty of a sufficiently serious breach of obligation, as to amount to a repudiation of the tenancy.<sup>57</sup> It remains to be seen whether the Irish courts will follow this approach.<sup>58</sup>

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<sup>52</sup> See Clark *op cit* at 427; McDermott *op cit* at 1069.

<sup>53</sup> *Corkery v Stack* (1947) 82 ILTR 60.

<sup>54</sup> *Riordan v Carroll* [1996] 2 ILRM 263, 275 (*per* Kinlen J).

<sup>55</sup> Paragraph 10.16 below.

<sup>56</sup> Thus, since one cannot enter into a contract with oneself, it has been held that a lease to oneself renders the covenants unenforceable (see *Rye v Rye* [1962] AC 496 at 513 *per* Lord Denning). However, a valid lease may be granted to a nominee: *Ingram v IRC* [1999] 2 WLR 90.

<sup>57</sup> *Hussein v Mehlman* [1992] 2 EGLR 97 (residential tenancy); *Chartered Trust plc v Davies* [1997] 2 EGLR 83, *cf* *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1999] 1 EGLR 7 (both commercial leases).

<sup>58</sup> Note that the specific provision in section 89 of the Ontario *Landlord and Tenant Act*, RSO 1980, c 232 (“Subject to this Part, the common law rules respecting the effect of the breach of a covenant by one party to a contract



1.15 It might be thought that the Irish courts would be inclined to pursue the contractual approach partly because of the apparent “break from the past” made by section 3 of *Deasy’s Act* expressly stating that the relationship is no longer founded on “tenure or service”.<sup>59</sup> It might even be argued that this returned leases or tenancies to their original purely contractual status unrecognised by the old feudal system. However, it is difficult to sustain this argument for several reasons. One obvious reason is that it deprives the tenant of any “estate” or “interest” in the land, which would run counter to many of the other provisions in *Deasy’s Act*. Indeed, several other sections in the Act expressly refer to the tenant’s “estate or interest”.<sup>60</sup> Furthermore, the essence of having an “estate” or “interest” in the land is that it is an asset with proprietary characteristics and not purely a personal right. It can, therefore, be assigned or passed on to a third party.<sup>61</sup> This too *Deasy’s Act* recognises in its provisions governing rights and obligations under the lease or tenancy passing to successors in title.<sup>62</sup>

1.16 What judicial authority there is supports the view that a lease or tenancy retains “proprietary” characteristics despite section 3 of *Deasy’s Act*. In the decades immediately following its enactment the consensus emerged that, although it clearly changed some things, particularly some technical features of the common law,<sup>63</sup> the

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on the obligation to perform by the other party apply to tenancy agreements”) does not appear to have had much impact, nor has a similar one in section 42 of the British Columbia *Landlord and Tenant Act*, RSBC 1979, c 207. The Canadian courts have been reluctant to accept what are perceived as “self-help” remedies and reform bodies have declined to recommend resort to them: see British Columbia Law Reform Commission *Report on Landlord and Tenant Relationship: Residential Tenancies* (1973) at 97; Ontario Law Reform Commission *Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1976) at 126-127. This was also the conclusion of the Northern Ireland Land Law Working Group: see *Final Report* (HMSO 1990) Volume 1 at 259-261. This matter is taken up later: see paragraph 10.18 below.

<sup>59</sup> See paragraph 1.10 above.

<sup>60</sup> *Eg* sections 7 (surrenders) and 9-16 (assignments). See further Chapter 2 below.

<sup>61</sup> See paragraph 1.03 above.

<sup>62</sup> Sections 12 and 13. See further Chapter 3 below.

<sup>63</sup> See paragraph 1.12 above.

relationship of landlord and tenant otherwise retained its traditional characteristics. Thus the rent payable was held still to be a rent “service” which automatically attracted the remedy of distress.<sup>64</sup> In more recent times the argument that section 3 changed the common law other than as expressly stated was rejected in the context of an assignment of the grantee’s interest under a fee farm grant creating the relationship of landlord and tenant.<sup>65</sup> Since this involved a conveyance of a fee simple estate, it was held that appropriate words of limitation should be used.<sup>66</sup> *The Commission’s preliminary conclusion is that, notwithstanding section 3 of Deasy’s Act, a lease or tenancy should continue to be regarded as creating an estate or interest in the land in the tenant.*

1.17 Two further points should be mentioned in this context. One is that it has been argued from time to time that section 3 is not a “universal” provision, *ie*, that it simply determines whether the rest of the Act’s provisions apply to a particular lease or tenancy. It does not prevent the creation of the relationship outside the Act, which will be governed by the pre-existing common law and to which the Act may or may not apply.<sup>67</sup> The reference to the relationship being “deemed” to be founded on the parties’ contract may be argued to support this view,<sup>68</sup> but the tenor of the rest of the wording seems to militate against it. In particular, if the section had such a limited scope, one might have expected to see included in it limiting words such as “For the purposes of this Act ...”.<sup>69</sup> There is no authority on the point to provide guidance and the Commission is concerned that the notion of a dual system of tenancies coming within *Deasy’s Act* and tenancies not within it, but governed by the old common law, is a recipe for uncertainty and confusion. *The Commission has reached the*

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<sup>64</sup> *Gordon v Phelan* (1881) 15 ILTR 70. See also *Attorney General v Wilson* (1893) 31 LR Ir 28, 48-53 (*per* Palles CB).

<sup>65</sup> See paragraph 1.12 above.

<sup>66</sup> *Re Courtney* [1981] NI 58.

<sup>67</sup> See, *eg*, in respect of the requirement for rent (see further paragraph 1.21 below) Hadden and Trimble *Northern Ireland Housing Law* (SLS Legal Publications (Northern Ireland) 1986) at 27. See also Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 577; Pearce and Mee *Land Law* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 141.

<sup>68</sup> Wylie *op cit* paragraph 2.10.

<sup>69</sup> *Ibid.*

*preliminary conclusion that any re-enactment or replacement of section 3 of Deasy's Act should be a provision of universal application, that is, applying to all tenancies, and should say so explicitly.*

1.18 In a recent English case, in the House of Lords<sup>70</sup> it was stated that a lease simply describes the relationship between two parties and, somewhat surprisingly, is not concerned with the question whether an estate or proprietary interest binding third parties has been created.<sup>71</sup> Thus it was held that a body, which itself had only a licence to use property, had created a tenancy in favour of a person it had let into temporary occupation of part of the property. Yet because the grantor did not itself have an estate or interest in the land (it had a licence only), it was recognised that the “tenant” in occupation had none – *nemo dat quod non habet*.<sup>72</sup> Nevertheless, the tenant was held entitled to claim statutory rights attaching to tenants and not to other occupiers of land.<sup>73</sup> The Commission has considerable doubts about the reasoning in this case<sup>74</sup> and even more doubts about policy considerations relating to the application of statutory rights.<sup>75</sup> It also seems to raise the prospect of the courts recognising another type of dual system of tenancies, namely those which create an estate or interest in the tenant and those which do not, but which confer some attributes of a tenancy of an uncertain scope. Again the Commission regards this as a recipe for uncertainty and confusion.<sup>76</sup> *The Commission has reached the preliminary conclusion that Irish law*

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<sup>70</sup> *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406.

<sup>71</sup> See especially the speech of Lord Hoffmann.

<sup>72</sup> A person cannot give to someone else what that person does not hold.

<sup>73</sup> Implied repairing obligations on landlords under section 11 of the English *Landlord and Tenant Act 1985*.

<sup>74</sup> For discussion, which also contains some criticism, see Rook [1999] Conv 517; Morgan [1999] Conv 493; Routley (2000) 63 MLR 424. See also Evans and Smith *The Law of Landlord and Tenant* (6<sup>th</sup> ed Butterworths 2002) at 10.

<sup>75</sup> In particular it seems clear that the result was the reverse of what all the parties involved intended or contemplated: see further paragraph 1.29 below.

<sup>76</sup> The Commission is not, therefore, in favour of a provision such as that contained in section 35 of the British Columbia *Landlord and Tenant Act*, RSBC 1979 (c 207): see paragraph 1.10 footnote 34 above.

*should retain the notion that all tenancies confer an estate or interest in the tenant and that legislation should make it clear that the absence of this will prevent the relationship of landlord and tenant from arising.*

## **E Exclusive Possession**

1.19 It has long been recognised by the courts on both sides of the Irish Sea<sup>77</sup> that “exclusive possession” of the premises occupied is a characteristic of a tenancy.<sup>78</sup> It is important to appreciate that this is not a conclusive criterion. The point is, as explained by Kenny J,<sup>79</sup> that, while a tenancy cannot exist unless the person claiming to be the tenant can establish exclusive possession of the premises occupied, it is now recognised that occupiers of land who are not tenants may nevertheless have exclusive possession, or at least, have some degree of exclusive occupation rights.<sup>80</sup> In this sense the concept of “possession” is a somewhat elusive one and it has been argued that there may be a distinction between “legal” possession strictly defined and other forms of possession or occupation which fall short of this.<sup>81</sup> The distinction may lie in the degree of “control” or “dominion” over the premises retained by the grantor or conferred on the grantee.<sup>82</sup> Thus while many occupiers of property may have what looks like exclusive use or occupation of premises, albeit often for a limited period, if the owner retains control of the premises they will not be tenants. This explains the many cases involving non-tenant occupiers

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<sup>77</sup> The leading authority on the matter in England is the speech of Lord Templeman giving the opinion of the House of Lords in *Street v Mountford* [1985] AC 809. See also *AG Securities Ltd v Vaughan* and *Antoniades v Villiers*, both reported at [1990] 1 AC 417.

<sup>78</sup> *Gatien Motor Co Ltd v Continental Oil Co of Ireland Ltd* [1979] IR 406.

<sup>79</sup> *Ibid* at 420.

<sup>80</sup> In the *Gatien* case Kenny J thought that the occupier had “possession”, but was a caretaker rather than a tenant: *ibid* at 421. See also *Davies v Hilliard* (1965) 101 ILTR 50 (caretaker with possession).

<sup>81</sup> See Wylie *op cit* paragraph 2.36.

<sup>82</sup> See, eg, *Governors of National Maternity Hospital v McGouran* [1994] 1 ILRM 521 (hospital entitled to change the venue of a coffee shop within the hospital).

like lodgers,<sup>83</sup> hotel guests,<sup>84</sup> servants and employees,<sup>85</sup> and hirers of premises for special events.<sup>86</sup>

1.20 The result of the case law is that the concept of exclusive possession, as explained in the previous paragraph, is treated by the courts as a negative criterion only.<sup>87</sup> Its absence in a particular case will rule out a tenancy, but its presence will not necessarily result in a ruling in favour of a tenancy. Its presence will simply be regarded as one factor, but not necessarily the determining one, pointing to a tenancy.<sup>88</sup> The Commission has concluded that this is a sensible view for the courts to adopt, given the multifarious types of occupational arrangements made in respect of land. *It has, therefore, reached the preliminary conclusion that any statutory guidelines should not include the requirement of exclusive possession.*

## **F Rent**

1.21 It has been a matter of considerable controversy whether the reservation of “rent” is a necessary requirement for a tenancy.<sup>89</sup> This stems partly from the reference in section 3 of *Deasy’s Act* to an agreement by one party to hold land from or under another “in consideration of any rent.” And “rent” is defined in section 1 of the Act as “any sum or return in the nature of rent payable or given by way of compensation for the holding of any land.” The issue has rarely been addressed directly by the courts. In an early case decided shortly after the enactment of *Deasy’s Act*, Pigot CB stated: “It is

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<sup>83</sup> *Waucob v Reynolds* (1850) 1 ICLR 142.

<sup>84</sup> *Carroll v Mayo County Council* [1967] IR 364, 367 (per Henchy J).

<sup>85</sup> *Moore v Doherty* (1843) 5 Ir LR 449; *Great Southern Railways v Bergin* (1937) 71 ILTR 276.

<sup>86</sup> *Kelly v Woolworth & Co Ltd* [1922] 2 IR 5; *Boylan v Dublin Corporation* [1949] IR 60.

<sup>87</sup> See Wylie *op cit* paragraphs 2.35-36.

<sup>88</sup> *Per Griffin J in the Gatien case op cit* at 414. See also Barron J in *Texaco (IR) Ltd v Murphy* High Court 17 July 1991, at 9.

<sup>89</sup> See Wylie *op cit* paragraphs 2.37-38. Similar controversy has arisen in England owing to Lord Templeman’s reference to rent in the leading case of *Street v Mountford* [1985] AC 809. However, the courts there have since confirmed that a gratuitous lease is valid: see *Ashburn Anstalt v Arnold* [1989] Ch 1.

perfectly consistent with the relation of landlord and tenant that the tenant should hold rent free.”<sup>90</sup> However, that case involved a landowner seeking to maintain an action for use and occupation against a purchaser who remained in possession after an abortive sale. Such an action proceeds on the basis that there is an implied agreement that the occupier should pay a reasonable sum equivalent to rent.<sup>91</sup> The court ruled that no such implied agreement existed in the circumstances of that case and that the overholding abortive purchaser was really a licensee.<sup>92</sup>

1.22 More recently the issue arose in *Irish Shell & BP Ltd v Costello Ltd*,<sup>93</sup> which concerned whether the licence agreement under which a petrol station was operated constituted a tenancy. Under this agreement the operator (described as “the Hirer”) paid hiring fees for use of petrol tanks and pumps, machinery and other items supplied with the premises. It was argued that since there was no payment of “rent”, there could be no tenancy within section 3 of *Deasy’s Act*. The majority of the Supreme Court held that the fees were in substance rent and that the agreement did create the relationship of landlord and tenant.<sup>94</sup> However, Kenny J dissented on this view of the fees and, holding they were not rent, ruled that no such relationship had been created because of section 3 of *Deasy’s Act*. Quoting both sections 1<sup>95</sup> and 3 of the Act he stated quite firmly: “But the payment of rent is, in Ireland, an essential for the creation of the relationship of

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<sup>90</sup> *Corrigan v Woods* (1867) IR 1 CL 73, 75.

<sup>91</sup> This common law rule was given statutory recognition in section 46 of the *Deasy’s Act*: Wylie *op cit* paragraph 12.13. See also paragraph 8.15 below.

<sup>92</sup> Pigot CB stated: “If it was a licence to hold without rent, no action lies: and is not what is done when a person is let into possession under an abortive sale a licence to hold without rent?” *Ibid*.

<sup>93</sup> [1981] ILRM 66.

<sup>94</sup> *Per* Griffin J *op cit* at 71 (O’Higgins CJ concurring). Note that Griffin J expressly referred to the *Deasy’s Act* argument and did not dispute its validity in principle; his decision was based on a different view of the nature of the fees (*ie*, that they were in substance rent).

<sup>95</sup> The definition of both “rent” (see paragraph 1.21 above) and “lease” (*ie* “any instrument in writing, whether under seal or not, containing a contract of tenancy in respect of any lands in consideration of a rent or return.”).

landlord and tenant.”<sup>96</sup> This seems to be the only explicit judicial statement of such a positive nature. Other judicial statements tend only to refer to the presence or absence of payments in the nature of rent as being important factors to be taken into consideration in determining whether or not a tenancy has been created.<sup>97</sup>

1.23 Clearly this uncertainty should be removed. The Commission’s inclination is to adopt the view of Kenny J, firmly rooted, as it is, in the provisions of *Deasy’s Act*. Furthermore, in doing so, the Commission would reiterate the view expressed earlier<sup>98</sup> that it is important that any statutory provision replacing *Deasy’s Act* should be of universal application. It would create further uncertainty if a common law relationship of landlord and tenant could exist independently of, and not complying with the requirements of, the statutory relationship. However, the Commission does recognise that in certain situations a lease (or demise) is used essentially as a conveyancing device. When so used it will often lack many of the attributes of a traditional lease or tenancy, such as the payment of rent. The obvious example of this is a mortgage by demise or sub-demise, where the mortgagee does not want to have an outright conveyance or assignment of the mortgagor’s interest.<sup>99</sup> If this is the freehold interest of a fee farm grantee<sup>100</sup> or a leasehold interest, the mortgagee will not want to incur the mortgagor’s liability to pay the fee farm or leasehold rent. The Commission would not wish to cast any doubt on the validity or efficacy of such well-established conveyancing practice. Otherwise, however, it takes the view that occupational arrangements not involving any payment of rent or other forms of consideration should not be regarded as tenancies. Rather

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<sup>96</sup> *Op cit* at 72.

<sup>97</sup> See, eg, *Hurly v Hanrahan* (1867) IR 1 CL 700, 715 (*per* O’Brien J); *Whipp v Mackey* [1927] IR 372, 382 (*per* Kennedy CJ); *Gatien Motor Co Ltd v Continental Oil Co of Ireland Ltd* [1979] IR 406, 415 (*per* Griffin J) and 421 (*per* Kenny J); *Kenny Homes & Co Ltd v Leonard* High Court (Costello P) 11 December 1997 (affirmed by Supreme Court 18 June 1998); *Ó Siodhachain v O’Mahony* High Court (Kearns J) 31 October 2002.

<sup>98</sup> Paragraph 1.17 above.

<sup>99</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 12.34 and 12.37.

<sup>100</sup> *Ibid* Chapter 4.

they should be regarded as arrangements of a different kind, such as licences. *The Commission provisionally recommends, therefore, that it should be made clear by statute that the universal rule is that a tenancy does not exist unless the occupier of the land in question is obliged to pay rent or some other form of consideration in return for the right to occupy. The legislation should, however, specify an exception to this rule to facilitate the continued creation of mortgages by demise or sub-demise, but no other exceptions are contemplated.*

1.24 A point made in the previous paragraph raises the issue of the status of so-called tenancies “at will” and “at sufferance”. A tenancy at will has long been recognised by the courts, but they have had considerable difficulty in determining its position in the law of landlord and tenant.<sup>101</sup> In essence it involves occupation of land for an indefinite period, with either party entitled to end the arrangement at any time.<sup>102</sup> In its traditional form the relationship of landlord and tenant is said to exist,<sup>103</sup> yet it has often been stated that the “tenant” has no estate or interest in the land.<sup>104</sup> Again in its traditional form the occupation by the tenant is rent free,<sup>105</sup> which is difficult to reconcile with the requirements of *Deasy’s Act*.<sup>106</sup> Not surprisingly it was held that such a tenant had no protection under the *Rent Restriction Acts*.<sup>107</sup> Given the Commission’s preliminary conclusions with respect to both

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<sup>101</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 4.21 and following.

<sup>102</sup> *Ward v Ryan* (1875) IR 10 CL 17.

<sup>103</sup> See *Bellew v Bellew* [1982] IR 447, 460 (*per* O’Higgins CJ). Note that the majority of the Supreme Court in that case (Griffin and Hederman JJ) held that the occupier was a licensee.

<sup>104</sup> *Wright v Tracey* (1874) IR 8 CL 478, 489 (*per* Fitzgerald J); *Brew v Conole* (1875) IR 9 CL 151, 156 (*per* Dowse B).

<sup>105</sup> Payment of rent tends to lead the court to conclude that the tenancy is a periodic tenancy, the category (weekly, monthly, *etc*) depending on how the rent is calculated: see *Fahy v O’Donnell* (1870) IR 4 CL 332 (*per* Keogh J).

<sup>106</sup> Paragraph 1.22 above.

<sup>107</sup> *Delany (Blanchardstown Mills Ltd) v Jones* [1938] IR 826; *Irish Sailors’ and Soldiers’ Land Trust v Donnelly* [1944] IR 464. See further on case-law involving the Irish Sailors’ and Soldiers’ Land Trust, Wylie *op cit* at paragraph 4.23.



the nature of a tenant's interest<sup>108</sup> and the need for rent or other consideration,<sup>109</sup> it must be queried whether a tenancy at will should continue to be regarded as creating the relationship of landlord and tenant. Indeed, the Commission is inclined to adopt the remarks of McCarthy J in *Irish Shell & BP Ltd v Costello*:<sup>110</sup> "A tenancy at will is somewhat of a misnomer if one gives to the cognate word 'tenant' the ordinary meaning rather than its limited source meaning of 'holder'. In truth a tenant at will is a person with a licence and no more than a licence to occupy."<sup>111</sup> *The Commission has reached the provisional recommendation that a tenancy at will should not be regarded as creating the relationship of landlord and tenant and that arrangements involving occupation of land rent free for indefinite periods should be regarded as a form of licence.*

1.25 What has been said above about a tenancy at will applies *a fortiori* to a tenancy "at sufferance". This has been described as "the lowest form of tenancy",<sup>112</sup> but in truth it is not really a tenancy of any kind. Such a "tenancy" arises by operation of law only, when a person who was a true tenant fails to vacate the demised premises at the end of the tenancy and holds over *without*<sup>113</sup> the assent or dissent of the landlord. The only element which distinguishes such a "tenant" from an out-and-out trespasser is that the initial occupation under the original, true tenancy was lawful.<sup>114</sup> But in all other respects the

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<sup>108</sup> Paragraph 1.16 above.

<sup>109</sup> Paragraph 1.23 above.

<sup>110</sup> [1984] IR 511, 523.

<sup>111</sup> Hence the tendency of the courts in recent times to construe occupation for an indefinite period as a licence rather than a tenancy at will: *per* O'Higgins CJ in *Bellew v Bellew* [1982] IR 447, 458. The development of the law relating to licences to occupy or use land in recent decades has been substantial: see Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) chapter 20.

<sup>112</sup> *Per* FitzGibbon LJ in *Holland v Chambers (No 1)* [1894] 2 IR 442, 449. See also Palles CB at 448.

<sup>113</sup> If the holding over was with consent or agreement of the landlord, a tenancy at will was often held to arise but more likely nowadays, a licence would arise: see paragraph 1.24 above.

<sup>114</sup> Thus such a tenant may be liable at common law to a claim for use and occupation rather than for damages for *mesne* profits, but this is a controversial point: see Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 4.36.

overholding tenant is a trespasser and treated as such by the general law. Thus it would appear that time runs against the landlord under the Statute of Limitations from the moment the tenancy arises.<sup>115</sup> The “tenant” has no estate or interest in the land<sup>116</sup> and no relationship of landlord and tenant in any meaningful form would seem to exist.<sup>117</sup> *The Commission has reached the preliminary conclusion that it should be confirmed that a tenancy at sufferance does not create the relationship of landlord and tenant.*

## **G The Parties’ Agreement**

1.26 Perhaps the most controversial aspect of section 3 of *Deasy’s Act* is how far the statement that the relationship of landlord and tenant “shall be deemed to be founded on the express or implied contract of the parties” should be taken literally. At first sight this suggests that it is the intention of the parties, as exhibited by their agreement, which should be the paramount consideration. To some extent the Irish courts have accepted this proposition, but over the years a somewhat inconsistent approach has emerged. There are many judicial statements to the effect that the issue of whether or not a particular arrangement for occupation of land amounts to a tenancy should be regarded by the court as a matter of construing the agreement entered into by the parties.<sup>118</sup> This may involve scrutiny of any written agreement they may have entered into or consideration of the evidence relating to any oral agreement. Furthermore, this is often said to be a subjective matter, in the sense that the court is trying to discern what those particular parties actually agreed. As Henchy J put it in *Irish Shell & BP Ltd v Costello Ltd (No 2)*: “In all cases it is a question of what the parties intended, and it is not permissible to apply an objective test which would impute to the

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<sup>115</sup> Wylie *op cit* paragraph 4.39. *Cf* a tenancy at will, where time does not run until after expiration of one year from its commencement, unless previously determined: section 17(1) of the *Statute of Limitations 1957*.

<sup>116</sup> *Jones d Gash v Cotter* (1830) 2 Hud & Br 203; *Segrave v Barber* (1855) 5 ICLR 67.

<sup>117</sup> Wylie *op cit* paragraph 4.34.

<sup>118</sup> *Whipp v Mackey* [1927] IR 372; *Gatien Motor Co Ltd v Continental Oil Co of Ireland Ltd* [1979] IR 406; *Irish Shell & BP Ltd v Costello Ltd (No 1)* [1981] ILRM 66; *Governors of the National Maternity Hospital v McGouran* [1994] 1 ILRM 521.

parties an intention which they never had.”<sup>119</sup> However, it is questionable how far the courts have heeded this warning.

1.27 What appears to have influenced many judges in the past is the danger that a landowner, perhaps taking advantage of a superior bargaining position, may persuade, if not force, an occupier to sign an agreement which purports to create one type of relationship rather than another. Often the motive will be to prevent the occupier obtaining statutory protection or rights which apply to a tenant, but not to other occupiers, such as a licensee.<sup>120</sup> Thus the courts have often been astute to identify “sham” agreements and to look at the substance of what has been entered into, rather than the wording or form.<sup>121</sup> Such a judicial attitude is perfectly understandable and entirely consistent with the notion that the courts should seek to advance the purpose of legislation such as the old *Rent Restriction Acts* and *Landlord and Tenant Acts*. However, it is arguable that the process has gone too far and has resulted in considerable uncertainty in the law and practice.

1.28 The difficulties which have arisen may be illustrated by reference to two recent cases: *Kenny Homes & Co Ltd v Leonard*<sup>122</sup> and *Smith v CIE*.<sup>123</sup> These both involved commercial arrangements. In *Kenny Homes* the operations of a garage and adjacent car park had occupied the premises for some 35 years under a series of “hiring and licence” agreements. In *Smith* the operator of a shop in a railway station had entered into a 10-year “licence” agreement negotiated by his legal advisers with the owner’s legal advisers. What is interesting is to compare key clauses in the written agreements under scrutiny by the courts in the two cases:

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<sup>119</sup> [1984] IR 511, 517.

<sup>120</sup> See paragraph 1.07 above.

<sup>121</sup> See cases cited in footnote 118 above. This principle was also the basis of the House of Lords leading decision in England, *Street v Mountford* [1985] AC 809.

<sup>122</sup> High Court 11 December 1997; Supreme Court 18 June 1998.

<sup>123</sup> High Court 9 October 2002 (Circuit Appeal).

## **Kenny Homes**

### **Clause 5(a)**

“This Agreement and the benefits hereby conferred on the hirer is [sic] a personal privilege of the hirer”

### **Clause 6**

“It is hereby agreed and declared and it is the intention of the parties hereto and each of them that nothing in this agreement shall be, or ought to be construed as granting any interest whatsoever in the said site to the Hirer, or giving rise to the relationship of landlord and tenant between the Company and the Hirer, or as conferring on the Hirer any exclusive right to possession of the site or any part thereof, or any right of possession at all therein, save to the extent necessary to give effect to the hiring and to enable the provisions of this agreement to be fulfilled.”

## **Smith**

### **Clause 10**

“Nothing in this licence shall be construed as giving the licensee any tenancy in or right to possession of or any right or easement over or with respect to any part of the property of the Board or the property of the Company. In particular and without prejudice to the generality of the foregoing it is hereby declared that it is not the intention of either the Board or the Company on the one part or the licensee on the other part in relation to the premises or the said Railway arch or any part thereof to create between them the relationship of landlord and tenant or to confer such rights upon the licensee as would amount in law to a tenancy (including a tenancy at will) or to create any estate or proprietary interest for the licensee therein.”

### **Clause 11**

“The arrangement hereby evidenced is made by the Board and the Company for their respective temporary convenience which is that the Board or the Company while retaining the ownership possession occupation control and

management of the said Railway arch (which is an integral part of the station and the railway undertaking and necessarily and essentially required in connection with the operation thereof) should use the airspace of the said Railway arch to good purpose and not allow same to remain idle without profit or return.”

An illustration of the uncertainty which has now been introduced into the law is the contrasting approach of the courts in the two cases.

1.29 In the *Kenny Homes* case Costello P took the view that the provisions of the agreements “could not have been in clearer terms” as indicating an intention on the part of the parties not to create a tenancy and, notwithstanding the long period of occupation of the premises, ruled that the occupiers did not have one. His decision was upheld by the Supreme Court, in which Lynch J, giving the judgment of the Court, described the agreements as “crystal” clear. On the other hand, in the *Smith* case Peart J<sup>124</sup> ruled that a tenancy had been created, notwithstanding his concluding remarks after a review of the evidence:-

“I have set out the evidence in some detail from my notes for the purpose of demonstrating that there is no dispute whatsoever on the facts that the agreement entered into between the parties was known to be, and accepted by the applicant to be, a licence agreement and that it was not intended that any tenancy rights should arise. It is clear from the evidence and from the documents produced in evidence that this is the case. In fact there is no dispute on the facts. What has to be decided is, in the main, a legal issue.”

Peart J also recorded that the occupier of the shop was an experienced business man who had engaged his own solicitors firm to negotiate the terms of the agreement on his behalf. He made it clear in his evidence that he had always understood that all he was getting was a licence. Indeed, when later during the course of his occupation he

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<sup>124</sup> A curious feature of Peart J’s judgment is that, although reference is made to earlier Irish cases and English cases like *Street v Mountford*, no mention is made of the *Kenny Homes* case (notwithstanding its status as a decision of the Supreme Court).

was offered a tenancy he turned this down. Despite all this Peart J concluded that he had had a tenancy from the beginning. The judge put much weight on the English authorities notwithstanding that they were dealing with residential arrangements, whereas the *Smith* case involved a commercial arrangement.

1.30 The Commission would make a number of comments about these two cases. First, it would appear to be extremely difficult to reconcile the judicial approaches: in *Kenny Homes* both Costello P and the Supreme Court clearly put considerable weight on the provisions of the agreement, as evidence of what the parties intended; in *Smith* Peart J disregarded the provisions of the agreement, even though he accepted that they did reflect exactly what the parties' intended. In that sense the approach adopted in *Smith* seems difficult to reconcile with section 3 of *Deasy's Act*.<sup>125</sup> It is one thing to scrutinise the terms of an agreement in order to protect a party from unfair advantage being taken by the other party through a weak bargaining position and to prevent "sham" transactions, but it is quite another to disregard terms which, the evidence confirms, reflect both parties' intention and understanding. This seems to be carrying the courts' supervisory function much too far and is difficult to square with the long-established principle that it is not the courts' function to rewrite commercial agreements. Furthermore, it is difficult to reconcile with Henchy J's statement of the parameters of the judicial role quoted earlier.<sup>126</sup> Perhaps the most questionable aspect of the approach in *Smith* is that it put so little weight on the fact that the parties' agreement was negotiated at arms length on their behalf by their own, independent professional advisers, including their lawyers.

1.31 The Commission has concluded that the uncertainty that now exists in our law and practice as a result of such not easily reconciled, decisions, should not be allowed to continue. The need for some legislative guidance seems clear, but the question remains as to what form it should take. The Commission is not unsympathetic to

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<sup>125</sup> It is, however, worth pointing out that the agreement in *Smith* contained more clauses commonly found in leases than the agreements in *Kenny Homes* (where, eg, there was no forfeiture clause or alienation clause). Yet in *Smith* the "landlord's" solicitor had refused to allow a covenant for quiet enjoyment to be included, on the basis that it was incompatible with a mere licence and the tenant's solicitors conceded this.

<sup>126</sup> Paragraph 1.26 above.

the courts' desire in the past to prevent legislation designed to protect tenants from being easily circumvented by "sham" agreements drafted by one party and forced on the other on a "take it or leave it" basis. But there must surely be some evidence in the particular case to suggest that such unfair advantage is being taken, or that a party is being deprived of rights which could be reasonably expected to arise. In circumstances such as existed in the *Smith* case it is difficult to see that any such evidence existed; indeed, the evidence quite clearly suggested otherwise. *The Commission provisionally recommends that new statutory guidelines should require the courts to give effect to the express provisions of documents relating to the occupation or use of land, provided each of the parties has had the benefit of independent legal advice. If such advice has been received, there seems no reason to distinguish between different categories of occupation, such as residential and commercial. Where, however, no such advice has been received, it should remain open to the court to disregard the terms of the agreement, but only if the evidence before it establishes that it does not reflect accurately what all the parties intended.*

1.32 The question remains whether the statutory guidelines should go further than what is proposed in the previous paragraph and earlier paragraphs.<sup>127</sup> For example, taking into account the guidance provided by the case law,<sup>128</sup> the legislation might raise a presumption that a tenancy has been created wherever a party is granted exclusive possession of land in return for payment of rent or some other form of consideration, but that this would be rebutted by evidence establishing (for example) that –

- (i) The parties had no intention to create legal relations; or
- (ii) The grant was made as an act of kindness, friendship or similar motive; or
- (iii) The grant was personal to the grantee; or
- (iv) A special relationship between the parties or special circumstances relating to them or the land or to the

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<sup>127</sup> *I.e.* paragraphs 1.20, 1.23, 1.24 and 1.25 above.

<sup>128</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 2.

activity to be carried on therein by the grantee demonstrated an intention not to create a tenancy.<sup>129</sup>

At this stage of its deliberations the Commission is not convinced that such a provision would add much to what is proposed in earlier paragraphs. Indeed, there is a danger that, by attempting to be so prescriptive, new uncertainties may be created as disputes arise concerning whether a particular case comes within one of the “rebuttal” categories. However, no final conclusion has been reached on this issue and further thought will be given to it, especially in the light of responses to the Consultation Paper.

1.33 The Commission has reached no formal conclusion as to whether legislation should raise a rebuttable presumption that a tenancy has been created and welcomes views on this.

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These categories would probably cover well-recognised arrangements not involving a tenancy, *eg*: a caretaker’s agreement (see *Davies v Hilliard* (1965) 101 ILTR 50); an arrangement with a servant or employee (see *Great Southern Railways v Bergin* (1937) 71 ILTR 276); one involving a lodger or guest (see *Waucob v Reynolds* (1850) 1 ICLR 142; *Carroll v Mayo County Council* [1967] IR 364) or member of the family (see *Peakin v Peakin* [1895] 2 IR 359); temporary hiring arrangements (see *Kelly v Woolworth & Co* [1922] 2 IR 5; *Boylan v Dublin Corporation* [1949] IR 60; *MacGinley v National Aid Committee* [1952] IR Jur Rep 43); franchising arrangements (*Governors of the National Maternity Hospital v McGouran* [1994] 1 ILRM 521).





## CHAPTER 2     FORMALITIES

2.01     This chapter is concerned with the various formalities which the law lays down with respect to tenancy agreements and leases. These are derived largely from statute but, before entering into a discussion of them, some fundamental distinctions must be made.<sup>1</sup>

### A            Contracts and Grants

2.02     It is important to distinguish between a “contract” for the grant at some future date of a lease or tenancy and the actual “grant” of the lease or tenancy. The former comprises simply a preliminary agreement, whereby the landowner (the prospective landlord) undertakes to grant the other party (the prospective tenant) a lease or tenancy at some future date. That agreement does not create the legal relationship of landlord and tenant between the parties nor confer on the prospective tenant any legal interest in the land in question. That relationship will not arise, and the prospective tenant will not acquire his or her tenancy or leasehold interest, until the landlord carries out the agreement and makes the further grant of the lease or tenancy contemplated by the agreement. The most the prospective tenant may acquire under the agreement is an equitable interest, under the so-called rule in *Walsh v Lonsdale*.<sup>2</sup>

2.03     The reason why it is important to distinguish between a contract and grant is that it has long been accepted<sup>3</sup> that the formalities governing a contract for a lease or tenancy, on the one hand, and the actual grant of the lease or tenancy are different, *ie*, different statutory provisions apply. As is explained later,<sup>4</sup> contracts

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<sup>1</sup>     See generally Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 5.

<sup>2</sup>     See *ibid* at paragraphs 15.19-23.

<sup>3</sup>     Certainly since the decision in *McCausland v Murphy* (1881) 9 LR Ir 9. See Sheridan, “Walsh v Lonsdale in Ireland” (1952) 9 NILQ 190.

<sup>4</sup>     Paragraph 2.06 below.

for a lease or tenancy, like all other contracts for the sale or other disposition of an interest in land are governed by section 2 of the *Statute of Frauds (Ireland) 1695*.<sup>5</sup> The actual grant of a lease or tenancy is governed by section 4 of *Deasy's Act*.<sup>6</sup> It is true that there was some doubt on the point shortly after the enactment of *Deasy's Act*, largely because section 3 rather confused matters by founding the relationship of landlord and tenant on the express or implied “contract” of the parties. Section 3 then went on to state that the relationship would be deemed to subsist in all cases in which there was “an agreement” by one party to hold land from or under another in consideration of any rent.<sup>7</sup> However, the essential point is that while *Deasy's Act* repealed<sup>8</sup> section 1 of the 1695 Statute, which dealt with grants of leases or tenancies,<sup>9</sup> it did not repeal section 2. Suggestions<sup>10</sup> that there was some sort of implied repeal were eventually rejected as unsound<sup>11</sup> and there have since been numerous Irish cases accepting the proposition that contracts for leases or tenancies remain governed by the 1695 Statute.<sup>12</sup>

2.04 The reference above to the confusion caused by the wording of section 3 of *Deasy's Act*<sup>13</sup> raises a more general issue to which the

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<sup>5</sup> See generally Farrell *Irish Law of Specific Performance* (Butterworths 1994) Chapter 5; Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) Chapter 6.

<sup>6</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 5.26 and following.

<sup>7</sup> The operation of section 3 was considered in detail in Chapter 1 above.

<sup>8</sup> Section 104 and Schedule (B).

<sup>9</sup> Requiring them to be in writing if for a term exceeding 3 years. Such grants are now governed by section 4 of *Deasy's Act*: see paragraph 2.10 below.

<sup>10</sup> See the judgment of Monahan CJ in *Bayley v Conyngham* (1863) 15 ICLR 406 (especially at 413).

<sup>11</sup> Note the trenchant reasoning of Christian J in *Bayley v Conyngham* which seems unassailable *op cit* at 416-417.

<sup>12</sup> *Eg Leslie v Crommelin* (1867) IR 2 Eq 134; *Waldron v Jacob* (1870) IR 5 Eq 131; *Ronayne v Sherrard* (1877) IR 11 CL 146; *McCausland v Murphy* (1881) 9 LR Ir 9; *Hughes v Fanagan* (1891) 30 LR Ir 111.

<sup>13</sup> The confusion was compounded by the wording of section 4 of the Act, which was clearly intended to deal with the actual grant of a lease or tenancy: see paragraph 2.03 (and footnote 9) above. Section 4 refers to

Commission has previously drawn attention.<sup>14</sup> This is the fact that the terminology used even by lawyers is bedevilled with a similar confusion. Thus it is common to find expressions like “contract of tenancy”, “tenancy agreement” and “lease agreement” used in relation to an arrangement which is not a contract or agreement in the sense used above (and so is not governed by section 2 of the *Statute of Frauds*), but rather is the actual grant of a lease or tenancy (and so is governed by section 4 of *Deasy’s Act*). The Commission is of the view that it would prevent much confusion if such expressions were avoided both in practice and, most certainly, in legislation. The expression “contract” or “agreement” should be confined to the situation where only a preliminary contract or agreement for the future grant of a lease or tenancy is being entered into. The expressions “lease” or “tenancy” (without any accompanying reference to a contract or agreement) should be confined to the situation where a lease or tenancy (creating the relationship of landlord and tenant) has been granted. This is, of course, without prejudice to the underlying principle that the relationship, once it has been created by such a grant, remains founded on the agreement of the parties. The consequences of that principle were discussed in the previous chapter.

2.05 The Commission also drew attention to the sometimes confusing use of expressions like “landlord” and “tenant”, “lessor” and “lessee” and “lease” and “tenancy”.<sup>15</sup> It reiterates its view that confusion would be avoided if the expressions “landlord”, “tenant” and “tenancy” were regarded as the generic terms. The expressions “lessor”, “lessee” and “lease” should then be confined to situations where the tenancy has been created by a written document. *The Commission provisionally recommends that any new legislation on landlord and tenant law should reflect the use of more precise terminology along the lines suggested above.*

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every “lease or contract” (emphasis added): see paragraph 2.11 below.

<sup>14</sup> *Consultation Paper on Business Tenancies* (LRC CP21–2003) paragraph 4.04.

<sup>15</sup> Paragraphs 2.04 and 2.05 above.

## B Contracts

2.06 As indicated earlier,<sup>16</sup> a contract for a lease or tenancy is governed by section 2 of the *Statute of Frauds (Ireland) 1695*. Such contracts are relatively rare in the context of residential tenancies, where the tendency is for the parties, at least with tenancies for a relatively short fixed period or periodic tenancies, to move directly to an immediate grant of the tenancy.<sup>17</sup> They are, however, more common in the context of commercial property, particularly where a new development, such as a shopping centre or office block, is involved. Here it may suit the parties to enter into an initial contract, which creates a commitment on both sides, but allows time for various matters<sup>18</sup> to be sorted out before the actual lease itself is granted.

2.07 The essence of section 2 of the 1695 Statute is that it requires a contract for the grant of *any* kind of tenancy to be *evidenced* in writing.<sup>19</sup> Thus the statutory requirements must be met whether or not any written formalities apply to the subsequent grant of the tenancy itself. For example, a tenancy for six months may be granted orally,<sup>20</sup> but a contract entered into now by a landowner whereby it is agreed that the other party will be granted on some future date a tenancy for six months must be evidenced in writing in accordance with section 2. Of course, as mentioned in the previous

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<sup>16</sup> Paragraph 2.03 above.

<sup>17</sup> Contracts were common in earlier times where a long lease of residential property was being granted, *eg*, a building lease subject to a ground rent. But such leases were prohibited by section 2 of the *Landlord and Tenant (Ground Rents) Act 1978*: See Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 652; Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 4.092 and 18.24.

<sup>18</sup> *Eg* fitting out of the premises, employment of staff, organisation of stock and equipment: see Wylie *Irish Landlord and Tenant Act* (2<sup>nd</sup> ed Butterworths 1998) paragraph 5.04.

<sup>19</sup> It is, of course, a pre-requisite of the application of section 2 that the parties have entered into a “contract”, *ie* the usual common law requirements for a contract must have been met, such as an intention to create legal relations, offer and acceptance and consideration: see *Connor v McCarthy* (1878) 12 ILTR 336; *Swan v Miller* [1919] 1 IR 151; *McGillicuddy v Joy* [1959] IR 189.

<sup>20</sup> Under section 4 of *Deasy’s Act*: see paragraph 2.15 below.

paragraph, such an arrangement would be very unlikely to arise in practice. In the residential context, such a short-term tenancy would usually be granted immediately without the complications of a preliminary contract preceding it. And in the commercial context, again such a preliminary contract would be rare, unlike where the tenancy contemplated is for a substantial term. This distinction between the requirements for contracts and grants is one of very long standing<sup>21</sup> and the Commission is not inclined at this stage to suggest its abolition, partly also for reasons given later.<sup>22</sup>

2.08 It should be noted that the requirement in section 2 of the 1695 Statute is not that the contract has to be in writing, but simply that it must be “evidenced” in writing, *ie*, to use the terminology of the section, there must be a sufficient “memorandum or note” in writing signed by “the party to be charged” with the contract. There has, of course, been voluminous case law on the operation of these provisions,<sup>23</sup> including the development of the equitable doctrine of part performance as an alternative means of enforcing a contract which does not meet the written evidence requirements of section 2.<sup>24</sup> However, the Commission takes the view that there is no need to enter into a discussion of these matters for the reasons set out in the next paragraph.

2.09 First, in so far as the developments referred to in the previous paragraph are based upon the courts’ development of equitable principles,<sup>25</sup> interference by legislation is usually not merited. Secondly, section 2 does not just apply to contracts for the grant of leases; it is a provision which applies to conveyancing

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<sup>21</sup> It was, in fact, enshrined in the 1695 Statute itself, because section 1, in the case of grants (as opposed to contracts governed by section 2), required writing only for leases exceeding three years. Section 1 was repealed (see section 104 and Schedule (B)) and replaced (see section 4) by *Deasy’s Act*.

<sup>22</sup> Paragraph 2.09 below.

<sup>23</sup> See Farrell *op cit* Chapter 5.

<sup>24</sup> *Ibid* Chapter 6.

<sup>25</sup> Apart from the doctrine of part performance (as to which note the Supreme Court’s recent pronouncement in *Mackey v Wilde* [1998] 1 ILRM 449), another example is the rule in *Walsh v Lonsdale* (“a contract for a lease is as good as a lease”): see Sheridan, “Walsh v Lonsdale in Ireland” (1952) 9 NILQ 190; Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 5.19.

contracts generally.<sup>26</sup> Any question of its reform should, therefore, be considered in that wider context. Indeed, just such a consideration has already been undertaken by the Commission recently in the context of “gazumping”.<sup>27</sup> One of the options considered for dealing with that problem was reform of section 2 of the 1695 Statute, but this option was rejected. The Commission at this stage sees no sound reason for re-opening that issue, but wishes to make it clear that it may have to be revisited in the future as a result of other on-going projects.<sup>28</sup> *The Commission provisionally concludes that it is not appropriate at this stage to recommend reform of the legislation governing contracts for the grant of tenancies.*

## **C Leases**

2.10 The extent to which some formal requirements apply to the grant of a tenancy is governed by section 4 of *Deasy’s Act*. This reads as follows:

“Every lease or contract with respect to lands whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time not being from year to year or any lesser period, shall be by deed executed, or note in writing signed by the landlord or his agent thereunto authorised in writing.”

This provision is not as clear as it might be and seems in need of some revision.

2.11 The first point to note is that, despite the words “or contract”, it seems clear that section 4 is not concerned with preliminary contracts for the grant of a tenancy, but rather with the grant itself. This point was dealt with earlier.<sup>29</sup> *The Commission’s preliminary conclusion is that the words “or contract” in section 4 of*

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<sup>26</sup> See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) Chapter 6.

<sup>27</sup> *Report on Gazumping* (LRC 59–1999).

<sup>28</sup> One is a project to replace all pre-1922 property statutes with modern legislation (this would obviously include section 2 of the 1695 Statute). Another is the e-Conveyancing Project, which will involve the consideration of how contracts relating to conveyancing transactions might be created under an entirely computerised system.

<sup>29</sup> See paragraph 2.03 above.

*Deasy's Act should be dropped from any replacement legislation since that section applies to the grant of a tenancy rather than preliminary contracts for the grant of a tenancy.*

2.12 The reference to “any freehold estate or interest” recognises the common practice in Ireland of granting leases for lives, for example, leases for lives renewable for ever and leases for lives combined with a term of years. The origin of these grants is somewhat obscure and they have ceased to be of any practical significance in modern times.<sup>30</sup> Of rather more significance, and still of relevance in modern times, the section also recognises the very common practice in Ireland of making fee farm grants which create the relationship of landlord and tenant between the grantor and grantee.<sup>31</sup> What is of particular interest is that, although in practice such grants are invariably created by a deed, section 4 does provide the alternative of simply a “note in writing”. In this regard the section does distinguish between the different interests in respect of which the relationship of landlord and tenant can be created. A deed is not necessary in any case, ranging from the smallest of interests to the largest (in fact not even in relation to the largest estate recognised by our legal system, the freehold “fee simple” estate). Notwithstanding this apparent oddity,<sup>32</sup> the Commission sees no reason to change this aspect of a provision of long standing. *The Commission provisionally recommends that the alternative of creating a lease in writing, without use of a deed, should remain available in all cases where an oral arrangement is insufficient.*

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<sup>30</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraphs 4.45–46. Under section 37 of the *Renewable Leasehold Conversion Act 1849* any lease for lives renewable for ever granted after 1849 operated as a fee farm grant. Any pre-1849 leases, not converted under the 1849 Act, were converted by section 74 of the *Landlord and Tenant (Amendment) Act 1980*. The latter is not entirely satisfactory in its drafting: see *Consultation Paper on Business Tenancies* (LRC CP21–2003) paragraph 4.51.

<sup>31</sup> See Wylie *op cit* paragraph 4.41 and following.

<sup>32</sup> A grant of a fee simple not involving a fee farm grant, and, indeed, of any other freehold interest, such as a life estate, must be by deed under section 2 of the *Real Property Act 1845* (as an alternative to the old feudal forms of conveyance): see Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) paragraph 17.02.



2.13 The reference to “any freehold estate or interest”, especially in conjunction with the following reference to “any definite period of time”, also emphasises a point made earlier. This is that the Irish courts have never been troubled, as the English courts have, by the concept of a lease or tenancy for a single<sup>33</sup> period of uncertain duration. The Commission reiterates the view expressed earlier that this feature of Irish law should be retained.<sup>34</sup>

2.14 The most controversial aspect of section 4 is the wording “for any definite period of time not being from year to year or any lesser period”. This wording is designed to distinguish between those tenancies which can be created orally, without any formality, and those which require some formality, at least a written document (but not necessarily a deed<sup>35</sup>). It is clear that most, if not all,<sup>36</sup> periodic tenancies can be created orally and the Commission sees no reason to change this position. In fact many, if not most, periodic tenancies arise by implication from the actions of the parties, rather than as a consequence of a deliberate entering into of an agreement.<sup>37</sup>

2.15 What has caused more difficulty is the question of which fixed term tenancies can be created orally. This is dealt with somewhat awkwardly by section 4, in the expression “being from year to year or any lesser period”. It would have been better if the section had drawn a clearer distinction between periodic tenancies, on the one hand, and fixed term tenancies, on the other, rather than dealing with the latter by reference to the former. It seems clear that any fixed term tenancy for a period *less* than a year comes within the wording of the section and so can be created orally. What has caused the Irish courts considerable difficulties is what is the position of a tenancy for one year exactly. In *Wright v Tracey*<sup>38</sup> the majority<sup>39</sup> of

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<sup>33</sup> Periodic tenancies (where there are successive periods) fall into a separate category: see paragraph 2.14 below.

<sup>34</sup> Paragraph 1.12 above.

<sup>35</sup> See paragraph 2.12 above.

<sup>36</sup> In theory there is no reason why the successive periods should not exceed one year, *eg*, a tenancy from 18 months to 18 months.

<sup>37</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraphs 4.13 and 4.18. Note also the somewhat odd provision in section 5 of *Deasy's Act*: see paragraph 2.19 below.

<sup>38</sup> (1874) IR 8 CL 478.

the judges of the old Exchequer Chamber<sup>40</sup> somewhat surprisingly took the view that a tenancy for one year was *not* less than a tenancy from year to year. The reasoning of the majority has been much criticised by later judges<sup>41</sup> and the Commission agrees with that criticism. Clearly, this point should be cleared up and new legislation should provide that a tenancy not exceeding one year may be created orally. At this stage the Commission is not convinced that the period for fixed term tenancies should be extended,<sup>42</sup> given that periodic tenancies, whether yearly or for lesser successive periods, can also be created orally and may last for longer than a year.<sup>43</sup> If the parties wish initially to create a tenancy for a term exceeding one year, it seems sensible to commit their agreement and the terms of the tenancy to writing. Furthermore, where it is part of the parties' agreement that the tenant has the right to require an extension of the term, which extension would result in the combined terms exceeding one year,<sup>44</sup> it would again seem sensible to require the agreement to be put in writing.<sup>45</sup> Section 4 of *Deasy's Act* does not deal with this point. *The Commission provisionally recommends that section 4 of Deasy's Act should be recast to provide that the following tenancies may be created orally: (i) any periodic tenancy; (ii) any tenancy for a fixed period not exceeding one year, but not a tenancy for a fixed period with an option to renew which, if exercised, would result in the combined periods exceeding one year.*

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<sup>39</sup> Whiteside CJ, Palles CB, Fitzgerald B and Fitzgerald J. *Cf* Dowse and Deasy BB and O'Brien J.

<sup>40</sup> The Court below (the old Court of Common Pleas) had taken a different view: (1873) IR 7 CL 134 (Monahan CJ, Morris and Lawson JJ).

<sup>41</sup> Within a very short time: see *Brew v Conole* (1875) IR 9 CL 151. See also *Lord Arran v Wills* and *Ryan v Chadwick*, both reported at (1883) 14 LR Ir 200 (and note the report of the appeal in *Ryan v Chadwick* at 353); *Jameson v Squire* [1948] IR 153, 165-166 (*per* Black J); *McGrath v Travers* [1948] IR 122, 125 (*per* Dixon J). For discussion of this case law see Wylie *op cit* paragraphs 5.30-32.

<sup>42</sup> In England a tenancy not exceeding three years may be created orally: section 54(2) of the *Law of Property Act 1925*.

<sup>43</sup> *Ie* they continue for successive periods until either party serves a notice to quit: see Wylie *op cit* paragraph 4.10 and following.

<sup>44</sup> *Eg* a tenancy for nine months with an option to extend it for a further six months.

<sup>45</sup> *Cf* section 54(2) of the *Law of Property Act 1925*.

2.16 Before leaving the subject of leases it may be convenient to draw attention to two further provisions in *Deasy's Act*, namely sections 23 and 24. Section 23 provides that in any proceedings proof of “perfection” (*ie* execution) of the counterpart<sup>46</sup> of a lease is the equivalence of proof of the execution of the original, and, if no counterpart has been executed, or it has been lost, destroyed or mislaid, proof of a copy of the original or any counterpart is sufficient evidence of the contents of the lease as against the lessee or any person claiming through him. Arguably this is a matter which should be dealt with by Rules of Court, but, in any event, it seems to be a useful provision worth retaining in some form. Section 24 provides that, in any proceedings by or against a person claiming to be a successor to the original landlord, after proof of the original lease<sup>47</sup> or contract<sup>48</sup> it is sufficient “*prima facie*”<sup>49</sup> evidence of that person’s title as landlord that he or she has received the rent for one year at least.<sup>50</sup> This too seems to be a provision worth retention. *The Commission provisionally recommends that the provisions of sections 23 and 24 of Deasy's Act, which concern proof of execution and proof of title, should be retained in some form.*

2.17 It should also be mentioned that there are special statutory provisions laying down requirements as to the form and contents of leases in certain circumstances. Examples are the provisions governing leases granted by a tenant for life under the *Settled Land Acts*<sup>51</sup> and by a mortgagor or mortgagee under the *Conveyancing Act 1881*.<sup>52</sup> The Commission does not regard such provisions as coming

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<sup>46</sup> It is common for a lease to be drawn up and engrossed in duplicate and to have both copies executed, first by the lessee and then by the lessor. The lessee is given the original and the lessor retains the counterpart.

<sup>47</sup> *Eg* in accordance with section 23.

<sup>48</sup> *Ie* of an oral agreement not involving a lease.

<sup>49</sup> Note that these words do not appear in section 23 and it is not clear what significance they have – a provision that something is only “sufficient” (as opposed to “conclusive”) evidence raises a presumption only, *ie* what is “*prima facie*” the position.

<sup>50</sup> Or the landlord’s immediate predecessor has received it for at least one year and within three years before the transmission of the title.

<sup>51</sup> See section 7 of the *Settled Land Act 1882* and section 7 of the *Settled Land Act 1890*: Wylie *op cit* paragraph 5.42.

<sup>52</sup> Section 18: Wylie *op cit* paragraph 5.43.

within the purview of the Landlord and Tenant Project and considers that they should be reviewed in their respective contexts, as part of a general review of land law and conveyancing law.<sup>53</sup> However, it does wish to draw attention to related provisions, which are the *Leases Acts 1849 and 1850*.<sup>54</sup> These short Acts purport to save leases which fail to comply with statutory requirements such as those mentioned above, by giving the lessee the option to treat the invalid lease as a contract to grant a valid one. The provisions are hedged with limitations<sup>55</sup> and restrictions<sup>56</sup> and are of uncertain scope. Thus it has been held by the English courts that they apply only where the invalidity relates to some minor or technical flaw in the exercise of statutory leasing powers.<sup>57</sup> Arguably this casts doubts on the policy behind the Acts; it is somewhat odd to have statutory provisions which seem to undermine other statutory requirements.<sup>58</sup> In any event, the Commission takes the view that the consequences of failure to comply with a particular set of statutory requirements for the exercise of leasing (or, indeed, any other kind of) powers should be spelt out in the statute conferring those powers. If that were done there would be no need for provisions like the *Leases Acts 1849 and 1850*. *On that basis the Commission has reached the provisional conclusion that the Leases Acts 1849 and 1850 should be repealed without replacement.*

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<sup>53</sup> This will occur in any event as part of a review of pre-1922 property statutes currently being undertaken: see paragraph 2.09 footnote 28 above.

<sup>54</sup> See Wylie *op cit* paragraph 5.47.

<sup>55</sup> For some unclear reason the Acts do not apply to leases of land held on charitable, ecclesiastical or public trusts.

<sup>56</sup> The Acts can be invoked only if the invalid lease was made in good faith and the lessee has taken possession under it: see *Moffett v Lord Gough* (1878) 1 LR Ir 331.

<sup>57</sup> *Kisch v Hawes Bros* [1935] Ch 102; *Iron Trades Employers Insurance Association Ltd v Union Land and House Investors Ltd* [1937] Ch 313; *Davies v Hall* [1954] 1 WLR 855; *Pawson v Revell* [1958] 2 QB 360.

<sup>58</sup> The Irish courts are not usually sympathetic to a failure to comply with such statutory requirements: see, eg, *Hughes v Fanagan* (1891) 31 LR Ir 111 (*Settled Land Acts*) and *ICC Bank plc v Verling* [1995] 1 ILRM 123 (lease of mortgaged land).

## D Periodic Tenancies

2.18 It was mentioned earlier<sup>59</sup> that many, if not most, periodic tenancies arise by implication from the actions of the parties, rather than being created by an express agreement entered into by them. There is a voluminous case law on this subject, which illustrates the interpretation the courts are likely to put on the parties' actions or the circumstances of a particular case.<sup>60</sup> The Commission does not consider it appropriate to recommend any statutory interference with such case law, which must remain based on issues of interpretation of the circumstances of particular cases which are best left to the courts.<sup>61</sup> However, attention must be drawn in this context to two further provisions in *Deasy's Act*, namely sections 5 and 6.

2.19 Section 5 is a very odd provision of doubtful significance. In essence it provides that where a tenant<sup>62</sup> continues in possession for more than a month after demand of possession by the landlord, the landlord may elect to treat the tenant as holding a new tenancy from year to year at the former rent and subject to such of the terms contained in the expired lease<sup>63</sup> as may be applicable to the new periodic tenancy. The main difficulty with this provision is that it is not clear how far it displaces the common law. The point is that it

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<sup>59</sup> Paragraph 2.14 above.

<sup>60</sup> See the discussion in Wylie *op cit* paragraph 4.10 and following.

<sup>61</sup> However note that the Commission does make substantial recommendations later in relation to other aspects of periodic tenancies, namely the operation of notices to quit: see paragraph 13.02 below. Note also the recommendations concerning break notices (paragraph 13.08 below).

<sup>62</sup> Or "his representative". It is unclear what this refers to. As Deale points out it cannot mean the tenant's personal representative, since section 1 of *Deasy's Act* defines "tenant" as meaning any person who acquires the tenant's interest by (*inter alia*) "devise, bequest, or act and operation of law": *The Law of Landlord and Tenant in the Republic of Ireland* (Incorporated Council of Law Reporting for Ireland 1968) at 4. However Deale's suggestion that it refers to the tenant's "agent" seems doubtful – under the law of principal and agent, possession by an agent is regarded as possession by the principal.

<sup>63</sup> Section 5 seems to apply only where the expired tenancy was held under a "lease or instrument". In theory there is no reason why a periodic tenancy should not arise by implication on expiration of a fixed term oral tenancy (for a term not exceeding one year: see paragraph 2.15 above).

seems to be inconsistent with the common law in several respects. For example, under the common law a holding over by a tenant will result *automatically* in a periodic tenancy arising, if the facts warrant it.<sup>64</sup> There is no question of the landlord having an option in this regard, as under section 5, apparently to foist the periodic tenancy on the tenant. Under the common law the periodic tenancy arises from the deemed implied agreement of both parties, probably on the basis of the doctrine of estoppel.<sup>65</sup> Furthermore at common law the periodic tenancy arises immediately upon the overholding and other circumstances occurring which give rise to the estoppel,<sup>66</sup> whereas section 5 refers to the somewhat arbitrary fixed date of one month after a demand for possession by the landlord. Section 5 confers on the landlord the option to treat the tenant as holding under a tenancy from year to year, yet at common law the courts recognise that the circumstances of a particular case may justify a finding that some other kind of periodic tenancy has arisen.<sup>67</sup> Given these doubts and difficulties it is not surprising that section 5 has very rarely been invoked in the numerous cases where it has been argued that a periodic tenancy has arisen by implication. Furthermore, in more modern times there has often been no need to invoke it because the tenant has had statutory protection which arose upon expiration of the tenancy.<sup>68</sup> For all these reasons the Commission has considerable doubts about the usefulness of section 5. *The Commission*

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<sup>64</sup> See *Earl of Meath v Megan* [1897] 2 IR 477, 479 (*per* FitzGibbon LJ); also the discussion by the Supreme Court in *Irish Shell & BP Ltd v Costello Ltd* [1984] IR 511.

<sup>65</sup> *Per* Gannon J in *Eamonn Andrews Productions Ltd v Gaiety Theatre (Dublin) Ltd* [1976-7] ILRM 119, 123. See also *Dublin Corporation v Donnelly* High Court 29 April 1969, at 9 (*per* McLoughlin J).

<sup>66</sup> *Nixon v Darby* (1868) IR 2 CL 467; *Doyle v Maguire* (1884) 14 LR Ir 24.

<sup>67</sup> *Phoenix Picture Palace Ltd v Capital & Allied Theatres Ltd* [1951] Ir Jur Rep 55 (weekly tenancy); *Esso Teoranta v Wong* [1975] IR 416 (monthly tenancy).

<sup>68</sup> *Eg*, under the old *Rent Restriction Acts* the tenant became a “statutory tenant”: see *Healy and Provisional Bank of Ireland v Armstrong* [1949] Ir Jur Rep 18; *McCombe v Sheehan* [1954] IR 183. As regards protection under the *Housing (Private Rented Dwellings) Act 1982*, see section 9 of that Act. Note also the protection of tenants holding over pending final determination of an application for a new tenancy or reversionary lease under sections 28 and 40 of the *Landlord and Tenant (Amendment) Act 1980*.

*provisionally recommends that section 5 of Deasy's Act should be repealed without replacement.*

2.20 Section 6 of *Deasy's Act* is a short provision as follows: "Every tenancy from year to year shall be presumed to have commenced on the last gale day of the calendar year on which the rent has become due and payable in respect of the premises, until it shall appear to the contrary." It is not entirely clear what the purpose of this provision was, but it was probably intended to facilitate proper service of a notice to quit.<sup>69</sup> The common law rules governing valid service of a notice to quit are riddled with uncertainties and the Commission has concluded that statutory clarification is clearly needed.<sup>70</sup> Section 6 is insufficient for these purposes for a number of reasons. One is that it appears to raise a presumption only, which arguably leaves matters still too uncertain for the parties. What they need is the security of knowing that a notice served is valid and not capable of legal challenge, so that they can order their affairs accordingly. Another is that section 6 relates only to a tenancy from year to year, whereas clarification is needed for all kinds of periodic tenancies.<sup>71</sup> *The Commission provisionally recommends that section 6 of Deasy's Act should be repealed and replaced by a comprehensive set of statutory provisions governing determination of periodic tenancies.*<sup>72</sup>

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<sup>69</sup> See, eg, Cherry *The Irish Land Law and Land Purchase Acts 1860–1901* (3<sup>rd</sup> ed John Falconer 1903) at 19.

<sup>70</sup> This matter is dealt with in Chapter 13 below. Note also the provision in section 16 of the *Housing (Miscellaneous Provisions) Act 1992*. Further provisions relating to residential tenancies are contained in the *Residential Tenancies Bill 2003*, Part 5. Notices to quit agricultural tenancies are governed by the *Notices to Quit (Ireland) Act 1896*: see paragraph 13.03 below.

<sup>71</sup> In respect of which there appear to be even more doubts as to the common law rules: see Wylie *op cit* paragraph 23.13.

<sup>72</sup> Note also the discussion later of the effect of service of a notice to quit on a sub-tenancy created out of the periodic tenancy to which the notice relates: see paragraph 13.08 below. *Cf* as regards the effect of a surrender by the head-tenant or exercise of a break option paragraph 13.08 below.

## **E            Surrenders**

2.21        Section 7 of *Deasy's Act* purports to govern the formalities for surrender of a tenancy by the tenant. It provides as follows:

“The estate or interest of any tenant under any lease or other contract of tenancy shall not be surrendered otherwise than by a deed executed, or note in writing signed by the tenant or his agent thereto lawfully authorised in writing, or by act and operation of law.”

The apparent rigidity of this provision, encapsulated by the references to “any” tenant holding under “any” lease or tenancy and the imperative “shall”, is clearly tempered by the express recognition of surrender “by act and operation of law”. This incorporates a huge amount of case law explaining what this expression means.<sup>73</sup> The likelihood is that any purported oral surrender will be accompanied by other actions, such as handing over the keys and vacating the premises, which would be construed by the courts as a surrender by act and operation of law.<sup>74</sup> *The Commission provisionally recommends that the provisions of section 7 of Deasy's Act governing surrenders are basically sound.*

2.22        There is, however, one major point which has to be considered. Notwithstanding the substantial case law on the point, it is arguable that much uncertainty exists as to when a surrender by act and operation of law will be held to have taken place. The question is whether some statutory definition or clarification should be provided. The Commission is mindful of the difficulties of attempting to define a concept whose application depends so much on the court's interpretation of the circumstances of each particular. However, in view of the difficulties which many practitioners apparently have with the concept, there may be a case for giving at least some statutory guidelines. These could be founded on what appears to be the underlying principle, namely unequivocal conduct of both the landlord and tenant which is inconsistent with the continuance of the tenancy. This might then be amplified by referring to typical examples of such conduct, distilled from the case law. Such examples are: delivery up of possession by the tenant and acceptance

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<sup>73</sup>        See Wylie *op cit* paragraph 25.08. See further paragraph 2.22 below.

<sup>74</sup>        See *Glynn v Coghlan* [1918] 1 IR 482, as explained by Kenny J in *McSweeney v McKeown* High Court 7 December 1970.



of this by the landlord;<sup>75</sup> the landlord granting a new tenancy to the tenant to displace the existing one;<sup>76</sup> the landlord granting a new tenancy to a third party with the old tenant's agreement, again to displace the old one;<sup>77</sup> permitted occupation of the premises which is inconsistent with the continuance of the tenancy.<sup>78</sup> *The Commission provisionally recommends that the replacement of section 7 of Deasy's Act should be expanded to give guidelines as to what constitutes a surrender by act and operation of law.*

2.23 There is one further practical problem which can arise with respect to the concept of surrender by act and operation of law. This occurs where the parties to a tenancy agree to vary the tenancy in some way. Such variations can take several forms. For example, it may be agreed to enlarge the demised premises by adding some additional property or, conversely, to reduce them. Such arrangements are quite commonly entered into in large multi-let commercial premises, such as shopping centres, office blocks and industrial parks, where the landlord wants to carry out some reconfigurations of the various units let separately. Other examples of variations to a tenancy are the adding of a further period to the term of years originally granted or the changing of the terms of the tenancy. Indeed, the original grant may make specific provision for such variation, the typical example being a rent review provision which is standard in commercial leases. The problem is that such variations may be construed as a surrender of the existing tenancy by act and operation of law and the regrant of a new tenancy incorporating the variation, which will often not be what the parties actually intend.<sup>79</sup> Furthermore because of the danger of this, the parties may feel compelled to incur considerable inconvenience and costs. For example, they may be advised that a new lease to govern the combined premises, or to incorporate the varied terms, should be executed. Yet the addition or change of terms may be very small compared to the rest of the demised premises, rendering the inconvenience and cost disproportionate. In the case of adding to

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<sup>75</sup> See Wylie *op cit* paragraph 25.11.

<sup>76</sup> *Ibid* paragraph 25.12.

<sup>77</sup> *Ibid* paragraph 25.13.

<sup>78</sup> *Ibid* paragraph 25.14.

<sup>79</sup> See Dowling "Variation of Lease or New Tenancy" [1995] Conv 124.

premises, the alternative of a new lease just for the addition may be very unsatisfactory, because the landlord and tenant will then have to operate two leases in respect of what is meant to be one holding.

2.24 The law on this subject is somewhat confusing.<sup>80</sup> The English courts seem to have been more inclined to construe such variations as amounting to a surrender by act and operation of law and requiring a regrant of a new tenancy to incorporate the variation.<sup>81</sup> The Irish courts have tended to take a more pragmatic view. For example, they have held that rent reviews or variations (such as an abatement of rent) do not effect a surrender.<sup>82</sup> They have also held that surrender does not necessarily occur where the demised premises are enlarged or diminished<sup>83</sup> or otherwise altered.<sup>84</sup> The Commission takes the view that such a pragmatic approach is sensible and in accord with what the parties will usually wish. However, it also concedes that there may be more fundamental variations which, arguably, should involve a surrender and regrant of a new tenancy to reflect the variation. This is where the transaction involves the landlord in a new demise or grant which should be carried out by the surrender of the old tenancy and a grant of the new one. The typical example is where the term of the tenancy is being extended.<sup>85</sup> On the other hand, given that Irish law is founded on the parties' agreement, and that the parties' intention is paramount,<sup>86</sup> it may be argued that they should be free to make any kind of variation to the tenancy without having to suffer a surrender and regrant. *The Commission provisionally recommends that the law governing the effect of variations of tenancies should be clarified, to make it clear that,*

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<sup>80</sup> See Dowling "Variation of Lease or New Tenancy" [1995] Conv 124.

<sup>81</sup> See *Fredco Estates Ltd v Bryant* [1961] 1 All ER 34; *Jenkin R Lewis & Son Ltd v Kerman* [1970] 3 All ER 414; *Friends Provident Life Office v British Railways Board* [1996] 1 All ER 336.

<sup>82</sup> *Clarke v Moore* (1844) 7 Ir Eq R 515, 518 (*per* Sudgen LC). See also *Lord Inchiquin v Lyons* (1887) 20 LR Ir 474; *Watt v Marquis of Clanricarde* (1896) 30 ILTR 128.

<sup>83</sup> *Curoe v Gordon* (1892) 26 ILTR 95; *Thomson v Hagan* [1906] 1 IR 1.

<sup>84</sup> *Walsh v Hendron Bros (Dublin) Ltd* (1947) 82 ILTR 64.

<sup>85</sup> See *Re Savile Settled Estate* [1931] 2 Ch 210; *Baker v Merckel* [1960] 1 QB 657.

<sup>86</sup> See Chapter 1 above.

*unless the parties decide otherwise, a variation may be achieved without the need for a surrender and regrant. Such a variation should be capable of being carried out either by execution of a deed or instrument in writing setting out the variation or by way of endorsement on the existing lease.*

2.25 Finally, there are some further statutory provisions governing surrenders. Section 8 of *Deasy's Act* contains a somewhat convoluted but nevertheless useful provision, which is designed to facilitate surrender of a lease for the purpose of obtaining a renewal of the tenancy. It does so by providing that this can be done without the surrender of any sub-tenancies and preserving the rights and remedies of the head-landlord and head-tenant. Curiously the section is silent about the position of the sub-tenants, but their position is probably also preserved by implication.<sup>87</sup> *The Commission takes the provisional view that section 8 of Deasy's Act should be clarified to make it clear that the position of sub-tenants is also preserved.*

2.26 Section 9 of the *Real Property Act 1845* provides (*inter alia*) that where a head-lease is surrendered, the head-landlord steps into the shoes of the surrendering head-tenant and becomes the landlord directly of the sub-tenants. This is a very useful provision, as is the protection conferred on sub-tenants in respect of statutory rights by section 78 of the *Landlord and Tenant (Amendment) Act 1980*. *The Commission takes the provisional view that both these statutory provisions should be preserved.*<sup>88</sup>

2.27 There are two other provisions in *Deasy's Act* which relate to surrenders. Section 40 contains a controversial provision conferring on the tenant a right of surrender on the “destruction” of the demised premises. This is discussed later.<sup>89</sup> Section 44 governs the position of the landlord where part only of the demised premises is surrendered<sup>90</sup> and preserves the landlord's rights and remedies with

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<sup>87</sup> See *Hayes v FitzGibbon* (1870) IR 4 CL 500.

<sup>88</sup> It has already pointed out that section 78 of the 1980 Act needs some clarification: see *Consultation Paper on Business Tenancies* (LRC CP21–2003) paragraph 4.52.

<sup>89</sup> Paragraph 11.03 below.

<sup>90</sup> Or where there is a “resumption of part by the landlord, which may be provided for by the lease: see *Coyne v Coyne* (1876) IR 10 Eq 496; *Liddy v Kennedy* (1871) LR 5 HL 134. The section also covers eviction of the tenant from part of the premises.

respect to the part not surrendered. In effect, an apportionment of rent and other obligations should be made in such cases, by the court if necessary.<sup>91</sup> This matter is also considered later.<sup>92</sup>

## **F Assignments**

2.28 Section 9 of *Deasy's Act* purports to govern the ways in which a tenancy can be assigned or transmitted. It provides as follows:

“The estate or interest of any tenant in any lands under any lease or other contract of tenancy shall be assigned, granted, or transmitted by deed executed, or instrument in writing signed by the party assigning or granting the same, or his agent thereto lawfully authorised in writing, or by devise, bequest, or act and operation of law, and not otherwise ...”<sup>93</sup>

This seems to be an exhaustive provision which requires use of a written instrument for assignments of all tenancies, *ie*, even those validly created initially without any writing, such as periodic tenancies and tenancies for fixed terms not exceeding one year.<sup>94</sup> At first sight it may appear anomalous that a tenancy which can be created orally can only be assigned to someone else by deed or other instrument in writing.<sup>95</sup> However, it is arguable that while it may be relatively easy for the original tenant to establish that a grant of a tenancy was made orally, because of the direct relationship between

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<sup>91</sup> *Danville v Ward* (1865) 16 ICLR 381; *Persse v Malcolmson* (1871) IR 5 CL 572.

<sup>92</sup> Paragraph 8.05 below.

<sup>93</sup> The remaining wording dealt with the situation where the tenant dies intestate as to his interest in the tenancy. This is now dealt with by the *Succession Act 1965* which repealed the wording in section 9: see section 8 and Second Schedule, Part III of the 1965 Act.

<sup>94</sup> See the trenchant views of the Supreme Court in *Foley v Galvin* [1932] IR 339, drawing attention to the words “or other contract of tenancy”. Doubts about whether a tenancy at will is assignable at all (see Wylie *op cit* paragraph 4.29) need not be considered since the Commission has earlier taken the view that such “tenancies” should no longer be regarded as creating the relationship of landlord and tenant: see paragraph 1.24 above.

<sup>95</sup> A similar distinction exists in England: see *Crago v Julian* [1992] 1 All ER 744; *Camden London Borough Council v Alexandrou* (1997) 74 P & CR D 33; *Parc Battersea Ltd v Hutchinson* [1999] 2 EGLR 33.

the landlord and the original tenant, it is more difficult for a third party to establish that this tenancy was assigned to him or her orally. Notwithstanding that, it may cause hardship that such a third party is apparently prevented by section 9 from establishing an assignment in a particular case. In particular it may be questioned whether it is not open to such a party to invoke an equitable doctrine such as estoppel to prevent the other parties (assigning tenant and landlord) from denying that an assignment has taken place. Indeed the Commission is not entirely convinced that such cases would not come within the expression “act and operation of law.” It is true that it has often been stated that this wording in section 9 covers matters such as the automatic vesting of the tenant’s interest in the Official Assignee on bankruptcy or in the personal representative on death of the tenant.<sup>96</sup> However, they may also cover situations where the actions of the parties would lead the court to hold that an estoppel should arise, by way of analogy with surrenders by act and operation of law.<sup>97</sup> *The Commission provisionally recommends that section 9 of Deasy’s Act, which deals with assignments, should be retained but that it should be made clear that it does not exclude the courts’ jurisdiction to apply equitable principles such as the doctrine of estoppel.*

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<sup>96</sup> *Foley v Galvin* [1932] IR 339, 350 (*per* Kennedy CJ). Other examples are the vesting in the creditor by way of mortgage where a judgment mortgage is registered under the *Judgment Mortgage (Ireland) Act 1850*, or where the tenant’s interest is seized by the sheriff under a writ of *fiery facias* and sold in execution of a judgment against the tenant: see Wylie *op cit* paragraph 21.05.

<sup>97</sup> See paragraphs 2.21–22 above.

## CHAPTER 3     SUCCESSORS IN TITLE

3.01     This chapter is concerned with the position of the parties after the landlord or tenant, or both, dispose of their respective interests. It is, therefore, primarily concerned with the position of successors in title, *ie*, persons to whom the landlord's reversion and the tenant's tenancy have been assigned.<sup>1</sup> Over the lifetime of the tenancy many such assignments may take place and so the position of several successors may become an issue. Also of interest is the position of the assignors after an assignment has been made to someone else. This includes both the original landlord and original tenant and successors who subsequently assign on to further successors during the lifetime of the tenancy. This is a subject which exercised the courts in the early days of development of leasehold interests, but the common law rules which the courts evolved<sup>2</sup> were largely replaced by statutory provisions.<sup>3</sup> Unfortunately, as explained later,<sup>4</sup> the provisions in question were enacted during the nineteenth century at Westminster, where insufficient attention seems to have been paid to the law in Ireland. The result was the enactment of duplicate provisions<sup>5</sup> which, although they overlap to a large extent, are sufficiently inconsistent to cause uncertainty.<sup>6</sup> *The Commission provisionally recommends that the duplicate statutory provisions in Deasy's Act and the Conveyancing Act 1881 governing successors in title should be amalgamated into a single provision or set of*

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<sup>1</sup>     See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 21.

<sup>2</sup>     *Eg Spencer's Case* (1583) 5 Co Rep 16a.

<sup>3</sup>     For an early example, dealing with the landlord's successors in title, see *Statute of Reversions (Ireland) Act 1634*.

<sup>4</sup>     See paragraph 3.03 below.

<sup>5</sup>     Sections 12 and 13 of *Deasy's Act 1860*; sections 10 and 11 of the *Conveyancing Act 1881*.

<sup>6</sup>     See Bready "Covenants Affecting Land" (1944) 6 NILQ 48.

*provisions, which should also remove the inconsistencies and uncertainties which exist in the current statutory provisions.*

3.02 There are two other related matters which require consideration. One is that the landlord or tenant may not dispose of the entire interest held, *eg*, the tenant may assign part only of the demised premises, in which case the issue of apportionment of rights and obligations as between the part assigned and part retained will arise. Similarly the landlord may assign title to part of the demised premises, what is usually referred to as “severance” as to the *land*.<sup>7</sup> There is, however, another kind of severance which can arise with respect to the landlord’s interest. This usually occurs where the landlord grants a lease of the reversion to a third party, which creates a “concurrent” lease and effects what is sometimes referred to as severance as to the *estate*.<sup>8</sup> These matters are considered later.<sup>9</sup> Also considered later<sup>10</sup> is a different kind of disposition of the tenant’s interest, namely a subletting. A subletting is fundamentally different from an assignment, but it does give rise to similar issues in terms of the various parties’ position.

#### **A Assignment by the Tenant**

3.03 At common law the rule developed that upon assignment of a tenancy the tenant’s obligations under covenants which “touched and concerned” the land passed to the assignee.<sup>11</sup> This limitation on the covenants has given rise to much litigation, especially in England where it was carried forward, albeit in different language, into statute law.<sup>12</sup> Indeed, the initial statute law applied also to Ireland, namely

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<sup>7</sup> See Wylie *op cit* paragraphs 21.32-33.

<sup>8</sup> *Ibid* paragraphs 4.09 and 21.32.

<sup>9</sup> Paragraph 3.19 below.

<sup>10</sup> Paragraph 3.22 below.

<sup>11</sup> *Spencer’s Case* (1583) 5 Co Rep 16a, applied in *Lyle v Smith* [1909] 2 IR 58; *O’Leary v Deasy* [1911] 2 IR 450. These cases, especially the latter where the relevant statutory provisions are not cited, illustrate the extraordinary tendency of the Irish courts to continue to rely upon the old common law and to ignore statutes displacing it. *Lyle v Smith* was a rare exception, but even in it the judges made much reference to the common law.

<sup>12</sup> Originally in section 10 of the *Conveyancing Act 1881* which used the words having “reference to the subject-matter of the lease”. That wording

section 10 of the *Conveyancing Act 1881*, which remains in force here. What appears to have been overlooked by the Westminster Parliament is that there had already been enacted for Ireland a statutory provision to displace the common law, namely section 12 of *Deasy's Act*.

3.04 Section 12 of *Deasy's Act* is a very comprehensive provision.<sup>13</sup> Indeed, section 12 of the Act is so comprehensive that it would seem to render redundant the provisions of section 11 of the Act. Section 11 relates to a particular category of obligation frequently imposed on a tenant, namely those concerning assignment or subletting. Section 12, however, seems to cover every category of obligation entered into by a tenant. In essence it provides that, following an assignment by the tenant, the landlord, and any successors of the landlord, can enforce the obligations contained in the tenancy against the assignee, and any successors of the assignee. The section does not contain any qualification of the obligations so enforceable, such as existed at common law or, later, under section 10 of the *Conveyancing Act 1881*,<sup>14</sup> and instead refers simply to “the agreements contained or implied in such lease or contract”. There is

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was held to have the same meaning as “touch and concern the land”: see *Davis v Town Properties Investment Co Ltd* [1903] 1 Ch 797; *Breams Property Investment Co Ltd v Stroulger* [1948] 2 KB 1. It was carried forward in England in section 141 of the *Law of Property Act 1925*, but was dropped from section 3 of the *Landlord and Tenant (Covenants) Act 1995*.

<sup>13</sup> See Wylie *op cit* paragraphs 21.22-23. Section 12 of *Deasy's Act* states:

Every landlord of any lands holden under any lease or other contract of tenancy shall have the same action or remedy against the tenant, and the assignee of his estate or interest, or their respective heirs, executors, or administrators, in respect of the agreements contained or implied in such lease or contract, as the original landlord might have had against the original tenant, or his heir or personal representative respectively; and the heir or personal representative of such landlord on whom his estate or interest under any such lease or contract shall devolve or should have devolved shall have the like action and remedy against the tenant, and the assignee of his estate or interest, and their respective heirs or personal representatives, for any damage done to the said estate or interest of such landlord by reason of the breach of any agreement contained or implied in the lease or other contract of tenancy in the lifetime of the landlord, as such landlord himself might have had.”

<sup>14</sup> See paragraph 3.03 above.



very little authority on the point,<sup>15</sup> but what there is suggests that section 12 has a wider scope than either the common law or section 10 of the 1881 Act.<sup>16</sup> At the very least it avoids, in practice, arguments as to whether a particular covenant “touches and concerns” the land or has sufficient “reference to the subject-matter of the lease”. That is not to say that there might not be obligations entered into by the original tenant that are so personal to that tenant that they should not pass to a successor in title, *eg*, obligations which are dependent on personal skills or qualifications of the original tenant.<sup>17</sup> Such examples are likely to be extremely rare and, in practice, would be likely to be covered by an express provision making it clear that the obligation in question is personal to the original tenant and does not pass to any successor. Even in the absence of such an express provision, the likelihood is that a court would construe this as being intended by the original landlord and tenant as part of their agreement.<sup>18</sup> The problem is that if there is no express provision in the lease, difficult questions of interpretation may arise and much uncertainty may be created. The Commission takes the view that it would be unfortunate if any replacement of the current statutory provisions, especially section 12 of *Deasy’s Act*, gave rise to such uncertainty.

3.05 It is clear that some clarification is necessary. At the very least the existence of overlapping, but not consistent, statutory provisions should be changed. The Commission takes the view that any new, single statutory provision should be a wide-ranging one based on section 12 of *Deasy’s Act*. The opportunity should be taken to clarify a number of matters. One is that it should be made clear that it remains open to the parties to a lease or tenancy agreement to

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<sup>15</sup> Partly because of the court’s tendency in the past to ignore the statutory provisions: see paragraph 3.03 footnote 11 above.

<sup>16</sup> *Liddy v Kennedy* (1871) LR 5 HL 134, 143 (*per* Lord Hatherley); *Lyle v Smith* [1909] 2 IR 58.

<sup>17</sup> An example which has been given is a tenant who is an accountant undertaking to handle the landlord’s tax affairs: see Wylie *op cit* paragraph 21.23. Another example might be a tenant who is a builder undertaking to carry out repairs to other property owned by the landlord. Yet another might be a commercial tenant who is granted a special concession, such as an initial rent free period.

<sup>18</sup> The old Divisional Court in *Lyle v Smith* [1909] 2 IR 58 put much weight on the perceived intention of the parties.

prescribe that a particular tenant's obligation is personal to the original tenant and does not pass to a successor in title, but this should be done expressly and not be left to become a matter of interpretation as to what the parties intended. It should also be made clear that the statutory provision captures all agreements intended to be part of the tenancy, *ie*, whether contained in the lease itself or in some collateral agreement or "side letter",<sup>19</sup> provided the successor in title acquired its interest with notice of the obligation contained in an agreement entered into "outside" the lease.<sup>20</sup> This too should be subject to the general principle that it does not apply where the parties prescribe otherwise. *The Commission provisionally recommends that the position of successors in title following assignment by the tenant should be governed by a provision based on section 12 of Deasy's Act. The new provision should extend to all obligations intended to be part of the tenancy, but it should be open to the original parties to prescribe expressly that particular obligations are personal to them and are not to bind successors in title.*

## **B Assignment by the Landlord**

3.06 At common law an assignee of the landlord's interest did not obtain the benefit of the obligations entered into by the tenant, nor was that assignee liable to the tenant for performance of obligations entered into by the landlord. That position was initially changed by the *Statute of Reversions (Ireland) Act 1634*<sup>21</sup> and, as in the case of assignment of the tenant's interest,<sup>22</sup> is now governed by duplicate provisions in *Deasy's Act*<sup>23</sup> and the *Conveyancing Act 1881*.<sup>24</sup> Clearly

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<sup>19</sup> Note that the English courts applied this principle even under the equivalent of section 11 of the *Conveyancing Act 1881* (see paragraph 3.06 below) (section 142 of the *English Law of Property Act 1925*): see *Weg Motors Ltd v Hales* [1961] 3 All ER 181; *Systems Floors Ltd v Ruralpride Ltd* [1995] 1 EGLR 48; *Lotteryking Ltd v AMEC Properties Ltd* [1995] 2 EGLR 13.

<sup>20</sup> This would accord with the view of Kinlen J in *Riordan v Carroll* [1996] 2 ILRM 263, 274. Cf the English cases cited in the previous footnote.

<sup>21</sup> See *Wyse v Myers* (1854) 4 ICLR 101 at 103 (*per* Moore J).

<sup>22</sup> See paragraphs 3.01 and 3.03 above.

<sup>23</sup> Section 13.

<sup>24</sup> Section 11.

this duplication should again be removed and a single provision modelled on what appears to be the wider provision, namely section 13 of *Deasy's Act*, should be enacted. There is, however, one aspect of section 13 which needs mention.

3.07 One odd feature is that, whereas section 12 of *Deasy's Act* appears to apply to a very wide range of obligations,<sup>25</sup> section 13 contains a qualification not to be found in section 12, namely that it applies only to agreements in the lease or tenancy “concerning the lands”. At the very least this suggests that section 13 covers a narrower range of obligations and it may even be argued that it has the same narrowing effect as the wording in section 11 of the *Conveyancing Act 1881* – having “reference to the subject matter of the lease” or, as the courts previously put it, “touch and concern the land”.<sup>26</sup> The Commission would regard that as an unfortunate interpretation and sees no reason to distinguish in this regard between landlord’s obligations and tenant’s obligations. So far as their enforcement by and against successors in title is concerned the same principles should apply. *The Commission provisionally recommends that the position of successors in title following assignment by the landlord should be governed by the same principles as apply following assignment by the tenant.*

## **C Position of Assignee**

3.08 The rule at common law was that an assignee, whether of the landlord or the tenant, had the benefit and was subject to the burdens of the tenancy only during the period the landlord’s or tenant’s interest was held, *ie*, the benefit and burden were lost when that assignee assigned the interest on to someone else. Thus an assignee of the landlord could sue only for breaches of tenant’s obligations occurring during the period that assignee held the landlord’s interest and not breaches occurring prior to acquisition of that interest, unless the breaches were of a continuing nature.<sup>27</sup> It is

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<sup>25</sup> See paragraph 3.04 above.

<sup>26</sup> Such a qualification was read by the English courts into the equivalent of the *Statute of Reversions (Ireland) 1634*, namely the *Grantees of Reversions Act 1540*: See Megarry and Wade *The Law of Real Property* (6<sup>th</sup> ed Stevens 2000) paragraph 15.046. See also *Brereton v Tuohey* (1857) 8 ICLR 190; *Athol v Midland Great Western Rly Co* (1868) IR 3 CL 333.

<sup>27</sup> *Doyle v Hort* (1880) 4 LR Ir 455, 467 (*per* Palles CB).

not clear how far statute law has changed this position in Ireland, partly because again there are duplicate provisions.

3.09 The English courts interpreted the replacement<sup>28</sup> of section 10 of the *Conveyancing Act 1881*, which still applies here,<sup>29</sup> as having the effect that a right to sue for breaches which have already occurred is one of the rights which passes on assignment to an assignee.<sup>30</sup> However this position, if it is the correct interpretation of section 10, is difficult to reconcile with section 14 of *Deasy's Act*. This provides that an assignee of the landlord's or tenant's interest has the benefit or liability of any obligations in the lease or tenancy only in respect of rent accrued due or breaches which occur *subsequent* to the assignment of that interest and while that interest is held by the assignee. Thus if the assignor has failed to pay rent, the assignee is liable only for the apportioned part accruing due from the date of assignment.<sup>31</sup> Section 14 adds the proviso that a tenant assignee does not secure a discharge from liabilities by assigning the tenant's interest to someone else unless and until notice in writing of the particulars of this further assignment are given to the landlord.

3.10 The Commission inclines to the view that section 14 is a sensible provision and that any replacement legislation should be based on it. There is, however, some scope for clarification. For example, it should operate without prejudice to the common law rule that an assignee is liable for continuing breaches,<sup>32</sup> *ie*, breaches of obligation which occurred initially before the assignee acquired the interest, but remained unremedied at the time of assignment and continued thereafter, such as a breach of a covenant to keep the demised premises in repair or to use them in a particular manner.<sup>33</sup> It has been held that the requirement to give notice to the landlord in order to secure a discharge of liability applies only to cases of

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<sup>28</sup> Section 141 of the *Law of Property Act 1925*.

<sup>29</sup> See paragraph 3.03 above.

<sup>30</sup> See *Re King* [1963] Ch 459; *Arlesford Trading Co Ltd v Servansingh* [1971] 3 All ER 113; *Warnford Investments Ltd v Duckworth* [1979] Ch 127.

<sup>31</sup> *Glass v Patterson* [1902] 1 IR 660.

<sup>32</sup> See paragraph 3.08 above.

<sup>33</sup> See *Woodfall's Law of Landlord and Tenant* (Looseleaf ed Stevens) Volume 1 paragraphs 17.105-106.

assignment by act *inter vivos* and not to involuntary assignments,<sup>34</sup> a point which should be made explicit in new legislation. It should also be made explicit what particulars should be given in the notice, *eg*, specifying the document of assignment (if there is one), its date and the parties thereto.<sup>35</sup> Finally, there is the point that the requirement to give notice in order to secure a discharge applies only to a tenant assignee. Arguably there is no reason in principle why a similar rule should not apply to a landlord assignee, to cover cases where the lease or tenancy agreement imposes, or has implied in it,<sup>36</sup> substantial obligations on the landlord, *eg*, repairing obligations or management obligations under the service charge provisions in the case of a multi-let property. *The Commission provisionally recommends that section 14 of Deasy's Act should form the basis of the law governing the position of an assignee of both the landlord's and tenant's interest, but without prejudice to liability for continuing breaches of obligation; the requirement to give notice of an assignment on, in order to secure a discharge from further liability, should apply to both landlord and tenant assignees.*

3.11 There is a related provision in *Deasy's Act*, which is section 15. This deals with the position of a tenant assignee who assigns on to someone else between two gale days. This also qualifies the common law<sup>37</sup> by providing that such an assignee<sup>38</sup> remains liable for the rent and performance of other obligations up to and including the gale day next after service of notice of the assignment. The section is couched in what appear to be imperative terms, with no qualifying words such as “subject to an agreement to the contrary”, so that it seems that the parties cannot contract out of it. In particular, it would appear that the parties to the assignment cannot agree as between themselves, with the sanction of the landlord, an apportionment of the rent linked to the date of the assignment. Yet it has been held that if

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<sup>34</sup> *Fields v Fields* [1918] 1 IR 140, 149 (*per* O'Brien C) and 151 (*per* Holmes J).

<sup>35</sup> As suggested in *Powell v Adamson* [1895] 2 IR 41.

<sup>36</sup> The issue of implied landlord obligations is discussed in Chapter 6 below.

<sup>37</sup> *Powell v Adamson* [1895] 2 IR 41, 61 (*per* Walker C). See paragraph 3.08 above.

<sup>38</sup> Note that the position of an original tenant who assigns only is governed by a separate provision, namely section 16: see paragraph 3.13 below.

the tenant assignee who has assigned defaults in paying rent, the new tenant to whom the tenancy has been assigned is liable only for an apportioned part of the rent from the date of assignment.<sup>39</sup> The Commission takes the view that section 15 should operate as a “default” provision only, to govern the position where the parties have not agreed otherwise. Furthermore, there again seems to be no reason why this default provision should not apply equally to a landlord assignee.<sup>40</sup> *The Commission provisionally recommends that section 15 of Deasy’s Act should be amended to enable the parties to contract out of it and to extend it to cover a landlord assignee.*

## **D Position of Assignor**

3.12 The position of the original landlord and tenant<sup>41</sup> following an assignment of their respective interests gave rise to particular difficulties at common law. This was because they were the original parties to the tenancy and, therefore, were governed by the doctrine of privity of contract. Under this doctrine the landlord and tenant assumed their respective obligations for the duration of the tenancy and could be held subject to a continuing liability even though their interest was assigned to someone else before the determination of the tenancy.<sup>42</sup> This could be a particular problem for the original tenant, especially in a commercial context, where over the period of the tenancy some obligations are likely to escalate considerably, *eg*, under rent review<sup>43</sup> and service charge<sup>44</sup> provisions. Until very recently in England it was a matter of considerable controversy<sup>45</sup> and

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<sup>39</sup> *Glass v Patterson* [1902] 2 IR 660.

<sup>40</sup> The position of an original landlord is not so clear, because there is no equivalent of section 16: see footnote 38 above and paragraph 3.17 below.

<sup>41</sup> The position of successors to the original landlord and tenant was considered in paragraphs 3.08-3.11 above.

<sup>42</sup> The common practice of obtaining an indemnity from the assignee was often of little comfort, because this would not bind the other party to the tenancy (landlord in the case of an assignment of the tenant’s interest) unless, which was unlikely, that party agreed to waive privity of contract claims. Furthermore, if an assignee defaulted on the tenancy obligations he was also likely to default on the indemnity.

<sup>43</sup> See Chapter 8 below.

<sup>44</sup> See Chapter 9 below.

<sup>45</sup> See the Law Commission’s Report *Landlord and Tenant Law: Privity of*

was not resolved until the enactment of legislation in 1995.<sup>46</sup> Fortunately Irish practitioners and their clients have been spared these difficulties, so far as an original tenant is concerned,<sup>47</sup> because of the provisions of section 16 of *Deasy's Act*.

3.13 Section 16 provides as follows:

“From and after any assignment hereafter to be made of the estate or interest of any original tenant in any lease, with the consent of the landlord, testified in the manner specified in section ten, the landlord so consenting shall be deemed to have released and discharged the said tenant from all actions and remedies at the suit of such landlord, and all persons claiming by, through, or under him, in respect of any future breach of the agreements contained in the lease, but without prejudice to any remedy or right against the assignee of such estate or interest.”

This is an extremely beneficial provision which clearly must be preserved, but there are some problems with its operation which need attention. One is that it applies only to assignment of a tenant's interest created by a “lease”, *ie*, by some written document.<sup>48</sup> Of course most problems concerning continuing liability are likely to arise in commercial lettings which are usually created by a lease, but there seems to be no reason why the provision should not apply to relieve a tenant holding under an oral tenancy, such as a periodic tenancy arising by implication.<sup>49</sup> *The Commission provisionally recommends that section 16 of Deasy's Act should be extended to discharge tenants holding under an oral tenancy.*

3.14 Rather more seriously, discharge of the original tenant is secured only where the landlord's consent to the assignment is “testified in the manner specified in section ten”. A number of problems arise in respect of this. One problem was drawn attention to previously by the Commission.<sup>50</sup> This is that section 10 of *Deasy's*

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*Contract and Estate* (Law Com No 174, 1988).

<sup>46</sup> Section 5 of the *Landlord and Tenant (Covenants) Act 1995*.

<sup>47</sup> Cf the position of the original landlord: see paragraph 3.17 below.

<sup>48</sup> See paragraph 2.10 above.

<sup>49</sup> See paragraph 2.18 above.

<sup>50</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC

*Act*, which provided that, where a lease contained a provision prohibiting or restraining assignment, it was “not lawful” to assign without the consent of the landlord testified as set out in the section,<sup>51</sup> was actually repealed by section 35(1) *Landlord and Tenant (Ground Rents) Act 1967*.<sup>52</sup> That Act did not repeal the cross-reference to section 10 in section 16 and it must be doubted whether any implied repeal occurred.<sup>53</sup> Clearly this doubt should be cleared up, but that leads to the issue as to what should be the requirements. Section 10 laid down somewhat cumbersome ones, namely, the landlord or the landlord’s agent “testifying” his or her consent to the assignment by “being an executing party to the instrument of assignment or by an endorsement on or subscription of the instrument”. In practice it may be more convenient to the parties to have the consent executed separately from the deed of assignment and it is not uncommon for it simply to be given by letter. *The Commission adheres to its previous recommendation that section 16 of Deasy’s Act should be amended so that the landlord’s consent need merely be in writing*.<sup>54</sup>

3.15 A question which arises is whether the need for writing should apply in cases where an oral tenancy, such as a periodic one, is assigned. It was suggested earlier that section 16 should apply to discharge the original tenant in such cases.<sup>55</sup> As the law stands the requirement of consent in writing would accord with the position under section 9 of *Deasy’s Act* that any assignment of an oral tenancy must be in writing.<sup>56</sup> However, the preliminary conclusion reached earlier is that this should be modified to make it clear that it does not exclude the courts’ jurisdiction to apply equitable principles such as

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30–1989) paragraphs 58-59.

<sup>51</sup> The preponderance of authority suggested that a failure to comply rendered the assignment “void” and not merely “voidable”: *per* Murray J in *Craigdarragh Trading Co Ltd v Doherty* [1989] NI 218, 230, citing *Earl of Donoughmore v Forrest* (1871) IR 5 CL 470.

<sup>52</sup> Section 35(1).

<sup>53</sup> See Wylie *op cit* paragraph 21.30.

<sup>54</sup> *Report on Land Law and Conveyancing Law: (I) General Proposals* (LRC 30–1989) paragraph 59.

<sup>55</sup> Paragraph 3.13 above.

<sup>56</sup> Paragraph 2.28 above.



the doctrine of estoppel.<sup>57</sup> On the same basis it would seem appropriate to allow the court to hold, if the circumstances of the case justify it, that not only may a landlord be estopped from denying that an assignment has taken place, but also that the original tenant is discharged from liabilities. *The Commission provisionally recommends that section 16 of Deasy's Act should be amended to make it clear that it does not exclude the courts' jurisdiction to apply equitable principles such as the doctrine of estoppel.*

3.16 There is a further problem about the operation of section 16 which is that it is predicated on the assumption that the landlord's consent is required to the assignment. It is not uncommon for a lease to contain no prohibition or restriction on alienation in which case the tenant is free to assign without seeking the landlord's consent. If the tenant does so, it would appear that the protection provided by section 16 is inapplicable – the section purports to apply to “any” assignment by “any” original tenant of “any” lease. Thus a tenant in such a situation would be wise to seek the consent of the landlord and to have it “signified” as the section requires.<sup>58</sup> Clearly this doubt should be removed and, at first sight, it would seem to be undesirable to force tenants to seek consent where the lease does not require it. However, there are clear dangers in this for a landlord and a potential trap for an unwary landlord. The landlord may have been prepared to concede that the original lease should contain no restriction on alienation because of the financial strength and attractiveness of the original tenant. The risk that the lease might be assigned to a tenant of little substance might be taken precisely because the view was taken that if consent was not given as prescribed under section 16, the original tenant of substance would remain liable. The Commission takes the view that it would be unfortunate if any amendment of section 16 created such a trap. *The Commission provisionally recommends that, where a tenant is not required by the terms of the tenancy to seek consent to an assignment, the protection provided by section 16 of Deasy's Act should nevertheless apply only where consent to the assignment is given by the landlord.*

3.17 As indicated by the previous paragraphs, section 16 of *Deasy's Act* applies only to an assignment by the original tenant.

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<sup>57</sup> Paragraph 2.28 above.

<sup>58</sup> See Wylie *op cit* paragraph 21.30.

There is no equivalent provision governing an assignment of the landlord's interest (reversion) by the original landlord. Yet privity of contract will also exist between the landlord and any tenants to whom that landlord granted tenancies. Following an assignment by that landlord continuing liability to such tenants on the landlord's covenants may exist.<sup>59</sup> In many cases this will not pose a major problem because of the few obligations entered into by the landlord. However, substantial obligations on the part of the landlord are not uncommon in commercial leases, such as those relating to multi-let properties like shopping centres.<sup>60</sup> Not infrequently the original landlord's interest in such cases will be disposed of, for example, by way of a concurrent lease granted to investors.<sup>61</sup> Under the current law, it would appear that the original landlord remains exposed to continuing liability and should, therefore, consider obtaining an indemnity from the assignees. In practice this is rarely, if ever, done, probably because tenants are not aware of the legal position and assume that they have a claim against the new landlord only. On balance, it would seem desirable to assimilate the position of the original landlord and original tenant.<sup>62</sup> *The Commission provisionally recommends that a provision equivalent to section 16 of Deasy's Act, which protects assignments by the original tenant, should be introduced to protect original landlords.*

## **E Part Assignments**

3.18 As mentioned earlier,<sup>63</sup> it is not uncommon for either the landlord or the tenant to engage in a partial assignment only, usually

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<sup>59</sup> *Stuart v Joy* [1904] 1 KB 362. Liability ends when the original landlord's interest in the reversion ends: see *Bath v Bowles* (1905) 93 LT 801.

<sup>60</sup> *Eg* those arising under typical service charge provisions, whereby direct liabilities are imposed on the common landlord, notwithstanding recoupment of the costs and expenses by way of the annual charges levied on tenants: see Chapter 9 below.

<sup>61</sup> See Wylie *op cit* paragraph 4.09. See also paragraph 3.19 below.

<sup>62</sup> The English legislation reversing privity of contract (see paragraph 3.12 above) does so: under sections 6-8 of the *Landlord and Tenant (Covenants) Act 1995*. The original landlord may apply to the court to be released from obligations on assignment of the reversion.

<sup>63</sup> Paragraph 3.02 above.

referred to as a severance of the interest held.<sup>64</sup> This is a somewhat complicated area of the law and the position of the parties following such a transaction is far from clear.

3.19 So far as severance by the landlord is concerned, two distinct transactions may take place. A severance as to the landlord's *estate* may be effected by granting a "concurrent" lease to a third party. Such a lease runs concurrently with the original lease and should be distinguished from a "reversionary" lease, which commences at the end of the original lease.<sup>65</sup> It seems to be settled law that the concurrent lessee steps into the shoes of the original landlord (the grantor of the concurrent lease) and is to be treated as an assignee of that landlord's interest for the term of the concurrent lease.<sup>66</sup> As such the concurrent lessee is liable on the original landlord's covenants and can enforce the tenant's covenants.<sup>67</sup> It was settled by statute<sup>68</sup> a long time ago that there was no need for the tenant to "attorn" or acknowledge the position as tenant of the concurrent lessee.<sup>69</sup> In this respect the position of the parties is governed by sections 12 and 13 of *Deasy's Act*.<sup>70</sup>

3.20 Rather more uncertainty exists where the landlord instead engages in a severance as to the *land*, or, as it is sometimes put, a severance of the *reversion*. This involves an assignment of part only of the landlord's interest, with the intention that there will be two (or more) landlords of the demised premises. Clearly as between the parties to such an arrangement the severance will be fully effective. As between themselves they can apportion the rent and other receipts (*eg* service charges) and a number of statutory provisions confirm that

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<sup>64</sup> See Wylie *op cit* paragraphs 21.31-36.

<sup>65</sup> Thus a concurrent lease is a lease *of* the reversion, whereas a reversionary lease is a lease *in* reversion: *per* FitzGibbon LJ in *Beamish v Crowley* (1885) 16 LR Ir 279, 290.

<sup>66</sup> Usually the same term as the original lease less a few days.

<sup>67</sup> *McKeague v Hutchinson* (1884) 18 ILTR 70; *Adelphi (Estates) Ltd v Christie* [1984] 1 EGLR 19.

<sup>68</sup> Sections 9 and 10 of the *Administration of Justice (Ireland) Act 1707*.

<sup>69</sup> However, the tenant can continue to pay rent to the original landlord (grantor of the concurrent lease) until notified of the assignment effected by the grant of the concurrent lease.

<sup>70</sup> See paragraph 3.06 above.

covenants and conditions in leases can be severed or apportioned.<sup>71</sup> What is not so clear is the extent to which the tenant is bound by any such severance or apportionment. Clearly the tenant is bound if he or she joins in the arrangement and agrees to accept two or more landlords, thereafter paying apportioned parts of the rent to different landlords and accepting apportionment of other obligations. Such joining in is rare and, where it does not occur, there has been much debate as to how far the tenant can disregard the severance of the landlord's interest and insist upon dealing only with the original landlord on the basis that that person remains the only landlord.<sup>72</sup> There is very little authority on the point<sup>73</sup> and clearly the position should be made clear. *The Commission provisionally recommends that the new statutory provisions to govern the position of successors in title should deal comprehensively with part assignments and should make explicit provision for severance or apportionment of rights and obligations as between all parties interested in the demised premises.*

3.21 There remains the question of the position where the tenant assigns part only of the demised premises. In practice the position of the parties in this situation is usually clearer, in that the consent of the landlord to such an assignment will usually be required by the terms of the tenant's lease. The landlord in that sense "joins in" and so the issue of what apportionment of the rents and obligations takes place will be resolved by express agreement.<sup>74</sup> Where there is no such agreement, the position is again not entirely clear and there is again a

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<sup>71</sup> Eg the *Statute of Reversions (Ireland) 1634*; *Law of Property Amendment Act 1859* (section 3); *Conveyancing Act 1881* (section 12). Note also the views of the House of Lords that sections 12 and 13 of *Deasy's Act* may have had the same effect: see *Liddy v Kennedy* (1871) LR 5 HL 134; see also *Lyle v Smith* [1909] 2 IR 58, 68-69 (*per* Lord O'Brien LCJ).

<sup>72</sup> See Wylie *op cit* paragraph 21.34.

<sup>73</sup> Again some of the law lords in *Liddy v Kennedy* (footnote 71 above) thought that sections 12 and 13 of *Deasy's Act* "put the question upon an entirely different footing" (*per* Lord Chelmsford at 149); see also Lord Hatherley at 143.

<sup>74</sup> Often the landlord will be reluctant to agree to such a part assignment, because of the "fragmentation" of the property which results (increasing the management burden of collecting rents, service charge payments, *etc*). And, where it is agreed, the landlord may insist on one of the tenants retaining responsibility for paying the whole rent and service charge (and for recouping apportioned parts from the other tenant or tenants).

need to have statutory provisions to clarify the situation, which would in effect be “default” provisions to govern the position which the parties have failed to resolve. *The Commission provisionally recommends that the statutory provisions should contain “default” provisions to govern part assignments by tenants in which the landlord did not join.*

## **F Sublettings**

3.22 Generally speaking the position of successors in title is irrelevant where a subletting, as opposed to an assignment, of the tenant’s interest occurs. Where a subletting is made there is no privity of estate between the head-landlord and sub-tenant.<sup>75</sup> The head-tenant making the sublettings retains his tenancy (head-tenancy) and retains the full benefits and liabilities attaching to it. The sub-tenant is in a direct relationship with the head-tenant only and has the benefits and liabilities under the terms of the subletting only.

3.23 The position outlined in the previous paragraph may be altered in a number of ways. One is that the head-landlord may make it a condition of giving consent to the sub-letting that the sub-tenant enters into direct covenants with the head-landlord, thereby creating privity of contract. Another is that the head-landlord may be able to enforce certain covenants in the head-lease against the sub-tenant under the rule in *Tulk v Moxhay*.<sup>76</sup> In essence this is confined to restrictive covenants (*eg* as to the user of the premises) which were clearly intended to bind all categories of successors, including sub-tenants.<sup>77</sup> Furthermore, exercise by the landlord of remedies against the head-tenant may have an inevitable impact on the position of the sub-tenant. Thus a forfeiture of the head-tenancy will automatically destroy any sub-tenancy created out of it and leave the sub-tenant in the position of having to claim relief against the forfeiture,<sup>78</sup> unless

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<sup>75</sup> See Wylie *op cit* paragraph 22.06.

<sup>76</sup> *Ibid* paragraph 22.08.

<sup>77</sup> See *Whelan v Cork Corporation* [1991] ILRM 19, 25-26 (*per* Murphy J) (affirmed by Supreme Court *ex tempore* [1994] 3 IR 367); see also *Northern Ireland Carriers Ltd v Larne Harbour Ltd* [1981] NI 171, 178 (*per* Murray J).

<sup>78</sup> See Chapter 14 below.

some statutory protection exists.<sup>79</sup> The Commission sees no reason to suggest any interference with such well settled law.

3.24 There are some specific provisions in *Deasy's Act* which deal with sub-lettings and require some discussion. One is section 19. This states that, in the case of a sub-letting made with the landlord's consent,<sup>80</sup> if the sub-tenant pays the sub-rent to the head-tenant, the latter's receipt is a "full discharge" as against the head-landlord, unless the head-landlord had served prior notice of the head-tenant's default on the sub-tenant under section 20.<sup>81</sup> At first sight this is a somewhat odd provision<sup>82</sup> given that there is no privity of estate between the head-landlord and sub-tenant.<sup>83</sup> It is also not entirely clear what the implications are, but it would appear to mean that the head-landlord in such circumstances is prevented from seeking forfeiture for non-payment of the head-rent in respect of the portion of the premises occupied by the sub-tenant. If that is, indeed, the effect of the section, it must be doubted whether it is appropriate so to restrict the landlord's right of forfeiture. It seems to be an unnecessary complication and there is surely an argument for saying that a sub-tenant's position should be left to be determined by the general law relating to relief against forfeiture.<sup>84</sup> In so far as this is based on the discretion of the court, it is arguable that section 19 involves an inappropriate interference with the jurisdiction of the court to determine what relief should be given to a particular sub-tenant in the light of all the circumstances of the case. *The Commission provisionally recommends that section 19 of Deasy's Act, which would appear to restrict the head-landlord's ability to seek forfeiture for non-payment of head-rent in respect of the portion of*

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<sup>79</sup> Eg under section 78 of the *Landlord and Tenant (Amendment) Act 1980*. Note also the protection for sub-tenants under section 32 and the Schedule in the *Residential Tenancies Bill 2003*.

<sup>80</sup> The section refers to this being given in the manner set out in section 18, but like section 10, that section was repealed by section 35(1) of the *Landlord and Tenant (Ground Rents) Act 1967*: see paragraph 3.14 above.

<sup>81</sup> Requiring the sub-tenant to pay the sub-rent directly to the head-landlord: see paragraph 3.25 below.

<sup>82</sup> It is not clear why section 19 excepts from its provisions a "building lease" (not defined anywhere in the Act).

<sup>83</sup> See paragraph 3.22 above.

<sup>84</sup> See paragraph 14.21 below.

*the premises occupied by the sub-tenant, should be repealed without replacement.*

3.25 Linked with section 19 is section 20, which is also a somewhat odd provision. In essence it entitles the head-landlord, where the head-tenant defaults in paying the head-rent, to require the sub-tenant to pay directly to the head-landlord so much of the sub-rent as will discharge the arrears of head-rent. The receipt of the head-landlord is a full discharge for the sub-tenant and the head-landlord has all the usual remedies to enforce payment of the sub-rent directly. It may be questioned whether it is again appropriate that the head-landlord can thereby unilaterally impose privity of contract on the sub-tenant, when normally not even privity of estate exists between the head-landlord and sub-tenant.<sup>85</sup> It is arguable that the head-landlord should be required to pursue remedies against the head-tenant and the position of the sub-tenant should be left to be dealt with as a consequential matter, *eg*, by way of relief against forfeiture.<sup>86</sup> It is also not clear from the section what the consequences of its application are on the position of the head-tenant and on the relationship between the head-tenant and sub-tenant. It would appear that the head-tenant has no say in the section's application by the head-landlord. It would also appear that the sub-tenant is entitled to deduct any payments made to the head-landlord from payments of sub-rent to the head-tenant. There is a suggestion, however, that, a sub-tenant who fails to make such deductions, cannot recover them unless the head-tenant "adopts" the payments to the head-landlord.<sup>87</sup> It is also not clear what time limit, if any, applies to the arrangement contemplated by section 20, other than, presumably, when the arrears of head-rent specified in the landlord's notice have been finally paid off. Nor is it clear whether the head-tenant can secure a stop on the arrangement by giving an undertaking to pay off the arrears of head rent. Given the various uncertainties which exist in respect of this provision, and its arguable inappropriateness mentioned earlier, the Commission doubts whether it should be retained. *The Commission provisionally recommends that section 20 of Deasy's Act, which entitles the head-landlord, where the head-tenant defaults in paying the head-rent, to require the sub-tenant to*

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<sup>85</sup> See paragraph 3.22 above.

<sup>86</sup> See paragraph 3.24 above.

<sup>87</sup> See *Ahearne v McSwiney* (1874) IR 8 CL 570.

*pay directly to the head-landlord so much of the sub-rent as will discharge the arrears of head-rent should be repealed without replacement.*

3.26 Finally section 21 of *Deasy's Act* is closely linked with section 20, in that it entitles the sub-tenant to achieve the same position by voluntarily paying sub-rent directly to the head-landlord, unless the head-tenant has already issued proceedings against the sub-tenant. It seems to the Commission that this section suffers from some of the same uncertainties and inappropriateness as afflict section 20, namely the imposition of privity of contract and the uncertain relationship between the head-tenant and the sub-tenant. *The Commission provisionally recommends that section 21 of Deasy's Act should be repealed without replacement.*





## CHAPTER 4     FIXTURES

4.01     The law of “fixtures”, which determines when an item of personal property has been so attached (“affixed”) to land that it is regarded as part of the land, is a notoriously difficult area of the law.<sup>1</sup> Over the centuries much debate has occurred as to the tests or criteria to be applied to determine the issue in a particular case. This has resulted in two tests in particular gaining recognition, namely (i) the *degree* of annexation and (ii) the *purpose* of annexation.<sup>2</sup> What is of special concern in this Consultation Paper is the application of the law as between landlords and tenants.

4.02     The issue of fixtures does arise frequently as between landlords and tenants.<sup>3</sup> Over the period of a tenancy, even a residential one, it would be very rare for the tenant not to install some items in the demised premises.<sup>4</sup> It is also extremely common for tenants of business premises to install fixtures and fittings; indeed, it will frequently be part of the initial agreement for the lease that the tenant will “fit-out” the premises in accordance with detailed specifications. It was in recognition of this that the courts from early times developed the notion of “tenant’s fixtures”.

4.03     The concept of “tenant’s fixtures” is an elusive one and somewhat confusing. In essence it refers to items so attached to the demised premises that, according to the general law of fixtures, they would be regarded as part of those premises and, therefore, belonging

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<sup>1</sup>     See generally Lyall *Land Law in Ireland* (2<sup>nd</sup> ed Round Hall Sweet & Maxwell 2000) at 622-25 and 785-86.

<sup>2</sup>     *Per* Andrews LJ in *Re Ross & Boal Ltd* [1924] 1 IR 129, 136. See also *Moore v Merrion Pier and Baths Co* (1901) 1 NIJR 184; *Whelan v Madigan* [1978] ILRM 136; *Maye v Revenue Commissioners* [1986] ILRM 377. Note the review of this subject by the House of Lords in *Elitestone Ltd v Morris* [1997] 2 All ER 513.

<sup>3</sup>     See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 9.

<sup>4</sup>     See *Whelan v Madigan* [1978] ILRM 136 (television aerials).

to the landlord. However, because this is regarded, in certain circumstances, as unfair to the tenant who installed the items, the law regards the items as “tenant’s fixtures” which can be removed from the demised premises by the tenant. The result is that, whenever a tenant installs an item in the demised premises, the following questions need to be addressed: (i) has the item been so attached that under the general law it should be regarded as a fixture? If the answer is no, then the item remains an item of personal property belonging to the tenant and the landlord has no claim on it. If the answer is yes, the next question which must be addressed is: (ii) does the fixture fall into the category of a tenant’s fixture? If the answer is no, then as a fixture which has become part of the demised premises the item belongs to the landlord and will have to remain attached to the premises when they revert to the landlord on the determination of the tenancy. If the answer is yes, then the tenant has a right of removal which must be exercised in accordance with the law. Before examining that law there is one practical point which requires discussion in this context.

4.04 As indicated in the previous paragraph, the special treatment of “tenant’s fixtures” by the law is a limited one. An item coming within this concept is, as the description itself emphasises, still a “fixture”, *ie*, it is regarded as belonging to the demised premises. All that the tenant has is a right of removal despite the fact that the item has become a fixture. The traditional theory has, therefore, been that a tenant’s fixture is regarded as belonging to the landlord until the tenant exercises the right of removal,<sup>5</sup> thereby severing the item from the demised premises. It is not clear how far the Irish courts adhere to this theory<sup>6</sup> and there may be an argument that the founding of the relationship of landlord and tenant on the agreement of the parties by section 3 of *Deasy’s Act* militates against it.<sup>7</sup>

4.05 Whatever the theory, there is no doubt that it can cause considerable practical difficulties and may operate unfairly on the

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<sup>5</sup> *Crossley v Lee* [1908] 1 KB 86 (tenant’s fixture could not be taken in distress for rent); see also *Climie v Wood* [1861-73] All ER Rep 831 (mortgage of landlord’s interest captures tenant’s fixtures).

<sup>6</sup> *Cf Earl of Antrim v Dobbs* (1891) 30 LR Ir 424 (tenant’s fixture taken in execution under a writ of *fieri facias* following a judgment against the tenant).

<sup>7</sup> See Wylie *op cit* paragraph 9.03 and following.

tenant. Often an item installed in the premises by the tenant for the purposes of the tenant's business (a typical example of a tenant's fixture<sup>8</sup>) eg, expensive plant, machinery or equipment, will not have been bought outright by the tenant. Instead, it will have been acquired by the tenant under a hiring or "leasing" arrangement,<sup>9</sup> whereby ownership of the item will be retained by a third party (eg, the hiring or leasing company). If the tenant then installs the item hired or leased in the demised premises in such a way that it becomes a fixture, a conflict arises. As a fixture, the item belongs to the landlord and remains so until the tenant exercises the right of removal, yet according to the tenant's hiring or leasing agreement the ownership of the item is supposed to be retained by the hiring or leasing company.<sup>10</sup> Technically, therefore, the tenant's actions in installing the equipment in the demised premises may be a breach of that agreement. If the tenant defaults on that agreement, so that the hiring or leasing company wishes to repossess the item in question, it presumably has to rely upon the tenant exercising the right of removal.<sup>11</sup> This may give rise to all kinds of practical difficulties, especially where the tenant has disappeared or refuses to co-operate.<sup>12</sup>

4.06 Difficulties may also arise under the taxation system. Where a tenant expends very substantial sums on the acquisition of machinery or plant for the business which is to be run on the demised premises, the tenant may wish to claim capital allowances in respect of income or corporation tax. Such "wear and tear" allowances can be claimed only in respect of "machinery or plant" which "belongs" to the taxpayer and is used for the purposes of the taxpayer's trade.<sup>13</sup> It would clearly be unjust if the tenant, who has incurred the relevant capital expenditure, were deprived of such allowances on the ground

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<sup>8</sup> See paragraph 4.09 below.

<sup>9</sup> Attention was drawn earlier to this somewhat, confusing use of the concept of leasing: see paragraph 1.03 above.

<sup>10</sup> See *Re Galway Concrete Ltd* [1983] ILRM 402 (batching plant, comprising two cement silos and two cement screw conveyors, obtained by tenant under a conditional sale agreement).

<sup>11</sup> *Per* Keane J in *Re Galway Concrete Ltd* *ibid* at 405-406.

<sup>12</sup> For an illustration of such problems see *Lombard and Ulster Banking Ltd v Kennedy* [1974] NI 20.

<sup>13</sup> Section 284(1) of the *Taxes Consolidation Act 1997*.

that so long as the machinery or plant is installed in the demised premises it does not belong to the tenant, but rather, under the law of fixtures, to the landlord.<sup>14</sup>

4.07 The Commission takes the view that the traditional theory concerning tenant's fixtures is inappropriate. In particular, in most, if not all, cases it does not accord with what the parties will have intended and, to that extent, is inconsistent with one of the fundamental principles of Irish landlord and tenant law, as enshrined in *Deasy's Act*.<sup>15</sup> It is, of course, possible that the Irish courts might take a different view if the issue were addressed specifically in the light of the possible effect of section 3 of *Deasy's Act*.<sup>16</sup> There is clearly a case for clarifying the law.

4.08 The Commission appreciates that the view stated in the previous paragraph may be regarded as calling into question the whole notion of a tenant's "fixture". Arguably the very concept itself is a misnomer, which causes more confusion than enlightenment.<sup>17</sup> Before reaching any conclusion on this, something further must be said about the current law. This is a mixture of the common law and statute law.

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<sup>14</sup> Some English cases display a tendency to apply the strict law of fixtures: see *Stokes (Inspector of Taxes) v Costain Property Investments Ltd* [1984] 1 All ER 849; *Melluish (Inspector of Taxes) v BMI (No 3) Ltd* [1995] 4 All ER 453.

<sup>15</sup> See paragraph 1.10 and 1.26 above.

<sup>16</sup> This was not done in either *Re Galway Concrete Ltd* [1983] ILRM 402 (where the landlord made no claim to the items installed by the tenant) or *Lombard and Ulster Banking Ltd v Kennedy* [1974] NI 20 (where the tenant had disappeared and the dispute was between the landlord and the leasing company wanting its machinery back).

<sup>17</sup> The law lords expressed similar dissatisfaction with the traditional concepts in *Elitestone Ltd v Morris* [1997] 2 All ER 513. Note that the English *Agricultural Tenancies Act 1995* abrogates the common law right to remove tenant's fixtures and provides that a fixture installed by a farm business tenant remains his property so long as he remains in possession of the land: section 8(1).

## A Common Law

4.09 Originally at common law a fixture was regarded as a tenant's fixture (and, therefore, removable by the tenant) if it was installed in the demised premises for the purposes of the tenant's trade or for ornamental and domestic purposes.<sup>18</sup> The former category, of fixture for trade purposes, covered a very wide range of items, but it seems that the latter category of fixtures for ornamental and domestic purposes may have been more limited in the sense that it would not apply where the item could not be removed in its entire state, *ie* without dismantling.<sup>19</sup>

4.10 The category of trade fixture did not apparently apply to agricultural tenants,<sup>20</sup> but that position was changed by the *Landlord and Tenant Act 1851*.<sup>21</sup> The 1851 Act gave agricultural tenants a statutory right to remove agricultural and trade fixtures, and buildings erected by them, provided prior notice was given to the landlord and the land was left in as good a condition as before the fixtures were installed. The landlord was, however, given the right to elect to purchase the items instead. Although the 1851 Act remains on our statute book,<sup>22</sup> it was largely superseded by later legislation.<sup>23</sup> In any event agricultural tenancies largely disappeared from the Irish scene as a result of the *Land Purchase Acts*. There has been little sign of the revival of agricultural tenancies which the *Land Act 1984* was designed to promote.<sup>24</sup> Apart from this, arguably the 1851 Act lost

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<sup>18</sup> See *Deeble v McMullen* (1857) 8 ICLR 353; *Barnett v Lucas* (1872) IR 6 CL 247; *Cosby v Shaw* (1887) 23 LR Ir 181; *Earl of Antrim v Dobbs* (1891) 30 LR Ir 424. See paragraph 4.11 for section 17 of *Deasy's Act*.

<sup>19</sup> See *Buckland v Butterfield* (1820) 2 Brod & B 54 (conservatory on brick foundation). See also *Spyer v Phillipson* [1931] 2 Ch 183; *Young v Dalgety Plc* [1987] 1 EGLR 116.

<sup>20</sup> *Elwes v Maw* (1802) 3 East 38. Cf market gardeners: see *Wardell v Usher* (1841) 3 Scot NR 508; *Mears v Callender* [1901] 2 Ch 388.

<sup>21</sup> This Act applied to both England and Ireland.

<sup>22</sup> In England it was replaced by later agricultural holdings legislation: see now *Agricultural Holdings Act 1986* and *Agricultural Tenancies Act 1995*.

<sup>23</sup> Eg section 4 of the *Landlord and Tenant (Ireland) Act 1870* conferred rights to compensation for improvements made by tenants.

<sup>24</sup> This "disapplied" the old nineteenth century legislation, such as the 1870 Act, but not the 1851 Act.

most of its significance with the enactment of the comprehensive provision contained in section 17 of *Deasy's Act*.<sup>25</sup>

## **B        *Deasy's Act, Section 17***

4.11        This is a somewhat convoluted provision which is worth quoting in full:

“Personal chattels, engines, and machinery, and buildings accessorial thereto, erected and affixed to the freehold by the tenant at his sole expense, for any purpose of trade, manufacture, or agriculture, or for ornament, or for the domestic convenience of the tenant in his occupation of the demised premises, and so attached to the freehold that they can be removed without substantial damage to the freehold or to the fixture itself, and which shall not have been so erected or affixed in pursuance of any obligation or in violation of any agreement in that behalf, may be removed by the tenant, or his executors or administrators, during the tenancy, or, when the tenancy determines by some uncertain event, and without the act or default of the tenant, within two calendar months after such determination, except so far as may be otherwise specifically provided by the contract of tenancy; provided that the landlord shall be entitled to reasonable compensation for any damage occasioned to the premises by such removal.”

To a large extent this provision recognises the principles evolved by the courts in respect of tenant's fixtures, supplemented by the provisions for agricultural tenants introduced by the *Landlord and Tenant Act 1851*. In essence it would appear to operate as a “default” provision where the parties have not made an express agreement as to the items in question.<sup>26</sup> The Commission takes the view that this should be the basis of the law, as it accords with the fundamental principle of founding the relationship of landlord and tenant on the

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<sup>25</sup>        Note the reference to the purpose of “agriculture” in section 17: see paragraph 4.11 below.

<sup>26</sup>        The suggestion that the reference to the parties' agreement relates only to the two calendar month period for removal was rejected in *Cosby v Shaw* (1887) 23 LR Ir 181, 199 (*per* Naish LJ).

parties' agreement. Furthermore, it should be made clear that the statutory "default" provisions displace the common law.

4.12 As regards the particular provisions of section 17, a number of points may be made. One is that it relates to "personal chattels, engines, and machinery, and buildings accessorial thereto." The Commission is not convinced that it is necessary to specify the property which should be regarded as remaining in the ownership of the tenant (or that of any third party from whom the tenant may have acquired it under, *eg*, a hiring or leasing agreement). Arguably the statutory principle should be applicable to any property brought into the premises by the tenant, subject always to the terms of the lease or tenancy. It may even be questioned whether an exception should be made for buildings or constructions added by the tenant.<sup>27</sup> Section 17 recognises "accessorial" buildings, and any other type of building work would most likely be the subject of an express agreement. Apart from that, substantial buildings are not likely to be removable in practice and so another way of recognising the tenant's interest should come into play, *eg*, compensation for improvements.<sup>28</sup>

4.13 Section 17 recognises the traditional categories of tenant's fixtures, namely items installed for the purposes of trade,<sup>29</sup> agriculture or ornament or domestic convenience. Again the Commission is not convinced that it is necessary or appropriate to put limits on the property which should be regarded as remaining in the ownership of the tenant. As suggested in the previous paragraph the statutory principle should apply to any property installed by the tenant, subject again to the terms of the lease or tenancy.<sup>30</sup>

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<sup>27</sup> Note the substantial constructions involved in *Lombard and Ulster Banking Ltd v Kennedy* [1974] NI 20 and *Re Galway Concrete Ltd* [1983] ILRM 402. See paragraphs 4.05-4.07 above.

<sup>28</sup> See Part IV of the *Landlord and Tenant (Amendment) Act 1980*: Wylie *op cit* Chapter 32. Note that the Commission has proposed dropping the statutory scheme (see Law Reform Commission *Consultation Paper on Business Tenancies* (LRC CP 21-2003), paragraphs 3.38-3.40), but it would remain open to the parties to negotiate such compensation.

<sup>29</sup> The section adds "manufacture" but it not clear that this adds anything of substance to "trade" in the context of fixtures. In *Re Galway Concrete Ltd* [1983] ILRM 402 Keane J held that a batching plant, comprising two cement silos and two cement screw conveyors, was a trade fixture.

<sup>30</sup> One of the interesting aspects of the *Galway Concrete* case is that it was



4.14 Section 17 also recognises the common law rule that the right of removal cannot be invoked unless it can be exercised without causing “substantial damage” to either the demised premises or the item being removed.<sup>31</sup> The section does, however, recognise that in other cases exercise of the right may cause some damage to the demised premises, hence the provision for “reasonable compensation” to be paid to the landlord. The Commission is not convinced that this apparent distinction is entirely clear and inclines to the view that, subject always to the terms of the lease or tenancy, the statutory principle should entitle the tenant to remove property installed by him or her on the demised premises in all cases, subject to the landlord’s right to compensation for any damage, however substantial, caused to the premises by the removal.

4.15 Section 17 also seems to recognise the common law rule that the tenant had to exercise the right of removal during or at the end of the tenancy.<sup>32</sup> There is no Irish authority to indicate whether the courts here would accept the English courts’ development of the doctrine of an “excrescence of the term”. According to this a tenant may be permitted a “reasonable time” for removal of fixtures after the natural expiry of the tenancy.<sup>33</sup> Section 17 seems to rule this out,<sup>34</sup> but it does allow for the exception where the determination of the tenancy is unexpected owing to the happening of an uncertain event and not due to the act or default of the tenant. In such cases it gives the tenant an additional period of two calendar months in which to remove the

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accepted that the concept of tenant’s fixtures applied to other relationships; in that case the company in question occupied the premises under a caretaker’s agreement. This point is outside the scope of the Consultation Paper, which is confined to the relationship of landlord and tenant.

<sup>31</sup> See the discussion in *Lombard and Ulster Banking Ltd v Kennedy* [1974] NI 20. See also the views of the House of Lords in *Leigh v Taylor* [1902] AC 157 and *Elitestone Ltd v Morris* [1997] 2 All ER 513.

<sup>32</sup> See the views of the old Court of Common Pleas in *Deeble v McMullen* (1857) 8 ICLR 353.

<sup>33</sup> See *Mackintosh v Trotter* (1838) 3 M & W 184; *Re Lavies* (1877) 7 Ch D 127.

<sup>34</sup> But this raises the question whether it should be regarded as displacing the common law: see Cherry *Irish Land Law and Land Purchase Acts 1860-1901* (3<sup>rd</sup> ed John Falconer 1903) at 45-46; Deale *The Law of Landlord and Tenant in the Republic of Ireland* (Incorporated Council of Law Reporting for Ireland 1968) at 17-18. See paragraph 4.11 above.

fixtures. Given that this is subject to the parties' agreement the Commission takes the view that the provisions of section 17 in this respect are sound as "default" provisions. There are, however, some points which should be clarified.

4.16 One is that the two month period should not be available where the tenant vacates the premises before the period expires. The Commission takes the view that the tenant should be required to take away all property belonging to him when the demised premises are vacated. The landlord should have the right to remove and store for safe keeping, after the tenant vacates the premises, any items which the tenant had the right to remove before vacating the premises and should be entitled to dispose of them, if not claimed within, say, 14 days of the tenant's vacation of the premises. The cost of storage should be recoverable from the tenant, and be payable before items are returned on reclaim of them by the tenant or should be deductible, together with any other expenses incurred, from any proceeds of disposal before these are paid over to the tenant.

4.17 It should also be made clear that the tenant's right of removal is carried forward in any renewal or extension of a tenancy,<sup>35</sup> and continues to apply where a lease is varied,<sup>36</sup> subject again to what the parties may expressly agree. The current position only seems clear where the tenant secures a statutory new tenancy or reversionary lease under the provisions of the *Landlord and Tenant (Amendment) Act 1980*.<sup>37</sup>

4.18 Section 17 excludes the right of removal where items have been installed by the tenant "in pursuance of any obligation or in violation of any agreement in that behalf". It should, perhaps, be made clear that this is subject to the terms of the tenancy, so that it is open to the parties to agree that the tenant may remove items installed in accordance with an undertaking or obligation contained in the agreement for lease or lease itself.

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<sup>35</sup> This general proposition seems to have been accepted by the English courts: see *New Zealand Government Property Corporation v H M & S Ltd* [1982] Q B 1145. *Cf Deeble v McMullen* (1857) 8 ICLR 353.

<sup>36</sup> See paragraph 2.24 above.

<sup>37</sup> Because such tenancy or lease is deemed to be a "graft" on the old one: see sections 27 and 39 of the 1980 Act.

4.19 Taking into account the points of clarification mentioned in the previous paragraphs the Commission inclines to the view that the law of tenant's fixtures should be radically overhauled. *The Commission provisionally recommends that the law relating to tenant's fixtures should be replaced by a new statutory provision which entirely displaces the common law and all existing statutory provisions. The fundamental principle of this should be that the ownership and other rights attaching to any items of property installed in the premises should be as set out in the lease. The statutory provision should then provide a set of "default" provisions to operate in the absence of such express provisions. The essence of the default provisions should be:-*

- (i) *they should apply to any property installed in the premises by the tenant, for whatever reason;*
- (ii) *the right of removal should be exercisable in all cases, subject to the landlord's right to compensation for any damage, however substantial, caused to the demised premises by the removal;*
- (iii) *the right of removal must be exercised before the tenancy ends, unless the determination is unexpected and not due to some act or default by the tenant; in the latter unexpected case the tenant who is not at fault should have an additional period up to two calendar months in which to remove property;*
- (iv) *in any event the right of removal must be exercised when the tenant vacates the demised premises; if it is not so exercised the landlord should have the right to remove the tenant's property for safekeeping and storage;*
- (v) *the landlord should have the right to dispose of property so removed, if not reclaimed by the tenant, or other party entitled to it, within 14 days of the tenant vacating the demised premises;*
- (vi) *the cost of storage should be recoverable from the tenant, and be payable before property is returned on a reclaim or deductible, together with any other expenses reasonably incurred, from the proceeds of disposal before those are paid over to the tenant;*
- (vii) *it should be made clear that in all cases the tenant's right of removal continues to apply to renewed, extended and varied tenancies;*

- (viii) *it should also be made clear that it is open to a landlord and tenant to agree expressly that the tenant may remove property installed in accordance with an undertaking or obligation contained in the agreement for lease or lease itself;*
- (ix) *it should also be made clear that a tenant's fixtures should be regarded as remaining in the ownership of the tenant and at no point belonging to the landlord.*



## CHAPTER 5 OBLIGATIONS

5.01 Since a tenancy involves the occupation by one person of another person's land, it is not surprising that the parties in most cases will wish to lay down various terms or conditions to govern the arrangement. This will usually be done by drawing up a formal lease which will contain various "covenants"<sup>1</sup> or "agreements"<sup>2</sup> by the parties. A modern commercial lease is likely to contain a wide range of covenants, especially by the tenant.<sup>3</sup> The issue which the Commission has had to consider is how far legislation should interfere with or apply to obligations arising under tenancies, whether created by a lease or not. It is this general issue with which this chapter is concerned. The ensuing chapters deal with particular obligations which concern both landlords and tenants.

### A Purpose of Legislation

5.02 It may be useful to begin with a consideration of the purpose of legislation in the area of landlord and tenant obligations. The Commission takes the view that there are three main objectives which could be achieved. These may be described as: (1) law reform;

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<sup>1</sup> Technically a "covenant" is a promise contained in a deed (a sealed document), but, as discussed in an earlier chapter, a deed is not required for any kind of lease in Ireland. Section 4 of *Deasy's Act* requires only that, in cases where some formal document must be used to create the relationship of landlord and tenant, that it be "by deed executed, *or note in writing*" (emphasis added): see paragraph 2.12 above. Nevertheless, in practice a deed is often used, especially in the case of commercial leases.

<sup>2</sup> No doubt because of the provisions of section 4 (see footnote 1 above) *Deasy's Act* tends to use the word "agreements" rather than "covenants": see *eg* sections 12 and 13 (binding successors in title) and 41 and 42 (implied obligations) generally.

<sup>3</sup> See generally Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) and the precedents in Division L.2 of Laffoy's *Irish Conveyancing Precedents* (Butterworths).

(2) consumer protection; (3) default provisions. The ensuing paragraphs explain further what the Commission has in mind.

**(1) Law Reform**

5.03 The Commission has concluded that there are areas of the law which relate to landlord and tenant obligations in need of reform by legislation. Some areas are essentially based on the common law. An example is the law of waste, which is essentially a branch of the law of torts.<sup>4</sup> Originally it did not apply to landlords and tenants, but that position was altered to some extent by legislation centuries ago,<sup>5</sup> and later developed by the courts.<sup>6</sup> The common law is also often overlaid with legislation and again the law of waste is a good example. *Deasy's Act* contains a substantial number of provisions dealing with various activities which are typical of those prohibited by the law of waste.<sup>7</sup> As will be discussed in a later chapter<sup>8</sup> it is extremely doubtful whether these provisions remain relevant in modern times.<sup>9</sup>

**(2) Consumer Protection**

5.04 Another objective of legislation is consumer protection, *ie* protecting one party to an arrangement from unfair or unreasonable advantage being taken by the other. Such statutory protection for tenants has long been a feature of our law. In the residential sector, much protection was introduced in the first half of the last century, through the *Rent Restrictions Acts*.<sup>10</sup> When significant parts of this legislation were ruled unconstitutional by the Supreme Court in

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<sup>4</sup> See Wylie *op cit* paragraph 15.22.

<sup>5</sup> *Statute of Marlborough 1267*, c 23 (which seemed confined to tenants for life or for a fixed term).

<sup>6</sup> To make it apply to periodic tenants: see *Warren v Keen* [1954] 1 QB 15.

<sup>7</sup> Sections 25-39.

<sup>8</sup> Chapter 10 below.

<sup>9</sup> Including the special summary remedy for restraining waste (a “precept” obtainable in the District Court) introduced by sections 35-37.

<sup>10</sup> Increase of *Rent and Mortgage Interest (Restrictions) Acts 1915-1919*, consolidated in the *Increase of Rent and Mortgage Interest (Restrictions) Act 1920*. This system was overhauled by the *Rent Restrictions Acts 1946* and *1960*.

1981,<sup>11</sup> a new scheme governing “controlled dwellings” was introduced by the *Housing (Private Rented Dwellings) Act 1982*.<sup>12</sup> Further substantial protection is envisaged by the *Residential Tenancies Bill 2003*<sup>13</sup> presented to the Oireachtas on 28 May 2003.<sup>14</sup> This Bill seeks to implement the recommendations of the Commission on the Private Rented Residential Sector.<sup>15</sup> In view of the work of that Commission and the governmental acceptance of its recommendations, it would not be appropriate for the Law Reform Commission to retrace the ground covered by it. This Consultation Paper does not, therefore, deal directly with matters covered by the 2003 Bill.

5.05 Turning more specifically to legislation prompting consumer protection by way of imposing obligations on landlords and tenants, again there is a long history of this. To some extent it may be argued that *Deasy’s Act* moved some way towards this, in that it does contain many provisions purporting to impose obligations. However, it is questionable whether they could be categorised as involving the notion of consumer protection, at least in its modern form. Much of *Deasy’s Act* is concerned with imposing various obligations on tenants, in order to enhance or bolster the landlord’s position. Furthermore, any notion of “protection” is usually lacking because the statutory provisions are usually subject to the express provisions of the lease or tenancy agreement concluded. To use modern parlance, it is usually the case that the parties can contract out of the provisions of *Deasy’s Act*.

5.06 The concept of obligations being imposed on landlords and tenants, which they cannot contract out of, is a more modern one. One example is the provisions in the *Landlord and Tenant Acts* requiring certain types of tenant covenants commonly found in leases<sup>16</sup> to be operated in a reasonable manner by landlords.<sup>17</sup> This

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<sup>11</sup> *Blake and Others v Attorney General* [1982] IR 117.

<sup>12</sup> See de Blacam *The Control of Private Rented Dwellings* (2<sup>nd</sup> ed Round Hall/Sweet & Maxwell 1992).

<sup>13</sup> No 23 of 2003.

<sup>14</sup> By the Minister for the Environment, Heritage and Local Government.

<sup>15</sup> See its Report (July 2000).

<sup>16</sup> *Eg* covenants against or restricting alienation, changing the user of the demised premises and making improvements.



subject was discussed in the *Consultation Paper on Business Tenancies*<sup>18</sup> and nothing further needs to be said in this Consultation Paper. Another example is the provision in the *Housing (Miscellaneous Provisions) Act 1992*,<sup>19</sup> which empowered the making of regulations prescribing “standards” for rented houses.<sup>20</sup> These govern the quality and condition of accommodation, facilities and appliances and impose on landlords an obligation to maintain houses in a proper state of structural repair. A failure to comply with these regulations is a criminal offence<sup>21</sup> and the local housing authority can do the necessary work and recover the costs and expenses from a landlord who fails to comply.<sup>22</sup> Further extensive obligations on landlords of dwellings, and, indeed, on tenants, will be imposed if the *Residential Tenancies Bill 2003* is enacted.<sup>23</sup> Again it would not be appropriate for the Law Reform Commission to review such ground so recently covered and so this Consultation Paper does not deal with matters covered by the 1992 Act and 2003 Bill.

5.07 Notwithstanding what was said in the previous paragraphs, the Commission does not rule out proposing further provisions seeking to promote consumer protection in relation to landlord and tenant obligations. These may take the form of general provisions, in

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<sup>17</sup> *Landlord and Tenant (Amendment) Act 1980* Part V, replacing sections 55-59 of the *Landlord and Tenant Act 1931*.

<sup>18</sup> LRC CP 21–2003 at 88-92.

<sup>19</sup> Replacing one in section 26 of the *Housing (Private Rented Dwellings) Act 1982*: see section 26 of the 1992 Act.

<sup>20</sup> See now the *Housing (Standards for Rented Housing) Regulations 1993* (SI No 147 of 1993). Note also the provisions in the 1992 Act requiring landlords to provide tenants of houses with rent books containing prescribed information: see section 17 and the *Housing (Rent Books) Regulations 1993* (SI No 146 of 1993). And note the requirements to register rented houses under the *Housing (Registration of Rented Houses) Regulations 1996* (SI No 30 of 1996) made under section 20 of the 1992 Act. The 1996 Regulations are to be revoked and replaced under the provisions of Part 7 of the *Residential Tenancies Bill 2003*.

<sup>21</sup> Section 34 of the 1992.

<sup>22</sup> Section 18.

<sup>23</sup> Again following recommendations made by the Commission on the Private Rented Residential Sector: see paragraph 5.04 above. See Part 2 of the Bill.

the sense that they need not be confined to particular categories of tenants. Examples are mooted in the following chapters.<sup>24</sup>

### **(3)      *Default Provisions***

5.08      Many leases are drawn up by professional experts on behalf of the parties, often following extensive negotiation, and will contain detailed provisions covering most, if not all, matters likely to arise during the continuance of the lease. This is especially the case with commercial leases which tend to be very comprehensive documents.<sup>25</sup> However, on occasion the drafting proves to be defective and a particular lease may not deal with certain important matters. This suggests that there may be a need for statutory “default” provisions, to fill the gap in particular cases. Such a need may be even greater where a less comprehensive lease is executed, and, of course, greater still where no lease or other written document at all is entered into. This will often arise in the case of short-term tenancies or periodic tenancies.<sup>26</sup> This need for “default” provisions<sup>27</sup> is considered in relation to various matters discussed in the ensuing chapters.

### **(4)      *Nature of Statutory Obligations***

5.09      It is clear from the above discussion of the purposes of legislation dealing with landlord and tenant obligations that the statutory provisions will fall into two categories. One category is what may be referred to as “overriding” obligations imposed on a landlord or tenant. These would be statutory obligations which are imposed regardless of what the parties may provide in the lease or agree to as part of the tenancy arrangement, *ie*, it would not be possible to contract out of them. The Commission envisages that there would be few such overriding obligations in the statutory scheme proposed. This is partly due to the fact that the area in which there is probably most need of them, especially from the consumer protection point of view,<sup>28</sup> is that of residential tenancies, which is

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<sup>24</sup>      *Eg* in relation to repairs (see paragraph 6.19), insurance (see paragraph 11.09) and service charges (see paragraph 9.04).

<sup>25</sup>      Note the precedents in Division L2 of Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>26</sup>      See Chapter 2 above.

<sup>27</sup>      An early example is the implied agreements contained in sections 41 and 42 of *Deasy’s Act*: see paragraphs 6.02, 6.04, 8.03 and 10.06 below.

<sup>28</sup>      See paragraphs 5.04-5.06 above.

already covered by modern legislation<sup>29</sup> and is likely to be covered by comprehensive new legislation in the near future.<sup>30</sup> The other reason is that an underlying philosophy behind much of the Commission's work in the area of landlord and tenant law is that the parties should remain free to negotiate the terms of the tenancy with the minimum of statutory interference. This philosophy should apply particularly to tenancies of business premises, a point emphasised in the *Consultation Paper on Business Tenancies*.<sup>31</sup>

5.10 The other category of statutory obligations is what may be referred to as “default” obligations. These would be obligations which the parties would be free to amend or, even, delete from any lease or agreement for a tenancy made. They would be the typical “default” provisions, which would apply to any tenancy where the lease failed to deal with a particular matter.<sup>32</sup> Filling the “gap” may take several forms. In some cases the “default” provision may shift an obligation from one party to the other, because, if nothing is said in the lease, the general law would otherwise regard the obligation as belonging to the other party.<sup>33</sup> Sometimes, the “default” provision will literally fill a gap, in the sense that if nothing is provided in the lease or tenancy agreement, it may not be clear which party has the obligation; indeed, the strict legal position may be that, in the absence of any express provision, neither party has any obligation (in the sense of one which the other party can enforce) in respect of the matter.<sup>34</sup>

5.11 *The Commission has concluded that there would be considerable merit in a new statutory scheme governing landlord and tenant obligations. The Commission provisionally recommends that the new legislation should:-*

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<sup>29</sup> Eg the *Housing (Miscellaneous Provisions) Act 1992*.

<sup>30</sup> In the form of the *Residential Tenancies Bill 2003*. See paragraph 5.06 above.

<sup>31</sup> LRC CP 21-2003, paragraphs 3.09-10.

<sup>32</sup> See paragraph 5.08 above.

<sup>33</sup> Eg, payment of outgoings such as rates (no longer payable in respect of dwellings), utility charges (water, gas, electricity *etc*) and taxes such as VAT. See Wylie *op cit* Chapter 13 and paragraph 8.21 below.

<sup>34</sup> Eg, in respect of matters like repairs (see paragraph 6.18 below) and insurance (see paragraph 6.21 below).

- (a) *promote purposes such as law reform, consumer protection and statutory “default” provisions;*
- (b) *take the form of a scheme of “overriding” obligations (not subject to contracting-out) and “default” obligations (subject to variation by the parties);*
- (c) *limit the number of “overriding” obligations in order to accord with the philosophy of freedom of contract, especially in the context of business tenancies;*
- (d) *not interfere with legislation, both recent and impending, governing residential tenancies.*



## CHAPTER 6 LANDLORD'S OBLIGATIONS

6.01 Following what was said in the previous chapter, this chapter considers how far a new legislative scheme should provide for landlord's obligations, whether "overriding" or "variable".<sup>1</sup> This necessitates a consideration of the existing position and, in particular, the statutory provisions governing residential property. It was emphasised that any proposals in this Consultation Paper should not interfere with those provisions, including those contained in the *Residential Tenancies Bill 2003*.<sup>2</sup> However, what this Paper does consider is the issue whether the provisions in that Bill should be given a wider scope, perhaps subject to adaptations. For that reason it is useful to consider the provisions in the Bill dealing with landlords' obligations.<sup>3</sup>

### A Title

6.02 Section 41 of *Deasy's Act* implies "an agreement"<sup>4</sup> in every lease that the landlord "has good title to make such lease." Several

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<sup>1</sup> See paragraphs 5.09-10 above.

<sup>2</sup> Paragraphs 5.04, 5.07 and 5.11 above.

<sup>3</sup> Sections 12-15 and 18. Note also Part 7 which will deal in future with registration of tenancies: see paragraph 6.24 below.

<sup>4</sup> The section itself does not use the word "covenant", presumably because a deed is not necessary in any case of a grant of a tenancy, however long the term, in Ireland: see section 4 of *Deasy's Act* and paragraph 2.12 above. Section 41 of *Deasy's Act* states:

"Every lease of lands or tenements made after the commencement of this Act shall (unless otherwise expressly provided by such lease) imply an agreement on the part of the landlord making such lease, his heirs, executors, administrators and assigns, with the tenant thereof for the time being, that the said landlord has good title to make such lease, and that the tenant shall have the quiet and peaceable enjoyment of the said lands or tenements without the interruption of the landlord or any person whomsoever during the term contracted for, so long as the tenant shall

points should be noted about this provision. One is that it does not apply to an oral grant of a tenancy, nor where a tenancy (usually a periodic one) arises by implication.<sup>5</sup> Secondly, it applies only to the grant of a new lease and does not apply to the subsequent assignment of an existing lease. Such a transaction is covered by the implied covenants for title contained in section 7 of the *Conveyancing Act 1881*. Those are part of the general law of conveyancing which the Commission regards as outside the scope of the Landlord and Tenant Project.<sup>6</sup> Thirdly, section 41<sup>7</sup> operates “unless otherwise expressly provided by such lease”. It is, therefore, a “variable” obligation, which operates as a “default” provision.

6.03 In practice it is extremely rare for a covenant for title to be included in a lease.<sup>8</sup> In the case of short-term leases and periodic tenancies the likelihood is that the parties rely more on the implied agreement for quiet enjoyment also contained in section 41 of *Deasy’s Act*.<sup>9</sup> In the case of long-term leases the grant of such a lease<sup>10</sup> will usually be preceded by a contract for the grant of the lease.<sup>11</sup> The issue of the title to be shown by the landlord will then be treated as a matter of contract. That issue is governed either by the provisions of the *Vendor and Purchaser Act 1874*<sup>12</sup> and *Conveyancing Act 1881*<sup>13</sup> or, more usually, as modified by the terms of the contract

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pay the rent and perform the agreements contained in the lease to be observed on the part of the tenant.”

<sup>5</sup> See paragraph 2.18 above.

<sup>6</sup> They will be considered in the review of pre-1922 property statutes which is part of the Commission’s e-Conveyancing Project.

<sup>7</sup> The section also implies an agreement relating to quiet enjoyment by the tenant: see paragraph 6.04 below.

<sup>8</sup> See the precedents in Division L of Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>9</sup> See paragraph 6.04 below.

<sup>10</sup> Such leases in the residential field have been reduced by the statutory restriction in section 2 of the *Landlord and Tenant (Ground Rents) Act 1978*, but note that this does not apply to premises divided into flats.

<sup>11</sup> On this distinction see paragraph 2.02 above.

<sup>12</sup> Sections 1 and 2.

<sup>13</sup> Section 13. See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed Butterworths 1996) paragraph 14.68 and following.

for sale.<sup>14</sup> This matter is again one which is outside the scope of the Landlord and Tenant Project.<sup>15</sup> Notwithstanding the above point the Commission takes the view that the provision in section 41 ought to be retained as a “default” provision, applicable to all tenancies, whether created by a written document or not. However the “default” provision should limit the landlord’s obligation so that the landlord would incur liability only for the landlord’s own actions and those of persons claiming through, under or in trust for the landlord. This point is taken up in the ensuing paragraphs relating to quiet enjoyment. *The Commission provisionally recommends that the obligation for good title in section 41 of Deasy’s Act should be repealed as a “default” provision applicable to all tenancies, but limiting all liability to the landlord’s own actions and those of persons claiming through, under or in trust for the landlord.*

## **B Quiet Enjoyment**

6.04 Section 41 of *Deasy’s Act* also implies in every lease an agreement that “the tenant shall have quiet and peaceful enjoyment” of the demised premises “without the interruption of the landlord or any person whomsoever during the term contracted for, so long as the tenant shall pay the rent and perform the agreements contained in the lease to be observed on the part of the tenant.” This may be contrasted with section 12(1)(a) of the *Residential Tenancies Bill 2003* which would impose on landlords of a dwelling<sup>16</sup> an obligation by the landlord to “allow the tenant of the dwelling to enjoy peaceful and exclusive occupation of the dwelling.”

6.05 The obligation under section 41 applies to any kind of tenancy, but only if created by a lease, and is couched in very wide-ranging terms. At common law there was probably implied, at least in a lease using the word “demise”,<sup>17</sup> a more limited covenant, namely

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<sup>14</sup> See the Law Society’s *General Conditions of Sale (2001 Edition)* Condition 10.

<sup>15</sup> But it too will be considered as part of the e-Conveyancing Project: see footnote 6 above.

<sup>16</sup> Note that section 3 of the Bill would exclude from its operation (when enacted) a number of dwellings, such as those let by public authorities or coming within the new tenancy and reversionary leases provisions of the *Landlord and Tenant (Amendment) Act 1980*.

<sup>17</sup> *Fitzpatrick v McGivern Ltd* [1976-7] ILRM 239, 240 (*per* Parke J).



one confined to “interruption” of the tenant by the landlord and persons claiming through the landlord (*ie*, deriving title from the landlord).<sup>18</sup> The obligation under section 41, on the other hand, extends to “any person whomsoever”, which appears to expose the landlord to liability for the actions of persons with whom no direct dealings will have taken place, of whom the landlord may have no knowledge and over whom the landlord may have no control.<sup>19</sup> The Commission is not convinced that such exposure is justified in any case and finds it not surprising that this implied provision in section 41 is invariably reduced by an express covenant in most leases. That covenant usually confines the landlord’s obligation to not causing disturbance or interruption by the landlord “or any person lawfully claiming through, under or in trust for him.”<sup>20</sup> This accords with the more limited covenant implied by statute on the assignment of an existing lease.<sup>21</sup> *The Commission provisionally recommends that in any replacement of section 41 of Deasy’s Act the provision for quiet enjoyment should have the more limited scope invariably adopted in express covenants in leases.*

6.06 It would appear that the obligation that would be imposed by section 12(1)(a) of the *Residential Tenancies Bill 2003* may have a more limited scope. It is confined to the “landlord” which under section 5(1) means “the person for the time being entitled to receive (other than as agent for another person) the rent paid in respect of a dwelling by the tenant thereof and, where the context so admits, includes a person who has ceased to be so entitled by reason of the termination of the tenancy.” It may be argued that this provision is confined to actions of disturbance or interruption by the landlord for the time being only and does not extend to actions of others, whether or not persons deriving title from the landlord. To a large extent much may depend on how the word “allow” is interpreted.<sup>22</sup> This

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<sup>18</sup> *Baynes & Co Ltd v Lloyd & Sons Ltd* [1895] 2 QB 610; *Jones v Lavington* [1903] 1 KB 253.

<sup>19</sup> *Ie* not only predecessors in title but also third parties having no connection hitherto with either the landlord or the tenant.

<sup>20</sup> See the precedents in Division L of Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>21</sup> In section 7 of the *Conveyancing Act 1881*: see Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed 1996) paragraph 21.23.

<sup>22</sup> See paragraph 6.04 above.

may not be a point of much substance because the landlord's obligations imposed by section 12 are in addition to "obligations arising by or under any other enactment." Thus reliance may still be put on section 41 of *Deasy's Act*, but only if the tenancy was created by a lease. If it was not, reliance can still be put on the more limited covenant implied at common law.<sup>23</sup>

6.07 What is of rather more significance is the fact that one cannot contract out of the obligation imposed by section 12(1)(a) of the 2003 Bill because "no provision of any lease, tenancy agreement, contract or other agreement (whether entered into before, on or after the commencement of this Part) may operate to vary, modify or restrict in any way"<sup>24</sup> the operation of section 12. On the other hand, as pointed out earlier,<sup>25</sup> section 41 of *Deasy's Act* can be, and invariably is, modified expressly in leases. This raises the issue of whether the "overriding", but arguably more limited,<sup>26</sup> obligation in section 12(1)(a) should be extended to cover a wider range of tenancies or, alternatively, whether the obligation suggested earlier as the appropriate one to replace that in section 41 of *Deasy's Act* should be an "overriding" one, or remain, as under section 41, a "variable" one. The Commission's inclination is not to base any proposal at this stage on a provision in a Bill only recently introduced in the Oireachtas, the wording and scope of which may change before it is finally enacted. This is supported by the fact that this provision is meant to operate as a supplement to other legislation, which is the concern of this Consultation Paper.

6.08 Turning then to the replacement of section 41 of *Deasy's Act*, the Commission's preliminary view is that an obligation by the landlord to see that the tenant has "quiet enjoyment" or, to use the expression in section 12(1)(a) of the *Residential Tenancies Bill 2003*, "peaceful and exclusive occupation", of the demised premises goes to the very root of the landlord and tenant relationship. The right to "exclusive possession" is what the landlord is purporting to give the tenant. That is why its existence has so often been regarded as a key

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<sup>23</sup> See paragraph 6.05 above.

<sup>24</sup> Section 18(1). A lease or tenancy agreement may, however, confer "more favourable terms" on the tenant: section 18(2).

<sup>25</sup> Paragraph 6.05 above.

<sup>26</sup> See paragraph 6.06 above.

characteristic of a tenancy.<sup>27</sup> On that basis the obligation to honour the bargain ought to be regarded as an “overriding” one, out of which the landlord may not contract. Any provision purporting to contract out of it could be regarded as negating the very grant of a tenancy. The key consideration is, of course, what it is that a landlord can reasonably be expected to stand over. That is why it was suggested earlier that the replacement of section 41 of *Deasy’s Act* should contain a more limited provision, in essence a provision whereby the landlord carries responsibility for his own actions and “those claiming through, under or in trust for him”, *ie*, those persons for whom it would not be unreasonable to expect the landlord to carry responsibility. *The Commission provisionally recommends that the more limited replacement of the obligation relating to quiet enjoyment in section 41 of Deasy’s Act should contain an overriding obligation.*

6.09 There remains one further matter to be raised. One of the interesting developments in English case law in recent times has been the courts’ willingness to regard landlords of multi-let properties, such as shopping centres, industrial parks and office blocks, as owing a duty to each tenant in such properties to manage it properly.<sup>28</sup> Sometimes this duty is stated to be based upon the doctrine of non-derogation from grant<sup>29</sup> and sometimes on an express or implied covenant for quiet enjoyment.<sup>30</sup> Sometimes it is based on the principles of contract law, in that the alleged failure by the landlord is said to amount to a fundamental breach of contract, a breach going to the root of the contract or amounting to a repudiation of it, which justifies the tenant in “rescinding” it,<sup>31</sup> *ie* treating himself or herself as discharged from any further performance of it.<sup>32</sup> It remains to be seen

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<sup>27</sup> See paragraph 1.19 above.

<sup>28</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraphs 14.12, 15.13 and 17.08.

<sup>29</sup> *Chartered Trust plc v Davies* [1997] 2 EGLR 83; *Petra Investments Ltd v Jeffrey Rogers plc* [2000] 3 EGLR 120.

<sup>30</sup> *Southwark London Borough Council v Mills* [1999] 4 All ER 449.

<sup>31</sup> Not to be confused with an order of the court rescinding a contract on the basis of inequitable conduct (*eg*, fraud, duress or undue influence) by the other party.

<sup>32</sup> *Hussein v Mehlman* [1992] 2 EGLR 83; *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1999] 1 EGLR 7.

how far the Irish courts will follow these developments, but attention should be drawn to the provisions in section 15 of the *Residential Tenancies Bill 2003*.

6.10 Section 15 provides that a landlord of a dwelling “owes to each person who could be potentially affected a duty to enforce the obligations of the tenant under the tenancy.”<sup>33</sup> The category of “a person who could be potentially affected” is defined as meaning “a person who, it is reasonably foreseeable, would be directly and adversely affected by a failure to enforce an obligation of the tenant were such a failure to occur.”<sup>34</sup> What is interesting about this provision is that in many of the English cases referred to in the previous paragraph, the alleged “management” failure by the landlord was that one tenant in the multi-let property was adversely affected by the landlord’s failure to enforce against other tenants in the same property common covenants to which all the tenants were subject.<sup>35</sup> This raises the question of whether the duty under section 15<sup>36</sup> should be extended to properties other than dwellings. The Commission’s inclination is to leave the law on this subject to develop in the context of non-residential property. It notes that the 2003 Bill contemplates that disputes concerning a breach of the landlord’s statutory duty will be remedied solely by making a complaint to the new Private Residential Tenancies Board to be established under the Bill when enacted,<sup>37</sup> and that no person will have a right of action in court for breach of the duty.<sup>38</sup> Such complaints are to be dealt with by a system of dispute resolution.<sup>39</sup>

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<sup>33</sup> Section 15(1). Note that this duty, and remedies to enforce it, do not affect any duty of care which exists apart from it: section 15(4).

<sup>34</sup> Section 15(2).

<sup>35</sup> *Eg* the *Chartered Trust* (footnote 29 above) and *Nynehead Developments* (footnote 32 above) cases.

<sup>36</sup> Note that it would appear that it is possible to contract out of it: section 18 prohibits contracting out only in relation to sections 12 and 16.

<sup>37</sup> Under Part 8.

<sup>38</sup> Section 15(3).

<sup>39</sup> Under Part 6.

## C Repairs

6.11 Responsibility for maintenance of and repairs to<sup>40</sup> the demised premises varies greatly from case to case. In particular, the responsibility is often shared between the landlord and tenant. A not infrequent arrangement is for the landlord to be responsible for the structure and exterior of the premises and the tenant to be responsible for the non-structural and internal parts of the premises. The precise allocation will usually vary according to the nature of the premises being let and the length of the tenancy. Generally, the more commercial the premises and the greater the length of the tenancy, the more likely it is that responsibility for maintenance and repairs will be imposed on the tenant.<sup>41</sup>

6.12 Apart from express provisions in the lease, the general law traditionally imposed few repairing obligations on landlords. The general principle applied by the courts has tended to be *caveat emptor*, ie, the tenant is expected to take the premises as found at the commencement of the tenancy.<sup>42</sup> The one exception to this at common law seems to have been an implied warranty which arises on the letting of *furnished*<sup>43</sup> accommodation, that the premises are fit for human habitation<sup>44</sup> *at the commencement of the tenancy*.<sup>45</sup> There is, however, no obligation on the landlord in such cases to keep the premises fit during the tenancy.<sup>46</sup>

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<sup>40</sup> The distinction, if there is one, between “maintenance” and “repairs” is not easy to discern and is often blurred in practice, *eg*, by including both concepts in the same covenant in a lease: see Wylie *op cit* paragraph 15.01.

<sup>41</sup> *Eg* as under a typical “FRI” (full repairing and insurance) commercial lease: see Wylie *op cit* paragraphs 5.04 and 15.28.

<sup>42</sup> *Scales v Vandeleur* (1913) 48 ILTR 36; *Chambers v Cork Corporation* (1959) 93 ILTR 45; *Burke v Dublin Corporation* [1991] 1 IR 341.

<sup>43</sup> But not unfurnished accommodation: *Murray v Mace* (1872) IR 8 CL 396; *Beaver v McFarlane* [1932] LJ Ir 128.

<sup>44</sup> Which may require more than being “habitable”: *per* Henchy J in *Coleman v Dundalk UDC* Supreme Court 17 July 1985.

<sup>45</sup> *Wilson v Finch Hatton* (1877) 2 Ex D 336. This common law rule was recognised by the Supreme Court in *Siney v Dublin Corporation* [1980] IR 400.

<sup>46</sup> *Sarson v Roberts* [1895] 2 QB 395.

6.13 To some extent the very limited responsibility of the landlord for maintenance and repairs has been mitigated partly by further development of the common law and partly by statute. So far as the common law is concerned the main development has been in the law of tort, whereby a landlord may incur liability to a tenant for the condition of the demised premises under either the law of nuisance<sup>47</sup> or the law of negligence.<sup>48</sup> The Commission sees no reason for interfering with these judicial developments, which the courts should remain free to pursue.

6.14 Statutory mitigation of the very limited responsibility of a landlord for maintenance and repairs has been somewhat piecemeal. In general *Deasy's Act* did not cover the landlord's responsibility, but rather contained an implied agreement putting responsibility on the tenant.<sup>49</sup> This is taken up in a later chapter.<sup>50</sup> The exceptional case in *Deasy's Act* concerns what it refers to as "cottier tenancies". The provisions in question<sup>51</sup> are of little or no practical significance today, because they apply only where there is a written letting of a tenement comprising a house or cottage without land (or no more than half an acre of land) at a rent not exceeding £5 (now the Euro equivalent) for a term of one month, or from month to month or any lesser period.<sup>52</sup> Furthermore the provisions only apply where the lease in such cases imposes an obligation on the landlord to keep and maintain the house or cottage "in tenantable condition and repair". No obligation is imposed on the landlord if the lease is silent on the matter. These provisions are clearly obsolete, but it is worth noting the special remedy provided to cottier tenants where the landlord breached the express repairing obligation. Contrary to the general rule adopted by

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<sup>47</sup> Eg where the nuisance suffered by the tenant emanates from other premises occupied by the landlord (see *Byrne v Martina Investments Ltd* High Court 30 January 1984) or other tenants of the same landlord (see *Goldfarb v Williams & Co Ltd* [1945] IR 433).

<sup>48</sup> See the discussion, in the context of a public authority landlord, by the Supreme Court in *Siney v Dublin Corporation* [1980] IR 400. See also generally McMahon and Binchy *The Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) chapter 13.

<sup>49</sup> Section 42.

<sup>50</sup> Paragraph 10.06 below.

<sup>51</sup> Section 81-83.

<sup>52</sup> Section 81.

the courts,<sup>53</sup> section 83 of *Deasy's Act* provided that no rent or compensation was recoverable by the landlord so long as the breach continued. This is an issue which is taken up in a later chapter.<sup>54</sup> *Meanwhile the Commission provisionally recommends that sections 81-83 of Deasy's Act, which deal with cottier tenancies, should be repealed without replacement.*

6.15 Tenants may secure the remedying of defects in the condition of demised premises by reporting the matter to the local authority and asking it to exercise various powers under the public health legislation to require, for example, the landlord to abate a nuisance.<sup>55</sup> Tenants may also ask a local authority to exercise powers under the housing legislation to require, for example, the landlord to comply with a repairs notice and execute works to render the premises fit for human habitation.<sup>56</sup> Rather more directly landlords, including now public authority landlords,<sup>57</sup> of houses are required to comply with the regulations governing the quality and condition of accommodation, facilities and appliances and the maintenance of a proper state of structural repair made under the *Housing (Miscellaneous Provisions) Act 1992*.<sup>58</sup> Furthermore, section 12(1)(b)

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<sup>53</sup> Namely, that a tenant cannot withhold rent for breach of obligation by the landlord: *Corkerry v Stack* (1947) 82 ILTR 60; *Riordan v Carroll* [1996] 2 ILRM 263.

<sup>54</sup> Paragraph 10.18 below.

<sup>55</sup> Sections 107-112 of the *Public Health (Ireland) Act 1878*: see Keane *The Law of Local Government in the Republic of Ireland* (The Incorporated Law Society of Ireland 1982) Chapter 5.

<sup>56</sup> Sections 66-69 of the *Housing Act 1966*.

<sup>57</sup> Housing authorities were held not to be caught by the implied warranty of fitness for human habitation relating to lettings of houses contained in section 114 of the *Housing Act 1966*, but nevertheless were subject to an equivalent implied warranty in order to ensure consistency with their general duties as regards the housing stock: see *Siney v Dublin Corporation* [1980] IR 400; *Burke v Dublin Corporation* [1991] 1 IR 341. Section 114 was repealed by the *Housing (Miscellaneous Provisions) Act 1992*, section 37 and Schedule.

<sup>58</sup> *Housing (Standards for Rented Houses) Regulations 1993* (SI No 147 of 1993), made under section 18 of the 1992 Act. These replace earlier bye-laws made under section 70 of the *Housing Act 1966* and regulations made under section 26 of the *Housing (Private Rented Dwellings) Act 1982*. See Wylie *op cit* paragraphs 15.09-11.

of the *Residential Tenancies Bill 2003* proposes imposing on landlords of dwellings a direct obligation<sup>59</sup> to carry out all repairs necessary from time to time to the structure of the dwelling and to the interior and fittings so that they are maintained in at least the condition in which they were at the commencement of the tenancy.<sup>60</sup> Tenants will be able, in certain circumstances,<sup>61</sup> to carry out the repairs and claim reimbursement of the expenses from the landlord.<sup>62</sup>

6.16 The Commission considers it inappropriate to suggest any modifications to such recent legislation, and proposed legislation, relating to residential tenancies. The issue remains, however, whether any of it should be extended or adapted to other categories, such as commercial tenancies. The Commission's inclination is to answer generally in the negative for two reasons. One is that, outside the category of residential tenancies, the issue of repairing obligations is, apart from the rent and other payments to be made, the one most likely to be the subject of express provisions in the lease. The other is that, as mentioned earlier,<sup>63</sup> the allocation of responsibility for repairs as between landlord and tenant is likely to vary according to the circumstances of the particular case and is, therefore, best left to negotiation between the parties with the outcome being reflected in the lease executed. *The Commission provisionally recommends that it is not appropriate in general to make further statutory provision, over and above those proposed in the Residential Tenancies Bill 2003 imposing repairing obligations on landlords.*

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<sup>59</sup> Which cannot be contracted out of: section 18.

<sup>60</sup> The Private Residential Tenancies Board to be established under Part 8 of the Bill will be empowered to make regulations specifying what parts of dwellings are to be regarded as the interior and structure of dwellings: section 13(1).

<sup>61</sup> Where the landlord has refused or failed to respond to the tenant's request to the landlord to carry out the repairs and a postponement would be unreasonable having regard to significant health or safety risks or reduction in the quality of the living environment: section 12(1)(g)(i) and (ii).

<sup>62</sup> Section 12(1)(g). Cf the right of set-off which exists in respect of any letting of a tenement under section 87 of the *Landlord and Tenant (Amendment) Act 1980*: see paragraph 10.17 below.

<sup>63</sup> Paragraph 6.11 above.



6.17 Notwithstanding the preliminary conclusion stated in the previous paragraph, the Commission considers that there are further issues which require consideration in this context. One is that much uncertainty exists over the concept of “repairs” and other works, such as “improvements”, which do not come within the concept. This issue can arise in several contexts. One is where there is a dispute between the parties as to whether particular works called for in, for example, a repairs or dilapidations notice fall within the obligation to repair contained in the lease. Another example is where a rent review clause contains a disregard for tenant’s “improvements”. Such disputes involve usually what is essentially a matter of the correct interpretation of the particular provision or covenant in the particular lease. It has been suggested to the Commission that practitioners would find it helpful if some statutory definition or guidelines as to what constitutes repairs, as opposed to improvements, were provided. At this stage the Commission has reached no conclusion on the matter and wishes merely to moot the point. There is always the danger that an attempt to produce a statutory definition or guidelines, however well-intentioned, will actually do more harm than good, by simply shifting the issue of uncertainty from interpretation of covenants in leases to interpretation of the statutory provisions or, even worse, increasing the uncertainty by requiring the interpretation of both in many cases in the future. The Commission will give further consideration to this issue in the light of response to this Consultation Paper.

6.18 Another issue arises from the fact that often repairing responsibilities are divided between the parties but the allocation is not exhaustive. A similar “gap” may also arise where the lease purports to put repairing obligations on just one of the parties, but again the allocation is not exhaustive. It is clearly undesirable that there should be any doubt as to where responsibility lies for repair work and it would be appropriate for legislation to fill any gap which might exist in a particular case. Given that the landlord is the owner of the demised premises, to whom they will return on determination of the tenancy, it would also seem appropriate that any residual responsibility should lie with the landlord. *The Commission provisionally recommends that where the lease or terms of a tenancy fail to deal with repairing obligations exhaustively, or not at all, any residual responsibility should lie with the landlord.*

6.19 It was mentioned earlier that the well-established conveyancing principle *caveat emptor* has been applied by the courts to landlord and tenant arrangements, in the sense that the tenant is expected to take the premises as found at the commencement of the tenancy.<sup>64</sup> There is no implied warranty by the landlord either as to the physical state of the premises or as to its legal fitness, *eg*, in terms of planning permission for the contemplated use of the premises.<sup>65</sup> The Commission suspects that on occasion this principle will operate unfairly, particularly where a relatively short-term commercial lease is made.<sup>66</sup> This subject was reviewed many years ago by the Commission and resulted in the very first Consultation Paper it published.<sup>67</sup> The proposals mooted in that Paper received judicial approval.<sup>68</sup> The subsequent follow-up Report published by the Commission in May 1982<sup>69</sup> contained a draft Defective Premises Bill, section 7 of which dealt with the duty of a lessor in respect of defects in the state of the premises and, in certain cases, fitness for the purpose for which they are intended to be used. The Commission considers that it would be appropriate to revisit this matter and that the proposals made in 1982 were sound, but that consideration should be given to their possible extension to cover “legal” as well as “physical” unfitness. The risks of non-compliance with planning, environmental and building control law are very real nowadays.<sup>70</sup> *The Commission has reached the provisional conclusion that the*

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<sup>64</sup> Paragraph 6.12 above. Sometimes, of course, a tenant covenants to make improvements.

<sup>65</sup> See *Hill v Harris* [1965] 2 All ER 358. *Cf Wettern Electric Ltd v Welsh Developments Agency* [1983] QB 796.

<sup>66</sup> Residential tenancies are less likely to be affected by planning and similar “legal” impediments and, as regards physical fitness, are protected by the standards regulations, *etc* referred to earlier: see paragraph 6.15 above.

<sup>67</sup> *The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises* (June 1977).

<sup>68</sup> See, *eg*, *Siney v Dublin Corporation* [1980] IR 400, 420 (*per* Henchy J). See also Costello J, at first instance, in *Ward v McMaster* [1985] IR 29, 42.

<sup>69</sup> *Report on Defective Premises* (LRC 3–1982). See further McMahon and Binchy *The Law of Torts* (3<sup>rd</sup> ed Butterworths 2000) Chapter 13.

<sup>70</sup> Hence General Condition 36 (vendor’s warranty as to “development”) in the Law Society’s *General Conditions of Sale* (2001 Edition). See Wylie *Irish Conveyancing Law* (2<sup>nd</sup> ed 1996) paragraphs 10.55 and 16.74–78.

*provisions governing landlords in the draft Defective Premises Bill appended to its earlier Report (LRC 3-1982) should be adopted, but extended to cover “legal” unfitness as well as “physical” unfitness.*

## **D Insurance**

6.20 There are no current statutory provisions governing insurance of the demised premises and this is usually dealt with by express provisions in the lease, at least in the case of commercial premises.<sup>71</sup> However, section 12(1)(c) of the *Residential Tenancies Bill* would impose on landlords of dwellings an obligation to<sup>72</sup> –

“effect and maintain a policy of insurance in respect of the structure of the dwelling, that is to say a policy –

(i) that insures the landlord against damage, loss and destruction of the dwelling, and

(ii) that indemnifies, to an amount of at least €250,000, the landlord against any liability on his or her part arising out of the ownership, possession and use of the dwelling.”

6.21 The Commission does not consider that there is any need to extend such a provision to other types of tenancy, at least not in the form of an overriding obligation. The insurance arrangements appropriate for commercial premises are likely to vary greatly according to the nature of the premises, particularly according to whether they are single-let or multi-let.<sup>73</sup> What may be appropriate is to have a “default” statutory provision designed to operate where no express provision is made in the lease or the express provision is not exhaustive of insurance requirements and a gap may exist. This subject is taken up again in the context of tenants’ obligations.<sup>74</sup>

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<sup>71</sup> See the precedents in Division L of Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>72</sup> Which again could not be contracted out of: see section 18.

<sup>73</sup> Where it may be appropriate for the landlord to have a “block” policy covering the entire multi-let premises and to recoup the cost via the service charges levied on individual tenants of units.

<sup>74</sup> See Chapter 11 below.

## **E Landlord's Identity and Agent**

6.22 In the case of dwellings previously controlled under the *Rent Restriction Acts 1960-81*, the *Housing (Private Rented Dwellings) Regulations 1982*<sup>75</sup> required landlords to provide tenants of dwellings with rent books or similar documents containing basic information like the name and address of the landlord and his or her agent (if any). Then the *Housing (Rent Books) Regulations 1993*<sup>76</sup> extended the requirement of provision of rent books containing such information to a much wider range of dwellings rented by both public and private landlords.<sup>77</sup> The *Residential Tenancies Bill 2003* proposes to reinforce these obligations on landlords of dwellings by introducing an obligation<sup>78</sup> to –

“(e) notify the tenant of the name of the person, if any, (the “authorised agent”) who is authorised by the landlord to act on his or her behalf in relation to the tenancy for the time being,

(f) provide to the tenant particulars of the means by which the tenant may, at all reasonable times, contact him or her or his or her authorised agent”<sup>79</sup>

The Commission inclines to the view that knowing who the landlord and the landlord's agent are, and how they can be contacted, is fundamental to the relationship of landlord and tenant. *The Commission provisionally recommends that the provisions of section 12(1)(e) and (f) of the Residential Tenancies Bill 2003, imposing an obligation on landlords to furnish tenants with contact details, should be extended, in some form or other, to tenancies in general.*

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<sup>75</sup> SI No 217 of 1982 (made under section 25 of the *Housing (Private Rented Dwellings) Act 1982*): see Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 5.51.

<sup>76</sup> SI No 146 of 1993 (made under section 17 of the *Housing (Miscellaneous Provisions) Act 1992*), as part of the Department of the Environment Heritage and Local Government's *Charter for Rented Housing*, as envisaged by its earlier reports: *A Plan for Social Housing* (1991) and *Social Housing: The Way Ahead* (1995).

<sup>77</sup> See Wylie *op cit* paragraph 5.52.

<sup>78</sup> Again which could not be contracted out of: see section 18.

<sup>79</sup> Section 12(1)(e) and (f).

## **F           Return of Deposit**

6.23       Section 12(1)(d) of the *Residential Tenancies Bill 2003* would impose an obligation on landlords of dwellings to return or repay any deposit paid by the tenant on entering into the agreement for the tenancy or lease, but not if at the date of the request for return of payment, rent is overdue or the tenant has caused a deterioration in the condition of the premises. The Commission inclines to the view that this is very much a matter likely to give rise to disputes in the residential context. *The Commission provisionally recommends that there is no need to extend the provisions of section 12(1)(d) of the Residential Tenancies Bill 2003 to other categories of tenancies.*

## **G           Registration of Tenancies**

6.24       Part 7 of the *Residential Tenancies Bill 2003* proposes to replace the requirement of landlords of dwellings to register their tenancies with the local housing authority,<sup>80</sup> with a new scheme requiring registration with the Private Residential Tenancies Board to be established under Part 8 of the Bill. Again the Commission is inclined to view this as a matter to be confined to the residential sector. *The Commission provisionally recommends that Part 7 of the Residential Tenancies Bill 2003 should not be extended to other categories of tenancies.*

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<sup>80</sup>       Registration relating to dwellings formerly controlled under the *Rent Registration Acts 1960-81* is governed by the *Housing (Private Rented Dwellings) Regulations 1982* (SI No 217 of 1982, made under section 24 of the *Housing (Private Rented Dwellings) Act 1982*). A scheme governing a much wider range of dwellings was introduced by the *Housing (Registration of Rented Houses) Regulations 1996* (SI No 30 of 1996, made under section 20 of the *Housing (Miscellaneous Provisions) Act 1992*).

## CHAPTER 7     TENANT'S OBLIGATIONS

7.01     The ensuing chapters<sup>1</sup> deal with the main obligations entered into by tenants when they take a tenancy. These relate to rent, service charges, repairs and insurance. Other obligations are, of course, likely to be entered into, such as covenants against or restricting alienation (such as assignment and subletting), user of the premises and making improvements or alterations.<sup>2</sup> Those matters are covered by provisions contained in the *Landlord and Tenant (Amendment) Act 1980*<sup>3</sup> and were considered in the Commission's *Consultation Paper on Business Tenancies*<sup>4</sup> published in March 2003. They therefore fall outside the scope of this Consultation Paper.

7.02     The Commission does, of course, recognise that in particular cases provisions imposing other obligations on tenants may be included in leases.<sup>5</sup> However, it takes the view that it is not appropriate to attempt to legislate for every conceivable possibility and that some scope for contractual arrangements should be left. It has noted that the *Residential Tenancies Bill 2003* contains some further examples which it would impose on tenants, such as an obligation on the tenant not to behave within the dwelling, or to allow other occupiers or visitors to the dwelling, to behave within it in a way which is "anti-social".<sup>6</sup> The Commission inclines to the view

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<sup>1</sup>       Chapters 8-11.

<sup>2</sup>       See the precedents in Division L of Laffoy's *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>3</sup>       Part V. Note also the provisions in section 16(j)–(l) of the *Residential Tenancies Bill 2003*.

<sup>4</sup>       Paragraph 4.44.

<sup>5</sup>       See again the precedents in Division L of Laffoy's *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>6</sup>       Section 16(h). What amounts to such behaviour is defined in section 17. Note also section 16(m) which would require the tenant to notify the landlord of the identity of each person (other than a multiple tenant) residing in the dwelling.

that such matters relate primarily to residential tenancies and that there is no need to extend them to other tenancies.

7.03 As with the previous chapter, which considered landlord's obligations, the ensuing chapters consider the current law, in particular existing statute law (if any) which governs the matters in question and considers how far this should be changed. In particular, they consider how far new legislation would be appropriate to promote the objectives stated earlier, namely, (1) law reform; (2) consumer protection; (3) default provisions.<sup>7</sup>

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<sup>7</sup> See Chapter 5 above.

## CHAPTER 8     RENT AND OTHER PAYMENTS

8.01     This chapter is concerned with the obligation to pay rent and other charges<sup>1</sup> usually imposed on the tenant. Payment of rent is invariably an obligation imposed on the tenant; indeed, as was discussed earlier, that obligation is one of the key features of a tenancy.<sup>2</sup> The obligation to make other payments may vary from tenancy to tenancy.<sup>3</sup>

8.02     It is convenient to begin the discussion with the subject of rent, concentrating on the need for legislation to govern the subject. This necessitates a consideration of the existing legislation, which deals with several aspects of the subject.

### **A            Obligation to Pay Rent**

8.03     Section 42 of *Deasy's Act* contains an implied agreement in leases that the tenant for the time being, and the tenant's successors in title, "shall pay, when due, the rent reserved ...". A number of points should be noted. One is that it is an implied obligation only, which is subject to the proviso "unless otherwise expressly provided by such lease." Given the primary function of rent as an indicator of the existence of a tenancy, reaffirmed earlier,<sup>4</sup> the Commission takes the view that this obligation should be an "overriding" one, and not one subject to variation by the parties. It is, of course, important to note the limitation to section 42, namely that it refers to payment of the rent "reserved".<sup>5</sup> If no rent is reserved, but some other consideration

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<sup>1</sup>        But not service charges or insurance premiums which are discussed in later chapters: see Chapters 9 and 11 below.

<sup>2</sup>        Paragraph 1.21 above.

<sup>3</sup>        See paragraph 8.21 below.

<sup>4</sup>        See paragraph 1.23 above.

<sup>5</sup>        Section 42 of *Deasy's Act* states:

          "Every lease of lands or tenements made after the commencement of this Act shall (unless otherwise expressly provided by such lease) imply



is,<sup>6</sup> then the overriding obligation should extend to this. Section 42 is confined to leases, but there seems to be no reason why the obligation should not extend to all categories of tenancies. The Commission notes that section 16(a) of the *Residential Tenancies Bill 2003* contains what is, in effect, an overriding obligation<sup>7</sup> by the tenant of a dwelling to “pay to the landlord or his or her authorised agent (or any other person where required to do so by any enactment) – (i) the rent provided for under the tenancy concerned on the date it falls due for payment.” In essence what the Commission is proposing is a provision along the lines of section 16(a), but with a general application. *The Commission provisionally recommends that the implied obligation to pay rent contained in section 42 of Deasy’s Act should be replaced by an overriding obligation to pay the rent or other consideration payable under a tenancy of any kind, however created.*

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the following agreements on the part of the tenant for the time being, his heirs, executors, administrators, and assigns, with the landlord thereof; that is to say,

1. That the tenant shall pay, when due, the rent reserved and all taxes and impositions payable by the tenant, and shall keep the premises in good and substantial repair and condition:
2. That the tenant shall give peaceable possession of the demised premises, in good and substantial repair and condition, on the determination of the lease (accidents by fire without the tenant’s default excepted), subject, however, to any right of removal (or of compensation for improvements) that may have lawfully arisen in respect of them, and to any right of surrender in case of the destruction of the subject matter of the lease as herein-before mentioned.”

Note that it is not strictly necessary to have a covenant to pay the rent, so long as the lease contains a reservation (in the form of the usual *reddendum*) which implies such a covenant. See *Giles v Cooper* (1690) Carth 135; *Iggulden v May* (1804) 6 Ves 325; *Vyvyan v Arthur* (1823) B & C 410. An overriding statutory obligation, such as is proposed, resolves this point.

<sup>6</sup> See again paragraph 1.23 above.

<sup>7</sup> Under section 18(1) of the Bill no provision of “any lease, tenancy, agreement, contract or other agreement (whether entered into before, on or after the commencement of this Part) may operate to vary, modify or restrict in any way section 12 or 16”.

8.04 Section 42 of *Deasy's Act* does not provide as to how the rent is to be paid (other than “when due”<sup>8</sup>), for examples, whether in advance or in arrear, by cheque or standing order. The Commission inclines to the view that it would be useful, especially in cases where the tenancy has not been created by execution of a formal lease, to provide statutory “default” provisions to cover such matters. However, it does not consider that the statutory provisions should go further and, for example, introduce days for payment, such as the common law ancient feast or quarter days.<sup>9</sup> Such days are rarely, if ever, used in Ireland and the “gale” days for payment of instalments of rent are invariably as agreed by the parties.<sup>10</sup> The Commission sees no reason to change this position. *The Commission provisionally recommends that there should be a statutory “default” provision to specify how, but not on what days, the rent or other consideration should be paid.*

## **B Apportionment**

8.05 The issue of apportionment of rent and other periodical payments due under a tenancy may arise in several situations. In substance two main types of apportionment may be necessary or appropriate, usually referred to as apportionment in respect of *time* and in respect of the *estate* or *interest* of one or other of the parties. Several statutory provisions apply to such apportionments.

8.06 Apportionment as to *time* arises when the landlord or tenant ceases to hold his or her interest between gale days. The *Apportionment Act 1870* in such cases renders rent and other payments in the nature of income<sup>11</sup> apportionable, on the basis of accruing from day to day.<sup>12</sup> This Act has been held to apply both to

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<sup>8</sup> Cf section 16(a) of the 2003 Bill – “on the date it falls due for payment”.

<sup>9</sup> *Ie* 25 March (Lady Day), 24 June (Midsummer Day), 29 September (Michaelmas Day) and 25 December (Christmas Day). These are still commonly used in England: see Hill and Redman *Law of Landlord and Tenant* (Looseleaf Butterworths) Volume 1 paragraph A1563.

<sup>10</sup> There are numerous references to “gale” days in *Deasy's Act*: see, *eg*, sections 6 (paragraph 2.20 above) and 47 (receipts for payments).

<sup>11</sup> It has been doubted whether the Act applies to the right to receive conacre or agistment payments: see *Foster v Cunningham* [1956] NI 29.

<sup>12</sup> Section 2. This Act replaced the earlier *Apportionment Act 1834* and

the landlord's right to receive rent and the tenant's liability to pay it.<sup>13</sup> Where a tenancy is determined by a forfeiture and re-entry, an apportioned part of the rent accruing to that date only is recoverable.<sup>14</sup> However there can be no apportionment in respect of rent payable in advance and already due when an event occurs which is alleged to justify apportionment.<sup>15</sup> These provisions operate as "default" provisions<sup>16</sup> and seem to the Commission to be satisfactory. Since they apply to periodical payments generally, and not just payments in the nature of rent, they should probably be left undisturbed by the current project.

8.07 It should be noted, however, that there are several provisions in *Deasy's Act* which bear on the subject of apportionment. First, there are the provisions dealing with the position of a tenant who assigns the tenancy between two gales, whether the original tenant<sup>17</sup> or a subsequent tenant.<sup>18</sup> These provisions were discussed in an earlier chapter<sup>19</sup> and nothing further need be said here. Secondly, section 34 gives the tenant a statutory right to hold over in lieu of "emblements"<sup>20</sup> where the tenancy has ended unexpectedly through circumstances beyond the tenant's control. The tenant can hold over

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superseded a similar provision in section 49 in *Deasy's Act* (which was repealed by the *Statute Law Revision Act 1893*). These statutory provisions reversed the common law rule that rent payable on a specified date accrued due as one indivisible gale of rent only on that date: *per* Johnson J in *Glass v Patterson* [1902] 2 IR 660, 674. See also Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 10.17 and following.

<sup>13</sup> *Glass v Patterson* [1902] 2 IR 660. See also *Re Leeks* [1902] 2 IR 339.

<sup>14</sup> Section 3. However, if the landlord's interest changes hands, the tenant can be sued for the whole rent only, not just an apportioned part: section 4.

<sup>15</sup> *Dublin Corporation v Barry* [1897] 1 IR 65.

<sup>16</sup> *Ie*, subject to an express provision ruling out apportionment: section 7. See *Sealy v Sewell* (1868) IR 2 Eq 326 (decided on section 49 of *Deasy's Act*: see footnote 12 above).

<sup>17</sup> Section 16.

<sup>18</sup> Section 15.

<sup>19</sup> Paragraph 3.11 above.

<sup>20</sup> *Ie* the common law right to return to the land in order to reap a crop sown before the tenancy ended.

until the last gale day of the current year of the tenancy<sup>21</sup> and the landlord can recover rent as if the tenancy had ended on that day. If the landlord assigns during the holding over period, the rent is apportionable as between the new landlord and the old one, but only the new one can sue for it.<sup>22</sup> Arguably there is some duplication here with the *Apportionment Act 1870*.<sup>23</sup> Apart from that it is questionable how relevant section 34 is nowadays, given the rarity of agricultural tenancies. The Commission will reconsider the provision as part of the review of the law relating to such tenancies.

8.08 Section 50 of *Deasy's Act* deals with cases not coming within section 34<sup>24</sup> and provides for apportionment when the tenancy ends "otherwise than by act of the landlord"<sup>25</sup> at any time before the date when rent is payable. The landlord is entitled to an apportioned part of the rent up to that date. The section does not deal with the converse case, where the landlord determines the tenancy, in which case reliance must be put on the *Apportionment Act 1870*.<sup>26</sup> The Commission considers that some rationalisation of these various statutory provisions would be appropriate, perhaps by way of extension of the provisions in the 1870 Act. *The Commission has reached the preliminary conclusion that the statutory provisions relating to apportionment of rent and other periodical sums payable under a tenancy should be consolidated into a single provision operating as a "default" provision.*

8.09 As regards the other type of apportionment which may arise, where the landlord or tenant assigns part only of the estate or interest held, this subject was discussed in an earlier chapter.<sup>27</sup> It was pointed out that the position of the parties on such part assignment or "severance" of the interest is not entirely clear. The Commission

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<sup>21</sup> *Earl of Derby v Sadler* (1866) 11 Ir Jur (ns) 171.

<sup>22</sup> But must then apportion it with the old landlord: see *Irwin v Frazer* (1882) 10 LR Ir 273.

<sup>23</sup> *Eg* section 4: see footnote 14 above.

<sup>24</sup> Curiously the Act refers to "clause" 34.

<sup>25</sup> Presumably on a surrender or exercise of a break option by the tenant, or service of a notice to quit in the case of a periodic tenancy.

<sup>26</sup> Paragraph 8.06 above.

<sup>27</sup> Paragraph 3.18 above.

would simply reiterate here its earlier preliminary conclusion that new statutory provisions to govern the position of successors in title should make explicit provision for apportionment of rights and obligations as between all the parties in such cases.<sup>28</sup>

## **C Rent Review**

8.10 One of the major developments in modern times with respect to rent has been the advent, especially in commercial leases,<sup>29</sup> of provisions for rent review. This is a complex subject which over the years has given rise to much litigation concerning the interpretation of the rent review provisions in particular leases.<sup>30</sup> The issue which arises for consideration is whether it would be appropriate to introduce statutory provisions to govern the matter.

8.11 In considering this issue the Commission has noted that Part 3 of the *Residential Tenancies Bill 2003* would introduce a statutory scheme for rent reviews in the case of tenancies of dwellings. This would prohibit the setting of the rent under such a tenancy above the “market rent”<sup>31</sup> or reviews more frequently than once every twelve months.<sup>32</sup> Either party to the tenancy would be able to require a review where the lease or tenancy agreement does not provide for

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<sup>28</sup> Paragraphs 3.21 and 3.22 above.

<sup>29</sup> Note, however, that Part 3 of the *Residential Tenancies Bill 2003* contains provisions for rent reviews in the case of tenancies of dwellings. Note also the statutory provision for rent review in the case of new tenancies granted under the *Landlord and Tenant Act*, where the terms have been fixed by the court: see section 24 of the *Landlord and Tenant (Amendment) Act 1980* (as substituted by section 15 of the *Landlord and Tenant (Amendment) Act 1984*): Wylie *op cit* paragraph 30.57-60. The Commission has already pointed out that this provision is not entirely satisfactory: see *Consultation Paper on Business Tenancies* (LRC CP 21-2003) paragraph 4.32 (reiterating what was said in an earlier report: *Report on Land Law and Conveyancing Law: (5) Further General Proposals* (LRC 44-1992) paragraphs 20-21).

<sup>30</sup> See Wylie *op cit* Chapter 11.

<sup>31</sup> Defined in section 24 along the lines of the “gross rent” which is the basis upon which a court fixes the rent of a new tenancy under section 23 of the *Landlord and Tenant (Amendment) Act 1980*.

<sup>32</sup> Sections 19 and 20. A review could be made more frequently if there is a substantial change in the nature of the accommodation in the interim: section 20(3).

one.<sup>33</sup> Disputes as to the new rent to follow a review<sup>34</sup> would be referred to the Private Residential Tenancies Board<sup>35</sup> for determination in accordance with the dispute resolution procedures set out in Part 6 of the Bill. For obvious reasons the Commission considers it inappropriate to trespass upon the territory covered by the 2003 Bill.

8.12 There remains the issue whether some similar scheme should be introduced for the business tenancies sector. The Commission is clear that it would not be appropriate to impose a mandatory statutory scheme. This would run counter to one of the guiding principles stated in the *Consultation Paper on Business Tenancies*,<sup>36</sup> and reiterated earlier in this Paper<sup>37</sup> namely, “removal of legislative provisions which militate against commercial practice and operation of free market choice”. The fact is that in the case of business tenancies there is often much negotiation over the terms of the rent review provisions, in particular the basis for calculating the new rent and including the various assumptions and disregards.<sup>38</sup> However, the Commission is aware that often rent review clauses are not drafted as well as they might be and prove to be defective in one way or another. There is, therefore, an argument for providing a statutory form of “model” clauses<sup>39</sup> which the parties would be free to adopt or which would operate as “default” provisions where the parties have failed to provide for certain matters. This could be particularly useful in relation to matters such as the procedure or machinery for carrying out the review.<sup>40</sup> *The Commission provisionally recommends that in the case of non-residential tenancies it would be appropriate to provide a statutory model of rent*

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<sup>33</sup> Section 21.

<sup>34</sup> It may result in an increase or reduction in the existing rent: section 24(2).

<sup>35</sup> To be established under Part 8 of the Bill.

<sup>36</sup> LRC CP 21-2003 at 5.

<sup>37</sup> Introduction paragraph 2.

<sup>38</sup> See Wylie *op cit* paragraph 11.26 and following.

<sup>39</sup> The statutory model could be based on one of the models frequently used in practice, such as the Law Society/IAVI recommended clauses: see Wylie *op cit* paragraph 11.03.

<sup>40</sup> Including its initiation, the time-scale and who does it when the parties cannot agree.

*review clauses, to operate as “default” provisions or as provisions which the parties would be free to adopt in toto or adapt to the circumstances of the particular case.*

## **D            Recovery of Rent**

8.13        It is convenient at this point to consider the subject of the landlord’s remedies for recovery of rent and related matters. What is under consideration here is recovery on the basis that the landlord does not necessarily wish to end the tenancy. The subject of determination of tenancies is dealt with in later chapters,<sup>41</sup> which also includes a discussion of various remedies for enforcement of obligations.<sup>42</sup>

## **E            Action for rent**

8.14        The most obvious remedy of the landlord is the right to sue the tenant for arrears of rent. This right of action is given statutory recognition in section 45 of *Deasy’s Act* and seems uncontroversial. There is, however, one point which might be clarified. It has recently been held in England that even where a landlord has issued proceedings to recover possession (on the basis of forfeiture for breach of covenant<sup>43</sup>), an action to recover rent can also be pursued up until possession is actually recovered under the court order.<sup>44</sup> This is clearly the position in Ireland where the landlord pursues an action of ejectment for non-payment of rent,<sup>45</sup> because section 66 of *Deasy’s Act* so provides.<sup>46</sup> What is not clear is the position where the landlord pursues some other remedy, such as forfeiture for breach of some other obligation followed by an ejectment on the title or for

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<sup>41</sup>        Chapters 12-16.

<sup>42</sup>        A “hybrid” remedy is the special statutory action of ejectment for non-payment of rent, which should be distinguished from other forms of ejectment: see paragraph 8.18 below.

<sup>43</sup>        The equivalent of an ejectment on the title: see paragraph 15.07 below.

<sup>44</sup>        *Maryland Estates Ltd v Bar Joseph* [1998] 3 All ER 193. See also *Ivory Gate Ltd v Spetale* [1998] L&TR 58.

<sup>45</sup>        Under sections 52-58 of *Deasy’s Act*.

<sup>46</sup>        See *Hardman v White* [1946] Ir Jur Rep 58.

overholding.<sup>47</sup> *The Commission provisionally recommends that section 66 of Deasy's Act ought to be extended to cover all cases of recovery of possession by the landlord thereby making it clear in every instance that rent is recoverable up to the date possession is actually recovered.*

8.15 It may be appropriate to note in passing that section 46 of *Deasy's Act* gives statutory recognition to the common law right of a landowner to recover "reasonable satisfaction" (*ie* compensation) where another person is permitted to occupy the land, without any agreement for payment of rent or other compensation. This right of action for "use and occupation"<sup>48</sup> should not be confused with the right to recover *mesne* profits or *mesne* rates against a trespasser.<sup>49</sup> In essence the latter constitute damages awarded for the tort of trespass. *Deasy's Act* appears to confuse the two distinct actions because section 77 provides for recovery of "rent or *mesne* profits" to the day of trial of an action of ejectment, yet, as pointed out earlier, section 66 provides that "rent" is recoverable until the recovery of possession under any court order made at the end of the trial of an action for ejectment of non-payment of rent. *The Commission provisionally recommends that the confusion between an action for use and occupation of land and an action for mesne profits or rates in Deasy's Act should be cleared up.*

## **F Set-off**

8.16 The issue of the extent to which a tenant can set-off against or make deductions from a claim for rent by the landlord is governed by the somewhat ambiguous provisions of section 48 of *Deasy's Act*. One point of doubt is that the section refers to "[a]ll claims and demands" by the landlord in respect of rent but this has been interpreted as referring only to proceedings to recover rent *qua* rent, for example, in an action to recover rent brought under section 45.<sup>50</sup>

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<sup>47</sup> See further paragraph 15.07 below.

<sup>48</sup> Which can be applied to a wide range of occupiers, *eg*, a purchaser who is allowed into possession under a contract for sale which is later aborted: see *Markey v Coote* (1876) IR 10 CL 149. See Wylie *op cit* paragraph 12.13.

<sup>49</sup> See Wylie *op cit* paragraph 27.17.

<sup>50</sup> See paragraph 8.13 above. Section 48 of *Deasy's Act* states:



It cannot be invoked in other proceedings, such as an action of ejectment for non-payment of rent,<sup>51</sup> or in other ejectment actions.<sup>52</sup> It is difficult to square this with the wide wording of the section<sup>53</sup> and the problem is increased by the Irish courts' conflicting views as to whether a tenant can claim a right of set-off in such cases at common law.<sup>54</sup> This matter ought to be resolved by clearer legislation. *The Commission provisionally recommends that the tenant's right of set-off under section 48 ought to apply to all proceedings which a landlord may bring against the tenant in respect of breach of obligations by the tenant.*

8.17 A second ambiguity is that section 48 refers to the tenant's right of set-off<sup>55</sup> in respect of "all just debts" due by the landlord to the tenant. Notwithstanding this very wide language it has been held that it does not apply to debts wholly unconnected with the particular tenancy.<sup>56</sup> The Commission's view is that this is an appropriate restriction on the right, but there is another restriction which the Irish courts have adhered to which is of more doubtful justification. It has long been held that the tenant can only set-off a liquidated sum, as opposed to an unliquidated sum, such as a claim for damages based

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"All claims and demands by any landlord against his tenant in respect of rent shall be subject to deduction or set-off in respect of all just debts due by the landlord to the tenant."

<sup>51</sup> *Dalton v Barlow* (1867) 1 ILT 490.

<sup>52</sup> See *Riordan v Carroll* [1996] 2 ILRM 263, 275-6 (*per* Kinlen J).

<sup>53</sup> It has been doubted whether the courts' interpretation accords with the legislative intent: see Dowling "Set-off against Rent" (1988) 39 NI LQ 258 at 266-7.

<sup>54</sup> *Cf Whitton v Hanlon* (1885) 16 LR Ir 117 and *Wilson v Burne* (1889) 24 LR Ir 14. The English courts seem to have taken a broader view: see *BICC plc v Burnley Corporation* [1985] 1 All ER 417; *Eller v Grovecroft Investments Ltd* [1994] 4 All ER 845.

<sup>55</sup> The section also refers to a right of "deduction", but this is probably superfluous and there is no difference between the two rights. Both involve a defence raised to the landlord's action and should be distinguished from a counterclaim, which is in substance a separate action by the tenant: see Doyle "Set-off and Counterclaim – Deciphering the Irish Rules" (1989) 83 *Gazette of Incorporated Law Society of Ireland* 367; Wylie *op cit* paragraph 12.09.

<sup>56</sup> *Mullarkey v Donohoe* (1885) 16 LR Ir 365.

on the landlord's breach of repairing obligations.<sup>57</sup> The reasoning seems to have been based on Rules of Court requiring a defendant to lodge money in court at the time of entering the defence.<sup>58</sup> Yet, as has very recently been pointed out in England, this restriction may cause considerable hardship. If the tenant is sufficiently well off to be able to afford to carry out the repairs which the landlord should carry out, the costs and expenses incurred can be produced as a liquidated amount upon which to base a set-off.<sup>59</sup> A tenant who cannot afford to do so, is apparently left to suffer and cannot raise a claim in damages as a set-off. The English Court of Appeal decided that this distinction should be abolished and that an unliquidated sum, such as a claim in damages, should equally be the subject of a set-off.<sup>60</sup> The Commission takes the same view. *The Commission provisionally recommends that the tenant's right of set-off should apply to both liquidated and unliquidated damages. A tenant who wishes to avail of set-off should be obliged to substantiate the claim in the landlord's proceedings in order to avoid unnecessary delays.*

## G Distress

8.18 The ancient feudal remedy of distress, *ie* the landlord's right to distrain the tenant's goods, for arrears of rent was abolished in respect of any premises let solely as a dwelling by section 19 of the *Housing (Miscellaneous Provisions) Act 1992*.<sup>61</sup> It remains available

<sup>57</sup> *MacCausland and Kimmitt v Carroll and Dooling* (1938) 72 ILTR 158. See also *Butcher v Ruth* (1887) 22 LR Ir 380; *Martin v Brady* (1934) 68 ILTR 136.

<sup>58</sup> *Per* Maguire P in the *MacCausland* case *op cit* at 149, cited, with approval, by Kinlen J in *Riordan v Carroll* [1996] 2 ILRM 263, 275. Maguire P was referring to Order 7 rule 6 of the Circuit Court Rules 1930; later replaced by Order 12 rule 7 of the Circuit Court Rules 1950. Order 15 rule 7 of the Circuit Court Rules 2001 now refers to a defendant setting-off or counterclaiming against claims "whether such set-off or counterclaim is a claim in damages or not".

<sup>59</sup> Note that section 87 of the *Landlord and Tenant (Amendment) Act 1980* gives express recognition of a set-off in respect of repairs carried out by a tenant on failure by the landlord. See *Consultation Paper on Business Tenancies* (LRC CP21–2003) paragraph 4.55. Note also section 61 of the 1980 Act (set-off of compensation against rent).

<sup>60</sup> *Muscat v Smith* [2003] 40 EG 148.

<sup>61</sup> See Wylie *op cit* paragraph 12.14.

in respect of commercial and mixed-use premises, but is rarely, if ever, invoked nowadays. One reason is that it is subject to numerous practical and procedural complications.<sup>62</sup> It has been queried whether such a “self-help” remedy has any place in modern times<sup>63</sup> and a number of jurisdictions have abolished it altogether.<sup>64</sup> There are also doubts whether certain features of the remedy would survive a constitutional challenge here.<sup>65</sup> In view of all this the Commission inclines to the view that the time has come to consign the remedy to history. *The Commission provisionally recommends that the right of distress should be abolished altogether.*

## **H Ejectment for Non-payment of Rent**

8.19 Attention should also be drawn in this context to the special statutory remedy of ejectment for non-payment of rent, now governed by sections 52-58 of *Deasy’s Act*.<sup>66</sup> This remedy is to be distinguished from other actions of ejectment<sup>67</sup> which proceed on the basis that the tenancy has determined and the landlord wishes to recover possession of the former demised premises.<sup>68</sup>

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<sup>62</sup> Largely owing to statutory intervention: *ibid* paragraph 12.17.

<sup>63</sup> See the views expressed in the *Bankruptcy Law Committee Report* (Prl 2714, 1972) paragraph 55.8.2: “In our view no case can be made in present day circumstances for the type of ‘self-help’ involved which puts landlords in an extraordinarily advantageous position *vis-à-vis* the community generally.”

<sup>64</sup> In Northern Ireland it was abolished by section 122 of the *Judgments (Enforcement) Act (Northern Ireland) 1969*. Note that the English Law Reform bodies have taken different stances at different times, ranging from recommending abolition (Law Com No 194 (1991)) to retaining it for commercial properties (Lord Chancellor’s Department’s *Distress for Rent Consultation Paper* (2001)).

<sup>65</sup> Under Articles 40 (citizen’s dwelling inviolable) and 43 (right of private ownership): see Wylie *op cit* paragraph 12.15.

<sup>66</sup> For detailed consideration of this remedy see Dowling *Ejectment for Non-payment of Rent* (SLS Legal Publications (Northern Ireland) 1986). Note that the remedy is not available against lessees of long leases who qualify to purchase the fee simple under Part II of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*.

<sup>67</sup> *Eg* on the title or for overholding.

<sup>68</sup> These forms are considered in Chapter 15 below.

Notwithstanding use of the title “ejectment”, an ejectment for non-payment of rent is primarily a proceeding to enforce payment of the rent on the basis that the tenancy still exists. The ultimate sanction of an ejectment order entitling the landlord to possession, and consequent determination of the tenancy, is a last resort, to be applied if the tenant does not respond to the proceedings by producing the rent arrears.

8.20 In practice the remedy is rarely invoked partly because of various restrictions on its scope<sup>69</sup> and partly because of some very unattractive features from the landlord’s point of view.<sup>70</sup> The result is that landlords prefer in non-payment of rent cases to invoke the express right of forfeiture for breach of covenant and to enforce this, if necessary, by bringing an ejectment on the title or for overholding. The subject of ejectment actions generally is reviewed in a later chapter.<sup>71</sup> *The Commission provisionally recommends that the statutory action of ejectment for non-payment of rent should be abolished.*

## **I Other Payments**

8.21 It was mentioned earlier that section 42 of *Deasy’s Act* also includes in leases an implied agreement by the tenant to pay “all taxes and impositions payable by the tenant.” Quite what this covers is far from clear, partly because it is not clear what is encompassed by the word “impositions”, which is not defined by the Act. Furthermore, it is not clear whether “payable by the tenant” refers to an obligation in the lease or under the general law. Even if it refers to the general law, there are further doubts because often taxes or impositions are not levied on the individual, but rather on the premises, or are not levied on the landlord or tenant as such but, *eg*, on the “occupier” of the premises.<sup>72</sup> Thus rates, which are still payable in respect of non-

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<sup>69</sup> It can be invoked only after at least a year’s rent is in arrear: section 52.

<sup>70</sup> The most obvious one is the tenant’s right to obtain an order of “restitution” restoring him or her to possession, if the rent arrears are tendered or lodged in court within 6 months of the landlord executing the ejectment order or retaking possession.

<sup>71</sup> See Chapter 15 below. As regards the landlord’s right of forfeiture see Chapter 14 below.

<sup>72</sup> This whole subject is discussed in Wylie *op cit* Chapter 13.

residential premises,<sup>73</sup> are levied on the person in “paramount occupation”.<sup>74</sup>

8.22 The Commission has concluded that there is a need to clarify the scope of section 42 in this regard. The appropriate way of doing this would seem to be to replace it with a general “default” provision which imposes on the tenant responsibility for payment of taxes and charges usually imposed on tenants, apart from rent and payments treated as rent.<sup>75</sup> As a default provision it would, of course, be subject to variation by the parties in a particular case. The provision should cover rates (where applicable to the property), outgoings, like water, gas and electricity charges and other payments for services enjoyed by the tenant (*eg* telephone, computer network connections, cable and satellite television) and, where applicable, taxes, such as VAT, which are commonly passed on to the tenant.<sup>76</sup> *The Commission provisionally recommends that section 42 of Deasy’s Act should be clarified by replacing it with a “default” provision imposing on the tenant liability, where applicable to the particular demised premises, for rates, outgoings and charges for services enjoyed by the tenant and certain taxes which are usually passed on to the tenant, such as VAT.*

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<sup>73</sup> Full relief for dwellings was introduced by sections 3 and 5 of the *Local Government (Financial Provisions) Act 1978*.

<sup>74</sup> See Keane *The Law of Local Government in the Republic of Ireland* (Incorporated Law Society of Ireland 1982) Chapter 10.

<sup>75</sup> *Ie* service charges and insurance premiums which relate to matters dealt with by the landlord whose costs and expenses the payments are to meet by way of reimbursement: see Chapters 9 and 11 below.

<sup>76</sup> See Wylie *op cit* paragraph 13.12.

## CHAPTER 9     SERVICE CHARGES

9.01     It has become increasingly common in modern times for a tenant to have to pay, in addition to rent in the traditional form,<sup>1</sup> a service charge usually on an annual basis.<sup>2</sup> Such charges have become standard in lettings of multi-unit developments, such as residential blocks of flats, apartments and duplexes and commercial developments like office buildings, shopping centres and industrial parks. The particular feature of such developments is that the various tenants of individual units have to share common areas (such as stairs, lifts, passageways, car parks and gardens), facilities (such as central heating and air conditioning) and machinery, plant and equipment providing facilities and services (such as gas, electricity, water, drainage and sewerage). Much the most practical way of managing this situation is to have the common landlord, or a management company established for the purpose, take responsibility for the provision and management of all aspects of these “services” and to recoup the costs and expenses by way of a service charge levied on each of the tenants.

9.02     Such developments can give rise to several problems, some of which relate to the complexity of the conveyancing involved<sup>3</sup> and

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<sup>1</sup>     In practice it is common for service charges to be reserved expressly as “additional rent”. The reason for this is so that the landlord can avail of special features attaching to enforcement of rental obligations. Apart from the special action of ejectment for non-payment of rent and right of distress, both now of questionable advantage (see paragraphs 8.17 and 8.19 above), the somewhat complicated notice procedure for effecting a forfeiture for breach of covenant contained in section 14 of the *Conveyancing Act 1881* does not apply to forfeiture for non-payment of rent: see paragraph 14.07 below.

<sup>2</sup>     See precedent L.2.4 in Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>3</sup>     To which attention was drawn by the Supreme Court in *Metropolitan Properties Ltd v O’Brien* [1995] 1 IR 467.

others of which relate to practical failures and bad management.<sup>4</sup> The Commission has recently pointed out that some of these problems have been solved in other jurisdictions by special legislation, such as the strata titles legislation in Australia and New Zealand and condominiums laws of North America.<sup>5</sup> It was indicated that this subject would be considered by the Commission at a later stage.<sup>6</sup> In fact that consideration is now under way as a separate project and it would be inappropriate for this Consultation Paper to anticipate the outcome. One obvious reason for this is that the other project will have under consideration various matters which lie outside the scope of landlord and tenant law.

9.03 It may, however, be appropriate to raise a few matters which do concern service charges provided for under letting arrangements in multi-let developments. One particular concern which has been put to the Commission is that service charge provisions tend to be very complex and their implications are often not fully understood by tenants, especially in residential developments.<sup>7</sup> At the very least this is a recipe for dispute as between the tenants themselves and as between the tenants and the landlord or management company. There is also the danger that little understood provisions will be drafted very much in favour of the landlord or will be operated in an unfair manner.

9.04 The Commission considers that there is substance to such concerns and that there may be scope for some legislative provisions to deal with them. The sort of issues which such legislation might deal with would be:<sup>8</sup> (1) introducing the concept of “reasonableness”

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<sup>4</sup> Eg a failure to set up the management scheme effectively or allowing the management company to be struck off the register of companies.

<sup>5</sup> *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other Proposals* (LRC 70–2003) paragraph 1.10.

<sup>6</sup> *Ibid* paragraph 1.14.

<sup>7</sup> An example of such legislation will be found in the English *Landlord and Tenant Act 1985*, sections 18–30, as amended by sections 41–42 and Schedule 2 of the *Landlord and Tenant Act 1987* and sections 150–9 and Schedules 9 and 10 of the *Commonhold and Leasehold Reform Act 2002*.

<sup>8</sup> It should be noted that the *Residential Tenancies Bill 2003* does not deal directly with the subject of service charges, but the provisions for dispute resolution in Part 6 may be relevant in so far as a dispute over service charges may be regarded as a “disagreement” raising an issue with regard

in service charges, so as to ensure that they are not used to secure for the landlord additional profit; (2) requiring full information about the service charge scheme to be provided to all tenants in the particular development in a readily understood manner; (3) requiring full annual accounts to be furnished to tenants explaining exactly how the charges have been calculated and prohibiting collection or enforcement unless and until the accounts are furnished; (4) providing a statutory scheme for arbitration or resolution of disputes.<sup>9</sup> The Commission must emphasise that these are simply illustrative of the type of statutory provision which might be appropriate. The Commission must reserve its position at this stage on the fundamental issues of what form any legislation should take, and its scope and content, until the consideration of multi-unit developments referred to earlier has progressed much further. Only then can a decision be taken as to whether the appropriate legislation should be included in proposed legislation to reform landlord and tenant law or in special legislation to deal with multi-unit developments. *The Commission provisionally recommends that some legislation on the subject of service charges may be appropriate, but that it must reserve its position on its form, scope and content until it has carried out a further review of multi-unit developments.*

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to compliance with the landlord's or tenant's obligations or to the legal relations between the parties: see section 74(3) of the Bill.

<sup>9</sup> This may be achieved for residential developments by the 2003 Bill: footnote 8 above.





## CHAPTER 10 REPAIRS

10.01 This Chapter is concerned primarily with the tenant's obligations in respect of repairs and maintenance of the demised premises. The subject of the landlord's obligations was considered in an earlier chapter.<sup>1</sup> In addition to considering the subject of repairing obligations from the point of view of the tenant, this Chapter also considers the subject of enforcement of such obligations from both parties' perspective.<sup>2</sup>

10.02 As in the case of the landlord's obligations, apart from any express provision made in the lease or tenancy agreement, the tenant's obligations are a mixture of the common law and statute law.

### A Law of Waste

10.03 The law of waste is essentially a branch of the law of torts which originally did not apply to tenants, but an early statute changed this,<sup>3</sup> at least as regard tenants for life and for a fixed term.<sup>4</sup> Much later section 26 of *Deasy's Act* prohibited any tenant holding "for any estate or interest less than a perpetual estate or interest" from opening mines, quarries, removing the soil or surface or subsoil or permitting or committing "any other manner of waste", unless authorised by the express terms of the lease. It is not clear to what extent this alters the common law<sup>5</sup> nor how far the various traditional categories of waste,<sup>6</sup>

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<sup>1</sup> Paragraph 6.11.

<sup>2</sup> This subject is also touched on elsewhere: see paragraphs 6.13–15 and 8.16 above.

<sup>3</sup> *Statute of Marlborough 1267*, c 23; note also the penalties imposed by the *Statute of Gloucester 1278*, c 5. Both these English statutes, which were extended to Ireland by *Poyning's Law 1495*, were repealed by the *Statute Law Revision Act 1983*.

<sup>4</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 15.22.

<sup>5</sup> The English courts developed the concept of a periodic tenant having to use the demised premises in a "tenantlike manner": see *Mint v Good*

namely permissive, voluntary, ameliorating and equitable apply.<sup>7</sup> *Deasy's Act* creates further uncertainty because sections 25-39 purport to prohibit or restrict the tenant in a wide range of activities likely to fall within the concept of waste, such as opening new mines and quarries, removing soil, cutting turf for profit, burning the soil or surface, cutting and lopping of trees. It is questionable how far these provisions remain of relevance in modern times; many of them relate to activities more likely to be carried on in agricultural areas where tenancies are extremely rare. The subject of agricultural tenancies will be reviewed at a later stage in the current project and it may be that what is needed is a new, more up-to-date statutory scheme for such tenancies. Apart from that, many of the activities dealt with in these sections of *Deasy's Act* are now the subject of control through more modern legislation such as that governing valuable minerals<sup>8</sup> and trees.<sup>9</sup>

10.04 The traditional remedy for waste is to seek damages in tort<sup>10</sup> or an injunction against the tenant. However *Deasy's Act* provided a special summary remedy for restraining waste, namely a “precept” obtainable from the District Court.<sup>11</sup> It would appear that this remedy is rarely, if ever, invoked nowadays.

10.05 For all the above reasons it must be questioned whether the law of waste should continue to have any place in our landlord and tenant law. Arguably activities which would come within it are best

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[1951] 1 KB 517, 522 (*per* Somervell LJ) and *Warren v Keen* [1951] 1 QB 15, 20 (*per* Denning LJ).

<sup>6</sup> See *Wylie Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 4.149.

<sup>7</sup> Thus section 25 refers to “fraudulent or malicious” waste; *cf* section 65(3) of the *Landlord and Tenant (Amendment) Act 1980*, which refers to “wilful” waste, a concept which caused the courts some difficulty: see *Wylie Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 15.33.

<sup>8</sup> *Minerals Development Act 1940*; *Petroleum and Other Minerals Development Act 1960*.

<sup>9</sup> *Forestry Acts 1946 and 1988*. Note also the provision for tree preservation orders under the planning legislation: see *Planning and Development Act 2000*, section 205.

<sup>10</sup> *Minister for Local Government and Public Health v Kenny* [1940] 75 ILTR 26; *Ellis v Dublin Corporation* [1940] IR 283.

<sup>11</sup> Sections 35-37 and Schedule (A).

left to be covered by obligations, whether express or statutory, relating to maintenance and repair of the demised premises. *The Commission provisionally recommends that the law of waste should no longer apply as between landlords and tenants and that sections 25-39 of Deasy's Act should be repealed without direct replacement.*

## **B        Repairing Obligations**

10.06    Section 42 of *Deasy's Act* implies in every lease<sup>12</sup> obligations<sup>13</sup> to (1) “keep the premises in good and substantial repair and condition” and (2) “give peaceable possession of the demised premises, in good and substantial repair and condition, on the determination of the lease”.<sup>14</sup> As what is essentially a “default” provision, this seems to be basically a satisfactory provision but there may be scope for some clarification and simplification.

10.07    The obligation implied under section 42 is one to “keep” the demised premises in repair. It has been held that such an obligation also implies an obligation to “put” the premises into repair if they are in a state of disrepair at the commencement of the tenancy.<sup>15</sup> The Commission doubts very much whether this accords with what most tenants would understand by an obligation simply to “keep” in repair, *ie*, one would assume that the obligation simply requires maintaining the condition in which the premises are first let to the tenant. It is to be noted that the statutory obligations proposed to be imposed on tenants of dwellings by section 16 of the *Residential Tenancies Bill 2003* confines the repairing obligation to not doing any act that would cause a deterioration “in the condition the dwelling was in at the commencement of the tenancy.”<sup>16</sup> The Commission considers that the

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<sup>12</sup>        It was pointed out earlier that there seems no reason why the implied obligations in section 42 should not apply to all tenancies, whether or not created by a document: see paragraph 8.03 above.

<sup>13</sup>        Which are “variable” ones subject to the express provisions of the lease: see *ibid*.

<sup>14</sup>        Covenant (2) is subject to the tenant's right of surrender in cases of “destruction” in accordance with section 40: see paragraph 11.03 below.

<sup>15</sup>        *Lurcott v Wakely and Wheeler* [1911] KB 905, approved by the Supreme Court in *Groome v Fodhla Printing Co Ltd* [1943] IR 380, 401 (*per* O'Byrne J) and 407 (*per* Black J). See also *Fleming v Brennan* [1941] IR 499.

<sup>16</sup>        Section 16(f).

section 42 implied obligation should also be so restricted. *The Commission provisionally recommends that the tenant's repairing obligation under section 42 of Deasy's Act should not extend to putting into repair or improving the condition in which the demised premises are in at the commencement of the tenancy.*

10.08 The Commission has noted that recent cases in England have held that there is a distinction between an obligation simply "to repair" and, as under section 42, an obligation "to keep in repair". The latter involves an obligation never to let the premises fall into disrepair, *ie* it refers more to the condition of the premises rather than the duty to take action to carry out repairs.<sup>17</sup> Thus liability, *eg* in damages, occurs as soon as the state of disrepair arises and there is no question of giving the party under the obligation time to carry out the necessary repair work.<sup>18</sup> This sort of strict liability may catch out a tenant where, for example, strict compliance with the terms of the lease is a pre-condition to proper exercise of a break option or other option.<sup>19</sup> Again it may be questionable whether such strict liability is appropriate for a statutory implied obligation. Section 16 of the *Residential Tenancies Bill 2003* contemplates a less strict liability for tenants of dwellings since it refers to the tenant in the case of deterioration in the condition of the dwelling having to "take such steps as the landlord may reasonably require to be taken for the purpose of restoring the dwelling".<sup>20</sup> *The Commission provisionally recommends that the tenant's repairing obligation under section 42 of Deasy's Act should not involve strict liability and should require only that reasonable steps are taken to deal with any disrepair promptly.*

10.09 The tenant's obligation under section 42 appears to be unqualified in the sense that it does not seem to allow for what is usually referred to as "fair wear and tear". On the other hand, the

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<sup>17</sup> *British Telecom plc v Sun Life Assurance Society plc* [1995] 4 All ER 44. *Cf Trane UK Ltd v Provident Mutual Life Assurance Association* [1995] 1 EGLR 33.

<sup>18</sup> In the *British Telecom* case it was the landlord which was caught by this principle, because it was liable directly for repairs to a multi-let property in accordance with the service charge provisions.

<sup>19</sup> See the *Trane UK* case, footnote 16 above. On the subject of options in leases see Wylie *op cit* Chapter 20.

<sup>20</sup> Section 16(g).

obligation as regards a deterioration in the condition of a dwelling to be imposed by section 16 of the *Residential Tenancies Bill 2003*<sup>21</sup> is so qualified. It is provided that in determining whether the obligation has been complied with at a particular time, there is to be disregarded any deterioration “owing to normal wear and tear, that is to say wear and tear that is normal having regard to –

- (i) the time that has elapsed from the commencement of the tenancy;
- (ii) the extent of occupation of the dwelling the landlord must have reasonably foreseen would occur since that commencement, and
- (iii) any other relevant matters.”<sup>22</sup>

The Commission inclines to the view that a similar qualification would be appropriate in the implied obligation under section 42. *The Commission provisionally recommends that the tenant’s repairing obligation under section 42 of Deasy’s Act should contain an exclusion of normal wear and tear.*

10.10 The Commission notes that section 16 of the *Residential Tenancies Bill 2003* contains other provisions relating to repairs. In particular it would impose on tenants of dwellings obligations to: (1) allow, at reasonable intervals, the landlord, and any person or persons acting on the landlord’s behalf, access to the dwelling (on a date and time agreed in advance with the tenant) for the purposes of inspecting the dwelling;<sup>23</sup> (2) notify the landlord or his or her authorised agent of any defect which it is the landlord’s responsibility to repair under any statute;<sup>24</sup> (3) allow the landlord, or again any person or persons acting on the landlord’s behalf, reasonable access to carry out works the responsibility of the landlord;<sup>25</sup> (4) to defray the costs of the landlord in taking such steps as are reasonable in doing repairs the tenant should have done.<sup>26</sup> The Commission takes the view that these are

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<sup>21</sup> See paragraph 10.07 above.

<sup>22</sup> Section 16(f).

<sup>23</sup> Section 16(c).

<sup>24</sup> Section 16(d).

<sup>25</sup> Section 16(e).

<sup>26</sup> Section 16(g). See further paragraph 10.17 below.

sensible provisions, which are usually found in a well-drafted lease. Given that section 42 is essentially a “default” provision<sup>27</sup> it is arguable that its effectiveness in this regard would be greatly enhanced by extending its scope to include the above matters. However, it must be reiterated that, unlike the obligations which would be imposed on tenants of dwellings by the 2003 Bill, the revised section 42 obligations on all other tenants would be variable by the express provisions of the lease or tenancy agreement. *The Commission provisionally recommends that the scope of the tenant’s implied repairing obligation under section 42 of Deasy’s Act should be extended, but on a variable basis only, along the lines of section 16(c), (d), (e) and (g) of the Residential Tenancies Bill 2003.*

## **C Enforcement of Obligations**

10.11 It may be convenient at this point to consider the remedies available for enforcement of repairing obligations. This chapter is concerned with the tenant’s obligations, so that the first issue to be considered is what remedies are available to the landlord. However, it is also important to consider what remedies are available to enforce the landlord’s obligations which were considered in an earlier chapter.<sup>28</sup>

10.12 The landlord has a wide range of remedies. One obvious one is an action for damages to recover the loss suffered by the tenant’s breach. The actual assessment of the damages in such cases tends to vary according to how near the landlord’s reversion is to falling in or whether it has already fallen in.<sup>29</sup> It should also be noted that the amount of damages recoverable may be severely restricted in certain cases by the provisions of section 65 of the *Landlord and Tenant (Amendment) Act 1980*.<sup>30</sup> The operation of this section was discussed in the *Consultation Paper on Business Tenancies*<sup>31</sup> and nothing further need be said at this stage.

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<sup>27</sup> It must be reiterated that the obligations in section 16 of the 2003 Bill, which are confined to tenants of dwellings, cannot be contracted out of. See section 18 of the Bill.

<sup>28</sup> Paragraph 6.11 above.

<sup>29</sup> See Wylie *op cit* paragraph 15.31.

<sup>30</sup> *Ibid* paragraphs 15.32-33.

<sup>31</sup> LRC CP 21-2003 paragraph 4.46.

10.13 The Irish courts have long recognised that a landlord may seek the equitable remedy of specific performance to force the tenant to carry out repairs in accordance with obligations under the tenancy.<sup>32</sup> It is not, however, often invoked. It is usually much more practical, if the landlord wants to keep the tenancy in place,<sup>33</sup> for the landlord to do the necessary repairs and to recoup the cost from the tenant. However, no such right to do so exists at common law<sup>34</sup> and at present the landlord has to rely upon an express provision in the lease or tenancy agreement.<sup>35</sup> As indicated earlier,<sup>36</sup> the Commission considers that there should be a variable statutory right to do so. *The Commission provisionally recommends that the landlord should have the variable right to carry out repairs for which the tenant is responsible and to recoup the costs and expenses from the tenant.*

10.14 Although not a remedy as such it is common for the landlord to seek compliance with the tenant's repairing obligations by serving a "dilapidations notice" or "schedule of dilapidations".<sup>37</sup> This may be served at any time when the premises are in a state of disrepair, but is commonly done shortly before or on the determination of the tenancy.<sup>38</sup> Another common situation is where the landlord makes compliance with such a notice or schedule a condition of giving consent to an assignment of the tenancy. There is some doubt as to how far this practice would be caught by the provisions in the *Landlord and Tenant (Amendment) Act 1980*<sup>39</sup>

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<sup>32</sup> *Rushbrooke v O'Sullivan* [1908] 1 IR 232. The English courts took much longer to recognise this right: see *Rainbow Estates Ltd v Tokenhold Ltd* [1998] 2 All ER 860.

<sup>33</sup> The alternative always open to the landlord is to invoke the remedy of forfeiture for breach of obligation, and thereby determine the tenancy. This subject is considered in a later chapter: see Chapter 14 below.

<sup>34</sup> See the *Rainbow Estates* case, footnote 32 above.

<sup>35</sup> See *Jervis v Harris* [1996] 1 All ER 303.

<sup>36</sup> With reference to the proposed provision in section 16(g) of the *Residential Tenancies Bill 2003*, see paragraph 10.11 above.

<sup>37</sup> See Wylie *op cit* paragraphs 15.30 and 15.35-37.

<sup>38</sup> Sometimes it is done at the commencement of the tenancy, where the tenant is under an obligation to put the premises into repair.

<sup>39</sup> See Wylie *op cit* paragraph 15.37. The 1980 Act's provisions were considered in the *Consultation Paper on Business Tenancies* (LRC CP 21-2003) paragraphs 3.41 and 4.47.



against “unreasonable withholding” of consent to alienation.<sup>40</sup> The Commission thinks that any doubt on this subject should be resolved. *The Commission provisionally recommends that it should be made clear by statute that it is permissible for a landlord to make it a condition of consent to an assignment that either the tenant or the assignee complies with repairing obligations within a reasonable specified time.*

10.15 So far as the tenant is concerned, again a range of remedies is available, including seeking specific performance,<sup>41</sup> to enforce the landlord’s obligations. The tenant may also seek damages but it would appear that it is not possible to claim on the basis of diminution in the value of the tenancy if, as will often be desired, the tenant remains in occupation despite the failure by the landlord to carry out repairs.<sup>42</sup> It has been suggested in Ireland that the tenant in such cases may, nevertheless, recover damages for “physical inconvenience and discomfort”.<sup>43</sup> This appears to be somewhat at variance with the general principle of the law of contract that damages for breach of contract cannot include an element for annoyance, vexation or disappointment.<sup>44</sup> The Commission thinks that this point should be clarified in favour of tenants. *The Commission provisionally recommends that, if a tenant continues in possession despite the landlord’s failure to perform obligations like a repairing one, the tenant should have a statutory right to claim damages for physical inconvenience and discomfort.*

10.16 One of the issues which is raised from time to time is that a tenant does not have, particularly in a commercial context, a very effective and practical remedy, the exercise or threat of exercise of which is likely to induce the landlord to carry out repairing and other obligations. The landlord can always threaten the tenant with a

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<sup>40</sup> The English authorities suggest that a landlord should be cautious in following this practice: *Orlando Investments Ltd v Grosvenor Estate Belgravia* [1989] 2 EGLR 74; *Straudley Investments Ltd v Mount Eden Land Ltd* [1997] EGCS 175. *Cf Farr v Ginnings* (1928) 44 ILTR 249.

<sup>41</sup> See Wylie *op cit* paragraph 15.19.

<sup>42</sup> *Wallace v Manchester City Council* [1998] 3 EGLR 38.

<sup>43</sup> *Siney v Dublin Corporation* [1980] IR 400, 415 (*per* O’Higgins CJ).

<sup>44</sup> See McDermott *Contract Law* (Butterworths 2001) at 1151. *Cf* aggravated damages in tort: see *Whelan v Madigan* [1978] ILRM 136.

forfeiture for breach of covenant<sup>45</sup> and in most cases the risk thereby of losing the premises in which the tenant runs a business is likely to make the tenant think seriously about continuing to breach obligations. The tenant does not really have an equivalent remedy, as the law stands. The right of set-off, even extended as proposed in an earlier chapter,<sup>46</sup> can only be invoked as a defence to a claim by the landlord for arrears of rent. It also remains to be seen whether the Irish courts will follow the English courts in permitting tenants to “rescind” the tenancy in circumstances where the landlord is alleged to have repudiated the agreement.<sup>47</sup> There are several problems about this development. One is that, quite apart from the lack of Irish authority, it is still not clear what the scope of this principle is. Another is that it seems reasonably clear that it can only be invoked where the landlord is guilty of a very serious, if not fundamental, breach of obligation and it is questionable whether breach of a repairing obligation would amount to this. Perhaps the biggest problem is that the remedy, *ie* the right to treat oneself as discharged from any further performance of the tenancy, is not what the tenant wants in many, if not most, cases. The tenant does not want to give up the tenancy; what the tenant wants is to continue with its enjoyment, but also with the landlord carrying out his or her obligations.

10.17 To some extent the tenant may achieve an effective remedy by invoking the provisions of section 87 of the *Landlord and Tenant (Amendment) Act 1980*.<sup>48</sup> This entitles a tenant, where the landlord refuses or fails to carry out repairing obligations despite being called upon to do so by the tenant, to execute the repairs and then to set off the expenditure against the rent.<sup>49</sup> The problem about this remedy, which arguably could be extended to cover breaches of other

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<sup>45</sup> See Chapter 14 below.

<sup>46</sup> See paragraphs 8.15-16 above.

<sup>47</sup> See paragraph 6.09 above.

<sup>48</sup> Like most of the 1980 Act the section is confined to “tenements”, but the *Consultation Paper on Business Tenancies* (LRC CP21-2003) proposed extending the Act to all tenancies: see paragraph 3.43 (concerning the provisions of Part V, which are confined to covenants in leases or tenancies).

<sup>49</sup> CP21-2003 proposed some minor amendments to section 87: *ibid* paragraph 4.55.

obligations by the landlord,<sup>50</sup> is that it is only effective for tenants who can afford to incur the initial expense of carrying out the landlord's obligations.<sup>51</sup>

10.18 The discussion in the previous paragraphs raises the issue whether some more effective remedy should be made available to tenants for breach of obligation by the landlord. Arguably some such remedy is needed to deal, in particular, with breaches of obligation which have a serious impact on the tenant's enjoyment of the property (like repairing obligations or, in the case of multi-let properties, the obligation to provide various services). The remedy which obviously comes to mind is withholding rent or service charge payments until the landlord complies with obligations, but it was pointed out earlier<sup>52</sup> that it has long been established at common law that the tenant has no such right.<sup>53</sup> Yet it was also pointed out earlier that, in fact, this principle was breached by section 83 of *Deasy's Act*. The breach was a very limited one, in the sense that it was confined to "cottier tenants"<sup>54</sup> of which there must be very few, if any, in existence nowadays.<sup>55</sup> Nevertheless, what is significant about the section in the present context is that it did provide that where the cottier dwelling was rendered unfit for occupation by reason of the landlord's failure to comply with repairing obligations, "no rent or compensation for the occupation of the said tenement during the time it shall continue in such state and condition shall be recoverable".

10.19 The question arises whether this sort of provision should be revived and extended to tenancies generally. It is to be noted that section 83 of *Deasy's Act* was confined to dwellings and the rent was rendered not "recoverable"<sup>56</sup> only where the landlord's failure was

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<sup>50</sup> Eg, a failure to insure the premises.

<sup>51</sup> This point was raised earlier in relation to restriction of the right of set-off to liquidated, as opposed to, unliquidated sums: see paragraph 8.16 above.

<sup>52</sup> Paragraph 6.14 above.

<sup>53</sup> *Corkerry v Stack* (1947) 82 ILTR 60; *Riordan v Carroll* [1996] 2 ILRM 263.

<sup>54</sup> Defined in section 81 of *Deasy's Act*.

<sup>55</sup> See paragraph 6.14 above.

<sup>56</sup> It is not clear whether this means that the rent is suspended only (*ie* it can be recovered subsequently once the premises are rendered fit) or lost altogether for the period of unfitness. The courts also held that a landlord

particularly serious, that is, where it rendered the dwelling “unfit for occupation”.<sup>57</sup> Creation of a new statutory right to withhold rent, or other payments,<sup>58</sup> even in cases of very serious breaches, would involve a radical change in the law. The Commission notes that the *Residential Tenancies Bill 2003*, notwithstanding the wide range of obligations imposed on landlords<sup>59</sup> which cannot be contracted out of,<sup>60</sup> does not contain such a provision.<sup>61</sup> At this stage the Commission has an open mind on the subject and wishes merely to moot the point. It will review the matter in the light of responses to this Consultation Paper.

10.20 In order to inform consideration by others, the following are aspects of the matter which seem to merit consideration if a new statutory remedy for tenants is to be considered:-

- (a) Should it involve the right merely to suspend payments owed to the landlord or deprive the landlord of the right to the payment for the period during which a breach of obligation is not remedied?
- (b) Should the right apply only to rent or extend to other payments which may be due to the landlord, *eg*, service charge payments?
- (c) Should the remedy apply to all tenants, or be confined to particular categories, *eg*, tenants of dwellings?
- (d) Should the remedy apply automatically regardless of the terms of the lease or tenancy agreement, or should the parties be able to contract out of it?

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caught by section 83 was not prevented from bringing a caretaker's summons to recover possession from an overholding tenant or caretaker under section 86: see *Listowel RDC v Stack* (1910) 44 ILTR 255; *Bartley v Fagan* [1938] IR 733.

<sup>57</sup> In this respect it is not unlike the possible right of “rescission”: see paragraph 10.16 above.

<sup>58</sup> *Eg* service charge payments: see Chapter 9 above.

<sup>59</sup> Section 12.

<sup>60</sup> Section 18(1).

<sup>61</sup> Note the provisions relating to “redress” in sections 113-118.

- (e) Should the remedy apply to all breaches of obligation or be confined to particular categories, for instance, repairing obligations and service provision?
- (f) Should it be further confined to particularly serious breaches, for example, those which have a substantial impact on the tenant's enjoyment of the property?
- (g) Should safeguards of any kind be included, for example, if the right is simply to suspend rent, should the payments due during the period of suspension still be made, may be to a third party or put on deposit in the joint names of the parties?

*The Commission provisionally recommends that consideration should be given to providing tenants with some sort of statutory right to withhold rent and other payments where the landlord's breaches of obligations have a substantial effect on the tenant's enjoyment of the demised premises.*

## CHAPTER 11 INSURANCE

11.01 The issue of insurance is an important one for both the landlord and tenant.<sup>1</sup> The landlord needs to protect the demised premises, which are usually a very valuable asset and investment, and the tenant needs to ensure that the place which is the tenant's home or place of business is protected. How insurance and, in particular, any obligations to take out different categories of insurance are allocated as between the parties is currently largely a matter for agreement between the parties. There are, however, some statutory provisions which are relevant and in need of some consideration. There is also the question whether some additional statutory provisions would be appropriate.<sup>2</sup>

### A Landlord and Tenant (Ground Rents) Act 1967

11.02 Section 30 of the *Landlord and Tenant (Ground Rents) Act 1967*<sup>3</sup> is designed to prevent landlords of tenants holding under a lease which qualifies for a reversionary lease<sup>4</sup> requiring tenants to take out building insurance with a specified insurer or someone else selected or approved by the landlord. Instead any express provision in the lease<sup>5</sup> to this effect is varied so as to permit the tenant to insure with any insurer holding for the time being an assurance licence under the *Insurance Act 1936*. It is not possible to contract out of this provision.<sup>6</sup> The Commission considers this to be a useful provision which should be extended to all tenants. *The Commission*

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<sup>1</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 16.

<sup>2</sup> See also in relation to landlord's obligations paragraphs 6.20-21 above.

<sup>3</sup> As amended by section 44 of the *Landlord and Tenant (Amendment) Act 1980*.

<sup>4</sup> Under Part III of the 1980 Act.

<sup>5</sup> Or in any "ancillary or collateral" agreement.

<sup>6</sup> Section 33 of the 1967 Act.

*provisionally recommends that the protection conferred on certain lessees by section 30 of the Landlord and Tenant (Ground Rents) Act 1967, concerning freedom to seek insurance cover, should be extended to all tenants.*

## **B        *Deasy's Act***

11.03     *Deasy's Act* does not deal directly with insurance, but there is one provision which has a bearing on the subject, namely section 40. That section confers on the tenant a right to surrender the tenancy where the dwelling house or other building constituting the "substantial matter" of the demise "shall be destroyed, become ruinous and uninhabitable, or incapable of beneficial occupation or enjoyment, by accidental fire or other inevitable accident, and without the default or neglect of the said tenant". To some extent this was early statutory recognition of a form of the doctrine of frustration.<sup>7</sup>

11.04     It is crucial to note, however, that the section does not apply where the lease or tenancy agreement contains "an express covenant or agreement binding on the tenant to repair" the building. Most commercial leases, being in the typical "FRI" (full repairing and insurance) form, will contain such a repairing covenant. However, since the tenant will usually also be paying for insurance cover, either directly or by way of reimbursement of premiums paid by the landlord,<sup>8</sup> it is usual for the repairing covenant to exclude repairs relating to damage coming within the "insured risks".<sup>9</sup> The point is that it would be grossly unfair that the tenant should pay the cost of insurance designed to cover repairs and also have to meet the cost of those same repairs. What has caused much debate amongst practitioners is whether such an exclusion in the repairing covenant nullifies its effectiveness to exclude the operation of section 40, *ie* the exception of an obligation to carry out repairs in respect of uninsured risks results in there being no covenant or agreement to repair within the meaning of the section. If it were so construed, thereby entitling the tenant to surrender the lease, it would defeat the whole purpose of

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<sup>7</sup> See on this doctrine paragraph 12.12 below.

<sup>8</sup> *Eg* where the landlord in a multi-let development arranges a "block" policy covering the entire development.

<sup>9</sup> See the precedents in Division L.2 of Laffoy's *Irish Conveyancing Precedents* (Looseleaf Butterworths).

an FRI lease. For this reason practitioners usually take the precaution of inserting in the lease a waiver of section 40.<sup>10</sup> All this makes for complicated drafting and constitutes a potential trap for the unwary practitioner. The obvious solution is to amend section 40 to make it clear that it also does not apply where repairs to the destroyed or badly damaged premises are covered by insurance paid for or contributed to by the tenant. *The Commission provisionally recommends that a covenant or agreement excepting an obligation to do repairs relating to “insured risks” should still exclude the tenant’s right of surrender under section 40 of Deasy’s Act.*

11.05 This leads to another issue which may arise, namely where insurance cover exists and the premises are destroyed or badly damaged, can either the landlord or the tenant insist upon the proceeds being used to reinstate or repair the premises? This may be a particular issue for the tenant where the landlord arranges the insurance and it is in the landlord’s name, but the tenant has paid for it.

11.06 In England, it was provided by the *Fires Prevention (Metropolis) Act 1774* that one party can require the other party’s insurance company to expend the proceeds on reinstatement<sup>11</sup> and, despite its title, this was held to apply outside London.<sup>12</sup> Indeed, it was regarded as one of the “statutes of general application” adopted in several former British colonies.<sup>13</sup> But the view was expressed in Ireland that “we have no corresponding enactment in this country”.<sup>14</sup> In particular, it was held that the landlord had no right to require the tenant to expend insurance proceeds on reinstatement and had to rely upon the tenant’s covenant to repair.<sup>15</sup> It must, therefore, be doubted

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<sup>10</sup> See the precedents in Division L.2 of Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>11</sup> Section 83.

<sup>12</sup> *Ex parte Goreley* (1864) 4 De G J & S 477.

<sup>13</sup> *Eg Canada: Canadian Southern Railways v Phelps* (1884) 14 SCR 132 and *Port Coquitlam v Wilson* (1923) SCR 235; New Zealand: *Hunter v Walker* (1888) 6 NZLR 690.

<sup>14</sup> *Andrews v Patriotic Assurance Co of Ireland (No 2)* (1886) 18 LR Ir 355, 366 (*per Palles CB*). See also *Brady v Irish Land Commission* [1921] 1 IR 56, 64 (*per O’Connor MR*).

<sup>15</sup> *Per Palles CB op cit* at 368.



whether, in the absence of an express provision for application of insurance proceeds on repairs or reinstatement, the Irish courts would follow the English courts in their approach to cases where the landlord has received the insurance proceeds but the tenant has directly or indirectly paid for the insurance. The English courts had held that in such circumstances the tenant can require the landlord to apply the insurance proceeds on reinstatement; either by regarding the landlord as, in effect, insuring for the joint benefit of both parties<sup>16</sup> or by implying an obligation by the landlord to exercise rights conferred by the insurance so as to preserve the tenant's interests.<sup>17</sup> This matter ought to be clarified.

11.07 The Commission takes the view that in cases coming within section 40 of *Deasy's Act*, ie destruction or damage rendering the premises uninhabitable or incapable of beneficial occupation or enjoyment, through no fault of the tenant, the tenant should be entitled, as an alternative to surrendering the lease, to require insurance proceeds received by the landlord to be expended on reinstatement of the premises. If the landlord has failed to insure the premises whether in breach of obligation or not,<sup>18</sup> the tenant should still have the right to surrender. Where the premises cannot be reinstated, for instance because planning permission is refused, the tenant should again be entitled to surrender, but the landlord, who is left with the destroyed premises, should be entitled to keep any insurance proceeds. *The Commission provisionally recommends that the tenants coming within section 40 of Deasy's Act should be entitled to require that insurance proceeds be used to reinstate the premises, as an alternative to surrender. If no insurance proceeds are available, or if the premises cannot be reinstated, the tenant should still have the right of surrender, but in the latter case, the landlord should be entitled to any insurance proceeds which are available.*

## **C Other Legislation**

11.08 The question remains whether other legislative provisions would be appropriate. The Commission noted earlier that section

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<sup>16</sup> *Mumford Hotels Ltd v Wheler* [1985] QB 755.

<sup>17</sup> *Varal Ltd v Security Archives Ltd* (1989) 60 P & CR 258.

<sup>18</sup> *Ie* even in cases where the tenant has provided the money, but the landlord has failed to take out the requisite insurance.

14(c) of the *Residential Tenancies Bill 2003* would impose<sup>19</sup> an insurance obligation on landlords of dwellings, but concluded that this should not be imposed on other landlords.<sup>20</sup> What was mooted earlier was whether there was a place for statutory “default” provisions, to operate where the lease or tenancy had a “gap” in provisions. An example of the sort of provision the Commission had in mind is again to be found in the 2003 Bill. Section 16(c) imposes on tenants of dwellings an obligation not to “act or allow other occupiers of or visitors to, the dwelling to act in a way which might result in the invalidation of a policy of insurance in force in relation to the dwelling or an increase in the premium payable under such a policy”. The Commission takes the initial view that it might be useful to have a set of statutory provisions covering such important matters, but, unlike the “overriding” provisions in the 2003 Bill, to operate as “variable” or “default” provisions.

11.09 The Commission considers that the following matters would be appropriate for inclusion in statutory “default” provisions covering insurance:<sup>21</sup>

- (a) Liability for insuring the building or buildings, and any landlord’s fixtures, to be on the landlord;
- (b) Liability for insuring the contents, including tenant’s fixtures, to be on the tenant;
- (c) Insurance for buildings to be for full reinstatement cost, plus an inflationary element where landlord arranges, but tenant pays for it; tenant to be entitled to explanation of how cover and costs are calculated and, if it is considered necessary, to insist upon increase in cover;<sup>22</sup>
- (d) Where there is a deficiency in insurance proceeds to cover the risk supposed to be covered, the party under obligation to arrange insurance to make up deficiency;<sup>23</sup>

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<sup>19</sup> This obligation could not be contracted out of: section 18(1).

<sup>20</sup> Paragraph 6.21 above.

<sup>21</sup> In addition to the modifications to section 30 of the *Landlord and Tenant (Ground Rents) Act 1967* and section 40 of *Deasy’s Act* discussed earlier: see paragraphs 11.02-07 above.

<sup>22</sup> See Wylie *op cit* paragraph 16.11.

<sup>23</sup> *Ibid* paragraph 16.14.

- (e) Tenant to be liable for increases in premiums relating to hazardous activities only if responsible for those activities;<sup>24</sup>
- (f) Tenant to be under an obligation not to do or permit anything to be done on the demised premises which might cause the insurance policy to become void or voidable, or which results in an increase in premiums;<sup>25</sup>
- (g) Building's insurance to be in joint names of the parties, or to be expressed for the benefit of both, so as to avoid the tenant being faced with a subrogation claim by the landlord's insurer, unless the insurer agrees to waive subrogation rights.<sup>26</sup>

The Commission provisionally recommends that a set of statutory "default" provisions concerning insurance cover, along the lines indicated, would be appropriate for all tenancies.

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<sup>24</sup> This may be important in a multi-let development, where the hazardous activities are carried on by other tenants in the development: *ibid* paragraph 16.15.

<sup>25</sup> *Ibid* paragraph 16.16. See also paragraph 11.08 above.

<sup>26</sup> It is not clear that the Irish courts will be as willing as the English courts have been to assume that insurance arranged by the landlord is for the benefit of the tenant as well: see *Mark Rowlands Ltd v Berni Inns Ltd* [1985] 3 All ER 473; *Lambert v Kymood Ltd* [1997] 1 EGLR 70. Cf *Andrews v Patriotic Assurance Co of Ireland (No 2)* (1886) 18 LR Ir 355, 369 (*per* Palles CB).

## CHAPTER 12 DETERMINATION OF TENANCIES

12.01 This and the ensuing chapters<sup>1</sup> deal with the various ways in which a tenancy may determine. They are concerned with areas of the law which seem to require consideration from the law reform perspective. For this reason they do not cover absolutely every method of determination, because some would not seem to require such consideration. For example, an obvious method of determination is the natural expiry of the term,<sup>2</sup> where a tenancy has been granted for a fixed period of duration,<sup>3</sup> *eg*, 10 years.<sup>4</sup>

12.02 The ensuing chapters deal with the more common methods of determination, such as notice to quit,<sup>5</sup> forfeiture,<sup>6</sup> ejectment<sup>7</sup> and under the Statute of Limitations.<sup>8</sup> The remainder of this chapter deals with various less common methods, but which nevertheless require some consideration.

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<sup>1</sup> Chapters 13–16.

<sup>2</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 26.01.

<sup>3</sup> *Cf* a periodic tenancy, *eg*, from year to year, month to month or week to week, which is ended by notice to quit given by one party to the other: see Chapter 13 below. Note also that a tenancy for a single fixed term may be ended prematurely under some option conferred by the lease, *eg*, a break option exercisable by the tenant or a “put” or “call” option exercisable by the landlord: see Wylie *op cit* Chapter 20. See also paragraph 13.01 below.

<sup>4</sup> The fact that the term has expired does not mean necessarily that the tenant has to give up possession, because statutory rights of renewal may exist, *eg*, under the *Landlord and Tenant (Amendment) Act 1980*.

<sup>5</sup> Chapter 13.

<sup>6</sup> Chapter 14.

<sup>7</sup> Chapter 15.

<sup>8</sup> Chapter 16.

12.03 Merger is a doctrine of general application<sup>9</sup> and applies wherever the one person or body acquires a greater and lesser estate or interest in the same land, with no intermediate estate or interest still in place to prevent a merger. In essence the doctrine is now based upon equitable principles<sup>10</sup> designed to uphold the intention of the parties, in particular the acquiring party. Although it is not always easy to predict what view a court would take in a particular case, the basic underlying principle is that there is a presumption that a merger of a lesser estate or interest in the greater one takes place unless the circumstances of the particular case rebut this.<sup>11</sup> Yet practitioners are often uncertain as to whether, for instance, a declaration of “merger” or “non-merger” should be included in the deed bringing about the vesting of two estates or interests in the one person, for instance, a tenant buying out the landlord’s reversion. The Commission takes the view that it would be helpful to practitioners to provide statutory guidance, in effect a statutory presumption. However, it should be made clear that where such a merger takes place, any rights, including statutory rights, previously attaching to the lesser (leasehold) estate are preserved. *The Commission provisionally recommends that there should be a statutory presumption that where a greater and lesser estate in land vest in the same person or body, without any intermediate estate or interest being outstanding, a merger takes place, unless the instrument bringing about the vesting contains an express provision to the contrary; such a merger should not prejudice any rights, including statutory rights, previously attaching to the lesser (leasehold) estate.*

12.04 It was realised a long time ago that a merger could cause problems in the landlord and tenant context. In particular, where sub-tenancies exist, the position of the sub-tenants was uncertain where the head-tenant acquired the head-landlord’s interest. If there was no declaration of non-merger of the head tenancy in the head-landlord’s reversionary interest, the danger was that the sub-tenancies disappeared with the head-tenancy.<sup>12</sup> This doubt was resolved by

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<sup>9</sup> See Wylie *Land Law* (3<sup>rd</sup> ed Butterworths 1997) Chapter 24.

<sup>10</sup> Reinforced by section 28(4) of the *Supreme Court of Judicature (Ireland) Act 1877*.

<sup>11</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraphs 25.20-22.

<sup>12</sup> There was neither privity of contract nor privity of estate between the

section 9 of the *Real Property Act 1845* which provides that in such cases the head-landlord's reversionary interest acquired by the head-tenant (and in which the head-tenant's intermediate head-tenancy merges) should be deemed thereafter to be the reversion on the sub-tenancies.<sup>13</sup> Thus the obligations and rights of the sub-tenants are preserved. There is, however, one limitation to section 9 which is that it is confined to leases and sub-leases. There seems to be no reason why this sensible provision should not apply to all tenancies, albeit that sub-tenancies granted out of an oral tenancy are probably rare. *The Commission provisionally recommends that section 9 of the Real Property Act 1845, which provides that where a head-tenant acquires a head-landlord's interest, the head-landlord's reversionary interest should be deemed thereafter to be the reversion on the sub-tenancies, should extend to all tenancies.*

12.05 There is another problem which arises in practice and that is the doubt which exists as to whether there can be a "partial" merger. This has arisen in recent decades in relation to the operation of the ground rents legislation. Because of the prevalence of so-called "pyramid" titles in the urban areas of Ireland,<sup>14</sup> the tenant in occupation may hold a sub-tenancy above which exist several tiers of intermediate tenancy and fee farm grant interests in ever-increasing areas of the neighbouring land. If that tenant exercises the right to purchase the ultimate fee simple in the land comprised in the occupational sub-tenancy, this will involve a "slicing" upwards from the base of the pyramid to its apex. The ground rents legislation does not deal with the practical problems this causes potentially, in particular if a partial merger only in the intermediate interests, which necessarily will relate to larger areas of land, is not recognised.<sup>15</sup> The Commission drew attention to this issue in an earlier Report<sup>16</sup> and

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head-landlord and any sub-tenant: see paragraph 3.22 above.

<sup>13</sup> Note that section 9 also dealt with the converse case, *ie*, where the head-landlord acquires the head-tenant's interest (*eg*, by purchasing it or accepting a surrender of it): see paragraph 12.06 below.

<sup>14</sup> See Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraph 4.179 and following.

<sup>15</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 25.24.

<sup>16</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paragraph 12, which states:

reiterates the recommendation of legislation to clarify the position. *The Commission reiterates its recommendation in paragraph 12 of its Report on Land Law and Conveyancing Law: (1) General Proposals for legislation confirming that partial merger may occur in appropriate cases.*

## **A Surrender**

12.06 The subject of surrender, whereby the tenant gives up, or is deemed to give up,<sup>17</sup> the tenancy to the landlord was discussed earlier.<sup>18</sup> Nothing further need be added here, other than to note that section 9 of the *Real Property Act 1845* applies also to surrenders of a head-tenancy and provides similar protection for sub-tenants.<sup>19</sup>

## **B Disclaimer**

12.07 It must first be pointed out that the expression “disclaimer” is used in a variety of senses. One meaning has already been referred to in this Paper, namely, the possibility that a party to a contract may “disclaim” it because of repudiation by the other party.<sup>20</sup> Nothing further need be added here. Another meaning relates to the right of a person to refuse to accept a gift of property, for instance, the right of a beneficiary in a will to refuse to accept property left by the will.<sup>21</sup>

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“It is recommended that, to avoid doubt, a statutory provision should be introduced confirming that where a person entitled to a leasehold interest in portion only of property held under that lease acquires any superior interest in that property that person shall be entitled, if he so desires, to merge the leasehold interest in the next or all superior interests held by him. The provision should confirm that any such merger shall not in any way derogate from the rights of the lessor in respect of any land that may still be subject to the lease.”

<sup>17</sup> By “act and operation of law”: see paragraph 2.22 above.

<sup>18</sup> Paragraphs 2.21-27 above.

<sup>19</sup> Paragraph 12.04 above.

<sup>20</sup> Sometimes referred to as “rescission” for breach by the other party. See paragraphs 6.09 and 10.16 above.

<sup>21</sup> Similarly the right of an intestate successor to disclaim property vested in the deceased intestate person. See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraph 26.05.

This area of the law does not seem to require further consideration in the context of landlord and tenant law.

12.08 Another meaning concerns the right of the Official Assignee to disclaim “onerous property” where the tenant has been declared bankrupt.<sup>22</sup> A similar right exists in the liquidator of a company tenant which has gone into liquidation.<sup>23</sup> The likelihood is that the insolvent tenant’s tenancy will be disclaimed because of the continuing obligations involved. The Commission does not consider it necessary to review such well-settled law in the present context,<sup>24</sup> but there is one point to which attention may be drawn. It would appear that there is some doubt as to the effect of a disclaimer in such cases, where there are no third party interests which are protected.<sup>25</sup> In the case of bankruptcy of an individual tenant it seems clear that the disclaimer terminates the lease and the landlord is left to prove in the bankruptcy for any outstanding debts (eg rent arrears).<sup>26</sup> Yet in the case of liquidation of a company tenant it has been suggested that on disclaimer the tenancy becomes *bona vacantia* vesting in the Minister for Finance under the *State Property Act 1954*.<sup>27</sup> It was further suggested that if the Minister then also disclaims the tenancy it vests in the landlord.<sup>28</sup> The Commission is not convinced that there

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<sup>22</sup> Section 56 of the *Bankruptcy Act 1988*.

<sup>23</sup> Section 290 of the *Companies Act 1963*.

<sup>24</sup> Note that Keane J’s views on the position of a guarantor following such a disclaimer given in *Tempany v Royal Liver Trustees Ltd* [1984] ILRM 273 were later accepted as correct by the House of Lords in *Hindcastle Ltd v Attenborough Associates Ltd* [1996] 1 All ER 737.

<sup>25</sup> Eg sub-lessees: see Wylie *op cit* paragraphs 26.07 and 26.10.

<sup>26</sup> Per Keane J in *Tempany v Royal Liver Trustees Ltd* [1984] ILRM 273 at 288. This is, of course, without prejudice to any guarantee provisions, which may require the guarantor to take on an equivalent tenancy: see precedents in Division L of Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>27</sup> *Tempany v Royal Liver Trustees Ltd* [1984] ILRM 273 at 288. The same applies where a company is struck off the Companies Register under section 311 of the *Companies Act 1963* and section 12 of the *Companies (Amendment) Act 1982*.

<sup>28</sup> *Tempany v Royal Liver Trustees Ltd* [1984] ILRM 273. There was also the suggestion in Keane J’s judgment that if the landlord then resumes possession, this would effect a surrender by operation of law. However, surrender presupposes an agreement between the parties whereas



should be any distinction as to the effect of a disclaimer on insolvency depending on whether the tenant is an individual or a company. *The Commission provisionally recommends that the position following disclaimer of the tenancy on insolvency of the tenant should be clarified and that there should be no distinction between an individual and company tenant. In both cases, unless there are third party interests to be protected, the tenancy should be regarded as terminated and the landlord should be left to make claims in the insolvency.*

12.09 Yet another meaning of “disclaimer” concerns the obscure, medieval doctrine of “denial of title”. This has links to the concept of forfeiture,<sup>29</sup> in that such a denial or disclaimer by the tenant may entitle the landlord to elect to treat the tenancy as, in effect, forfeited. The place of this doctrine in modern landlord and tenant law is unclear, especially since *Deasy’s Act*, and it was called into question by the Supreme Court in *O’Reilly v Gleeson*.<sup>30</sup> In that case the Court drew a distinction between disclaimer “on the record” (*ie*, in pleadings in court proceedings) and “by act *in pais*” (*ie*, without resort to proceedings). The Court seemed prepared to countenance application of the doctrine to the former,<sup>31</sup> but was firmly of the view that no disclaimer by act *in pais* should be recognised except by invoking an express right of re-entry on the basis of a breach of covenant by the tenant. The one exception to this was considered to be a periodic tenancy, in the sense that if the tenant denied the landlord’s title this had the effect of depriving the tenant of the usual right to a notice to quit before the tenancy ended.<sup>32</sup> Notwithstanding the Supreme Court’s efforts to reconcile the medieval concept with modern landlord and tenant law, the Commission is not convinced that it succeeded. In particular it is difficult to square survival of the doctrine with the fundamental notion introduced by section 3 of *Deasy’s Act* that the relationship of landlord and tenant is based upon

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disclaimer is a unilateral act, *per* Carroll J in *Re Erris Investments Ltd* [1991] ILRM 377, 379. Arguably a better view is that the vesting in the landlord results in a merger: see paragraph 12.04 above.

<sup>29</sup> See further Chapter 14 below.

<sup>30</sup> [1975] IR 258. See Wylie *op cit* paragraphs 24.02-6.

<sup>31</sup> See also *Wallace v Daly & Co Ltd* [1949] IR 352, in which varying views were expressed by different judges.

<sup>32</sup> See Chapter 13 below.

the parties' agreement.<sup>33</sup> The Commission inclines to the view that it would clarify the law considerably if the doctrine of denial of title were consigned to history and that the position of a tenant who denies that a valid tenancy has been granted should be governed by the law of forfeiture, *ie*, once the tenant acts upon the denial by breaking any of the obligations under the apparent tenancy, the landlord should be required to exercise the usual remedies for breach of obligation, including, if preferred, forfeiting the tenancy. Alternatively, it is possible that the courts here will follow, by way of analogy,<sup>34</sup> the English courts' recent application of the contractual principle of disclaimer or rescission for repudiation by the other party.<sup>35</sup> *The Commission has reached the preliminary conclusion that the doctrine of denial of title should no longer apply as between landlords and tenants.*

## **C        Enlargement**

12.10     The concept of enlargement of the tenant's interest in the demised premises has had a long history in Ireland. Quite apart from the dramatic impact of the *Land Purchase Acts* of the late nineteenth and first half of the twentieth centuries, there was the more specific example of the *Renewable Leasehold Conversion Act 1849* dealing with leases for lives renewable for ever.<sup>36</sup> In more recent times there has been the right of certain lessees to purchase the fee simple under the ground rents legislation.<sup>37</sup> This legislation will be reviewed separately as part of the current project.

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<sup>33</sup> See paragraph 1.10 above.

<sup>34</sup> This has usually been invoked by tenants against landlords: see paragraph 6.09 above.

<sup>35</sup> See paragraph 12.07 above. Another possibility is that the doctrine of estoppel may come into play: see again *Wallace v Daly & Co Ltd* [1949] IR 352, 380 (*per* Black J).

<sup>36</sup> Note also section 74 of the *Landlord and Tenant (Amendment) Act 1980*, dealing with pre-1849 unconverted leases. See the *Consultation Paper on Business Tenancies* (LRC CP 21–2003) paragraph 4.51. See also Wylie *op cit* paragraphs 4.42 and 4.45.

<sup>37</sup> In particular the *Landlord and Tenant (Ground Rents) Act 1967* and *Landlord and Tenant (Ground Rents) (No 2) Act 1978*. See Wylie *op cit* Chapter 31.

12.11 There is one further, somewhat obscure, provision to be mentioned and that is section 65 of the *Conveyancing Act 1881*.<sup>38</sup> This is a provision which could be invoked very rarely because it applies only to leases where the original term was not less than 300 years, of which not less than 200 years remain outstanding. Furthermore no rent must be payable or at most only a peppercorn rent “or other rent having no money value”. Alternatively, if a substantial rent was originally reserved, it must have been released subsequently, have become statute-barred or otherwise ceased to be payable. Nor can it apply if the lease contained a re-entry clause for breach of condition. It is highly unlikely that many such leases exist nowadays<sup>39</sup> and it is difficult to see why one would be created.<sup>40</sup> There was a short-lived practice of using it to avoid stamp duty in the 1980s, but this was killed off by the anti-avoidance provisions of section 96(2) of the *Finance Act 1986*.<sup>41</sup> It has been argued that the section may be used to make covenants run with the enlarged freehold interest, which would not otherwise run because of the restrictions of the rule in *Tulk v Moxhay*,<sup>42</sup> but the Commission has already published separate recommendations to deal with this subject.<sup>43</sup> In view of this the Commission inclines to the view that section 65 has outlived its usefulness. It will, however, revisit the subject when it reviews the ground rents legislation. *The Commission provisionally recommends that section 65 of the Conveyancing Act 1881 should be repealed without replacement.*

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<sup>38</sup> It was amended slightly by section 11 of the *Conveyancing Act 1882*. See Wylie *op cit* paragraphs 26.12-3.

<sup>39</sup> The section was mentioned in the judgment of Kenny J in the unreported case of *Atkins v Atkins* High Court 30 March 1976.

<sup>40</sup> Note, however, that there is a precedent (F.2.15) for using it in Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>41</sup> See now section 35 of the *Stamp Duties Consolidation Act 1999*.

<sup>42</sup> Wylie *Irish Land Law* (3<sup>rd</sup> ed Butterworths 1997) paragraphs 4.085-86; Taylor “Enlargement of Leasehold to Freehold” (1958) 22 Conv 101.

<sup>43</sup> *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and other Proposals* (LRC 70–2003).

## **D Frustration**

12.12 For a long time there was considerable doubt as to how far, if at all, the doctrine of frustration of contract could apply to a lease or tenancy of land (as opposed to a contract for such a lease or tenancy).<sup>44</sup> In England those doubts were resolved, in favour of application in appropriate circumstances, by the House of Lords in *National Carriers Ltd v Panalpina (Northern) Ltd*.<sup>45</sup> The reasoning in that case was accepted by the Supreme Court in *Neville & Sons Ltd v Guardian Builders Ltd*.<sup>46</sup> Given the founding of the relationship of landlord and tenant on the agreement of the parties by section 3 of *Deasy's Act*,<sup>47</sup> this is hardly surprising. In view of this there does not seem to be any need for statutory interference.

12.13 It is, however, worth drawing attention again to the provisions of section 40 of *Deasy's Act* which were discussed earlier.<sup>48</sup> The Commission would reiterate the changes proposed.

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<sup>44</sup> On this distinction see Chapter 2 above. See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) paragraphs 26.14-5.

<sup>45</sup> [1981] AC 675.

<sup>46</sup> [1995] 1 ILRM 1.

<sup>47</sup> See paragraph 1.10 above.

<sup>48</sup> Paragraphs 11.03-4 and 11.07 above.



## CHAPTER 13 NOTICE

13.01 Service of a notice to quit, by either the landlord on the tenant or the tenant on the landlord, is the standard method of terminating a periodic tenancy.<sup>1</sup> Until such a notice is served the periodic tenancy will continue to run from period to period (week to week, month to month, year to year or whatever are the successive periods) indefinitely. No such notice is required in the case of a tenancy for a fixed term, since it will end automatically, by natural expiration, at the end of the term in question.<sup>2</sup> That is not to say that termination by notice never applies in the case of a fixed term tenancy, because it is common, particularly in commercial leases, to have a “break” option, whereby the tenant may terminate the tenancy early.<sup>3</sup> Similarly the landlord may have an option to terminate the tenancy early, such as a “put” or “call” option requiring the tenant to buy out the landlord’s interest or to surrender the tenancy to the landlord.<sup>4</sup> Exercise of such options usually involves service of a notice on the other party.

13.02 The requirements for service of a notice in relation to exercise of an option, such as a break option, are usually set out in the lease conferring the option. Since they are essentially a matter of contract, dependant upon the agreement of the parties in the particular case, there is little or no place for statutory regulation. What this chapter is concerned with, therefore, is notices to quit designed to terminate periodic tenancies. Since many, if not most, such tenancies arise without any lease or other written document being entered into,<sup>5</sup> the requirements concerning service of notices to quit are largely

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<sup>1</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed 1998) Chapter 23.

<sup>2</sup> *Ibid* paragraph 26.01.

<sup>3</sup> *Ibid* paragraph 20.14.

<sup>4</sup> *Ibid* paragraph 20.16.

<sup>5</sup> They often arise by implication: see Wylie *op cit* paragraph 4.13.

based upon common law principles, but there are some statutory provisions of relevance.

## **A        Agricultural Tenancies**

13.03    Various provisions governing notices to quit were contained in the nineteenth century legislation relating to tenancies of agricultural and pastoral holdings. For example there were various sections in the *Landlord and Tenant (Ireland) Act 1870* dealing with notices to quit,<sup>6</sup> and further provisions in the *Notices to Quit (Ireland) Act 1896*. These provisions ceased to have much relevance with the disappearance of agricultural tenancies as a consequence of farmers acquiring the freehold under the *Land Purchase Acts*. There are signs of a revival in recent years,<sup>7</sup> largely confined to cases where a lease or tenancy is necessary if some particular subsidy or grant is to be obtained. It may be, therefore, that this subject will become of increasing significance again. The Commission takes the view that the whole subject of future agricultural tenancies, and what modern legislation would be appropriate, should be considered as a separate exercise in the Landlord and Tenant Project. It will, therefore, review the nineteenth century legislation referred to above as part of that exercise.

## **B        Residential Tenancies**

13.04    Various provisions relating to “notices of termination”<sup>8</sup> concerning tenancies of houses are contained in section 16 of the *Housing (Miscellaneous Provisions) Act 1992*. These require the notice to be in writing and to be served not less than 4 weeks before the date on which it is to take effect.<sup>9</sup> The *Residential Tenancies Bill 2003* would introduce much more detailed provisions to govern termination of tenancies of dwellings.<sup>10</sup> These are designed to be

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<sup>6</sup>        Eg sections 57, 58 and 69.

<sup>7</sup>        The “disapplying” of provisions in the nineteenth century *Landlord and Tenants Act* by the *Land Act 1984* (section 3), which was intended to facilitate a revival of agricultural tenancies, seems to have had a limited impact.

<sup>8</sup>        The 1992 Act does not use the expression “notice to quit”.

<sup>9</sup>        Section 16(1).

<sup>10</sup>       Part 5.

comprehensive and exhaustive, in the sense that such a tenancy could, in future, only be terminated in accordance with the Act's procedures,<sup>11</sup> whatever the reason for the termination.<sup>12</sup> These provisions govern the requirements for a valid notice of termination,<sup>13</sup> the period of notice to be given<sup>14</sup> and the position of sub-tenants when a head-tenancy is terminated.<sup>15</sup> It would clearly be inappropriate for the Commission to comment at this stage on such proposed new legislation promoted by the Government. The issue for this Consultation Paper is whether legislation should be proposed for tenancies not falling into the agricultural or residential categories, namely business tenancies or mixed use tenancies.

## **C Business and Mixed Use Tenancies**

13.05 Business and mixed use tenancies remain governed largely by the common law which has been developed over the centuries. This is characterised by numerous points of doubt and areas of uncertainty.<sup>16</sup> In some instances these concern the actual rule or requirement, for example, in relation to the period of notice whether it should expire on a particular date, such as the anniversary of the commencement of the tenancy, or at the end of a period or on a gale day.<sup>17</sup> In other instances the practitioner is in great difficulty in applying the rules because it is not clear what type of periodic tenancy exists (weekly, monthly, yearly or whatever) or when vital events occurred (such as the date of commencement of the tenancy). The constant risk faced by the practitioner, and, therefore, the client on whose behalf the notice is served, is that the purported notice to quit

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<sup>11</sup> Section 57.

<sup>12</sup> Thus in the case of a breach of obligation by the tenant the landlord would no longer be able to invoke a re-entry clause in order to effect a forfeiture: see Chapter 14 below.

<sup>13</sup> Part 5 Chapter 2.

<sup>14</sup> Chapter 3.

<sup>15</sup> Chapter 4 and the Schedule. Sections 72 and 73 deal with termination in the case of a property occupied by multiple tenants.

<sup>16</sup> See Wylie *op cit* paragraph 23.07.

<sup>17</sup> *Ibid* paragraphs 23.11, 23.13 and 23.14.



which has been served will prove to be invalid. Hence the need to take the precaution of providing a “slip” provision in the notice.<sup>18</sup>

13.06 The Commission is of the view that practitioners would welcome legislation which clarifies the common law rules and introduces some certainty and simplicity. In particular the statutory provisions should be easy to operate, so that in future practitioners can feel secure in the knowledge that a notice which has been served does not run the of risk of being held to be invalid. The Commission is not convinced that it would be appropriate to extend to business and mixed use tenancies the provisions contained in the *Residential Tenancies Bill 2003*. Those are designed to complement the provisions conferring security of tenure on tenancies of dwellings,<sup>19</sup> hence the displacement of other methods of termination usually available.<sup>20</sup> No such displacement is contemplated for business or mixed use tenancies.

13.07 The Commission inclines to the view that in the case of tenancies not covered by specific legislation, like the *Residential Tenancies Bill*, there should be general legislation which provides for matters such as the following: (1) where it is uncertain what category of periodic tenancy exists, a minimum statutory period of notice (say 3 months) should be sufficient; (2) a notice served for the statutory period should be in writing; (3) in any case, whether a common law or statutory period of notice, the notice could be served at any time and end on any date (provided the period of the notice is sufficient); (4) some guidance on the procedure for service.<sup>21</sup> *The Commission provisionally recommends that general statutory provisions to clarify and simplify the law relating to notices to quit should be introduced for all tenancies not covered by specific legislation.*

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<sup>18</sup> See Wylie *op cit* paragraph 23.20.

<sup>19</sup> In Part 4 of the Bill.

<sup>20</sup> Such as forfeiture for breach of obligation: see paragraph 13.04 above.

<sup>21</sup> *Eg* adapting to notices to quit the provisions of section 67 of the *Conveyancing Act 1881* (which apply only to notices served under that Act): see Wylie *op cit* paragraph 23.30.

## **D Sub-Tenants**

13.08 It may be convenient at this point to consider the position of sub-tenants where the head-tenancy is terminated by a notice to quit or, in the case of a fixed term head-tenancy, by exercise of a break or some other option.<sup>22</sup> The position seems to be that in such cases any sub-tenancy is automatically terminated also,<sup>23</sup> without any redress for the sub-tenants unless provided by statute.<sup>24</sup> This is to be contrasted with the position where a head-tenancy is surrendered or bought out by the landlord (so that it merges with the landlord's reversion).<sup>25</sup> The reasoning seems to be that a surrender (or merger) involves a bilateral act between the landlord and head-tenant, which the sub-tenants could not be expected necessarily to anticipate. For this reason the common law took the view that sub-tenants should have protection and this was given statutory recognition in the *Real Property Act 1845*.<sup>26</sup> Similarly, where the head-tenancy is terminated by the landlord forfeiting it for breach of obligation by the head-tenant, the courts again took the view that innocent sub-tenants should have protection. This led to the principle of sub-tenants being entitled to apply for equitable relief against the forfeiture. This too was subsequently given some statutory recognition.<sup>27</sup>

13.09 Unlike in the case of surrender, a notice to quit is said to be a unilateral act which is the standard way of terminating a periodic tenancy and of which any sub-tenant must be taken to have been aware. The problem may occur, however, in particular cases that the sub-tenant is not, in fact, aware of the nature of the head-tenancy, which may have arisen by implication many years previously. Furthermore, the existing law facilitates collusion between the landlord and head-tenant whereby they can act together to get rid of the sub-tenant, *ie*, a notice to quit to determine the head-tenancy (and thereby the sub-tenancy) can be served and then, after it expires, a

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<sup>22</sup> See paragraph 13.01 above.

<sup>23</sup> See the recent discussion by the House of Lords in *Barrett v Morgan* [2000] 1 All ER 481. See also the Court of Appeal in *Pennell v Payne* [1995] 2 All ER 592.

<sup>24</sup> See paragraph 13.11 below.

<sup>25</sup> See Chapter 12 above.

<sup>26</sup> Section 9: see paragraphs 12.04 and 12.06 above.

<sup>27</sup> Section 4 of the *Conveyancing Act 1892*. See paragraph below.

new tenancy can be granted to the head-tenant unencumbered by any sub-tenancy. The same position seems to apply in the case of terminating the head-tenancy by exercise of a break or other option. It was even held in a recent English case that the parties cannot make express provision to counter this, *eg* a provision in the break option in the head-tenancy to the effect that, upon its exercise, any sub-tenancy is to remain in place.<sup>28</sup>

13.10 The Commission has some doubts about whether the reasoning in the English case law is entirely satisfactory, especially where there is the risk of collusion between the landlord and head-tenant. It is arguable that in some cases considerable hardship will be caused to a sub-tenant who has acted in good faith. Instead of having a rigid rule that sub-tenancies are automatically destroyed without redress, it is arguable that at least an equitable jurisdiction in the courts should be available, analogous to that developed in cases of forfeiture.<sup>29</sup> On that basis, whenever a head-tenancy is terminated by a notice to quit or exercise of a break or other option, it would be open to any sub-tenant to apply for relief and to the court to determine, as in a case of forfeiture, what form that relief should take. It would be up to the court to lay down what the future relationship between the head-landlord and sub-tenants should be.<sup>30</sup> In passing the Commission notes that the *Residential Tenancies Bill 2003* contains provisions designed to protect sub-tenants, where a head-tenancy is terminated by a notice of termination under the Act.<sup>31</sup> *The Commission provisionally recommends that, where a head-tenancy is terminated by a notice to quit or exercise of a break or other option, it should be open to any sub-tenant to apply to the court for equitable relief to be granted at the discretion of the court, unless the position is governed by some other statutory provision.*

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<sup>28</sup> *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994. One of the grounds given by Neuberger J for adopting this ruling in the case was the absence of an equivalent of section 9 of the 1845 Act (paragraph 13.08 above) to indicate the future relationship of the landlord and sub-tenants. There would be neither privity of contract nor privity of estate.

<sup>29</sup> Paragraph 13.08 above.

<sup>30</sup> This would overcome the difficulty perceived by Neuberger J in the *Milton Gate* case: see footnote 28 above.

<sup>31</sup> Section 32 and Schedule. Note also sections 69-71 (notice procedures where sub-tenancies exist).

13.11 As indicated in the recommendation made in the previous paragraph, it is possible that sub-tenants may claim other statutory relief.<sup>32</sup> In the case of sub-tenants who would otherwise become entitled to statutory rights under the *Landlord and Tenant (Amendment) Act 1980*, it is provided by section 78 of that Act that where a head-tenancy is terminated “before its normal expiration”, the sub-tenancy survives and the landlord becomes the landlord of the sub-tenancy.<sup>33</sup> What is not clear is what is covered by the words “normal expiration”. In particular, it could be argued that termination of a periodic tenancy is the “normal” way of terminating such a tenancy. Furthermore, it could also be argued that exercise of a break or other option in a lease is a “normal” way of terminating that lease. The Commission is inclined to the view that the potential loss of statutory rights should be a factor which the court should take into account in exercising the jurisdiction suggested in the previous paragraph. *The Commission provisionally recommends that the potential loss of statutory rights should be a factor to be taken into account by the court in considering whether a sub-tenant should be granted relief where the head-tenancy is terminated by notice to quit or exercise of a break or other option.*

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<sup>32</sup> Reference was made earlier to the proposed provisions for sub-tenants of dwellings contained in the *Residential Tenancies Bill 2003*: see paragraph 13.10 above.

<sup>33</sup> Somewhat akin to the provisions of section 9 of the *Real Property Act 1845*: see paragraph 13.08 above.



## CHAPTER 14 FORFEITURE

14.01 The law relating to the landlord's right to forfeit a lease or tenancy for breach of obligation by the tenant is fraught with complexity and uncertainty.<sup>1</sup> The Commission has concluded that some radical reform is needed and this chapter includes numerous recommendations. The first issue which must be addressed, however, is whether the remedy should survive at all,<sup>2</sup> given its draconian effect on the tenant and the possibility that it can be exercised, on occasion, without the landlord obtaining any court order.<sup>3</sup>

### A Statutory Restrictions

14.02 It is important to note that there already exist some statutory restrictions on the landlord's right to forfeit a lease or tenancy by re-entry. Section 27(1) of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978* renders unenforceable a right of re-entry for non-payment of a ground rent in respect of a dwellinghouse whose lessee is entitled to acquire the fee simple under that Act.<sup>4</sup> The reason is, no doubt, that it was considered inappropriate or disproportionate to permit a landlord to take back property, which in substance belongs to the tenant, on the basis of a failure to pay what would invariably be a

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<sup>1</sup> See Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 24.

<sup>2</sup> The English Law Commission has changed its position over the decades, ranging from proposing replacing the remedy with a scheme requiring a court "termination order" in all cases (Law Com No 142 (1985) – *Forfeiture of Tenancies*), to drafting a Bill which dropped the idea of enabling a tenant to obtain a termination order for the landlord's breach of obligation (Law Com No 221 (1994) – *Termination of Tenancies Bill*) to proposing retention of the landlord's right to effect a "peaceable" re-entry without a court order in the case of commercial tenancies (Consultation Document (1998) – *Termination of Tenancies by Physical Re-Entry*).

<sup>3</sup> See further on "peaceable" re-entry paragraph 14.16 below.

<sup>4</sup> On this right see Wylie *op cit* Chapter 31.

very small rent. The *Residential Tenancies Bill 2003* would introduce a much wider restriction of the remedy in the case of tenancies of dwellings. Under section 57(1) of the Bill such a tenancy would be terminated only by following the procedures for termination laid down<sup>5</sup> and could not be terminated “by means of a notice of forfeiture, a re-entry or any other process or procedure”. It would clearly not as yet be appropriate for the Commission to comment on such proposals being promoted by the Government.

14.03 Section 49 of the *Bankruptcy Act 1988* renders a forfeiture provision in a lease to an individual tenant void as against the Official Assignee, so as to stop the landlord using it to deprive the bankrupt tenant’s creditors of a claim to the leasehold interest. It is not entirely clear whether this also renders ineffective peaceable re-entry, as opposed to one following the obtaining of a court order. It is arguable that such a re-entry does not involve the invocation of a “remedy” or commencement of “proceedings” within section 136 of the 1988 Act.<sup>6</sup> If that view were adopted it would seem to be a serious flaw in the protection which the 1988 Act intended to give the tenant’s creditors. The point ought to be clarified. Another point which ought to be clarified is the position where the tenant is a company which becomes insolvent. There appears to be no equivalent of section 49 in the companies legislation,<sup>7</sup> so that a landlord is free to invoke the right of re-entry. *The Commission provisionally recommends that it should be made clear that section 49 of the Bankruptcy Act 1988 cannot be circumvented by a peaceable re-entry and that an equivalent of section 49 ought to apply in the case of a company tenant going into liquidation.*

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<sup>5</sup> Part 5.

<sup>6</sup> This was the view taken by the English courts of the equivalent provision in the *Insolvency Act 1986* (section 285): see *Razzaq v Pala* [1997] 1 WLR 1336; *Re Lomax Leisure Ltd* [1999] 3 All ER 22.

<sup>7</sup> It is not clear that a forfeiture is a “disposition” of the company’s property rendered void by section 218 of the *Companies Act 1963*, or an “attachment, sequestration, distress or execution” rendered void by section 219. A peaceable re-entry would not appear to be “proceedings” which the court may stay or restrain under section 217 or an “action or proceeding” which needs the leave of the court under section 222 after a winding-up order has been made.

14.04 The question remains whether there should be further restrictions on the right of forfeiture, in particular, whether it should remain available in full force<sup>8</sup> in cases involving commercial premises, effectively being, any premises not confined to use as a dwelling. The Commission inclines to the view that it is a very important remedy for landlords in commercial cases and that what is needed is legislation to improve its effectiveness, rather than to restrict or abolish it.<sup>9</sup> *The Commission provisionally recommends that the remedy of forfeiture should remain available to landlords of properties other than dwellings.*

14.05 The discussion in the remainder of this chapter proceeds on the basis that the remedy of forfeiture will remain available to landlords of commercial and mixed use properties. It deals with numerous difficulties concerning the present law, including the procedure for effecting a forfeiture, and the rights of interested parties.

## **B The Right of Forfeiture**

14.06 The common law rule is that, in the absence of an express provision for forfeiture or re-entry, the right exists only for a breach of a “condition” of the lease or tenancy.<sup>10</sup> It is rare nowadays to express obligations in a lease as “conditions”: usually they take the form of “covenants” and so it is important to provide expressly that the landlord may forfeit the lease and re-enter for breach of covenant.<sup>11</sup> It would be helpful to practitioners if the rule were the reverse, *ie*, that the right to forfeit and re-enter for breach of obligation applies to all tenancies (including oral ones) unless it is excluded by statute<sup>12</sup> or an express provision in the particular lease or tenancy agreement. *The Commission provisionally recommends that the right of forfeiture and re-entry should apply to any breach of*

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<sup>8</sup> Apart from restrictions where the tenant becomes insolvent: see paragraph 14.03 above.

<sup>9</sup> *Ie* adopting the view ultimately reached by the English Law Commission: see paragraph 14.01 footnote 2 above.

<sup>10</sup> *Doe d Henniker v Watt* (1828) 8 B & C 308.

<sup>11</sup> *Doe d Wilson v Phillips* (1824) 2 Bing 13.

<sup>12</sup> See paragraphs 14.02-3 above.



*obligation by any tenant unless excluded by statute or an express provision.*

## **C Procedure**

14.07 The procedure to be followed by a landlord wishing to exercise the right to forfeit and re-enter is riddled with complexities and some uncertainty. One problem is that a distinction has to be drawn between forfeiture for non-payment of rent and forfeiture for breach of some other obligation. There are few formalities with respect to the former;<sup>13</sup> in effect there is simply the common law requirement of a prior formal demand for the overdue rent,<sup>14</sup> but that is usually dispensed with by the lease expressly allowing forfeiture in such cases “whether formally demanded or not”.<sup>15</sup> There are no statutory requirements such as are contained for the latter in section 14 of the *Conveyancing Act 1881*.<sup>16</sup> The Commission is not convinced that this distinction is justified any longer and inclines to the view that all forfeitures should be required to follow the same, albeit much simplified, procedure. *The Commission has reached the preliminary conclusion that the same, much simplified, procedure should apply to all forfeitures, whatever the nature of the breach of obligation.*

14.08 The procedure laid down in section 14 of the *Conveyancing Act 1881* for breaches other than non-payment of rent suffers from a number of complexities. One is that there are various exceptions which have been modified over the years,<sup>17</sup> where the landlord does not have to follow the statutory procedure. These relate to covenants or conditions relating to mining leases and where the tenant becomes bankrupt or goes into liquidation and the property involves

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<sup>13</sup> This is one reason why other payments, such as service charges and insurance premiums, are reserved as “additional rent”. See paragraph 9.01 above.

<sup>14</sup> *Bary v Glover* (1859) 10 ICLR 113.

<sup>15</sup> See the precedents in Division L of Laffoy’s *Irish Conveyancing Precedents* (Looseleaf Butterworths).

<sup>16</sup> A view accepted by Carroll J in *Re Erris Investments Ltd* [1991] ILRM 377.

<sup>17</sup> See section 2 of the *Conveyancing Act 1892* and section 35 of the *Landlord and Tenant (Ground Rents) Act 1967*.

agricultural land, mines or minerals, pubs, furnished dwellings or the “personal qualifications” of the tenant are important to the landlord. These convoluted provisions must be of doubtful significance nowadays and are difficult to square with the special legislation relating to bankruptcy and dwellings referred to earlier.<sup>18</sup> *The Commission provisionally recommends that the exclusions from the procedural requirements in section 14 of the Conveyancing Act 1881 should be repealed.*

14.09 The procedural requirements in section 14 apply only to forfeiture of a “lease”, which includes a sub-lease and agreement for a lease.<sup>19</sup> The Commission inclines to the view that the procedural requirements should apply to all tenancies, whether oral or created by a written document. *The Commission provisionally recommends that the procedural requirements should apply to all tenancies, whether created orally or by a written document, and to all agreements for the grant of a tenancy.*

14.10 The section 14 procedure requires the landlord to serve a notice on the tenant covering a number of matters. The formalities for service are governed by section 67 of the Act and seem generally satisfactory. However, it was held in *Foott v Benn*<sup>20</sup> that where the tenant has died, and no representation has been raised, the notice can be served on the person in possession.<sup>21</sup> It might be useful to give statutory recognition to this rule, and that the provisions of section 67 governing affixing or leaving the notice at the premises or sending a registered letter should apply to cover the case where there is no person in possession. In *Bank of Ireland Finance Ltd v McSorley*<sup>22</sup> Murphy J held that a forfeiture notice addressed to and served on only one of two joint tenants was defective. Yet service of a notice to quit

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<sup>18</sup> Paragraphs 14.02-3 above.

<sup>19</sup> But only an enforceable agreement: see *Enock v Jones Estates Ltd* [1983] ILRM 532.

<sup>20</sup> (1844) 18 ILTR 10. See also *Sweeny v Sweeny* (1876) IR 10 CL 375.

<sup>21</sup> By analogy with a notice to quit: see *Kelly v Tallon* (1950) 84 ILTR 196; *Hill v Carroll* [1953] IR 52; *O'Sullivan & Sons Ltd v O'Mahony* [1953] IR 125.

<sup>22</sup> High Court 24 June 1994. Murphy J took the view that the same principle applied to service of a notice to quit.

by one joint tenant is sufficient to end the joint tenancy<sup>23</sup> and there is some authority for the proposition that a service on one is evidence of service on them all.<sup>24</sup> The Commission inclines to the view that the same rule should apply to service on one joint tenant as applies to service by one joint tenant. *The Commission provisionally recommends that a forfeiture notice should be valid, in the case of a dead tenant in respect of whom no representation has been raised, if it is served on the person in possession of the demised premises and that section 67 of the Conveyancing Act 1881 should apply to cover the case where there is no person in possession; further that service upon one joint tenant of a jointly held tenancy should be valid as against all the joint tenants.*

14.11 The requirements as to the contents of the notice laid down in section 14 are also somewhat complicated. The landlord is required to specify three things. The first is the “particular breach complained of”, but it is not entirely clear what degree of detail is required.<sup>25</sup> Nevertheless the Commission considers it to be entirely reasonable to require the landlord to inform the tenant of the breach of obligation justifying the forfeiture.

14.12 The second thing required in the notice is to call upon the tenant to remedy the breach “if the breach is capable of remedy”. Which breaches fall into this category has been a matter of some controversy and in modern times the courts seem to be very reluctant to find that any breach comes within it.<sup>26</sup> Arguably the concept could be dropped. Conversely, section 14 does not require the landlord to specify the remedy sought,<sup>27</sup> but it has been held that the tenant must be given sufficient time in which to remedy the breach.<sup>28</sup> The problem is that what this amounts to may vary from case to case and

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<sup>23</sup> *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 All ER 1; *Harrow London Borough Council v Johnstone* [1997] 1 All ER 929.

<sup>24</sup> *Pollock v Kelly* (1856) 6 ILCR 367.

<sup>25</sup> See the discussion in *McIlvenny v McKeever* [1931] NI 161.

<sup>26</sup> See *ETS Vehicles Ltd v Fargate Developments Ltd* [1997] NI 25, following *Expert Clothing Service and Sales Ltd v Hillgate House Ltd* [1986] Ch 340.

<sup>27</sup> *Piggott v Middlesex County Council* [1969] 1 Ch 134.

<sup>28</sup> *Walsh v Wightman* [1927] NI 1, 11 (*per* Andrews LJ). See also *McIlvenny v McKeever* [1931] NI 161.

so the landlord in a particular case may be left uncertain as to when the forfeiture can be effected. This problem is returned to later.<sup>29</sup>

14.13 The third thing required in the notice is that “in any case” the landlord must call upon the tenant “to make compensation in money for the breach”. This will often not be what the landlord wants, in that, the preference would be for the tenant to rectify the breach. It is, therefore, not surprising that the courts have long taken the view that, notwithstanding the wording of section 14, the landlord need not claim compensation if it is not wanted.<sup>30</sup> It has, as a consequence, been held that a failure to call for it does not invalidate the notice.<sup>31</sup> The Commission is of the view that this requirement should be dropped.

14.14 The Commission inclines to the view that there is scope for simplifying the requirements laid down in section 14 of the *Conveyancing Act 1881*. Arguably all that should be strictly necessary is that before a landlord seeks to forfeit a tenancy for breach of obligation by the tenant, the tenant should be given some warning and the opportunity to rectify the situation. On that basis the minimum requirement should be that the landlord gives notice of the intention to forfeit and specifies the ground, namely, what the alleged breach of obligation is. That should be sufficient to enable the tenant to accept the allegation and rectify the breach or to challenge the allegation. The issue of what time should be allowed bears on when the landlord can proceed with the forfeiture and is discussed below.<sup>32</sup> *The Commission provisionally recommends that the requirements for a forfeiture notice should be simplified and confined to notifying the tenant of the intention to forfeit and identifying the breach of obligation relied upon.*

14.15 Section 14 then goes on to provide that the forfeiture does not operate unless the tenant fails to remedy the breach “within a reasonable time” after service of the notice.<sup>33</sup> Again what is a

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<sup>29</sup> Paragraph 14.15 below.

<sup>30</sup> *Lock v Pearce* [1893] 2 Ch 271.

<sup>31</sup> *Walsh v Wightman* [1927] NI 1, 11 (*per* Andrews LJ)

<sup>32</sup> Paragraph 14.15.

<sup>33</sup> Or to make “reasonable compensation in money, to the satisfaction of the lessor”. See paragraph 14.13 above.

“reasonable time” may vary from case to case. In practice, where the landlord seeks to effect the forfeiture by obtaining a court order for possession,<sup>34</sup> the “reasonableness” will be judged by the court when the action is heard.<sup>35</sup> The position is not so clear where the landlord effects the forfeiture by a “peaceable” re-entry – presumably the onus is on the tenant to bring proceedings to challenge this. This leads to the vital issue of how the landlord effects the forfeiture.

#### **D           Effecting the Forfeiture**

14.16   This is a subject involving several difficulties. First, as indicated in the previous paragraph, it is clear that it is always open to a landlord to effect a “peaceable” re-entry, *ie*, without resorting to any court proceedings.<sup>36</sup> There are, however, a number of problems. One is, as indicated above,<sup>37</sup> that the re-entry may be precipitate, in that insufficient time has been allowed to the tenant to remedy the breach and so the tenant may be entitled to challenge the re-entry.<sup>38</sup> Another is that great care must be exercised, especially if the tenant resists the re-entry, that criminal offences are not committed, ranging from offences against the person (tenant) to offences against the property (*eg*, “forcible entry”<sup>39</sup>). Another is that, having achieved a successful “peaceable” re-entry, the landlord remains subject to the risk that the tenant will subsequently apply for relief against the forfeiture and succeed in this.<sup>40</sup> Thus the landlord must be cautious about re-letting

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<sup>34</sup>       *ie* by an ejectment action: see paragraphs 14.18 and 15.07 below.

<sup>35</sup>       And if the court is not satisfied that the tenant has been given sufficient time the action will fail. See *Crofter Properties Ltd v Genport Ltd* High Court 15 March 1996, Supreme Court 16 March 2001 and 9 July 2002.

<sup>36</sup>       *Sweeney Ltd v Powerscourt Shopping Centre Ltd* [1984] IR 501.

<sup>37</sup>       Paragraph 14.15.

<sup>38</sup>       It is also settled that even though the landlord has physically re-entered and dispossessed the tenant, the tenant may still apply for relief against the forfeiture: *Monument Creameries Ltd v Carysfort Estates Ltd* [1967] IR 462; *Billson v Residential Apartments Ltd* [1992] 1 All ER 141; *WG Clark (Properties) Ltd v Dupre Properties Ltd* [1992] 1 All ER 596.

<sup>39</sup>       See the *Prohibition of Forcible Entry and Occupation Act 1971* which did not repeal earlier legislation like the *Forcible Entry Acts (Ireland) 1634 and 1786*. See the remarks of Carroll J in *Sweeney Ltd v Powerscourt Shopping Centre Ltd* [1984] IR 501, 504.

<sup>40</sup>       See footnote 38 above and paragraph 14.23 below.

the property and about what should be done with goods found on the premises belonging to the tenant and other persons. All this calls into question whether peaceable re-entry should be retained.

14.17 The sort of “self-help” remedy which peaceable re-entry involves has been the subject of much criticism<sup>41</sup> in England, where, nevertheless, the Law Commission there has concluded in its latest pronouncement that it ought to be kept as an “effective management tool” for landlords of commercial properties.<sup>42</sup> Given the current delays which exist in obtaining a court order for possession in Ireland, there is little doubt that landlords here would echo that view. It is important therefore to address those difficulties, because if a solution to these were to be found the need for a self-help remedy may be greatly reduced.

14.18 The difficulties concerning the obtaining of a court order for possession stem from a number of factors. One is that, if peaceable re-entry cannot be achieved, and this must involve actual physical re-entry,<sup>43</sup> such an order must be obtained. This necessitates bringing an ejectment action, but the law relating to the various actions of ejectment is riddled with complexity. This subject is dealt with in the next chapter,<sup>44</sup> but the following points are relevant in the present context.

14.19 In *Bank of Ireland v Lady Lisa Ireland Ltd*<sup>45</sup> it was ruled that an ejectment action<sup>46</sup> to recover possession on the basis of a forfeiture cannot be commenced by a summary summons, but must be begun by a plenary summons, where the action has to be pursued in the High Court. This may involve considerable delay and meanwhile arrears of

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<sup>41</sup> Note the views of the former chairman of the English Law Commission in *Kataria v Safeland plc* [1998] 05 EG 155, 157 (*per* Brooke LJ). See also that Commission’s earlier pronouncements referred to in footnote 2 above.

<sup>42</sup> *Termination of Tenancies by Physical Re-entry: A Consultative Document* (1998) paragraphs 1.6-1.9.

<sup>43</sup> Mere service of the forfeiture notice is not enough: *Bank of Ireland v Lady Lisa Ireland Ltd* [1992] 1 IR 404.

<sup>44</sup> Chapter 15 below.

<sup>45</sup> [1992] 1 IR 404.

<sup>46</sup> Technically it should be an ejectment on the title, but an ejectment for overholding is commonly used: see Wylie *op cit* paragraphs 24.18 and 27.08.

rent and other payments may be accumulating, which may not be recovered.<sup>47</sup> By contrast if the case comes within the jurisdiction of the Circuit Court, the landlord may apply for a summary judgment, notwithstanding the entering by the tenant of an appearance or defence.<sup>48</sup> This contrast in the procedures is clearly unsatisfactory. What is most unsatisfactory is the fact that landlords may be kept out of the property for a substantial period,<sup>49</sup> while substantial losses are accumulating. The Commission inclines to the view that the procedure for effecting a forfeiture requires a radical overhaul and considerable rationalisation.

14.20 One way in which some of the problems referred to in the preceding paragraphs might be dealt with would be to give much greater legal status to the forfeiture notice served on the tenant. What the Commission has in mind is a new statutory form of notice to replace the section 14 forfeiture notice and to operate in respect of all breaches of obligation by a tenant, including non-payment of rent.<sup>50</sup> This new notice, which might be called a Notice of Re-entry, would notify the tenant of the breach of obligation and that the landlord is invoking the right to forfeit the tenancy. In addition to serving the notice on the tenant it would be required that it be lodged with the County Registrar (if the case comes within the Circuit Court jurisdiction) or in the High Court. That lodgement would effect the forfeiture and, if the tenant did not give up possession on the basis of this, it should be open to the landlord to issue summary proceedings for possession.<sup>51</sup> It should also be open to the tenant to enter a defence or to lodge monies in court or to give a suitable undertaking to comply with obligations. This sort of procedure should provide landlords with a reasonably speedy and effective remedy, while at the same time giving the tenant an opportunity of redemption. It is also

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<sup>47</sup> An ejectment for non-payment of rent is a different remedy altogether (not concerned primarily with forfeiture) and, in any event, suffers from its own problems: see paragraphs 8.19 above and 15.04 below.

<sup>48</sup> See paragraph 14.20 below.

<sup>49</sup> At the time of writing it can take two years or more before a plenary hearing in a contested case is heard in the High Court.

<sup>50</sup> See paragraph 14.07 above.

<sup>51</sup> Applications should be by motion, similar to applications for a planning injunction under section 160 of the *Planning and Development Act 2000*. Chapter 15 proposes a radical overhaul of ejectment actions.

arguable that its advantages would outweigh the disadvantages of peaceable re-entry (where it is practicable).<sup>52</sup> *The Commission provisionally recommends that a new procedure for effecting a forfeiture should be introduced, involving service of a Notice of Re-entry on the tenant and lodgement of the Notice in court and, where necessary, issue of summary proceedings for possession.*

## **E Relief against Forfeiture**

14.21 This is another area where a distinction has to be made between forfeiture for non-payment of rent and forfeiture for other breaches of obligation. In the former case the relief is based entirely on the courts' general equitable jurisdiction.<sup>53</sup> In the latter case there is a statutory right to relief under the *Conveyancing Acts*,<sup>54</sup> although it is not clear that this displaces the courts' general jurisdiction.<sup>55</sup> Notwithstanding this difference it is doubtful whether the courts apply any different principles in the two categories of cases.<sup>56</sup> There would appear, therefore, to be a case for the statutory provision to cover all cases. *The Commission provisionally recommends that the right to apply for relief against forfeiture in all cases should be governed by the same statutory provision.*

14.22 There are some points of doubt or difficulty which need addressing. One is that the statutory relief under section 14 of the *Conveyancing Act 1881* is expressed to be available only from the High Court, but nevertheless, it is understood that it is commonly granted in the Circuit Court.<sup>57</sup> This provision in section 14 is clearly an inappropriate restriction, especially when the ejectment proceedings have been brought in the Circuit Court. *The Commission provisionally recommends that relief against forfeiture should be*

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<sup>52</sup> See paragraphs 14.17-18 above.

<sup>53</sup> *Whipp v Mackey* [1927] IR 372; *Cue Club Ltd v Navaro Ltd* Supreme Court 23 October 1996.

<sup>54</sup> Section 14(2) of the 1881 Act; sections 4 and 5 of the 1892 Act.

<sup>55</sup> See *Shiloh Spinners Ltd v Harding* [1973] AC 691, 724-5 (*per* Lord Wilberforce).

<sup>56</sup> See Wylie *op cit* paragraph 24.21.

<sup>57</sup> See the definition in section 2(xviii).



*obtainable from the court in which the ejectment proceedings were or could have been brought.*

14.23 It seems to be settled that the tenant can apply for relief, even after the landlord has obtained a possession order, at any time before the landlord takes possession under the court order.<sup>58</sup> Furthermore if the landlord effects a peaceable re-entry, it appears that the tenant can thereafter still apply for relief,<sup>59</sup> but it is not clear what time-limit applies.<sup>60</sup> This does put the landlord in a difficult position and is one of the disadvantages of such a “self help” remedy.<sup>61</sup> The Commission inclines to the view that the new Notice of Re-entry procedure suggested earlier<sup>62</sup> calls for a reconsideration of the tenant’s right to apply for relief against the forfeiture. Given that service and lodgement of that Notice would bring about a forfeiture, there may be an argument for imposing a statutory time-limit for applications for relief, say one month after service of the Notice on the tenant. In order to bring certainty to the situation the Commission is not inclined to suggest that the court should be given a discretion to extend the time-limit. Instead, it should be open to the court to award damages to any party, for instance a sub-tenant,<sup>63</sup> who can show prejudice through no fault of that party resulting from operation of the time-limit. *The Commission provisionally recommends that there should be a statutory time-limit for applications for relief against forfeiture, but any party who can show prejudice through no fault of that party resulting from operation of the time limit should be able to claim damages.*

14.24 It is provided by section 4 of the *Conveyancing Act 1892* that relief can be claimed by an “underlessee” and section 5 defines this as including “any person deriving title under or from an underlessee”. It is clear that this includes a mortgagee of the lessee’s interest, since this is invariably created by a sub-demise.<sup>64</sup> What is,

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<sup>58</sup> *West v Rogers* (1888) 4 TLR 229; *Rogers v Rice* [1892] 2 Ch 170.

<sup>59</sup> *Billson v Residential Apartments Ltd* [1992] 1 All ER 141.

<sup>60</sup> Presumably, given that it is essentially equitable jurisdiction, the doctrine of *laches* (“delay defeats equity”) may apply.

<sup>61</sup> See paragraph 14.16 above.

<sup>62</sup> Paragraph 14.20 above.

<sup>63</sup> See paragraph 14.24 below.

<sup>64</sup> *Wylie op cit* paragraph 24.23.

perhaps, not so clear is what the position is where the lease is of registered land, because a mortgage of such land can be created only by a charge and not by sub-demise.<sup>65</sup> This point ought to be clarified. *The Commission provisionally recommends that it should be made clear that a chargee of a registered lease is entitled to apply for relief against its forfeiture.*

14.25 Where relief is granted to the tenant, this restores the original tenancy as if no forfeiture had occurred and the landlord can claim rent and other payments accordingly.<sup>66</sup> However, where relief is granted to a sub-lessee or mortgagee under section 4 of the *Conveyancing Act 1892*, the vesting order provided for creates a new tenancy or new security.<sup>67</sup> It is arguable that the court should have discretion to restore the original sub-tenancy, especially if the landlord would prefer this. As the law stands under section 4, it is not clear what the position is as regards rent and other payments in the interim period between the landlord instituting possession proceedings and the sub-lessee or mortgagee obtaining a vesting order for a new tenancy or security.<sup>68</sup> Furthermore it appears that section 4 does not permit the court to grant a new term longer than the sub-tenancy, nor does it give any guidance as to the terms of the new tenancy created by the vesting order.<sup>69</sup> These matters ought to be clarified. *The Commission provisionally recommends that relief against forfeiture granted to a sub-tenant or mortgagee should be capable of restoring the original sub-tenancy or mortgage as if no forfeiture of the head-lease had occurred and that the court should have wide powers to determine the position of the parties accordingly. Where the court decides to confer a new tenancy or*

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<sup>65</sup> Section 62 of the *Registration of Title Act 1964*. There is no equivalent of section 87 of the *English Law of Property Act 1925*, which provides that a charge by way of legal mortgage operates as if the chargee obtained a sub-term less by one day the mortgagor's (lessor's) term: see *Grand Junction Co Ltd v Bates* [1954] 2 All ER 385.

<sup>66</sup> See the discussion in *Maryland Estates Ltd v Bar Joseph* [1998] 3 All ER 193.

<sup>67</sup> *Chelsea Estates Investment Trust Co v Marche* [1955] Ch 328.

<sup>68</sup> *Official Custodian for Charities v Mackey* [1984] 3 All ER 689, on appeal [1985] 2 All ER 1016.

<sup>69</sup> It has been held in England that the court may vary the rent: see *Ewart v Fryer* [1901] 1 Ch 489.

*mortgage it should have power to determine the terms, including power to vary the previous terms applicable to the parties.*

## **F Consequences of Forfeiture**

14.26 The general rule is that a valid forfeiture operates to determine the tenancy in full and thereafter deprives the landlord of any remedies based on continuance of the tenancy.<sup>70</sup> However, it was held by the Northern Ireland Court of Appeal that the landlord can still sue the tenant for damages to compensate for loss arising from the forfeiture, for instance, loss of rent arising from being able to relet only at a lower rent.<sup>71</sup> The Commission considers that this point ought to be confirmed by statute and furthermore that such damages should include costs and expenses incurred by the landlord, for example, from having to advertise the property and having a new lease drawn up. *The Commission provisionally recommends that there should be statutory confirmation that a landlord can claim damages for losses, plus costs and expenses, consequential on having to forfeit the tenancy and relet the premises.*

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<sup>70</sup> *O'Reilly v Gleeson* [1975] IR 258, 274 (*per* Henchy J).

<sup>71</sup> *Rainey Brothers v Kearney* [1990] NI 18.

## CHAPTER 15 EJECTMENT

15.01 An action of ejectment is an action to recover possession of land and so will frequently be resorted to by landlords.<sup>1</sup> There are numerous provisions relating to such actions in *Deasy's Act* and these demonstrate that one of the main problems is the fact that there are several forms of ejectment, each with different rules. This causes considerable confusion amongst practitioners<sup>2</sup> and the case for rationalisation is clear. However, before discussing this subject, it is important to note that, as in the case of forfeiture,<sup>3</sup> there are statutory restrictions on this remedy. This is hardly surprising in that an action of ejectment often has to be resorted to in order to effect a forfeiture against a tenant who refuses to vacate the premises.<sup>4</sup>

### A Restrictions

15.02 Section 27 of the *Landlord and Tenant (Ground Rents) Act 1967* prohibits the bringing of an action for ejectment for non-payment of rent,<sup>5</sup> as part of the protection afforded to tenants entitled to acquire the fee simple.<sup>6</sup> The *Residential Tenancies Bill 2003* will confine landlords of dwellings to obtaining termination of tenancies, and thereby possession, through the proposed new termination procedures.<sup>7</sup> Section 57(i) of the Bill as a consequence provides that

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<sup>1</sup> See Harrison *The Law and Practice relating to Ejectments in Ireland* (Hodges, Figgis & Co Ltd 1903). See also Deale *The Law of Landlord and Tenant in the Republic of Ireland* (Incorporated Council of Law Reporting for Ireland 1968) Part II Chapter 8; Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 27.

<sup>2</sup> Illustrated by *Bank of Ireland v Lady Lisa Ireland Ltd* [1992] 1 IR 404.

<sup>3</sup> See paragraph 14.02 above.

<sup>4</sup> See paragraphs 14.18 above and 15.08 below.

<sup>5</sup> See paragraph 15.05 below.

<sup>6</sup> See Wylie *op cit* chapter 31.

<sup>7</sup> See paragraph 14.02 above.

a tenancy of a dwelling could not be terminated by notice of forfeiture or re-entry “or any other process or procedure”. Apart from such direct restrictions, there are various other indirect restrictions which form part of provisions giving certain tenants statutory rights<sup>8</sup> or security of tenure.<sup>9</sup> These provisions do not call for comment here.

## **B Forms of Ejectment**

15.03 Sections 52-102 of *Deasy’s Act* contain a convoluted set of provisions relating to different forms of ejectment action. As indicated earlier, there is clearly a need for considerable rationalisation and arguably there should be one basic form of ejectment only, capable of being invoked in all cases where a landlord needs a court order to recover possession of the demised premises. This rationalisation should extend to the procedure and many of the provisions in *Deasy’s Act* which relate to this should be governed by rules of court rather than by legislation.<sup>10</sup> *The Commission provisionally recommends that the various forms of ejectment action should be consolidated into one form of action available in all cases where a landlord wishes to recover possession and all matters concerning procedure should be dealt with by rules of court rather than by primary legislation.*

## **C Non-Payment of Rent**

15.04 This is a special statutory action introduced for landlords in the eighteenth century<sup>11</sup> and is governed by sections 52-58 of *Deasy’s Act*.<sup>12</sup> Unlike other forms of ejectment,<sup>13</sup> it is not primarily concerned

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<sup>8</sup> Eg the right of tenants to continue in undisturbed possession pending a final judicial determination of whether a new tenancy or reversionary lease will be granted: see sections 28 and 40 of the *Landlord and Tenant (Amendment) Act 1980*.

<sup>9</sup> Eg the right of tenants and members of their families to remain in possession for the “relevant period” under section 16 of the *Housing (Private Rented Dwellings) Act 1982*. Note also the provisions relating to security of tenure in Part 4 of the *Residential Tenancies Bill 2003*.

<sup>10</sup> Arguably the majority of sections 52-102 fall into this category.

<sup>11</sup> See the discussion in *Russell v Moore* (1880) 8 LR Ir 318; *O’Sullivan v Ambrose* (1892) 32 LR Ir 102; *McSheffrey v Doherty* [1897] 2 IR 191; *Hardman v White* [1946] Ir Jur Rep 68.

<sup>12</sup> See Dowling *Ejectment for Non-payment of Rent* (SLS Legal Publications

with determination of the tenancy and recovery of possession by the landlord. As the name implies, it is more concerned with recovery of arrears of rent and recovery of possession is the ultimate sanction only. This form of action does suffer, however, from serious drawbacks from the landlord's point of view. One is that it can only be invoked when at least one year's rent is in arrear.<sup>14</sup> Few landlords are willing to wait that long before taking action against a defaulting tenant. Another is that even though the landlord has succeeded in obtaining ultimately an order for possession and has re-entered the property on foot of this, the tenant still has the right to apply for "restitution"<sup>15</sup> within six months of the execution of the decree for possession.<sup>16</sup> This has the effect of preventing the landlord who has retaken possession from re-letting the property during the six month period. It is hardly surprising, therefore, that this form of ejectment is rarely used nowadays. *The Commission provisionally recommends that the special form of an ejectment for non-payment of rent should cease to be available.*

#### **D            Deserted Premises**

15.05    This form of action is governed by sections 78 and 79 of *Deasy's Act* and is available where a tenant has deserted or abandoned the premises, leaving them unoccupied or, in the case of agricultural land, the land or the greater portion uncultivated. Again there are drawbacks from the landlord's point of view. The action is available only where half a year's rent is in arrear and there are insufficient goods left in the premises to amount to a "sufficient distress".<sup>17</sup> The procedure is also somewhat complicated, involving the obtaining of, first, a certificate of "desertion" from the District Court and, secondly, on the basis of this an ejectment order from the Circuit Court. Again, it is hardly surprising that this form of action

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(Northern Ireland) 1986).

<sup>13</sup>    *Eg* on the title (paragraph 15.8 below) and for overholding (paragraph 15.09 below).

<sup>14</sup>    Section 52.

<sup>15</sup>    *Ie* an order restoring the tenant to possession.

<sup>16</sup>    Sections 70 and 71.

<sup>17</sup>    See paragraph 8.17 above. As regards the need to search the premises for sufficient distress see *Nestor v O'Neill* [1939] Ir Jur Rep 80.

seems to have fallen into disuse.<sup>18</sup> Where premises have been abandoned it is imperative that the landlord is able to take action to safeguard them urgently. The new Notice of Re-entry procedure for forfeiture proposed in the previous chapter<sup>19</sup> should be capable of adaptation to such cases, and the common form of ejectment action proposed earlier in this chapter<sup>20</sup> should also be available in summary proceedings in such cases.<sup>21</sup> There should, of course, be safeguards for tenants, in that the landlord would have to provide evidence of the desertion or abandonment and undertake to safeguard any tenant's goods left on the premises for a specified time to allow the tenant to reclaim them.<sup>22</sup> If, of course, as will be likely, there are outstanding debts owed, *eg*, rent arrears, the landlord should be permitted to sell the goods and off-set the proceeds against such debts.<sup>23</sup> *The Commission provisionally recommends that the procedures governing deserted or abandoned premises in sections 78 and 79 of Deasy's Act should be replaced by the Notice of Re-entry procedure, backed up by a summary procedure for obtaining a possession order.*

## **E Cottier Tenancies**

15.06 Sections 84-86 of *Deasy's Act* provide for the summary recovery of possession through a District Court order in cases involving "cottier" tenancies. It was pointed out earlier that few, if any, such tenancies must exist nowadays, so that this aspect of the provisions is probably of little relevance.<sup>24</sup> However, it should be noted that there is another aspect to this procedure, hence its common

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<sup>18</sup> It is likely that an ejectment for overholding will be used nowadays: see paragraph 15.09 below.

<sup>19</sup> Paragraph 14.20 above.

<sup>20</sup> Paragraph 15.04 above.

<sup>21</sup> See paragraph 15.10 below.

<sup>22</sup> Some safeguards for third parties would also be needed, *eg*, by requiring notices to be published that the landlord has repossessed the premises and requiring claimants against the tenant to come forward. Utility companies (supplying water, gas, electricity *etc*) should also be notified.

<sup>23</sup> Again notices of the repossession by the landlord should warn third parties who have retained ownership of goods under hiring, hire-purchase, credit sale and similar agreements.

<sup>24</sup> See paragraphs 6.14 and 10.18 above.

description as a “caretaker’s summons”. It entitles the owner of land to recover possession from any person put in possession by permission of the owner as “servant, herdsman or caretaker”. The Commission takes the view that a summary procedure to recover possession should be available against any permissive occupant, whether or not coming within those three categories. Apart from that a summary procedure to recover possession should be available to landlords to cover a wide variety of situations where urgent action is required,<sup>25</sup> for example where tenants overhold<sup>26</sup> or abandon the premises.<sup>27</sup> *The Commission provisionally recommends that the summary procedure for recovery of possession in sections 84-86 of Deasy’s Act should be extended to all categories of permissive occupants and made available to landlords generally in cases where urgent action is required.*

## **F            On the Title**

15.07    An ejectment on the title is the action which should be brought where it is claimed that the tenant has no title to the premises.<sup>28</sup> The classic case is where the landlord claims to have forfeited the lease. In theory it can also be used where the tenant has ceased to have any title, because the tenancy has ended by natural expiration or service of a notice to quit.<sup>29</sup> However, it is most usual in the latter cases for an ejectment for overholding to be brought. The reason for this is that an ejectment on the title cannot be brought in the District Court, whereas an ejectment for overholding can.<sup>30</sup> In the former case the civil bill or summons must be served on every person in actual occupation (or in receipt of rents and profits),<sup>31</sup> whereas in the latter case service on persons in occupation as tenant or sub-tenant

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<sup>25</sup>        Note the extension of the caretaker’s summons procedure to housing authorities under sections 62, 107 and 118 of the *Housing Act 1966*.

<sup>26</sup>        See paragraph 15.08 below.

<sup>27</sup>        See paragraph 15.06 above.

<sup>28</sup>        See Wylie *op cit* paragraph 27.08.

<sup>29</sup>        See Chapter 13 above.

<sup>30</sup>        Wylie *op cit* paragraph 27.13.

<sup>31</sup>        *Ibid* paragraphs 27.09-10.



is sufficient.<sup>32</sup> It is questionable whether these sort of distinctions are necessary or appropriate and this confirms the Commission in its view that rationalisation<sup>33</sup> is needed and one common form of ejectment should replace all the current forms of ejectment.<sup>34</sup> To assist in its deliberations the Commission would welcome views on this matter.

## **G Overholding**

15.08 As mentioned in the previous paragraph this is the form of ejectment action most commonly used nowadays. There are, however, a couple of features worth mentioning. One is that section 76 of *Deasy's Act* entitles the landlord in cases of “wilful” overholding to claim “double” rent for the period of overholding. It would appear that this is rarely done nowadays and the Commission is not convinced that it is appropriate. *The Commission provisionally recommends that the provision for double rent in cases of “wilful” overholding in section 76 of Deasy’s Act should be removed.*

15.09 Section 77 of *Deasy's Act* provides that an action of ejectment for overholding may include a claim for “mesne rates”, ie, damages for trespass arising from the wrongful possession. It would appear that these are recoverable from the date the landlord demanded possession to the date the order for possession is executed.<sup>35</sup> Yet in the case of an ejectment for non-payment of rent apparently the landlord can continue to claim the rent until the date possession is obtained. This may be significant because the existing rent may be well below the current market rent, whereas the tendency nowadays is for mesne rates or profits to be based on the current market rent rather than the former rent.<sup>36</sup> The Commission inclines to the view that in all cases the landlord should be entitled to rent only so long as the tenancy exists and, where a tenant wrongfully fails to vacate the premises, mesne rates or profits based on the going market rent should

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<sup>32</sup> Wylie *op cit* paragraphs 27.13-14.

<sup>33</sup> Paragraph 15.01 above.

<sup>34</sup> Paragraph 15.04 above.

<sup>35</sup> *Meares v Redmond* (1879) 4 LR Ir 533, 546 (*per* Palles CB). In any replacement legislation technical expressions like “mesne rents” or “mesne profits” should be replaced by ones in plainer English, eg “damages”.

<sup>36</sup> *Viscount Chelsea v Hutchinson* [1994] 2 EGLR 61; *Dean and Chapter of Canterbury Cathedral v Whitbread plc* [1995] 1 EGLR 82.

be recoverable from the date the tenancy ends to the date the premises are vacated. *The Commission provisionally recommends that in all cases the landlord should be entitled to rent until the date a tenancy ends, whatever the method of determination, and thereafter should be entitled to mesne rates or profits based upon the current market rent until the tenant vacates the premises.*

## **H            Procedural Matters**

15.10     The Commission would simply reiterate at this point the need to rationalise procedures and to consolidate them into a common set governing the new single form of ejectment proposed earlier.<sup>37</sup> As also mentioned earlier, much of the content of sections 52-102 of *Deasy's Act* relate to matters of procedure best left to rules of courts, which can be amended or revised by subsidiary legislation. Part of this rationalisation should be to remove anomalies and inconsistencies which currently exist between the different forms of ejectment. In future an ejectment, whatever the ground upon which it is based, should be available in the District, Circuit or High Court according to the usual jurisdictional limits and summary orders should be available where the circumstances justify application for such an order. Where the tenant takes the view that statutory rights exist, *eg* to a new tenancy, it should be possible to enter an application by way of counterclaim for this, instead of having to issue a new civil bill.

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<sup>37</sup>            Paragraph 15.04 above.



## CHAPTER 16    LIMITATION OF ACTIONS

16.01    The application of the *Statute of Limitations 1957*, and the doctrine of adverse possession to leasehold situations has proved to be a very controversial area of the law.<sup>1</sup> However, there is no need to go into the subject in this Consultation Paper because it was dealt with in a recent Report published by the Commission.<sup>2</sup>

16.02    It should also be noted that the 1957 Statute contains special provisions relating to tenancies at will<sup>3</sup> and yearly or other periodic tenancies created orally.<sup>4</sup> These provisions were also reviewed by the Commission and were the subject of recommendations in an earlier Report.<sup>5</sup> *The Commission reiterates the recommendations contained in earlier reports relating to limitation of actions, namely its 1989 Report on Land Law and Conveyancing Law: (1) General Proposals (paragraphs 54-55) and its 2002 Report on Title by Adverse Possession of Land.*

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<sup>1</sup>    See, in particular, the Supreme Court's decision in *Perry v Woodfarm Homes Ltd* [1975] IR 104. See also Brady and Kerr *The Limitation of Actions* (2<sup>nd</sup> ed Incorporated Law Society of Ireland 1994) Chapter 4; Wylie *Irish Landlord and Tenant Law* (2<sup>nd</sup> ed Butterworths 1998) Chapter 28.

<sup>2</sup>    *Report on Title by Adverse Possession of Land* (LRC 67-2002). Chapter 3 of this deals particularly with leasehold situations.

<sup>3</sup>    Section 17(1). See Wylie *op cit* paragraphs 4.32-3.

<sup>4</sup>    Section 17(2). See *ibid* paragraphs 4.17 and 4.20.

<sup>5</sup>    *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paragraphs 54-55.



## CHAPTER 17 NEW LEGISLATION

17.01 In accordance with the guiding principles of the Landlord and Tenant Project,<sup>1</sup> it is envisaged that new legislation on the general law of landlord and tenant will consolidate the numerous pre-1922 statutes which remain in force.<sup>2</sup> An important aspect of the Project is a review of this legislation with a threefold purpose: (1) identifying what can be repealed without replacement, as being obsolete, unnecessary or inappropriate in modern times; (2) identifying with respect to what should be retained, any amendments necessary to ensure that what is kept achieves its purpose in the modern context; (3) considering how what is retained can be consolidated so as to make it readily accessible to users (in particular, legal practitioners) and recast in plain language, in accordance with the Commission's *Report on Statutory Drafting and Interpretation: Plain Language and the Law*.<sup>3</sup>

17.02 This review is an on-going exercise and will not be completed until further work is done on the subject of agricultural tenancies.<sup>4</sup> It may, however, be useful at this stage to provide a preliminary list of the pre-1922 statutes, or parts of such statutes relating to landlord and tenant matters,<sup>5</sup> likely to be replaced in the consolidation process. The preliminary list, according to date sequence is:-

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<sup>1</sup> See Introduction paragraph 2 above.

<sup>2</sup> It is, of course, also envisaged that consolidation of post-1922 statutes will occur. The *Consultation Paper on Business Tenancies* (LRC CP21-2003) referred to consolidation of legislation like the *Landlord and Tenant Acts*: see paragraph 3.47.

<sup>3</sup> LRC 61-2000.

<sup>4</sup> See paragraph 10.03 above. The post-1922 ground rents and reversionary leases legislation is also being reviewed.

<sup>5</sup> The remaining parts are likely to be replaced as part of the review of pre-1922 statutes relating to property law generally being carried out as part of the Commission's e-Conveyancing Project.

- 1707 *Administration of Justice Act (Ireland)* (sections 9 and 10)
- 1712 *Distress for Rent Act (Ireland)*
- 1717 *Distress for Rent Act (Ireland)*
- 1721 *Distress for Rent Act (Ireland)*
- 1741 *Distress for Rent Act (Ireland)*
- 1751 *Distress for Rent Act (Ireland)*
- 1796 *Distress for Rent Act (Ireland)*
- 1845 *Real Property Act* (section 9)
- 1846 *Ejectment and Distress (Ireland) Act*
- 1849 *Leases Act*  
*Renewable Leasehold Conversion Act*
- 1850 *Leases Act*
- 1851 *Landlord and Tenant Act*
- 1860 *Landlord and Tenant Law Amendment Act, Ireland*  
*(Deasy's Act)*
- 1868 *Renewable Leaseholds Conversion (Ireland) Act*
- 1870 *Landlord and Tenant (Ireland) Act*
- 1876 *Notices to Quit (Ireland) Act*
- 1881 *Conveyancing Act* (Parts III and XIII)  
*Land Law (Ireland) Act*
- 1882 *Conveyancing Act* (section 11)
- 1888 *Law of Distress and Small Debts (Ireland) Act*
- 1892 *Conveyancing Act* (sections 2-5)
- 1893 *Law of Distress and Small Debts (Ireland) Act*
- 1908 *Law of Distress Amendment Act*
- 1911 *Conveyancing Act* (section 2)

## CHAPTER 18 SUMMARY OF RECOMMENDATIONS

The provisional recommendations contained in this Paper may be summarised as follows:

### **Chapter 1 The Relationship of Landlord and Tenant**

18.01 The Commission concludes that the preliminary practical consequences of section 3 of *Deasy's Act*, for example the removal of the need to retain a reversion or the facilitation of the granting of tenancies of minor rights, have been beneficial and so should be retained as part of the law in Ireland. [Paragraph 1.12]

18.02 The Commission recommends that a lease or tenancy should continue to be regarded as creating an estate or interest in the land in the tenant. [Paragraph 1.16]

18.03 The Commission recommends that any re-enactment or replacement of section 3 of *Deasy's Act* should be a provision of universal application and should say so explicitly. [Paragraph 1.17]

18.04 The Commission recommends that Irish law should retain the notion that all tenancies confer an estate or interest in the tenant and that legislation should make it clear that the absence of this will prevent the relationship of landlord and tenant from arising. [Paragraph 1.18]

18.05 According to the case law the concept of exclusive possession is treated as a negative criterion only in that its absence in a particular case will rule out a tenancy, but its presence will not necessarily result in a ruling in favour of a tenancy. Its presence will simply be regarded as one factor, but not necessarily the determining one, pointing to a tenancy. The Commission has concluded that this is a sensible view for the courts to adopt and recommends therefore that any statutory guidelines should include the requirement of exclusive possession. [Paragraph 1.20]

18.06 The Commission recommends that it should be made clear by statute that the universal rule is that a tenancy does not exist unless



the occupier of the land in question is obliged to pay rent or some other form of consideration in return for the right to occupy. The legislation should, however, specify an exception to this rule to facilitate the continued creation of mortgages by demise or sub-demise, but no other exceptions are contemplated. [Paragraph 1.23]

18.07 The Commission recommends that a tenancy at will should not be regarded as creating the relationship of landlord and tenant and that arrangements involving occupation of land rent free for indefinite periods should be regarded as a form of licence. [Paragraph 1.24]

18.08 The Commission has reached the preliminary conclusion that it should be confirmed that a tenancy at sufferance does not create the relationship of landlord and tenant. [Paragraph 1.25]

18.09 The Commission recommends that new statutory guidelines should require the courts to give effect to the express provisions of documents relating to the occupation or use of land, provided each of the parties has had the benefit of independent legal advice. If such advice has been received, there seems no reason to distinguish between different categories of occupation, such as residential and commercial. Where, however, no such advice has been received, it should remain open to the court to disregard the terms of the agreement, but only if the evidence before it establishes that it does not reflect accurately what all the parties intended. [Paragraph 1.31]

## **Chapter 2 Formalities**

18.10 The Commission is of the view that it would prevent much confusion if expressions such as “contract of tenancy”, “tenancy agreement” and “lease agreement” were avoided both in practice and, most certainly, in legislation. The expression “contract” or “agreement” should be confined to the situation where only a preliminary contract or agreement for the future grant of a lease or tenancy is contemplated. The expressions “lease” or “tenancy” (without any accompanying reference to a contract or agreement) should be confined to the situation where a lease or tenancy (creating the relationship of landlord and tenant) has been granted. The Commission also draws attention to the sometimes confusing use of expressions like “landlord” and “tenant”, “lessor” and “lessee” and “lease” and “tenancy”. It reiterates its view that confusion would be avoided if the expressions “landlord”, “tenant” and “tenancy” were regarded as the generic terms. The expressions “lessor”, “lessee” and “lease” should be confined to situations where the tenancy has been

created by a written document. The Commission provisionally recommends that any new legislation on landlord and tenant law should reflect the use of more precise terminology along the lines suggested here. [Paragraphs 2.04 and 2.05]

18.11 The Commission concludes that it is not appropriate at this stage to recommend reform of the legislation governing contracts for the grant of tenancies. [Paragraph 2.09]

18.12 The Commission recommends that the words “or contract” in section 4 of *Deasy’s Act* should be dropped from any replacement legislation, since that section applies to the grant of a tenancy rather than preliminary contracts for the grant of a tenancy. [Paragraph 2.11]

18.13 The Commission recommends that the alternative of creating a lease in writing, without use of a deed, should remain available in all cases where an oral arrangement is insufficient. [Paragraph 2.12]

18.14 The Commission recommends that section 4 of *Deasy’s Act* should be recast to provide that the following tenancies may be created orally: (i) any periodic tenancy; (ii) any tenancy for a fixed period not exceeding one year, but not a tenancy for a fixed period with an option to renew which, if exercised, would result in the combined periods exceeding one year. [Paragraph 2.15]

18.15 The Commission recommends that the provisions of sections 23 and 24 of *Deasy’s Act*, which concern proof of execution and proof of title, should be retained in some form. [Paragraph 2.16]

18.16 The Commission takes the view that the consequences of failure to comply with a particular set of statutory requirements for exercise of leasing powers should be spelt out in the statute conferring those powers. If that were done there would be no need for provisions like the *Leases Acts 1849 and 1850*. On that basis the Commission recommends that the *Leases Acts 1849 and 1850* should be repealed without replacement. [Paragraph 2.17]

18.17 The Commission recommends that section 5 of *Deasy’s Act* should be repealed without replacement. [Paragraph 2.19]

18.18 The Commission provisionally recommends that section 6 of *Deasy’s Act* should be repealed and replaced by a comprehensive

set of statutory provisions governing determination of periodic tenancies. [Paragraph 2.20]

18.19 The Commission is of the view that the provisions of section 7 of *Deasy's Act* governing surrender are basically sound. [Paragraph 2.21]

18.20 The Commission provisionally recommends that the replacement of section 7 of *Deasy's Act* should be expanded to give guidelines as to what constitutes a surrender by act and operation of law. [Paragraph 2.22]

18.21 The Commission recommends that the law governing the effect of variations of tenancies should be clarified so as to make it clear that, unless the parties decide otherwise, a variation may be achieved without the need for a surrender and regrant. Such a variation should be capable of being carried out either by execution of a deed or instrument in writing setting out the variation or by way of endorsement on the existing lease. [Paragraph 2.24]

18.22 The Commission takes the view that section 8 of *Deasy's Act* should be clarified to make it clear that the position of sub-tenants is also preserved. [Paragraph 2.25]

18.23 The Commission is of the view that both section 9 of the *Real Property Act 1845* and section 78 of the *Landlord and Tenant (Amendment) Act 1980* should be preserved. [Paragraph 2.26]

18.24 The Commission recommends that section 9 of *Deasy's Act* is basically sound but that it should be made clear that it does not exclude the courts' jurisdiction to apply equitable principles such as the doctrine of estoppel. [Paragraph 2.29]

### **Chapter 3 Successors in Title**

18.25 The Commission recommends that the duplicate statutory provisions governing successors in title (sections 12 and 13 of *Deasy's Act* and sections 10 and 11 of the *Conveyancing Act 1881*) should be amalgamated into a single provision or set of provisions, which should also remove the inconsistencies and uncertainties which exist in the current statutory provisions. [Paragraph 3.01]

18.26 The Commission recommends that the position of successors in title following assignment by the tenant should be governed by a provision based on section 12 of *Deasy's Act*: the new provision should extend to all obligations intended to be part of the

tenancy, but it should be open to the original parties to prescribe expressly that particular obligations are personal to them and are not to bind successors in title. [Paragraph 3.05]

18.27 The Commission recommends that the position of successors in title following assignment by the landlord should be governed by the same principles as apply following assignment by the tenant. [Paragraph 3.07]

18.28 The Commission recommends that section 14 of *Deasy's Act* should form the basis of the law governing the position of an assignee of both the landlord's and tenant's interest, but without prejudice to liability for continuing breaches of obligation; the requirement to give notice of an assignment on, in order to secure a discharge from further liability, should apply to both landlord and tenant assignees. [Paragraph 3.10]

18.29 The Commission recommends that section 15 of *Deasy's Act* should be amended to enable the parties to contract out of it and to extend it to cover a landlord assignee. [Paragraph 3.11]

18.30 The Commission recommends that section 16 of *Deasy's Act* should be extended to discharge tenants holding under an oral tenancy. [Paragraph 3.13]

18.31 The Commission recommends that section 16 of *Deasy's Act* should be amended so that the landlord's consent need merely be in writing. [Paragraph 3.14]

18.32 The Commission recommends that section 16 of *Deasy's Act* should be amended to make it clear that it does not exclude the courts' jurisdiction to apply equitable principles such as the doctrine of estoppel. [Paragraph 3.15]

18.33 The Commission recommends that, where a tenant is not required by the terms of the tenancy to seek consent to an assignment, the protection provided by section 16 of *Deasy's Act* should nevertheless apply only where consent to the assignment is given by the landlord. [Paragraph 3.16]

18.34 The Commission recommends that a provision equivalent to section 16 of *Deasy's Act* should be introduced to protect original landlords. [Paragraph 3.17]

18.35 The Commission recommends that the new statutory provisions to govern the position of successors in title should deal

comprehensively with part assignments and should make explicit provision for severance or apportionment of rights and obligations as between all parties interested in the demised premises. [Paragraph 3.20]

18.36 The Commission recommends that the new statutory provisions to govern the position of successors in title should contain “default” provisions to govern part assignments by tenants in which the landlord did not join. [Paragraph 3.21]

18.37 The Commission recommends that section 19 of *Deasy’s Act*, which would appear to restrict the head-landlord’s ability to seek forfeiture for non-payment of head-rent in respect of the portion of the premises occupied by the sub-tenant, should be repealed without replacement. [Paragraph 3.24]

18.38 The Commission recommends that section 20 of *Deasy’s Act*, which entitles the head-landlord, where the head-tenant defaults in paying the head-rent, to require the sub-tenant to pay directly to the head-landlord so much of the sub-rent as will discharge the arrears of head-rent, should be repealed without replacement. [Paragraph 3.25]

18.39 The Commission recommends that section 21 of *Deasy’s Act* should be repealed without replacement. [Paragraph 3.26]

#### **Chapter 4 Fixtures**

18.40 The Commission recommends that the law relating to tenants’ fixtures should be replaced by a new statutory provision which entirely displaces the common law and all existing statutory provisions. The fundamental principle of this should be that the ownership and other rights attaching to any items of property installed in the premises should be as set out in the lease. The statutory provision should then provide a set of “default” provisions to operate in the absence of such express provisions. The essence of the default provisions should be:-

- (i) they should apply to any property installed in the premises by the tenant, for whatever reason;
- (ii) the right of removal should be exercisable in all cases, subject to the landlord’s right to compensation for any damage, however substantial, caused to the demised premises by the removal;

- (iii) the right of removal must be exercised before the tenancy ends, unless the determination is unexpected and not due to some act or default by the tenant; in the latter case the tenant should have an additional period up to two calendar months in which to remove property;
- (iv) in any event the right of removal must be exercised when the tenant vacates the demised premises; if it is not so exercised the landlord should have the right to remove tenant's property for safekeeping and storage;
- (v) the landlord should have the right to dispose of property so removed, if not reclaimed by the tenant, or other party entitled to it, within 14 days of the tenant vacating the demised premises;
- (vi) the cost of storage should be recoverable from the tenant, and be payable before property is returned on a reclaim, or else be deductible, together with any other expenses reasonably incurred, from the proceeds of disposal before these are paid over to the tenant;
- (vii) it should be made clear that in all cases the tenant's right of removal continues to apply to renewed, extended and varied tenancies;
- (viii) it should also be made clear that it is open to a landlord and tenant to agree expressly that the tenant may remove property installed in accordance with an undertaking or obligation contained in the agreement for lease or lease itself;
- (ix) it should also be made clear that a tenant's fixtures should be regarded as remaining in the ownership of the tenant and at no point belonging to the landlord. [Paragraph 4.19]

## **Chapter 5 Obligations**

18.41 The Commission recommends the enactment of a new statutory scheme governing landlord and tenant obligations. Such new legislation should:-

- (i) promote purposes such as law reform, consumer protection and statutory "default" provisions;

- (ii) take the form of a scheme of “overriding” obligations (not subject to contracting-out) and “default” obligations (subject to variation by the parties);
- (iii) limit the number of “overriding” obligations in order to accord with the philosophy of freedom of contract, especially in the context of business tenancies;
- (iv) not interfere with legislation, both recent and impending, governing residential tenancies. [Paragraph 5.11]

## **Chapter 6 Landlord’s Obligations**

18.42 The Commission recommends that the obligation for good title in section 41 of *Deasy’s Act* should be retained as a “default” provision applicable to all tenancies, but limiting all liability to the landlord’s own actions and those of persons claiming through, under or in trust for the landlord. [Paragraph 6.03]

18.43 The Commission recommends that in any replacement of section 41 of *Deasy’s Act* the provision for quiet enjoyment should have the more limited scope invariably adopted in express covenants in leases. [Paragraph 6.05]

18.44 The Commission recommends that the more limited replacement of the obligation relating to quiet enjoyment in section 41 of *Deasy’s Act* should contain an overriding obligation. [Paragraph 6.08]

18.45 The Commission recommends that sections 81-83 of *Deasy’s Act*, which deal with cottier tenancies, should be repealed without replacement. [Paragraph 6.14]

18.46 In the light of the *Residential Tenancies Bill 2003* the Commission recommends that it is not appropriate in general to make further statutory provision for repairing obligations on landlords. [Paragraph 6.16]

18.47 The Commission recommends that where the lease or terms of a tenancy fail to deal with repairing obligations exhaustively, or not at all, any residual responsibility should lie with the landlord. [Paragraph 6.18]

18.48 The Commission has reached the provisional conclusion that the provisions governing landlords in the draft Defective

Premises Bill appended to its earlier *Report on Defective Premises* (LRC 3-1982) should be adopted, but extended to cover “legal” unfitness as well as “physical” unfitness. [Paragraph 6.19]

18.49 The Commission recommends that the provisions of section 12(1)(e) and (f) of the *Residential Tenancies Bill 2003*, dealing with the landlord’s obligation to notify the tenant of his or her identity or that of any agent, should be extended, in some form or other, to tenancies in general. [Paragraph 6.22]

18.50 The Commission recommends that there is no need to extend the provisions of section 12(1)(d) of the *Residential Tenancies Bill 2003*, which deals with the landlord’s obligation to return or repay any deposit paid by the tenant on entering into the agreement for the tenancy or the lease, to other categories of tenancies. [Paragraph 6.23]

18.51 The Commission recommends that Part 7 of the *Residential Tenancies Bill 2003* should not be extended to other categories of tenancies. [Paragraph 6.24]

## **Chapter 8 Rent and Other Payments**

18.52 The Commission recommends that the implied obligation to pay rent contained in section 42 of *Deasy’s Act* should be replaced by an overriding obligation to pay the rent or other consideration payable under a tenancy of any kind, however created. [Paragraph 8.03]

18.53 The Commission recommends that there should be a statutory “default” provision to specify how, but not on what days, the rent or other consideration should be paid. [Paragraph 8.04]

18.54 The Commission has reached the preliminary conclusion that the statutory provisions relating to apportionment of rent and other periodical sums payable under a tenancy should be consolidated into a single provision operating as a “default” provision. [Paragraph 8.08]

18.55 The Commission recommends that in the case of non-residential tenancies it would be appropriate to provide a statutory model of rent review clauses, to operate as “default” provisions or as provisions which the parties would be free to adopt in full or adapt to the circumstances of the particular case. [Paragraph 8.12]

18.56 The Commission recommends that section 66 of *Deasy’s Act* ought to be extended to cover all cases of recovery of possession



by the landlord thereby making it clear in every instance that rent is recoverable up to the date possession is actually recovered. [Paragraph 8.14]

18.57 The Commission recommends that the confusion between an action for use and occupation of land and an action for *mesne* profits or rates in *Deasy's Act* should be cleared up. [Paragraph 8.15]

18.58 The Commission recommends that the tenant's right of set-off under section 48 of *Deasy's Act* ought to apply to all proceedings which a landlord may bring against the tenant in respect of breach of obligations by the tenant. [Paragraph 8.16]

18.59 The Commission recommends that the tenant's right of set-off should apply to both liquidated and unliquidated damages. A tenant who wishes to avail of set-off should be obliged to substantiate the claim in the landlord's proceedings in order to avoid unnecessary delays. [Paragraph 8.17]

18.60 The Commission recommends that the right of distress should now be abolished altogether. [Paragraph 8.18]

18.61 The Commission recommends that the statutory action of ejectment for non-payment of rent should be abolished. [Paragraph 8.20]

18.62 The Commission provisionally recommends that section 42 of *Deasy's Act* should be clarified by replacing it with a "default" provision imposing on the tenant liability, where applicable to the particular demised premises, for rates, outgoings and charges for services enjoyed by the tenant and certain taxes which are usually passed on to the tenant, such as VAT. [Paragraph 8.22]

## **Chapter 9 Service Charges**

18.63 The Commission is of the view that while some legislation on the subject of service charges may be appropriate, it must reserve its position on its form, scope and content until it has carried out a further review of multi-unit developments. [Paragraph 9.04]

## **Chapter 10 Repairs**

18.64 The Commission recommends that the law of waste should no longer apply as between landlords and tenants and that sections 25-39 of *Deasy's Act* should be repealed without direct replacement. [Paragraph 10.05]

18.65 The Commission recommends that the tenant's repairing obligation under section 42 of *Deasy's Act* should not extend to putting into repair or improving the condition in which the demised premises are in at the commencement of the tenancy. [Paragraph 10.07]

18.66 The Commission recommends that the tenant's repairing obligation under section 42 of *Deasy's Act* should not involve strict liability and should require only that reasonable steps are taken to deal with any disrepair promptly. [Paragraph 10.08]

18.67 The Commission recommends that the tenant's repairing obligation under section 42 of *Deasy's Act* should contain an exclusion for normal wear and tear. [Paragraph 10.09]

18.68 The Commission recommends that the scope of the tenant's implied repairing obligation under section 42 of *Deasy's Act* should be extended, but on a variable basis only, along the lines of section 16(c), (d), (e) and (g) of the *Residential Tenancies Bill 2003*. [Paragraph 10.10]

18.69 The Commission recommends that the landlord should have the variable right to carry out repairs for which the tenant is responsible and to recoup the costs and expenses from the tenant. [Paragraph 10.13]

18.70 The Commission recommends that it should be made clear by statute that it is permissible for a landlord to make it a condition of consent to an assignment that either the tenant or the assignee complies with repairing obligations within a reasonable specified time. [Paragraph 10.14]

18.71 The Commission recommends that, if a tenant continues in possession despite the landlord's failure to perform obligations such as a repairing one, the tenant should have a statutory right to claim damages for physical inconvenience and discomfort. [Paragraph 10.15]

18.72 The Commission recommends that consideration should be given to providing tenants with some sort of statutory right to withhold rent and other payments where the landlord's breaches of obligations have a substantial effect on the tenant's enjoyment of the demised premises. [Paragraph 10.20]

## Chapter 11 Insurance

18.73 The Commission recommends that the protection conferred on certain lessees by section 30 of the *Landlord and Tenant (Ground Rents) Act 1967*, concerning freedom to seek insurance cover, should be extended to all tenants. [Paragraph 11.02]

18.74 The Commission recommends that a covenant or agreement excepting an obligation to do repairs relating to “insured risks” should still exclude the tenant’s right of surrender under section 40 of *Deasy’s Act*. [Paragraph 11.04]

18.75 The Commission recommends that the tenants coming within section 40 of *Deasy’s Act* should be entitled to require that insurance proceeds be used to reinstate the premises, as an alternative to surrender. If no insurance proceeds are available, or if the premises cannot be reinstated, the tenant should still have the right of surrender, but in the latter case, the landlord should be entitled to any insurance proceeds which are available. [Paragraph 11.07]

18.76 The Commission considers that the following matters would be appropriate for inclusion in a set of statutory “default” provisions appropriate for all tenancies:

- (i) Liability for insuring the building or buildings, and any landlord’s fixtures, to be on the landlord;
- (ii) Liability for insuring the contents, including tenant’s fixtures, to be on the tenant;
- (iii) Insurance for buildings to be for full reinstatement cost, plus an inflationary element where the landlord arranges, but the tenant pays for it; the tenant to be entitled to explanation of how cover and costs are calculated and, if considered necessary, to insist upon increase in cover;
- (iv) Where there is a deficiency in insurance proceeds to cover the risk supposed to be covered, party under obligation to arrange insurance to make up deficiency;
- (v) Tenant to be liable for increases in premiums relating to hazardous activities only if responsible for those activities;
- (vi) Tenant to be under an obligation not to do or permit anything to be done on the demised premises which might

cause the insurance policy to become void or voidable, or which results in an increase in premiums;

(vii) Building's insurance to be in joint names of the parties, or to be expressed for the benefit of both, so as to avoid the tenant being faced with a subrogation claim by the landlord's insurer, unless the insurer agrees to waive subrogation rights.

## **Chapter 12 Determination of Tenancies**

18.77 The Commission recommends that there should be a statutory presumption that where a greater and lesser estate in land vest in the same person or body, without any intermediate estate or interest being outstanding, a merger takes place, unless the instrument bringing about the vesting contains an express provision to the contrary; such a merger should not prejudice any rights, including statutory rights, previously attaching to the lesser (leasehold) estate. [Paragraph 12.03]

18.78 The Commission recommends that section 9 of the *Real Property Act 1845*, which provides that where a head-tenant acquires a head-landlord's interest, the head-landlord's reversionary interest should be deemed thereafter to be the reversion on the sub-tenancies, should extend to all tenancies. [Paragraph 12.04]

18.79 The Commission reiterates its recommendation in paragraph 12 of its *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) for legislation confirming that partial merger may occur in appropriate cases. [Paragraph 12.05]

18.80 The Commission recommends that the position following disclaimer of the tenancy on insolvency of the tenant should be clarified and that there should be no distinction between an individual and company tenant. In both cases, unless there are third party interests to be protected, the tenancy should be regarded as terminated and the landlord should be left to make claims in the insolvency. [Paragraph 12.08]

18.81 The Commission has reached the preliminary conclusion that the doctrine of denial of title should no longer apply as between landlords and tenants. [Paragraph 12.09]

18.82 The Commission recommends that section 65 of the *Conveyancing Act 1881* should be repealed without replacement. [Paragraph 12.11]

18.83 The Commission recommends that general statutory provisions to clarify and simplify the law relating to notices to quit should be introduced for all tenancies not covered by specific legislation. [Paragraph 13.07]

18.84 The Commission recommends that, where a head-tenancy is terminated by a notice to quit or exercise of a break or other option, it should be open to any sub-tenant to apply to the court for equitable relief to be granted at the discretion of the court, unless the position is governed by some other statutory provision. [Paragraph 13.10]

18.85 The Commission recommends that the potential loss of statutory rights should be a factor to be taken into account by the court in considering whether a sub-tenant should be granted relief where the head-tenancy is terminated by notice to quit or exercise of a break or other option. [Paragraph 13.11]

#### **Chapter 14 Forfeiture**

18.86 The Commission recommends that it should be made clear that section 49 of the *Bankruptcy Act 1988* cannot be circumvented by a peaceable re-entry and that an equivalent of section 49 ought to apply in the case of a company tenant going into liquidation. [Paragraph 14.03]

18.87 The Commission recommends that the remedy of forfeiture should remain available to landlords of properties other than dwellings. [Paragraph 14.04]

18.88 The Commission provisionally recommends that the right of forfeiture and re-entry should apply to any breach of obligation by any tenant unless excluded by statute or an express provision. [Paragraph 14.06]

18.89 The Commission has reached the preliminary conclusion that the same, much simplified, procedure should apply to all forfeitures, whatever the nature of the breach of obligation. [Paragraph 14.07]

18.90 The Commission recommends that the exclusions from the procedural requirements in section 14 of the *Conveyancing Act 1881* should be repealed. [Paragraph 14.08]

18.91 The Commission recommends that the procedural requirements should apply to all tenancies, whether created orally or by a written document, and to all agreements for the grant of a tenancy. [Paragraph 14.09]

18.92 The Commission recommends that a forfeiture notice should be valid, in the case of a dead tenant in respect of whom no representation has been raised, if it is served on the person in possession of the demised premises and that section 67 of the *Conveyancing Act 1881* should apply to cover the case where there is no person in possession; further that service upon one joint tenant of a jointly held tenancy should be valid as against all the joint tenants. [Paragraph 14.10]

18.93 The Commission recommends that the requirements for a forfeiture notice should be simplified and confined to notifying the tenant of the intention to forfeit and identifying the breach of obligation relied upon. [Paragraph 14.14]

18.94 The Commission recommends that a new procedure for effecting a forfeiture should be introduced, involving service of a Notice of Re-entry on the tenant and lodgement of the Notice in court and, where necessary, issue of summary proceedings for possession. [Paragraph 14.20]

18.95 The Commission recommends that the right to apply for relief against forfeiture in all cases should be governed by the same statutory provision. [Paragraph 14.21]

18.96 The Commission recommends that relief against forfeiture should be obtainable from the court in which the ejectment proceedings were or could have been brought. [Paragraph 14.22]

18.97 The Commission recommends that there should be a statutory time-limit for applications for relief against forfeiture, but any party who can show prejudice through no fault of that party resulting from operation of the time limit should be able to claim damages. [Paragraph 14.23]

18.98 The Commission recommends that it should be made clear that a chargee of a registered lease is entitled to apply for relief against its forfeiture. [Paragraph 14.24]

18.99 The Commission recommends that relief against forfeiture granted to a sub-tenant or mortgagee should be capable of restoring

the original sub-tenancy or mortgage as if no forfeiture of the head-lease had occurred and that the court should have wide powers to determine the position of the parties accordingly. Where the court decides to confer a new tenancy or mortgage it should have power to determine the terms, including power to vary the previous terms applicable to the parties. [Paragraph 14.25]

18.100 The Commission recommends that there should be statutory confirmation that a landlord can claim damages for losses, plus costs and expenses, consequential on having to forfeit the tenancy and relet the premises. [Paragraph 14.26]

## **Chapter 15 Ejectment**

18.101 The Commission recommends that the various forms of ejectment action should be consolidated into one form of action available in all cases where a landlord wishes to recover possession and all matters concerning procedure should be dealt with by rules of court rather than by primary legislation. [Paragraph 15.03]

18.102 The Commission recommends that the special form of an ejectment for non-payment of rent should cease to be available. [Paragraph 15.04]

18.103 The Commission recommends that the procedures governing deserted or abandoned premises in sections 78 and 79 of *Deasy's Act* should be replaced by the Notice of Re-entry procedure, backed up by a summary procedure for obtaining a possession order. [Paragraph 15.05]

18.104 The Commission recommends that the summary procedure for recovery of possession in sections 84-86 of *Deasy's Act* should be extended to all categories of permissive occupants and be made available to landlords generally in cases where urgent action is required. [Paragraph 15.06]

18.105 The Commission recommends that the provision for double rent in cases of "wilful" overholding in section 76 of *Deasy's Act* should be removed. [Paragraph 15.08]

18.106 The Commission recommends that in all cases the landlord should be entitled to rent until the date a tenancy ends, whatever the method of determination, and thereafter should be entitled to *mesne* rates or profits based upon the current market rent until the tenant vacates the premises. [Paragraph 15.09]

18.107 The Commission reiterates the recommendations contained in earlier reports relating to limitation of actions, namely *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989 at paragraphs 54-55) and *Report on Title by Adverse Possession of Land* (LRC 67-2002). [Paragraph 16.02]





**APPENDIX      LIST OF LAW REFORM COMMISSION  
PUBLICATIONS**

First Programme for Examination of Certain Branches of the Law with a View to their Reform (December 1976) (Prl 5984)	€0.13
Working Paper No 1-1977, The Law Relating to the Liability of Builders, Vendors and Lessors for the Quality and Fitness of Premises (June 1977)	€1.40
Working Paper No 2-1977, The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects (November 1977)	€1.27
Working Paper No 3-1977, Civil Liability for Animals (November 1977)	€3.17
First (Annual) Report (1977) (Prl 6961)	€0.51
Working Paper No 4-1978, The Law Relating to Breach of Promise of Marriage (November 1978)	€1.27

Working Paper No 5-1978, The Law Relating to Criminal Conversation and the Enticement and Harbours of a Spouse (December 1978)	€1.27
Working Paper No 6-1979, The Law Relating to Seduction and the Enticement and Harbours of a Child (February 1979)	€1.90
Working Paper No 7-1979, The Law Relating to Loss of Consortium and Loss of Services of a Child (March 1979)	€1.27
Working Paper No 8-1979, Judicial Review of Administrative Action: the Problem of Remedies (December 1979)	€1.90
Second (Annual) Report (1978/79) (Prl 8855)	€0.95
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