



The Law Reform Commission
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

ON

BUSINESS TENANCIES

(LRC CP 21 - 2003)

IRELAND

The Law Reform Commission

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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 Act.

To date the Commission has published sixty eight Reports containing proposals for reform of the law; eleven Working Papers; twenty Consultation Papers; a number of specialised Papers for limited circulation; *An Examination of the Law of Bail*; and twenty three 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.

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners. The Commissioners at present are:

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Landlord and Tenant Law Project 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 and Local Government. Professor Wylie is the author of several standard texts on Irish property law, including *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998). The other members of the Working Group are:

The Hon Mr Justice Declan Budd, President of the Law Reform Commission
Commissioner Patricia T Rickard-Clarke (Convenor)
John F Buckley, Solicitor (former judge of the Circuit Court)
Ruth Cannon, Barrister-at-Law
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Professor David Gwynn Morgan

Brónagh Maher was Secretary and Legal Researcher to the Group until September 2002, when she was replaced by Mark O’Riordan

The Group has met regularly over the past 18 months, and during this period has refined the scope of the Project, as outlined below. In furtherance of this, it has concentrated initially on business tenancies, which is the subject of this Consultation Paper.

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INTRODUCTION

Scope of the Project

1 Landlord and Tenant Law is a vast area of the law which can be categorised in a number of ways. One common method is by reference to the nature of the property (usually referred to as “demised premises”) the subject of the tenancy, *eg*, agricultural tenancies, residential tenancies and business tenancies. Agricultural tenancies used to be very common in Ireland but largely disappeared as a consequence of the nineteenth and twentieth centuries’ legislative scheme usually referred to as the “Land Purchase Acts”.¹ Under this scheme, Irish tenants had the freehold vested in them, and their titles were compulsorily registered in the Land Registry.² For decades, the culture amongst Irish farming families, ever mindful of past struggles to acquire ownership to the land they farmed, militated against recreation of tenancies. Another factor against creation of tenancies was that, until recent times, old nineteenth century legislation conferring various rights on agricultural tenants remained on the statute book.³ The Irish farming community took the view that the possible impact of this old legislation rendered it sensible to avoid creating tenancies of agricultural land.⁴ An attempt to stimulate interest in agricultural tenancies was made in the 1980s. The *Land Act 1984* “disapplied”⁵ the old nineteenth century legislation just

¹ See Lyall *Land Law in Ireland* (2nd ed Round Hall 2000) Chapter 15; Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraph 1. 38 *et seq*.

² Originally under the *Local Registration of Title (Ireland) Act 1891*; see now section 23 (1) (a) of the *Registration of Title Act 1964* and Fitzgerald *Land Registry Practice* (2nd ed Round Hall 1995) Chapter 24.

³ *Eg* provisions in such Acts as the *Landlord and Tenant (Ireland) Act 1870* and *Land Law (Ireland) Acts 1881, 1887 and 1896*.

⁴ This was the primary reason why the very common practice of making conacre and agistment “lettings” (which do not create a tenancy of the land) developed: see Wylie, *op cit*, paragraph 20.25 *et seq*; also *Irish Landlord and Tenant Law* (2nd ed. 1998) paragraph 3.20 *et seq*.

⁵ The Act does not purport to repeal the old legislation: see section 3 (1).

referred to in relation to any “lease of agricultural land”⁶ made after the passing of that Act.⁷ At the same time, certain financial institutions⁸ joined with the Irish Farmers’ Association and other organisations⁹ to promote a “Master Lease” for agricultural land.¹⁰ Nevertheless, an investigation by the Commission has revealed that agricultural leases remain comparatively rare, and are usually only created where it is necessary to create a leasehold interest in order to take advantage of some statutory or other official scheme, such as the milk quota or farm retirement schemes. The result is that the Commission has put the subject of agricultural tenancies to one side and has concentrated on other, more pressing aspects of landlord and tenant law. It is important to emphasise, however, that the Commission will return to this subject, partly because some of the general law, including some statute law,¹¹ clearly applies as much to agricultural tenancies as it applies to other categories. The likelihood is, then, that the Commission will have a number of recommendations to make with respect to agricultural tenancies.

2 Residential tenancies form a very important category with obvious relevance to modern-day methods of occupying property. Notwithstanding the drive in recent decades towards owner-occupation of houses, the huge rise in property prices experienced in the major urban areas of Ireland over the past decade has resulted in large sections of the population being priced out of the market. The demand for residential property available for letting is strong, and is likely to remain so in the foreseeable future. This is an area of the law which has long been the subject of legislative control. Indeed, the original Rent Acts were enacted nearly a century ago¹² and,

⁶ This means “any instrument in writing (whether under seal or not) containing a contract of tenancy in respect of land used wholly or mainly for the purpose of agriculture, horticulture or forestry”: section 3(2).

⁷ *Ie* 16th December 1984.

⁸ *Eg* Allied Irish Banks.

⁹ The Law Society and Royal Institution of Chartered Surveyors.

¹⁰ *Cf* The Irish Auctioneers and Valuers Institute Long Term Agricultural Land Lease.

¹¹ An obvious example, reflecting the era in which it was enacted, is “Deasy’s Act” (*Landlord and Tenant Law Amendment Act, Ireland 1860*).

¹² As part of the scheme introduced at Westminster at the beginning of the First World War: see *Increase of Rent and Mortgage Interest (Restrictions) Acts 1915-1919* (consolidated in the *Increase of Rent and Mortgage Interest (Restrictions) Act 1920*): see Coghlan *Law of Rent Restriction in Ireland* (3rd

although envisaged as a temporary scheme, it took on a permanent status in subsequent decades.¹³ Over time, the extent of rent control reduced and, by the 1980s, when aspects of the legislation were declared unconstitutional by the Supreme Court, probably no more than 15% of the total private rented sector came with it. The new legislative scheme, introduced in 1982, applies to a declining proportion of the sector. In 1999, the Minister for Housing and Urban Renewal established a Commission on the Private Rented Residential Sector, with a broad remit to examine the working of the landlord and tenant relationship in respect of residential tenancies in the private rented sector. Particular issues to be addressed were: improving security of tenure of tenants of dwellings; maintaining a fair and reasonable balance between the respective rights and obligations of landlords and tenants; increasing investment in, and the supply of, residential accommodation for renting. It reported in July 2000,¹⁴ and the Government accepted most of its proposals,¹⁵ which are now in the course of implementation.¹⁶ For obvious reasons, the Law Reform Commission accepts that it would be inappropriate for its Project Group to review matters covered by the 2000 Report and the projected legislation. It must, however, be recognised that there are many aspects of landlord and tenant law applicable to residential property which are not so covered. This includes large areas of the general law (both common law and statute law) and special legislation, such as the ground rents legislation.¹⁷ The Commission will, in due course, subject this to detailed examination, but, not surprisingly, it has concentrated first on the third main category of tenancies.

3 Business tenancies came to be recognised as a discrete area of landlord and tenant law towards the end of the nineteenth century, when the issue of special legislation to protect business tenants was

ed 1979) at 1-3.

¹³ Following the Report of the Black Tribunal - *Agreed Report of the Town Tenants (Occupational Tenancies) Tribunal* (1941), the major enactments were the *Rent Restrictions Acts 1946* and *1960*.

¹⁴ *Report of the Commission on the Private Rented Residential Sector* (Department of the Environment and Local Government July 2000).

¹⁵ Press Release 5 January 2001.

¹⁶ A *Housing (Private Rented Sector) Bill* is in the course of drafting, but has not yet been introduced to the Oireachtas.

¹⁷ *Landlord and Tenant (Ground Rents) Acts 1967-1987*: see Wylie *op cit* Chapter 31.

debated. Enactment of such legislation was recommended by a British Parliamentary Committee in 1889.¹⁸ This was not acted upon at Westminster for England and Wales, but was, in fact, for Ireland in the form of the *Town Tenants (Ireland) Act 1906*.¹⁹ The 1906 Act was subsequently replaced by the *Landlord and Tenant Act 1931*,²⁰ and this, in turn, was eventually replaced by the *Landlord and Tenant (Amendment) Act 1980*.²¹ That Act has since been amended on several occasions, as a result of review by the Landlord and Tenant Commission, chaired by Judge Charles Conroy²² and, more recently, the Law Reform Commission.²³ However, this has, for the most part, resulted only in piecemeal changes to the details of the scheme originally laid down in the 1931 Act. Doubts have continued to be expressed as to whether the scheme now accords with the significant changes which have occurred in the Irish business and commercial environment in recent times. Furthermore, the legislative scheme now comprises a complex jumble of Acts of the Oireachtas, which are not easy to access and understand. The Commission has examined this subject in considerable detail, and the result of its deliberations is set out in this Consultation Paper.

4 It is important to reiterate that the categorisation of landlord and tenant law by reference to the nature of the property is only one, albeit convenient, method of categorisation. The Commission will, on occasion, adopt other categorisations. For example, another method is by reference to the source or derivation of the law, whereby a distinction is often drawn between the common law (as largely developed over the centuries by the courts) and statute law. Further sub-categorisation may be appropriate. For example, statute law can be sub-divided. Some statute law is specific, in the sense that it is confined to and dealing with a particular area of landlord and tenant law or type of tenancy. Examples have already been referred to such

¹⁸ *Report on the Select Committee on Town Holdings*.

¹⁹ Legislation for England and Wales did not occur until the enactment of the *Landlord and Tenant Act 1927*.

²⁰ See Hughes and Dixon, *Landlord and Tenant Act 1931* (1932); Moore and Odell, *Landlord and Tenant Act 1931* (Falconer 1932).

²¹ See Wylie *op cit* Chapter 30.

²² See further Chapter 1 below.

²³ The latest amending Act was the *Landlord and Tenant (Amendment) Act 1994*, which was based, to some extent, on recommendations contained in the Law Reform Commission's *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) Chapter 5.

as the ground rents legislation and rent restriction/private rented dwellings legislation. Other statute law is more general in character, in that its application tends to cover most, if not all, types of tenancy, whatever the nature of the property. Good examples of this are Deasy's Act 1860 and the various provisions governing leases in the *Conveyancing Acts 1881-1911*. All this will be the subject of review by the Project Group, and the Commission will publish recommendations in due course.

Guiding Principles

5 It may be useful at this stage to state the guiding principles adopted by the Commission in carrying out its work. The overall aim is to produce a legislative scheme which draws a fair balance between the interests of landlords and tenants. Particular attention will be paid to the issue of whether there is a continuing need for legislative interference in private contractual arrangements. In the context of commercial property, regard must be had to the business environment in which landlords and tenants have to operate. A primary consideration should be ensuring that the law, particularly in the form of legislation, does not force landlords and tenants into arrangements which suit neither group. Statutory control and protection should be confined to situations where there is an obvious need, such as where there is a substantial risk that one party may take unfair advantage of the other. These broad aims should be furthered by achieving the following objectives:

- (1) Removal of obsolete provisions, including ancient legislation;
- (2) 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;
- (3) Recasting legislative provisions which create uncertainties or have proved to be ambiguous;
- (4) Introducing new provisions to meet what are perceived to be gaps in existing law;

- (5) Consolidating existing legislation (together with any new provisions to be introduced) in order to make the law much more accessible and easily understood.

Outline of this Consultation Paper

6 This Paper begins in Chapter 1 with an outline of the current law relating to business tenancies, as enshrined in the legislative scheme comprising the *Landlord and Tenant (Amendment) Acts 1980, 1984, 1989 and 1994*. Chapter 2 then outlines, by way of contrast, the position in other jurisdictions, in particular the United Kingdom and other parts of Europe. Chapter 3 considers some fundamental issues which the Commission considers underpin much of the existing law, such as: the scope for “contracting-out” of the legislative scheme; entitlement to statutory rights; the position of the State; restrictions on statutory rights and compensation provisions. Chapter 4 draws attention to numerous detailed, but nonetheless significant, doubts, uncertainties and other apparent flaws in the existing legislative scheme. Both Chapter 3 and Chapter 4 contain the Commission’s provisional recommendations for changes in the scheme.

The Consultation Process

7 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 on this topic following further consideration of the issues and consultation with interested parties. They are likely to be incorporated in a Report covering the whole scope of the Project as outlined above, and which may be based partly on the response to other Consultation Papers which may be issued in due course. Submissions on the recommendations included in this Consultation Paper are welcome, as they will greatly assist the Commission in their further deliberations. To that end, those who wish to do so are requested to make their submissions in writing to the Commission by 30 June 2003.

CHAPTER 1 BUSINESS TENANCIES LAW IN IRELAND

1.01 The principle of conferring statutory protection on tenants occupying property, including business premises, in the urban areas of Ireland¹ gained currency in the latter half of the nineteenth century. Irish MPs made several, but unsuccessful, attempts to persuade the Westminster Parliament to enact appropriate legislation.² When, eventually, they did succeed at the beginning of the twentieth century, the British Government of the day insisted upon watering down the provisions in question. In particular, the Bill which was enacted as the *Town Tenants (Ireland) Act 1906*³ did not include the provisions in the original draft giving tenants a right to renewal of expired leases at rents to be fixed, in default of agreement, by the court,⁴ or, alternatively, a right to purchase the freehold at a price to be fixed again, in default of agreement, by the Court. Instead, the 1906 Act simply contained provisions for compensation for improvements made by tenants,⁵ and for disturbance on termination of a tenancy.⁶

1.02 The general view seems to have been that even the limited provisions of the 1906 Act were flawed. For example, the amounts of

¹ Hitherto, most attention had been focussed on the position of agricultural tenants, and much of the nineteenth century legislation related to such tenants.

² See Rents and Leasehold Commission *Report on Reversionary Leases under the Landlord and Tenant Acts* (Pr 2532 1954) Chapter 2; Ground Rents Commission *Report on Ground Rents* (Pr 7783 1964) Chapter 2.

³ For commentary on this Act see eg Lehane and Coles *Town Tenants (Ir) Act 1906* (1906); Clery, Kennedy and Dawson *Town Tenants (Ir) Act 1906* (1913).

⁴ In those days the County Court.

⁵ *Ie* tenants using premises in towns and villages wholly or partly for business purposes: see sections 1-4 and 13.

⁶ These provisions applied to business tenants wherever the premises were situated: see sections 5 and 7.

compensation⁷ awarded for disturbance by the courts have been described as “absurdly small,” and, by the time of the establishment of the State, the view was taken that the Act was largely a dead letter.⁸ Pressure for reform was exhibited in Dáil Éireann,⁹ and eventually, in January 1927, a Commission, under the chairmanship of Mr Justice Meredith was appointed to inquire into the law governing the relationship of landlord and tenant in respect of “holdings in urban districts, towns and villages”. Its final report, presented on 27 April 1928, recommended, in essence, that the principles of statutory protection conferred on agricultural tenants during the nineteenth century should be adopted for urban tenants. Those principles were known as the “Three Fs”, viz a fair rent, free sale and fixity of tenure.¹⁰ These recommendations were acted upon with the enactment of the *Landlord and Tenant Act 1931*, which repealed the *Town Tenants (Ireland) Act 1906*.¹¹

1.03 It is important to note that much of the 1931 Act applied to urban tenants generally, *ie*, whether occupying their premises for business or residential purposes.¹² This Consultation Paper is concerned with the provisions of particular relevance to business tenants, which fall into three main categories. First, a statutory right to a new tenancy on determination of the old one was conferred, with the terms, including the rent, to be fixed by the Court in default of

⁷ Compensation could only be awarded where the landlord had refused to renew a lease without “good and sufficient” cause: see *O’Leary v Deasy* [1911] 2 IR 450; *Samuels v O’Brien* (1914) 48 ILTR 249; *Haughton v Ross* (1915) 49 ILTR 72.

⁸ Rents and Leasehold Commission, *op cit*, paragraph 21. A more favourable view of the Act’s operation seems to have been taken in the North: see *Report of the Departmental Committee on the Law of Landlord and Tenant* (Cmd 96 1929); Dawson *Business Tenancies in Northern Ireland* (SLS Legal Publications (NI) 1994) Chapter 1.

⁹ Bills to apply the protection conferred by nineteenth century legislation on agricultural tenants to urban tenants (of both residential and business premises) were promoted by Captain W Redmond TD: Bills No 13 of 1924 and No 42 of 1926.

¹⁰ They were finally enshrined for agricultural tenants in the *Land Law (Ireland) Act 1881*: see Wylie *Irish Land Law* (3rd ed Butterworths 1997) paragraph 1.47 *et seq*.

¹¹ Section 9 of the *Landlord and Tenant Act 1931*.

¹² See Hughes and Dixon *Landlord and Tenant Act 1931* (1932); Moore and Odell *Landlord and Tenant Act 1931* (Falconer 1932).

agreement by the parties.¹³ Secondly, where, under the Act, the landlord was entitled to refuse a new tenancy on certain grounds,¹⁴ the tenant would be entitled to compensation for disturbance.¹⁵ Thirdly, again where a tenant had to give up his tenancy, he would be entitled to compensation for improvements which he had made to the premises.¹⁶ Apart from this, the Act introduced new statutory provisions governing covenants in leases, designed to ensure that common prohibitions or restrictions on matters like “alienation” (eg assignment of his interest) by the tenant did not operate unfairly.¹⁷ Although the 1931 Act¹⁸ has long since been replaced by subsequent legislation, its provisions have remained the core of the statutory rights enjoyed by business tenants, and all later legislation has largely involved its refinement and amendment.

1.04 The operation of the 1931 Act was subjected to review by the Landlord and Tenant Commission, established in 1966 under the chairmanship of Judge Conroy.¹⁹ Its Report, issued in 1967,²⁰

¹³ Part III of the Act. This met two of the “Three Fs”, viz fixity of tenure and fair rent.

¹⁴ Not involving any breach of the old tenancy agreement: see section 22 of the Act.

¹⁵ See again Part III of the Act.

¹⁶ Part II of the Act.

¹⁷ Part VI of the Act. This met the other element of the “Three Fs”, viz free sale.

¹⁸ The Act contained detailed provisions governing tenants holding property under comparatively long leases, ie building leases, or sub-leases of such leases, and conferred the right to a “reversionary” lease: see Part V. These provisions were amended by the *Landlord and Tenant (Reversionary Leases) Act 1943*: see Deale *Landlord and Tenant Acts 1931 and 1943* (Browne and Nolan 1952). They were later replaced by the *Landlord and Tenant (Reversionary Leases) Act 1958*, which, in turn, was replaced by Part III of the *Landlord and Tenant (Amendment) Act 1980* (see also further modifications in the *Landlord and Tenant (Amendment) Act 1984*). See Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998) Chapter 31.

¹⁹ The Commission’s Terms of Reference also covered operation of the reversionary leases legislation and ground rents legislation enshrined originally in the *Landlord and Tenant (Ground Rents) Act 1967*. The 1967 Act resulted from the recommendations of the Ground Rents Commission, established in 1961 also under the chairmanship of Judge Conroy: see *Report on Ground Rents* (Pr 7783 1964).

²⁰ *Report on Occupational Tenancies under the Landlord and Tenant Act, 1931* (Pr No 9685 1967).

eventually resulted, after much delay, in the replacement of the 1931 Act²¹ by the provisions of the *Landlord and Tenant (Amendment) Act 1980*. As stated earlier, although the 1980 Act made numerous modifications to the 1931 provisions, in accordance with the Landlord and Tenant Commission's recommendations, it preserved the core of the 1931 scheme. Thus, Part II of the 1980 Act deals with the rights to a new tenancy, Part IV²² deals with compensation for improvements and disturbance, and Part V deals with covenants in leases. All these matters are dealt with in this Consultation Paper.

1.05 These provisions in the 1980 Act have since been the subject of further modification by a number of Acts, viz the *Landlord and Tenant (Amendment) Acts 1984*,²³ *1989*²⁴ and *1994*.²⁵ The 1994 Act puts into effect, to some extent, recommendations made by the Law Reform Commission.²⁶ It represents, albeit in a limited way, something of a radical departure from one of the core principles of the legislative scheme, viz that it is not possible to "contract-out" of the statutory rights.²⁷ This is a subject which is taken up in a later Chapter,²⁸ but first it may be helpful to preface the detailed discussion of the statutory scheme operating in Ireland with an outline of the position in other jurisdictions with which this State has most dealings, viz other parts of the European Union and the United States of America. The next chapter provides such an outline.

²¹ The 1931 Act was repealed by the 1980 Act: see section 11 (1) and the Schedule.

²² Part III deals with reversionary leases.

²³ Most of this Act deals with modifications to the reversionary leases and ground rents legislation, and, in the context of this Consultation Paper, only sections 14 and 15 are relevant.

²⁴ A short Act excluding leases granted to companies trading in the Custom House Docks Area from the statutory provisions. Although envisaged as a temporary measure, initially to operate for a 5-year period, it has been extended, most recently until 2004: see *Landlord and Tenant (Amendment) Act 1980 (Section 13(4)) Regulations 1999* (SI No 52 of 1999).

²⁵ This Act, originally introduced as a Private Member's Bill by Alan Shatter TD, Solicitor, was much modified during its passage through the Oireachtas.

²⁶ *Report on Land Law and Conveyancing Law: (1) General Principles* (LRC 30-1989) paragraphs 63-64.

²⁷ This principle is enshrined in section 85 of the 1980 Act (replacing section 42 of the 1931 Act).

²⁸ See Chapter 3 below.

1.06 There is one final point to be made. Notwithstanding the existence of the legislative scheme outlined above, many aspects of commercial leases remain unregulated. This is especially so with regard to the terms of a typical commercial lease. In recent decades, the format of such leases has tended to take on a fairly standard structure.²⁹ Usually referred to as an “FRI” (*ie*, full repairing and insurance) lease, its terms are designed to ensure that, after the landlord (or those providing the funding) has made the initial investment in acquiring and developing the property, the return on the investment is maximised, and the full costs and expenses of running and maintaining the property are borne by the tenant.³⁰ The pattern has developed of such leases being granted for substantial terms (terms of 25 years and upwards have been usual) with regular (every 5 years has been typical³¹) rent reviews through the term, usually on an “upwards-only” basis.³² The major redevelopment of commercial property in the State’s urban areas which has occurred in recent decades has been facilitated by the use of such leases. The most obvious example of this has been the development of huge retail operations, such as shopping centres, involving major international brand names. The impact on the State’s economy has been immense. In formulating its final proposals, the Commission will be concerned not only with the issue of whether the existing legislative scheme militates against good commercial practice. It will also be concerned with the issue of whether existing practice is entirely satisfactory, and whether some aspects should have a degree of statutory regulation.

²⁹ See the Introductory Note and Precedents in Division L of Laffoy’s *Irish Conveyancing Precedents* (Butterworths).

³⁰ Either directly by covenant to carry out repairs and maintenance, take out insurance, *etc* or, where the premises comprise part only of a multi-let building, indirectly by reimbursing expenditure incurred by the landlord, in retaining responsibility for the building as a whole, by way of a service charge payable in addition to rent.

³¹ Much does, of course, depend on the state of the market, and there have been signs recently of the tenants resisting lengthy terms and/or seeking inclusion in the lease of a “break” option, *ie*, a right to terminate the lease early, usually on a specified date. This date will often be linked to a rent review, because it may be the revised rent which makes up the tenant’s mind whether to exercise the break option.

³² *Je* it is specified that, on any review, the rent for the new period will not be lower than the existing (“passing”) rent. This applies even though the open market rent, upon which most rent reviews are based, may have fallen and be below the passing rent.

CHAPTER 2 OTHER JURISDICTIONS

General Conclusions

2.01 A study of the position in other jurisdictions, especially the rest of the European Community, with regard to business leases and their statutory control suggests that there are similarities, but also some major differences.¹ This chapter draws some general conclusions, and then sets out some specific features of the extent of statutory control in other jurisdictions which seem worthy of note.

2.02 It would appear that there is a marked difference between Ireland and parts of the United Kingdom, on the one hand, and other parts of Europe, on the other hand, with regard to commercial leasing. As mentioned in the previous Chapter,² much commercial leasing in Ireland, as in the United Kingdom, is based on relatively long-term FRI institutional leases. In a recent comparative study³ of office leases between the United Kingdom and six continental European⁴ countries (and the United States of America), it was found that leasing practices in these other jurisdictions differed considerably. The overall conclusion was that the United Kingdom has a much less flexible leasing structure than the other jurisdictions. For example, the typical term of the lease is usually at least 50% longer⁵ than in other jurisdictions. Leases in other jurisdictions are much more likely to contain break options for tenants, and rent review provisions provide for downwards as well as upwards reviews. Tying reviews to

¹ Much useful comparative material is contained in Hurndall (ed) *Property in Europe: Law and Practice* (Butterworths 1998).

² Paragraph 1.06 above.

³ Commissioned by the British Council for Offices and entitled *Office Leases: Can the UK be more flexible?* (May 2002).

⁴ France, Germany, Holland, Italy, Spain and Sweden.

⁵ Taking 15 years as typical for office leases in the UK. Typical terms elsewhere ranged from 5 years in Spain and Sweden (also common in Germany, Holland and the USA), 6 years in Italy to 9 years in France.

some form of indexation⁶ rather than the open market is also common in other jurisdictions. Landlords in other jurisdictions tend to retain much more responsibility for repairs, with tenants usually only responsible for minor, internal repairs. Notwithstanding the use of shorter leases, the study found that this did not equate necessarily to a rapid turnover of tenants.⁷ The study concluded that shorter leases “may necessitate a closer and more symbiotic relationship between occupiers and investors/owners”.⁸

2.03 The position in the United Kingdom, in particular in England and Wales, has come under increasing scrutiny by the British Government in recent times. In particular, pressure has been put on the property market to adopt a much more flexible leasing practice, with the threat that legislation would be introduced to enforce this if no response was made. In fact, this resulted in the launch⁹ on 22nd April 2002 of a *Code of Practice for Commercial Leases*. Although this is essentially a voluntary code devised by the property market, the Government made it clear that it expects landlords to adhere to it, wherever possible, when negotiating terms of new leases. It aims to promote flexibility in commercial leases by recommending that landlords offer tenants, during lease negotiations, alternatives to the terms of standard FRI leases, *eg* choices over the term of the lease; downwards as well as upwards rent reviews; alternative bases for rent reviews (indexation instead of open market), and alternatives to full repairing obligations on the tenant.¹⁰ It remains to be seen what impact the Code will have on commercial leasing practice in England and Wales over the next few years.

2.04 Much of what was found in the study of office leases with respect to the United Kingdom applies equally to Ireland. Our commercial leasing practice over recent decades has been greatly influenced by the fact that many of the financial institutions funding

⁶ *Eg* linked to domestic consumer price indices. In France, the residential construction cost index is used.

⁷ *Eg* the average office move in the City of London of every 7 years is to be contrasted with every 12 to 15 years in Paris and Madrid.

⁸ British Council for Offices *Office Leases: Can the UK be more flexible?* (May 2002) at i.

⁹ By the British Minister for Housing (Sally Keeble MP).

¹⁰ For discussion of the Code see Organ “Change Now, or Have Change Thrust Upon You” 27 April 2002 *Estates Gazette* 146; Keating “The Commercial Code: A New Lease of Life?” (2002) 152 *NLJ* 1033.

commercial developments have been based in the United Kingdom. Similarly, many of the trading organisations taking leases in multi-unit developments like shopping centres and industrial estates have been UK-based. Thus, both landlords and tenants have created expectations based on their UK experience. However, as is discussed in the next chapter, often such expectations cannot be met entirely, because the extent of statutory control in Ireland seems to exceed even that existing in the UK. This becomes an even greater problem where institutions wishing to invest in, and organisations wishing to trade from, commercial property in Ireland come from jurisdictions where leasing practices are much more flexible and less subject to statutory control. This applies particularly to the other two regions with which Ireland has major commercial contact – continental Europe and the USA.

2.05 *The Commission's preliminary conclusion is that the current state of commercial leasing law and practice in Ireland is so out-of-line with that in the rest of Europe and other jurisdictions with which Ireland has substantial trading links (such as the USA), that serious consideration must be given to a radical overhaul.* As the subsequent Chapters of this Consultation Paper discuss, issues which need addressing include whether there remains a need for any statutory regulation of business tenancies. If there is still a need, it is important to identify where that need lies, and this leads to a consideration of what form any regulation should take, what its scope should be, and how far it should be possible to contract-out of the regulation. Consideration must also be given to the danger that statutory regulation may have adverse, perhaps even unforeseen, consequences in that it introduces inflexibility and artificiality to commercial transactions which should be left to function in the market without such elements. The law, including any legislative scheme, should facilitate commercial transactions and not dictate terms, except where there is a substantial risk of unfairness occurring.

Statutory Control

2.06 The ensuing paragraphs outline the extent of statutory control in other jurisdictions. It begins with the jurisdiction which has had most influence on commercial leasing practice in Ireland, *viz* the United Kingdom.

The United Kingdom

2.07 The position in the United Kingdom varies between its constituent parts. So far as England and Wales are concerned, although the idea of providing statutory protection for business tenants was suggested in the Report of the Select Committee on Town Holdings presented in 1889, no legislation was enacted until the passing of the *Landlord and Tenant Act 1927*.¹¹ This was despite the fact that Irish MPs at Westminster secured legislation for Ireland much earlier, in the form of the *Town Tenants (Ireland) Act 1906*.¹² The 1927 Act was largely¹³ confined to providing compensation rights to business tenants whose leases had expired. A general right to a new lease upon determination of an existing lease was not conferred until the enactment of the *Landlord and Tenant Act 1954*.¹⁴ More details of the operation of this Act are given below.¹⁵

2.08 By contrast, there is very little statutory protection of business tenants in Scotland. There is no equivalent of the English *Landlord and Tenant Acts 1927* and *1954*, and so no general provisions governing security of tenure or compensation for disturbance or improvements. There is simply some limited protection for tenants of shops.¹⁶

2.09 The position in Northern Ireland is now very similar to that in England and Wales. Originally, of course, the *Town Tenants (Ireland) Act 1906* applied equally to that part of Ireland, where it seems to have been regarded as being more effective than in the South.¹⁷ It was supplemented by the enactment of the *Business Tenancies Act (NI) 1964*, which was modelled on the English 1954 Act.¹⁸ The operation of the 1964 Act was reviewed by the Law

¹¹ See Hill and Redman *Law of Landlord and Tenant* (18th ed Butterworths 1995) Volume 1, Division B.

¹² Paragraph 1.01 above.

¹³ An exception to this related to “shops”, where a right to a new lease was conferred if the goodwill built up by the tenant would remain attached to the premises even if the tenant vacated them: see sections 4-7.

¹⁴ Part II of the Act.

¹⁵ Paragraph 2.10 below.

¹⁶ Paragraph 2.26 below

¹⁷ See paragraph 1.02 above.

¹⁸ See generally Dawson *Business Tenancies in Northern Ireland* (SLS Legal

Reform Advisory Committee for Northern Ireland, and its Report, published in 1994¹⁹ led to the replacement of both the 1906 and 1964 Acts by the modified statutory scheme contained in the *Business Tenancies (NI) Order 1996*. The 1996 Order is considered further below.²⁰

England and Wales

2.10 Part II of the *Landlord and Tenant Act 1954* contains a statutory scheme for business tenants not dissimilar to that operating in this State under the *Landlord and Tenant (Amendment) Act 1980*.²¹ It provides security of tenure (by giving a right to a new tenancy upon determination of the existing tenancy), and compensation for disturbance where the landlord successfully opposes the grant of a new tenancy on a ground not based on the tenant's breach of agreement or behaviour. Compensation for improvements remains based on the provisions in Part I of the *Landlord and Tenant Act 1927*. There are, however, substantial differences of detail, some of which are worth noting at this point in view of the discussion of the 1980 scheme in the following chapters of this Consultation Paper.

(i) The Crown

2.11 The 1954 Act binds the Crown like any other landlord,²² but there is provision for ministerial certification that the use or occupation of premises owned by public bodies²³ should be changed by a specified date on the basis that this is requisite for the purposes of the relevant body.²⁴

(ii) Contracting-out

2.12 There is no absolute prohibition on contracting-out of the statutory scheme.²⁵ Instead, the position is this: so far as the right to a

Publications (NI) 1994).

¹⁹ *Report on Business Tenancies* (LRAC No 2).

²⁰ Paragraph 2.20 below.

²¹ See Chapter 1 above.

²² Section 56.

²³ *Eg* government departments and local authorities.

²⁴ Section 57.

²⁵ Section 38 of the 1954 Act, as modified by section 5 of the *Law of Property*

new tenancy is concerned, any agreement which purports to preclude an application or request for a new tenancy, or to provide for termination or surrender of an existing tenancy or for a penalty upon an application or request being made, is void, subject, however, to the right to apply to the court for a fixed term to be granted with an exclusion of new tenancy rights.²⁶ Contracting-out of the right to compensation for disturbance is permitted, except where the tenant has been in occupation for at least five years.²⁷ No guidance is given to the court in sanctioning contracting-out of new tenancy rights in an individual case,²⁸ and the Law Commission has reported that it is very rare for the court to intervene in the parties' application.²⁹

2.13 Subsequently, in March 2001, the British Government published a Consultation Paper³⁰ in which it accepted the Law Commission proposal³¹ that landlords and tenants wishing to contract-out of new tenancy rights should no longer have to make an application to court. Instead, it is proposed³² that in such cases, the landlord should be required to serve a notice in a statutory form on the tenant, indicating that the statutory security of tenure would not apply to the tenancy in question. This notice would contain a prominent "health warning" as set out below:

"Important Notice

You are being offered a lease without security of tenure. Do not sign the lease unless you have read

Act 1969.

²⁶ Or for a surrender of an existing tenancy, excluding acquired rights: see section 38(4).

²⁷ Section 38 (2) and (3). *Cf* compensation for improvements: see section 9 of the 1927 Act. But note paragraph 2.19 below.

²⁸ Indeed, it is not clear that the Court has a discretion in the matter: see *Hagee (London) Ltd v AB Erikson and Larson* [1976] 1 QB 209, 215 (*per* Lord Denning MR).

²⁹ See the 1988 Working Paper No 111 (*Part II of the Landlord and Tenant Act 1954*) paragraphs 3.5.10-15; Law Com No 208 (1992) (*Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II*) paragraph 2.16 (c).

³⁰ Department of the Environment, Transport and the Regions *Business Tenancies Legislation in England and Wales – Consultation Paper*.

³¹ Law Commission of England and Wales No 208 paragraphs 2.17-20.

³² Consultation Paper paragraphs 5-10.

this message carefully and discussed it with your professional adviser.

Normally business tenants enjoy security of tenure – the right to continue occupying their business premises for a further period when the lease ends. Tenants can pursue these rights through the courts if necessary.

If you sign the lease you will be giving up these important statutory rights. *When the lease comes to an end, you will not be able to continue occupying the premises, unless the landlord voluntarily offers you a further term (in which case you would lose the right to ask the court to determine the new rent). You will need to leave the premises. You will be unable to claim compensation for the loss of your business premises, unless the lease specifically gives you this right.*

If you want to ensure that you can remain in the same business premises once the initial lease expires, you should consult your professional adviser about another form of lease which does not exclude the protection of the Landlord and Tenant Act 1954.”

It is proposed that normally the landlord would be required to give this notice at least 14 days before the lease was due to be executed, if contracting-out is to be effective. Where this is not possible, both the landlord and tenant would have to sign a statement setting out why advance notice could not be given and that they agree that it is reasonable to waive it. That statement would also contain the above “health warning”. Additional safeguards would require the tenant to sign a statement that the tenant had read the warning and accepted its consequences, and the lease would contain a note confirming that the warning had been given, and acknowledging that the tenant had read and understood the statement.

2.14 The above proposals are not dissimilar to recommendations made by the Law Reform Commission in an earlier Report,³³ which

³³ *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30-1989) paragraphs 62-64.

were adopted, but to a limited extent only, in the *Landlord and Tenant (Amendment) Act 1994*.³⁴ This subject is taken up again later in this Consultation Paper.³⁵

(iii) *Property covered*

2.15 The 1954 Act is not confined to tenancies of property containing buildings; thus, it has been held to apply to a tenancy of “gallops”, *ie* land used for the training and exercise of racehorses.³⁶ This again is a point taken up later, for it is a curious feature of the Irish statutory scheme that it is confined to tenancies comprising largely built-on land.³⁷

(iv) *New tenancies*

2.16 Under the 1954 Act, in default of agreement between the landlord and tenant, the court can order renewal of the tenancy for whatever term it deems “reasonable in all the circumstances”, up to a maximum of 14 years.³⁸ The British Government, in its recent Consultation Paper³⁹ accepted the Law Commission’s recommendation⁴⁰ that the maximum term should be increased to 15 years, to make it more conveniently divisible into three or five-year periods. Such periods are the common periods for rent reviews.⁴¹

³⁴ See section 4.

³⁵ Paragraph 3.08 below.

³⁶ *Bracey v Read* [1962] 3 All ER 472. See also *Wandsworth London Borough Council v Singh* [1991] 2 EGLR 75. *Cf* incorporeal hereditaments: see *Land Reclamation Co Ltd v Basildon District Council* [1979] 2 All ER 993; *Nevil Long & Co (Boards) Ltd v Firmenich & Co Ltd* (1983) 268 EG 572.

³⁷ Paragraph 3.16 below.

³⁸ Section 33.

³⁹ See paragraph 2.13 above.

⁴⁰ Law Commission of England and Wales No 208 (1992) paragraphs 2.76 – 79.

⁴¹ See paragraphs 3.25 and 4.32 below.

(v) *Grounds of opposition*

2.17 The landlord is entitled, under the 1954 Act, to oppose the grant of a new tenancy on a number of grounds.⁴² Some relate to breach of obligation by the tenant,⁴³ but others relate to the position of the landlord. An example of the latter is where the landlord provides alternative accommodation suitable for the tenant's requirements. Another is where the landlord intends to demolish, reconstruct or redevelop the premises. There is no requirement that the landlord should have planning permission, but the prospect of obtaining this is relevant to the issue of the landlord's "intention".⁴⁴

(vi) *Compensation*

2.18 Compensation for improvements remains governed by the provisions of Part I of the *Landlord and Tenant Act 1927*. These require the tenant, if a claim is to be successful, to follow an elaborate notice procedure prior to carrying out improvement works. A failure to abide by this procedure will deprive the tenant of the right to compensation.⁴⁵ Compensation is based upon the addition the improvements make to the letting value of the premises.⁴⁶

2.19 Compensation for disturbance, where the landlord successfully opposes the grant of a new tenancy on a ground not based on the tenant's behaviour or default, is governed by Part II of the 1954 Act.⁴⁷ The amount of compensation is calculated according to a statutory formula⁴⁸ based upon the rateable value of the premises and a multiplier set from time to time by statutory regulation.⁴⁹ In essence, the current position is that the amount is the rateable value or, if the tenant has been in occupation for at least 14 years, twice the rateable value. As a result of an amendment made by the *Law of*

⁴² Section 30.

⁴³ Eg breach of repairing obligation and persistent delay in paying rent.

⁴⁴ See paragraph 4.22 below.

⁴⁵ See paragraphs 2.24 and 3.38 below.

⁴⁶ 1927 Act, section 1.

⁴⁷ Section 37.

⁴⁸ Section 37 (2).

⁴⁹ From 1981 to 1984, the multiplier was 2¼, increased to 3 from 1984 to 1990, but then reduced to 1 as from 1st April 1990: see *Landlord and Tenant Act 1954 (Appropriate Multiplier) Order 1990* (SI No 363 of 1990).

Property Act 1969,⁵⁰ a tenant no longer has to make an application to court for a new tenancy, in order to claim his right to compensation. The point is that the tenant may be aware that the landlord will rely upon a ground of opposition, which means that there is no prospect of a new tenancy being granted.⁵¹

Northern Ireland

2.20 It was mentioned earlier⁵² that the *Business Tenancies Act (NI) 1964* was modelled on the English 1954 Act, but that the 1964 Act⁵³ was replaced, with several modifications,⁵⁴ by the *Business Tenancies (NI) Order 1996*. The 1996 Order is still largely based on the English statutory scheme, but some differences are worth noting in the light of discussion in the remaining chapters of this Consultation Paper.

(i) The Crown

2.21 It is now made clear for the first time that the Crown is equally bound by the legislation,⁵⁵ but a new ground to opposition to the grant of a new tenancy has been added, viz where a public authority⁵⁶ landlord needs possession of the premises in order to carry out its functions.⁵⁷

(ii) Contracting-out

2.22 Unlike under the English statutory scheme,⁵⁸ the prohibition on contracting-out remains in Northern Ireland, in the sense that there

⁵⁰ Section 11. This was based on a recommendation made by the Law Commission: see Law Com No 17 (1969) (*Report on The Landlord and Tenant Act 1954 Part II*), paragraph 46.

⁵¹ See paragraph 3.35 below.

⁵² Paragraph 2.09 above.

⁵³ And the *Town Tenants (Ireland) Act 1906*.

⁵⁴ Based upon recommendations made by the Law Reform Advisory Committee for Northern Ireland in its Report No 1: *Business Tenancies* (LRAC No 2 1994).

⁵⁵ *Ibid* paragraphs. 3.3.1-5 and Article 43 (1) of the 1996 Order. See also paragraph 3.12 below.

⁵⁶ *Ie* a government department, local authority or any public body or authority constituted by or under any statutory provision: see Article 2 (2).

⁵⁷ Article 12 (1) (i).

⁵⁸ See paragraph 2.12 above.

is no scope for the parties to obtain court⁵⁹ sanction for this in a particular case.⁶⁰ The one exception to this introduced by the 1996 Order gives the Lands Tribunal jurisdiction to sanction an agreement entered into while the tenant is still in possession to surrender the lease at some future date.⁶¹

(iii) *Grounds of opposition*

2.23 The 1996 Order now imposes for the first time a requirement that a landlord opposing the grant of a new tenancy on the ground that he intends to demolish buildings or structures or engage in substantial works of construction must furnish evidence that he has planning permission for the work.⁶² The tenant may claim compensation for misrepresentation by the landlord as to his intentions where these are relevant to grounds of opposition.⁶³ There is no provision for punitive damages.⁶⁴

(iv) *Compensation*

2.24 Although the 1996 Order preserves provision for compensation for disturbance,⁶⁵ it drops the provision for

⁵⁹ In fact, as under the 1964 Act, the Lands Tribunal for Northern Ireland has jurisdiction to deal with matters arising under the 1996 Order.

⁶⁰ See paragraph 3.10 below. The Law Reform Advisory Committee took the view that the prohibition was “at the heart of the legislation”, and its removal, even with safeguards, would result in contracting-out becoming “the norm”, and the legislation quickly becoming “meaningless”: see Report (footnote 54 above) paragraph 3.5.9.

⁶¹ Article 25. This is based upon a recommendation of the Law Reform Advisory Committee, Report (footnote 54 above) paragraphs 3.6.1-4.

⁶² Article 13(1). This again was a recommendation of the Law Reform Advisory Committee, paragraph 5.2.4. See paragraph 4.22 below.

⁶³ Article 27.

⁶⁴ The Law Reform Advisory Committee was “exercised by the practical difficulty of assessing the basis” on which such damages could be assessed: Report, paragraph 5.3.1. Note, however, the criminal penalties for fraud or wilful concealment of material facts contained in Article 28. See paragraph 4.25 below.

⁶⁵ Article 23. As under the English statutory scheme (see paragraph 2.19 above), the amount of compensation is based upon a statutory formula, which involves multiplying the net annual value of the premises. The multiplier varies with the period of occupation by the tenant, ranging from 2.5 (not exceeding 5 years) to 10 (exceeding 15 years): see table in Article 23 (2).

compensation for improvements. The Law Reform Advisory Committee had concluded that the previous provisions⁶⁶ were subject to so many exceptions and involved such complex procedural hurdles that the statutory right to compensation should be abolished.⁶⁷ In the Committee's view, the question of whether a tenant should spend money on improvements is "essentially commercial in nature." It then went on to state: "If he is wise, the tenant will only do so where the anticipated return on the improvements exceeds their cost. This matter is thus best left to market conditions and commercial decision."⁶⁸

Scotland

2.25 There is very little statutory protection given to business tenants in Scotland.⁶⁹ There is no equivalent of the English 1927 and 1954 Acts (apart from the limited provision for "shops" referred to in the next paragraph), so that there is no general security of tenure for business tenants. Nor is there any provision for compensation for disturbance or improvements, nor, indeed, provisions governing the "reasonableness" of covenants against alienation or other transactions by the tenant.⁷⁰ The tenant's position remains very much one based on the terms of the tenancy, *eg* sub-tenants have no right to relief on forfeiture of the head-lease, and have to seek protection by contracting directly with the head-landlords.

2.26 Some temporary protection was conferred on tenants of "shops", *ie* premises in which a retail trade or business is carried on, by the *Tenancy of Shops (Scotland) Act 1949*. This was put on a permanent basis by the *Tenancy of Shops (Scotland) Act 1964*. This gives such tenants a very limited security of tenure, whereby they can apply to the sheriff for a renewal of the tenancy.⁷¹ This must not be for a period exceeding one year, but an application can be made for further renewals indefinitely.⁷² The landlord can oppose a renewal on

⁶⁶ In Part II of the 1964 Act.

⁶⁷ Report Chapter 9.

⁶⁸ *Ibid* paragraph 9.1.7. See paragraph 3.39 below.

⁶⁹ See Campbell, Paton and Cameron *The Law of Landlord and Tenant in Scotland* (W Green and Son 1967) Part II especially Chapter XXI.

⁷⁰ See paragraph 3.40 below.

⁷¹ 1949 Act, section 1.

⁷² Section 1(4).

various grounds, including the tenant's breach of obligation, the landlord offering alternative accommodation, and greater hardship arising if a renewal is granted.⁷³ It is expressly provided that the Crown and government departments are bound as landlords.⁷⁴ There is no provision for compensation if a renewal is refused.

Continental Europe

2.27 As is perhaps to be expected, given the range of jurisdictions, the position in continental Europe varies somewhat. What follows is a brief outline designed to give a flavour of the position of business tenants.⁷⁵

2.28 Looking at the laws governing commercial landlord and tenant relationships in Europe, the tenant often has a right unilaterally to renew the tenancy, or the tenancy is automatically renewed upon expiration of the initial term. In the limited circumstances where landlords may refuse a renewal or terminate the lease, compensation will usually be payable to the tenant.⁷⁶

Security of tenure

2.29 In Belgium, the commercial tenant enjoys strong security of tenure. Commercial leases are governed by an Act of 1951. The minimum duration of a commercial lease is nine years, and the tenant is entitled to three agreement renewals, which must be formally applied for. Each renewal may be for a period equal to the duration of the original rental agreement. Thus, a ten-year lease entitles a tenant to occupation for a maximum of forty years. Upon receiving the formal application, the landlord may accept the contract on the tenant's terms, he may refuse the renewal, or he may accept it on different terms to those proposed by the tenant. In the latter case, the tenant will have to bring the case before a judge within thirty days. There are certain statutory grounds upon which the landlord may refuse to renew the agreement, subject to the payment of compensation. (For example, he may be required to pay to the tenant compensation which is confined to one year's rent where he takes

⁷³ Section 1(3).

⁷⁴ Section 2. See paragraph 3.12 below.

⁷⁵ See generally Hurndall (ed) *Property in Europe: Law and Practice* (Butterworths 1998).

⁷⁶ *Ibid.*

possession for reconstruction). When the landlord refuses to renew without reason, the tenant will be entitled to compensation equal to three years' rent.

2.30 In Denmark, leases are usually for indefinite periods, subject to termination on three months' to a year's notice, depending on the reason for termination. A landlord may not generally terminate a tenancy or make it for a limited time, subject to narrow exceptions. Fixed-length tenancies will only be upheld if the period is usually no more than five years, and if the terms and length of the lease are considered reasonable, taking into consideration the general circumstances of the parties. If the tenancy is not for a fixed period, it may only be terminated by the landlord under exceptional circumstances, for example, where the landlord wishes to use the property for himself, where he wishes to demolish or carry out major renovation works, or where the tenant's behaviour is unreasonable. In these circumstances, the landlord may terminate on three months' notice (or one year's notice when recovering the property for his own use). The landlord will be obliged to pay compensation to cover relocation expenses and expected loss of turnover.

2.31 In France, at the expiry of the term of the lease, the landlord can initiate the termination of the business lease provided that he pays eviction damages (*indemnités d'éviction*) to the tenant in order to compensate the tenant for the damage incurred as a result of the non-renewal of the business lease.⁷⁷ If the landlord does not do so, the tenant may request a renewal of the lease. In such a case, the landlord may refuse the renewal, and pay eviction damages, or accept the request for renewal and propose a revised rent.⁷⁸ If the landlord does not reply, the lease will be renewed for another nine-year period. If, at the expiration of the lease, neither the landlord nor the tenant take any action (that is, there is no termination by the landlord and no request for renewal by the tenant), the lease continues for an indefinite term. The landlord may terminate the lease at any time,

⁷⁷ The current practice is that the amount of eviction damages would be equal to the commercial value of the going concern operated by the tenant on the lease premises; this value is determined according to normal trade usage, and is increased by the taxes and costs incurred by the tenant in relocating his business at alternative premises.

⁷⁸ If the parties cannot agree on the new rent, it is fixed by the court.

provided he pays eviction damages, or the tenant may request the renewal of the lease for another nine-year period.⁷⁹

2.32 In Greece, the nine-year minimum period for a commercial tenancy may be extended unilaterally by the tenant for another three years. Upon expiry of the contractual period, the landlord may reclaim possession of the property either for reconstruction purposes or for his own business or office use.

2.33 In Italy, where leases of commercial premises have a minimum duration of six years, the lease is automatically renewed for a further similar period, unless either party notifies the other at least twelve months before the end of the term that he does not wish to renew. The lessor cannot refuse renewal at the end of the first period, unless he needs the premises for his own use, or for reconstruction or demolition. The landlord is obliged to pay compensation for loss of goodwill (equal to 18 months' rent) on any termination other than the lessee's notice, breach of contract, or bankruptcy. The amount of the indemnity will be twice this if the new lessee of the premises engages in the same form of business, and if the new lease commences within a year from the termination of the previous one. These principles are mandatory and one cannot contract out of them. The lessor is always entitled to terminate the lease of commercial premises, if he requires the premises for his own commercial activity or has to demolish the property in order to rebuild and restore it, or is ordered to make improvements by the local authority.

2.34 In Luxembourg, the *Civil Code* provides that a commercial tenant who has been in business for over three years has a preferential right to renew the contract which takes priority over any third party's right to become the new tenant. Therefore, in order for the landlord to defeat this right to renew, he must require the property for his own use. (This preferential right of renewal expires after 15 years of the tenancy).

2.35 In the Netherlands, unless notice of termination is given in accordance with the statutory requirements, a retail tenancy for a five-year period is automatically extended by a further five years.

⁷⁹ Commercial leases are governed principally by Ordinance No 2000-912 of 18 September 2000, codified in articles L 145-1 *et seq* of the *French Commercial Code*, which contains numerous public policy rules protecting the lessee's rights, and Articles 1708 *et seq* of the *French Civil Code*, which apply to any type of lease arrangement, and are considered generally as supplementary provisions.

Different provisions apply to other business tenancies (*ie* non-retail). Following expiration of the term, the tenant's obligation to vacate the premises is suspended for two months, during which the tenant may apply to the court to extend the term for a one-year period. This application for extension may be repeated twice.

2.36 In summary then, in continental Europe the possibility of renewal attaches to most commercial leases. Landlords can only resist such renewal if they can show good reason: for example, they wish to use the premises for their own purposes, or for reconstruction or demolition. Compensation for disturbance and loss of goodwill will usually be payable to the tenant. It is also common for any new statutory period pursuant to a renewal to be limited in duration, and for the number of renewals to be limited.

Terms of Business Leases

2.37 The minimum term for commercial tenancies in Belgium, France and Greece is nine years. In France, unless contractually provided for to the contrary, the tenant may terminate the business lease at the end of each three-year period, upon six months formal statutory notice served upon the landlord by a bailiff. (This explains why business leases in France are referred to as "3-6-9" leases). There is an exception in that "short-term leases" are not governed by the same Ordinance as other business leases.⁸⁰ Short-term leases are leases with a duration not exceeding two years, and the tenant's right of renewal does not apply. If the short-term lease exceeds two years, it will be re-qualified as a standard business lease.

2.38 In Greece, the minimum term of tenancies of commercial property will be determined by the specific use for which they are leased, regardless of what the parties may otherwise agree (there is usually a minimum of nine years). In Austria, the landlord is free to fix the term of the lease in respect of certain categories of buildings.⁸¹ All other premises can be let for a term between three and ten years. The minimum term for commercial premises is six years in Italy (nine years in respect of hotels).

⁸⁰ The provisions applicable to such short-term leases are contained in the *French Commercial Code* in article L 145-5.

⁸¹ Any term is possible for: buildings built without government subsidies after 1967; buildings with not more than two flats; premises in business parks; condominiums in buildings built after 1953, and business premises in condominiums.

2.39 In the Netherlands, retail premises are usually let for an initial five-year term, and the tenancy is renewed by operation of law, unless terminated by the tenant. Other commercial premises are regulated by landlord and tenant legislation, and are generally also granted for five years, with an option for the tenant to renew for a further five years.

Restrictions on Alienation

2.40 In Austria, where a corporate tenant sells his business, the lease rights will be attached to the business and acquired by the buyer without the need for the landlord's consent. The position is similar in Belgium, Italy and Luxembourg. In Denmark, the assignment of a non-residential tenancy is a statutory right, unless the landlord has material objections, such as insufficient information about the tenant's financial status or commercial activities. This provision may be contracted out of (subject to the application of the *Commercial Property Rent Adjustment Act*).

Other Statutory Interference

2.41 In many European countries, rent for some residential premises is regulated by statute and is often linked to a consumer price index or cost of living index. In commercial agreements, however, the parties are generally free to negotiate the rent.

The United States of America

2.42 It would appear that there is very little statutory interference with the relationship of landlord and tenant in the United States of America. This may be illustrated by referring to the laws in two major States, *viz* New York and California. Landlord and tenant law in New York and California is primarily a mixture of common law and statute. The relationship is grounded in both contract law and property law. The laws relating to the relationship of landlord and tenant in New York are the common law and Chapter 50, Article 7 of the New York Consolidated Laws. In California, it is the common law and the California Civil Code.

General Common Law of the United States

2.43 The common law relating to landlord and tenant agreements in the United States places heavy emphasis upon the contractual nature of the relationship. Business leases tend to be for a relatively short term, and there is no statutory right to a renewal. In relation to improvements, the tenant is permitted to make changes to the physical condition of the premises which are reasonably necessary in order for the tenant to use the premises in a reasonable manner.⁸² As a general rule, the parties are free to agree whether the landlord will have a duty to repair; in some cases, the tenant can even make the repairs and deduct the cost from the rent.⁸³ The obligation to keep the leased property in a condition that meets health and safety standards is placed on the landlord, but the tenant is under an obligation to prevent deterioration of the premises.⁸⁴

2.44 Usually, the duty to repair is expressly stated in the contract or imposed by statute. The common law will only impose such a duty if it is manifest from the intention of the parties expressed in the lease agreement. Underlining the primarily contractual nature of relationship, the parties are free to increase or decrease the duties and obligations under the agreement, so long as they are not unconscionable or against public policy.⁸⁵

2.45 The tenant has a common law right to damages from the landlord for his failure to fulfil obligations under the lease. The parties may agree as to the measure of damages, but absent of such a provision, the tenant may be entitled to compensation for, *inter alia*, the loss sustained by the tenant due to the reasonable expenditures made by the tenant due to the landlord's default.⁸⁶ Loss of anticipated business profits by the tenant, due to the landlord's default, may be so recovered.

⁸² *Restatement 2d Property (Landlord and Tenant)* (American Law Institute 1977) at paragraph 12.2(1).

⁸³ *Cook v Soule* 56 NY 420 (1874).

⁸⁴ *Restatement 2d Property (Landlord and Tenant)* (American Law Institute 1977) at paragraph 5.5.

⁸⁵ *Ibid* at paragraph 5.6.

⁸⁶ Provided, that is, that the landlord, at the time the lease was entered into, could reasonably have foreseen the expenditures made by the tenant.

2.46 Any expenditure on improvements made by the tenant, whereby the tenant suffers a loss, can be claimed as part of the damages – but such expenditure must be reasonable and foreseeable. A tenant may also recover relocation expenses, and possibly additional relocation expenses as a result of the landlord’s default.⁸⁷

2.47 A tenant may (absent of an agreement to the contrary) make changes to the physical condition of the premises, and the tenant may even have a duty to restore the premises to its previous condition before the changes were made at the termination of the lease.⁸⁸ The guiding principle is, however, that the parties are entitled to expand or limit the duties and obligations regarding changes and improvements by agreement.

2.48 A tenant is generally entitled to remove ‘annexations’ or improvements which were permitted by the landlord.⁸⁹ This right is, however, subject to any agreement to the contrary. However, the tenant may (except as the parties agree otherwise) break his obligation to the landlord if he removes improvements which were made without the consent of the landlord.

Law in New York State

2.49 The general common law, outlined above, applies in New York State. However, Chapter 50, Article 7 of the *New York Consolidated Laws* and case law from New York also apply. Generally, the right of a tenant to make improvements depends on the terms of the lease: permission of the landlord is generally needed, as even improvements which increase the value of the property can be considered ‘waste’.⁹⁰

2.50 For a landlord to be held liable for an improvement to the leased property, his consent must constitute more than mere

⁸⁷ *Restatement 2d Property (Landlord and Tenant)* (American Law Institute 1977) paragraph 10.2.

⁸⁸ *Ibid* at paragraph 12.2(1) and (3).

⁸⁹ *Ibid* at paragraph 12.2(4).

⁹⁰ *Two Guys from Harrison NY Inc v SFR Realty Assoc* 482 NYS 2 d 465 (1984).

acquiescence,⁹¹ however, consent may be implied if the improvements are required under the terms of the lease, and the landlord obtains a direct benefit from them.⁹² Where a tenant carries out improvements with the consent of the landlord, the landlord will be held responsible for payment.⁹³

*Law in California*⁹⁴

2.51 The guiding principle in California is freedom of contract – section 1995.270(1) of the *California Civil Code* states: “[i]t is the public policy of the State and fundamental to the commerce and economic development of the State to enable and facilitate freedom of contract by the parties to commercial real property leases.”

2.52 As a general rule in California, a tenant is not entitled to compensation for improvements voluntarily made to the landlord’s land unless the landlord has expressly agreed to the improvements and expressly agreed to pay compensation.⁹⁵ The rights and obligations to make improvements are generally included in the lease. Absent such provisions, a tenant may only carry out an improvement with the consent of the landlord.⁹⁶ It is advised that, if a lease allows the tenant to carry out improvements to the property, that it should also set out the rights and obligations of the parties on termination of the lease – “ownership of the improvements...should be covered.”⁹⁷

⁹¹ *Eisensohn Elec Serv Co v Wien* 219 NYS 2d 736 (1961).

⁹² *Backstatter v Berry* 228 NYS 2d 850 (1968). See also *Wolf v 2539 Realty Assoc* 560 NYS 2d 24 (1990), where the landlord was held responsible for the cost of repairing a dangerous asbestos condition. An environmental statute made the asbestos’ removal necessary, and the tenant was held not to be responsible for an inherent characteristic of the material used at the time of construction.

⁹³ Bender *New York Practice Guide: Real Estate* (Lexis 2002) at Part III, Chapter 25.03 ‘Creation and Operation of the Lease’.

⁹⁴ See further Bender *California Real Estate Law and Practice* (Lexis 2002) at Part 3, Division 1, Chapter 153. The California Law Revision Commission has not prepared any report in this area.

⁹⁵ *Callnon v Callnon* 7 Cal App 2d 676 (1935).

⁹⁶ *Briggs v Sherman* 65 Cal App 249 (1924).

⁹⁷ Bender *California Real Estate Law and Practice* (Lexis 2002) at Part 3, Division 1, Chapter 153.03(2).

2.53 Where a tenant carries out improvements to the property, the landlord's interest is subject to a lien in respect of those improvements, unless agreed otherwise.⁹⁸ However, should the lease require the tenant to carry out the improvements, the landlord cannot escape responsibility by contracting-out.⁹⁹

Australasia

2.54 It may be informative to draw attention to the position in non-European jurisdictions, such as Australia and New Zealand.

Security of Tenure

2.55 The level of statutory intervention in the commercial landlord and tenant relationship appears to be limited in such jurisdictions. In New Zealand, there is no legislation intervening in the contractual relationships between landlord and tenant which determines the duration of the term of a lease, or the existence or non-existence of a renewal option. Tenancies in Australia are also predominantly governed by general contract law and common law rules.

2.56 In New South Wales, there is no statutory right to renew a lease. Section 44 of the *Retail Leases Act 1994 (NSW)* provides for a statutory right to notification for tenants who have no option to renew in their tenancies.¹⁰⁰ Between six and twelve months prior to the expiration of the lease, the landlord must give written notification to the tenant of his intentions upon expiration of the lease. That is, he may state that the lease is due to expire and demand vacant possession, or he may extend or renew the lease. If the intention is to renew or extend the lease, the notification constitutes an irrevocable offer for one month after it is given; tenants, therefore, have an option to renew for this period. In the event that no notification is given to the tenant, the tenant may request such notification before the expiration of the lease. The tenant will then be entitled to remain in possession under the lease for six months after the requested

⁹⁸ *Ibid* at Chapter 153.04(1). Such a lien is known as a "mechanic's lien" in US real estate law.

⁹⁹ *Baker v Hubbard* 101 Cal App 3d 226 (1980).

¹⁰⁰ An option to renew is a contractual right and an interest in property contingent on the exercise of the option.

notification is given. It is not possible to contract out of this notice provision.

2.57 Similar provisions in relation to notification requirements are contained in section 29 of the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tasmania)*. Under these regulations, the landlord is obliged to pay compensation to the tenant where he causes the tenant to vacate the premises before the end of the lease or any renewal of it because of any extensions, refurbishment or demolition.¹⁰¹

Terms of Business Leases

2.58 In Western Australia, section 13 of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* provides for a basic right for retail tenants in most circumstances to be granted a minimum period of tenancy of five years. Similarly, in Tasmania, section 10(3) of the *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 (Tasmania)* provides for a minimum term of five years.

Other Statutory Interference

2.59 In Western Australia, “the common law right of the parties to negotiate freely as to the method of calculating the rent or as to increasing the rent has been severely compromised by various provisions in the retail tenancies legislation.”¹⁰² In Tasmania and Western Australia, the landlord is also obliged to give the tenant a disclosure statement¹⁰³ at least seven days before entering into a retail shop lease, and he is obliged not to demand key money or consideration for goodwill. The disclosure statement refers to a variety of miscellaneous information concerning the lease including, for example: rent details; shopping centre details; details as to the

¹⁰¹ Section 23(1)(k).

¹⁰² Bradbrook, MacCallum and Moore *Australian Real Property Law* (2nd ed LBC Information Services 1997) paragraph 12-110.

¹⁰³ *Ibid* paragraph 12-113.

interest of the landlord in the premises; details as to agreements or representations made by either party in respect of the premises, and details as to the lease itself.

CHAPTER 3 FUNDAMENTAL ISSUES

3.01 This chapter raises what the Commission regards as fundamental issues relating to the *Landlord and Tenant Acts*, particularly as they apply to business tenancies. It sets out the Commission's preliminary conclusions on each of the matters considered, and invites comments on or responses to these.

The Relationship of Landlord and Tenant

3.02 It is a fundamental feature of statutory schemes such as the Landlord and Tenant Acts that they apply only to parties in the relationship of landlord and tenant. They do not apply to other arrangements, such as a licence agreement, whereby a person may be permitted to occupy or use another person's land, but without having a tenancy. It is vital, therefore, to be able to determine in any particular case whether or not a tenancy has been created. Given the benefits attaching to a tenancy under the Landlord and Tenant Acts, it is not surprising that this issue has frequently come before the courts.¹ The problem the courts have faced, however, is that the Landlord and Tenant Acts do not provide any definition, or, indeed, any guidance, as to what constitutes a tenancy. Some guidance was provided by the general statute governing the relationship of landlord and tenant, Deasy's Act.² Section 3 of that Act stated that, in future, the relationship would be founded on the parties' "contract" and that it would "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." Notwithstanding this general guidance, the Irish courts, like their English counterparts,³ have struggled to

¹ For discussion of the case law see Wylie *Irish Landlord and Tenant Law* (2nd ed 1998) Chapters 2 and 3.

² *Landlord and Tenant Law Amendment Act, Ireland 1860*.

³ In *Street v Mountford* [1985] AC 809 the House of Lords reviewed earlier case law and attempted to lay down indicia of tenancy, in essence exclusive

evolve clear criteria by which to judge whether in a particular case a tenancy, as opposed to some other relationship like a licence, has been created. Various concepts have been referred to, such as the need for exclusive possession, the degree of control over the premises retained by the landowner, the payment of rent and the appearance in any document drawn up of terms commonly found in leases or tenancy agreements.⁴

3.03 It is important to emphasise that the need to determine whether or not a tenancy has been created is not just of relevance in the context of statutory schemes which may apply. A tenancy constitutes an interest in land and, as such, has the attributes of such an interest.⁵ Thus, it can be assigned to others and rights and obligations generally pass to successors in title.⁶ There is much general law which applies only to tenants, including statute law contained in enactments like Deasy's Act.⁷ Certain remedies apply particularly to tenants, such as ejection actions.⁸ *The Commission has reached the preliminary conclusion that since whatever future decisions may be taken on the issue of statutory protection of tenants,⁹ it will remain important to distinguish between a tenancy and other relationships; serious consideration should be given to providing a statutory definition of a tenancy or, at least, clear statutory guidelines or criteria by which particular cases may be judged with reasonable certainty.* The Commission is giving detailed

possession for a term at a rent. See also *Bruton v London and Quadrant Housing Trust* [2001] 1 AC 406.

⁴ See eg, *Gatien Motor Co Ltd v Continental Oil Co of Ireland* [1979] IR 406; *Irish Shell & BP Ltd v Costello Ltd* [1981] ILRM 66; *Texaco (Ireland) Ltd v Murphy* High Court, 17 July 1991; *Governors of the National Maternity Hospital v McGouran* [1994] 1 ILRM 521; *Kenny Homes and Co Ltd v Leonard* Supreme Court, 18 June 1998; *Smith v CIÉ* High Court 9 October 2002.

⁵ Cf other relationships which may involve possession or occupation of land, such as a licence, caretaker's agreement, lodger or guest arrangement, conacre and agistment agreements: see Wylie *op cit* Chapter 3.

⁶ See Wylie *op cit* Chapters 21 and 22.

⁷ Eg implied covenants or agreements: see sections 41 and 42 of Deasy's Act.

⁸ See Wylie *op cit* Chapter 27.

⁹ See paragraph 3.04 below.

consideration to this matter, which is not without its difficulties. There is always the danger that statutory definitions or guidelines will generate new doubts and uncertainties.

Scope of Statutory Protection

3.04 In the context of the Landlord and Tenants Acts, especially as they apply to business tenancies, the most fundamental issue is whether there is a continuing need for statutory protection.¹⁰ *The Commission's preliminary view is that a repeal of the entire statutory scheme would not be justified.* At the very least, there ought to remain those provisions which are designed to prevent unreasonable behaviour or provisions in leases operating unfairly.¹¹ *Indeed, as indicated later,¹² the Commission takes the view that these provisions should be made more effective.* On the other hand, the issue arises as to whether rights, such as the right to a new tenancy, should remain, at least in its present almost universal form. The Commission has reached no conclusion on this issue and at this point is simply raising the issue for discussion. It is arguable that the commercial environment has changed so substantially since business tenancy legislation was first introduced nearly a century ago, that it should no longer be taken for granted that there is a need for all aspects of the statutory scheme. This point is pursued further in the following paragraphs dealing with "contracting-out".¹³ *It should also be noted that the Commission's preliminary view is that the statutory provisions relating to compensation for improvements should be repealed.*¹⁴

Contracting-Out

3.05 Ever since the modern statutory scheme giving protection to tenants was introduced by the *Landlord and Tenant Act 1931*, a fundamental principle has been that "contracting out" is prohibited,¹⁵

¹⁰ See paragraph 2.05 above.

¹¹ *Eg* the provisions relating to covenants in leases in Part IV of the *Landlord and Tenant (Amendment) Act 1980*.

¹² See paragraph 4.17 below.

¹³ See paragraph 3.05 *et seq* below.

¹⁴ See paragraph 3.34 *et seq* below.

¹⁵ See section 42 of the 1931 Act.

ie the parties cannot exclude to any degree the statutory protection conferred on tenants by the terms of the lease or tenancy agreement. The current provision¹⁶ is to be found in section 85 of the *Landlord and Tenant (Amendment) Act 1980*¹⁷ which reads:

“So much of any contract, whether made before or after the commencement of this Act, as provides that any provision of this Act shall not apply in relation to a person or that the application of any such provision shall be varied, modified or restricted in any way in relation to a person shall be void.”

This section is couched in very broad language and the courts have given it a wide interpretation; in particular, it has been construed as catching both direct and indirect provisions in leases, in effect any provision which has “the effect of” depriving the tenant of any benefit or right conferred by the statutory scheme.¹⁸ Over the decades, various attempts to draft agreements with a view to avoiding the legislation have been found wanting, and the generally accepted position adopted by practitioners is that, to the extent that the parties seek an arrangement which confers the rights and obligations normally associated with a tenancy, any attempt to exclude the legislation by careful drafting runs the high risk of being held void under section 85.¹⁹ Apart from using one of the long-standing exceptions to the statutory scheme,²⁰ where, but only where appropriate,²¹ the parties and their professional advisers have often

¹⁶ Although the wording of section 85 of the 1980 Act differs from that of section 42 of the 1931 Act, the overall effect would seem to be the same.

¹⁷ Note that this governs all the Landlord and Tenant Acts, which are to be construed together as one Act: see, eg section 1(2) of the 1980 Act and section 1(2) of the latest Act, the *Landlord and Tenant (Amendment) Act 1994*.

¹⁸ See the judgment of Lardner J in *Bank of Ireland v Fitzmaurice* [1989] ILRM 452 (holding void a provision in a rent review clause which combined indexing with a multiplier provision designed to pressure the tenant into surrendering his lease).

¹⁹ See the discussion in Wylie *Irish Landlord and Tenant Law* (2nd ed 1998) paragraph 30.20 *et seq.*

²⁰ Eg a “temporary convenience” letting: see section 5(1)(a)(iv) of the 1980 Act.

²¹ The temporary convenience must be genuine (see Wylie *op cit* paragraph 3.40), and its nature must be stated in the lease or tenancy agreement: see again section 5(1)(a)(iv).

been forced to confine the term of the letting to a short term, which ensures that the tenant will not enjoy the minimum continuous period of occupation necessary to acquire statutory rights.²²

3.06 At the time when the 1931 Act was enacted, the absolute prohibition on contracting-out no doubt made much sense in the light of the underlying purpose of the legislation. It was designed to protect tenants and, in the context of business tenancies, most tenants would have been running small private businesses, such as retail shops in urban areas and professional practices. Such tenants would often have a weak bargaining position, and the desire to prevent landlords taking advantage of this is perfectly understandable. However, as the decades passed, it became clear that the conditions obtaining in the 1930s were no longer an accurate reflection of the nature of the business tenancy market in Ireland. Indeed, the Oireachtas itself recognised this in 1989 by exempting from the statutory right to a new tenancy leases granted to financial services companies trading in Custom House Docks Area.²³ Although this was originally to operate for a five-year period only, provision was made for its extension by statutory instrument,²⁴ and it has been extended since,²⁵ most recently to the year 2004.²⁶

3.07 The Law Reform Commission considered the matter around the same time and was particularly concerned that the general prohibition on contracting-out had led to a “petrification” of the business letting market, *ie* landlords and tenants were forced into

²² Hence, the very common two years, nine months business tenancies created until the *Landlord and Tenant (Amendment) Act 1994* raised the minimum qualifying occupation period from three years to five years (section 3(1) of the 1994 Act amending section 13(1)(a) of the 1980 Act). This has since led to lettings of four years, nine months becoming common.

²³ *Landlord and Tenant (Amendment) Act 1989* section 1, adding new subsections (3)-(5) to section 13 of the 1980 Act.

²⁴ Section 13(4) and (5) of the 1980 Act (inserted by section 1 of the 1989 Act).

²⁵ It was extended for a further 5 years by the *Landlord and Tenant (Amendment) Act 1980 (Section 13(4)) Regulations 1994* (SI No 36 of 1994).

²⁶ *Landlord and Tenant (Amendment) Act 1980 (Section 13(4)) Regulations 1999* (SI No 52 of 1999).

using short-term lettings.²⁷ The Commission recommended that the 1980 Act should be amended so as to allow parties to contract out of the provisions of Part II,²⁸ as they apply to business tenancies generally, provided that both parties had independent advice.²⁹

3.08 The Oireachtas responded³⁰ with the enactment of the *Landlord and Tenant (Amendment) Act 1994*. Section 4 of that Act³¹ adopted the principle recommended by the Commission by introducing the concept of the tenant being able to execute a “renunciation” of entitlement to a new tenancy, provided he has received “independent legal advice”.³² There is, however, one vital respect in which the 1994 Act departs from the Commission’s recommendation. Renunciation is permitted under the 1994 Act only where the terms of the tenancy provide “for the use of the tenement wholly and exclusively as an office”.³³ Thus, the only sector of the business tenancy market which has been rendered open generally to contracting-out is the office sector.³⁴

²⁷ See *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) paragraphs 62-64.

²⁸ *Ie* those conferring the right to a new tenancy.

²⁹ *Op cit* paragraph 64.

³⁰ By way of a Private Member’s Bill introduced by Alan Shatter TD, Solicitor, which was taken over by the Government, and modified during its passage through the Oireachtas.

³¹ Which adds an additional “restriction” on the right to a new tenancy to those listed in section 17(1)(a) of the 1980 Act – a new sub-paragraph (iii)(a).

³² The actual wording of the provision is somewhat controversial – see the discussion in Wylie *op cit* paragraph 30.22. Note, however that the Oireachtas did accept the Commission’s view that it was unnecessary to put the parties to the expense of seeking court approval, as is the current position under the English legislation (although it is proposed to change this): see paragraphs 2.12-2.14 above. Note also that the 1994 Act requires that the tenant only need obtain independent legal advice, whereas the Commission recommended that both parties should obtain this.

³³ This wording in what is now sub-paragraph (iii)(a) of section 13(1)(a), in particular the phrase “wholly and exclusively”, has given rise to much speculation and controversy: see again Wylie *op cit* paragraph 30.22.

³⁴ From enquiries made of law firms with particular experience of the office letting market, it would appear that the facility of renunciation has largely been used in the subletting situation, *ie* where the head-landlord is anxious to

3.09 The Commission has reconsidered this issue, and remains convinced that its original recommendation was sound. Indeed, the arguments in favour to a general contracting-out facility for the business sector seem to be even stronger as the Irish economy embarks upon the 21st century. The most striking feature of the past 10 to 15 years has been the expansion of the commercial property market to include substantial office blocks, major retail outlets like shopping centres and other commercial trading operations like industrial parks. Both the landlords and tenants entering into leasing arrangements in relation to such property are frequently very large corporate bodies, often with an international dimension. They have very substantial resources, and access to the best legal and other professional advice available. Their position, particularly with regard to a need for statutory protection, is light years away from that of the sort of tenants for whose protection the 1931 Act was enacted. In a sense, the 1994 Act has made the position worse by creating what appears to many to be an extraordinary anomaly, by confining the facility of contracting-out to office tenants. Why should a sole practitioner accountant or auctioneer renting a small office be able to “contract-out” of the right to a new tenancy, whereas the likes of multiple retail organisations like Dunnes Stores, Tesco or Marks & Spencer renting the anchor unit in a huge shopping centre, or a multi-national corporation like Microsoft renting units on a industrial park, not be permitted to do so? This sort of anomaly does Ireland’s reputation as a trading and commercially-orientated nation no good at all. When the position under Irish law is explained by legal and other professional advisers to international investors and to commercial trading organisations such as those just mentioned, it is frequently a source of embarrassment. It is somewhat difficult to reconcile with the recent Government policy of ensuring that Ireland embraces the challenges of e-commerce.³⁵ No doubt reasoning such as this led to the special provision made for financial services companies trading in the Custom House Docks Area, but the point is that these are simply illustrative of the sort of operations which have become commonplace in the commercial property sector in recent times.

3.10 The Commission is, of course, mindful of the fact that the general prohibition on contracting-out has been a feature of our law

avoid the fragmentation of his property in the future which would arise if the sub-tenants acquired new tenancy rights in their own right.

³⁵ See the *Electronic Commerce Act 2000*.

for a very long time. It understands the natural caution of the Oireachtas to remove what may appear to be a fundamental feature of the statutory scheme. It is also important not to allow recognition of the enormous changes which have occurred in recent times in the commercial property market to disguise the fact that there are obviously still many small retail operations (the typical corner shop) which may be vulnerable because of the economic advantage enjoyed by the landlord. However, it was just such considerations which led the Commission, in its original recommendation, to insist that contracting-out should only be permitted on the basis that the parties had independent legal advice before committing themselves to it. *The Oireachtas largely accepted this principle³⁶ when it introduced the renunciation facility for office tenants (whatever their economic status), and the Commission reiterates that it is convinced that it should now be applied generally.*

3.11 In reiterating this point, the Commission wishes to emphasise a number of other points. One concern which some may have is that there may still be the risk that some business tenants will remain vulnerable through ignorance or undue influence in signing legal documentation. *The Commission believes that the 1994 Act's provisions could be strengthened by adopting proposals such as those announced recently by the British Government for England and Wales.³⁷ These would involve the requirement by the landlord to serve on the tenant a notice containing a prominent "health warning" about the contracting-out, and by the tenant to sign an acknowledgement of having read and accepted it. The Commission takes the view that it would further serve to impress upon any uncertain tenants what they were committing themselves to if this warning and tenant's acknowledgement had to be incorporated into or endorsed upon the lease. Consideration is being given to the form this might take, including in what way the obtaining of independent legal advice³⁸ may be exhibited. The Commission believes that such provisions will provide more than adequate safeguards for business tenants of all categories, while at the same time ensuring that the law*

³⁶ Note also the recent acceptance of it by the British Government: see paragraph 2.13 above.

³⁷ See again paragraph 2.13 above.

³⁸ One matter which is being considered is how far the concept of "independence" needs to be taken, eg should it rule out the same firm of solicitors acting for both parties?

*keeps pace with commercial developments, and enables business organisations to enter into the sort of leasing arrangements which best suit them. In this respect, the proposal should be read in the context of other recommendations designed to make the law accord more with the realities of the commercial world in the 21st century.*³⁹

Position of the State

3.12 Although the State has always been in the same position under the *Landlord and Tenant Acts* as any individual or other body so far as being a tenant is concerned,⁴⁰ it was not entirely clear what its position was as a landlord.⁴¹ However, section 4(2) of the *Landlord and Tenant (Amendment) Act 1980* resolved this point by providing that this Act does not bind a State authority⁴² “in its capacity as lessor or immediate lessor of any premises”. As a result of this sweeping provision,⁴³ State tenants are deprived not only of the rights to a new tenancy or reversionary lease or to compensation for disturbance or improvement, but also of the benefit of other provisions in the Act, such as those governing covenants.

3.13 Quite apart from doubts as to the constitutionality of aspects of this provision,⁴⁴ the Commission has grave doubts as to the need for such a blanket protection. The Commission has noted that a major change was made with respect to the equivalent provision, giving the

³⁹ See eg paragraphs. 3.25 and 3.39 below.

⁴⁰ See *Commissioners of Public Works v Kavanagh* [1962] IR 216.

⁴¹ However, in *Shanley v Commissioners of Public Works* High Court (Carroll J) 31 October 1991 it was held that the 1931 Act never applied to a tenancy granted in 1972 by the Commissioners of Public Works.

⁴² Defined in section 3(1) as meaning a Minister of the Government, the Commissioners of Public Works in Ireland or the Irish Land Commission. Note that the last has now been dissolved: see *Irish Land Commission Dissolution Act 1992* and *Irish Land Commission (Dissolution) Act 1992 (Commencement) Order 1999* (SI No 75 of 1999).

⁴³ Note the provisions in subsection (3) (as substituted for the original subsections (3) and (4) by section 14 of the *Landlord and Tenant (Amendment) Act 1984*) dealing with the case where one State authority takes over from another State authority. These provisions are not entirely satisfactory: see Wylie *op cit* paragraph 30.27 and paragraph 4.07 below.

⁴⁴ See Wylie *ibid.*

State protection from the right to acquire the fee simple conferred on tenants by the ground rents legislation.⁴⁵ Section 20 of the *Landlord and Tenant (Amendment) Act 1980* now confers the right to acquire that fee simple on State tenants of dwellinghouses, unless the appropriate State authority⁴⁶ certifies that the acquisition would not be in the public interest.⁴⁷ *The Commission's preliminary view is that a similar amendment would be appropriate to section 4 of the 1980 Act.*

Tenement

3.14 A key concept in the statutory scheme originally introduced by the *Landlord and Tenant Act 1931* is that of a "tenement".⁴⁸ Important statutory rights, including rights to new tenancies, compensation and the benefit of provisions governing covenants are confined to premises coming within this concept. Its definition relates to both the physical nature⁴⁹ of the premises and the status of the occupier. *The Commission's preliminary conclusion is that there are several aspects of this concept which need reconsideration.*

The Concept

3.15 One issue is that it is not clear that the adoption of such an artificial concept is really necessary. Much simplification would be introduced by allowing the Act to apply simply to tenancies.⁵⁰ This

⁴⁵ See *Landlord and Tenant (Ground Rents) (No. 2) Act 1978* section 4.

⁴⁶ Or, in the case of leases made by the Commissioners of Irish Lights or a harbour authority, by the Minister for Transport.

⁴⁷ See further on the issue of certification paragraph 4.07 below. *Cf* the position in England and Wales (paragraph 2.11 above) and Northern Ireland (paragraph 2.21 above).

⁴⁸ See now the definition in section 5 of the *Landlord and Tenant (Amendment) Act 1980* (replacing section 2 of the 1931 Act).

⁴⁹ Section 5 of the 1980 Act dropped the references to the location of the premises on the recommendation of the Landlord and Tenant Commission's *Report on Occupational Tenancies under the Landlord and Tenant Act 1931* (Pr No 9685, 1967) paragraphs 65-69.

⁵⁰ It is pointed out later that it seems to be particularly unfortunate that the provisions of Part V of the 1980 Act relating to covenants are confined to leases of tenements: see paragraph 3.43 below.

would import the basic characteristics of a tenancy, such as the occupier being entitled to exclusive possession of the premises, and avoid the confusion which often arises between notions of occupation and possession.

Buildings

3.16 It is also not clear that the need for “buildings”⁵¹ on the land should continue. This word is not defined, and the courts have been prepared to regard it as encompassing some very flimsy structures.⁵² In the context of business tenancies, it may be questioned why the legislation should not apply to leasing arrangements relating to operation of businesses like car parks and park-and-ride facilities. The same question might be raised with respect to business activities associated with farm land.⁵³ Dropping the requirement of buildings would also get rid of the difficult distinction between the part of the land on which buildings exist and another parts without buildings, and the concept of the latter being “subsidiary and ancillary” to the buildings.⁵⁴ An alternative would be to introduce in this context the provision which applies under the ground rents legislation,⁵⁵ whereby an applicant for statutory benefits can “sever”⁵⁶ a portion from the

⁵¹ A particular puzzle is the use of the plural in the legislation: see section 5(1)(a)(i) and (ii) of the 1980 Act.

⁵² See *O'Reilly v Kevans* (1935) 69 ILTR 1; *Terry v Stokes* [1993] 1 IR 204; *Dursley v Watters* [1993] 1 IR 224; *Flynn v McMahon* Circuit Court 3 May 2001. Note that under ground rents legislation the buildings have to be “permanent”: see *Landlord and Tenant (Ground Rents) (No 2) Act 1978*, section 9(1) (a)-(c).

⁵³ Cf the position in England: see paragraph 2.15 above. The Commission is not inclined, however, to recommend that the legislation should be extended to tenancies where the demised premises comprise only an incorporeal (as opposed to a corporeal) hereditament, such as an easement (eg a right of way) or profit à prendre (eg fishing rights): see *Brittas Fly-Fishing Club Ltd v Aimsitheoir Deantoreacht Teoranta* High Court (Barr J) 30 March 1993. This is also the position in England and Wales: see *Land Reclamation Co Ltd v Basildon District Council* [1979] All ER 993.

⁵⁴ See the cases cited in footnote. 52 above; see also *Kenny Homes & Co Ltd v Leonard* High Court (Costello P) 11 December 1997, and Supreme Court 18 June 1998.

⁵⁵ See section 14 of the *Landlord and Tenant (Ground Rents) (No 2) Act 1978*.

⁵⁶ The courts have been disinclined to permit this without a specific statutory provision: see *Lynch v Simmons* (1954) 88 ILTR 3.

unbuilt-on land so as to create a portion which can be regarded as subsidiary and ancillary to the built-on land, and to confine the claim to this portion of the built-on land.

Tenancy

3.17 There are other aspects of the definition of a “tenement” which the Commission considers merit attention. One is, of course, the critical requirement that the statutory protection can only be claimed by an occupier who is a tenant, and not some other category of occupier, such as a licensee. This distinction is one which has exercised property lawyers and the courts for well over a century. It became an issue of fundamental importance once statutory protection was conferred on “tenants”, so that the issue would arise frequently as to whether a particular arrangement whereby one person agreed to permit another person to occupy his land, created a tenancy. Thus, as a result of the statutory scheme relating to agricultural tenants, particularly that enshrined in the nineteenth century *Landlord and Tenant Acts* and the *Land Purchase Acts* of that and the twentieth century, the extremely common concept of conacre and agistment “lettings” was developed.⁵⁷ Traditionally, the courts have regarded such arrangements as not creating a tenancy, and so as falling outside such legislation.⁵⁸

3.18 In the context of business tenancies coming within the 20th-century Landlord and Tenant Acts, there have been several difficult cases where, again, the issue was whether the occupier was a tenant entitled to statutory protection or, usually, a licensee falling outside the legislation.⁵⁹ *The Commission is considering whether to*

⁵⁷ Note, however, that the concept was recognised before this legislation, and early cases involved rulings that such lettings did not come within covenants against subletting of leased land: see *Dease v O'Reilly* (1845) 8 Ir LR 52; *Booth v McManus* (1863) 12 ICLR 418.

⁵⁸ See Wylie *op cit* paragraph 3.20 *et seq.* Note, however, that some large-scale business conacre arrangements in Northern Ireland have recently been held to involve incidents not usually present in the traditional form, *eg* sufficient paramount occupation to incur liability for rates: *ibid* paragraphs 3.26 and 3.35.

⁵⁹ See *eg*, *Gatien Motor Co Ltd v Continental Oil Co of Ireland Ltd* [1979] 406; *Irish Shell & BP Ltd v Costello Ltd* [1981] ILRM 66; *Bellew v Bellew* [1982] IR 447; *Texaco (Ir) Ltd v Murphy* High Court 17 July 1991; *Governors of the National Maternity Hospital v McGouran* [1994] 1 ILRM 521; *Kenny Homes & Co Ltd v Leonard* High Court (Costello P) 11

recommend that some statutory guidance should be given as to the criteria for a tenancy. It may be argued that however precisely any such legislative provision may be drafted, it is likely to cause as many problems as it solves. The point is that the case law demonstrates that a wide range of arrangements for the occupation of land have been created in the past, exhibiting to a varying degree some, and often most, of the typical incidents of a tenancy.⁶⁰ Devising a workable definition of a tenancy capable of distinguishing other arrangements with sufficient clarity would not be easy, and may run the high risk of generating a new line of caselaw concerning interpretation of the statutory definition. The ultimate conclusion may turn out to be that this is an area of the law best left to the courts to develop.

3.19 At this stage, the Commission is keeping an open mind, because it is an issue which will arise in other contexts. For example, the issue of what constitutes a tenancy is, in many respects, the most fundamental one in the whole of landlord and tenant law, and also arises in statutes of more general application. The obvious example is Deasy's Act,⁶¹ and, in particular, its core provision, section 3, which governs the creation of the relationship of landlord and tenant in Ireland. *The Commission will, therefore, return to this subject in due course.*⁶²

Community of Interest

3.20 Subsections (3) and (4) of section 5 in the *Landlord and Tenant (Amendment) Act 1980* provide for situations where there is a "community of interest" between the tenant,⁶³ *ie* the person holding

December 1997 and Supreme Court 18 June 1998; *Smith v CIÉ* High Court (Peart J) 9 October 2002. See the discussion of most of these cases in Wylie *op cit* Chapter 2; Cannon "The Lease/Licence Distinction" (2000) *The Bar Review* 332; Ryall "Lease or Licence? The Contemporary Significance of the Distinction" (2001) 6(3) *CPLJ* 56.

⁶⁰ See the discussion of the most common examples in Wylie *op cit* Chapter 3.

⁶¹ *Landlord and Tenant Law Amendment Act, Ireland 1860*.

⁶² See Introduction paragraphs 2-5 above.

⁶³ These provisions are based on recommendations in the Landlord and Tenant Commission's *Report on Occupational Tenancies under the Landlord and Tenant Act 1931* (Pr No 9685 1967), paragraphs 79-82 and 84 (4) and (5).

the lease or with whom the tenancy agreement was made (the “paper” tenant), and some other person or body actually carrying on the business in the demised premises. The typical examples are where a family business is operated through a private company, or a corporate enterprise is operated through a holding company with one or more subsidiary companies. *The Commission considers that several issues arise in relation to these provisions.*

3.21 First, it would draw attention to two recommendations made in an earlier Report.⁶⁴ One was that, where an individual lessee has transferred the lessee’s interest in a tenancy to a limited company without the lessor’s consent, the right to a new tenancy should remain vested in the individual. The other recommendation was that the provisions should be extended to cover one not presently covered, *viz* where the lessee’s interest is vested in a company (the original tenant), but the business is carried on by an individual who is the principal (owner) of the company.⁶⁵ *The Commission reiterates these recommendations, but considers that there is a more fundamental point which merits consideration in this context.*

3.22 There is a concern that these provisions may operate unfairly on landlords, particularly in so far as they result in the landlord being saddled with the trader as the new tenant, when a new tenancy is granted under the legislation. There is an argument for saying that, in every case, the starting point should be that the tenant with whom the landlord entered into the original tenancy arrangement should be the entity entitled to a new tenancy. *The Commission takes the preliminary view that there is much force in this argument, and that it should at least be open to a landlord to make the case that it is unfair to its interests that it should have to accept some other entity (the trader) as the new tenant. What is envisaged is that the court should be given a discretion to consider such an argument, and to make what it considers to be the most appropriate order in all the circumstances*

⁶⁴ *Report on Land Law and Conveyancing Law: (5) Further General Proposals* (LRC 44 – 1992) 16-17.

⁶⁵ It has been pointed out that there is another *lacuna* in the existing provisions, *viz* where an individual owns two companies (one the original tenant and the other the trader on the premises), but the companies are not “holding” and “subsidiary” companies. The Commission’s preliminary view is that this is not a situation that should be covered, because it seems to fall outside the underlying philosophy of there being a clear connection or element of control between the original tenant and the trader.

of the case. This might involve the grant of the new tenancy to the trading entity, but on condition that a suitable guarantee is provided. This might be provided by the original tenant.

Right to a New Tenancy

3.23 Apart from the issues relating to the concept of a “tenement” raised in the previous paragraphs, the Commission has concluded that there are several other issues concerning the right to a new tenancy which should be considered further.

Occupation Period

3.24 The period of continuous occupation which a business tenant must establish at the time a new tenancy is claimed was extended from three years to five years by the *Landlord and Tenant (Amendment) Act 1994*.⁶⁶ Although adoption of the Commission’s earlier recommendation that general contracting-out should be permitted⁶⁷ would remove some of its force, there may be an argument for extending this qualifying period even further, perhaps as far as ten years. *The Commission would also reiterate another recommendation yet to be acted upon, viz that there should be a general rule that the tenement should remain a tenement*⁶⁸ *throughout the entire qualifying period.*⁶⁹ This would remain without prejudice to the existing provisions covering a “temporary break in the use” of the premises.⁷⁰

⁶⁶ Section 3(1), amending section 13(1)(a) of the *Landlord and Tenant (Amendment) Act 1980*.

⁶⁷ See paragraphs 3.05-3.11 above.

⁶⁸ Or, if the suggestion that this concept be dropped is adopted (see paragraph 3.15 above), that the occupation be as a tenant throughout the requisite qualifying period.

⁶⁹ *Report on Land Law and Conveyancing Law: (5) Further General Proposals* (LRC 44-1992) 17-19.

⁷⁰ 1980 Act section 13(2). This adopted a recommendation in the Landlord and Tenant Commission’s *Report on Occupational Tenancies under the Landlord and Tenant Act 1931* (Pr No 9685 1967) paragraphs 158-159.

Term of New Tenancy

3.25 The 1994 Act also reduced the maximum term of a new tenancy of business premises⁷¹ which can be fixed by the court to 20 years.⁷² *Again, the Commission considers that there may be an argument for reducing the maximum period still further, to, say, 15 years.*⁷³ It was pointed out earlier that the term of years granted under commercial leases in other jurisdictions, particularly in continental Europe, tends to be much lower than in Ireland until recently, without creating any problems.⁷⁴ There have been signs in recent times of the commercial property market in Ireland experiencing resistance to the longer terms that used to be prevalent, *ie* 25 to 35 years. Increasingly, tenants are seeking shorter terms and inclusion of further protection, such as “break” clauses.

Subletting

3.26 It has long been established that, where a business tenant sublets part of the demised premises, the subtenant may acquire, as an own right, statutory rights in the part sublet.⁷⁵ Conversely, the head tenant in such cases will only be able thereafter to claim statutory rights in respect of the part retained for the head tenant’s own occupation after the subletting.⁷⁶ These rules, however, apply only where a genuine subletting, in the sense of a tenancy being granted, has occurred. If the head tenant grants something less to someone

⁷¹ It remains 35 years for new tenancies granted on the basis of the other “equities”, *ie* the “long occupation” equity provided for in section 13(1)(b), and the “improvement” equity provided for in section 13(1)(c) of the 1980 Act.

⁷² Section 5, substituting a new subsection (2) in section 23 of the 1980 Act. Note that the new subsection (2) adopts an earlier recommendation of the Commission that a term fixed by the Court should not be less than 5 years, unless the landlord agrees otherwise.

⁷³ This is the period proposed recently for England and Wales: see paragraph 2.16 above.

⁷⁴ See paragraph 2.27 *et seq* above.

⁷⁵ See Wylie *op cit* paragraph 30.08. Note the protection conferred on subtenants against determination of the head-tenancy by section 78 of the 1980 Act: see paragraph 4.52 below.

⁷⁶ *McManus v ESB* [1941] IR 371; *Corr v Ivers* [1949] IR 245.

else, *eg* a right to use only,⁷⁷ or a mere licence to occupy⁷⁸ part of the original demised premises, the head-tenant retains statutory rights in respect of those entire premises.

3.27 The Commission is concerned that, on occasion,⁷⁹ the head-landlord may suffer some injustice from sublettings, because a consequence will often be that the single holding originally demised becomes fragmented into two or more holdings. This may be commercially inconvenient to the head-landlord. *The Commission's preliminary view is that head-landlords should be given some protection in such cases.* They should be given the option to insist that either the head-tenant should take a new tenancy of the entire original holding (but without prejudice to any rights any sub-tenant may have), or, if only one subtenancy has been created, that the sub-tenant instead takes a new tenancy of the entire holding. The head-landlord should also retain the option to sever the holding into the part retained by the head-tenant and the part let to the sub-tenant. An alternative would be to give the court a discretion to order such re-arrangement of the holding as it considers appropriate in all the circumstances, with all the parties involved free to argue their cases.

Periodic Tenancies

3.28 Ever since the decision by Carroll J in *Mealiffe v Walsh Ltd*⁸⁰ it has emerged that the statutory scheme is defective in its application to periodic tenancies. The Landlord and Tenant Commission had recommended that tenants holding under such tenancies, which continue indefinitely from period to period (week to week, month to month, year to year, *etc* according to the nature of the particular tenancy) until either party serves notice on the other,⁸¹ should not

⁷⁷ *Fetherstonhaugh v Smith* High Court (Costello J) 12 February 1979. *Cf Calaroga Ltd v O'Keeffe* [1974] IR 450.

⁷⁸ *Twil Ltd v Kearney* Supreme Court 28 June 2001.

⁷⁹ In many cases, any apparent "injustice" may be assuaged to some extent by the fact that the head-landlord's consent has been sought and given for the subletting, so that, to an extent, he is partly responsible for the situation he later faces.

⁸⁰ [1986] IR 427.

⁸¹ See Wylie *op cit* paragraph 4.10 *et seq.*

have to wait until the tenancy had been terminated.⁸² The 1980 Act adopted this recommendation by providing that a periodic tenant, *ie* whose tenancy is terminable by notice to quit, can serve a notice of intention to claim relief (*eg* a new tenancy) “at any time”, but before expiration of three months after service of the notice to quit.⁸³ However, although the 1980 Act makes provision for the court to determine an application for relief “before and in anticipation of” termination of the tenancy,⁸⁴ Carroll J ruled that the court could not do so in the case of a periodic tenancy until it knew the actual date of termination of that tenancy.⁸⁵ The court needs to know this date because the new tenancy runs from it,⁸⁶ and the terms of it to be fixed by the court, such as the rent, must be fixed by reference to it. Thus, in practice, a periodic tenant cannot get a claim for relief determined by the court until either he or the landlord serves a notice to quit specifying the termination date of the tenancy.⁸⁷

3.29 *The Commission takes the preliminary view that the legislation should be amended to deal with this problem, which, no doubt, was not anticipated by the Landlord and Tenant Commission or the Oireachtas. The solution is probably to treat periodic tenants as a separate category, and to give such tenants the right to claim relief by serving a notice which includes specification of the termination date for the tenancy in question. This provision could be applicable also to tenants claiming under the long occupation equity.*

⁸² As was the case under the 1931 Act: see section 24(2). See the Commission’s *Report in Occupational Tenancies under the Landlord and Tenant Act 1931* (Pr No 9685, 1967), paragraphs. 231 and 236.

⁸³ Section 20(2)(c).

⁸⁴ Section 21(3). This provision is also not without its difficulties: see paragraph 4.13 below.

⁸⁵ This date is, of course, always known right from the beginning in the case of a fixed-term tenancy, which, *ex hypothesi*, runs from a specified date for a fixed period, which necessarily ends on the date at the end of that period.

⁸⁶ 1980 Act, section 18(3).

⁸⁷ The Court can determine the application while the notice period is still running because, by then, by virtue of the service of the notice, it knows the date the tenancy terminates, *ie* expiration of the notice period. Note, however, difficulties which can arise over the correct period of notice, where there is uncertainty as to the category of periodic tenancy, or when the tenancy commenced: see paragraph 3.29 below.

Given the uncertainties which often exist in individual cases as to the category of periodic tenancy and when it commenced, it may be appropriate to require a minimum date in the future for such termination date (say, three months), whatever the nature of the tenancy. Such a provision would not affect the right of the landlord to serve a notice to quit in respect of a periodic tenancy.

Other Equities

3.30 In passing, it should be noted that the statutory scheme conferring the right to a new tenancy⁸⁸ provides for two other bases upon which a tenant may qualify, *ie* in addition to the so-called “business equity”. These are the so-called “long occupation”⁸⁹ and “improvement” equities.⁹⁰ Under the former, a tenant qualifies for a new tenancy if he can show 20 years’⁹¹ continuous occupation of the tenement. This is primarily aimed at residential property not coming within the business equity, and has come under scrutiny in recent times. In particular, it has been pointed out that, because it encourages landlords to terminate tenancies before the 20 years have elapsed, the provision militates against the security of tenure it is designed to promote. The *Report of the Commission on the Private Rented Residential Sector*⁹² concluded that it was not an effective measure,⁹³ and should be repealed on the basis of a transitional period of five years, during which renewal could be claimed, but with a voluntary opt-out provision being available.⁹⁴ That Commission’s recommendations for the sector were approved by the Government in

⁸⁸ But not the right to compensation for disturbance, which is largely confined to tenants coming within the “business equity” provided for by section 13(1)(a) of the 1980 Act: see section 58(1)(b) thereof.

⁸⁹ Section 13(1)(b).

⁹⁰ Section 13(1)(c).

⁹¹ Reduced from 30 years (as provided by section 19(1)(b) of the 1931 Act) on the recommendation of the Landlord and Tenant Commission: see *Report on Occupational Tenancies under the Landlord and Tenant Act 1931* (Pr No 9685 1967) paragraphs 161 and 171.

⁹² Department of the Environment and Local Government (July 2000).

⁹³ Adopting the view taken earlier in the *Report of the Working Group on Security of Tenure* (Department of Justice, Equality and Law Reform 1996).

⁹⁴ Paragraphs 4.4.5 and at 99.

January 2001 and the Law Reform Commission understands that it is intended to include this particular recommendation in the proposed legislation.

3.31 As regards the “improvement” equity, whereby a tenant may become entitled to a new tenancy on the basis of improvements made by the tenant, there is little or no evidence of this provision being invoked in modern times. Indeed, the Landlord and Tenant Commission so reported as long ago as 1967.⁹⁵ No doubt the primary reason for this is that, to qualify, not less than one-half the letting value of the tenement must be attributable to the improvements.⁹⁶ Furthermore, the tenant must be entitled to compensation for those improvements under the statutory scheme⁹⁷ the procedures for which are notoriously complex.⁹⁸ Indeed, as indicated later in this Chapter, the Commission’s preliminary view is that the statutory provisions relating to compensation for improvements should be repealed, but not so as to affect any accrued rights. *Notwithstanding these points, the Commission’s preliminary view is that there is no harm in allowing the improvement equity to remain on the statute book to be invoked in the very rare case when it is applicable.*

Restrictions on the Right to a New Tenancy

3.32 The provisions of section 17 of the *Landlord and Tenant (Amendment) Act 1980* which restrict (in essence, disqualify) a tenant from claiming a tenancy to which he would otherwise be entitled, are somewhat complex, and, in some respects, difficult to interpret.⁹⁹ Detailed points about the section are dealt with in the next chapter,¹⁰⁰

⁹⁵ *Report on Occupational Tenancies under the Landlord and Tenant Act 1931* (Pr No 9685 1967) paragraph 165.

⁹⁶ Section 13(1)(c).

⁹⁷ Part IV of the 1980 Act.

⁹⁸ See paragraph 3.38 below.

⁹⁹ Note the new sub-paragraph (iii a) added to section 17(1)(a) by section 4 of the *Landlord and Tenant (Amendment) Act 1994* (dealing with the right of renunciation in the case of office premises: see paragraph 3.05 above). The wording of this gives rise to a number of interpretation problems: see paragraph 4.18 below.

¹⁰⁰ See paragraph 4.16 below.

and, for the moment, the Commission will confine itself to more general points.

3.33 *The Commission has reached the preliminary conclusion that the provisions of this section should be recast. Instead of detailing a large number of specific grounds of opposition, it may be better to simplify the provisions by dividing them into two broad categories: (1) default or voluntary action by the tenant, and (2) an overriding need in the landlord.* The second of these would involve an expansion of the “good and sufficient reason” grounds. What the Commission has in mind in this regard is that the court should be given a discretion to accede to arguments put forward by the landlord based on “need,” and that the legislation would specify a range of factors to be taken into account by the court. These would include, albeit somewhat amended,¹⁰¹ most of the existing grounds, but might add some additional ones. One obvious *lacuna* in section 17 is where the landlord wishes to take the property back for his own use.¹⁰²

Compensation for Disturbance

3.34 *The Commission has reached the preliminary conclusion that some adjustments should be made to the way the provisions governing compensation for disturbance operate.* Some points of detail are dealt with in the next Chapter,¹⁰³ but at this stage the Commission wishes to draw attention to some more general points.

3.35 The current provisions in the *Landlord and Tenant (Amendment) Act 1980*¹⁰⁴ treat a claim to compensation for disturbance strictly as an alternative, largely limited to business premises,¹⁰⁵ to a claim to a new tenancy. It would appear from the

¹⁰¹ *Ibid.*

¹⁰² Cf section 16(1)(d) of the *Housing (Private Rented Dwellings) Act 1982*.

¹⁰³ See paragraphs 4.27 and 4.37 below.

¹⁰⁴ See sections 19 and 58-63.

¹⁰⁵ Some provision is made for compensation in the case of old decontrolled dwellings brought under the Landlord and Tenant Acts: see sections 15 and 58(3) of the 1980 Act and paragraph 3.36 below. Although section 19 of the 1980 Act seems to confer an unqualified right to compensation and makes no reference to section 58 of the Act, section 58(1)(b) specifically confines

wording of the legislation that a tenant who has been told that the landlord will oppose the grant of a new tenancy on one of the grounds which qualifies the tenant for compensation¹⁰⁶ cannot accept this, and proceeds directly to make a claim for compensation for disturbance.¹⁰⁷ Apparently, the tenant must still make a claim for a new tenancy and either include in this an alternative claim for compensation for disturbance or make a subsequent claim for such compensation.¹⁰⁸ *The Commission takes the view that this is an unnecessary complication in the procedures.* One way of dealing with this would be to impose a requirement on a landlord, when served with a tenant's notice of intention to claim relief, to serve a counter notice specifying (if this is the case) that he opposes the grant of a new tenancy and stating upon what ground. It should, then, be open to the tenant to decide to accept this and to proceed simply to pursue a claim of compensation for disturbance.

3.36 *The Commission's preliminary view is that it is not convinced that the basis for calculation by the court of compensation for disturbance laid down in the legislation¹⁰⁹ can be greatly improved upon.* Some further guidance has been provided by the case-law, albeit that some of this related to earlier legislation,¹¹⁰ but it might be useful to supplement the current provisions by adding factors which the court should take into account. One obvious factor is the availability and cost of acquiring alternative premises,¹¹¹ and the tenant should be under a clear obligation to mitigate his loss by making reasonable efforts to find alternative premises.¹¹² *The*

compensation for disturbance to business tenants, *ie* those coming within section 13 (1)(a). This ambiguity ought to be cleared up.

¹⁰⁶ In essence, those listed in section 17(2) of the 1980 Act, which are based on the needs of the landlord: see section 58(1)(a).

¹⁰⁷ *Cf* a claim to compensation for improvements: see section 56 of the 1980 Act.

¹⁰⁸ Which may be done by the tenant amending, with the leave of the Court, his original claim for relief: see section 19 of the 1980 Act.

¹⁰⁹ See section 58 of the 1980 Act.

¹¹⁰ *Viz* the *Town Tenants (Ireland) Act 1906*.

¹¹¹ See *Farrell v Brown* High Court 5 December 1967; *Aherne v Southern Metropole Hotel Co* [1989] ILRM 693.

¹¹² *Herlihy v Texaco (Ireland) Ltd* [1971] IR 311, 315-316 (*per* Pringle J).

Commission does not favour, however, fixing a statutory minimum level of compensation. Such a provision tends to introduce an undesirable inflexibility, by fixing the court's attention unduly on that minimum. It does not, therefore, recommend adopting, more generally, the basis for calculation of compensation laid down for old decontrolled dwellings,¹¹³ where, in some circumstances, a minimum of three years' rent, including rates, is specified.¹¹⁴ The Commission would also draw attention to a particular feature of this latter provision. This is that the court is required to include in the compensation such sum which will enable the tenant to secure alternative accommodation "without hardship". This seems to expose the landlord in such cases to the risk that, where market rents may have increased, he may have to compensate the tenant for his inability to pay the rent.

3.37 The sanction to enforce payment by the landlord of a compensation award is a somewhat odd one. In essence, if the payment is not made within the statutory time limit,¹¹⁵ the tenant is entitled to renew his application for a new tenancy, which this time the landlord will not be able to oppose on the grounds that could previously have been relied upon.¹¹⁶ This seems to be a particularly inappropriate sanction in many, if not most, cases, where by the time the compensation is fixed the tenant will have left the old premises and have installed himself in new premises. Furthermore, it is not clear what the court should do if, in the meantime, the landlord has installed a new tenant in the old premises, who may be an entirely innocent party.¹¹⁷ *The Commission's initial conclusion is that some other sanction should be imposed on the landlord which is more*

¹¹³ This provision involves a number of doubts and uncertainties: See Wylie *op cit* paragraphs 30.11 and 30.61.

¹¹⁴ Section 58 (3). It would appear that this statutory minimum applies only in "hardship" cases.

¹¹⁵ The expiration of one month from the fixing of the amount (by agreement or by the Court) or on delivery by the tenant of clear possession to the landlord: section 58 (4).

¹¹⁶ Section 58 (5).

¹¹⁷ It is unlikely that the award of compensation would be raised in pre-lease enquiries (if any) made by the incoming tenant. Nor would the usual enquiry about litigation affecting the premises be likely to elicit the information because, once the award is made, the litigation is at an end.

appropriate and in accord with the practical realities in most cases. Section 63 of the 1980 Act renders compensation payable by trustees a charge on the premises, but the Commission is not convinced that this is appropriate either. The problem is that if this was applied generally all prospective tenants or other parties contemplating entering into a transaction with respect to the premises would be forced into making enquiries in order to protect themselves against what is probably an extremely low risk of such a charge coming into existence. *Although the Commission is, in general, opposed to the imposition of criminal sanctions in what is essentially a civil matter, it may be that this is a situation where some penalty would be appropriate.*¹¹⁸

Compensation for Improvements

3.38 The provisions in Part IV of the 1980 Act dealing with compensation for improvements made by the tenant are of long standing,¹¹⁹ but are characterised by complex procedures to be followed by the tenant if he is to make a successful claim.¹²⁰ Depending upon the nature of the works in question,¹²¹ these involve service of notices and counter notices before any works are carried out. Although the 1980 Act now provides that a failure to follow these procedures is not necessarily fatal to a claim,¹²² a tenant cannot

¹¹⁸ Cf the provision for punitive damages in section 17(4) of the 1980 Act: see paragraph 4.25 below.

¹¹⁹ They replace, with considerable modifications recommended by the Landlord and Tenant Commission (see *Report on Occupational Tenancies under the Landlord and Tenant Act 1931* (Pr No 9685, 1967) Chapter IV) those in Part II of the 1931 Act, but earlier provisions were contained in the *Town Tenants (Ireland) Act 1906*.

¹²⁰ See especially sections 48-52.

¹²¹ Note the provisions in section 49 dealing with the case where a sanitary or housing authority serves a notice on the tenant requiring execution of improvements. The Commission's preliminary view is that these provisions should be kept: see paragraph 3.40 below.

¹²² The onus is on the landlord to satisfy the court that the failure to observe the procedures has prejudiced him, or that the improvement is in breach of any covenant or injures the amenity or convenience to the neighbourhood: see section 54 (2). In the case of work required by a sanitary or housing authority, the onus is on the tenant to show that the landlord did not suffer loss or damage: see section 54 (4).

be sure that he can rely on this provision. Nevertheless the Commission understands that many tenants fail to follow the statutory procedures, largely out of a lack of awareness of them. *The Commission has reached the initial conclusion that these provisions have outlived their usefulness.* In most leases there will be a covenant dealing with the making of improvements or alterations to the premises, the operation of which is governed by other provisions in the 1980 Act.¹²³ There is considerable potential unfairness to landlords if tenants are free to make improvements, which considerably alter the nature of the premises, yet the landlord ends up paying not only the cost but a sum to reflect the increase in the value of the premises. This will often amount to a very substantial sum, yet the landlord may be greatly inconvenienced because the improvements are not consistent with his future plans for the property.¹²⁴

3.39 *The Commission's view is that tenants should be expected to take a more commercial view of such matters.*¹²⁵ If they are contemplating improvements, this should be regarded as making an investment in their business, which should be written off over time in the usual way. In accordance with good business practice, the investment should not be made unless the investor expects to get an adequate return. The improvements should not, therefore, be carried out towards the end of the lease, unless the tenant knows that it is going to be renewed.¹²⁶ Carrying out very expensive improvements at the end of the lease in the expectation that the landlord will pay substantial compensation, which the present provisions allow, seems an abuse of the scheme.

¹²³ Section 67 (3) and 68. See paragraph 3.41 below. In the case of business leases containing a rent review provision, again the making of improvements or carrying out of works by the tenant will usually be dealt with expressly: see Wylie *op cit* paragraph 11.39.

¹²⁴ The landlord has no guarantee that the court will take the view that he has been "prejudiced":

¹²⁵ This was the view of the North's Law Reform Advisory Committee which also recommended repeal of the provisions relating to compensation for improvements. This was acted upon in the *Business Tenancies (NI) order 1996*: see paragraph 2.24 above.

¹²⁶ See further paragraph 3.40 below.

3.40 The Commission wishes to emphasise a number of further points about the proposal that the statutory provisions of compensation for improvements should be dropped from the legislative scheme. One is that this should operate prospectively, *ie* in respect of improvements made in the future. It should not affect the right to compensation in respect of improvements already made at the time the new legislation is announced. The need for transitional provisions may have to be considered. The Commission is concerned that abolition of the statutory right to compensation should not be seen as a discouragement to improvement of property. Thus, in order that tenants may continue to consider it economically worthwhile to incur expenditure on such works, it should remain the case that a tenant should be able to apply for a new tenancy well in advance of termination of his existing one.¹²⁷ In this way, he can make a sensible judgment whether the cost can be written off during this continued period of occupation of the premises. It should also remain the case that any expenditure on improvements is taken into account in fixing the rent of a new tenancy.¹²⁸ Finally, the Commission's proposal is not intended to affect the operation of the provisions of the sort contained in section 49 of the Act. These concern improvements required to be carried out by a sanitary or housing authority in the exercise of its statutory powers. There will clearly continue to be a need to provide for such requirements to be met in the context of rented property.

Covenants in Leases

3.41 The 1980 Act¹²⁹ continued the provisions originally introduced by the 1931 Act¹³⁰ designed to ensure that certain covenants in leases, such as a covenant against alienation by the tenant,¹³¹ operate fairly. There are various points of detail relating to these provisions which are dealt with in the next Chapter,¹³² but there

¹²⁷ See further paragraph 4.12 below.

¹²⁸ See section 23(4) and (6) of the 1980 Act and paragraph 4.30 below.

¹²⁹ See Part IV.

¹³⁰ See Part VI. These were to some extent based on provisions in the English *Landlord and Tenant Act 1927*, sections 18 and 19.

¹³¹ See section 66 of the 1980 Act.

¹³² See paragraph 4.44 *et seq* below.

are two general points which the Commission wishes to deal with at this stage.

Scope of Provisions

3.42 A curious feature of these provisions is that, unlike their English equivalent,¹³³ they are of limited scope. In the first place, the provisions are limited to “leases” and so do not cover other tenancy agreements, in particular oral agreements.¹³⁴ It is understandable that the Oireachtas had in mind primarily the situation where the parties’ agreement is put in the form of a written document, the terms of which are, therefore, susceptible to easy proof. *However, the Commission’s preliminary conclusion is that there seems no reason, in principle, why the statutory scheme should not have the widest, possible scope, so that it should apply to all tenancies.* It is, then, up to a party seeking to invoke the statutory provisions to prove that the particular agreement is covered, in the sense that one of its terms comes within one of the statutory provisions.

3.43 A further limit on the scope of the existing provisions is that they are confined to leases of “tenements”. This has been described as “unfortunate and perhaps undesigned”.¹³⁵ *The Commission takes the view that there appears to be no reason in principle why these provisions should not apply to both oral tenancies and leases.*

Tenant’s Remedy

3.44 Several of the statutory provisions are concerned with ensuring that the landlord does not unreasonably withhold consent to

¹³³ The English 1927 provisions (see footnote 130 above) were modified by the provisions of the *Landlord and Tenant Act 1988*. These Acts apply to any “tenancy” (defined as “any lease or other tenancy”, including a sub-tenancy and agreement for a tenancy) and “covenant” is defined as including a “condition and agreement”: see section 5(1) of the 1988 Act.

¹³⁴ Note, however, that section 64 of the 1980 Act extends the provisions to yearly tenancies arising by implication on the expiration of a lease, thus dealing with a *lacuna* pointed out by Kenny J in *Whelan v Madigan* [1978] ILRM 136, 145 (in relation to section 55 of the 1931 Act). A puzzle remains as to why this extension is confined to “yearly” periodic tenancies: see paragraph 4.45 below.

¹³⁵ Moore and Odell *The Landlord and Tenant Act 1931* (Falconer 1932) at 101.

certain transactions which the tenant wishes to carry out, *eg*, to assign or sublet the demised premises.¹³⁶ A frequent problem is that the tenant does not have a very effective remedy to enforce such provisions against an obstructive or dilatory landlord. Many weeks and months may go by while the tenant tries to negotiate the relevant consent from the landlord, until eventually he may feel compelled to go to court.¹³⁷ When the tenant does go to court the usual remedy is a declaration that the landlord's refusal to give consent either has or has not been unreasonable. A declaration that the landlord has, indeed, been unreasonable is not much help to a tenant who has incurred considerable expense over months of fruitless negotiation and who finds that prospective assignees or sub-tenants have become fed up with the delays and have lost interest. The tenant may have to start all over again in the search for a new assignee or sub-tenant.

3.45 It is by no means clear that in such cases the court would award damages against the landlord to cover the tenant's losses and expenses. There is a line of English¹³⁸ cases which held that in the usual situation, where the obligation by the landlord not to act unreasonably is simply a qualification or adjunct (express or implied by statute¹³⁹) to a covenant by the tenant not to do something; there is no scope for awarding damages against the landlord for breach of covenant.¹⁴⁰ The reason is that, technically, the landlord has not entered into a covenant and so damages can be awarded only in cases, which are very rare, where the landlord enters into a separate

¹³⁶ See section 66.

¹³⁷ It is arguable that a tenant, who is convinced that the landlord is acting unreasonably, can go ahead with the transaction, but few tenants are willing to run the risk of the Court not agreeing with that view, and even fewer prospective new tenants are willing to proceed without the requisite consent: see Wylie *op cit* paragraph 21.21.

¹³⁸ The only Irish case in which the point seems to have been raised (*Kelly v Cussen* (1954) 88 ILTR 97) is unsatisfactory because the Circuit Court ruled that no damages could be awarded because the tenant had failed to prove any loss.

¹³⁹ Sections 66-68 of the 1980 Act operate in this way by modifying express covenants (even those involving an absolute prohibition) by tenants.

¹⁴⁰ See *Treloar v Bigge* (1874) LR 9 Exch 151, followed in *Rose v Grossman* [1967] EGD 103; *Bulcock v St Marylebone Property Co* [1968] EGD 398.

covenant of his own not to act arbitrarily or unreasonably.¹⁴¹ *Arguably this is ultimately a question of the correct construction of the particular lease, but the Commission's preliminary conclusion is that there is sufficient uncertainty as how the Irish courts would deal with the matter to justify legislative intervention.*

3.46 The English authorities led the Law Commission there to recommend such intervention¹⁴² and this was done with the enactment of the *Landlord and Tenant Act 1988*. Amongst other things, this imposes a statutory obligation on the landlord to act expeditiously and reasonably, reversing the onus of proof so as to put it on the landlord to show that he has complied with his obligations.¹⁴³ The Act then goes on to provide: "A claim that a person has broken any duty under this Act may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty."¹⁴⁴ *The Commission's preliminary view is that similar provisions should be enacted here.*

Consolidation

3.47 The plethora of different enactments which now relate to the law of landlord and tenant render it difficult to understand and inaccessible even to professional experts like lawyers. There is clearly a need for consolidation but at this stage the Commission is keeping an open mind as to the form this should take. As was indicated earlier,¹⁴⁵ the existing legislation falls into different categories, such as general statutes like Deasy's Act, parts of the old Conveyancing Acts, the Landlord and Tenants Acts, the Ground Rents Acts, and the Private Rented Dwellings Acts. It may be that an attempt to consolidate all these into one Act would result in such a

¹⁴¹ See *Shepard v Hong Kong and Shanghai Banking Corporation* (1872) 20 WR 459; *Ideal Film Renting Co Ltd v Nielson* [1921] 1 Ch 575.

¹⁴² See Reports Law Commission of England and Wales Nos 141 (1985) and 161 (1987).

¹⁴³ Section 1.

¹⁴⁴ For examples of this being invoked by tenants, see *CIN Properties Ltd v Gill* [1993] 2 EGLR 97; *Footwear Corporation Ltd. v Amplight Properties Ltd.* [1998] 2 EGLR 38; *London and Argyll Developments Ltd. v Mount Cook Laud Ltd.* [2002] 50 EG 111 (CS).

¹⁴⁵ See the Introduction to this Consultation Paper.

large and unwieldy enactment that the exercise would be self-defeating. *A series of consolidating Acts may be more appropriate but, in any event, the Commission is of the view that the process of consolidation must include serious attempts at simplification and removal of doubts and uncertainties. The sort of things which come into the latter category are illustrated in the next Chapter.*

CHAPTER 4 DETAILED POINTS

4.01 This chapter draws attention to numerous points of detail concerning the provisions of the Landlord and Tenant Acts, with particular reference to their application to business tenancies.¹ In essence it covers Parts I, II and IV – VI² of the *Landlord and Tenant (Amendment) Act 1980*, as amended by subsequent Acts.³

Part I of the 1980 Act

4.02 Part I of the 1980 Act contains some key provisions governing much of the remainder of the Act, including concepts considered in the previous chapter. Thus it deals with the position of the State⁴ and the concept of a “tenement”.⁵ There is obviously no need to repeat what was said earlier about these provisions at this stage.

Section 3 – Interpretation

4.03 Clearly if the Commission’s final recommendations lead to substantial amendment and consolidation of the legislation the definitions contained in section 3 will have to be reconsidered. One point which the Commission wishes to draw attention to is that some confusion arises from the proliferation in the legislation of expressions like “lessor”, “lessee”, “lease”, “landlord”, “tenant” and “tenancy”. *The Commission’s initial conclusion is that the legislation*

¹ The Commission’s Project Group has been aided in its analysis of the Acts by the annotations to be found in the original loose-leaf version of Wylie *Irish Landlord and Tenant Law* (Butterworths 1990-92) Part VI.

² Part III deals with reversionary leases and will be considered in due course along with related legislation like the *Landlord and Tenants (Ground Rents) Acts 1967-1987*.

³ *See the Landlord and Tenant (Amendment) Acts 1984, 1989 and 1994.*

⁴ Section 4: see paragraph 3.12 above.

⁵ Section 5: see paragraph 3.14 above.

should apply to all tenancies, including oral tenancies (ie those created or arising without any written document), unless there is some overriding reason to confine a particular provision to certain types of tenancies (such as those involving a written document, ie a “lease”).⁶

4.04 On this basis, and in the interests of simplification and consistency, the expressions “landlord”, “tenant” and “tenancy” only should be used. The expression “contract of tenancy”, which is sometimes used in this context, is somewhat ambiguous in that there is a clear distinction to be made between a **contract** for the grant of a tenancy and the **actual grant** of the tenancy. The former involves a contract which is governed by the provisions of the *Statute of Frauds (Ireland) 1695*.⁷ This creates, at most, an equitable interest only in the prospective tenant.⁸ The latter involves the immediate creation of a tenancy, whereby the tenant acquires legal title to the demised premises.⁹ This is governed by the provisions of Deasy’s Act,¹⁰ especially sections 3 and 4. The source of much of the confusion derives from the fact that section 3 bases the relationship on the “express or implied **contract** of the parties”¹¹ and section 4 requires only that every “lease or **contract**”¹² creating the relationship “shall be by deed executed, **or note in writing**.”¹³ Notwithstanding this

⁶ See paragraphs 3.15 and 3.41 above. Note, eg the provisions of section 4: see paragraph 4.07..

⁷ In essence this requires some form of written evidence of the making of the contract: see Farrell *Irish Law of Specific Performance* (Butterworths 1994) Chapter 5.

⁸ See Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998) Chapter 5.

⁹ *Ibid.*

¹⁰ *Landlord and Tenant Law Amendment Act, Ireland 1860.*

¹¹ Emphasis added. See the discussion of the operation of section 3 in Wylie *op cit* Chapter 2.

¹² Again emphasis added.

¹³ Again emphasis added. Cf the requirements of the *Statute of Frauds (Ireland) 1695*: see footnote 7 above.

confusing terminology the Irish Courts have recognised¹⁴ that there is a fundamental distinction between a contract for a tenancy¹⁵ and a grant of a tenancy.¹⁶ Care must, therefore, be taken over the use of expressions like “contract of tenancy”, “tenancy agreement” and “lease agreement”.¹⁷

4.05 There is a point which arises in connection with the definition of “predecessors in title” as it applies to a tenant. This definition is important in relation to qualification for the right to a new tenancy,¹⁸ which requires continuous occupation for the requisite period.¹⁹ The tenant is permitted to add a period of occupation by his predecessor in title to his own period of occupation to make up the requisite period. The definition, however, requires that this occupation must be “under the same tenancy”. This may give rise to a problem where the terms of the tenancy have been the subject of a variation agreed by the parties. It is often a difficult issue whether such a variation will be construed by the courts as resulting in a surrender of the old tenancy and the grant of a new tenancy. The Irish courts seem to have been less ready than the English courts to construe a variation as amounting to a surrender and re-grant.²⁰ *The Commission’s preliminary view is that it ought to be made clear that a variation of the terms of a tenancy does not affect a tenant’s or his successors’ statutory rights.*

¹⁴ See *M’Causland v Murphy* (1881) 9 LR Ir 9 and the discussion in Sheridan “*Walsh v Lonsdale in Ireland*” (1952) 9 NILQ 190; Wylie *op cit* paragraphs 5.01 *et seq.*

¹⁵ Cf the expressions “contract **for** a tenancy” and “contract **of** tenancy”.

¹⁶ Cf the expressions “agreement **for** lease” and “lease agreement”.

¹⁷ See, *eg* section 78 of the 1980 Act and paragraph 4.52 below. The Commission will also return to this subject when it comes to consider the provisions of Deasy’s Act.

¹⁸ Under section 13(1)(a) (business equity) and (b) (long occupation equity).

¹⁹ See paragraphs 3.24 and 3.29 above.

²⁰ See *Curoe v Gordon* (1892) 16 ILTR 95; *Thomson v Hagan* [1906] 1 IR 1; *Walsh v Hendron Bros (Dublin) Ltd* (1947) 82 ILTR 64. Cf *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. See further Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998) paragraph 25.12.

Section 4 – Application to the State

4.06 *The general operation of this section was discussed earlier and the Commission’s preliminary view is that it ought to be amended quite radically.*²¹ There is, however, one further point which should be mentioned in relation to subsections (3) and (4) as amended by section 14 of the *Landlord and Tenant (Amendment) Act 1984*.

4.07 Subsection (3) preserves the right to a new tenancy where the State acquires the landlord’s interest, but prevents the tenant from obtaining any further renewal. This provision was amended by section 14 of the 1984 Act, to prevent a transfer from one State authority to another being treated as a new “acquisition” of the landlord’s interest, thereby preserving the tenant’s rights for longer than was originally intended by the Oireachtas. A problem arises because this provision applies not only where the State acquires the interest of the tenant’s immediate lessor, but also the interest of a superior lessor. Under conveyancing law and practice a lessee, when he acquires his interest, is not entitled to see the superior lessor’s interest²² and so may not be aware of the fact that the State has acquired that interest. *The Commission’s preliminary view, subject to the suggested overhaul of this section, is that the onus should be put on the State to notify all inferior tenants of acquisition of a superior interest and, if the recommended system of certification of the public interest is introduced,*²³ *to notify them of each such certification.*

Section 5 – Tenement

4.08 A number of fundamental issues to do with the central concept of a “tenement”, as defined by section 5, was discussed in the previous chapter.²⁴ There is, however, one other point worth mentioning.

²¹ See paragraphs 3.12-3.13 above.

²² *Linders Garage Ltd v Syme* [1975] IR 161 at 166 (*per* O’Higgins J). See *Wylie Irish Conveyancing Law* (2nd ed Butterworths 1996) paragraph 14.68 *et seq.*

²³ See paragraph 3.13 above.

²⁴ See paragraph 3.14 *et seq* above.

4.09 Subsection (1)(a)(iv) and (v) contain longstanding provisions exempting from the benefit of the statutory scheme so-called “temporary convenience” and “employment” lettings. However, whereas it is a requirement that the nature of the temporary convenience must be stated in the letting agreement, there is no equivalent requirement in respect of a letting relating to an “office, employment or appointment”. *The Commission’s preliminary view is that there should be a similar requirement in respect of such a letting.*

Part II of the 1980 Act

4.10 Part II of the 1980 Act deals with the right to a new tenancy and again some of its provisions were discussed in the previous chapter.²⁵ What follows is a brief note of various other points worth consideration.

Section 13 – Application of Part II

4.11 Section 13 determines entitlement to a new tenancy and this Consultation Paper is concerned primarily with the “business equity” provided for in subsection (1)(a). *The wording of this section has given rise to considerable difficulties over the years and the Commission’s preliminary view is that it needs review.* Some suggested changes were referred to earlier,²⁶ but there are other points worth consideration.

4.12 The phrases “at any time” and “at that time”, which relate to when the right to a new tenancy “crystallises” (*ie* when it can be invoked) have provoked much discussion over the years.²⁷ They were the subject of considerable scrutiny by the Supreme Court in the recent case of *Twil Ltd v Kearney*.²⁸ The majority of the Court²⁹ took

²⁵ See paragraph 3.23 *et seq* above.

²⁶ See, *eg* paragraphs 3.24 and 3.28-3.29 above.

²⁷ Especially when viewed with the provision in section 21(3) permitting an application for a new tenancy to be heard and determined by the Court “before and in anticipation of” termination of the existing tenancy. Note the particular problem concerning periodic tenancies discussed earlier: see paragraph 3.28 above.

²⁸ 28 June 2001 (pursuant to a case stated by Judge John F Buckley).

²⁹ Fennelly J (Murray J concurring).

the view that the crystallisation point was the date of termination of the existing tenancy³⁰ and any application made before then³¹ should be determined by reference to that date.³²

4.13 Murphy J (dissenting) thought that the phrases were “neutral” and not necessarily pointing to any particular date.³³ He conceded that, notwithstanding this “flexible” interpretation, the date of termination of the existing tenancy was, indeed, the appropriate date when the issue arose after that date. Where, however, a tenant applied before the date of termination of his existing lease, Murphy J’s view was that the appropriate date was the date of service of the notice of intention to claim relief.³⁴ Perhaps not surprisingly, Murphy J ended his judgment with the following statement:

“I believe that the attention of the appropriate authorities should be drawn to the fact that doubts have arisen in relation to a proposition which is fundamental to the operation of the legislation which is of great practical and commercial importance so that the legislation could be reviewed and any necessary amendments made to it.”

The Commission whole-heartedly endorses that view.

4.14 *The Commission’s preliminary view is that the majority view of the Supreme Court in the Twil case should form the basis of any amendment of the wording of section 13(1)(a) and related provisions like section 21(3). It accepts that the right to apply for a new tenancy*

³⁰ From when any new tenancy granted will run: see section 16.

³¹ As permitted by section 21(3): see footnote 27 above.

³² As Fennelly J put it: “to anticipate is not merely to expect but to take into account and act by reference to a future event.”

³³ As he put it, they permit “parties relying upon the Act to ascertain their rights by inserting an appropriate date which fell to be identified by other provisions of the Act and the circumstances of the case.”

³⁴ A problem with this interpretation is that in the interval between the date of service of the notice and the date of termination of the lease the tenant may become disqualified, *eg* by breaching the terms of the lease, or one of the other grounds of opposition giving rise to a restriction on the right to a new tenancy under section 17 may arise.

*before the expiration of the existing one is a very useful provision and one of which many tenants will wish to take advantage.*³⁵ However, the legislation should make it clear that the issue for the court, whenever it hears an application for a new tenancy, is whether on the date of termination of the old tenancy, when the new tenancy will commence, the tenant will qualify or, if that date has passed, did qualify for a new tenancy. It should further be made clear that, where an application for a new tenancy is made in advance of that date,³⁶ the Court can make a “conditional” order, *eg* declaring that the tenant has already qualified for a new tenancy and will remain so, provided the circumstances relating to qualification do not change by the date of termination of the old tenancy.

Section 14 – Decontrolled Business Premises

4.15 Section 54 of the *Rent Restrictions Act 1960* gave tenants of business premises decontrolled by that Act the right to a new tenancy under Part III of the *Landlord and Tenant Act 1931*.³⁷ Both section 54 and the 1931 Act were repealed by the *Landlord and Tenant (Amendment) Act 1980*,³⁸ but section 14 preserved the rights of such tenants. Since these provisions relate to tenants of premises originally controlled by the *Rent Restrictions Act 1946* and still under control when the 1960 Act came into force, it must be doubted whether any such tenants still exist. *The Commission’s preliminary view is that this provision could probably be repealed now, which would not, of course, affect any rights already acquired or accrued under section 14.*³⁹

³⁵ See earlier in relation to the decision to carry out improvements to the demised premises paragraph 3.39 above.

³⁶ The Commission’s preliminary view is that it is neither necessary or desirable to impose any limit on how far in advance such an application can be made.

³⁷ See *Farrell v Brown* High Court 5 December 1967.

³⁸ Section 11(1) and the Schedule.

³⁹ *Interpretation Act 1937*, section 21(1)(c).

Section 17 – Restrictions on right to a new Tenancy

4.16 It was indicated earlier that the Commission’s preliminary view is that the provisions of this section need some recasting.⁴⁰ There are, however, some further points worth noting.

4.17 Section 17(1)(a)(ii) seems to alter the position which obtained under the 1931 Act,⁴¹ in that it seems to permit a landlord to prevent a tenant from obtaining a new tenancy by serving a notice to quit for any breach of covenant, however trivial. The 1931 Act confined this to breaches of “condition”⁴² which is usually taken to mean a major provision of the tenancy. Furthermore, since such a notice to quit in the case of a periodic tenancy does not involve a forfeiture,⁴³ there is no scope for the tenant to seek equitable relief from the court.⁴⁴ *It is not clear whether this was an intended change made by the 1980 Act and the Commission’s preliminary view is that it may operate unfairly. However, it may be dealt with by the earlier suggestion that many of the provisions in subsection (1)(a) could be subsumed within the concept of the landlord having to establish a “good and sufficient” reason for opposing the grant of a new tenancy.*

4.18 Section 17(1)(a)(iii a) was inserted by section 4 of the *Landlord and Tenant (Amendment) Act 1994* in order to introduce the limited facility of renunciation of statutory rights. The wording of this provision has given rise to a number of queries,⁴⁵ but if the Commission’s preliminary view on the scope for contracting-out is

⁴⁰ See paragraph 3.32 above.

⁴¹ See section 21(1)(b).

⁴² Section 3(1) of the 1980 Act does not meet this point since it simply defines “covenant” as **including** a condition.

⁴³ *Cf* service of a notice of a breach of covenant of a fixed term lease under section 14 of the *Conveyancing Act 1881*, which may lead to forfeiture, in the sense of invoking a right of re-entry reserved in a lease. Most leases nowadays reserve such a right for breach of covenant, rather than, as was once the practice, making obligations conditions rather than covenants. See Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998) paragraph 24.07 *et seq.*

⁴⁴ See Wylie *op cit* paragraph 24.19 *et seq.*

⁴⁵ *Ibid* paragraph 30.22.

accepted,⁴⁶ the provision would become redundant. There is no point, therefore, in considering amendments to it at this stage, except in respect of one crucial matter.

4.19 Even if the Commission's preliminary view, that the scope for contracting-out should be extended generally, is accepted, it is important to reiterate that, as under subsection (1)(a)(iii a), this would be subject to the tenant obtaining independent legal advice. Indeed, the Commission proposed that this should be strengthened by adopting the proposal recently put forward in England of requiring tenants to be given a clear "health warning" in a statutory form.⁴⁷ There remains, however, the issue of what constitutes independent legal advice and whether some further guidance should be given by statute. This is an important matter because landlords and those investing subsequently in the landlord's interest must be assured that any purported renunciation or contracting-out can be relied upon.

4.20 *The Commission is giving further consideration to this issue. Its preliminary view is that the statutory form incorporating the "health warning" should contain a declaration by the tenant that he has read the "health warning" and that he has had its meaning explained to him by a legal practitioner. This declaration should be signed by the tenant and countersigned by the practitioner who gave the advice. The health warning should also state explicitly that by signing it the tenant and his successors will be bound by the contracting-out. Who constitutes a "legal practitioner" should be defined and "independent" should be stated to be independent of the landlord. That does not necessarily exclude, as is not uncommon, the same large firm of solicitors acting for both parties in the negotiations over the tenancy, but on the issue of contracting-out, at least, different members of that firm would have to be acting for the landlord and tenant, to ensure genuinely independent expert advice.*

4.21 Subsection (1)(b) defines what is meant by a "good and sufficient" reason relied upon by a landlord in refusing a new tenancy, but conflicting views have been expressed in the courts as to where lies the onus of establishing this to the satisfaction of the

⁴⁶ See paragraph 3.09 above.

⁴⁷ See paragraphs 2.13 and 3.11 above.

court.⁴⁸ *Clearly this should be clarified,⁴⁹ and the Commission's preliminary view is that the onus should be on the landlord.*

4.22 Subsection (2)(a)(i) and (ii) relate to cases where the landlord can oppose a new tenancy on various grounds relating to rebuilding or reconstruction works⁵⁰ or development which includes the property. The 1980 Act added the requirement⁵¹ that the landlord must have planning permission for the works or development. However, nowadays such permission is often made subject to meeting various conditions and this may cause the landlord considerable inconvenience. It was recently held that a landlord could not obtain an immediate court order in his favour in such a case until the conditions attached to the grant of planning permission were met.⁵² The problem will be in many cases that some conditions may relate to the finished building and will not, therefore, be met until it is completed. There may be further complications if the landlord decides to appeal against the conditions or another party appeals the decision to grant permission.⁵³ All this may involve considerable

⁴⁸ Note the different views on the similar provision in the *Town Tenants (Ireland) Act 1906* given in *O'Reilly v Leahy* [1931] IR 474 at 492 (*per* Kennedy CJ); *cf* 478 (*per* Hanna J) and 489 (*per* Fitzgerald J). See also Gavan Duffy J in *M'Evoy v Arnott & Co Ltd* [1943] IR 214 at 217 and at 226-228.

⁴⁹ Especially since the Commission's preliminary view is that this ground should assume a more central role and other grounds should be subsumed within it: see paragraph 3.33 above.

⁵⁰ The operation of these provisions was recently considered in the Circuit Court in the case of *Johnson & Perrott Ltd v Cantrell* Circuit Court 3 May 2001.

⁵¹ In *Dolan v Corn Exchange Corporation* [1983] IR 269 the Supreme Court refused to accept "outline" permission since this did not entitle the landlord to carry out the proposed works. Note that section 3(1) of the 1980 Act defines planning permission as including outline permission and that section 36 of the *Planning and Development Act 2000* makes substantial amendments to the meaning of such permission.

⁵² The *Johnson & Perrott v Cantrell* Circuit Court 3 May 2001, Judge Buckley ruled that the appropriate course for the court to adopt was to adjourn the case to see if the landlord had met the conditions by the date set for re-hearing.

⁵³ In *Stone v National Mutual Life Assurance Co of Australasia Ltd* High Court 29 July 1974, it was held that a landlord could not rely on permission so long as it was subject to an appeal.

delays and put both the landlord and the tenant in an unsatisfactory state of limbo. *Here, again, the Commission's preliminary view is that this sort of problem might be best resolved by subsuming such grounds within the "good and sufficient reason" ground. The landlord's intentions and plans, and the issue of planning permission, would then simply become factors to be taken into consideration by the court in determining whether the landlord had established his case to the satisfaction of the court.*

4.23 Subsection (2)(b) confirms the right to compensation for disturbance when a landlord succeeds in opposing the grant of a new tenancy on a ground which is not based on a breach of agreement by the tenants or other improper behaviour. A number of queries arise with respect to this provision. One is that there was probably no need for it in this section, as the right to such compensation is dealt with in Part IV of the Act. Rather more seriously, it refers to both "certain dwellings" and "business premises", yet section 58(1)(b) of the Act confines compensation for disturbance to tenants coming within the business equity.⁵⁴ It is true that this equity includes premises used "wholly or partly" for the purpose of carrying on a business, so that it covers premises partly used as a dwelling. Nevertheless, the wording of subsection (2)(b) is a somewhat misleading way of indicating this. That, however, leads to an even more fundamental point, which is whether it is constitutionally valid to distinguish, in the way section 58 does, between business tenants and other tenants so far as compensation for disturbance is concerned. *The Commission is not convinced that this is appropriate.*

4.24 Subsection (3) enables the court to continue the tenancy in certain cases, such as where the landlord does not require possession for his works or redevelopment "until the expiration of a period of at least six months." However, it is not clear from when this period runs and it ought to be made clear. *The Commission's preliminary view is it should run from the date of the hearing (ie when the court must be "satisfied" that the subsection applies) or, if the existing tenancy is still running then, from the date of its termination.*

4.25 Subsection (4) contains a draconian sanction, viz an award of punitive damages, against a landlord who fails to carry through works or development after successfully opposing the grant of a new tenancy on such grounds. *The Commission accepts that there is*

⁵⁴ *Ie* under section 13(1)(a).

obviously a need for a deterrent of some kind but is not convinced that this is the appropriate one. No guidance is given as to the basis upon which the court would assess such damages and enquiries revealed no evidence of the provision ever having been invoked. A more appropriate provision might be to entitle the tenant to recover damages by way of compensation for misrepresentation.⁵⁵ This could also cover cases where a tenant is induced not to apply for a new tenancy because of misrepresentations by the landlord.

Section 18 – Award of a new tenancy

4.26 *The Commission’s preliminary view is that the provisions of this section are largely unproblematic. However, it is arguable that more provision should be made to ensure that all those who need to join in the grant of the new tenancy are identified, especially superior owners. The Commission’s preliminary view is that the provisions dealing with this in the ground rents legislation⁵⁶ could be adapted for this purpose.*

Section 19 – Where tenant not entitled to a new tenancy

4.27 This and the following sections deal with the procedure for claiming relief under the Act. *The Commission’s preliminary conclusion is that the procedure needs tightening up.* It has already been indicated that the Commission’s view is that, when the tenant serves a notice of intention to claim relief on the landlord, the landlord should be obliged to serve a counternotice, within a specified time-limit, indicating his position, *ie*, either acceding to the relief and specifying the proposed terms or opposing it and specifying the ground or grounds. If, in the case of the latter, the tenant accepts the landlord’s opposition, he should be entitled to claim compensation for disturbance directly.⁵⁷

Section 20 – Notice of intention to claim relief

4.28 *As part of the tightening-up of the procedure, the Commission’s preliminary view is that the tenant should be required*

⁵⁵ This is the position under the equivalent provision in Northern Ireland: see *Business Tenancies (NI) Order 1996* Article 27. See paragraph 2.23 above.

⁵⁶ See *Landlord and Tenant (Ground Rents) Act 1967*, section 7 and 8.

⁵⁷ See paragraph 3.35 above.

to state in this notice what length of term he wants for the new tenancy. There is also a particular problem which arises in connection with periodic tenancies, but this was dealt with earlier and a solution was suggested.⁵⁸

Section 22 – Offer by landlord of new tenancy in lieu of compensation

4.29 This is a somewhat odd provision which seems to have been rarely used. In effect, it empowers the court to force a tenant, who has claimed compensation for improvements, to take a new tenancy instead. This can be done even though the tenant does not want one and, indeed, would not otherwise qualify for one.⁵⁹ No guidance is given as to what factors the court should take into account in exercising its discretion (beyond the fact that the tenant is entitled to compensation for improvements). *The Commission's preliminary view is that this provision should be dropped, but it would become redundant anyway if the view given earlier to the effect that the provisions for compensation for improvements should also be dropped is adopted.*⁶⁰

Section 23 – Fixing of terms of new tenancy by the court

4.30 This section, as amended,⁶¹ deals with the court's fixing of the terms of a new tenancy. *Although, in general, it does not seem to have caused much difficulty, the Commission's preliminary view is that some recasting of the provisions should be considered. In*

⁵⁸ See paragraph 3.28 above.

⁵⁹ Unlike in the case of compensation for disturbance (which can be claimed as an alternative to a new tenancy only by a tenant qualifying for a new tenancy under the business equity: see paragraph 4.23 above), compensation for improvements is available also to tenants who do not qualify under any of the equities: see section 46 of the 1980 Act.

⁶⁰ See paragraph 3.38 *et seq* above.

⁶¹ By section 5 of the *Landlord and Tenant (Amendment) Act 1994* to reduce the maximum duration of a new business tenancy to 20 years, but the tenant can nominate a lesser term, though not one less than 5 years without the landlord's agreement. The latter provision gave effect to an earlier recommendation of the Commission see: *Report on Land Law and Conveyancing Law: (1) General Proposals* (LRC 30 – 1989) paragraphs 65 – 67. Note that the Commission's preliminary view is that the maximum term might be reduced further, to 15 years: see paragraph 3.25 above.

essence, it should be made clear that the presumption upon which the court should base its order should be that, apart from the rent, the terms of the old tenancy should carry forward to the new tenancy. It should, however, be open to either party⁶² to make representations as to what adjustments should be made to the old terms, whether by way of amendment, addition or deletion. The matter should then be left to the court to settle in the light of the representations.⁶³

4.31 There is one minor point which arises in connection with subsection (7). This empowers the court to require, as one of the terms of the new tenancy, the tenant to expend a specified “sum of money” on repairs, but it is not clear whether the court can instead order specific repairs to be carried out (whatever the actual cost turns out to be). *The Commission’s preliminary view is that this ought to be permitted and the point should be clarified.*

Section 24 – Review of rent

4.32 This provision⁶⁴ was replaced by a modified one contained in section 15 of the *Landlord and Tenant (Amendment) Act 1984*. However, even the modified one suffers from a flaw in that it does not, as is standard commercial practice, make the reviewed rent take effect from the fifth anniversary of the new tenancy’s commencement date. Rather the reviewed rent becomes payable on the first gale day after service of the notice seeking the rent review or, if later, the first gale day following the fifth anniversary of the date of the fixing of the terms of the tenancy⁶⁵ (on the first review) or (on subsequent reviews) of the date of service for the preceding review. The Commission pointed out in an earlier Report that this is open to abuse, particularly

⁶² Under section 23, as it stands, only the tenant can nominate a lesser term.

⁶³ The Commission is not convinced that there is a need to give the parties the right to apply for subsequent adjustments after the court has made its final decision – after that it is *functus officio*: see *Hill v Mulcahy* [1985] ILRM 700. In practice the court tends to fix the rent and then leave it to the parties to settle the other terms and report back to the court, which only then will make its final order.

⁶⁴ Originally introduced in the 1980 Act to meet the criticisms of the position under the 1931 Act (which had no such provision) made by the Supreme Court in *Byrne v Loftus* [1978] IR 211.

⁶⁵ Yet whatever the delays in the Court fixing the terms, the new tenancy commences on the date of termination of the old one: see section 16.

by tenants, and reiterates now that the provision should be amended to accord with commercial practice.⁶⁶ There are two further points to which attention is drawn. One is that section 15 of the 1984 Act gives the Court jurisdiction to review the rent only where it has fixed the terms of the new tenancy. *The Commission takes the view that there may be merit in extending the section so as to enable parties who agree the terms of a new tenancy themselves to provide for a review by the court under section 15, if that is their preference.* The other point is that it should be made clear in the legislation that where the court is fixing the terms of a new tenancy it has jurisdiction to insert a rent review clause into the proposed lease.

Section 26 – Termination of tenancy after order for new tenancy

4.33 This was a new section introduced by the 1980 Act to cover the right conferred by that Act to apply for relief and to have the court determine that matter before termination of the existing tenancy.⁶⁷ The point is, however, that the circumstances upon which the court acted may alter subsequently, *eg* the tenant may become disqualified under section 17 of the Act. Section 26 nullifies the grant of the new tenancy, but only where the disqualification relates to a section 17(1) ground, *ie* one based upon a breach or other improper conduct of the tenant. *It may be queried why this provision does not apply also to section 17(2) grounds, ie those based on the needs of the landlord (which, of course, may also change), but the Commission's preliminary view is that this is a fair distinction to draw. The landlord would have had the opportunity to raise such a ground at the original court hearing and the need to give thought to such matters would be emphasised by the Commission's earlier suggestion that, in future, the landlord should be required to serve a counternotice specifying any grounds of opposition upon which it is intended to rely.*⁶⁸

⁶⁶ See *Report on Land Law and Conveyancing Law: (5) Further General Proposals* (LRC 44 – 1992) 20 – 21.

⁶⁷ See section 21(3) and paragraph 4.14 above.

⁶⁸ See paragraphs 3.35 and 4.27 above.

Section 27 – Continuation of existing tenancies

4.34 This section adopts the long-established Irish doctrine of graft,⁶⁹ so as to make a new tenancy subject to the same rights and equities as the old one. However, the wording of the section contains a number of ambiguities which should be clarified:-

- (i) It refers also to a tenancy “continued” and later to “under this Part”. It is not clear whether the latter qualifies the former, so as to exclude provisions for continuation not in Part II of the Act.⁷⁰ *The equivalent provision in the 1931 Act⁷¹ used the expression “under this Act”, which the Commission considers is more appropriate.*
- (ii) It refers also to a tenancy “renewed” and again there is the question whether this too is qualified by the latter phrase “under this Part”. But it is even more puzzling because there do not appear to be any provisions in any part of the Act providing for renewal of a tenancy, in contradistinction to, what is also referred to, a new tenancy “created under this Part”. That suggests that it may be referring to cases where the parties agree a renewal without invoking the statutory provisions, including cases where they could not invoke them because the tenant did not qualify for statutory rights. *The Commission has doubts as to whether the section should have such an all-embracing effect.*
- (iii) The section draws a distinction between the tenancy (the continued, renewed or new one) being deemed a continuation of the old one “for the purposes of this Act” and being a graft on it “for all purposes”. It is not clear why this distinction is made and, furthermore, it is not clear that the provision purports to confer on continued or renewed tenancies the benefits of the Act, especially if such tenancies did not otherwise qualify for statutory rights. *Again the Commission’s preliminary view is that this provision needs to be recast so as to confine its scope to new tenancies created under the statutory scheme.*

⁶⁹ See Delany *Equity and the Law of Trusts in Ireland* (2nd ed Round Hall 1999) at 200-202.

⁷⁰ Eg under section 7, which is in Part I.

⁷¹ Section 35.

Section 28 – Right of tenant to continue in occupation pending decision

4.35 This provision is designed to protect a tenant pending the outcome of the court's decision on an application for relief. *Again, the Commission's preliminary view is that some modifications to it may be appropriate:-*

- (i) Unlike under section 27, it is not the existing tenancy which is continued, but only a right of occupation. It is not clear that this makes much difference to the tenant, since it is stated to be on the same terms (including the rent), but presumably it affects third parties, like mortgagees, who lose their rights on termination of the old tenancy. However, if a new tenancy is, in due course, granted by the court, those rights are presumably revived because it operates retrospectively from the date of termination of the old one.⁷² The section then goes on to refer to "recoupments and readjustments" which may be necessary. *The Commission's preliminary view is that it might be more appropriate in all the circumstances to continue the old tenancy rather than simply a right of occupation.*
- (ii) The section excludes the protection where the old tenancy was terminated "by ejection or surrender",⁷³ but it is not clear why the tenant should be able to claim the protection in other circumstances disqualifying him based on his behaviour, *eg*, where the landlord terminates for "good and sufficient reason".⁷⁴ *The Commission's preliminary view is that the exclusion should extend to all such cases.*
- (iii) The section applies only if the tenant "so desires". *The Commission's preliminary view is that either the protection should apply automatically, unless the tenant makes it clear that he does not want it or else the tenant should be required to specify that he wants the protection, by including this in his notice of intention to claim relief and application for relief.*

⁷² Section 16 and 18(3).

⁷³ This seems to cover sub-paragraphs (i)-(iii) of section 17(1)(a).

⁷⁴ *Ie* coming within sub-paragraphs (iv) and (v) of section 17(1)(a).

- (iv) *The section protects only a tenant who has made an application for relief, but the Commission's preliminary view is that it should also protect a tenant who has served a notice of intention to apply for relief until the landlord invokes the right to apply to the court to resolve matters when the tenant shows no sign of doing so.*⁷⁵

Part IV of the 1980 Act

4.36 Part IV of the 1980 Act deals with compensation for improvements and for disturbance. Both these matters were considered in the previous Chapter⁷⁶ and little needs to be added here. *This is particularly so with regard to compensation for improvements, as the Commission's preliminary conclusion is that the statutory scheme governing this should be dropped.*⁷⁷ With respect to the provisions governing compensation for disturbance there are a few points of detail to which attention may be drawn.

Section 58 – Compensation where tenant is not entitled to a new tenancy

4.37 In the previous Chapter the current position that a claim of compensation for disturbance is strictly an alternative to a claim for a new tenancy was discussed. *The Commission's preliminary conclusion was stated to be that it should no longer be necessary to make a claim for a new tenancy when all the tenant wants is compensation.*⁷⁸ In this connection attention has been drawn to a recent English case, *Sun Life Assurance plc v Thales Tracs Ltd.*⁷⁹

4.38 In this case the landlord had informed the tenants prior to expiry of their leases that he would oppose new tenancies on the ground that the landlord proposed to redevelop the lands. The tenants

⁷⁵ *Ie* under section 21(2).

⁷⁶ See paragraph 3.34 *et seq* above.

⁷⁷ See paragraph 3.38 above.

⁷⁸ See paragraph 3.35 above.

⁷⁹ [2001] 34 EG 100.

entered into contracts to purchase an adjoining site as replacement premises, but a few months later served requests for new tenancies on the landlord.⁸⁰ The landlord served a counternotice opposing renewal on redevelopment grounds.⁸¹ The tenants did not proceed to apply for new tenancies, but claimed compensation for disturbance. The County Court judge ruled that they were not entitled to make this claim because the requests for new tenancies were not “genuine”, *ie*, at the time they were served the tenants had already decided to accept the landlord’s opposition and had acted upon this by contracting to buy an adjoining site. The Court of Appeal reversed this ruling on the basis that the English procedures, in referring to a “request” and “proposal” by the tenant, were not concerned with the state of mind or intentions of the person making them. They were “performative utterances” which should be given an “unqualified objective meaning” by the court; evidence as to the tenant’s state of mind when serving a request for a new tenancy was inadmissible as it was “legally irrelevant”.

4.39 It is not easy to discern what relevance this decision may have here because the procedures under the 1980 Act are different.⁸² However, some concern does exist because, unlike under the English legislation, the intention of the tenant does seem to be relevant. Indeed, section 20 requires a tenant to serve a “notice of intention to claim relief” and an application for relief can only be made under section 21 by a “person who serves a notice of intention to claim relief”. *The Commission’s preliminary view is that the legislation should be amended to clarify a tenant’s position in circumstances such as those which arose in the Sun Life case.* In particular, where a landlord indicates to a tenant an intention to oppose the grant of a new tenancy on a ground based on the landlord’s needs,⁸³ the tenant’s search for alternative accommodation in anticipation that the landlord will succeed in sustaining this ground, should not preclude a claim for

⁸⁰ As provided by section 26 of the *English Landlord and Tenant Act 1954*. This is the equivalent of a notice of intention to claim relief under section 20 of the 1980 Act.

⁸¹ Under the 1980 Act there is no requirement to serve a counternotice, but the Commission indicated earlier that this procedure should be introduced here: see paragraphs 3.35 and 4.27 above.

⁸² *Ibid.*

⁸³ *Ie* a section 17(2) ground rather than a section 17(1) ground: see paragraph 4.22 above.

a new tenancy. If, however, the tenant has actually acquired alternative accommodation,⁸⁴ then this should preclude an application for a new tenancy, but not, of course, a claim for compensation for disturbance. This is where the Commission's proposal that such a claim may be made directly, and independently of a claim for a new tenancy, is significant.⁸⁵ If, however, the search for alternative accommodation proves to be unsuccessful or, if by the time the tenant decides to serve notice of intention to claim relief, any arrangements previously made have fallen through, then again the tenant ought to be able to apply still for a new tenancy, with the alternative of a claim for compensation if the landlord succeeds in his opposition.

Section 60 – Compensation on termination of tenancy in obsolete buildings

4.40 This was a new provision added to the 1980 Act⁸⁶ to enable a landlord to recover possession of a building in an "obsolete area" as defined by the *Local Government (Planning and Development) Act 1963*.⁸⁷ Apparently, the planning legislation has not proved to be effective in dealing with derelict land⁸⁸ and this matter is largely dealt with under other legislation, such as the *Derelict Sites Act 1990* and *Urban Renewal Act 1998*.⁸⁹ *The Commission's preliminary view is that section 60 should, at least, be updated so as to refer to the more appropriate legislation. Furthermore, in doing so, it may be more appropriate to make it apply to "obsolete buildings" rather than to "buildings situated in an obsolete area"; in the case of the latter, many buildings in such an area are not necessarily obsolete themselves.*

⁸⁴ Including entering into an enforceable contract.

⁸⁵ Paragraph 4.37 above.

⁸⁶ On the recommendation of the Landlord and Tenant Commission: see *Report on Occupational Tenancies under the Landlord and Tenant Act 1931* (Pr No 9685, 1967) paragraphs 200-204, 214-221 and 222(3)-(5).

⁸⁷ Section 2 (1).

⁸⁸ See Scannell *Environmental and Planning Law* (Round Hall 1995) at 271-272.

⁸⁹ Note that the *Planning and Development Act 2000* does not refer to obsolete areas.

4.41 Subsection (2)(a)(i) refers to repairing of the building involving expenditure which would be excessive in relation to the value of “the tenement”. It is not clear whether such value is confined to the building or buildings on the premises which constitute the tenement, or covers also the site upon which they stand.⁹⁰ *The Commission’s preliminary view is that it ought to cover both.*

Section 61 – Set-off of compensation against rent

4.42 One small point arises in connection with this provision, viz that it is not entirely clear how far the court’s jurisdiction extends in settling a dispute. *The Commission’s preliminary view is that it should be made clear that it extends to settling a dispute over the money payable and, therefore, the amount to be set-off against the compensation sum.*

Section 63 – Protection of trustees

4.43 Again a few, minor points arise for consideration, viz:-

- (i) In subsection (1) the expression “entitled to receive” in relation to rents and profits is somewhat ambiguous, in that it could be construed as including persons authorised to receive, such as a rent collector or other agent. *The Commission’s preliminary view is that it ought to be made clear that it is confined to a person in whom the landlord’s interest is vested and who is, thereby, liable to pay the compensation, such as a trustee or personal representative or liquidator of a company.*
- (ii) Also in subsection (1), the expression “costs, charges or expenses in relation to a claim” is ambiguous, in that it could be taken to extend to all sorts of expenses incurred by the tenant, not necessarily confined to those included in a court award of compensation. *The Commission’s preliminary view is that it should be confined to the latter.*
- (iii) The references to a charge on the premises in paragraphs (a) and (c) of subsection (1) do not seem to square with one another; paragraph (a) suggests that the charge arises

⁹⁰ A similar point arises under section 65 of the 1980 Act and there is conflicting judicial opinion on the scope of the provision contained in it: see paragraph 4.46 below.

automatically, whereas paragraph (c) contemplates obtaining the charge from the court. *The Commission's preliminary view is that the latter should be the correct position and this should be made clearer.*

Part V of the 1980 Act

4.44 This part modifies how covenants in leases of tenements operate and the Commission stated earlier its preliminary view that these provisions should have a wider scope.⁹¹ The next few paragraphs deal with various other points which arise in connection with this Part.

Section 64 – “Lease”

4.45 Although the necessity for this definition would go if the Commission's earlier suggestion⁹² that Part V should apply to tenancies generally is adopted, it may still be worth noting that the definition in section 64 is not entirely satisfactory. It was added to the 1980 Act to deal with a gap in the 1931 Act to which Kenny J drew attention in *Whelan v Madigan*,⁹³ viz that the 1931 Act did not apply to a periodic tenancy which may arise by implication when the tenant holds over following expiration of the lease.⁹⁴ Section 64 refers only to a “yearly” tenancy, despite the fact that in *Whelan v Madigan* itself the overholding tenant was held to have a monthly tenancy. Section 64 should have referred to any kind of periodic tenancy.

Section 65 – Damages for breach of covenants to repair

4.46 This provision is designed to “prevent useless expenditure and relieve tenants from liability on covenants, the performance of which would involve such expenditure.”⁹⁵ However, over the years it has

⁹¹ See paragraphs 3.15 and 3.41 *et seq* above.

⁹² See paragraph 3.42 above.

⁹³ [1978] ILRM 136 at 145 (referring to section 55 of the 1931 Act).

⁹⁴ The terms of the expired lease are usually imported into such a periodic tenancy. See *Wylie Irish Landlord and Tenant Law* (2nd ed Butterworths 1998) paragraph 4.13 *et seq*.

⁹⁵ *Groome v Fodhla Printing Co Ltd* [1943] IR 380 at 406 (*per* O’Byrne J).

proved to be a somewhat controversial one; thus one judge stated that its “inescapable effect” is “to encourage tenants in fecklessness, disregard of property and breach of their undertakings.”⁹⁶ *The Commission’s preliminary view is that the provision is worth keeping, but a number of points should be considered, viz:-*

- (i) It has been suggested that the provision may be avoided if the landlord enters and does the repairs⁹⁷ and, instead of suing the tenant for damages (which is what section 65 refers to), sues the tenant to recover as a debt the costs and expenses incurred.⁹⁸ *The Commission’s preliminary view is that the landlord should not be allowed to circumvent the provision in this way and that, where the landlord exercises a right to enter and carry out repairs, the amount recoverable as a debt should be similarly restricted. Furthermore, the Commission is of the view that the policy underlying section 65 should apply where the landlord purports to forfeit for breach of the tenant’s repairing obligations. The provisions in section 65 should be a factor to be considered by the court in determining whether to exercise its discretion to grant relief against the forfeiture.*
- (ii) Conflicting views have been expressed by the judges as to whether, in estimating how far the “value of the reversion...is diminished”, the value of the site, as opposed to the buildings, should be included.⁹⁹ *The Commission’s preliminary view is that it should include the value of the site.*

⁹⁶ *Gilligan v Silke* [1963] IR 1at 18 (*per* Kingsmill Moore J). See the discussion in Wylie *op cit* paragraph 15.31 *et seq.*

⁹⁷ Such a right of entry is commonly reserved to the landlord, especially where the tenant fails to respond to a repair notice: see Laffoy *Irish Conveyancing Precedents* (Butterworths) Precedent L 2.2, clauses 4.11.2. and 4.11.3.

⁹⁸ This was the view of the Court of Appeal (in relation to the English equivalent, the *Leasehold Property (Repairs) Act 1938*) in *Jervis v Harris* [1996] All ER 303. See also *Rainbow Estates Ltd v Tokenhold Ltd* [1998] 2 All ER 860.

⁹⁹ For inclusion: O’Byrne J (with whom O’Sullivan CJ agreed) in *Groome v Fodhla Printing Co Ltd* [1943] IR 380 at 404 (O’Byrne J’s view was quoted with approval by Kingsmill Moore J, the only judge in the Supreme Court to advert to the point, in *Gilligan v Silke* [1963] IR 1). For exclusion: Geoghegan J (at 398) and Black J (at 418) in the *Groome* case.

- (iii) Subsection (1) refers to a lease “made” before or after the commencement of the Act which “contains” a repairing covenant. Neither of these expressions is entirely apt. The former is inapposite for periodic tenancies brought within its scope by section 64¹⁰⁰ because these “arise” by implication (rather than by being made expressly). The latter suggests that the section is confined to obligations stipulated within a covenant or term of a lease, and carried forward to a periodic tenancy arising when a tenant overholds upon expiry of the lease. *The Commission’s preliminary view is that the section should apply to a tenant’s repairing obligations however they arise, ie, including those implied by statute and those entered into by way of a collateral or “side” agreement.*

Section 66 – Covenants against alienation

4.47 This section controls the operation of covenants against “alienation” of the tenant’s interest and seeks to ensure that a landlord does not act unreasonably when considering whether to give consent. The Commission set out earlier¹⁰¹ its preliminary view as to how the tenant’s remedies against an obstructive landlord could be improved, along the lines of recent English legislation.¹⁰² There are, however, several other points which merit consideration, viz:-

- (i) Curiously, the expression “alienation” is not defined and over the years there has been much speculation as to what it covers, eg in addition to assignment, does it cover subletting or mortgaging and what about alienation of part only of the demised premises? *The Commission’s preliminary view is that there may be some merit in the argument that a wide “including” definition ought to be provided,¹⁰³ because it will in each case still be open to the landlord to oppose the transaction in question and to have the reasonableness of his stance tested in court.*

¹⁰⁰ See paragraph 4.45 above.

¹⁰¹ See paragraph 3.44 above.

¹⁰² *Landlord and Tenant Act 1988.*

¹⁰³ *Eg section 1(1) of the English 1988 Act applies it to “assigning, underletting, charging or parting with possession of the demised premises or any part thereof.”*

- (ii) *The Commission further considers that the section should impose certain procedural requirements on the parties,*¹⁰⁴ such as: a tenant wishing to alienate must serve notice in writing on the landlord, giving details of what he proposes; the landlord must serve, within a specified time limit, a counternotice giving his response; if this involves a refusal of consent, his reasons must be set out and if it involves consent only if conditions are met, these must be specified. It would, however, be open to the landlord to seek further information from the tenant which would have to be furnished within a time-limit. All this would be backed up by the remedy of compensation for a tenant where the landlord breaches the statutory obligations.
- (iii) *In order to encourage further a speedy response by landlords, the Commission's preliminary view is that the onus of proof should be reversed.*¹⁰⁵ Instead of the tenant having to prove that the landlord's withholding of consent is unreasonable,¹⁰⁶ the onus should be on the landlord to prove that it is reasonable.

Section 67 and 68 – Covenants restrictive of user and against making improvements

4.48 Much of what was said about section 66 applies equally to these two sections, which contain similar provisions applying to other types of covenant commonly found in leases. Sections 67 and 68 are clearly linked together, partly because a change of user will often also involve making improvements¹⁰⁷ to the premises. There is also a link with section 29 of the *Landlord and Tenant (Ground Rents) Act 1967*, which nullifies a user or improvement restriction in certain circumstances.¹⁰⁸ *The Commission's preliminary view is that these*

¹⁰⁴ Cf those set out in the English 1988 Act.

¹⁰⁵ This is the position under the English 1988 Act, see section 1(6).

¹⁰⁶ See *Cahill & Co v Drogheda Corporation* (1924) 58 ILTR 26; and *OHS Ltd v Green Property Co Ltd* [1986] IR 39.

¹⁰⁷ Note also the special definition of "improvements" in section 67(3), which also covers section 68.

¹⁰⁸ See section 67(4).

provisions should be recast and pulled together into one section so as to make them more easily understood.

Section 69 – Consent of lessor who cannot be found

4.49 *The Commission’s preliminary view is that some changes should be made to the wording of this section.* For example, it is not clear why “and” is used instead of “or” in the phrase “not known to and cannot be found” in paragraph (c). The difficulties envisaged by the section may be present where the identity of the landlord, but not the whereabouts, is known.

Part VI of the 1980 Act

4.50 This Part contains various miscellaneous provisions, several of which are not relevant to this Consultation Paper.¹⁰⁹ Others have a wider application than the business tenancy context of this Paper, but it may be appropriate to draw attention to a few points at this stage. The Commission may return to these in later publications.

Section 74 – Conversion of leases for lives into fee simple

4.51 The drafting of this section is, perhaps, not as clear as it might have been.¹¹⁰ It would have been clearer if, instead, it had provided that any unconverted lease was to be deemed converted. That would have incorporated well-established law.

Section 78 – Lease terminating by ejectment or re-entry

4.52 In *Enock v Lambert Jones Estates Ltd*¹¹¹ Costello J held that the phrase “lease or other contract of tenancy”¹¹² does not cover a person who does not have an “enforceable”¹¹³ contract for the grant of a tenancy. But he also queried whether it covers even an enforceable contract for a tenancy, as opposed to an actual grant of a tenancy, *ie* it

¹⁰⁹ *Eg*, sections 70-73 relate to the ground rents legislation.

¹¹⁰ See Wylie *op cit* paragraph 4.45.

¹¹¹ [1983] ILRM 532.

¹¹² See paragraph 4.04 above.

¹¹³ *Ie* under the *Statute of Frauds (Ireland) 1695* and see paragraph 4.04 above.

covers a contract **of** tenancy but, perhaps, not a contract **for** a tenancy. *The Commission's preliminary view is that this point should be clarified, as discussed earlier in general terms.*¹¹⁴ Such confusing expressions should be avoided and the legislation should generally refer only to tenancies when dealing with someone who has legal title to a tenancy interest.

Section 81 – Valuation by Commissioner of Valuation

4.53 *The Commission's preliminary view is that it doubts whether this provision still serves a useful purpose.* It has been informed by the Commissioner of Valuation that his office has no record of it ever having been invoked.

Section 85 – Void contracts

4.54 This very controversial section was considered in the context of contracting-out¹¹⁵ and would cease to have significance if the Commission's preliminary conclusion on that subject were adopted,¹¹⁶ viz that fresh consideration should be given to contracting-out of the statutory scheme for business tenancies provided that the parties have independent legal advice before making such agreements.

Section 87 – Set-off against rent for cost of repairs

4.55 A few points arise for consideration in relation to this, often forgotten, provision, viz:-

- (i) In subsection (1) the expression "has been called upon" is somewhat vague. *Given the consequences of set-off for the landlord (ie reduction or even abatement of rent), the Commission's preliminary view is that the section should require the tenant to give notice in writing.*
- (ii) The expression "against **any** subsequent gale or gales of rent"¹¹⁷ suggests that the tenant has a free hand to set-off

¹¹⁴ See paragraph 4.04 above.

¹¹⁵ See paragraph 3.05 *et seq* above.

¹¹⁶ See paragraph 3.09 above.

¹¹⁷ Emphasis added.

against any future gales, not necessarily the immediate one or ones becoming due. *The Commission is not convinced that this is satisfactory,*¹¹⁸ *and takes the view that the word “any” should be replaced by “the next and”.*

- (ii) *The Commission recommends that the references to expenditure should be clarified to emphasise that it must be the actual expenditure incurred by the tenant and the evidence must establish this, eg by producing invoices marked “paid”.*

¹¹⁸ The 1931 Act confined it to the next gale due after the expenditure: see section 61(a).

CHAPTER 5 SUMMARY OF PRELIMINARY RECOMMENDATIONS

5.01 The Commission wishes to re-emphasise that this Consultation Paper is intended to form the basis of discussion and that the recommendations in it are preliminary only. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation with interested parties.

5.02 The Commission feels that as commercial leasing law and practice is so out-of-line with that in other jurisdictions, serious consideration must be given to a radical overhaul. [paragraph 2.05]

5.03 The Commission has reached the preliminary conclusion that since whatever future decisions may be taken on the issue of statutory protection of tenants, it will remain important to distinguish between a tenancy and other relationships; serious consideration should be given to providing a statutory definition of a tenancy or, at least, clear statutory guidelines or criteria by which particular cases may be judged with reasonable certainty. [paragraph 3.03]

5.04 The Commission has identified the most fundamental issue as being whether there is a continuing need for statutory protection of business tenancies. The Commission's preliminary view is that a repeal of the entire statutory scheme would not be justified. At the very least, there ought to remain those provisions which are designed to prevent unreasonable behaviour or provisions in leases operating unfairly. The Commission takes the view that these provisions should be made more effective. On the other hand, the issue arises as to whether rights, such as the right to a new tenancy, should remain, at least in its present almost universal form. The Commission has reached no conclusion on this issue and at this point is simply raising the issue for discussion. [paragraph 3.04]

5.05 The Commission reiterates its earlier 1989 recommendation to allow contracting-out of the statutory scheme of protection for business tenancies, provided the parties have independent legal advice

before committing themselves to the agreement. The Commission takes the view that it would further serve to impress upon any uncertain tenants what they were committing themselves to if a prominent “health warning” had to be incorporated or endorsed upon the lease. [paragraphs 3.09; 3.10-3.11; 4.20 and 4.54]

5.06 The Commission provisionally recommends that the State should be bound by landlord and tenant legislation, with certain limited exceptions. The Commission’s view, subject to an overhaul of the legislation, is that the onus should be put on the State to notify all inferior tenants where it acquires a landlord’s interest. [paragraphs 3.13 and 4.06-4.07]

5.07 The Commission’s preliminary view is that the key concept of “tenement” needs reconsideration. Also the Commission is considering whether to recommend some statutory guidance as to the criteria for a tenancy, however at the moment the Commission is keeping an open mind. [paragraphs 3.14-3.19]

5.08 The Commission reiterates its two 1992 recommendations in relation to subsections (3) and (4) of section 5 of the *Landlord and Tenant (Amendment) Act 1980* that: (i) where an individual lessee has transferred the lessee’s interest in a tenancy to a limited company without the lessor’s consent, the right to a new tenancy should remain vested in the individual; and (ii) that the provisions should be extended to cover one not presently covered, *viz* where the lessee’s interest is vested in a company (the original tenant), but the business is carried on by an individual who is the principal (owner) of the company. However, there is an argument for saying that, in every case, the starting point should be that the tenant with whom the landlord entered into the original tenancy arrangement should be the entity entitled to a new tenancy. The Commission takes the preliminary view that there is much force in this argument, and that it should at least be open to a landlord to make the case that it is unfair to his interests that he should have to accept some other entity (the trader) as the new tenant. What is envisaged is that the court should be given a discretion to consider such an argument, and to make what it considers to be the most appropriate order in all the circumstances of the case. This might involve the grant of the new tenancy to the trading entity, but on condition that a suitable guarantee is provided. This might be provided by the original tenant. [paragraphs 3.21-3.22]

5.09 The Commission reiterates another of its 1992 recommendations, viz that there should be a requirement that a tenement should remain a tenement throughout the entire qualifying period. [paragraph 3.24]

5.10 The Commission considers that there may be an argument for reducing the maximum term of a new tenancy of a business premises which can be fixed by the court to 15 years. [paragraph 3.25]

5.11 The Commission's preliminary view is that head-landlords should be given some protection in cases of subletting where this leads to a fragmentation of the holding. [paragraph 3.27]

5.12 The Commission takes the preliminary view that the 1980 Act should be amended to clarify the position of periodic tenancies in relation to an application for relief following the decision in *Mealiffe v Walsh* (1986). The solution is probably to treat periodic tenancies as a separate category. [paragraphs 3.28-3.29]

5.13 The Commission's preliminary view is that there is no harm in allowing the improvement equity to remain on the statute book to be invoked in the very rare case when it is applicable. [paragraph 3.31]

5.14 The Commission has reached the preliminary conclusion that the provisions of section 17 of the 1980 Act, relating to restrictions on the right to a new tenancy, should be recast. Instead of detailing a large number of specific grounds of opposition, it may be better to simplify the provisions by dividing them into two broad categories. Further, it appears that section 17(1)(a)(ii), relating to service of a notice to quit by a landlord for a tenant's breach of covenant, may operate unfairly. The Commission also provisionally recommends that the onus in section 17(1)(b), which defines "good and sufficient reason" for a landlord refusing a new tenancy, should be placed on the landlord. The Commission provisionally recommends that cases where the landlord refuses consent on various reconstruction or rebuilding grounds (contained in section 17(2)(a)(i) and (ii)) should be subsumed within the "good and sufficient reason" grounds. Further, the Commission is concerned at the constitutionality of the distinction contained in section 17(2)(b) between business and other tenancies. The Commission also provisionally recommends that section 17(3), which enables the court to extend a tenancy in certain cases, be clarified to show that the relevant period should run from the date of the hearing, or the date of the existing tenancy's

termination. In relation to section 17(4), the Commission accepts that there is obviously a need for a deterrent of some kind in relation to a landlord who fails to carry through works of development after successfully opposing the grant of a new tenancy on such grounds, but is not convinced that the draconian sanction of an award of punitive damages is the appropriate one. No guidance is given as to the basis upon which the court would assess such damages and enquiries revealed no evidence of the provision ever having been invoked. A more appropriate provision might be to entitle the tenant to recover damages by way of compensation for misrepresentation. This could also cover cases where a tenant is induced not to apply for a new tenancy because of misrepresentations by the landlord. [paragraphs 3.33 and 4.16-4.25]

5.15 The Commission has reached the preliminary conclusion that some adjustments should be made to the way the provisions governing compensation for disturbance operate. The Commission takes the preliminary view that the requirement that a claim to a new tenancy be treated as an alternative to a claim compensation for disturbance is an unnecessary complication. One way of dealing with this would be to impose a requirement on the landlord to serve a counter notice objecting to the grant of a new tenancy, and then it should be open to the tenant to decide to accept this and proceed directly to a claim for compensation for disturbance. Further, the Commission is not convinced that the basis for calculation of compensation can be greatly improved upon, but it might be useful to add factors which the court can take into account. The Commission has also reached the preliminary conclusion that the sanction imposed on a landlord to enforce a compensation award ought to be reformed. [paragraphs 3.34-3.37 and 4.36 *et seq*]

5.16 The Commission's preliminary conclusion is that the provisions of Part IV of the 1980 Act dealing with compensation for improvements have outlived their usefulness. The Commission's view is that tenants should be expected to take a more commercial view of improvements. The Commission's proposal is not intended to affect improvements carried out by a sanitary or housing authority in the exercise of its statutory powers. [paragraphs 3.38-3.40 and 4.36 *et seq*]

5.17 The Commission provisionally recommends that the provisions of the 1980 Act intended to ensure that covenants in leases operate fairly should have the widest possible scope. The

Commission takes the view that these provisions should apply to both oral tenancies and leases. [paragraphs 3.42-3.43]

5.18 It is the Commission's preliminary view that legislation, analogous section 1 of the English *Landlord and Tenant Act 1988* (relating to a tenant's remedy for arbitrary and unreasonable conduct by the landlord) be enacted in Ireland. Several other amendments to section 66 of the 1980 Act (dealing with covenants against alienation) have also been proposed. [paragraphs 3.44-3.46 and 4.47]

5.19 The Commission is of the preliminary view that a process of consolidation should be undertaken in relation to landlord and tenant legislation, and provisionally recommends a series of consolidating Acts. Clearly the confusion surrounding different terms used in the existing legislation needs clarification. The Commission has also initially concluded that the new legislation should apply to all tenancies (both written and oral) unless there is some overriding reason to confine it. [paragraphs 3.47; 4.03-4.04 and 4.52]

5.20 The Commission provisionally recommends that it ought to be made clear that a variation of the terms of a tenancy does not affect a tenant's or his successor's statutory rights. [paragraph 4.05]

5.21 The Commission feels that there should be a requirement in relation to a letting relating to an office, employment or appointment to state the nature of the office, employment or appointment. [paragraph 4.09]

5.22 The Commission provisionally recommends that section 13(1)(a) of the 1980 Act, which determines entitlement to a new tenancy under the "business equity" heading, needs review along the lines of the majority decision in the Supreme Court in *Twil v Kearney* (2001) as to when the right to a new tenancy crystallises. [paragraphs 4.11-4.14]

5.23 The Commission's preliminary view is that section 14 of the 1980 Act, dealing with decontrolled business premises, can now probably be repealed. [paragraph 4.15]

5.24 It is the Commission's provisional view that the provisions relating to the grant of a new tenancy (contained in section 18 of the 1980 Act) should be modified so as to identify properly all those who should be joined in the grant. [paragraph 4.26]

5.25 In relation to notices of intention to claim relief, it is the Commission's preliminary conclusion that a tenant should be required to state in his notice what length of term he wants for the new tenancy. [paragraph 4.28]

5.26 The Commission's preliminary view is that section 22 of the 1980 Act be repealed. [paragraph 4.29]

5.27 The Commission considers that section 23 of the 1980 Act (dealing with the fixing of terms for a new tenancy by the court) should be recast – it should be made clear that the presumption upon which the court should base its order should be that, apart from rent, the terms of the old tenancy should carry forward to the new tenancy. The Commission also recommends that subsection (7) be clarified. [paragraphs 4.30-4.31]

5.28 The Commission reiterates its 1992 comments in relation to section 24 of the 1980 Act (as amended by section 15 of the *Landlord and Tenant (Amendment) Act 1984*). The Commission takes the view that there may be merit in extending the section so as to enable parties who agree the terms of a new tenancy themselves to provide for a review by the court under section 15, if that is their preference. The other point is that it should be made clear in the legislation that where the court is fixing the terms of a new tenancy it has jurisdiction to insert a rent review clause into the proposed lease. [paragraph 4.32]

5.29 The Commission provisionally recommends a number of clarifications to section 27 of the 1980 Act which deals with continuation of existing tenancies. [paragraph 4.34]

5.30 The Commission's preliminary view is that section 28 of the 1980 Act, dealing with the right of a tenant to remain in occupation pending a court decision needs a number of amendments. [paragraph 4.35]

5.31 It is the Commission's preliminary recommendation that certain amendments be made to various sections in Part IV of the 1980 Act which deals with compensation for disturbance and improvements. These proposed amendments are set out in Chapter 4 of the Report and also at paragraph 5.16 above. [paragraphs 4.36-4.55]

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