

# Consultation Paper

# Business Tenancies

## **CONSULTATION PAPER**

## **BUSINESS TENANCIES**

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Northern Ireland Law Commission  
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# **NORTHERN IRELAND LAW COMMISSION BUSINESS TENANCIES**

## **CONSULTATION PAPER**

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## **PREFACE AND ACKNOWLEDGEMENTS**

The Northern Ireland Law Commission is an independent body, established under the Justice (Northern Ireland) Act 2002, charged with the statutory responsibility of modernising and simplifying the law. The law reform projects upon which the Commission is engaged at any given time require the approval of the Department of Justice, following public consultation. At present, the Commission is in the midst of its First Programme of law reform. This programme contains five projects, one of which is the law of business tenancies.

The Commission is pleased to publish this Consultation Paper. This step of publication initiates the highly important process of eliciting the views and suggestions of interested members of the public, professions and organisations. Some initial views and suggestions have already been canvassed and these are duly reflected in the paper: see Appendix E. The Commission is grateful for the valuable assistance and information thereby provided.

The current legislation in this field is contained in the Business Tenancies (Northern Ireland) Order 1996. This legislation is familiar to many and has a substantial daily impact on the business sector in Northern Ireland. In this project, the Commission is reflecting on the desirability and viability of reforming aspects of this legislation. The representations received by the Commission when consulting about the content of its First Programme suggest that there is a relatively strong case for selective reform of the present law. This remains the Commission's provisional view.

Fundamentally, is the present law making it unreasonably difficult to do business in Northern Ireland? In particular, is the absolute prohibition on contracting out an unnecessary and unreasonable impediment? How best to protect the more vulnerable members of the business community, particularly small and medium sized start up businesses? To what extent should the principle of freedom of contract feature in this area of the law? Why should the law in Northern Ireland differ from that throughout the remainder of the British Isles? Is the absolute prohibition harmonious with the original spirit and intent of landlord and tenant legislation in this jurisdiction? These, and other related, questions seem to us to

arise. This is not, of course, an exhaustive list and you are strongly encouraged to raise any issues you consider appropriate.

At the conclusion of this law reform project, the Commission will submit a Report, likely to incorporate draft legislation, to the Department of Justice. The quality and strength of this Report will depend to an important extent on the engagement which precedes it. I would, therefore, request you to read this Consultation Paper and respond accordingly. We are most keen to receive your views and suggestions. It would be preferable to read the Paper in full. However, if pressed for time, I invite you to consider in particular the Executive Summary, Part I ('The issues stated'), and Part III ('The Options') and the list of questions contained in Appendix A.

Particular thanks are accorded to our two legal researchers on this Project: Darren McStravick LL.B, LL.M and Rebecca Riordan LL.B, Solicitor and to Ronan Cormacain LL.B, LL.M, B.L. our Legislative Drafting Consultant.

Finally, I would request you to note that the last date for responding to this invitation to provide your views and suggestions is **30 September 2010**. In making your response, please note the mechanism suggested at page vii.

On behalf of the Commission, I look forward to receiving your views and suggestions.

*Bernard McCloskey*

*May 2010*

# THE CONSULTATION PROCESS

This Consultation Paper sets out and explains the possibilities for reform as well as identifying the policy options preferred by the Commission. The Commission would very much welcome the views and thoughts of consultees on the issues raised: both on the general principles and on the particular questions in the following chapters. The Commission will then carefully consider the responses and suggestions received before preparing a Report setting out its final recommendations with draft legislation to implement them.

This Consultation Paper marks the completion of the first phase of the Project and prepares the ground for the consultation process which forms the second phase. Responses to the questions may be made either in writing or electronically.

## RESPONDING TO THIS CONSULTATION

Interested parties are invited to comment on the questions raised in this Consultation Paper. As well as being available in hard copy, the Paper is available on the Commission's website: [www.nilawcommission.gov.uk](http://www.nilawcommission.gov.uk)

If the format of this document is not suitable please contact us to discuss how we can best provide a copy that meets your needs.

The closing date for responses is **30 September 2010**. All responses should therefore be submitted by that date as the Commission cannot guarantee that it will be able to consider responses received after that date. Responses will be acknowledged on receipt.

Any responses should be forwarded by post for the attention of: -

Rebecca Riordan  
Northern Ireland Law Commission  
Linum Chambers  
2 Bedford Square  
Bedford Street  
Belfast BT2 7ES



Or alternatively by e-mail to:  
[rebecca.riordan@nilawcommission.gov.uk](mailto:rebecca.riordan@nilawcommission.gov.uk)

## **QUERIES**

Any queries regarding the proposals should be sent to: -

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telephone: +44 (0)28 9054 4852; or  
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telephone: +44 (0)28 9054 4850

## **CONSULTATION CRITERIA**

This consultation is being conducted in line with the following seven consultation principles contained in the 'Code of Practice on Consultation' which has been adopted across government:

- Formal consultation should take place at a stage when there is scope to influence the policy outcome
- Consultations should normally last for at least 12 weeks with consideration given to longer timescales where feasible and sensible
- Consultation documents should be clear about the consultation process, what is being proposed, the scope to influence and the expected costs and benefits of the proposals
- Consultation documents should be designed to be accessible to, and clearly targeted at, those people the exercise is intended to reach
- Keeping the burden of consultation to the minimum is essential if consultations are to be effective and if consultees' buy-in to the process is to be obtained
- Consultation responses should be analysed carefully and clear feedback should be provided to participants following the consultation
- Officials running consultations should seek guidance in how to run an effective consultation exercise and share what they have learned from the experience.

Further information on these consultation criteria is available at [www.bre.berr.gov.uk](http://www.bre.berr.gov.uk).

If you have any queries about the manner in which this consultation has been carried out, please contact the Commission at the following address:

Business Manager  
Northern Ireland Law Commission  
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Tel: +44 (0)28 9054 4860  
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Website: [www.nilawcommission.gov.uk](http://www.nilawcommission.gov.uk)

## **CONSULTATION RESPONSES: CONFIDENTIALITY AND FREEDOM OF INFORMATION**

### **Freedom of Information Act 2000**

The Freedom of Information Act 2000 gives the public a right of access to any information held by a public authority: in this case the Northern Ireland Law Commission. The right of access to information includes information provided in response to a consultation. The Commission will treat all responses as public documents in accordance with the Freedom of Information Act 2000 and may attribute comments and include a list of all respondents' names in any final report.

**If you wish to submit a confidential response, you should clearly mark your submission as 'confidential'. The Commission cannot automatically consider as confidential information supplied to it by you in response to a consultation.**

**Please note that the Commission will disregard automatic confidentiality statements generated by an IT system.**

# **EXECUTIVE SUMMARY**

## **THE PROJECT**

The current legislation for business tenancy protection in Northern Ireland is contained in the Business Tenancies (Northern Ireland) Order 1996 ('the 1996 Order') which provides a substantial degree of security of tenure for tenants of business premises. The 1996 Order contains in Article 24 an absolute prohibition against contracting out from the tenant's entitlement to apply for a new tenancy.

Representations were made to the Commission during our consultation on our First Programme of Law Reform that this absolute prohibition on contracting out was causing significant difficulties. These difficulties were arising in a range of business transactions where the parties were of equivalent bargaining power, were professionally represented and did not wish or require that the tenancy arrangements negotiated between them should be restricted by or subject to the terms of the 1996 Order. This restriction in its absolute terms does not pertain in England and Wales or in the Republic of Ireland while Scotland has only limited business tenancy protection legislation. So in these categories of business transaction the continuation of the restrictive terms of Article 24 of the 1996 Order may be seen as an instance of making it difficult to do business in Northern Ireland. In other respects, however, the 1996 Order was perceived to be working well and there were no submissions to us for wholesale review or repeal of the 1996 Order.

Accordingly, the Project was adopted in our First Programme and is primarily focused on the question of whether the absolute prohibition on contracting out should continue and if it should not what other, if any, protections should be put in its place? (Certain subsidiary questions as to other possible minor reforms or 'tweaks' of the terms of the 1996 Order are contained in Chapter 10.)

## **PART I                    THE ISSUES STATED**

### **Chapter 1                Introduction**

This Chapter briefly explains the legislative and Project background and raises the question in principle of how far should be the reach of legislation into contracts made between landlords and tenants? It also raises the issue of whether it is right for Northern Ireland's legislation to be 'out of step' with the provisions of the other jurisdictions of England and Wales, Scotland and the Republic of Ireland, or whether the continuance of the absolute prohibition on contracting out is justifiable as a continuance of the original spirit and intent of landlord and tenant legislation in Northern Ireland?

### **Chapter 2                The work we have carried out**

In this Chapter we set out the pre-consultation we have carried out with a wide variety of stakeholders. We note that most are in favour of at least some modification of the current absolute prohibition on contracting out. But there is some general concern expressed that the provision of contracting out could have the result of the effective removal of business tenancies protection from the small and medium sized enterprise sector: particularly those who are renting small scale premises for the purpose of business start up.

### **Chapter 3                Contracting out – the case for and against**

Here we set out in some detail some case studies that have been presented to us making the case for at least modification of the current absolute prohibition on contracting out. We also present the case of those who have reservations about removal of the protection on the basis that a substantial degree of protection is in the interests of the more vulnerable categories of business tenant.

## **PART II                    EXPERIENCE IN VARIOUS JURISDICTIONS**

### **Chapter 4                England and Wales**

We set out the legislative history of business tenancy protection legislation in England and Wales with particular emphasis on the provisions regarding contracting out. We note that originally there

was an absolute prohibition on contracting out in England and Wales (from which the equivalent provision in Northern Ireland derived). We note the various relaxations of this absolute prohibition leading to the current position in England and Wales where contracting out may be achieved under a system of notices or 'health warnings' duly completed by landlord and tenant.

## **Chapter 5          Northern Ireland**

We set out in some detail the legislative history of business tenancy protection legislation in Northern Ireland with particular emphasis on the provisions regarding contracting out. We note that the matter was under consideration by the Law Reform Advisory Committee in the early 1990s and that they recommended against significant change and advised that the absolute prohibition on contracting out should continue.

## **Chapter 6          Republic of Ireland**

We set out in some detail the legislative history of business tenancy protection legislation in the Republic of Ireland with particular emphasis on the provisions regarding contracting out. We note that recent reform there has led to the provision for contracting out subject to the tenant having completed a written 'renunciation' of protection under the legislation but that the tenant must have independent legal advice before completing such renunciation.

## **Chapter 7          Scotland**

We make brief reference to the position in Scotland which has only limited legislation for business tenancies protection.

## **PART III          THE OPTIONS**

### **Chapter 8          How contracting out has worked in England and Wales and in the Republic of Ireland**

Here we consider and contrast in some further detail the operation in practice of the current legislative provisions for contracting out in these jurisdictions.

## **Chapter 9            Possibilities for a contracting out scheme for Northern Ireland**

Here we set out options for possible schemes for Northern Ireland. We are minded to recommend that there should be at least some contracting out provisions, though we seek responses and views from consultees before we come to any final decision on that issue of principle.

We are also minded to recommend (again subject to responses and views from consultees before we come to any final decision) that there should be, if feasible, an additional level of protection for the more vulnerable tenants over and above the protections available in England and Wales and in the Republic of Ireland.

We set out options of possible additional levels of protection and we invite responses and views from consultees before we come to any final decisions.

## **Chapter 10           Minor Reforms**

We set out for consultation responses certain other proposals for minor amendments to the 1996 Order.

# PART I THE ISSUES STATED

## CHAPTER 1 INTRODUCTION

### THE LAW'S PROTECTION

- 1.1 It is the mark of a civilised society that the law protects the weak from unwarranted harm inflicted by the strong<sup>1</sup>.

Necessitous men are not, truly speaking, free men, but to answer a present exigency will submit to any term that the crafty may impose upon them<sup>2</sup>.

Certainly, it seems generally accepted that Northern Ireland's business tenancy legislation was motivated by such sentiments<sup>3</sup>. On the other hand one has to bear in mind that proper policy should preclude such

being used as a means of evading a fair bargain come to between persons dealing at arms' length and negotiating on equal terms<sup>4</sup>.

- 1.2 Business tenancy protection in its modern form in Northern Ireland has its origins in the Business Tenancies Act (Northern Ireland) 1964. That legislation drew heavily on the equivalent legislation for England and Wales some ten years previously: Part II of the Landlord and Tenant Act 1954.
- 1.3 The aim of both pieces of legislation was to give business tenants some reasonable prospect of security of tenure, thought to be particularly important (at least in 1964 for the retail trade and some service businesses) where a tenant's goodwill in trading from a particular location was an issue. At the same time the landlord was entitled on the termination of a business lease to have the rent adjusted to the then

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<sup>1</sup> M Porter "Culture Clash" (2009) 159 (7396) *New Law Journal* 1680.

<sup>2</sup> *Vernon v Bethell* (1762) 2 Eden 110, Lord Henley.

<sup>3</sup> *Business Tenancies* (1994) LRAC No 2, (HMSO), paragraph 1.7.

<sup>4</sup> *Samuel v Jarrah Timber and Wood Paving Corporation Limited* [1904] A.C. 323, page 327.



current open market rent. In the event of dispute thereon the Lands Tribunal may fix the new rent and other terms of the new lease.

- 1.4 The legislation also provides that the landlord may refuse to grant a new lease on one or more of the grounds set out in the legislation: such as persistent failure to pay rent or breach of the terms and conditions of the lease.
- 1.5 Thus there is balance. But such balance could be illusory if the legislation permitted that the landlord could persuade the tenant to sign away or opt out of the tenant's rights and protections of the legislation. So the 1954 legislation in England and Wales contained an absolute prohibition on 'contracting out'<sup>5</sup>. This was followed in similar terms in the 1964 legislation in Northern Ireland<sup>6</sup>.
- 1.6 But the story did not end there. In 1969 amending legislation in England and Wales introduced a 'contracting out' scheme: where there was agreement between the parties and where the matter was submitted to and approved by the County Court<sup>7</sup>. But no similar change was made in Northern Ireland, so the absolute prohibition on contracting out continued in this jurisdiction.
- 1.7 The issue was, however, reviewed by the Law Reform Advisory Committee for Northern Ireland (LRAC) which considered the matter along with other possible reforms of the legislation. In their Report issued in 1994<sup>8</sup> they came down firmly against any abolition or modification of the absolute prohibition on contracting out. New legislation was introduced in Northern Ireland in 1996 – the Business Tenancies (Northern Ireland) Order 1996 ('the 1996 Order'). This replaces the 1964 Act but in effect re-enacts it subject to the revisions in other areas as recommended by LRAC. So the prohibition against contracting out has continued in force in Northern Ireland in the 1996 Order<sup>9</sup>.

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<sup>5</sup> Landlord and Tenant Act 1954, section 38.

<sup>6</sup> Business Tenancies Act (Northern Ireland) 1964, section 20.

<sup>7</sup> Law of Property Act 1969, section 5 amending section 38 of the Landlord and Tenant Act 1954.

<sup>8</sup> *Business Tenancies* (1994) LRAC No 2 (HMSO), paragraph 3.5.9.

<sup>9</sup> Article 24.

- 1.8 However, in the consultation process for our First Programme of Law Reform we received several submissions which queried why Northern Ireland did not have a provision permitting contracting out (with appropriate safeguards). These submissions made the following basic points:
- (i) Radically altered market conditions since the 1960s mean that the need for statutory protection is questionable. If it is required, it should not be in as stringent a form;
  - (ii) An ability to contract out of the legislation would bring greater flexibility to the commercial property market;
  - (iii) It is unhelpful that our jurisdiction is at odds with the position in England and Wales and in the Republic of Ireland. This has brought the Northern Ireland law into disrepute in the eyes of business people who operate within the more liberal regimes elsewhere. This is particularly in light of the recent relaxation of the conditions to allow contracting out in both England and Wales and in the Republic of Ireland;
  - (iv) The prohibition on contracting out is detrimental to the economy and the good management of landlord and tenant negotiations, and a complicating factor in major commercial transactions;
  - (v) If parties are properly advised and happy to proceed there is no reason why they should not be able to give effect to contracting out of security of tenure; and
  - (vi) An academic commentator also made the point that in view of the radically altered market conditions since the early 1960s one might question the need for statutory protection of business tenancies either at all or in the stringent form still prevalent here. She commented that the 'Northern Ireland only' restrictions on the commercial property market seem more and more an anachronism within the United Kingdom / Republic of Ireland to-day.
- 1.9 Other issues raised during the consultation to the First Programme in relation to the 1996 Order in general were that:

- (i) The process of obtaining consent to agreements to surrender is cumbersome and should be abolished for those parties that are professionally represented; and
- (ii) The legislation is unfair on the landlord with particular reference to the undue weighting of the timescale for response to application in favour of the tenant.

1.10 These submissions can be summarised as indicating that there is concern that the 1996 Order creates at least a perception that it is more difficult to do business in Northern Ireland compared with the competing jurisdictions of England and Wales, Scotland and the Republic of Ireland. The World Bank publishes “Doing Business” reports annually<sup>10</sup> which analyse the ease of doing business throughout the world. It takes into account:

- the degree of business regulation
- regulatory outcomes
- the extent of legal protections of property
- flexibility of employment regulation
- the tax burden on business

In the 2010 Doing Business Report the United Kingdom was ranked at number 5 out of 183 countries, with the Republic of Ireland ranked at number 7. There are ten topics which are rated in determining the ranking which include the ease with which businesses can secure rights to property. In this particular category the United Kingdom is ranked at 23 on the basis of the number of procedures and length of time to secure the property for business purposes. The Republic of Ireland is ranked at 79 in this particular category. It is perhaps unfortunate that the ranking does not subdivide the United Kingdom per region in order to gain an insight into the perceived ease of doing business especially in respect of property rights throughout the United Kingdom. However, this does perhaps highlight the importance that each economy has an appropriate balance of commercial freedom and removal of barriers to business in order to attract investment, of which the legal protection in relation to property is an important consideration.

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<sup>10</sup> [www.doingbusiness.org](http://www.doingbusiness.org).

- 1.11 We consider in more detail these submissions along with the other preliminary consultation work we have carried out in Chapters 2 and 3.
- 1.12 The submissions made to us did not challenge the overall intent of the legislation but suggested that there should be investigation as to whether Northern Ireland alone of the jurisdictions of the United Kingdom and the Republic of Ireland should continue to have such absolute protection for tenants<sup>11</sup>. We accepted the suggestions that pros and cons of law reform to remove or modify the prohibition on contracting out should be considered (together with other possible ‘tweaking’ of the legislation<sup>12</sup>). Accordingly, the Project was included in our First Programme of Law Reform and accepted by government.
- 1.13 This Project seems to encapsulate in a neat way the issue of how far should the reach of legislation be into the contracts made between landlord and tenant. It is striking that as, we have already briefly noted, Northern Ireland is the only jurisdiction which continues to have such a degree of protection for business tenants. We seek in this Consultation Paper to elicit views on this.
- 1.14 Is it a case of Northern Ireland being out of step and should the reform be introduced (with appropriate safeguards)? Certainly, those who made the original submissions to us largely favour this position. They have given examples of how the absolute prohibition on contracting out causes (perhaps unintended) difficulties in a range of commercial transactions where the tenant is of equal if not greater bargaining power to the landlord. These are cases where (to outsiders at least) Northern Ireland may appear to be a difficult place to do business – or at least more difficult than the other competing jurisdictions in Britain and the Republic of Ireland.

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<sup>11</sup> England and Wales have contracting out provisions (see Chapter 4), Republic of Ireland has introduced legislation with contracting out provisions (see Chapter 6) and Scotland has only minimal business tenancy protection legislation (see Chapter 7).

<sup>12</sup> See Chapter 10.

- 1.15 But, on the other hand, is the continuance of the absolute prohibition on contracting out still justifiable as a continuance of the original spirit and intent of the legislation here going back to 1964?
- 1.16 Thirdly, is there a middle way where contracting out may be permitted but with full protection for the more vulnerable tenants or with a greater degree of protection than the schemes in England and Wales and in Ireland?
- 1.17 These are the central issues of the Project. In the following Chapters we examine the issues in greater detail and we seek answers to the questions we raise and views and submissions on all points.

## **CHAPTER 2 THE WORK WE HAVE CARRIED OUT**

### **PRELIMINARY AND RESEARCH WORK**

2.1 Pending approval of the First Programme we commenced preliminary work in May 2009. We identified a number of research areas in which papers were prepared by Darren McStravick, the legal researcher then assigned to the Project viz:

- a scoping paper including an examination of the history and philosophy of business tenancies protection, the current nature of business tenancy law in Northern Ireland, Scotland, England and Wales and the Republic of Ireland, as well as a review of how contracting out provisions have been operating in practice.
- a review of service tenancies and service occupancies.
- consideration of the levels of property awareness of small business tenants and the notion of unconscionable conduct in commercial leasing in England and Wales, including a contrast with 'unconscionable conduct principles' in retail leasing in Australia and some states therein.
- research on principles for the proper scope of regulation.

### **STAKEHOLDERS**

2.2 From the beginning of July 2009 we identified various stakeholders in order to instigate preliminary discussions.

2.3 For the purpose of the discussions we prepared an Introductory Note setting out the Commission's remit, project selection criteria, the case for reform, the alternative view, other possible solutions and the position in other jurisdictions. We circulated this to the stakeholders in advance of our meetings.

2.4 The discussions can be listed as follows:

### **Commercial Solicitors**

2.5 We held meetings with selected commercial property solicitors<sup>13</sup> on 22 July and 21 August 2009. The solicitors were asked for their input by way of forwarding case study examples of their practical experiences of the workings of the 1996 Order. These studies are considered further in Chapter 3. We received helpful responses from many of the participating solicitors and look forward to continuing this process during the remainder of the Project. Responses from other solicitors will be especially welcome.

### **Local Solicitor Associations**

2.6 We wrote to the associations of solicitors throughout Northern Ireland with the Introductory Note. We received some responses to this Note. In particular we attended a meeting with the Portadown Solicitors Association.

### **Chartered Surveyors and Agents**

2.7 We held a preliminary meeting on 30 July 2009 with Kenneth Crothers FRICS. This was an investigative meeting to discuss the experiences of chartered surveyors while operating within the confines of the 1996 Order, and how the provision of contracting out provisions might affect the market.

2.8 In addition, we sought to identify further contacts within the surveyor and agent professions.

2.9 We prepared an Introductory Note and made contact with Nuala O'Neill of the Northern Ireland Branch of the Royal Institution of Chartered Surveyors (RICS) and a meeting with interested members was held on 5 October 2009.

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<sup>13</sup> Those listed for Northern Ireland in *Chambers Guide to the UK Legal Profession* which carries out independent research to identify the 'leading individuals'.

- 2.10 We drafted a survey, with RICS kindly agreeing to circulate both this and the Introductory Note to members. We have received a number of responses to the survey. These responses are considered further in Chapter 3 of this Paper.
- 2.11 The details of the Project were also placed on the RICS blog for further comments. We would seek to have ongoing contact with the RICS and agents during the course of the Project.

### **Business Contacts**

- 2.12 We held a meeting on 3 August 2009 with the assistant director of the Confederation of Business Industry Northern Ireland, Deirdre Stewart. We discussed with her the need to make contact with representatives of small and medium sized enterprises (SMEs). She kindly forwarded a list of contacts in order to widen our preliminary sources and contact is ongoing. We have written to these other organisations inviting their response: the Northern Ireland Hotels Federation, the NI Chamber of Commerce and Industry and the Federation of Small Businesses (FSB). We would seek further contact with this sector, and particularly with representatives of small business interests, though we appreciate their difficulty with the technical detail of this Project.

### **Lands Tribunal for Northern Ireland**

- 2.13 The Member of the Tribunal, Mr Michael Curry FRICS, and his Registrar, Mr Gary Shaw, have kindly assisted us in the Project. We have visited them at the Tribunal both on 6 August and 4 November 2009 to discuss the Project and their experience of operation of the 1996 Order. We discussed whether a 'tweaking' of the current legislation might allow for categories of commercial agreements such as outsourcing, Public Finance Initiatives (PFIs) and Public Private Partnerships (PPPs) to be excluded from the ambit of the 1996 Order, whilst still safeguarding the basis protection of the legislation for SME tenants. Mr Curry supplied the Commission with estimated statistics of the number of annual applications to the Tribunal for approval of



agreements to surrender. We would welcome ongoing contact with the Tribunal for the purposes of the Project.

### **The Law Society of Northern Ireland**

- 2.14 We held a meeting on 10 October 2009 with Colin Caughey, Policy and Research Officer with the Society. A notice regarding the Project has been included on the Society's 'e-nformer' with our Introductory Note attached. (The 'e-nformer' is circulated by email to all solicitors in Northern Ireland.) We would welcome ongoing contact with the Law Society of Northern Ireland during the course of the Project.

### **Public Sector Contacts**

- 2.15 Some public sector lawyers have also kindly assisted us during the course of the Project. We appreciate that they have contributed their own professional views and expertise and that they do not purport to make representations on behalf of the public bodies in which they serve.

### **Barristers**

- 2.16 We sent our Introductory Note by email to selected members of the Bar of Northern Ireland<sup>14</sup>. A number of responses were received. We have taken them into account in the considerations we set out in Chapter 3 of this Paper.

### **Legal Academics**

- 2.17 We initiated contact with and had meetings with Professor Norma Dawson and Dr Alan Dowling at The Queen's University of Belfast. We shall forward the Consultation Paper to each of them when it is issued for further comment. We would welcome comment and involvement from other legal academics who can contribute to the consideration of the issues in this Project.

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<sup>14</sup> Those identified in the Barrister Directory that Landlord and Tenant Law is an area of particular interest.

## **THE OTHER JURISDICTIONS**

- 2.18 We have enjoyed the benefit of kind assistance from the Irish Law Reform Commission. Through them we have made contact with the Department of Justice in Dublin, and with solicitors with experience (to date) in the workings of the recently implemented Civil Law (Miscellaneous Provisions) Act 2008. (This provides for a system of 'renunciation' for all categories of businesses tenancies.)
- 2.19 As a result we have received several submissions detailing how the legislation is operating so far in that jurisdiction. These responses are considered further in Chapter 6 and Chapter 8.
- 2.20 We have made a number of contacts in England and have received some helpful comment as to how the contracting out provisions are currently operating there.
- 2.21 We have also been in contact with the Scottish Law Commission to try and evaluate the current position in that jurisdiction. However, in Scotland there is only very limited business tenancies protection for certain categories of retail premises only; so the question of problems associated with 'contracting out' does not seem to arise in that jurisdiction.

## **PRELIMINARY EVALUATION**

- 2.22 What follows is of course merely a tentative assessment of the material we have gathered from our research and stakeholder contact. Subject to that:
- 2.23 The case studies from commercial solicitors demonstrate a range of commercial transactions where the parties are of equal bargaining power and fully represented by professional advisors. In these cases the absolute bar on contracting out seems to be a regulatory prohibition to no apparent useful end.
- 2.24 Concern has been expressed to us by the business clients and professional advisors from other jurisdictions accordingly perceive Northern Ireland as 'a difficult place to do business' as they do not understand why there should be this

restriction here as compared with the other jurisdictions where they do business.

- 2.25 But concern has been expressed to us that the provision of contracting out could have the result of effective removal of business tenancies protection from tenants in the small and medium size enterprise sector: particularly those who are taking small scale premises for start up businesses. They may have little or no business experience and may not have (or cannot afford) the professional assistance of solicitors or agents. The particular concern is that whatever 'safeguards' might be proposed for a contracting out system (such as that the tenant must have independent legal advice) may in the event prove illusory if the landlords concerned adopt a 'take it (with contracting out) or leave it' approach. This concern has been raised by agents and some solicitors<sup>15</sup>.

## PROPOSALS

- 2.26 The following comments are also of course tentative. But two possible options can be considered for a solution that both addresses the (legitimate) issues for the larger transactions while also presenting a (legitimate) degree of protection for the smaller transactions:

- The 1996 Order provides that certain categories of tenancy (such as service tenancies) are exempt from the provisions of the Order. So we are considering whether it would be feasible to extend that list to include categories of the nature indicated in the commercial solicitor case studies. The difficulty with that, however, may be in determining precisely those categories of tenancy or those categories of tenant, to which the exemption from the 1996 Order would apply.
- An alternative proposal suggested to us<sup>16</sup> is that 'contracting out' might apply only to leases over a certain rental value and/or floor area and/or Net Annual Value. On that basis the tenants at the lower end of the

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<sup>15</sup> Including some commercial solicitors who would advocate the need for reform to permit some degree of contracting out.

<sup>16</sup> By Mr Graham Truesdale, Solicitor, of Magherafelt.

SME scale<sup>17</sup> would continue to enjoy complete statutory protection from contracting out being imposed on them. At the higher end of the SME scale, and in the larger categories of commercial transactions, whether or not contracting out were to apply would be a matter for commercial bargain in situations in which it would be expected that both parties would be professionally represented. In such cases the legislation could still provide for the 'safeguards' to apply before contracting out could go ahead.

- 2.27 The latter option would seem to be simpler to draft – but the policy issue would be where on the scale to put the dividing line between the fully protected tenancies and those where contracting out (subject to the 'safeguards') would be permitted?

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<sup>17</sup> The Department of Enterprise, Trade and Industry Northern Ireland defines 'small businesses' as those having fewer than 50 employees, and 'medium businesses' as having less than 250 employees in the Central Procurement Directorate guide for small and medium sized enterprises. This definition follows the European Commission's Enterprise and Industry SME definition (Recommendation 2003/361/EC). Accordingly any references to the SME sector throughout the Consultation Paper can be defined as being those businesses with less than 250 employees.

## **CHAPTER 3      CONTRACTING OUT – THE CASE FOR AND AGAINST**

### **INTRODUCTION**

- 3.1 As we have already indicated<sup>18</sup> impetus for this Project came from submissions made in our consultation exercise when we were formulating our First Programme. But that should not lead to any ‘mission capture’ conclusion: that because we have started on this Project we should finish with a recommendation for law reform on the basis of those initial submissions or of any other submissions made to us during the course of the Project.
- 3.2 As will be seen there is a case for reform and a case against reform - or at least a case for being cautious about reform. So we set out the case ‘for’ and the case ‘against’ to the extent that our research and consultations to date have taken us. Then we set out some initial thoughts as to conclusions which we might reach.
- 3.3 In all of this our aim is to set matters out for response by readers of this Consultation Paper: our aim is to animate discussion rather than to foreclose on it.

### **THE CASE FOR CONTRACTING OUT**

- 3.4 The initial case that there should be law reform to permit contracting out has been amplified in the further consultations which we have carried out. We have been very much assisted by case studies which solicitors have submitted to us. We would be interested in any comments thereon.
- 3.5 What follows is a brief analysis of the categories of transaction where the case studies suggest that the absolute prohibition on contracting out serves no useful purpose and where, indeed, it only serves as an inhibiting factor in the efficiency of doing business in Northern Ireland. The categories of examples given to us cover:

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<sup>18</sup> See Chapter 1, paragraph 1.8.

- Outsourcing/supply/franchise agreements
- Management Buy Out transactions
- Factory outlets/turnover rentals
- Large tenants and retailers
- PFIs/PPPs
- Sub-leases

3.6 We should add that the solicitors who have kindly supplied these examples are not necessarily advocates of complete freedom to contract out. At our meetings with commercial solicitors there was acknowledgement that many of the small categories of business lease transactions never involve any input from solicitors. But these examples come from the categories of the larger transactions as examples of areas where it appears that the law is not serving the needs of any of the parties to a transaction. We consider each of these categories in turn:

### **Outsourcing/supply/franchise agreements**

3.7 The essence of these arrangements is that the provision of commercial premises on a landlord/tenant legal relationship is but part of the commercial matrix between the parties.

3.8 An example of an *outsourcing* contract that was put to us was in a case taken to the Lands Tribunal<sup>19</sup>. In that transaction the essence of the contract between the parties was the provision of call centre services by Capita to the BBC. It suited the parties that the services should be provided by Capita to the BBC from BBC premises in Belfast (a floor in the BBC Blackstaff Studios in Great Victoria Street). But the relationship between the parties was governed by the outsourcing agreement between them. If that relationship was brought to an end – for whatever reason – there was no question of ‘tenant’s goodwill’ to merit protection.

3.9 We were given details also of a *supply* agreement. The solicitor acted for a party which agreed as part of the terms of the agreement to build a new facility on its premises which

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<sup>19</sup> *Capita Business Services Ltd v British Broadcasting Corporation* [2008] BT/57/2006.

the supply company could occupy so long as it was performing the terms of the supply agreement. But the client was unwilling to contemplate that if the supply agreement came to an end – for whatever reason – the supply company could continue to operate from the client's premises. That could result in the supply company operating to supply the client's competitors.

- 3.10 Similarly, in the case of *franchise* agreements the relationship between franchisor and franchisee depends on the franchise agreement. In cases which involve the letting of premises by the franchisor to the franchisee as part of the franchise arrangements, the franchisor does not wish the premises to be burdened with obligations involving the 1996 Order if the franchise comes to an end. If the franchise is brought to an end – for whatever reason – there is no question of 'tenant's goodwill' to merit protection.

### **Management Buy Out transactions**

- 3.11 We were given several examples of difficulties which have arisen in this category of transaction:

- (i) An international trading company wished to dispose of a business carried on by a Northern Ireland subsidiary to a management buy-out team. As part of the commercial negotiations it was agreed the seller would retain ownership of the property from which the business was carried on but was prepared to grant the management buy out team a three year lease to allow it time to relocate to other premises. This arrangement could not safely be accommodated within the terms of the 1996 Order as the management buy out team would have acquired security of tenure. As the transaction was structured as a share sale of the subsidiary company, the seller had to grant the lease to the subsidiary prior to completion of the management buy out and seek Lands Tribunal approval of an agreement to surrender the lease in three years' time. That approval was ultimately obtained but only with difficulty. Had it not been obtained, it had been agreed between the seller and the management buy out team that the subsidiary

would surrender the lease back to the seller before completion of the management buy out and that, at completion, the seller would grant the management buy out team a nine month lease with the option to renew for a further nine months, that being the maximum permitted under the 1996 Order if security of tenure was to be avoided. Ironically, in those circumstances, the 1996 Order would have operated not to protect the management buy out tenant but to disadvantage it by creating pressure to relocate within a relatively short period.

- (ii) Another international trading company wished to dispose of a Northern Ireland subsidiary to a management buy out team. The property from which the business was conducted had very significant development potential and the seller wished to retain ownership in order to realise that potential. Again, it was agreed as part of the commercial deal between the parties that the management buy out team would be granted a three year lease to allow it time to relocate. Contemporaneously within the management buy out transaction, the seller agreed the sale of the property to a developer who had concerns over the property arrangements between the seller and the management buy out team. This gave rise to considerable further negotiation, and consequently to increased cost, as between the seller and the developer on the one hand and the seller and management buy out team on the other. Ultimately, the matter was resolved satisfactorily, but only because the developer was prepared to take a commercial view that it would, once planning permission for the proposed development had been obtained, be able to recover possession from the management buy out team on the redevelopment ground contained in Article 12(1)(f) of the 1996 Order. Had the developer not been prepared to take such a view, the entire transaction might well have unravelled, to the detriment of all concerned, including the management buy out tenant.
- (iii) A foreign company was closing down its Northern Ireland operation and agreed to sell its factory



premises here to another substantial multi-national trading company. The seller wanted to be able to retain possession of part of the factory for a period after completion in order to facilitate a smooth relocation to premises outside Northern Ireland. The terms on which the seller was to be permitted to remain in possession became one of the most significant commercial issues in the transaction and resulted in prolonged negotiations and increased costs. The buyer's concern was that, by accommodating the seller's request to remain in possession for up to five years, it risked creating security of tenure if that arrangement was structured as a conventional lease reserving a commercial rent. A compromise was ultimately hammered out on the basis that the buyer retained a proportion of the sale price until a successful application had been made to the Lands Tribunal to approve a surrender of a tenancy in favour of the seller. Under the terms of the 1996 Order, the Lands Tribunal application could only be made when the tenant was in possession under the tenancy. Consequently, there was no certainty that the application would be successful. Ultimately, but not without difficulty, it was successful. Had it not been, the buyer would not have been able to obtain the benefit of all it had contracted to buy. The retention would, in those circumstances, have been of relatively little comfort. Its purpose was primarily as an incentive to the seller to vacate by the due date and thereby obtain payment.

- (iv) Another firm of solicitors was acting for a management buy out team. The company owned a single property and the management buy out team wished to acquire the property as part of the buy out but could not afford the full purchase price in the short term. The company owners were happy to sell and did not wish to create a long term tenancy. Had contracting out been permissible, the matter could have been dealt with simply on the basis of, for instance a five year lease incorporating tenant's option to purchase, but with the lease contracted out from the 1996 Order. As contracting out was not possible the parties had to

adopt the stratagem of a nine month lease to be followed by a three year lease but subject to Lands Tribunal approval of an agreement to surrender applying to the three year lease. As the solicitors comment this was an unnecessarily messy transaction involving additional fees and time which could have been avoided if contracting out from the 1996 Order were permissible.

### **Factory outlets/turnover rentals**

3.12 We have commentary from both a solicitor and a commercial property agent in regard to this category of transaction:

- (i) A solicitor who has personally dealt with a number of these schemes throughout Northern Ireland explains the common feature of these schemes is to have short term leases where the main rental is based on turnover. The short term nature of the leases is to allow both the landlord and the tenant flexibility to establish whether the business will be successful and the ability to terminate the lease if the turnover is insufficient to sustain the business. This arrangement is thought to be beneficial to both parties and allows for the distinct nature of factory outlet centres. She considers that the difficulty with the current business tenancies legislation is that it does not allow for a lease such as this to be terminated if the required turnover is not reached. Both landlords and tenants of these schemes are then forced to use agreements for surrender and other penalties 'as a means of circumventing the legislation'.
- (ii) A commercial property agent with considerable experience in property transactions of all categories across Northern Ireland was involved in negotiations to let a substantial site to an operator of a proposed factory outlet centre. The parties were some distance down the road in the transaction when it became apparent that the prospective operator could not effect sub-lettings of the units outside the scope of the 1996 Order. Quite literally, the inability to contract out of the 1996 Order was fatal to that particular transaction.

## **Large Tenants and Retailers**

- 3.13 Businesses such as 'superstores' and other large retailers often wish to grant 'concessions' of small areas within their large stores. Again a solicitor in practice in Northern Ireland has informed us that because of the inability to contract out of the business tenancies legislation such businesses consider they have no option but to grant tenancies at will or licences. These offer the prospective traders very short terms and uncertain occupation. As a result often the transactions do not proceed. The large retailers must avoid the trader getting security of tenure and as a result the trader is forced to take a short term licence or tenancy which can be terminated at any time. The answer would be to allow for fixed term leases but with no security of tenure beyond the agreed fixed term: that should suit both parties.

## **PFI / PPP Schemes**

- 3.14 It has also been pointed out to us that the inability to contract out of the 1996 Order creates significant difficulties for both parties in relation to Private Finance Initiatives (PFI) / Public Private Partnership (PPP) schemes. A firm of solicitors explains that they are well aware of the problems. The issue is that in order to secure bank finance, which may often run to several £100 million, the project company has to be given a sufficient interest in the land which is the subject of the development to allow security to be taken. The usual procedure is that the private sector project company arranges to build the scheme and then the public sector body occupies the new building which is serviced and maintained for them for an agreed period of years. The solicitors explain that they have spent the last period of years trying to deal with the concerns of the public sector that if the project company are given access to and occupation of the site for a period they will get security of tenure and the requirements of the project company that they need to be given full access to the site and the bank must have an interest to secure. The outcome may be that a form of licence is used but one has to address the issue of whether the transaction is that of a licence to occupy in the true sense. This is another instance where both parties are trying

to deal with the same concerns but the legislation does not really allow for it.

### **Sub-leases**

3.15 A solicitor of very many years experience in commercial property leasing work has explained to us that a landlord may not wish to grant consent to a tenant subletting part of its property because of the landlord's concern over the security of tenure protecting the sub tenant under the current legislation. This is because upon the expiry of the 'head lease' the sub tenant may be the party entitled to apply for a new tenancy under the provisions of the legislation. Tenants themselves may also be reluctant to see their sub-tenants having such right. This can adversely affect the landlord's ability to deal with the property on the expiry of the lease. So this may be forceful argument for permitting contracting out – at least in relation to sub leases of part of a holding.

3.16 A summary of the case for contracting out was well put to us by one solicitor:

As you know I practised in London for some time before returning to Northern Ireland and I found the system of contracting out in England to be straightforward and fair for both landlords and tenants. It encourages small businesses to take leases and to provide a landlord with some comfort that he can get the premises back after a specified period of time. As more and more tenants take leases in Northern Ireland they are amazed at the difficulties which result from our inflexible legislation and it often discourages them from implementing their usual arrangements.

**QUESTION A.** *We have outlined in paragraphs 3.4 to 3.16 circumstances where it appears that the absolute prohibition on contracting out is causing problems without conferring benefits – Do you agree?*

**QUESTION B.** *Do you consider there could be other circumstances in which a relaxation in the prohibition would be helpful? If so, please list same.*

## **THE CASE AGAINST – RESERVATIONS ABOUT CONTRACTING OUT**

### **Introduction**

- 3.17 As we have already indicated, some whom we have consulted are, in the interests of more vulnerable tenants, opposed to a relaxation of the current prohibition on contracting out, or at least they have reservations about the Project.
- 3.18 Accordingly, we wish, through this Consultation, to encourage as wide and free a debate as possible. And it should not be thought that those who have made the case for the Project necessarily disregard the case for some at least continuing protection for the more vulnerable categories of tenants.
- 3.19 We should, however, acknowledge that the collection of evidence as to vulnerability is much more problematic. In a sense this is the dark side of the business tenancy world in that so many of the vulnerable do not seek legal or even agents' advice before entering into business tenancy arrangements. This seems from the soundings we have taken to pertain or be more prevalent in transactions involving small shops, cafes, taxi offices and small start up businesses or trades.
- 3.20 But we do consider that the fact we cannot collect any statistical data about these categories should not mean that the 'better evidence' we have been able to obtain (through for instance the case studies) inevitably means that the case for contracting out should prevail.
- 3.21 So we place some considerable weight on the (albeit limited) amount of evidence we have been able to collect – largely with the kind assistance of the RICS and some of its members. An important part of this consultation exercise is to see if readers and respondents can provide any further evidence for us to evaluate on this important issue before we come to conclusions in our Report.

**QUESTION C.** *Do you have any evidence or views as to the risks or problems that the various categories of more vulnerable tenants may face if it is deemed appropriate to relax the absolute prohibition?*

**QUESTION D.** *Do you consider that there should be some degree of continuing protection for the more vulnerable categories of tenants if there is a decision to relax the current absolute prohibition on contracting out?*

3.22 Accordingly in what follows we set out and evaluate the evidence so far collected. This included the following points:

- That agents have a more ‘hands on’ view of the whole of the market than solicitors. Indeed, this was accepted by many of the solicitors to whom we spoke<sup>20</sup>.
- The view was expressed that there is a huge degree of ignorance among small businesses as tenants.
- Concern was also expressed that many solicitors are not fully or adequately informed as to the provisions of the legislation.
- A two tier system prevails: the larger commercial clients desire the opportunity to contract out as compared with the smaller tenants who struggle to receive any meaningful representation: protection is at a premium for that category. It was described to us that this situation pertained especially in the provincial towns and that the system of the 1996 Order was necessary or desirable to protect the ‘lower tier’ of tenants.
- In this context concern was expressed that landlords could force unrepresented tenants to contract out.
- One agent commented that there was no doubt that there were instances where redevelopment had been curtailed because of the inability to contract out of the 1996 Order. He agreed that this was frustrating and often expensive from a developer’s point of view. But he felt that the 1996 Order was often the only protection for small business tenants against the less scrupulous landlords seeking to charge excessive rents over and above what the market would sustain.

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<sup>20</sup> See paragraph 3.6 of this Chapter.

Without the 1996 Order some small business tenants (in the circumstances where such tenants often did not seek professional representation when taking on or renewing leases) would be faced with the choice either to pay the excessive rent or to be ejected from the premises which were the essential base for their business.

- An agent with some 80% of his work on behalf of tenants felt there was clear evidence that tenants were given an unfair ride by landlords. So on that view it is justifiable that the legislation should be heavily loaded in favour of such tenants.
- The agents felt there is increasing evidence of informality in the system. Partly this may be due to the current recession where formal long term leases are now more a rarity for understandable reasons. Partly it is due to devices such as 'turnover rent' leases<sup>21</sup> and licence arrangements.
- These agents felt that the legislation, despite its contracting out bar, has not in fact stymied long term development.
- The agents agreed that the flexible and pragmatic approach taken by the Lands Tribunal was helpful to both landlords and tenants in achieving case by case resolutions appropriate to the circumstances of each case. (Concern was expressed that any reforms of the tribunal system could prejudice this if the 'reforms' made the Tribunal more rule bound and less adaptable and 'user friendly' as it currently can be with its informed and flexible but fully independent role).
- It was agreed that the current economic recession is currently a determining factor: a landlord will be keen to have a tenant renew on any terms – but it was agreed that law reform should not be predicated on the current economic circumstances.
- The view was also expressed that if contracting out procedures are introduced the danger would be that the professional advisors would protect the interests of the larger categories of tenants while the smaller tenants would continue to go unrepresented and any

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<sup>21</sup> See paragraph 3.12 of this Chapter.

‘protections’ in any reform legislation would be overridden or ineffective.

- There are many good cases for contracting out but the concern is to provide protection against a malevolent landlord who applies contracting out for simple evasion of the legislation.

3.23 There was concern that a provision for contracting out but with the protection that the tenant must first obtain prior legal advice may be ineffective if the legal advice does not include informed commercial advice. An example submitted to us demonstrates this point. A couple spent a considerable amount of money (their life savings) acquiring premises (by way of assignment of the existing lease) in order to carry on the existing café business and they spent considerable sums on refurbishment. Soon after, the landlord was able to exercise an early termination clause in the lease to permit redevelopment, for a major shopping centre. This proposal was on the horizon at the time that the couple took the assignment of the lease. The landlord was able to establish grounds for refusing a new tenancy. The tenants had purchased the goodwill at considerable cost, lost, and received only a pittance in compensation. Perhaps this was a case where the solicitor only advised of the legal points and not the commercial risks.

3.24 Professionals within the Northern Ireland Housing Executive have indicated general support for the current legislation and that they would not favour provisions to permit contracting out. The Housing Executive as a public body, has dual landlord and tenant functions. In both capacities they would be generally supportive of the status quo. In the capacity of the Housing Executive as a tenant it is their view that the security of tenure provided by the legislation is, and would remain desirable, particularly in circumstances where the Executive may make a substantial financial commitment in terms of the building infrastructure which is the subject of the relevant lease. Accordingly they are not aware of any obvious commercial advantage, in the above circumstances to the proposed contracting out provision. In its capacity as landlord the Housing Executive has a significant commercial property portfolio. Internally, the view has been expressed that the existing 1996 Order provides a level of certainty in



relations between landlord and tenant, legal precedents have been established and the forum of the Lands Tribunal provides an expert and relevantly cost efficient means of settling disputes. In the context of commercial lettings, it is their experience that the current legislation represents on the whole a fair balance of the rights and responsibilities between landlord and tenant. They are not aware of any commercial justifications or imperative to amend the existing legislative framework (by way of the proposed contracting out provision) in that regard. They did however propose a specific exemption for 'community leases' and we deal with that in Chapter 10.

# **PART II      EXPERIENCE IN VARIOUS JURISDICTIONS**

## **INTRODUCTORY NOTE**

- (i) In the various Chapters in this Part we consider the contracting out provisions of the business tenancies legislation in England and Wales, Northern Ireland and the Republic of Ireland. We add a brief note on the position in Scotland. We commence with England because Northern Ireland's legislation is substantially based on the English legislation. England and Wales have considerable experience of contracting out: first through a court procedure and then, after regulatory reform, through a service of notices/statutory declarations procedure. In the Republic of Ireland contracting out provisions are of more recent provenance, so there is not so much experience of the provisions in operation, but their Law Reform Commission has done much useful work from which we have benefitted and we gratefully acknowledge their assistance. So we have a wealth of directly comparable experience on which we draw in this Part.
- (ii) We would just add that Scotland has never introduced a comprehensive system of business tenancy protection legislation. Our researches so far have not discovered the reason why such protection is not deemed necessary in Scotland compared with her neighbouring jurisdictions, including our own. For that reason, we include only a brief Chapter on the Scottish situation. Of course Scotland does not have to justify her position but if any readers can throw further light on the Scottish experience for us that would be most helpful.
- (iii) In any event it is a given of our Project that our business protection legislation should stay in place; our consultations so far have indicated there is general acceptance that the legislation remains useful. So, unless there is a strong reaction to the contrary from respondents, we would intend

to proceed with the Project as envisaged on the basis of reform rather than fundamental review.

# **CHAPTER 4     ENGLAND AND WALES**

## **INTRODUCTION**

4.1 This Chapter examines the contracting out position in the business tenancies protection legislation in England and Wales. The story starts with the 1954 legislation, with its complete prohibition of contracting out, through the reform in 1969, permitting contracting out subject to the approval of the County Court, to the current position: a form based contracting out model.

## **THE STARTING POSITION – COMPLETE PROHIBITION OF CONTRACTING OUT**

4.2 As may be known the current business tenancies legislation in England and Wales (from which Northern Ireland's legislation derives<sup>22</sup>) remains Part II of the Landlord and Tenant Act 1954 as amended ('the 1954 Act').

4.3 The broad effects of the 1954 Act can be put thus:

- There is a general right to renewal of tenancies available to all tenants of business premises, including in this expression professional and non-profit making bodies.
- The landlord can oppose the grant of a new lease on certain specified grounds, including bad conduct by the tenant, and the landlords' own proposals to occupy or redevelop the premises.
- The tenant is entitled to compensation for having to leave the premises, but only where the right to a new tenancy is successfully resisted by the landlord on certain grounds, of which an intention to redevelop and an intention to occupy by the landlord are the two most important.
- The rent under a new tenancy ordered to be granted by the County Court<sup>23</sup> is the open market rent. The new lease must not be for a term exceeding 15 years

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<sup>22</sup> N Dawson, *Business Tenancies in Northern Ireland* (1<sup>st</sup> ed 1994), page 7.

<sup>23</sup> Landlord and Tenant Act 1954, section 34.

and will generally be on the same terms as the previous tenancy.

- 4.4 But the 1954 Act contained a complete ban on contracting out. Section 38(1) provided as follows:

Any agreement relating to a tenancy to which this Part of this Act applies (whether contained in the instrument creating the tenancy or not) shall be void in so far as it purports to preclude the tenant from making an application or request under this Part of this Act or provides for the termination of the surrender of the tenancy in the event of his making such an application or request or for the imposition of any penalty or disability on the tenant in that event.

### **The introduction of contracting out**

- 4.5 In 1969 the workings of the security of tenure provisions in the 1954 Act were examined by the Law Commission (England and Wales)<sup>24</sup>. They explained their approach to section 38(1) in this way, at paragraphs 32 to 33:

There are many cases where the landlord would be willing to let on a temporary basis and the tenant would be willing to accept such a tenancy. This may happen, for instance, when the landlord has obtained possession and intends to sell, demolish or reconstruct the property but is not ready to do so immediately. He will however, understandably, be reluctant to effect a temporary letting if he thereby risks having to oppose a tenant's claim for a new tenancy under the Act when the time comes. In many cases, therefore, he may prefer, having got possession, to leave the premises unoccupied ...

We ... accept that there may be cases where a tenant is willing, for good reasons, to accept a tenancy for more than six months without rights under the Act. We believe that this should be possible, but only where

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<sup>24</sup> *Report on the Landlord and Tenant Act 1954 Part II* (1969) Law Com No 17.

there is the safeguard that the court has sanctioned the agreement in advance.

- 4.6 The recommended changes to the 1954 Act, proposed in the 1969 Report, were implemented by section 5 of the Law of Property Act 1969.
- 4.7 It has been argued that this change in policy seems somewhat remarkable based as it was on the basis of these two small paragraphs in the 1969 Paper; moreover, it ran contrary to the Commission's earlier conclusions in a 1967 Working Paper<sup>25</sup> where it underlined its support for a continued ban on contracting out<sup>26</sup>. Nevertheless, section 38(1) of the 1954 Act was now qualified by a new subsection (4)<sup>27</sup> allowing the parties to seek the approval of the County Court to a proposed new tenancy to operate outside the business tenancies code, with no renewal rights for the tenant.

## THE OPERATION OF THE 1969 ACT

- 4.8 An agreement to contract out had to be authorised by the County Court on the parties' joint application, and had to be contained or endorsed on the instrument creating the tenancy or such other instrument as the court specified. The scope for contracting out was further limited in that it extended only to a term of years certain, including any fixed-term (including a term for a year and for less than a year). A periodic tenancy would fall outside this description as such tenancies are not certain.
- 4.9 This court order had to be obtained before the lease was completed in order to validate the exclusion agreement<sup>28</sup>.
- 4.10 The joint application to the court was signed and submitted by the solicitors to each party together with copies of the

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<sup>25</sup> *Provisional Proposals for Amendments to the Landlord and Tenant Act 1954 Part II (Business Tenancies)* (1967) Working Paper No 7.

<sup>26</sup> See M Haley, "Contracting out and the Landlord and Tenant Act 1954: the ascendancy of market forces" (2008) 4 *Conveyancer and Property Lawyer* 281 at page 282.

<sup>27</sup> Inserted by the Law of Property Act 1969.

<sup>28</sup> *Essexcrest Ltd v Evenlex Ltd* (1988) 55 P. & C.R. 279.

agreed draft lease, an agreed form of court order and the court fee.

- 4.11 Since the court application had to exhibit the draft lease and the court order would refer to the draft, the question arose as to whether changing the terms of the lease (in relation to matters other than contracting out) in the period between applying for the court order and completing the lease invalidated the contracting out unless a fresh court order was obtained referring to the amended draft lease. It was held that changes not material to the contracting out (even in certain circumstances a change in the parties to the lease) would not necessarily invalidate the contracting out. Furthermore, the Court of Appeal commented that the Act should not be treated over-technically<sup>29</sup>.
- 4.12 It was also thought that, where the tenancy had been entered into and the landlord and tenant subsequently agreed to vary the tenancy, the security of tenure provisions would remain excluded from the tenancy except where the variation was so radical as to amount to the surrender of the original tenancy and a re-grant of another in the varied terms. (See *Friends Provident Life Office v British Railways Board*<sup>30</sup> in which it was said that a surrender and re-grant by operation of law arose only where the variation affected the legal estate and either increased the extent of the premises demised or the term for which they were held).
- 4.13 In one case, under this procedure, an existing landlord and tenant entered into an agreement for a contracted-out lease which was conditional on obtaining the court order. They then obtained the order, thus fulfilling the condition, and the tenant continued in occupation. The parties, however, inadvertently failed to complete the new lease. The court held that the tenant's current tenancy nevertheless did contain the exclusion of protection that had been sanctioned by the court order, under the ancient legal doctrine of *Walsh*

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<sup>29</sup> *Metropolitan Police District Receiver v Palacegate Properties Ltd* [2000] 1 E.G.L.R. 63; *Brighton and Hove City Council v Collinson* [2004] 2 E.G.L.R. 65; P Freedman, E Shapiro and K Steele, *Business Lease Renewals the New Law and Practice* (1<sup>st</sup> ed 2006), paragraph 3.5.

<sup>30</sup> [1996] 1 All E.R. 336.

*v Lonsdale*<sup>31</sup> by which the agreement for lease was treated as granting the lease in the agreed form<sup>32</sup>.

## PROPOSALS FOR FURTHER REFORM

- 4.14 It has been noted that this contracting out procedure was widely used<sup>33</sup>. According to a Law Commission (England and Wales) Working Paper in 1988, there were over 11,000 applications in 1986, compared with over 16,000 applications for new tenancies in the same year<sup>34</sup>.
- 4.15 This Paper considered the 1954 Act to be, for the most part, working well<sup>35</sup>. This was in line with the earlier view of the Parliamentary Under-Secretary of State at the Department of the Environment (England) who, in 1985, after reviewing the responses to a Departmental circular inquiring what issues concerning the legislation should be reconsidered, concluded that the balance between landlords and tenants of business premises was being properly maintained<sup>36</sup>.
- 4.16 A number of misgivings had, however, been expressed in the Working Paper, relating to section 38<sup>37</sup>. The Paper questioned:
- Did the procedure under which agreements were being authorised by the court in practice, provide the safeguard which was originally intended? It seemed that few courts examined the bargains made by the parties with much care and a large proportion of applications were approved.
  - Did the Act deal with 'offer back' clauses satisfactorily?<sup>38</sup> The distinction the Act appeared to draw between agreements to surrender in advance,

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<sup>31</sup> (1882) 21 Ch. D. 9.

<sup>32</sup> *Tottenham Hotspur Football and Athletic Co Ltd v Princegrove Publishers Ltd* [1974] 1 W.L.R. 113; P Freedman, E Shapiro and K Steele, *Business Lease Renewals the New Law and Practice* (1<sup>st</sup> ed 2006), paragraph 3.5.

<sup>33</sup> N Dawson, *Business Tenancies in Northern Ireland* (1994), page 45.

<sup>34</sup> *Part II of the Landlord and Tenant Act 1954* (1988) Working Paper No 111, paragraph 3.5.8.

<sup>35</sup> Paragraph 1.3.

<sup>36</sup> *Hansard* (HC), 20 November 1985, vol.87 written answers.

<sup>37</sup> Paragraphs 3.5.6 to 3.5.33.

<sup>38</sup> See the discussion of this in Chapter 5, paragraphs 5.15. to 5.22.



which it restricted, and surrenders taking effect immediately, which it did not, was not being applied wholly consistently.

So the question was raised as to whether the requirement of court approval could be dispensed with.

## THE PROCESS OF FURTHER REFORM

4.17 In a further report in 1992<sup>39</sup> by the Law Commission (England and Wales), the Commission reiterated the point that the courts did not exercise any discretion when examining contracting out procedures as the 1954 Act made no such requirement.

4.18 It found that courts intervened rarely and only where an application was deemed to be technically deficient or where doubts arose as to parties fully understanding their rights. Invariably, applications to contract out were authorised. See Lord Denning M.R:

when (an agreement) has been made by business people, properly advised by their lawyers, it has no material with which to refuse it  
(*Hagee (London) Ltd v A.B. Erikson and Larson*<sup>40</sup>).

4.19 Thus, the Commission did not perceive this process to be an effective filter to prevent abuse of what was generally held to be the landlord's dominant position<sup>41</sup>.

4.20 However, the Commission believed that allowing unrestricted contracting out of the 1954 Act would fundamentally undermine the statutory scheme. Landlords would gain no benefit from the renewal rights and would be tempted to demand contracting out as a matter of routine. Tenants might often concede it without understanding its significance. Constraint was deemed necessary and the nature of that constraint had to be such as to ensure that the prospective tenant only agrees to contract out if he understands the

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<sup>39</sup> *Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II* (1992) Law Com No 208.

<sup>40</sup> [1976] Q.B. 209, page 215.

<sup>41</sup> Paragraph 2.17.

nature of the statutory rights he is planning to forgo. It believed a court application was not the only nor necessarily the best way to achieve that purpose; nor was it at that time even an effective one<sup>42</sup>.

4.21 What the Commission did recommend was that a new procedure be adopted. This would require the parties to observe certain formalities if they agreed that the Act is not to apply. This would help to ensure that parties would be able to opt out of the renewal provisions without unnecessary formality, delay or expense but would nevertheless only do so after being fully informed of the implications of any steps they were about to take. New requirements proposed would be:

- the agreement should be contained in or endorsed on the instrument creating the tenancy;
- a statement in a prescribed form and explaining clearly the implications of the agreement should be endorsed on the instrument creating the tenancy;
- a declaration by the tenant should be endorsed on the instrument which creates the tenancy, stating that he has read and understood the terms of the agreement and the statement<sup>43</sup>.

4.22 On the question of surrenders, it was noted that most of those who responded to the Working Paper agreed that the legislation should draw a clear distinction between surrender of leases, which are unobjectionable, and agreements to surrender them in the future where some control is appropriate. There was general agreement that the conflict or ambiguity in section 24(2)(b), which accepts the validity of a surrender made pursuant to an agreement reached after the tenant has been in occupation for one month, and section 38 of the 1954 Act, which invalidates all agreements to surrender unless authorised by the court, should be resolved. It was recommended that the provision in section 24(2)(b) be repealed. All surrenders would then become effective, but no agreement for surrender would be valid unless the requirements for such agreements were complied

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<sup>42</sup> Paragraph 2.18.

<sup>43</sup> Paragraph 2.19 to 2.20.

with. Other concerns were mooted with agreements to surrender:

First, an agreement for a future surrender entered into contemporaneously with the grant of a lease is a clear way to evade the renewal rights given by the Act. This should therefore not be freely possible. On the other hand, once a tenant is in possession under the terms of a lease which entitle him to renew, he has a strong bargaining position from which to negotiate surrender and there is no reason to suppose that he will improperly be induced to forego his statutory rights. Accordingly, on one view any intervention in this second case may well be an unjustified interference, but we consider that other considerations which apply to agreements contracting out of renewal rights in advance of the tenancy being granted – the need to be sure that the parties are fully informed and the need to alert successors in title – also apply here<sup>44</sup>.

- 4.23 Accordingly, the Commission recommended that an agreement to surrender, while not requiring court application, should comply with the requirements recommended for agreements to contract out in advance (see above).
- 4.24 In 1996, the Department of the Environment (England) held a consultation exercise on some detailed modifications to the Law Commission's 1992 proposals<sup>45</sup>. Its conclusions formed the basis for a further Consultation Paper<sup>46</sup>.
- 4.25 In the 2001 Paper, the Government agreed with the Commission's view that security of tenure equalled an important right for business tenants, particularly small business occupiers. It saw no reason to remove the facility to contract out altogether as it considered the ability to exclude security of tenure as providing a useful degree of flexibility in

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<sup>44</sup> Paragraph 2.22.

<sup>45</sup> *Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II* (1992) Law Com No 208.

<sup>46</sup> Department of the Environment, Transport and the Regions *Business Tenancies Legislation in England and Wales: the Government's proposals for reform* (March 2001).

certain cases. However, it did consider that most business tenants should continue to enjoy security of tenure; it did not favour any weakening of this 'basic right' and aimed to ensure that any changes in the safeguards for tenants contracting out should be at least as effective as those in force at the time<sup>47</sup>. The Government noted the Commission's earlier findings on a lack of court discretion under the 1954 Act; thus, removing the requirement to obtain court permission would reduce the burden on the courts while saving legal expenses for parties wishing to contract out<sup>48</sup>.

- 4.26 Also considered was the Commission's recommendation of a prominent 'health warning' to the tenant about the consequences of giving up statutory rights of renewal, along with a note confirming the 'warning' had been given as well as acknowledgement by the tenant that the statement had been read and fully understood. On the one hand it did not want an abolition of the court procedure to suggest any weakening of its commitment to security of tenure. However it did recognise that, as the courts rarely intervene, procedures at that time did not provide effective protection for tenants. It therefore agreed with the Commission's assessment that a 'health warning' would be a more effective procedure<sup>49</sup>. It was nevertheless concerned that the 'warning' should be received in time for tenants to influence any decision they wished to make. It was deemed not appropriate for tenants to see it for the first time when they are signing the lease; by that time, the tenant may well have entered into business commitments that would make it difficult to withdraw from the contract and begin afresh a search for business premises. On the other hand, any requirement for advance notice would make it impossible for a tenant to occupy new premises at very short notice<sup>50</sup>.

- 4.27 The Government proposed that an agreement to contract out of security of tenure would be valid where one of the following procedures had been followed:

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<sup>47</sup> Paragraph 5.

<sup>48</sup> Paragraph 6.

<sup>49</sup> Paragraph 8.

<sup>50</sup> Paragraph 9.

- normally, the landlord should give the tenant notice, at least fourteen days before the lease is due to be executed, that security of tenure will not apply. The notice would bear a prominent 'health warning' drawing the tenant's attention to the consequences of contracting out. When executing the lease, the tenant would sign a statutory declaration that he/she has received the notice, has read the 'warning' and accepted its consequences; or
- where it was not possible to give fourteen days notice, both landlord and tenant should sign a statement setting out why advance notice could not be given and both should agree that it is reasonable for this to be waived. The statement would contain the 'health warning' and, as an additional safeguard against abuse, the tenant would then be required to sign a statement that he/she had read the 'warning' and accepted the consequences<sup>51</sup>.

4.28 In principle, the Commission's proposals on surrenders and agreements to surrender were accepted. It proposed to repeal section 24(2)(b) of the 1954 Act. All surrenders would be valid; however it considered that any agreements to surrender which would effectively remove the right to renew the tenancy should be subject to similar safeguards as those proposed for contracting out (see above). If these were followed correctly, such agreements would therefore be valid<sup>52</sup>.

## THE 2003 ORDER

4.29 The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003<sup>53</sup>, ('the 2003 Order') came into operation on 1 June 2004. The 2003 Order repealed and replaced section 38(4) with a new section 38A. Thus, agreements to contract out of security of tenure will be valid under this new provision provided:

- (a) the tenancy is to be granted for a term of years certain;

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<sup>51</sup> Paragraph 10.

<sup>52</sup> Paragraphs 21 to 23.

<sup>53</sup> SI 2003 No 3096.

- (b) the landlord has served on the tenant a notice in the form, or substantially in the form, set out in Schedule 1 to the 2003 Order; and
- (c) the requirements specified in Schedule 2 to the 2003 Order have been met.

4.30 Under the 2003 Order, a Schedule 1 notice should be served 14 days prior to entry by the tenant into the tenancy or (if earlier) the date on which the tenant becomes contractually bound to do so. The provisions of Schedule 2 draw a distinction between the requirements to be followed where the Schedule 1 notice is served 14 days before, and 14 days prior, to that date. As there are different procedural requirements depending on when the Schedule 1 notice is received, it has been suggested that it would be foolish to serve notice by post<sup>54</sup>.

4.31 Agreements to surrender follow a similar procedure as for agreements to contract out. The surrender may be on such date or in such circumstances and subject to such conditions as may be specified in the agreement. There is no requirement for the tenancy to be granted for a term of years certain but:

- (a) the landlord must have served on the tenant a notice in the form, or substantially in the form, set out in Schedule 3 to the 2003 Order; and
- (b) the requirements specified in Schedule 4 to the 2003 Order must have been met.

4.32 Schedules 3 and 4 largely replicate for agreements to surrender the provisions of Schedules 1 and 2 for agreements to contract out.

### **The operation of the 2003 Order**

4.33 Schedule 1 to the 2003 Order provides for a Notice to be served by the landlord on the tenant containing three elements:

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<sup>54</sup> K Reynolds QC and W Clarke, *Renewal of Business Tenancies* (3<sup>rd</sup> Ed 2007), paragraph 2.10.

- the name and address of the tenant to whom the notice is to be given;
- the name and address of the landlord who is serving the notice; and
- the 'health warning' to the tenant informing the tenant that he has no security of tenure, the time limits involved and the possible declaration he will be required to enter into if the lease is completed within 14 days of the issue of the notice.

4.34 Schedule 2 sets out the requirements:

- the Schedule 1 notice must be served not less than 14 days before the tenant enters into the tenancy or (if earlier) becomes contractually bound to do so;
- the tenant or a duly authorised agent of the tenant must, before he enters into the tenancy, or (if earlier) becomes contractually bound to do so, make a declaration in the form, or substantially in the form, set out in paragraph 7 to Schedule 2 (paragraph 3);
- a reference to the landlord's notice and the tenant's declaration must be contained in or endorsed on the instrument creating the tenancy (paragraph 5); and
- the agreement, or reference to the agreement, under section 38A(1) must be contained in or endorsed on the instrument creating the tenancy (paragraph 6).

4.35 The declaration is set out in paragraph 7 to Schedule 2 to the 2003 Order. It provides for the tenant to declare a number of things, namely:

- that he has been served with the requisite notice in the form, or substantially thereof, contained in Schedule 1 not less than 14 days before the relevant date;
- that he has read the notice and accepts the consequences of entering into the agreement to exclude sections 24 to 28;
- the name of the tenant and the address of the property which is to form the subject matter of the letting and that he proposes to enter into a tenancy of those premises;
- the duration of the term and its commencement date; and

- that he proposes to enter into an agreement with the named landlord for the provisions of sections 24 to 28 to be excluded in relation to the tenancy.

4.36 If the landlord has not served on the tenant a Schedule 1 notice prior to the period starting 14 days before the tenant enters into the tenancy or if earlier becomes contractually bound to do so, the agreement to exclude the security of tenure provisions (section 38A(3)(a) and paragraph 4 to Schedule 2) will, nevertheless, be valid provided:

the Schedule 1 notice required to be served is in fact served:

- on the tenant before the tenant enters into the tenancy or (if earlier) becomes contractually bound to do so; and
- the tenant, or agent, before that time, makes a statutory declaration under the Statutory Declarations Act 1835 in the form, or substantially in the form, set out in paragraph 8 to Schedule 2.

4.37 This statutory declaration requires the tenant to declare:

- that he is proposing to enter into the tenancy of premises and for the term specified;
- that he proposes to enter into an agreement excluding the provisions of sections 24 to 28;
- that the landlord has served a notice in the form, or substantially in the form, set out in Schedule 1; and
- that the tenant has read the notice and that he accepts the consequences of entering into it.

4.38 The declaration is required to reproduce the Schedule 1 form of notice. Where paragraph 4 of Schedule 2 applies (i.e. where the Schedule 1 notice is served less than 14 days before the tenancy or the contract to take the tenancy is entered into) it is still necessary to comply with the remaining requirements of Schedule 2, namely:

- a reference to the landlord's notice and the tenant's statutory declaration must be contained in or endorsed on the instrument creating the tenancy (paragraph 5 to Schedule 2); and



- the agreement, or reference to, under section 38A(1) must be contained in or endorsed upon the instrument creating the tenancy (paragraph 6 to Schedule 2).

4.39 Thus, the only difference between the procedures applicable to the case where at least 14 days notice has been given and the case where it has not is that where the 14 days requirement has not been complied with the declaration has to be a statutory one. That is to say it has to be sworn in front of someone who is empowered to administer oaths, usually a solicitor<sup>55</sup>.

4.40 Schedules 3 and 4 make largely the same provision for agreements to surrender.

4.41 We comment further on the operation of the 2003 Order in Chapter 8.

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<sup>55</sup> K Reynolds QC and W Clarke, *Renewal of Business Tenancies* (3<sup>rd</sup> Ed 2007) paragraphs 2.07 to 2.15.

# CHAPTER 5     NORTHERN IRELAND

## INTRODUCTION

- 5.1 Professor Dawson in her text book (published in 1994, but still helpful), *Business Tenancies in Northern Ireland*<sup>56</sup>, commented with regard to Northern Ireland's business tenancy protection legislation:

It seems remarkable that this part of our commercial property law should have survived virtually intact for 30 years without any significant challenge from the business community...<sup>57</sup>

- 5.2 Now of course over 45 years have passed since the introduction of the business tenancy protection in 1964. Though there were some significant changes introduced by the 1996 Order (as will be seen) it did not alter the fundamental balance of the legislation.

- 5.3 Professor Dawson had identified a number of related reasons for the survival of the legislation:

- That the legislation does not shield the tenant from market conditions: at renewal the tenant must pay the market rent – the legislation only prevents the landlord extracting more than the market rent from the tenant.
- The legislation does not put a brake on redevelopment of commercial premises nor does it prevent the landlord from recovering the premises for the landlord's own use.
- Security of tenure is contingent on the tenant's satisfactory performance of the tenant's own contractual obligations.

Professor Dawson thus concludes:

These factors combine to create a policy which is regarded as broadly fair<sup>58</sup>.

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<sup>56</sup> N Dawson, *Business Tenancies in Northern Ireland* (1<sup>st</sup> ed 1994).

<sup>57</sup> Page 3.

<sup>58</sup> Page 3.

- 5.4 As we have indicated the representations already made to us and our own preliminary consultations have not indicated any fundamental disagreement with that proposition.
- 5.5 As we have also indicated<sup>59</sup> our predecessor the Law Reform Advisory Committee for Northern Ireland examined the topic in considerable detail in the early 1990s and came to a similar broad conclusion while promoting some modification of the legislation leading to the 1996 Order<sup>60</sup>.
- 5.6 In their Discussion Paper<sup>61</sup> on the topic the LRAC identified that the policy of the legislation reflected ‘three potentially conflicting interests’<sup>62</sup> which they set out as follows:
- The landlord’s property rights in the land
  - The tenant’s property rights in the goodwill of his business
  - The public’s interest in the promotion of stability, growth and modernisation in the business sector
- 5.7 While there may be discussion as to the extent to which a tenant’s interest now necessarily relates to protection of tenant’s goodwill – as opposed to protection from landlord exploitation and business disruption, certainly the legislation should be tested as to whether it continues to strike the balance between the landlord’s interests, the tenant’s interests and the public interest.
- 5.8 The representations and submissions so far made to us do raise the question as to whether the continuation of the complete bar on contracting out now properly represents the public interest in the modernisation of the business sector in Northern Ireland?
- 5.9 So this Chapter examines the story of Northern Ireland’s business protection legislation from its modern origins in 1964 through to the reform of 1996 in the particular context of the prohibition on contracting out.

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<sup>59</sup> See Chapter 1, paragraph 1.7.

<sup>60</sup> *Business Tenancies Report No 1* (1994) LRAC No 2 HMSO.

<sup>61</sup> *A Review of the law relating to Business Tenancies in Northern Ireland* (1992) LRAC Discussion Paper No 3 HMSO.

<sup>62</sup> Paragraph 2.1.1.

## THE BUSINESS TENANCIES (NI) ACT 1964

- 5.10 The implementation of the Business Tenancies (NI) Act 1964 followed discussions by the Joint Select Committee on the workings of the Business Tenancies (Temporary Provisions) Act (NI) 1952<sup>63</sup>.
- 5.11 The object of the 1964 Act was as indicated to give the tenant of business premises the general right to retain the business premises after the contractual term of the tenancy has terminated. This protection was conferred on the tenant subject to the performance by the tenant of the tenant's obligations under the tenancy and subject to the tenant paying a fair market rent under the renewal lease.
- 5.12 The landlord was obliged to allow the tenancy to continue unless he can specify one of the conditions specified in section 10 of the Act for opposing renewal:
- (a) the tenant's failure to comply with obligations in respect of the repair and maintenance of the holding;
  - (b) the tenant's persistent delay in paying rent;
  - (c) other substantial breaches by the tenant of his obligations under the current tenancy or for any other reasons connected with the tenant's use or management of the holding;
  - (d) that the landlord offered and was willing to provide or secure the provision of alternative accommodation for the tenant, and—
    - (i) that the terms were reasonable
    - (ii) that the accommodation and the time at which it will be available were suitable for the tenant's requirements;
  - (e) where the current tenancy was created by the subletting of part only, the landlord is the owner of an estate in reversion, that the aggregate of the rents reasonably obtainable on separate lettings of the holding and the remainder of that property would be substantially less than the rent reasonably obtainable

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<sup>63</sup> *Special and Final Reports on Business Tenancies* (1959) NI, HC 1359.

on a letting of that property as a whole, the landlord required possession of the holding for the purpose of letting or otherwise disposing of the said property as a whole;

- (f) the landlord intended —
  - (i) to demolish or rebuild the premises comprised in the holding or a substantial part of those premises; or
  - (ii) to carry out substantial works of construction on the holding or part thereof;  
and that the landlord could not reasonably do so without obtaining possession of the holding;
- (g) the landlord intended that the holding will be occupied for a reasonable period for the purposes, or partly for the purposes, of a business to be carried on by him or by a company in which he has a controlling interest, or as his residence.

5.13 The broad effect of the Act was as for the 1954 Act in England and Wales<sup>64</sup>.

5.14 Following the 1954 Act the 1964 Act contained an absolute bar on contracting out in section 20 in the following terms (quite similar to section 38 of the 1954 Act):

So much of any agreement relating to a tenancy to which this Part applies (whether contained in the instrument creating the tenancy or not) as purports directly or indirectly by any means whatsoever to preclude the tenant from making an application or request under this Part or provides for the termination or the surrender of the tenancy in the event of his making such an application or request or for the imposition of any penalty, restriction or disability on the tenant in that event, shall be void.

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<sup>64</sup> See Chapter 4, paragraph 4.3.

## Agreements to Surrender and Offer Back Clauses

- 5.15 Under section 6 of the 1964 Act, a business tenancy might be terminated by surrender. The agreement of the landlord would be required as there is no generally unilateral right of surrender for a tenant in either common law or statute. Where the parties agree on a surrender of a business tenancy the surrender had to take effect immediately. This was because it has been held that agreements to surrender in the future are void under the contracting out prohibition<sup>65</sup>.
- 5.16 The Law Reform Advisory Committee considered these issues in some detail in its Discussion Paper No 3 in 1992<sup>66</sup>. It considered that the distinction between an actual surrender and an agreement for a future surrender seemed logical and fair. When a tenant enters into an agreement to surrender his tenancy at some point in the future, he is agreeing to a course of action which may not be in his best interests when the time comes to follow it through<sup>67</sup>. Further, the Committee noted the English decision of *Tarjomani v Panther Securities Ltd*<sup>68</sup> in which it was held that an agreement to surrender intended to take place immediately, not in the future, was also void. But the Committee noted that in this jurisdiction under section 7 of the Landlord and Tenant Act (Ireland) 1860 a surrender may be made by deed or writing signed by the tenant. Thus, the agreement to surrender with immediate effect in the *Tarjomani* case would have been effective as an immediate surrender in Northern Ireland<sup>69</sup>.
- 5.17 The Committee noted that offer back clauses have been typically described as a proviso attached to covenants against assignment<sup>70</sup>. The tenant covenants not to assign, underlet or part with possession of the demised premises. There then follows a proviso that if he does wish to assign he must first offer to surrender the lease to the landlord, either without consideration or in consideration of a payment. The

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<sup>65</sup> See *Joseph v Joseph* [1966] 3 All E.R. 486.

<sup>66</sup> *A Review of the law relating to Business Tenancies in Northern Ireland* (1992) LRAC Discussion Paper No 3 HMSO paragraphs 3.4.10 to 3.4.16.

<sup>67</sup> Paragraph 3.4.10.

<sup>68</sup> (1983) 46 P. & C. R. 32.

<sup>69</sup> Paragraphs 3.4.10 to 3.4.11.

<sup>70</sup> Paragraph 3.4.12.

tenant is not free to assign unless he has offered the lease back and the landlord has declined the offer.

5.18 The Committee referred to the '*Allnatt*' issue as follows<sup>71</sup>. Such clauses are, as a matter of the general law governing relations between landlord and tenant, valid and enforceable. It has been held in England that they do not contravene the statutory provision whereby covenants against assignment are made subject to a proviso that the landlord's consent will not be unreasonably withheld. However, it was held in the English case of *Allnatt London Properties Ltd v Newton*<sup>72</sup> that invoking an offer back clause of this nature has the effect of precluding the tenant from making an application or request for a new tenancy, and is therefore void by reason of section 38(1) of the 1954 Act. In this instance the tenant had offered the lease back in accordance with the clause and the landlord had accepted the offer, but the tenant subsequently withdrew it. The landlord sought to enforce the clause, while the tenant opposed it, successfully, on the plea that the clause was void and unenforceable. Thus, the landlord was not entitled to insist on taking the property back as the offer back clause was held to be unenforceable; whereas the tenant could not assign the property, because the landlord had not declined the offer of surrender.

5.19 The Committee<sup>73</sup> agreed with the viewpoint of the Law Commission (England and Wales) that such a stalemate was unsatisfactory in practice and contrary to the policy of the business tenancies legislation<sup>74</sup>. The Commission had centred on two proposals for possible reform in this area, namely the invalidation of the offer back proviso – leaving the covenant against assignment standing – and some provision for the landlord to apply to court for validation of the clause. The Committee did not find any great attraction in a multiplication of applications to court, while it did recognise that such a solution might have to be accepted as the best available. It was interested in how extensively offer back clauses were being used in Northern Ireland, and what

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<sup>71</sup> Paragraph 3.4.13.

<sup>72</sup> [1984] 1 All E.R. 423.

<sup>73</sup> Paragraph 3.4.15.

<sup>74</sup> *Part II of the Landlord and Tenant Act 1954* (1988) Working Paper No 111, paragraph 3.5.27.

problems had arisen from their use. Further to this, it welcomed views on whether the 1964 Act should be amended, and if so how, in order to prevent the occurrence of the *Allnatt* stalemate<sup>75</sup>.

5.20 Answering these questions, the Belfast Solicitors Association<sup>76</sup>, disagreeing with the Committee, saw a substantial problem with regard to agreements to surrender. The problem was said to commonly arise in tri-partite situations where an existing tenant wishes to move out and a new one wishes to move in (a common enough scenario in, for instance, a shopping centre). The parties prefer that there be a new lease, rather than an assignment of the existing lease. Both landlord and new tenant may have legitimate business reasons for such preference. In such circumstances the landlord needs to know that there is a binding agreement to surrender with the existing tenant before the landlord can enter into an agreement for a new lease with the new tenant. Conversely, the landlord cannot afford to take a surrender from the existing tenant before he knows the new tenant is bound to the terms of the new lease. The existing tenant may also require time to run down stock and make arrangements to move out, while the new tenant may require time to make arrangements for shop fitting and the like. Thus there is a myriad of agreements and obligations. Accordingly, the Association saw it as essential that provision be made for agreements to surrender to be valid, presumably done by way of application of the parties to the Lands Tribunal in the same way as for an application for contracting out of the terms of the legislation. The Association did reiterate that this was a difficult area with differences of opinion amongst the sub-committee<sup>77</sup>. Further suggestions put forward offered a way around the *Allnatt* stale-mate noted above. Should the previous suggestion that agreements to surrender are put to the Lands Tribunal for approval, this would then negate the situation in *Allnatt* as

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<sup>75</sup> Paragraph 3.4.16.

<sup>76</sup> Belfast Solicitors Association *A review of the law relating to Business Tenancies in Northern Ireland* (1993) Submission to the Law Reform Advisory Committee for Northern Ireland.

<sup>77</sup> Belfast Solicitors Association *A review of the law relating to Business Tenancies in Northern Ireland* (1993) Submission to the Law Reform Advisory Committee for Northern Ireland, pages 13 to 14.



such 'offer back' to the landlord would have to go before the Tribunal for approval<sup>78</sup>.

5.21 In the Committee's 1994 Report<sup>79</sup>, with regard to agreements to surrender, they were of the view that they stood on the same footing as a general power to contract out of the Act, and that the same reasoning should apply. It did, however, take on board the concerns of the Belfast Solicitors Association and accepted that in certain circumstances a valid agreement to surrender was essential. Therefore, agreements to surrender were recommended subject to two conditions:

- they must be entered into at a time when the tenant is in possession under the terms of a lease which would enable him to apply for a new lease. The tenant would then be in a strong position; and
- they must be approved by the Lands Tribunal, thus preventing any abuse of the ability to enter into a valid agreement to surrender, for example an agreement to surrender entered into a day after the protected tenancy began<sup>80</sup>.

5.22 On the subject of offer back clauses, the Committee took the view that they also ran contrary to the spirit of the 1964 Act. It considered that landlords should not be permitted to impose them upon tenants. Instead of recommending that the proposed legislation should strike such clauses down, the Committee looked at the wider question of covenants against assignment in business tenancy agreements, of which offer back clauses play a part. It concluded that absolute covenants against assignment without the landlord's consent were not justified in modern conditions and afforded landlords an unwarranted opportunity to seek payment for their agreement to permit an assignment. Therefore, it recommended that all covenants restricting assignment, whether by absolute prohibition, or by requiring

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<sup>78</sup> Page 15.

<sup>79</sup> *Business Tenancies Report No 1* (1994) Law Reform Advisory Committee for Northern Ireland Report, LRAC No 2 HMSO.

<sup>80</sup> *Business Tenancies Report No 1* (1994) LRAC No 2 HMSO, paragraphs 3.6 to 3.7; see Article 25 of the 1996 Order.

an offer back, should be treated as including a proviso that the landlord's consent to assignment would not be unreasonably withheld (a similar provision was recommended for all tenancies by the Land Law Working Group<sup>81</sup> in paragraph 4.4.20 of its Report). The Committee also recommended giving the Lands Tribunal the power to award compensation where such consent was unreasonably withheld or delayed, or where attempts were made to impose unreasonable conditions on the giving of that consent<sup>82</sup>.

### **Abolition of the contracting out bar?**

5.23 The Committee considered this in some detail also. In paragraph 3.4.8 of their Discussion Paper<sup>83</sup> they set out their preliminary view as follows:

There is clearly a desire on the part of landlords to operate outside the legislation. One proposal, made by the Irish Law Reform Commission, is that parties who wish to contract out should be permitted to do so, without the necessity of incurring the expense and delay of an application to court for approval, provided that they have each received independent legal advice before entering into the transaction. We are not convinced there is sufficient equality of bargaining power between landlords and tenants to make that an acceptable solution. We are exercised by the fact that the prohibitions on contracting out were intended to reflect the tenant's need to establish and protect goodwill, and we are not persuaded that that need has disappeared. Nor can we espouse with any enthusiasm the lengthening of terms of tenancies to which the Act will not apply.

5.24 The Committee did however set out questions for respondents to answer:

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<sup>81</sup> *The Law of Property* (1990) The Final Report of the Land Law Working Group Report Belfast HMSO.

<sup>82</sup> Paragraphs 3.7.3 to 3.7.4 - this formed the basis of Article 26 of the 1996 Order.

<sup>83</sup> *A review of the law relating to Business Tenancies in Northern Ireland* (1992) LRAC Discussion Paper No 3 HMSO.

- Whether the lengths of short term leases outside the Act should be extended, and if so, to what extent?
- Should contracting out be allowed? The Committee was particularly interested to know if commercial property was lying vacant because of the owner's reluctance to let within the scope of the Act.
- If contracting out were to be permitted,
  - Should it be necessary for the parties to have their agreement approved?
  - Should an application for approval be made to the court or the Lands Tribunal? The Committee indicated a preference for the retention of all business tenancies matters in the Lands Tribunal.
  - On what criteria should the decision to grant or withhold approval be based?

5.25 In its final 1994 Report<sup>84</sup> the Law Reform Advisory Committee referred back to the questions it had set in its Discussion Paper. They reported<sup>85</sup> that most of the respondents were against unrestricted contracting out but a majority were in favour of contracting out by way of temporary lettings. They noted that there was little evidence of properties lying vacant because of the landlord's reluctance to let within the scope of the Act. But they also noted suggestions that there was a significant need for temporary lettings in order to make optimum use of land and property resources. Examples included:

- after bomb damage
- pending private development
- lettings during periods of over supply to tenants with poor track records
- public authority landlords which had acquired land for a statutory scheme to be carried out at some time in the future

5.26 They noted that proposals for temporary lettings varied between twelve months and five years with, in the case of public authority landlords which had acquired land for a

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<sup>84</sup> *Business Tenancies* (1994) LRAC No 2 HMSO.

<sup>85</sup> Paragraph 3.5.8.

statutory scheme to be carried out at some time in the future, an unlimited right for the tenant to apply for temporary renewals of his temporary tenancy.

5.27 They concluded in paragraph 3.5.9:

We are not convinced that the recommendations of the Law Commission [England and Wales<sup>86</sup> for a form based procedure] are suitable for conditions in Northern Ireland. Even with the safeguards proposed by the Law Commission we consider that contracting out would become the norm, and that the 1964 Act would quickly become meaningless. The prohibition against contracting out is at the heart of the legislation and **we recommend strongly that it remains there.** (emphasis in original)

5.28 They did, however, take the points made for some extension of the periods of temporary lettings outwith the legislation and recommended that the term of such temporary lettings be extended from 3 months to 9 months with one further renewal of 9 months<sup>87</sup>. They were not convinced to make any case for longer temporary lettings in the case of public authority landlords as<sup>88</sup>:

They would complicate the Act to an unnecessary degree and extent and create a significant distinction between private and public authority landlords.

5.29 The Committee's recommendations were given effect in the 1996 Order which remains the current law which we now examine in some further detail with regard to the relevant provisions.

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<sup>86</sup> *Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II* (1992) Law Com No 208, paragraph 2.20.

<sup>87</sup> Paragraphs 3.5.10 to 3.5.15.

<sup>88</sup> *Business Tenancies* (1994) LRAC No 2 HMSO, paragraph 3.5.14. See, however, now Chapter 10, paragraphs 10.14 to 10.26 for suggestions now made to us by some public sector lawyers that this should be re-considered.

## THE CURRENT POSITION

- 5.30 So the business tenancy protection law as it now stands is in the Business Tenancies (Northern Ireland) Order 1996 ('the 1996 Order'). We set out provisions relevant to the contracting out issue. Firstly Article 24 repeats the absolute bar on contracting out as was contained in the 1964 Act:

. . . so much of any agreement relating to a tenancy to which this Order applies (whether contained in the instrument creating the tenancy or not) as—

- (a) purports directly or indirectly by any means whatsoever to preclude any person from making an application or request under this Order; or
- (b) provides for the termination or surrender of the tenancy in the event of the tenant's making such an application or request; or
- (c) provides for the imposition of any penalty, restriction or disability on any person in the event of his making such an application or request; or
- (d) purports to exclude or reduce compensation under Article 23,

shall be void.

- 5.31 This prohibition should of course be considered in the overall context of the terms of the 1996 Order. Article 3(1) (identical to section 1(1) of the 1964 Act) provides:

Subject to the provisions of this Order, this Order applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by the tenant or for those and other purposes.

- 5.32 Article 2(2) of the 1996 Order (identical to section 1(2) of the 1964 Act) provides that 'business' includes:

- (a) a trade, profession or employment and
- (b) any activity carried on by a body of persons, whether: -  
corporate or unincorporated,

whether or not carried on for gain or reward;

5.33 This is identical to section 23(2) of the 1954 Act and section 1(2) of the 1964 Act, except for the phrase 'whether or not carried on for gain or reward'.

5.34 Article 4(1) of the 1996 Order excludes a number of tenancies from the operation of the Order and in general terms it will not apply to:

- (a) tenancies protected under the Rent (NI) Order 1978;
- (b) tenancies held under perpetually renewable leases<sup>89</sup>;
- (c) short term tenancies (not more than 9 months except where the tenant or a predecessor has already been in occupation not exceeding a total of 18 months);
- (d) agricultural tenancies;
- (e) mining tenancies;
- (f) tenancy granted for or made dependent on the continuance of the tenant in any office, employment or appointment;
- (g) tenancies granted under section 40(1)(a) of the Administration of Estates Act (NI) 1955;
- (h) a tenancy where the tenant has been convicted after 1 January 1965 of using the premises or permitting the premises to be used for an illegal purpose;
- (i) tenancies granted by a person in breach of a prohibition against granting a tenancy contained in that person's own tenancy agreement;
- (j) tenancies to which the Leasehold (Enlargement and Extension) Act 1971 applies;
- (k) tenancies between parties who are holders of licences under Part II of the Electricity Order (Northern Ireland) 1992.

5.35 These exceptions are broadly comparable to those contained in section 43 of the 1954 Act and section 2 of the 1964 Act. But the 1964 Act contained an exception in section 2(1)(g) of tenancies granted by public authorities where the authority requires possession in order to carry out its functions under any enactment or rule of law. A major

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<sup>89</sup> Repealed by the Property (NI) Order 1997 with effect from the 10<sup>th</sup> January 2000 by virtue of SR 1999/461.

recommendation of the Law Reform Advisory Committee was that public authorities should no longer enjoy this exception. This has been given effect in the 1996 Order. In Northern Ireland legislation<sup>90</sup> does not bind the Crown unless it contains an express provision to that effect. No express binding provision appeared in the 1964 Act, although section 2(1)(g) specifically excluded public authority landlords in certain circumstances.

- 5.36 The application of the Order is modified in two ways as it relates to the Crown. Firstly, one of the Article 12 grounds for refusing a new tenancy is that the estate is held by a public authority and that possession is reasonably necessary for the public authority to carry out its functions under any statutory provisions or rule of law<sup>91</sup>. Secondly, public authorities are not obliged to pay the compensation for refusing to renew a tenancy, in certain circumstances, which a private landlord would otherwise have to pay – see Article 23(7).
- 5.37 Article 43 provides (subject to Articles 12(1)(i) and 23(7)) that the Order binds the Crown. It goes on to state that where a tenancy is held by or on behalf of a government department, the Order applies and that occupation for the purposes of the department satisfies any requirement that the business is occupied for business purposes.

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<sup>90</sup> Under Section 7 of the Interpretation Act (NI) 1954.

<sup>91</sup> Article 12(1)(i) of the 1996 Order but see suggestion in Chapter 10, paragraphs 10.14 to 10.22 that this requires some reconsideration.

## CHAPTER 6     REPUBLIC OF IRELAND

### SOME HISTORICAL BACKGROUND

- 6.1 As the Irish Law Reform Commission has noted<sup>92</sup> the principle of conferring statutory protection on tenants occupying property, including business premises, in the urban areas of Ireland accelerated in the latter half of the nineteenth century. Up to this point most attention had been focused on the position of agricultural tenants, and much of the legislation at that time related to such tenants. Irish MPs made several unsuccessful attempts to persuade the Westminster Parliament to enact appropriate legislation, on a wider basis. The Government did eventually succumb to these demands at the beginning of the twentieth century, with the enactment of the Town Tenants (Ireland) Act 1906 ('the 1906 Act'), but not before it had insisted on diluting the provisions in question. In particular the 1906 Act did not include the provisions giving tenants a right to renewal of expired leases at rents to be fixed, in default of agreement, by the County Court, 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, and for disturbance on termination of a tenancy.
- 6.2 In general terms, the 1906 Act was born out of an historic preoccupation with 'tenant right' in Ireland. Preferential treatment for the sitting tenant at the expiry of his lease became established practice in Ireland in the seventeenth and eighteenth centuries wherever the Ulster tenant-right custom and similar customary rights prevailed. The key element in the Ulster custom was what was known as the tenant's 'goodwill' in the land. This was a proprietary interest; 'goodwill' based on mere possession and the expectation of renewal. The right under the custom to sell this goodwill arose even though the tenant had no lease to sell; the tenants 'goodwill' was recognised as a right of property by

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<sup>92</sup> Much of the information for this Chapter derives from the Consultation Paper of the Irish Law Reform Commission on Business Tenancies (LRC CP 21-2003) and we gratefully acknowledge that source.



custom and, after 1870, by law: Landlord and Tenant (Ireland) Act 1870<sup>93</sup>.

- 6.3 Elements of the 'tenant right' policy were enshrined in the 1906 Act: compensation for loss of security of tenure was conferred in recognition of the sitting tenant's goodwill in the premises, not necessarily the tenant's commercial goodwill, but an ill defined right arising from the tenant's status as a sitting business tenant and from the tenant's vulnerability in negotiations with the landlord for a renewal. The tenant may have different reasons for remaining on the premises, but it has been argued that a sitting tenant can find himself in a weak negotiating position with his landlord. At first, under the 1906 Act, security of tenure was a right for the tenant to be compensated if renewal was refused but this developed further (under the Landlord and Tenant Act 1931), into a right to renewal, subject to good behaviour and provided the landlord did not need the premises for his own use or redevelopment, wherein compensation would be then paid to the tenant.
- 6.4 As opposed to the more favourable views of the 1906 Act in Northern Ireland, it was apparently viewed more askance in the Republic of Ireland; indeed it has been generally described as limited and flawed<sup>94</sup>. The compensation awarded for disturbance was seen as minimal at best, only being awarded where the landlord had refused to renew a lease without 'good and sufficient' cause<sup>95</sup>. By the time of the establishment of the State, the view was taken that the Act was largely a dead letter<sup>96</sup>.

## THE LANDLORD AND TENANT ACT 1931

- 6.5 After pressure for reform in Dáil Éireann, 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

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<sup>93</sup> N Dawson, *Business Tenancies in Northern Ireland* (1<sup>st</sup> ed 1994), pages 1 to 5.

<sup>94</sup> *Consultation Paper on Business Tenancies* LRC CP 21-2003, paragraph 1.02.

<sup>95</sup> *O'Leary v Deasy* [1911] 2 IR 450.

<sup>96</sup> J Wylie, *Irish Land Law* (3<sup>rd</sup> Ed 1997), paragraph 18.04.

urban districts, towns and villages'. Its final report, presented in April 1928, recommended 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 F's', viz a fair rent, free sale and fixity of tenure. These recommendations were acted upon with the enactment of the Landlord and Tenant Act 1931 ('the 1931 Act'), which marked a development from compensation only to a right to renewal. Section 9 repealed the Town Tenants (Ireland) Act 1906<sup>97</sup>.

6.6 The 1931 Act applied to urban tenants generally, including those occupying premises for both business and residential purposes. Provisions relating to business tenants fell into three categories:

- 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 agreement by the parties (Part III of the 1931 Act).
- Where, under the 1931 Act, the landlord was entitled to refuse a new tenancy on certain grounds, the tenant would be entitled to compensation for disturbance (Part III).
- A tenant who had to give up the tenancy would be entitled to compensation for improvements which the tenant had made to the premises (Part II).

6.7 The 1931 Act also introduced new statutory provisions governing covenants in leases, designed to ensure that common prohibitions or restrictions on matters like 'alienation' by the tenant did not operate unfairly (Part IV), thus meeting the other element of the 'Three F's', viz free sale. It has been noted that, despite subsequent legislation, the provisions of the 1931 Act have remained the foundation of the statutory rights enjoyed by business tenants<sup>98</sup>.

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<sup>97</sup> *Consultation Paper on Business Tenancies* LRC CP 21 -2003, paragraph 1.02.

<sup>98</sup> *Consultation Paper on Business Tenancies* LRC CP 21-2003, paragraph 1.03.

- 6.8 Ever since the introduction of the protections contained in the 1931 Act, a fundamental principle was that contracting out of such provisions is prohibited. Section 42 of the 1931 Act states that:

A contract, whether made before or after the passing of this Act, by virtue of which a tenant would be directly or indirectly deprived of his right to obtain relief under this Act or any particular such relief shall be void.

- 6.9 Thus, the parties cannot exclude to any degree the statutory protection conferred on tenants by the terms of the lease or tenancy agreement.

## **THE 1980 ACT AND THE 1994 ACT**

- 6.10 The Landlord and Tenant (Amendment) Act 1980 largely preserved the intent of the 1931 Act.

- 6.11 Section 16 of the 1980 Act provided that where Part II of the 1980 Act applied to a tenancy, the tenant shall be entitled to a new tenancy, commencing on the termination of the previous one, subject to proving any one of a number of 'equities'. The relevant one for our purposes is where there is a 'business equity'. Originally this was where the tenant had continuously occupied the premises for 3 years (section 13(1) (a) of the 1980 Act). Subsequently the period was extended to 5 years (section 3 of the Landlord and Tenant (Amendment) Act 1994).

- 6.12 If a new tenancy were established based on business equity, the new tenancy would be fixed at twenty years or such lesser term as the tenant might nominate. It would not however be fixed for a period of less than five years without the landlord's agreement.

- 6.13 Section 17 of the 1980 Act set out the restrictions on right to a new tenancy. The grounds for refusal included:

- Non payment of rent by a tenant.
- Breach by a tenant of a covenant of the tenancy.
- A notice of surrender served by the tenant.

- Notice to quit served by a landlord if for good and sufficient reason.
- Where the tenancy terminated otherwise than by notice to quit and the landlord had a good and sufficient reason to refuse renewal.
- Landlord intended to redevelop the premises.
- The landlord is a planning authority and the premises are situate in an area designated as obsolete in the development plan.
- Landlord as a local authority is entitled to acquire the premises compulsorily.
- The creation of a new tenancy would not be consistent with good estate management.

6.14 A good and sufficient reason was defined by section 17(1)(b) as a reason traceable to conduct of the tenant. Section 17(1)(a)(ii) changed the position from the 1931 Act by permitting a landlord to prevent a tenant from obtaining a new tenancy if there had been any breach by the tenant. Previously the 1931 Act had only allowed refusal for breaches of 'condition' which was generally accepted to be a major breach. It can be seen that these grounds are similar to those grounds for refusal under Article 12 of the 1996 Order in Northern Ireland.

6.15 The prohibition to contracting out was maintained by section 85 of the 1980 Act:

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.

6.16 The Irish Law Reform Commission Consultation Paper<sup>99</sup> alluded to the courts giving section 85 a wide interpretation; in particular, it was construed as taking hold of both direct and indirect provisions in leases, in effect any provision which 'has the effect of' depriving the tenant of any benefit or

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<sup>99</sup> *Consultation Paper on Business Tenancies* (2003) LRC CP 21-2003, paragraph 3.05.

right conferred by the statutory scheme<sup>100</sup>. This can be seen from the judgment of Lardner J in *Bank of Ireland v Fitzmaurice*<sup>101</sup> who held void a provision in a rent review clause which combined indexing with a multiplier provision designed to pressure the tenant into surrendering his lease<sup>102</sup>. In his view, the review provision was ‘an ingenious method of circumventing the provisions of the 1980 Act’ and therefore void under section 85. The section was held not to be confined to cases where the contract ‘directly’ provides that the Act does not apply. Thus, the position is clear; any attempts at circumventing the rights and obligations protected by the 1980 Act by careful drafting will likely be held void under section 85.

- 6.17 The Irish Law Reform Commission had noted in a previous Report<sup>103</sup> that concerns as to the applicability of this provision had led to practitioners devising various methods of bypassing the 1980 Act, most notably by way of the ‘*Gatien device*’. This referred to the case of *Gatien Motor Company Ltd. V Continental Oil Company Ltd*<sup>104</sup> in which a landlord granted a lease that fell short of the statutory time which would have entitled the tenant to a new tenancy at its expiry. The landlord then entered into a caretaker’s agreement with the tenant for six days and then executed a new lease for a further period. This case concerned the provisions of the 1931 Act which contained a similar prohibition on contracting out of its provisions. The Supreme Court held that the device used in that case did not constitute contracting out of the 1931 Act as the tenant had not satisfied the prerequisites for entitlement to a new tenancy as he had not been a tenant for the required amount of time. But the Commission had noted that there were doubts as to the efficacy of the application of this to the 1980 Act<sup>105</sup>.

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<sup>100</sup> Paragraph 3.05 and paragraphs 3.05 to 3.15 in general.

<sup>101</sup> [1989] ILRM 452.

<sup>102</sup> J Wylie, *Irish Landlord and Tenant Law* (1st Ed 1990), paragraph 30.17.

<sup>103</sup> *Report on Land Law and Conveyancing Law: (1) General Proposals* (1989) LRC 30-1989, paragraphs 62 to 64.

<sup>104</sup> [1979] IR 406.

<sup>105</sup> At paragraph 63.

- 6.18 Section 1 of the Landlord and Tenant (Amendment) Act 1989 amended the 1980 Act and marked the first erosion into the absolute prohibition on contracting out. Section 1 added new subsections 13(3)–(5) to the 1980 Act which exempted financial services companies trading in Custom Houses Docks Area from the prohibition on contracting out.

## **THE PROPOSALS OF THE IRISH LAW REFORM COMMISSION**

### **1989 Proposals**

- 6.19 In its 1989 Report the Irish Law Reform Commission stated its opinion that there was no reason why two parties entering an agreement at arms length should not be allowed to contract out of the Act.
- 6.20 The Oireachtas responded by way of a Private Members' Bill which was taken over and modified by the Government during its passage, leading to the enactment of the Landlord and Tenant (Amendment) Act 1994. Section 4 of that Act introduced the concept of the tenant being able to execute a 'renunciation' of entitlement to a new tenancy provided he has received 'independent legal advice in relation to the renunciation'. The Oireachtas accepted the view that it was unnecessary for the parties to seek court approval. It should be noted that the 1994 Act required that the tenant only need obtain such legal advice whereas the Irish Law Reform Commission had recommended both parties should do so. More importantly, the 1994 Act further departed from the recommendations of the Commission in that renunciation was permitted only where the terms of the tenancy provide 'for the use of the tenement wholly and exclusively as an office' (sub-paragraph (iii)a of section 17(1)(a) of the 1980 Act).
- 6.21 The 1994 Act also raised the minimum qualifying occupation period from three to five years (section 3(1) of the 1994 Act amending section 13(1)(a) of the 1980 Act), consequently leading to lettings of four years, nine months becoming common. It was also believed that many landlords would be prepared to let properties for periods of five years and longer if they were sure the tenant would not be entitled to a new

lease at the expiry of the initial term, while tenants would wish to be able to obtain such longer lettings even at the expense of not being entitled to a renewal of the tenancy at its expiry.

### **Consultation Paper 2003**

6.22 Certainly there appeared to be some congruence in thinking in the Republic of Ireland as in present day opinion in England and Wales. In its 2003 Consultation Paper<sup>106</sup> the Irish Law Reform Commission noted the changes in the business tenancy market from the time when the 1931 Act was first enacted<sup>107</sup>. It pointed out the most striking feature of the 15 years prior to its Report was the expansion of the commercial property market to include substantial office blocks, major retail outlets like shopping centres and industrial parks. This, in turn, led to a changing dynamic among landlords and tenants. The Report noted the following features:

- Both landlords and tenants could be classed as large corporate bodies, often with an international dimension.
- Both possessed substantial resources and had access to the very best legal and professional advice.
- The Oireachtas had recognised this changing dynamic through the amendments made in 1989 and 1994.

6.23 Further, the Commission argued that, in a sense, the 1994 Act had made the position worse in that an embarrassing anomaly had been created by confining the contracting out resource to office tenants. It asked the question<sup>108</sup>:

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's or Marks and Spencer renting the anchor unit

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<sup>106</sup> *Consultation Paper on Business Tenancies* (2003) LRC CP 21-2003.

<sup>107</sup> *Consultation Paper on Business Tenancies* (2003) LRC CP 21-2003, paragraphs 3.09 to 3.11.

<sup>108</sup> Paragraph 3.09.

in a huge shopping centre, or a multi-national corporation like Microsoft renting units in an industrial park, not be permitted to do so?

- 6.24 The Commission viewed such an anomaly as damaging to Ireland's trading and commercially-orientated reputation, noting that when the position under Irish law is explained by legal and professional advisers to international investors and trading organisations, it is frequently a source of embarrassment<sup>109</sup>.
- 6.25 Further, it viewed the position at that time as somewhat difficult to reconcile with the Government policy of ensuring that Ireland embraced the challenges of e-commerce<sup>110</sup>.
- 6.26 It was underlined in the 2003 Consultation Report that the 1994 Act's provisions could be strengthened by adopting the proposals, similar to those now contained in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. These provisions, including 'health warnings', were aimed to sufficiently safeguard the rights of business tenants, as well as landlords, of all categories and ensure that the law was kept up to date with developments and was fit to face the commercial realities of the 21<sup>st</sup> Century<sup>111</sup>.
- 6.27 In February 2006 the Minister for Justice, Equality and Law Reform, Mr Michael McDowell, T.D., announced his intention to provide in law for any business tenant to contract out of the provisions of the Landlord and Tenant (Amendment) Act 1980 on the right to a new tenancy<sup>112</sup>. He stated that:

The proposal to extend it to all classes of business tenancy, including existing tenancies, is a deliberate policy change to meet the dynamic market economy that exists in the State. It is intended to allow greater flexibility than at present in the arrangements which business tenants and landlords choose to make

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<sup>109</sup> Ibid.

<sup>110</sup> See the Electronic Commerce Act 2000.

<sup>111</sup> Paragraph 3.11 of 2003 Consultation Paper.

<sup>112</sup> See Department of Justice, Equality and Law Reform, *Minister McDowell announces publication of Civil Law (Miscellaneous Provisions) Bill 2006* (February 2006) at <http://www.justice.ie>.



between each other. At the same time, it maintains a good balance between sometimes competing interests by ensuring that tenants cannot sign away the protections at present afforded by the law without first having obtained independent legal advice on the matter.

- 6.28 Accordingly the Civil Law (Miscellaneous Provisions) Act 2008 ('the 2008 Act') opens up contracting out (called 'renunciation' in the 2008 Act) to all tenants, provided that they sign a waiver after taking independent legal advice.
- 6.29 Section 4 of the 1994 Act is essentially repealed by Section 47 of the 2008 Act, which came into operation on 20 July, 2008. The 2008 Act allows all business tenants to contract out of their entitlement to renew their tenancy after five years. Thus, after taking legal advice and the signing of a waiver, tenants can contract out.
- 6.30 The intent of the provisions is to ease the difficulties that business tenants have faced, with the prospect of termination of their leases within a five year period with no possibility of renewal, and to liberalise the market in business rentals generally. It has been noted that the legislation is particularly welcome in the current climate as start up businesses / SMEs will be slow to enter into long leases with guarantees. Many landlords wish to redevelop their premises and are either caught in the planning process or, where they have planning permission, are finding it difficult to get development finance. This legislation will enable landlords to let to tenants and gain valuable income from the property during this planning/pre-development process without the concern they are giving away renewal rights<sup>113</sup>.
- 6.31 However, there could also be some disadvantages to the 2008 Act. Most prudent landlords may now insist on receiving waivers for all leases. While powerful or anchor tenants will be able to resist requests to contract out, those smaller businesses will not have this power and thus may

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<sup>113</sup> A Marsh, "Major change in tenancy law introduced" (23 July 2008) *The Irish Times*.

have to accept that they will not have renewal rights, in turn considerably weakening their position. Further, landlords need to be careful not to take on more responsibility. Generally in long leases landlords pass either the responsibility or the cost of maintaining the external and structural parts of a building to tenants either through a direct covenant to repair or service charge. However, the standard four year and nine month letting agreement provides that the tenant has a responsibility to repair the interior only of a property with the landlord responsible for repairing the external or structural parts. If consecutive leases are granted on the same terms, this could mean that the landlord is taking a greater degree of responsibility and cost in relation to repairs. Landlords may be advised to push the responsibility or costs of repairing the exterior or structural parts on to the tenant – this will boil down to a matter for negotiation.

## **OPERATION OF THE 2008 ACT**

- 6.32 Section 47 of Civil Law (Miscellaneous Provisions) Act 2008 gives tenants the rights to renunciate

Section 17(1)(a) (as amended by section 4 of the Landlord and Tenant (Amendment) Act 1994) of the Landlord and Tenant (Amendment) Act 1980 is amended by substituting the following for subparagraph (iia):

“(iia) if section 13(1)(a) (as amended by section 3 of the Landlord and Tenant (Amendment) Act 1994) applies to the tenement, the tenant has renounced in writing, whether for or without valuable consideration, his or her entitlement to a new tenancy in the tenement and has received independent legal advice in relation to the renunciation ...”

- 6.33 Section 47 allows for renunciations to be entered into both before and during the course of tenancy. Therefore agreements to renunciate can be entered into regardless of when the lease was created i.e. pre the 2008 Act. It should be noted that when a tenant renounces their right to a new

tenancy the right to compensation for improvements under section 46 of the 1980 Act is unaffected.

- 6.34 The tenant's renunciation must be in writing and will typically be negotiated between the parties as part of the negotiation of all the lease documentation. There is no reference in section 47 as to what constitutes independent legal advice but the Law Society of Ireland have helpfully issued a Practice Note<sup>114</sup> with guidance to solicitors on how to approach the provisions in practice together with a recommended draft of the terms of the 'renunciation'. This contains a paragraph in which the tenant must acknowledge that they have received independent legal advice in relation to the renunciation along with the name of the independent solicitor.
- 6.35 In some cases solicitors may choose to insert additional information such as a brief summary of the rights which the tenants have chosen to renounce. This is in a similar vein to the 'health warning' provisions in England and Wales.
- 6.36 The Law Society of Ireland has suggested that it would be preferable that the solicitor giving independent advice should witness the signature of the tenant on renunciation. If this advice is followed by practitioners, this largely mirrors the procedure in England and Wales in obtaining a statutory declaration, the main difference being that the actual content and the fact that it is not compulsory to have a solicitor witness the signature in the Republic of Ireland. If the signature is not witnessed the landlord is advised to obtain confirmation from the solicitor that the tenant was independently advised.
- 6.37 The Law Society of Ireland also advises that on execution of a renunciation it may be registered as an inhibition by the lessor on any leasehold folio in the Land Registry opened in respect of the tenancy. They suggest that a purchaser of a leasehold interest should carry out a registry of deeds search and ask by way of requisition on title to ascertain if any renunciations are in force. A renunciation will be binding on any assignees even if they are not put on notice although it

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<sup>114</sup> Law Society Gazette, June 2009.

is desirable that any renunciations should be recited in or physically annexed to the lease in the event of an assignment.

6.38 We comment further on the operation of the 2008 Act in Chapter 8.

## CHAPTER 7 SCOTLAND

- 7.1 This jurisdiction is an interesting example when the question is raised as to the *necessity* of security of tenure within business leases. Here, unlike its English or Irish counterparts, there is very little statutory protection given to business tenants. The relationship between the parties is governed mainly by contract/lease terms. Nevertheless, we understand that in Scotland business leases bear much similarity to the documentation in general use in England and Wales and in Northern Ireland, drawing on English case law in areas such as rent reviews, where the processes are virtually identical. As there is little security of tenure for commercial property tenants, the lease is brought to an end either by the landlord serving a 'notice to quit' or 'notice of removing', or a tenant serving a 'notice of removal'. This usually needs to be at least 40 days prior to lease expiry, as prescribed by statute<sup>115</sup> but the parties may have negotiated a longer period, as contained in the lease. Leases of commercial property entered into after 9 June 2000 cannot be of a term greater than 175 years. Exceptions include leases where contracts were concluded prior to the above date and sub-leases where the existing head lease has an unexpired term in excess of 175 years.
- 7.2 There is a limited provision for tenants of 'shops', (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 which gives such tenants a very limited security of tenure whereby they can apply to the sheriff for a renewal of the tenancy under section 1 of the 1949 Act. The sheriff can then grant an extension of up to one year on terms that they consider reasonable. The one year limit is qualified in that an application can be made for further renewals indefinitely (section 1(4)), although it has been claimed that this procedure is rarely used in practice<sup>116</sup>. The landlord can oppose a renewal on various grounds, including the tenant's breach of obligation, the landlord offering alternative accommodation, and greater hardship arising if a renewal is

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<sup>115</sup> Sheriff Courts (Scotland) Act 1907.

<sup>116</sup> "A slightly different world up north" (2002) 0224 *Estates Gazette* 140.

granted (section 1(3)). It is expressly provided that the Crown and government departments are bound as landlords. There is no provision for compensation if a renewal is refused<sup>117</sup>.

- 7.3 There is a further exception to the security of tenure rule in Scotland. Tacit relocation provides that where neither of the parties serve notice to end the lease, it either continues for a further year from the expiry date if the lease was for a term of one year or more; or, if the term of the lease was less than one year, it continues for the same duration as the term of the expired lease. The 'continuation lease' carries the same terms as the expired lease and is extended similarly if neither of the parties serves notice. This is said to be similar to 'statutory continuation' under section 24 of the 1954 Act in England, where the lease continues on the same terms until either the landlord or the tenant serves notice bringing the lease to an end by a section 25, 26 or 27 notice.
- 7.4 Thus, the lack of security of tenure in Scotland means that tenants need to plan ahead well in advance of lease expiry, seeking to negotiate new terms and/or identify options for relocation. Further, compensation for both disturbance and improvements is not available unless there is express provision in the lease, which is unusual<sup>118</sup>.

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<sup>117</sup> *Consultation Paper on Business Tenancies* (2003) LRC CP 21 -2003, paragraph 3.26.

<sup>118</sup> "A slightly different world up north" (2002) 0224 *Estates Gazette* 140.

## PART III THE OPTIONS

### CHAPTER 8 HOW CONTRACTING OUT HAS WORKED IN ENGLAND AND WALES AND IN THE REPUBLIC OF IRELAND

#### INTRODUCTION

- 8.1 The purpose of the 2003 Order has been said to ‘make the renewal or termination of business tenancies quicker, easier, fairer and cheaper (and) would remove traps for the unwary’<sup>119</sup>. Indeed, much the same could be said for the initial implementation of contracting out procedures through section 5 of the Law of Property Act 1969. The question can be asked as to whether or not the principle matches the reality.
- 8.2 In this respect, we have the benefit of a review of the new English legislation, carried out by the Department for Communities and Local Government and culminating in a report *Landlord and Tenant Act 1954: Review of Impact of Procedural Reforms* published as recently as 2006 (‘the 2006 Report’).
- 8.3 The 2006 Report concluded that the abolition of the court procedure had simplified the process of excluding security of tenure for both landlord and tenant, without removing necessary protection from tenants. There were no signs that the change in procedures had, of itself, increased the proportion of leases without security of tenure. While there were trends towards more contracting out, it was the market itself that was seen as driving this rather than the procedures themselves<sup>120</sup>. Difficulties were seen to arise, however, in

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<sup>119</sup> Statement by the Office of the Deputy Prime Minister, The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (2003), paragraph 3.

<sup>120</sup> Paragraph 10.

that landlords' solicitors were generally reluctant to use the 14 days' advance warning notice procedure, combined with a simple declaration. Instead, they were relying on the statutory declaration procedure designed essentially for emergencies or other exigencies. This was due to a general concern that any changes to the wording of the lease since the date of service of the original notice would require service of a new notice, bearing in mind the implications of the 'Palacegate' judgement<sup>121</sup>. This case has been interpreted as requiring a new authorisation in the event of a material change in the proposed lease terms; thus solicitors have been taking the view that it is only safe to serve the notice when the tenancy is in an agreed form. The 2006 Report noted that this had several consequences; some tenants were not receiving the full 14 days' advance notice as ODPM originally intended, and the statutory declaration procedure was evidently not being seen as a deterrent. It argued that many of these problems could be removed if it was made clear that any changes to the proposed deal following service of the warning notice would not invalidate the notice. As well as this, a single notice could be used, backed up by a declaration, to support leases between the same parties at a number of different premises.

- 8.4 Amongst the Report's detailed recommendations, it was thought that the contracting out procedures should be amended to confirm that the essential requirement for a valid agreement to contract out would be that the tenant must have received a warning notice and signed a simple and statutory declaration before entering into the tenancy. There would be no need for the warning notice to be specific to the lease; it would not be necessary to serve a fresh warning notice in the event of changes to the proposed lease terms, even major ones. The simple or statutory declaration would, however, be specific to the lease. There would be no need to repeat the process where a statutory declaration had been signed even though, in the event, more than 14 days had elapsed between service of the warning notice and the tenant entering into the agreement or lease. The form of notice of the simple declaration should be amended to clarify

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<sup>121</sup> *Metropolitan Police District Receiver v Palacegate Properties Ltd* [2000] 1 E.G.L.R. 63.



that it should be signed at any time between the expiry of the 14 days' notice and the tenant entering into the agreement or lease, and also to clarify the circumstances in which it would be appropriate to use each type of declaration<sup>122</sup>.

- 8.5 Further recommendations included amending the 1954 Act to make it clear that compliance with the statutory procedures for an agreement for lease without security of tenure would remain valid for any lease made pursuant to the agreement, regardless of whether or not there had been any subsequent change in the identity of the landlord; amend the provisions on service of warning notices for agreements to exclude security of tenure and agreements for surrender to make it clear that service may be made either on the tenant or the tenant's authorised representative (where known); amending legislation should not be retrospective and should not have any bearing on interpretation of the law between the date that the Order came into effect and the coming into effect of the further amending legislation; and, amend the provisions to make it clear that it is possible for a tenant to enter into an agreement to surrender part of the premises<sup>123</sup>.
- 8.6 Despite this long list of recommended amendments, the 2006 Report did conclude that the reforms had been very successful in streamlining the procedures under the Landlord and Tenant Act 1954. It noted that the Lovells survey of those operating the provisions on a day-to-day basis found that 72% of respondents considered that overall the reforms had been successful while 81% found them easy to understand and put into practice. Generally, the aims of making the provisions 'quicker, fairer, easier and cheaper' to operate had been successfully achieved<sup>124</sup>.
- 8.7 Despite this seal of approval the contracting out process continues to throw up controversy and confusion. This is illustrated by the lengthy trail of court judgments occasioned by doubts and difficulties of interpretation concerning some of the extant statutory provisions.

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<sup>122</sup> Paragraph 22.

<sup>123</sup> Paragraph 90.

<sup>124</sup> Annex B.

## **‘TERM OF YEARS CERTAIN’**

- 8.8 The provisions of the 2003 Order for exclusion of a tenancy from protection apply (in the terms of the new section 38A) to ‘a tenancy granted for a term of years certain’. This repeats the previous statutory language introduced by the 1969 Act for contracting out subject to the approval of the court. Under that provision it was clearly established that it was only leases which were for a term of years certain which could be contracted out. Thus the Court of Appeal ruled that a lease for a term of 12 months and thereafter from year to year (determinable by the landlord on 12 months notice) could not be a contracted out lease<sup>125</sup>. The Court of Appeal has confirmed that the terms of the 2003 Order must also be so strictly applied. They have held that a lease with a holding over provision is inconsistent with the fixed term required by the legislation for a contracted out lease<sup>126</sup>.
- 8.9 However, in Northern Ireland under Article 2(2) of the 1996 Order ‘term certain’ in relation to any tenancy means any definite period of certain duration whether or not the tenancy is renewable for further such periods. Accordingly, it would appear that the difficulties of statutory interpretation in the English legislation should not occur in Northern Ireland, should any amending legislation be based (as it would) on the terms of the 1996 Order.

## **FORM OF NOTICE**

- 8.10 As has been stated above, section 38A(3)(a) of the 1954 Act provides that the notice must be in the form, or substantially in the form, set out in Schedule 1 to the 2003 Order. The form of notice contains a prominent ‘health warning’ drawing the tenant’s attention to the consequences of contracting out of security of tenure. The language is severe and emphasises that the tenant will be giving up any rights to stay in the premises when the lease comes to an end and will be unable to obtain statutory compensation for loss of the premises. Some commentators have pointed out that difficulties may arise where the notice served by the landlord

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<sup>125</sup> *Nicholls v Kinsey* [1994] 16 E.G. 145.

<sup>126</sup> *Newham LBC v Thomas – Van Staden* [2008] EWCA Civ 1414.

is not exactly the same as the Schedule 1 prescribed notice. For example, it may not contain all the required information or may have been completed incorrectly. Thus, will such a notice be 'substantially in the form' set out in Schedule 1? In such a situation it has been suggested that existing case law on defective section 25 notices would then come into play<sup>127</sup>.

- 8.11 The 2003 Order Schedule 2 stipulates that the notice must also advise the tenant that, unless there are urgent reasons for taking the lease sooner, there will be a two-week cooling off period within which the tenant can reflect upon the wisdom of forgoing its statutory rights. The general rule is that the notice must be served on the tenant not less than 14 days before he/she enters the tenancy, or, where relevant, any contract to take the tenancy. In these circumstances, paragraph 7 requires that the tenant must make a simple declaration which identifies the parties and the premises, states the commencement date of the lease and confirms that the consequences of the notice are accepted. This declaration must also contain a prominent reminder that the tenant is in the process of giving up key legal rights and encourages recourse to legal advice. If the requirement as to 14 days' notice is not met, the tenant (or its agent) must make a statutory declaration in the form envisaged by paragraph 8. This involves similar information as the paragraph 7 notice, except that it requires a solemn and sincere declaration in front of a solicitor, who must then sign the declaration.
- 8.12 The potential danger in not following these requirements correctly is illustrated in the case of *Chiltern Railway Co Ltd v Patel*<sup>128</sup>. In this instance, the wrong form of declaration was employed and the tenant later asserted that, as a result, the contracting out was invalidated. Although a simple paragraph 7 declaration was appropriate, the tenant mistakenly made a statutory declaration under paragraph 8. The Court of Appeal held that this mistake did not render the agreement void. It was held that it would be absurd and wrong if the declaration was declared ineffective merely because it was in a more solemn form than was necessary and failed to state that the

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<sup>127</sup> R Hewitson *Business Tenancies* (1<sup>st</sup> ed 2005), paragraph 2.2.2.

<sup>128</sup> [2008] EWCA Civ 178.

notice had been served more than 14 days before the lease was granted. From this perspective, the paragraph 8 declaration was substantially the same as its simple counterpart. It was also reiterated, however, that a paragraph 7 declaration would not be adequate in circumstances where the notice was served less than 14 days in advance of the grant. In that instance a formal statutory declaration would be the only effective means of contracting out.

- 8.13 Although the intent of the 2003 Order was to simplify the contracting out process it has since been labelled as overly technical, costly and frustrating. Lawyers, concerned to ensure that the process is valid, tend to insist that the landlord's warning notice is served and the tenant's declaration made only when the final form of lease is agreed<sup>129</sup>. Contrary to the government's intentions, this means that tenants are frequently required to swear a statutory declaration rather than being able to sign a simple declaration, as the gap between the landlord's warning notice and the grant of the lease is less than 14 days. To swear a statutory declaration of this type, tenants must attend the office of an independent solicitor. Although the swear fee is not significant, the delay and rigmarole can be frustrating<sup>130</sup>.

## **EXCLUSION OF SECURITY WHERE PARTIES ARE ALREADY LANDLORD AND TENANT**

- 8.14 There has been some debate as to whether the landlord and tenant can enter into an exclusion agreement under Section 38A(1) where there already exists between both parties a relationship of landlord and tenant. The fear is that both may be unable to do so, based largely on the wording of the relevant section which states that the exclusion is in respect of a tenancy to be granted between the persons 'who will be landlord and tenant' and because the exclusion is in relation to 'a tenancy to be granted'. It has been considered that this

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<sup>129</sup> See paragraph 8.20 of this Chapter.

<sup>130</sup> M Dowden, "Property: Ripe for Reform" (2008) 158 (7338) *New Law Journal* 1320.

argument is ill founded<sup>131</sup>. The fact that the parties are already landlord and tenant in relation to an existing tenancy has been said to be irrelevant, for they will be the landlord and tenant in relation to the tenancy in respect of which the exclusion agreement is made. This view is seen to be supported, indirectly at least, by *Cardiothoracic Institute v Shrewdcrest Ltd*<sup>132</sup> where three consecutive applications for short-term tenancies were granted. No point was taken that the exclusion orders under section 38(4) were of no effect by reason of the fact that the parties were already in a relationship of landlord and tenant.

## **GUARANTORS AND THE 2003 ORDER**

8.15 It can be said, perhaps, that the 2003 Order has forgotten one particular kind of 'tenant': the guarantor. Many commercial leases contain guarantees that routinely provide for the guarantor to take a new lease. Fenn, Colby and Highmore have discussed the question if the lease is contracted out, how will the landlord ensure that the lease taken by the guarantor is also validly contracted out<sup>133</sup>. Under the old procedure, the parties would simply apply to the court for an exclusion order before the guarantor took the new lease. Complexity now arises in that the health warning/declaration procedure must be gone through before the tenant becomes 'contractually bound' to take the lease. When does this 'commitment' occur with a guarantor? Is it when it first signs the guarantee or much later, when the landlord asks it to take a new lease? These authors suggest that the latter arrangement would be a more sensible one, although the 2003 Order seems to suggest that the former is in fact the correct procedure. If the latter procedure is followed, the notice/declaration would then only be needed if the tenant was to default, or the lease forfeited or disclaimed, and the landlord had decided to call in the guarantee.

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<sup>131</sup> K Reynolds QC and W Clarke *Renewal of Business Tenancies* (3<sup>rd</sup> ed 2007), paragraph 2.07.

<sup>132</sup> [1986] 1 W.L.R. 368.

<sup>133</sup> K Fenn, A Colby and S Highmore "A procedure guaranteed to confuse" (2004) 0425 *Estates Gazette* 166.

- 8.16 Under *Hindcastle Ltd v Barbara Attenborough Associates Ltd*<sup>134</sup> a landlord can ask the guarantor to simply continue paying the rent – as long as the terms of the guarantee do not restrict the right to claim rent to a mere few months. The issue of contracting out a new lease will, therefore, not arise although no one will then have the right to possession of the property, and the guarantor's liability might end if the landlord enters the property to effect repairs or to make it secure. The landlord could be left with an empty and deteriorating property.
- 8.17 If, on the other hand, the landlord desires the guarantor to take a new lease, it could serve the health warning on the guarantor, in the hope of receiving the declaration in reply, before calling on the guarantor to take up the new lease. If the guarantor returns the declaration, the landlord can grant the lease on what looks like a contracted out basis (with the chance that the guarantor or its assignee might later argue, despite the declaration, that it had been contractually bound to take the replacement lease for much longer, and the exchange of notices is therefore invalid). The authors argue that this is a risk the landlord has to assess at the time. If the declaration is not returned, the landlord will have the choice of either granting the guarantor a contracting in lease or continuing to send in rent demands. The guarantor cannot be contractually obliged to sign the declaration as this would fall foul of the anti-avoidance provisions. Landlord clients should be apprised, before the lease is first granted in this form, both of the fact that the guarantee clause may not be watertight on the obligation to take a properly contracted out replacement lease and of their fall-back position.
- 8.18 Fenn et al have seen this approach as a bold but necessary attempt at escaping the 'blizzard of notices' that only add to the sense of confusion where guarantors are concerned. It is stated that, in any case, landlords rarely ask the guarantor to take a replacement lease; they have always run the risk that the guarantor would not co-operate in obtaining the court order for that lease; and if the grant of the replacement contracted out lease was to go missing, the landlord can always continue to send to the guarantor rent demands and

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<sup>134</sup> [1996] 15 E.G. 103.

requests for performance of other covenants. Combined with the practical benefits of saving time, paperwork and expense, it is submitted that this approach is undoubtedly a risky but attractive one for landlords<sup>135</sup>.

## ASSIGNING A CONTRACTED OUT TENANCY

8.19 An assignee of a tenancy which is contracted out of the provisions of sections 24 to 28 has no greater security of tenure than the original tenant. This is equally the case where an assignment occurs by operation of law<sup>136</sup>. In *Parc Battersea Ltd (in Receivership) v Hutchinson*<sup>137</sup> the landlord granted a lease of premises on 4 December 1997 to M Ltd for a term expiring on 31 March 1998. The tenancy was excluded from the operation of sections 24 to 28 of the 1954 Act. On 8 December 1997 M Ltd orally agreed to sub-let part of the land leased to H at a monthly rent. It was expressly agreed that M Ltd would not serve a notice to quit expiring before 31 March 1999. The agreement was never reduced into writing but H went into occupation of the premises on 18 December 1997 and paid rent in accordance with the agreed terms. Upon the expiry of M Ltd's lease the landlord sought possession against H. H contended that he was protected by the 1954 Act. It was held that:

- the true nature of the tenancy granted to H was a tenancy for a term certain expiring on 31 March 1998; such an agreement, albeit created by parol, granted a legal interest in favour of H: section 54(2) of the Law of Property Act 1925;
- the grant of the sub-lease being for a period equal to or exceeding the remainder of the term of M Ltd's lease in relation to the part demised to H, took effect not as a sub-lease but as an assignment of the remainder of the grantor's term: *Milmo v Carreras*<sup>138</sup> although the sub-lease, viewed as an assignment, was made orally an oral tenancy for a period exceeding the remainder of the grantor's term fell within section 53(1)(a) being a

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<sup>135</sup> M Dowden "Property: Ripe for reform?" (2008) 158 (7338) *New Law Journal* 1320.

<sup>136</sup> *St Giles Hotel Ltd v Microworld Technology Ltd* [1997] 2 E.G.L.R. 105.

<sup>137</sup> [1999] L. & T.R. 554.

<sup>138</sup> (1946) 1 K.B. 306.

disposal of an interest by operation of law within the terms of that sub-section;

- accordingly, as H effectively took an assignment of part of the premises demised to M Ltd, H had no statutory protection as the assignment was part of the premises demised by a lease which was excluded from the security of tenure provisions of the 1954 Act<sup>139</sup>.

8.20 An English solicitor who practices in commercial property transactions has kindly given us the following comments on the operation of the English procedure for contracting out:

- One of the main difficulties encountered is the failure of agents to address the issue at heads of terms stage<sup>140</sup>, particularly where the tenant is not represented by its own agent or surveyor. Then if during the negotiations on the terms of the lease the landlord insists on the lease being contracted out this may lead to an impasse between the parties. (That of course is an issue that can hardly be resolved by any form of legislation, but it is noted as a commonly encountered problem.)
- There is some reluctance on the part of landlords to use the 'simple declaration' procedure. Often the warning notice is not served until the lease has been negotiated and agreed. Often the warning notice is sent out with the engrossments of lease for execution. So the tenant then follows the statutory declaration procedure because neither party, at that stage, wishes to have a 14 day period before they can proceed to completion.
- The reason that the warning notice is not served until the form of lease has been finalised is because of the risk that any amendments agreed after the service of the warning notice will invalidate the warning notice.
- Tenants' solicitors often misunderstand that the statutory declaration needs to be sworn before an independent solicitor (neither the tenant's solicitor nor the landlord's solicitor is competent for this purpose).

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<sup>139</sup> K Reynolds QC and W Clarke *Renewal of Business Tenancies* (3<sup>rd</sup> ed 2007), paragraph 2.29.

<sup>140</sup> 'Heads of terms' is the initial outline of a transaction – usually negotiated by the parties themselves and their agents.



So it is advisable for the landlord's solicitor to insist on seeing a copy of the completed statutory declaration (for instance sent by fax) prior to completion to check that the statutory declaration has in fact been properly sworn.

- Issues also arise as to a sub-letting by a tenant of a contracted out lease. Generally a well advised landlord will have provided in the contracted out lease that the tenant may not sub-let without landlord's consent and that it will be a condition of any landlord's consent that the sub-letting itself must also be contracted out. However, if the landlord does not so provide then the subletting could be protected albeit that the head lease was contracted out.
- There are further technical issues which may arise in the case of a tenant's application to assign its lease. This includes a situation where the landlord has consented to an assignment but with a guarantee by the outgoing tenant (or by another party) that in the event of the appointment of a liquidator to the assignee who subsequently disclaims the lease the guarantor will enter into a new contracted out lease with the landlord on the terms and conditions of the original lease. It is good practice in such circumstances to insist that the contracting out procedure is followed (including the making of the declaration or statutory declaration by the guarantor) before the landlord grants its consent to the assignment to cover this eventuality. If not, and if the circumstances arise of the guarantor being required to take a new lease, then that will not be a contracted out lease, albeit that the original lease was contracted out. The reason for this argument is because the legislation requires the contracting out procedure to have been completed before the tenant becomes 'contractually bound' to enter the lease. In the example given, the guarantor is entering into the contractual commitment to take a new lease when it stands as guarantor to the assignee and therefore, potentially, the guarantor could insist that it would only enter into a protected lease if the contracting out procedure were not completed before it gave its guarantee.

8.21 Notwithstanding these (largely technical) points the solicitor is largely positive about the operation of the legislation. He comments that while the legislation does have its problems it does allow landlords and tenants flexibility to agree lease terms. Under the old Court Order system there was no straightforward way that the parties in a corporate transaction could have agreed, for instance on the evening of a completion meeting a contracted out lease. They could of course have agreed a licence to occupy or tenancy at will but these arrangements may not have sufficed for various reasons, and in particular may have created a protected tenancy despite the parties' intentions. With the statutory declaration procedure now available in England and Wales the parties can agree and implement a contracted out lease even in the last stages of completion of a corporate transaction. That facility is in fact important where parties may not have turned their attention to business leasing and contracting out issues until the very final stage of their negotiations, perhaps in the late or midnight hours of a negotiation.

## **REPUBLIC OF IRELAND**

8.22 In contrast, in the Republic of Ireland the procedures are more straightforward and do not appear to have caused difficulties to date. But one has to take account of the fact that the legislation only came into effect on 20 July 2008 so there is not yet time to gauge how effective it is in operation and whether problems may emerge.

8.23 Nevertheless, the comments we have received from practitioners has been positive.

8.24 A firm of solicitors with experience of practising in the Republic of Ireland as well as in Northern Ireland sets out what it sees as the advantages of the position there:

- Section 47 should provide greater flexibility for landlords and tenants when negotiating the terms of leases. Leases of varying lengths should now be granted to suit the business requirements of the parties. (This will be assisted because of the introduction in 2008 of a new VAT regime with the

effect of removing the adverse consequences of landlords granting leases of between 10 and 20 years).

- The issue of contracting out will probably become a more relevant topic when heads of terms are being negotiated.
- Landlords with plans to redevelop their buildings in the short to medium term will now have the certainty of being able to obtain vacant possession when the term expires.
- As the legislation would seem to allow for renunciation after the execution of a lease (as well as before or on execution) it will be interesting to see how many landlords, perhaps with development plans for their buildings, will attempt to encourage tenants to enter into renunciations most likely for financial consideration.
- The sub-letting market should become more flexible. Previously landlords restricted their tenants from granting sub-lease of more than four years and nine months (as a five year tenancy would have attracted the protection of the legislation). With the introduction of section 47 sub-tenants of all categories of commercial premises can now contract out of their statutory rights. A landlord will no longer have concerns about the sub-tenant acquiring statutory rights and tenants will now have more flexibility when endeavouring to off load surplus space.
- The extension of the legislation to retail space will mean that the shopping centre and development store operators will be able to grant concessions without the risk that the concessionaire will attract rights of renewal.

8.25 Some solicitors in Dublin have kindly provided us with their preliminary comments on the operation of the new legislation – although as we have noted it is early days:

- A Dublin solicitor has given us the following comments:
  - (i) Typically, the tenant's agreement to execute a renunciation would be commercially agreed as part of any lease negotiation. Consequently, the landlord's

solicitor would simply draft a form of renunciation and forward it to the tenant's solicitor along with the draft lease documentation. If it has been commercially agreed, one would assume that in the absence of the tenant executing the renunciation the landlord would not proceed with the lease.

- (ii) There is no prescribed form of renunciation in this jurisdiction at present and accordingly the formats used can often differ. Our precedent renunciation document includes a paragraph in which the tenant acknowledges it has received independent legal advice in relation to the renunciation from a qualified solicitor whose name is inserted into the form of renunciation the tenant executes. Our precedent also includes a signature block for the independent solicitor advising the tenant, so that he may countersign the execution of the renunciation by the tenant.
- (iii) It is really a matter for each advising solicitor to keep his own record of advices given to any tenant executing a renunciation. That said, it seems tenants have been reasonably receptive to the concept of renouncing renewal rights. Further, in our precedent renunciation, we include wording which expressly states that the solicitor providing the independent advice has alerted the tenant to the fact that it would be entitled to a new tenancy on the expiry of the lease and, notwithstanding such advice, has opted to renounce its rights of renewal. Therefore, the document the tenant is signing clearly sets out the entitlement that it is agreeing to forego which offers the independent solicitor some comfort that the tenant was clearly on notice of the agreement it was entering into.
- Another solicitor comments that he believes that in the current property market the ability to contract out, not only for offices, but also for retail premises and indeed commercial premises has been embraced certainly by landlords and tenants appear to have little concern with the concept. He adds that this may be in part at least attributable to the fact of the current 'tenant's market' in regard to commercial premises which means that there

is surplus space on the market available for a tenant if the landlord refuses renewal at the end of a tenancy.

## **SOME CONCLUDING OBSERVATIONS**

8.26 To summarise, our review of the relevant legislation in England and Wales and in the Republic of Ireland suggests the following key distinctions of approach:

- The 2003 Order is form based – perhaps excessively so.
- It has given rise to many court cases, some of which we have reviewed in this Chapter.
- The ‘five principles of good regulation’ as set out by the Department for Business Innovation & Skills are that regulation must be transparent, accountable, proportionate, consistent and targeted – only at cases where action is needed<sup>141</sup>.
- So a question may be raised as to whether the 2003 Order is proportionate regulation?
- In contrast, as we have indicated the legislation in the Republic of Ireland – in form at least – is short and simple.
- It is noteworthy, for instance, that it does not define what is meant by ‘independent legal advice’ and that this gap has been filled by the Practice Note of the Law Society of Ireland to which we have referred<sup>142</sup>.
- But the legislation in the Republic of Ireland has not yet been in operation for 5 years<sup>143</sup>.
- So it may well be too early to tell if problems will arise when landlords attempt in future years to terminate leases which have been contracted out (or renounced) under the legislation and if tenants seek to avoid the consequences of their agreement to that effect?

8.27 Readers may wish to consider whether in principle the approach of the Republic of Ireland should be taken and

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<sup>141</sup> See ‘Better Regulation’ section of the website of the Department for Business Innovation & Skills: [www.berr.vo.uk/bre/](http://www.berr.vo.uk/bre/).

<sup>142</sup> Paragraph 6.34 of Chapter 6.

<sup>143</sup> It came into effect on 20 July 2008 – see paragraph 8.23 of this Chapter.

whether they can foresee any difficulties or problems with such approach?

- 8.28 The alternative candidate for consideration would be a simplified version of the 2003 Order and we would be grateful if readers would consider that also.

# CHAPTER 9      POSSIBILITIES FOR A CONTRACTING OUT SCHEME FOR NORTHERN IRELAND

## INTRODUCTION

- 9.1 As appears from the foregoing chapters, in the researches and activities of the Commission in this law reform project to date, the most important issue which has emerged is that of contracting out. As a result, one of the main purposes of this present consultation exercise is to ascertain the views and suggestions of interested members of the public, professions and organisations on this issue. The balance of the evidence assembled by the Commission thus far suggests that there should be reform of the Northern Ireland legislation to permit at least some contracting out. Thus we are particularly keen to ascertain as fully as possible the nature and extent of agreement or disagreement with this proposal. **Accordingly in this chapter we formulate a number of specific questions for your consideration and response.**
- 9.2 So we proceed in this Chapter to set out some possible schemes so that those in favour, and those who may be against, have some concrete examples of how such a scheme might operate.
- 9.3 While, as we have indicated the balance of evidence to date has been in favour of some form of contracting out, there has also been demonstrable concern that unrestricted contracting out could be damaging to the interests of the more vulnerable categories of business tenants: those who may take small premises at low rent for small business purposes. Indeed, some who advocate contracting out acknowledge that this is a concern which should be addressed.
- 9.4 So in this Chapter while setting out possible schemes, we examine in particular the safeguards which might be put in place for 'across the board' contracting out. In particular we examine the protections which have been introduced for this

purpose in England and Wales, and in the Republic of Ireland and we consider the efficacy of such mechanisms.

- 9.5 We also have some suggestions of our own as to how contracting out might be introduced for appropriate categories of tenancies, while the prohibition against contracting could continue in place for the protection of the more vulnerable tenants.
- 9.6 In all of this we would emphasise that the Commission has not come to fixed and final conclusions.
- 9.7 This chapter examines various options for the working out in practice of these propositions in order that respondents may give us their views and inform us before we come to our final conclusions and recommendations. First, however, by way of overview we reprise the legislation in England and Wales (as considered in more detail in Chapter 4) and in the Republic of Ireland (as considered in more detail in Chapter 6).

## **THE ENGLISH MODEL**

- 9.8 In England and Wales, business tenancies law is set out in the Part II of the Landlord and Tenant Act 1954 as amended and the current provisions for contracting out are contained in the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. We set out in Chapter 4 the provenance of contracting out in England and Wales and in Chapter 8 some details of the procedures under the 2003 Order.
- 9.9 These amendments have had a significant impact upon business tenancies law and practice in England and Wales. For present purposes, the significant change is that it is now possible in that jurisdiction to exclude the security of tenure provisions in the 1954 Act by way of agreement between landlord and tenant (rather than by the previous procedure which required the approval of the County Court). The agreement can only be entered into after the tenant acknowledges that he is giving up the rights of security of tenure.



9.10 Section 38 of the 1954 Act broadly states that any provision which seeks to exclude rights of security of tenure, or penalises their exercise is void.

9.11 Section 38A sets out the exceptions. Under section 38A(1) the persons who will be landlord and tenant to a business tenancy can agree that the security of tenure provisions shall not apply. Under section 38A(2), a landlord and tenant can agree to the surrender of an existing business tenancy at a specified date or in specified circumstances.

9.12 The safeguard in both these situations is largely the same:

- A Notice must be served in advance of the contracting out agreement upon the tenant.
- The notice sets out the tenant's rights and warns the tenant that the agreement will remove the tenant's security of tenure.
- The Notice advises the tenant to seek professional advice.
- The tenant must make a declaration.
- The Declaration is essentially a 'health warning' setting out the rights the tenant is giving up.
- The contracting out agreement must refer both to the Notice and to the Declaration.
- If the Notice is served less than 14 days before the contracting out agreement, the Declaration must be a statutory declaration (witnessed by a solicitor).

Unless all these steps are followed, there is no contracting out.

9.13 However it is interesting to note application of the procedures in practice in England and Wales. As advised by an English solicitor who practices in commercial property<sup>144</sup>, common practice is that the expedited statutory declaration procedure has become the norm in commercial transactions and not the exception. It is in a minority of cases where both parties are willing to wait 14 days after terms have been agreed before proceeding to completion.

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<sup>144</sup> See paragraph 8.20 of Chapter 8.

- 9.14 So it is for discussion whether any reform for Northern Ireland should include provision both for an 'ordinary' procedure and for an 'expedited' procedure?
- 9.15 On the face of it, on the basis of this experience in England and Wales to date our tentative view is for one procedure only. But readers' views are sought. On such basis we consider also that the procedure should preferably require that the tenant must complete a statutory declaration: a declaration to be sworn in front of someone who is empowered to administer oaths, usually a solicitor<sup>145</sup>.

### **Surrender Process**

- 9.16 The process for surrender of an existing tenancy is essentially the same as for contracting out with its notices, warnings and declarations.

## **THE IRISH MODEL**

- 9.17 There is an admirably short amending provision in section 47 of Civil Law (Miscellaneous Provisions) Act 2008 (providing a new sub section 17(1)(a)(iiia) to the Landlord and Tenant Amendment Act 1980. This provides that contracting out (or 'renunciation' as the 2008 Act calls it) from business tenancies protection as contained in the 1980 Act as amended is permitted where:

. . . the tenant has renounced in writing, whether for or without valuable consideration, his or her entitlement to a new tenancy in the tenement and has received independent legal advice in relation to the renunciation  
. . .

## **POSSIBILITIES FOR NORTHERN IRELAND**

- 9.18 We have come to the following tentative views but would emphasise that we very much look forward to a wide variety of responses so what follows below should not be regarded as determinative of our final recommendations.

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<sup>145</sup> K Reynolds QC and W Clarke *Renewal of Business Tenancies* (3<sup>rd</sup> ed 2007), paragraphs 2.07 to 2.15.

- 9.19 We consider there is a case for a contracting out scheme for Northern Ireland.
- 9.20 But we also acknowledge and share the concern of the potential effect of unrestricted contracting out on the more vulnerable categories of tenants: those taking small premises at low rents for small businesses.
- 9.21 So our provisional view is that there should be a contracting out scheme but with protections for the more vulnerable categories of tenants.

**QUESTION E.** *The Commission's provisional view is that on balance, the evidence received to date favours that Northern Ireland should permit some form of contracting out scheme with some degree of protection for the more vulnerable categories of tenants. Do you agree?*

- 9.22 At the start we identify two main issues with any contracting out model:
- Firstly, that the tenant may not read and may not appreciate the full significance (whether or not any notices are read) of contracting out of business tenancy protection. Good bargains can only be entered into if parties have full information about the consequences of the bargain.
  - Secondly, even a tenant who does appreciate the position may not genuinely be in a position to bargain over it: 'necessitous, not free'.
- 9.23 The English and Irish models go some way to addressing the first of these problems, but not the second.
- 9.24 We have considered the English and Irish models as outlined above but have, accordingly, some concern as to whether the protections they offer are in fact fully robust.
- 9.25 The English model is prescriptive with its schedule of forms and requirements.
- 9.26 The Irish model is more flexible – it sets the requirement for a written renunciation from the tenant and that the tenant

must have independent legal advice but it does not prescribe how this is to be achieved.

- 9.27 In the English model, which is form based, it would not be hard to imagine a scenario where forms are presented by the landlord as 'paperwork' that the tenant has to fill in. Even though the forms under the 2003 Order are admirably simple and clear, there is still no guarantee that they will actually be read and, if read, understood.
- 9.28 On the other hand a difficulty with the Irish model may be cost. Is it right that a small businessperson has to be required by the legislation to go to a solicitor before entering into a contracting out or renunciation of the business tenancy protection?

**QUESTION F.** *In the vein of the Irish model, we would seek your views as to whether there should be a statutory requirement that the tenant must obtain independent legal advice before any contracting out would be permitted?*

- 9.29 This may impose an extra financial burden on the cost of doing business and may eat into the very limited resources of someone starting in business.
- 9.30 Should going to a solicitor be a standard business start-up cost? Views from the business community (particularly the small business community) would be very welcome.

**QUESTION G.** *The views of the business community (particularly the small business community or their representatives) would be particularly helpful. Would you consider such requirement to be an acceptable additional business cost?*

- 9.31 Equally views from the legal profession (particularly solicitors) would also be very welcome. If solicitors are inclined to support the proposition can they offer anything by way of assurance to those starting up in business as to the level of support they would offer and costs they would be likely to charge?

**QUESTION H.** *If solicitors are inclined to support the proposition of making it compulsory to seek independent legal advice can they*

*offer anything by way of assurance to those starting up in business as to the level of support they would offer and the costs they would be likely to charge?*

- 9.32 Subject to views from respondents our tentative view is that we are attracted to follow the Irish practice. We note as indicated above the helpful role that the Law Society of Ireland has taken in its Practice Note in guiding the legal profession in regard to solicitors' duties under section 47. We feel that this is a legitimate and appropriate way to achieve the objectives of a straightforward scheme for contracting out – one that is particularly suitable for a small jurisdiction such as Northern Ireland.
- 9.33 But we still remain to be convinced that either the English model or the Irish model necessarily affords the fullest possible or desirable level of protection for the more vulnerable categories of tenants: those taking small premises at low rents for small businesses.
- 9.34 The Irish model in this regard seems preferable to the English model as the Irish model requires the involvement of independent legal advice in every case of renunciation, albeit at the price of increased business start up costs.
- 9.35 But we are not certain that independent legal advice necessarily provides a sufficient degree of protection. This is not of course to question in any way the quality of advice that is we are sure given by solicitors under the legislation in the Republic of Ireland. The matter is taken seriously by the profession as indicated by the Practice Note of the Law Society of Ireland.
- 9.36 But we remain to be convinced about a cadre at least of people who may be so keen to 'start in business' and who have so little bargaining power against their prospective landlords that they will be impervious to even the best and clearest legal advice to the effect that it is inadvisable to cede your security of tenure.
- 9.37 A perhaps equivalent example of such requirement for independent legal advice is where lending institutions such as banks require a spouse to receive independent legal

advice when the family home is being offered as security. We would welcome views from those with experience of such scenarios (solicitors in particular) of whether such requirement of independent legal advice is in fact an effective protection?

**QUESTION 1.** *The Commission would welcome the views from those with experience of whether the requirement of independent legal advice is in fact an effective protection?*

9.38 For these reasons we have come to the tentative view that it would be preferable to achieve a greater degree of protection for the more vulnerable categories of tenants.

9.39 The question is, however, whether there is any feasible model for this? We put forward, accordingly, some possible models and would welcome views and suggestions on these. Readers are welcome to suggest other possible models.

9.40 We do consider, however, that any such protective measures should not introduce such a level of intricacy as hazards the successful operation of a contracting out scheme. There is a balance to be struck. We would also welcome all suggestions as to how the balance might be achieved.

9.41 On this basis we put forward the following proposals for consideration:

- The first would be a general scheme for contracting out - but with contracting out not permitted for certain categories of tenancy: those categories of leases likely to be taken in the main by small start up businesses.
- The second would be to apply the contracting out regime only to specified categories of tenancy.
- The third would be to extend the term of short term leases (e.g. of up to 3 years or 5 years) from protection.
- The fourth would be to widen the categories of tenancies to which the 1996 Order does not apply.

9.42 We now explain each of these options – with their ‘pros’ and ‘cons’ in a little more detail.

## **The first proposal - contracting out with exception of continuing protection for smaller tenancies?**

9.43 This suggestion (originally suggested to us by Mr Graham Truesdale, Solicitor, of Magherafelt) is that there could be a contracting out scheme but certain categories of tenancy would not qualify for contracting out so that the tenants under such tenancies would continue to enjoy the benefit for their protection of the absolute prohibition on contracting out.

9.44 One or more of the following criteria could be applied to identify this category of 'protected tenancies' viz

- Tenancies beneath a specified rental value
- Tenancies beneath a specified net annual value
- Tenancies beneath a specified floor area

9.45 In each of the categories we have chosen the 'specification' would be set to capture the premises typically taken by the most vulnerable tenants: those taking small premises at low rents for small businesses. We understand however that practical difficulties could arise in regard to these proposals:

- A 'rental value' limit would perhaps be the most straightforward. However, could difficulties arise if at the time of the transaction negotiations the actual rent level had not been determined, for instance, if it were to be calculated by reference to comparable rents or on the basis of floor area to be taken?
- A 'net annual value' limit would present difficulties where the net annual value for the premises in question had still to be determined as would be the case, for instance, for new builds. We understand that chartered surveyor advice would be available to give a professional opinion as to the likely level of the net annual value, but subject to the qualification of a range of values 10% above or below the estimated value. This would clearly present a particular problem where the net annual value limit for the purposes of the legislation fell within such range.

- A 'floor space' limit would present a further range of problems. A definition for the purposes of the legislation could be supplied by reference to the RICS Code of Measuring Practice. (A better approach may be to leave the term undefined and to rely on the common meaning of the term.) But significant issues and difficulties would arise, for instance as to whether car parking areas or storage space or other areas within the demise should be included?

9.46 We would seek responses and suggestions (particularly from chartered surveyors) on these issues and problems. Could a workable category could be so identified?

**QUESTION J.** *We would seek evidence (particularly from chartered surveyors) as to whether a workable category of exemption from contracting out for vulnerable tenants could be identified on the basis of rental value, NAV or floor area?*

**QUESTION K.** *Are there cases of small tenants taking large spaces for start up business purposes even if at low rent?*

9.47 We acknowledge that wherever the line might be drawn there would be difficulties: some 'smaller tenancies' may in fact be taken by bigger players who might wish to avail of the contracting out opportunity but who would be frustrated by reason of the designation of their tenancy into the small tenancies protected category.

9.48 Equally, are there cases of small tenants taking large spaces for start up business purposes even if at low rent? If so such cases could inadvertently fall within the regime where contracting out would be permitted.

9.49 We would emphasise of course that we would envisage that in all cases of contracting out there would be protections equivalent at least to those of section 47 of the 2008 Act (the Irish model). So the small tenant in such scenario would not be bereft of all protection but there could be concern as to whether the level of protection would be adequate to meet the circumstances?



9.50 We also considered a criteria of company size. But we are not minded to consider that further for two reasons:

- Firstly, many small tenants are not incorporated as companies.
- Secondly, it does not appear that the small company definition in the Companies Act 2006 would be appropriate for our purposes.

9.51 Our preliminary thoughts on the legislative drafting issues for this model are as follows:

The legislation could create a new definition of ‘eligible tenancy’ by reference to one (or possibly more than one) of the following:

- NAV of holding – “the net annual value of the holding is greater than £X”
- Floor space
- Rental value – “the [annual] rent payable under the tenancy is greater than £X”

There would be power to amend numerical limits by subordinate legislation.

9.52 However, several issues would have to be carefully considered:

- Choosing the precise numerical limit (for NAV, floor space or rent) will not be an exact science and is bound to be somewhat arbitrary.
- The vulnerable tenant could be caught on the wrong side and lose security whereas the commercially adroit could be burdened with an unwanted security.
- Numerical limits (especially rent) would have to be updated on a semi-regular basis to keep pace with changes in the business environment.
- There is no guarantee that NAV/floor space/rent is an effective surrogate way of determining whether a tenant has genuine equality of bargaining power in a contractual relationship.

- Floor space, in particular is likely to be an inaccurate guide to bargaining power of the tenant. Contrast a jeweller's shop (high street, limited floor space, high rent) with a builder's yard (out of town, larger floor space, low rent).

Certainly, determining this exemption by reference to floor space seems to present such considerable drafting difficulties as to make it not feasible but readers' views would be welcome.

### **The second proposal - contracting out only for specified categories of transactions**

9.53 We identified certain categories of transactions in Chapter 3 where the current prohibition on contracting out is causing practical difficulties. These are:

- Outsourcing/supply/franchise agreements
- Management Buy Out transactions
- Factory Outlets/turnover rentals
- Large Tenants and retailers
- PFIs/PPPs
- Sub-leases

If legislation could specify these as categories where contracting out would be permitted then this could have the merit of a specific solution to a specific problem.

9.54 But there are clearly three (at least) pertinent problems:

- The first is whether legislation could be accurately, comprehensively and efficaciously drafted to give full and unequivocal definition to each of these categories.
- The second is that the representations which we have received giving these examples are examples of current issues and problems of concern to legal practitioners. But the corporate world and commercial dealings are always changing. So to do an intricate and elaborate drafting exercise now on a snapshot of current commercial problems might fail to address some new form of commercial activity coming down the track. Equally valuable drafting time and expertise

might be lavished on legislative words to encapsulate a particular category of commercial transaction which is à la mode to-day but rejected by the corporate world to-morrow so making the drafting exercise redundant for practical purposes.

- The third problem is more prosaic – complexity. It would be technically possible to define this myriad of business circumstances where contracting out is possible. But it would make the legislation very complex both for the legislators and users. All other things being equal, a simple solution is usually the better one.

9.55 Our preliminary thoughts on the legislative drafting issues for this model are as follows:

There could be a definition of an ‘eligible tenancy’ by reference to one (or more than one) of the following:

- It is ancillary to other commercial arrangements between the parties – where those arrangements require the tenant to provide specified services to the landlord – the services must be provided on, or from the premises subject to the tenancy – the services are coterminous with the tenancy – specified means specified in the tenancy agreement [*out-sourcing / supply exemption*]
- It is ancillary to other commercial arrangements between the parties – where those arrangements constitute a franchise [*franchise exemption*]
- It is ancillary to other commercial arrangements between the parties – where those arrangements involve the sale of a business from the landlord to the tenant – the business being sold is to be carried on in the holding to which the tenancy relates [*management buy out 1 – sale of business, land on which business carried out is leased to buyer*]
- It is ancillary to other commercial arrangements between the parties – where those arrangements are for the sale of a business from the tenant to the landlord – sale of the business includes the sale of the property which is to be subject to the tenancy

*[management buy out 2- sale of business, including the land, land leased back to seller]*

- It is ancillary to other commercial arrangements between the parties – where those arrangements are for a Private Finance Initiative or Public Private Partnership *[PFI / PPP exemption]*
- The tenancy is otherwise ancillary to other commercial arrangements between the parties *[catch-all provision to cover future cases]*

9.56 In this definition, the terms landlord and tenant may have to include all those who will be landlord and tenant once the commercial arrangements are complete, including persons acting on their behalf, or possibly their predecessors in title. Consideration will also have to be given to the impact of Article 31 of the 1996 Order and the treatment of groups of companies.

9.57 Provision could also be made for a 'turnover rent' lease as follows:

Such tenancy would be an 'eligible tenancy' if:

- The lease contains a condition that the tenant shall make a specified amount of sales in a specified period.
- Specified means specified in the tenancy – adequate safeguards to ensure that any changes in specified levels must be by agreement, such agreement not to be unreasonably withheld.

9.58 Contracting out only takes effect if tenant fails to make the specified sales. Existence of specified sales in the tenancy should not of itself remove security of tenure, security only lost if sales condition is breached. *[turnover rentals]*

9.59 Provision could also be made for sub leases as follows:

A tenancy is an 'eligible tenancy' if:

- Holding forms part of a larger building.
- Landlord either owns all of that building or is the landlord of all of it.

- Rest of building is used for business purposes (either of the landlord or of other persons). [*superstore / concession exemption*]

9.60 A 'franchise agreement' could be defined as 'an agreement under which one party grants to another party rights consisting of or including the right to use a particular trading name, style or design in the carrying on of a particular business'.

9.61 But there are several important and difficult issues to consider:

- There is no general principle for these exemptions, we are simply dealing piecemeal with specific suggestions made by various solicitors arising out of discrete factual circumstances.
- With no guiding principle, the resulting legislation could be a bit of an amorphous mess.
- The closest to a governing principle could be – the tenancy is part of broader commercial arrangements and is ancillary to them.
- This governing principle only applies to some, not all of the exemptions here. Is this the statutory equivalent of 'hard cases make bad law'? Or instead, is the Commission being acutely responsive to the needs of users of the law?
- If we follow this piecemeal approach, we are limited to the pieces referred to us in the consultation (or generated ourselves) and could arguably miss out on other pieces.
- The danger is that these specific definitions may also extend to other unforeseen circumstances which we would want them to extend to if we had considered them in advance.
- In the alternative, they may be too specific to current business practices and not able to cope with innovative business models which may be developed in the future.
- Finally, the provisions would be replete with opportunities for avoidance strategies by landlords who might continue to bring otherwise straight forward transactions within the terms of the exemptions.

- 9.62 In contrast eligibility by reference to a simple, objectively verifiable measure like NAV is simple and clear-cut – the parties know whether or not that exemption applies.
- 9.63 Eligibility by reference to these narrative definitions is not as clear-cut. How can a landlord be sure that the rights are effectively contracted out of? Certainty (rather than simply a good arguable case) is key in many business relationships. What if there is an honest but mistaken belief in eligibility for contracting out?
- 9.64 With regard to PFI / PPP – this exemption could possibly fit under the ‘ancillary to other commercial arrangements’ under the general provision in the first bullet point in paragraph 9.55.
- 9.65 We would be loathe to attempt to define PFI / PPP for a variety of reasons:
- Firstly, PFI/ PPP can cover an extremely broad set of arrangements.
  - Secondly, if we define it precisely, we may tie the hands of future government PFI / PPP projects.
  - Thirdly, it will be very hard to tie it down in a simple definition.
  - Fourthly, there has been no attempt in primary legislation to exhaustively define PFIs or PPPs. The Appropriation Acts refer to them by name, but do not define them. The Health and Personal Social Services (Private Finance) (Northern Ireland) Order 1997 gives a partial definition for the purposes of the health service. There is a fuller definition within subordinate legislation in the Construction Contracts Exclusion Order (Northern Ireland) 1999 SR 33, but it would not be good practice to base primary legislation upon subordinate legislation definitions. The decision to not define PFI in primary legislation could be indicative of the pitfalls in doing so. As ever though, we wish to hear the views of others.

**QUESTION L.** *Would the present PFI definition contained in the Construction Contracts Exclusion Order (NI) 1999 be appropriate for inclusion in the 1996 Order?*

- 9.66 Accordingly, our tentative conclusion is that this option is clearly going to be the most complicated option to draft. It will also be the most difficult to 'get right' both from a drafting perspective, and from a policy and practical perspective. It will be complicated for users to understand. It will create a dense knot of possible exemptions which will be difficult for even lawyers to untangle to see if they can use any of them. Why not simply cut the Gordian knot with one of the broader (and simpler) other options?
- 9.67 In short our tentative view would be that to react to the fashions of the day is not the right road for law reform – particularly involving legislative drafting. But we are as ever open to views and opinions from respondents on this issue also.

**The third proposal - short terms leases (e.g. of up to 3 years or 5 years) excluded from protection.**

- 9.68 This option would be to extend substantially the current exclusion of leases for terms of 9 months. The relevant period has been suggested to be 5 years. Solicitors have given us the following comments:
- In the current economic climate it is proving very difficult to get a tenant to enter into a lease of longer than 5 years. Landlords are always wary of short term leases as the tenant will have security of tenure and the terms of a short term lease are often very different in their nature to a lease of say 10 or 15 years. The difficulty is that the repairing obligations and covenants in a five year lease would often be less onerous than in a longer lease but the fact that a tenant can keep renewing the 5 year lease will make the landlord more likely to refuse to grant this short term. Allowing for short term leases of say 5 years or less to be contracted out would in my view be a compromise which would help to allow for these short term arrangements but without prejudicing tenants, who would be free to take a longer term lease if they wanted to have security of tenure.
  - Another solicitor has commented that he believes there are certain benefits in retaining the provisions against

contracting out but that in practice these are proving too restrictive. He considers that the current short term letting exemption of 9 months is quite often too limited in a major redevelopment situation. He does not consider that the fundamental principle of the 1996 Order would be prejudiced if the parties were entitled to grant a short term letting not exceeding (he suggests) three years without attracting security of tenure.

**The fourth proposal – widen the categories of tenancies to which the 1996 Order does not apply**

9.69 As already noted<sup>146</sup> Article 4 of the 1996 Order provides quite an extensive list of categories of tenancies which are excluded from the terms of the Order (including the short term tenancies – currently 9 months – referred to in the preceding paragraph).

One of these exemptions is:

- (f) a tenancy granted for or made dependent on the continuation of the tenant in any office, employment or occupation

We have considered whether that exemption might be broadened or extended to include tenancies which are granted for or made dependent on other categories of commercial arrangements; such as those discussed in Chapter 3, paragraphs 3.5 to 3.15. Alternatively should further exemptions be added to Article 4 of the 1996 Order to cover these or any of these categories?

We would welcome thoughts and views on this. We have doubts, however, if it would be possible to achieve drafting that would be clear and certain and which would cover adequately all of the commercial possibilities. Essentially, the issues which we raise at paragraph 9.54 of this Chapter would apply here also.

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<sup>146</sup> See Chapter 5, paragraph 5.34.



Furthermore, if this route were to be taken, it would mean that the categories of transaction covered by the expanded version of Article 4(1)(f) or in additional exemptions added to Article 4(1) would not be subject to any version of the range of contracting out protective measures.

Our tentative view, accordingly, is that this is too extreme a solution given the general concern that has been expressed to us that there should be some degree of continuing protection for tenants. But thoughts and views on this are welcome.

#### **9.70 What precisely should be contracted out from?**

There are three broad approaches to the detail of what parties to a tenancy could actually contract out from: complete contracting out, substantial contracting out or limited contracting out:

- Complete contracting out would entail contracting out from the entirety of the 1996 Order. In some respects, this is the simplest option, but it also removes all safeguards for tenants. There would be no security of tenure, no right of access to the Lands Tribunal, no right to seek information on the tenancy, no minimum notice periods, no prescribed procedure for terminating the tenancy etc.
- Substantial contracting out would entail contracting out of Articles 5 to 9 of the 1996 Order (the equivalent of the English and Welsh approach under the 2003 Order amending the 1954 Act). These Articles deal with security of tenure rights, minimum notice periods and procedure for terminating a business tenancy. In practice, substantial contracting out would be very similar to complete contracting out.
- Limited contracting out would entail contracting out from the right to be granted a renewal of the tenancy. Other provisions of the 1996 Order would continue to apply, such as procedure for terminating tenancies and minimum notice periods.

Our tentative view is that limited contracting out is to be preferred. The representations made to us are to the effect

that the difficulty with the 1996 Order in practice is that landlords are worried about giving security of tenure. That is the extent of the problem raised. Therefore, the other provisions which protect tenants should be retained unless there is a groundswell of opinion that these other provisions are deleterious to good business in Northern Ireland.

**QUESTION M.** *Should contracting out be complete (from the whole 1996 Order), substantial (everything to do with termination and renewal of tenancies) or limited (only to do with actual security of tenure)?*

## **9.71 Conclusion – a summary of the options**

### **Option 1 - no contracting out**

Keep current law as it is. Only option approaching contracting out is agreement for surrender of an existing tenancy with consent of the Lands Tribunal (as in the 1996 Order).

### **Option 2 - contracting out following 'health warning' – the English model**

The pertinent question has been already raised - does this really address the mischief at which it is aimed, or are the 'necessitous' still not really free?

The 'English model' as described in Chapter 4 and 8 provides for substantial contracting out. This means that the legislation ceases to apply in any way to the contracted out tenancies. Thus:

- There is no provision for tenancies to continue save for what the lease or tenancy agreement in question may specifically provide – or for over holding under common law principles if the landlord fails to exercise rights to regain possession at the end of the term of the lease or tenancy agreement.
- There is no provision for notice period save as provided in the lease or tenancy agreement.
- There is no obligation for the landlord to offer a new lease (or renewal of the lease) at the end of the term,

nor does the tenant have any right to apply for a new lease or renewal of the lease at the end of the term.

- There is no provision for compensation for the tenant at the end of the term.
- There is no duty of disclosure on either the landlord or the tenant save for any such duty contained in the lease itself.

### **Option 3 - contracting out following independent legal advice – the Republic of Ireland model**

This is less complex than the English model with some additional protection for tenants, but still raises the same question.

The 'Irish model' as described in Chapter 6 provides for limited contracting out. The effect is limited to there being no obligation for the landlord to offer a new lease (or renewal of the lease) at the end of the term, nor does the tenant have any right to apply for a new lease or renewal of the lease at the end of the term.

Under the Irish model all of the other provisions of the legislation continue to apply. Under this model then the landlord would have to continue to give the tenant six month's notice, even though the tenant would not have the right to apply for a new tenancy.

If we follow this model we would also be minded to follow the terms of the 2008 Act in not providing any definition of what is meant by 'independent legal advice'. Our reasoning is as follows.

We have considered in this context Article 77(4)(aa) and Article 74(4A)(a) of the Sex Discrimination (NI) Order 1976 which provide that advice must be obtained 'from a relevant independent advisor' before a settlement of a complaint may be confirmed. Then Article 74(4B)(a) provides that a person may be a relevant independent advisor for the purposes of Article 77(4A)(c) if he is (a) a qualified lawyer (and then there are some other categories relevant in the employment sphere but not relevant to us). Article 77(4BB) then provides that - 'qualified lawyer' means a barrister (whether in practice

as such or employed to give legal advice) or solicitor with a practising certificate.

However, our tentative view would be that such level of definition detail is not required in the proposed contracting out provisions: a quite different scenario from the employment terrain of the 1976 Order. As we see it, the governing issue is the interest of the landlord to make sure that the tenant has received 'professional' legal advice. If there is any question mark over whether the tenant has in fact received professional legal advice the landlord is subsequently at risk of the tenant seeking to avoid the contracting out agreement on the grounds that he did not in fact receive advice that properly qualifies under the legislation as 'legal advice'.

This will also be an important factor for the landlord endeavouring to sell on its development with the benefit of the contracted out lease (or leases) (or seeking to raise finance on its security) in view of the importance of demonstrating to solicitors for prospective purchasers or funders that the contracting out agreements are 'solid' and not open to attack on any (however remote) grounds.

For these reasons as indicated we are minded to follow the Irish model without elaborate definition of what is meant by 'independent legal advice' – but we would seek readers' views thereon.

#### **Option 4 - contracting out of 'bigger' tenancies**

Allow contracting out if either the tenancy or the tenant is of a certain size. This could be by reference to NAV, floor space or rent<sup>147</sup>.

This option is really a surrogate way of determining if the tenant has a genuine equality of bargaining power with the landlord.

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<sup>147</sup> See the questions and issues which we raise at paragraph 9.46 of this Chapter.

### **Option 5 - contracting out of specified categories of tenancies**

If the lease is really ancillary to a broader set of business arrangements between landlord and tenant where the tenancy may be described as being part of a broader commercial matrix then you can contract out. Our preliminary view is that drafting difficulties make this an unattractive option but we are open to respondents' views or proposals.

### **Option 6 – short term leases (e.g. of up to 3 years or 5 years) excluded from protection**

The issue here would be that business tenancy protection be more or less removed effectively from the smaller more vulnerable tenants.

Note that Options 4 and 5 could still contain the requirements of Option 2 (the English model) or Option 3 (the Irish model) before contracting out would be permitted.

### **Option 7 – exclusion of specified categories of tenancies**

This seems to us (for the reasons set out in paragraph 9.61) difficult to draft and too extreme a solution. But views are sought.

**QUESTION N.** *The Commission has set out the proposals for potential contracting out schemes. Please let us have your views on the Options:*

#### Option 1 – no contracting out

*Do you support this Option?*

#### Option 2 – contracting out following 'health warning' - the English model

*Do you support this Option?*

#### Option 3 – contracting out following independent legal advice – the Republic of Ireland model

*Do you support this Option?*

*Option 4 – contracting out of ‘bigger’ tenancies*

*Do you support this Option?*

*Option 5 – contracting out of specified categories of tenancy*

*Do you support this Option?*

*Option 6 – short term leases (e.g. of up to 3 years or 5 years) excluded from protection*

*Do you support this Option?*

*Option 7 – exclusion of specified categories of tenancies*

*Do you support this Option?*

**QUESTION O.** *If you support Option 4 or Option 5 please answer these further questions:*

- (i) do you also consider that the protections of Option 2 should also be imposed?*
- (ii) do you also consider that the protections of Option 3 should also be imposed?*

**QUESTION P.** *We would also be interested in your views in general on the different options proposed with particular regard as to the:*

- (i) Suitability in addressing the issues raised;*
- (ii) Operation in practice, including any evidence which may be available; and*
- (iii) Necessity and appropriateness of safeguard.*

**QUESTION Q.** *We would also welcome any additional options which you might think feasible in addition to those which we have put forward?*

9.72 As emphasised in the Preface, the above list of questions is not intended or designed to be exhaustive. These questions reflect the main issues which seem to arise, based on the

evidence presently available to the Commission. However, please do not feel constrained by the questions when responding to this consultation invitation.

## CHAPTER 10 POSSIBLE MINOR REFORMS?

### INTRODUCTION

10.1 This Project has been primarily engaged in looking at the absolute prohibition on contracting out and the merits (or otherwise) of amending the 1996 Order in this regard. However during the course of our consultation to date in the Project we received certain other submissions and responses regarding more minor issues which are of some concern to a number of practitioners. As already indicated the Project does not envisage that the overall provisions of the 1996 Order would be subject to re-consideration in this Project. But clearly, if there is substantial interest in the points, in the interests of completeness it may be opportune to consider various ‘tweaks’ to the legislation.

10.2 We would seek the views of consultees as to whether they feel it would be necessary and appropriate to ‘tweak’ the legislation in any one of more of the following areas:

### COMPENSATION

**QUESTION R.** *Where a landlord can successfully oppose the renewal of a tenancy is the measure of compensation acceptable?*

**QUESTION S.** *Do you consider the measure of compensation adequate where improvements have been carried out?*

**QUESTION T.** *Does the 1996 Order operate to prevent effective improvement/ refurbishment of business property?*

10.3 The compensation provisions are to be found in Article 21, 23 and 27 of the 1996 Order<sup>148</sup>. Article 21 entitles a landlord to such sum as appears sufficient as compensation where a tenant withdraws their application or applies for the revocation of an order for the grant of a new tenancy. There have not been any submissions that this particular provision is problematic.

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<sup>148</sup> Business Tenancies (Northern Ireland) Order 1996.



- 10.4 Under Article 23 a tenant can receive compensation on quitting the holding if a landlord has successfully opposed a new tenancy on the grounds in Article 12(1)(e)–(i). The measure of compensation is dependent on the relevant multiplier, the net annual value of the holding and the qualifying period (based on length of occupation).
- 10.5 Section 30 of the 1964 Act contained a right of compensation for improvements for a tenant. However the provisions were repealed by the 1996 Order<sup>149</sup> as the Law Reform Advisory Committee had considered that it was a complex procedure restricted to a relatively small number of cases<sup>150</sup>. However, Article 26(2) of the 1996 Order now provides that where a business lease<sup>151</sup> prohibits the tenant from making improvements without the landlord's consent such prohibition is to be subject to the qualification that such consent is not to be unreasonably withheld. Article 26(3) provides that where such application is made by the tenant the landlord shall not delay unreasonably in giving or refusing such consent. Any question arising in regard to the operation of the provision shall be determined by the Lands Tribunal under Article 26(5) to (7)<sup>152</sup>. In particular, Article 26(7) provides that where the Lands Tribunal determines that a landlord unreasonably withheld such consent or unreasonably delayed in giving or refusing such consent or has imposed an unreasonable condition, the Tribunal may order the landlord to pay to the tenant 'such sum as appears sufficient' as compensation for damage or loss sustained or likely to be sustained by the tenant as a result of the landlord's action or inaction in that respect. It may be argued that in many instances the question of improvements is essentially a commercial one between landlord and tenant and one in which the law should not interfere. However are there instances when as a result of a landlord successfully opposing the grant of a new tenancy a tenant is unfairly prejudiced by a lack of compensation for improvements made in good faith which ultimately are of benefit to the landlord?

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<sup>149</sup> Schedule 4 of the 1996 Order repealed the 1964 Act in its entirety.

<sup>150</sup> *Report on Business Tenancies* (1994) LRAC No 2, paragraph 9.17.

<sup>151</sup> By virtue of paragraph 7 of Schedule 2 of the 1996 Order this applies only to leases entered into after the commencement of the 1996 Order: 1 April 1997.

<sup>152</sup> Article 26 also applies to covenants against alienation.

- 10.6 Article 27 provides that the Lands Tribunal may award the tenant compensation where the landlord has made misrepresentations or concealed material facts in regard to the grounds under Article 12(1)(e) to (h) or that the landlord's intentions in regard thereto have not, without reasonable excuse, been fulfilled. Such compensation is to be the amount which would be sufficient compensation for the damage or loss sustained by the tenant as a result of the refusal of the new tenancy in such circumstances<sup>153</sup>.

## LANDLORD APPLICATIONS

**QUESTION U.** *The Commission has received some submissions that the 1996 Order can create difficulties for landlords in circumstances where the landlord is willing to proceed with the grant of a new tenancy but the tenant is unresponsive after service of landlord's notice to determine. Do you believe that it would be beneficial to amend Article 10(1) to allow a landlord to initiate a 'tenancy application' in such a situation?*

- 10.7 The 1996 Order enables both landlords and tenants to make a tenancy application to the Lands Tribunal. However the landlord can make an application only under Article 10(1)(a) to oppose a new tenancy and not for the grant of a new tenancy. It has been argued that the current legislation has 'inadvertently left willing landlords vulnerable to the threat of unresponsive tenants'<sup>154</sup>. A landlord who is willing to grant a new tenancy will serve a notice to determine on a tenant along with the terms of the new tenancy. Ideally the service of such a notice will lead to negotiations and a new lease will be agreed. However landlords are dependent on the tenant responding in some form in order to progress the matter. Should a tenant fail to respond the landlord is precluded from making a tenancy application to the Lands Tribunal. In such a case a landlord's only move is to apply to the Lands Tribunal to reduce time under Article 10(5) to attempt to gain a response but the Lands Tribunal has no power to force a tenant to make a tenancy application and this will not always

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<sup>153</sup> It does not appear that there is any substantial number of applications to the Lands Tribunal under Article 26 or Article 27 since the commencement date of the 1996 Order.

<sup>154</sup> R Carson and N Dawson "Willing landlords, unresponsive business tenants", (2002) 53(1) *Northern Ireland Legal Quarterly* 28.

guarantee a response. Obviously this potential scenario presents a very unsatisfactory situation for a landlord. It is further complicated by the fact that the tenancy will come to an end in accordance with the date of determination under Article 5 of the 1996 Order upon which the landlord has no certainty as to the status of the tenancy if the tenant remains in possession. It cannot be said to constitute a 'continuing tenancy' under Article 5 as the statutory continuation mechanism is expressly ousted by the service of a valid trigger notice pursuant to Article 6 or 7. The question arises as to what type of tenancy is created by virtue of continued occupation and in some instances payment of rent raises difficult issues in the operation of the tenancy.

- 10.8 A potential resolution to this situation could be to amend Article 10(1) to allow a landlord to apply to the Lands Tribunal to order the terms of a new tenancy in addition to making an application to oppose the grant of a new tenancy.

## **FAILING TO REACH AN AGREEMENT – ARTICLE 7**

**QUESTION V.** *Do you agree that Article 7(6)(a) should be amended for situations when the parties fail to reach an agreement regarding the terms of a new tenancy?*

- 10.9 When a tenancy is coming to the end of the term, renewal can be initiated by a landlord under Article 6 or by a tenant under Article 7. As discussed above there is no obligation for a tenant to respond to a landlord's notice to determine. However, should a tenant serve a Article 7 notice, a landlord is required to serve a counter notice within 2 months under Article 7(6). The counter notice must state that the landlord either opposes the tenancy or:

that he is willing to grant a new tenancy on the tenant's terms (or on those terms as modified by an agreement reached between the landlord and the tenant).

- 10.10 It has been suggested that difficulties may arise when a landlord is willing to grant a new tenancy but the two month period is nearing and negotiations are continuing with an agreement yet to be finalised. A landlord is faced with the difficulty of whether or not to serve a counter notice stating

that he is willing to grant a new tenancy on 'agreement reached'. Once the counter notice has been served neither party has a right to bring a tenancy application to the Lands Tribunal. Landlords can only make a tenancy application to oppose renewal and a tenant is precluded from bringing a tenancy application under Article 10(3). If a new tenancy is not agreed then the tenancy will come to an end at the date specified in the notice and there is again uncertainty as to the position of a tenant remaining in possession.

- 10.11 A proposal has already been made to deal with this issue<sup>155</sup>. It appears there would be merit in clarifying the meaning and correct interpretation of Article 7(6)(a). In particular the 1996 Order could be amended so that a 'tenancy application' could be initiated where a landlord has served a counter notice under Article 7(6)(a).

## **GROUND FOR OPPOSING RENEWAL OF A NEW TENANCY**

**QUESTION W.** *Do you consider that the terms of Articles 12(1)(g) and (h) should be reconsidered? If so how should they be amended?*

- 10.12 A further point has been made to us that Articles 12(1)(g) and (h) should be reconsidered. These are provisions that a landlord, or someone with a controlling interest in a landlord company, may have the right to reoccupy the premises to carry on the landlord's own business there. It has been suggested that this should be re-considered as there could be a measure of unfairness if, for example, the landlord wanted to have the benefit of the goodwill built up at the property by the activities of the tenant in circumstances where the landlord could reasonably obtain alternative accommodation for the landlord's own business.

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<sup>155</sup> R Carson and N Dawson "The Business Tenancies (NI) Order 1996 – to agree or not to agree" (2003) 54(2) *Northern Ireland Legal Quarterly* 196.

## **AGREEMENTS TO SURRENDER**

**QUESTION X.** *It has been submitted to the Commission that the process of obtaining consent to agreements to surrender is cumbersome and should be abolished for those parties that are professionally represented. Do you agree?*

**QUESTION Y.** *Should Article 25 of the 1996 Order apply to leases pre-dating the legislation?*

10.13 Article 25 permits an agreement to surrender a tenancy only if the tenant is in possession of the holding and if the consent of the Lands Tribunal is obtained. Respondents commended the diligent work of the Lands Tribunal who act with 'great speed and sensitivity' but it was submitted that the procedure was unnecessary where clients are professionally represented. This issue is inextricably linked to the absolute prohibition on contracting out, as agreements to surrender are currently the only mechanism to circumvent the legislation, therefore any amendments to the absolute prohibition will also impact upon this issue.

10.14 A submission was also put forward that Article 25 should apply to leases pre-dating the 1996 Order. By virtue of paragraph 7 of Schedule 2 of the 1996 Order Articles 25 and 26 apply only to leases made after the commencement of the Order on 1 April 1997<sup>156</sup>. However it is for consideration whether it would be proper to provide that the 1996 Order should provide in this regard for an alteration applicable to leases which were negotiated before the commencement of the 1996 Order on 1 April 1997.

## **PUBLIC SECTOR ISSUES**

10.15 While the 1996 Order applies to public authority premises in the letting of land to business tenants, the provisions of Article 12(1)(i) do give public authorities an additional ground on which they may resist a tenant's application for a new tenancy:

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<sup>156</sup> The Business Tenancies (1996 Order) (Commencement) Order (Northern Ireland) 1997 SR 1997 No. 74.

Where there subsists in the premises comprised in the tenancy an estate acquired (whether before or after the commencement of this Order) by a public authority, that possession of the premises is reasonably necessary for the public authority to carry out its functions under any statutory provision or rule of law.

- 10.16 But we have received some submissions from public sector lawyers that this can still present difficulties for the public sector particularly where business premises have been acquired for a 'statutory function' of the public body but then are no longer required for the particular 'statutory function'. In cases, the public body may not wish immediate disposal of the premises, because they may be usable for another 'statutory function' of the body. Clearly, it is in the public interest if a letting can be made of the premises with the public authority being able to rely on Article 12(1)(i) to resist a new tenancy where the premises are subsequently required for another such function of the public authority.
- 10.17 However, cases may arise where the other statutory function is not immediately identifiable and in such case it may be legitimate for the premises to be held in the body's 'land bank' pending a decision on such alternative use or for disposal.
- 10.18 In such circumstances clearly it is in the public interest that income could be derived from the premises by way of a letting until such decision can be made. If the decision is that the premises are required for another 'statutory function' of the body then Article 12(1)(i) clearly applies. However, if the decision then is for disposal of the premises on the open market, it would appear that Article 12(1)(i) cannot apply and in such circumstances the public body has no right to resist the application for a new tenancy.
- 10.19 It has been submitted to us that this has the unintended effect of making public bodies reluctant to commit premises in their land banks to lettings because of the potential subsequent loss on sale in the open market if the sale cannot be with vacant possession.

- 10.20 The provision for short term lettings (even if the term of lettings exempted from the 1996 Order is extended) is not all that helpful as in many cases premises may remain long term in land banks until a definitive decision can be made as to the ultimate fate of the premises.
- 10.21 Clearly it should be of concern if there is financial loss to the public purse because of this effect that public bodies may be reluctant to commit to business lettings in such circumstances and in addition public property is lying vacant rather than being tenanted for a business use.
- 10.22 If any form of contracting out is to be permitted then presumably public bodies will be able to avail of it to give them the comfort to let out such land bank properties on the basis of contracted out leases. Similarly, if the term of short term leases exempted from the 1996 Order is extended that also might provide the necessary comfort – albeit in cases where the premises are destined for the duration in the land bank there might be concern that the letting would in fact extend beyond the short term exemption.
- 10.23 Our attention has also been drawn to ‘community leases’ which are granted by Northern Ireland Housing Executive under Article 23 of the Housing (Northern Ireland) Order 1981.
- 10.24 It has been pointed out to us that these are lettings by the Housing Executive of buildings, land and / or dwelling houses generally to charitable associations or community groups, or resident associations at a subsidised, or nominal or less than a market value rent (pursuant to Article 23 of the Housing (Northern Ireland) Order 1981). They are generally referred to as ‘community leases’. The view has been expressed that, for the reasons set out below, these community leases should be specifically exempt from the application of the 1996 Order and that this would be best achieved by expanding the scope of Article 4(1) of the Order accordingly.
- 10.25 The reasoning behind this is that such tenancies or lettings are not of a business or commercial nature in the true sense. Such lettings are generally entered into for the

benefit of the tenant, or community, rather than a mutual commercial interest, and at a cost to the public purse in the form of a subsidised rent (usually a nominal rent). Examples of such tenants include Women's Aid, Community Groups and local housing associations, St Vincent de Paul, Sustainable Communities in Northern Ireland, Northern Ireland Tenant's Action Programme. The view is that such an amendment would have the advantages of providing legal certainty without undermining the protections afforded to truly commercial or business transactions (to which the 1996 Order would otherwise apply).

- 10.26 As emphasised in the Preface, the above list of questions is not intended or designed to be exhaustive. These questions reflect the main issues which seem to arise, based on the evidence presently available to the Commission. However, please do not feel constrained by the questions raised when responding to this consultation invitation.



## **APPENDIX A LIST OF QUESTIONS**

### **CHAPTER 3**

#### **The case for contracting out**

- A.** We have outlined in paragraphs 3.4 to 3.16 circumstances where it appears that the absolute prohibition on contracting out is causing problems without conferring benefits – Do you agree?
- B.** Do you consider there could be other circumstances in which a relaxation in the prohibition would be helpful? If so, please list same

#### **Representations against contracting out**

- C.** Do you have any evidence or views as to the risks or problems that the various categories of more vulnerable tenants may face if it is deemed appropriate to relax the absolute prohibition?
- D.** Do you consider that there should be some degree of continuing protection for the more vulnerable categories of tenants if there is a decision to relax the current absolute prohibition on contracting out?

### **CHAPTER 9**

#### **Possibilities for Northern Ireland**

- E.** The Commission's provisional view is that on balance, the evidence received to date favours that Northern Ireland should permit some form of contracting out scheme with some degree of protection for the more vulnerable categories of tenants. Do you agree?
- F.** In the vein of the Irish model, we would seek your views as to whether there should be a statutory requirement that the tenant must obtain independent legal advice before any contracting out would be permitted?

- G.** The views of the business community (particularly the small business community or their representatives) would be particularly helpful. Would you consider such requirement to be an acceptable additional business cost?
- H.** If solicitors are inclined to support the proposition of making it compulsory to seek independent legal advice can they offer anything by way of assurance to those starting up in business as to the level of support they would offer and the costs they would be likely to charge?
- I.** The Commission would welcome the views from those with experience of whether the requirement of independent legal advice is in fact an effective protection?
- J.** We would seek evidence (particularly from chartered surveyors) as to whether a workable category of exemption from contracting out for vulnerable tenants could be identified on the basis of rental value, NAV or floor area?
- K.** Are there cases of small tenants taking large spaces for start up business purposes even if at low rent?
- L.** Would the present PFI definition contained in the Construction Contracts Exclusion Order (NI) 1999 be appropriate for inclusion in the 1996 Order?
- M.** Should contracting out be complete (from the whole 1996 Order), substantial (everything to do with termination and renewal of tenancies) or limited (only to do with actual security of tenure)?
- N.** The Commission has set out the proposals for potential contracting out schemes. Please let us have your views on the Options:

Option 1 – no contracting out

Do you support this Option?

Option 2 – contracting out following ‘health warning’ - the English model

Do you support this Option?

Option 3 – contracting out following independent legal advice – the Republic of Ireland model

Do you support this Option?

Option 4 – contracting out of ‘bigger’ tenancies

Do you support this Option?

Option 5 – contracting out of specified categories of tenancy

Do you support this Option?

Option 6 – short term leases (e.g. of up to 3 years or 5 years) excluded from protection

Do you support this Option?

Option 7 – exclusion of specified categories of tenancies

Do you support this Option?

- O.** If you support Option 4 or Option 5 please answer these further questions:
  - (i) do you also consider that the protections of Option 2 should also be imposed?
  - (ii) do you also consider that the protections of Option 3 should also be imposed?
- P.** We would also be interested in your views in general on the different options proposed with particular regard as to the:

- (i) Suitability in addressing the issues raised;
- (ii) Operation in practice, including any evidence which may be available; and
- (iii) Necessity and appropriateness of safeguards:

**Q.** We would also welcome any additional options which you might think feasible in addition to those which we have put forward?

## **CHAPTER 10**

### **Compensation**

- R.** Where a landlord can successfully oppose the renewal of a tenancy is the measure of compensation acceptable?
- S.** Do you consider the measure of compensation adequate where improvements have been carried out?
- T.** Does the 1996 Order operate to prevent effective improvement / refurbishment of business property?

### **Landlord applications**

- U.** The Commission has received some submissions that the 1996 Order can create difficulties for landlords in circumstances where the landlord is willing to proceed with the grant of a new tenancy but the tenant is unresponsive after service of landlord's notice to determine. Do you believe that it would be beneficial to amend Article 10(1) to allow a landlord to initiate a 'tenancy application' in such a situation?

### **Failing to reach an agreement**

- V.** Do you agree that Article 7(6)(a) should be amended for situations when the parties fail to reach an agreement regarding the terms of a new tenancy?

### **Grounds for opposing the renewal of a tenancy**

- W.** Do you consider that the terms of Articles 12(1)(g) and (h) should be reconsidered? If so how should they be amended?

### **Agreements to surrender**

- X.** It has been submitted to the Commission that the process of obtaining consent to agreements to surrender is cumbersome and should be abolished for those parties that are professionally represented. Do you agree?
- Y.** Should Article 25 of the 1996 Order apply to leases pre-dating the legislation?

### **APPENDIX B and C – Equality Impact Assessment and Regulatory Impact Assessment**

The Commission has carried out an initial screening of its provisional policy views and consultees are invited to comment on its preliminary conclusions.

As emphasised in the Preface, the above list of questions is not intended or designed to be exhaustive. These questions reflect the main issues which seem to arise, based on the evidence presently available to the Commission. However, please do not feel constrained by the questions when responding to this consultation invitation.

# **APPENDIX B      CONSULTATION ON INITIAL EQUALITY IMPACT SCREENING**

## **EQUALITY OF OPPORTUNITY SCREENING ANALYSIS FORM**

### **Policy to be screened**

#### **B.1    Title of the policy to be screened**

Proposals for reform of the Business Tenancies (Northern Ireland) Order 1996.

#### **B.2    Description of the policy to be screened**

To review the existing law and practice regarding Business Tenancies in Northern Ireland in relation to the absolute prohibition on contracting out and to consider whether any other minor amendments should be made.

#### **B.3    Aims of the policy to be screened**

The proposed policy aims to consider representations made by practitioners regarding the difficulties surrounding the absolute prohibition on contracting out of the Business Tenancies (Northern Ireland) Order 1996. The policy proposes to consider whether contracting out of the legislation should be permitted in certain limited situations whilst maintaining safeguards for tenants in the small and medium enterprise sector.

#### **B.4    On whom will the policy impact? Please specify.**

The individuals and organisations most likely to be affected by proposals are as follows:

- (i)    the business community in Northern Ireland, whether it be landlords or tenants;
- (ii)   potential inward investors into Northern Ireland;

- (iii) Government and public service with interests in PFI / PPP and outsourcing; and
- (iv) professionals and all those involved in commercial property and the management of business tenancies e.g. solicitors, property agents, surveyors etc.

**B.5 Who is responsible for (a) devising and (b) delivering the policy? What is the relationship and have they considered this issue and any equality issues?**

The Northern Ireland Law Commission has responsibility for devising the policy and will set out its recommendations in a Final Report pursuant to section 52(1) of the Justice (Northern Ireland) Act 2002.

**B.6 What linkages are there to other Northern Ireland departments or non departmental public bodies in relation to this policy?**

Northern Ireland Office have had involvement as the original sponsoring body of the Northern Ireland Law Commission. From 12 April 2010 this role has been transferred to the Department of Justice.

**B.7 What data is available to facilitate the screening of this policy?**

A detailed list of all sources used in developing the proposals can be found in Appendix D.

We have contacted several bodies in relation to obtaining statistical data on this area –

- Lands Tribunal
- Land and Property Services
- Northern Ireland Statistics and Research Agency

There seems to be limited relevant statistical data available in this area after consulting the relevant agencies listed in Appendix 4 of the Equality Commission Practical Guidance

on EQIA. The statistics obtained are referenced throughout the policy.

**B.8 Is additional data required to facilitate screening? If so, give details of how and when it will be obtained.**

No (See Appendix 4 of the Equality Commission Practical Guidance on EQIA which provides a list of Sources of section 75 data or speak to Central Statistics and Research). As part of this consultation, consultees are invited to provide the Commission with any further data which they consider to be of relevance to this initial screening exercise and any further screening exercise or full EQIA.

## **SCREENING ANALYSIS**

**B.9 Is there any indication or evidence of higher or lower participation or uptake by the following section 75 groups of differential needs, experiences, issues and priorities in relation to this policy issue?**

Data supplied by Land and Property Services indicates that there are currently approximately 72,000 non domestic properties in Northern Ireland. The total value of non-domestic properties for rating purposes is £1.3billion with Belfast City Council area accounting for a third of the properties alone.

### *Religious belief*

The ability to benefit from the proposals contained within the policy is not affected by religious belief. It is businesses, Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which religious belief has no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on people of different religious belief.

### *Political opinion*

The ability to benefit from the proposals contained within the policy is not affected by political opinion. It is businesses,



Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which political opinion has no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on people of different political opinion.

### *Racial Group*

The ability to benefit from the proposals contained within the policy is not affected by racial group. It is businesses, Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which racial group has no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on people of different racial group.

### *Marital status*

The ability to benefit from the proposals contained within the policy is not affected by marital status. It is businesses, Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which marital status of the individuals involved has no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on people of different marital status.

### *Sexual orientation*

The ability to benefit from the proposals contained within the policy is not affected by sexual orientation. It is businesses, Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which sexual orientation has no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on people of different sexual orientation.

### *Gender*

The ability to benefit from the proposals contained within the policy is not affected by gender. It is businesses, Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which gender has no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on people of different gender.

### *Disability*

The ability to benefit from the proposals contained within the policy is not affected by disability. It is businesses, Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which disability is of no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on people with disabilities.

### *Dependants*

The ability to benefit from the proposals contained within the policy is not affected by dependants. It is businesses, Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which whether the individuals involved have dependants or not is of no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on people with dependants.

### *Age*

The ability to benefit from the proposals contained within the policy is not affected by age. It is businesses, Government, investors and advisors acting in their professional capacity which will be most affected by the policy in which age has no relevance. The Commission is therefore of the view that the proposals contained in the policy do not have a differential impact on age.

**B.10 Have consultations with the relevant groups, organisations or individuals within any section 75 categories indicated that policies of this type create problems specific to them?**

The Commission identified various stakeholders and carried out preliminary discussions and focus groups with multiple stakeholders including:

- Commercial solicitors
- Local Solicitor Associations
- Royal Institution of Chartered Surveyors and Agents
- Business Contacts
- Northern Ireland Lands Tribunal
- Law Society of Northern Ireland
- Public Sector Contacts
- Barristers
- Legal Academics

During these meetings there have been no issues raised in relation to section 75. The Commission would welcome any additional comments or views that relevant groups, organisations or individuals may wish to provide.

**B.11 Is there an opportunity to better promote equality of opportunity or good relations by altering the policy or by working with others in Governments or in the larger community in the context of this policy?**

Not applicable.

**B.12 It may be that a policy has a differential impact on a certain section 75 group, as the policy has been developed to address an existing or historical inequality or disadvantage. If this is the case please give details**

No - the policy will have a uniform effect across the population.

**B.13 Please consider if there is any way of adapting the policy to promote better equality of opportunity or good relations**

Not applicable.

## EQUALITY IMPACT ASSESSMENT RECOMMENDATIONS

### **B.14 Full EQIA procedures should be carried out on policies considered to have significant implications for equality of opportunity**

Prioritisation Factors	Significant Impact	Moderate Impact	Low Impact
Social need			Yes
Effect on people's daily lives			Yes
Effect on economic, social and human rights			Yes
Significance of the policy in terms of strategic importance			Yes
Significance of the policy in terms of expenditure			Yes

### **B.15 In view of the considerations above do you consider that this policy should be subject to a full EQIA?**

The Commission do not think that this policy should be subject to a full EQIA. There is no evidence to suggest that any section 75 group will be at an advantage or disadvantage by the proposals and the policy has a low impact on all factors listed in B.14. The views of consultees would be welcome in this regard.

### **B.16 If an EQIA is considered necessary please comment on the priority and time in light of the above**

Not applicable - see above.

### **B.17 If an EQIA is necessary, is any data required to carry it out or to ensure effective monitoring?**

Not applicable - see above.

## **ANNEX A**

### **MAIN GROUPS RELEVANT TO THE SECTION 75 CATEGORIES**

Category	Main Groups
Religious Belief	Protestants; Catholics; people of non-Christian faiths; people of no religious belief
Political opinion	Unionists generally; Nationalist generally; members / supporters of any political party
Racial Group	White people; Chinese; Travellers; Indians; Pakistanis; Black people
Gender	Men (including boys); Women (including girls); Transgendered people; Transsexual people
Marital status	Married people; unmarried people; divorced or separated people; widowed people
Age	Children under 16; people of working age (16 - 65); people over 65
"Persons with a disability"	Persons with a physical, sensory or learning disability as defined in sections 1 and 2 and Schedules 1 and 2 of the Disability Discrimination Act 1995
"Persons with dependants"	Persons with personal responsibility for the care of a child; persons with personal responsibility for the care of a person with an incapacitating disability; persons with personal responsibility for the care of a dependant elderly person
Sexual orientation	Heterosexual people; homosexual people; bisexual people

# **APPENDIX C      REGULATORY IMPACT ASSESSMENT (RIA) SCREENING ANALYSIS FORM**

## **C.1    Policy to be screened**

Proposals for reform of the Business Tenancies (Northern Ireland) Order 1996.

## **C.2    Aims of the policy to be screened**

The proposed policy aims to consider representations made by practitioners regarding the difficulties surrounding the absolute prohibition on contracting out of the Business Tenancies (Northern Ireland) Order 1996. The policy proposes to consider whether contracting out of the legislation should be permitted in certain limited situations whilst maintaining safeguards for tenants in the small and medium enterprise sector.

## **C.3    On whom will the policy impact? Please specify.**

The individuals and organisations most likely to be affected by proposals are as follows:

- the business community in Northern Ireland, whether it be landlords or tenants;
- potential inward investors into Northern Ireland;
- Government and public service with interests in PFI / PPP and outsourcing; and
- professionals and all those involved in commercial property and the management of business tenancies e.g. solicitors, property agents, surveyors, barristers etc.

## **C.4    Who is responsible for (a) devising and (b) delivering the policy? What is the relationship and have they considered this issue and any equality issues?**

The Northern Ireland Law Commission has responsibility for devising the policy and will set out its recommendations in a Final Report pursuant to section 52(1) of the Justice (Northern Ireland) Act 2002.

**C.5 What linkages are there to other NI departments / non departmental public bodies in relation to this policy?**

Northern Ireland Office have had involvement as the original sponsoring body of the Northern Ireland Law Commission. From 12 April 2010 this role has been transferred to the Department of Justice.

**C.6 What data is available to facilitate the screening of this policy?**

A detailed list of all sources used in developing the proposals can be found in Appendix D.

We have contacted several bodies in relation to obtaining statistical data on this area:

- Lands Tribunal
- Land and Property Services
- Northern Ireland Statistics and Research Agency

There seems to be limited relevant statistical data available in this area despite consulting relevant agencies from Appendix 4 of the Equality Commission Practical Guidance on EQIA. The statistics obtained are referenced throughout this policy.

**C.7 Is additional data required to facilitate screening? If so, give details of how and when it will be obtained**

No. (See Appendix 4 of the Equality Commission Practical Guidance on EQIA which provides a list of Sources of section 75 data or speak to Central Statistics and Research). As part of this consultation, consultees are invited to provide the Commission with any further data which they consider to be of relevance to this initial screening exercise and any further screening exercise or full EQIA.



## SCREENING ANALYSIS

### **C.8 Is the policy or amendment to the policy likely to have a direct or indirect impact on businesses, voluntary / community sector (this includes charities and the social economy sector)?**

Consultees are being invited for their views as to whether the current legislation needs to be amended and if so in what format based on the alternative options put forward. If the proposals are adopted it will have a direct impact on certain categories of businesses in a positive manner. Commercial transactions in which parties are professionally advised will be more easily facilitated when it is mutually beneficial to contract out of the legislation. The Commission believes that any increase to cost through the proposals will be outweighed by the overall benefit in the policy and in some instances such as complex transactions there will be significant cost savings as there will be no need to circumvent the legislation with complex legal structures. The proposals seek to maintain an important balance by ensuring that the more vulnerable business tenants in the small medium enterprise sector have some protection against the impact of the proposals.

The policy seeks to bring the jurisdiction in line with England and Wales and the Republic of Ireland which should have a positive benefit on the business community and economy as a whole as it should remove a possible bar to further investment and business opportunities. Currently many UK wide companies find it difficult to understand the differences in the legislation in Northern Ireland from that in other jurisdictions especially the inability to contract out of the legislation. Although there is no direct evidence to suggest that business is being lost as a result of this, it would be envisaged that if the proposals are implemented that it would strengthen the attractiveness of the economy in bringing greater options and flexibility. It should remove a perception that Northern Ireland is a difficult place to do business.

## RIA RECOMMENDATION

**C.9 Full RIA procedures should be carried out in policies considered to have significant costs or savings on business, charities and the social economy sector. Please fill in the following grid in relation to the policy.**

Prioritisation Factors	Significant Impact	Moderate Impact	Low Impact
Social Need			Yes
Effect on people's daily lives			Yes
Effect on economic, social and human rights			Yes
Strategic significance			Yes
Financial significance			Yes

**Please give details:** Not applicable.

**C.10 In view of the considerations in above do you consider that this policy should be subject to a full RIA? Please give reasons for your considerations. If you are unsure, please consult with affected groups and revisit the screening analysis accordingly.**

The Commission do not believe that a full RIA is necessary. The proposals contained within the policy should have a positive benefit on businesses in allowing certain commercial arrangements to operate without unnecessary constraints while still providing appropriate safeguards. The policy should have a low impact on the prioritisation factors listed at C.9. The views of consultees will be welcome in this regard.

**C.11 If an RIA is considered necessary please comment on the priority and timing in light of the factors above?**

Not applicable.

**C.12 If an RIA is considered necessary is any data required to carry it out / ensure effective monitoring?**

Not applicable.

## APPENDIX D      SOURCES

### BOOKS AND ARTICLES

#### Articles

- R Carson and N Dawson, "Willing landlords, unresponsive business tenants" (2002) 53(1) *Northern Ireland Legal Quarterly* 28
- R Carson and N Dawson, "The Business Tenancies (NI) Order 1996 – to agree or not to agree" (2003) 54(2) *Northern Ireland Legal Quarterly* 196
- M Dowden, "Property: Ripe for reform?" (2008) 158 (7338) *New Law Journal* 1320
- K Fenn, A Colby and S Highmore "A procedure guaranteed to confuse" (2004) 0425 *Estates Gazette* 166
- M Haley, "Contracting out and the Landlord and Tenant Act 1954: the ascendancy of market forces" (2008) 4 *Conveyancer and Property Lawyer* 281
- A Marsh, "Major change in tenancy law introduced" 23 July 2008, *The Irish Times*
- "A slightly different world up north" (2002) 0224 *Estates Gazette* 140
- M Porter "Culture Clash" (2009) 159 (7396) *New Law Journal* 1680

#### Books

- T M Aldridge QC (Hon), *Letting Business Premises* (8th ed 2004)
- N Dawson, *Business Tenancies in Northern Ireland* (1<sup>st</sup> ed 1994)
- P Freedman, E Shapiro and K Steele, *Business Lease Renewals the New Law and Practice* (1<sup>st</sup> ed 2006)
- R Hewitson, *Business Tenancies* (1<sup>st</sup> ed 2005)
- K Reynolds QC and W Clarke, *Renewal of Business Tenancies* (3<sup>rd</sup> ed 2007)
- J Wylie, *Irish Land Law* (3<sup>rd</sup> ed 1997)
- J Wylie, *Irish Landlord and Tenant Law* (1<sup>st</sup> ed 1990)

## CASES

Allnatt London Properties Ltd v Newton [1984] 1 All E.R. 423  
Bank of Ireland v Fitzmaurice [1989] IRLM 452  
Brighton and Hove City Council v Collinson [2004] 2 E.G.L.R. 65  
Capita Business Services Ltd v British Broadcasting Corporation [2008] BT/57/2006  
Cardiothoracic Institute v Shrewdcrest [1986] 1 W.L.R. 368  
Chiltern Railway Co Ltd v Patel [2008] EWCA Civ 178  
Essexcrest Ltd v Evenlex Ltd (1988) 55 P. & C.R. 279  
Friends Provident Life Office v British Railways Board [1996] 1 All E.R. 336  
Gatien Motor Company Ltd v Continental Oil Company Ltd [1979] IR 406  
Hagee (London) Ltd v A.B. Erikson and Larson [1976] Q.B. 209  
Hindcastle Ltd v Barbara Attenborough Associates Ltd [1996] 15 E.G. 103  
Joseph v Joseph [1966] 3 All E.R. 486  
Newham LBC v Thomas-Van Staden [2008] EWCA Civ 1414  
Milmo v Carreras [1946] K.B. 306  
Nicholls v Kinsey [1994] 16 E.G. 145  
O'Leary v Deasy [1911] 2 IR 450  
Parc (Battersea) Ltd (In Receivership) v Hutchinson [1999] L. & T.R. 554  
Metropolitan Police District Receiver v Palacegate Properties Ltd [2000] 1 E.G.L.R. 63  
Samuel v Jarrah Timber and Wood Paving Corporation Limited [1904] A.C. 323  
St Giles Hotel Ltd v Microworld Technology Ltd [1997] 2 E.G.L.R. 105  
Street v Mountford [1985] 2 All E.R. 289  
Tarjomani v Panther Securities Ltd (1983) 46 P. & C.R. 32  
Tottenham Hotspur Football and Athletic Co Ltd v Princegrove Publishers Ltd [1974] 1 W.L.R. 113  
Vernon v Bethell (1762) 2 Eden 110  
Walsh v Lonsdale (1882) L.R. 21 Ch. D. 9

## **LEGISLATION**

### **Northern Ireland**

Administration of Estates Act (Northern Ireland) 1955, c. 24  
Business Tenancies Act (Northern Ireland) 1964, c. 36  
Business Tenancies (Temporary Provisions) Act (Northern Ireland) 1952, c.2  
Construction Contracts Exclusion Order (Northern Ireland) 1999 SR 1999 No. 33  
Interpretation Act (Northern Ireland) 1954, c. 33  
Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971, c. 7  
Rent (Northern Ireland) Order 1978, No. 1050 (N.I. 20)  
The Business Tenancies (1996 Order) (Commencement) Order (Northern Ireland) 1997 SR 1997 No. 74  
The Business Tenancies (Amendment) Act (Northern Ireland) 1968, c. 4  
The Business Tenancies (Northern Ireland) Order 1996, No. 725 (N.I. 5)  
The Health and Personal Social Services (Private Finance) (Northern Ireland) Order 1997 No. 2597 (N.I. 17)

### **England and Wales**

Landlord and Tenant Act 1954, c. 56  
Law of Property Act 1969, c.59  
The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, No.3096

### **Republic of Ireland**

Civil Law (Miscellaneous Provisions) Act 2008, No. 14 of 2008  
Electronic Commerce Act 2000, No. 27 of 2000  
Landlord and Tenant (Ireland) Act 1870, c. 46  
Landlord and Tenant Act 1931, No. 55 of 1931  
Landlord and Tenant (Amendment) Act 1980, No. 10 of 1980  
Landlord and Tenant (Amendment) Act 1994, No. 20 of 1994  
Town Tenants (Ireland) Act 1906, c. 54

### **Scotland**

Sheriff Courts (Scotland) Act 1907, c.51

Tenancy of Shops (Scotland) Act 1949, c.25  
Tenancy of Shops (Scotland) Act 1964, c.50

## **REPORTS AND CONSULTATION PAPERS**

### **Northern Ireland**

Special and Final Reports on Business Tenancies (1959) NI, HC 1359

*The Law of Property* (1990) The Final Report of the Land Law Working Group Report Belfast HMSO

*A review of the law relating to Business Tenancies in Northern Ireland* (1992) LRAC Discussion Paper No. 3 HMSO

*Business Tenancies Report No 1* (1994) Law Reform Advisory Committee for Northern Ireland Report, LRAC No 2 HMSO

### **England and Wales**

*Provisional Proposals for Amendments to the Landlord and Tenant Act 1954 Part II (Business Tenancies)* (1967) Working Paper No 7

*Report on the Landlord and Tenant Act 1954 Part II* (1969) Law Com No 17

*Part II of the Landlord and Tenant Act 1954* (1988) Working Paper No 111

*Business Tenancies: A Periodic Review of the Landlord and Tenant Act 1954 Part II* (1992) Law Com No 208

### **Ireland**

*Report on Land Law and Conveyancing: General Proposals* (1989) LRC 30 - 1989

*Consultation Paper on Business Tenancies* (2003) LRC CP 21 - 2003

### **Government Papers**

Department of the Environment, Transport and the Regions, *Business Tenancies Legislation in England and Wales: the Government's proposals for reform* (March 2001)

Statement by the Office of the Deputy Prime Minister, *The Regulatory Reform (Business Tenancies) (England and Wales) Order 2003* (2003)

The Department for Communities and Local Government, *Landlord and Tenant Act 1954: Review of impact of Procedural Reforms* (2006)

Hansard (HC), 20 November 1985, Vol 87 written answers

Belfast Solicitors Association *A review of the law relating to Business Tenancies in Northern Ireland* (1993) Submission to the Law Reform Advisory Committee for Northern Ireland



## **APPENDIX E      THOSE WHO HELPED US**

### **SOLICITORS**

#### **Written Submissions**

##### *Organisations*

Northern Ireland Commercial Property Lawyers Association

##### *Solicitors in private practice in Northern Ireland*

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Rosemary Carson, Carson McDowell  
Adam Curry, Mills Selig  
Nemonie Fulton, Cleaver Fulton Rankin  
Brian Garrett, Elliott Duffy Garrett  
Laurence Mahood, Elliott Duffy Garrett  
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##### *Solicitors in public sector practice in Northern Ireland*

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Jimmy Wilson, Departmental Solicitors Office

##### *Solicitors in private practice in England*

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##### *Solicitors in private practice in Republic of Ireland*

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Ernest Farrell, Dockrell Farrell Solicitors  
Marc McLaughlin, Arthur Cox,  
John Walsh, Arthur Cox

## **Attendance at Meetings**

### **22 July 2009**

Phyllis Agnew, Tughans  
Kathryn Collie, Cleaver Fulton Rankin  
Adam Curry, Mills Selig  
Jim Houston, Cleaver Fulton Rankin  
Laurence Mahood, Elliott Duffy Garrett  
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Graham Pierce, McGrigors  
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Rowan White, Arthur Cox  
Jimmy Wilson, Departmental Solicitors Office

### **21 August 2009**

Rosemary Carson, Carson McDowell  
Johnny Forrester, Cleaver Fulton Rankin  
Ian Huddleston, McGrigors  
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Royal Institution of Chartered Surveyors

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Chris Callan FRICS Whelan Chartered Surveyors and Property Consultants  
Kenneth Crothers FRICS, Crothers Chartered Surveyors  
David McKinney MRICS, James H McKinneys & Sons  
Rory Clark MRICS, Brown McConnell Clark McKee  
Nicholas Rose, RHM Commercial

## **Attendance at meetings**

### **5 October 2009**

Tim Hopkins FRICS, Hopkins Partnership

Chris Callan FRICS, Whelan Chartered Surveyors and Property Consultants  
Nuala McNeill, Royal Institution of Chartered Surveyors

**30 July 2009**

Kenneth Crothers, FRICS, Crothers Chartered Surveyors

**LANDS TRIBUNAL FOR NORTHERN IRELAND**

**Written Submissions and Meetings on 6 August 2009 and 4 November 2009**

Michael Curry, FRICS  
Gary Shaw, Registrar

**ACADEMICS**

Professor Norma Dawson, The Queen's University of Belfast  
Dr J A Dowling, The Queen's University of Belfast

**BUSINESS SECTOR**

**Meeting on 3 August 2009**

Deirdre Stewart, CBI

**LAW SOCIETY OF NORTHERN IRELAND**

**Meeting on 10 October 2009**

Colin Caughey, Law Society of Northern Ireland

**GOVERNMENT**

Regina Terry, Civil Law Reform Division, Department of Justice, Dublin

Law Reform Commission, Dublin

**LOCAL SOLICITOR ASSOCIATIONS**

Portadown Solicitors Association  
Antrim and Ballymena Solicitors Association  
Belfast Solicitors Association  
Bangor Solicitors Association  
Foyle Solicitors Association

# **NORTHERN IRELAND LAW COMMISSION**

## **BACKGROUND INFORMATION**

The Northern Ireland Law Commission was established in 2007 following the recommendations of the Criminal Justice Review Group (2000). Its purpose is to keep the law of Northern Ireland under review and make recommendations for its systematic development and reform.

The Commission was established under the Justice (Northern Ireland) Act 2002. The Act requires the new Commission to consider any proposals for the reform of the law of Northern Ireland referred to it. The Commission must also submit to the Department of Justice for approval (after consultation) of programmes for the examination of different branches of the law with a view to reform.

## **MEMBERSHIP**

The Northern Ireland Law Commission consists of a Chairman, who must hold the office of judge of the High Court, and four Commissioners, one of whom must be a person from outside the legal professions. The Chairman and Commissioners are appointed on a part-time basis. There is also a Chief Executive, who is appointed from the legal professions.

Chairman:	The Honourable Mr Justice McCloskey
Commissioner:	Professor Sean Doran (Barrister-at-Law)
Commissioner:	Mr Neil Faris (Solicitor)
Commissioner:	Mr Robert Hunniford (Lay Commissioner)
Commissioner:	Dr Venkat Iyer (Law Academic)
Chief Executive	Ms Judena Goldring MA, BLegSc, Solicitor

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