The Landlord and Tenant (Amendment) Act 1980 – Time for an Update?

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Abstract: The Landlord and Tenant (Amendment) Act 1980 is the centrepiece of (non-residential) tenants' statutory rights in this jurisdiction. However, its provisions date back to Edwardian times and some aspects would benefit from updating. This article considers the operation of the provisions of this Act in the 21st century landlord and tenant context, highlighting the main controversies which have arisen in relation to its interpretation and making the case for certain amendments.

Keywords: landlord and tenant; business tenancy.

Introduction

The stated year of enactment of the Landlord and Tenant Amendment Act 1980 ('the 1980 Act'), which gives important statutory rights to Irish tenants of non-residential property,[1] might indicate that this statutory protection is of recent origin. In fact, the 1980 Act, and its predecessor, the Landlord and Tenant Act 1931, find their genesis in a pre-First World War statute, the Town Tenants (Ireland) Act 1906. The legislation has changed so little since, that annotated versions of the 1906 Act remain an extremely useful guide to interpretation of the 1980 Act.

As its title suggests, the Town Tenants (Ireland) Act 1906 was intended to apply to urban property, something which continues to be reflected in a key limitation on the scope of the 1980 Act – the restriction of the operation of its provisions to tenements. For property to be a 'tenement', section 5 of the 1980 Act requires it to satisfy *inter alia* the following requirements: there must be a building on the property, and the entirety of any vacant land also included therein must be subsidiary and ancillary to the building.

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[1] Although the 1980 Act originally applied to residential property, such property is now excluded from the scope of the 1980 Act and falls under the statutory protection of the Residential Tenancies Act 2004.

One consequence of this has been to wholly exclude agricultural land from the statutory protections available to other tenants. At least one dramatic work has been premised on this exclusion. In John B Keane's play *The Field,* a farmer who had rented a field for many years was evicted when its owner wanted to sell, prompting a spiral of bitterness and vengeful events leading to tragedy and death.

Indeed, the tenement limitation also has the potential to deny statutory protection under the 1980 Act to urban property, where, for example, urban land is used for open-air activities or where urban land with a building on it includes even a small area of additional land not subsidiary and ancillary to the building. It has been held that if any unbuilt-on land forming part of a lease premises is not subsidiary and ancillary to the buildings, then there is no entitlement to the statutory protections under the 1980 Act in respect of any part of the premises.[2]

Definition of Tenement

The above restriction of the scope of the 1980 Act has resulted in an impressive amount of caselaw on the definition of 'tenement' as set out in section 5. The leading decision on the definition of 'building' for the purposes of this section remains that of the Supreme Court in *Mason v Leavy,* [3] which involved consideration of the following structures:

- a mechanical hoist for raising motor cars off the ground with a base set into the concrete surface of the yard to a depth of about nine feet; and

- a mass concrete well twelve inches thick designed for a petrol storage tank with capacity of 500 gallons.

In that case, Maguire CJ stated:

> Very little guidance is to be got from decided cases as to whether these structures or any of them can be held to be buildings within the meaning of the section. The cases cited dealt with the construction of the word, 'buildings', in particular statutes. The purpose of the Act, widely stated in the long title, is— 'To make provision for the further improvement and amelioration of the position of tenants … and for that purpose to

[2] *Lynch v Simmons* (1954) 88 ILTR 3.
[3] [1952] IR 40.

> amend the law relating to' (amongst other things) 'disturbance of such tenants…'. It is clear that the tenant's aim here was to provide a station for servicing motor cars and supplying oil and petrol. In the Case Stated the items of equipment installed are described as structures. They are, of course, artificial structures. They all have been built by the hand of man. A building which is the subject of a tenancy usually consists of walls and a roof. The concrete well for a petrol storage tank has walls. I do not think the fact that it is sunk beneath the level of the yard surface affects the question whether it is a building; nor does the fact that at present it is roofless prevent it from being regarded as a building. In my opinion, there is evidence which would support a finding that it is a building.
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> On this view, an answer may be given to the question whether the land described as a yard is a tenement within the meaning of s 2 of the Landlord and Tenant Act, 1931, to the effect that this is a question of fact to be determined by the Circuit Court Judge and depends upon whether he holds that the concrete well is a building…
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> I have, however, formed a clear opinion, which I think it well to express, that the mechanical hoist cannot be considered a building. In my view, this hoist is of the character of a machine fixed to the ground. It resembles a stationary engine used to provide power. The elaborate concrete foundations are merely provided for the purpose of holding it in position. Were the mechanism removed they would serve no purpose. The bed in which it is fixed and held in position could not be described as a building.[4]

Black J in *Mason* likewise took the view that the concrete well was a 'building' within the meaning of the Act, being a substantial artificial structure of permanent character incapable of being removed. He declined to dissent from the view of Maguire CJ regarding the hoist. The remaining judge, O'Byrne J, agreed with both judges.

In *Fitzgerald v Corcoran,*[5] Lardner J held that the word 'building' in the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 ('the 1978 Act') could not be

[4] ibid 45-46.
[5] [1991] ILRM 545.

construed as including a hard tennis court and car park. More recently, in *The Board of Management of St. Patrick's School v Eoghan O'Neachtain Limited,*[6] Hunt J held that a wheeled hut, fixed to the property by means of power cables, was capable of being a 'building', emphasising that buildings do not need to be permanent to come within section 5 of the 1980 Act.

The meaning of the term 'subsidiary and ancillary' has likewise been considered in several cases, commencing with *Killeen v Baron Talbot de Malahide*.[7] In that case a lessee had applied for a reversionary lease in respect of not only a house and grass plot (to the front of the house), but also a field which had been sublet for some time for agricultural purposes and was included in the lease but located beyond a wire fence dividing it clearly from the house and grass plot. HHJ Shannon held that while the grass plot was ancillary and subsidiary to the house, the field beyond was not, stating:

> On examination of the words, it seems to me that the word 'ancillary' is stronger against an applicant than the word 'subsidiary', but by reason of the draughtsmanship of the Act I need do no more than decide that either of the words is inapplicable to the particular facts … I think that 'ancillary' means ministering in an active way, whereas 'subsidiary' suggests a mere passive addition to the building … the words 'ancillary and subsidiary' require the giving or doing of something actively benefiting the house and are not satisfied by proof that the land is aesthetically advantageous to the building.[8]

The most detailed consideration of 'subsidiary and ancillary' is to be found in the judgment of Peart J in *A. O'Gorman & Co. Ltd v JES Holdings Ltd,*[9] in which he was called upon to consider whether a relatively small area of waste ground adjacent to a supermarket building and used for employee parking, the assembling of pallets and containers and incineration of rubbish relating to the supermarket was 'subsidiary and ancillary' to the building. Peart J stated:

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[6] [2018] IEHC 128.
[7] [1951] Ir Jur Rep 19.
[8] ibid 21.
[9] [2005] IEHC 168.

> Given the cardinal rule of statutory construction that words contained in a statute must be given their ordinary meaning, it is helpful to refer to the meaning of these words as set forth in The Concise Oxford Dictionary of Current English, [Clarendon Press Oxford 1990]. The word 'ancillary' when followed by the word 'to' is defined as 'subordinate, subservient'. The former in turn being defined as 'of inferior importance or rank; secondary, subservient', and the latter as 'subordinate'. Clearly there is considerable overlap in these dictionary definitions. The word 'subsidiary' is given the meaning 'serving to assist or supplement'. I find it helpful to regard 'ancillary' as meaning 'of lesser importance or subordinate.' and 'subsidiary' as 'serving to assist or supplement.' These meanings seem to me to accord with one's ordinary usage of the terms…
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> Having regard to the fact that that the area has been used in connection with the business of the supermarket for the parking of cars, and also for the collecting and incineration of rubbish, it is an area which comes within the definition of 'ancillary and subsidiary'. It is clearly 'of lesser importance or subordinate' and it has also been an area 'serving to assist or supplement' the premises in the sense of being of assistance to the business run out of the premises. An important factor in my consideration of the point has been the certain fact that at all relevant times this small area has been within the boundary of the property, is not of sufficient size or character to be capable of any independent use, and that, accordingly it is of an entirely different character to the field beyond the grass plot in front of the house, which was the subject of the judgment of Judge Shannon in *Killeen v. Baron Talbot de Malahide*.[10]

Although a car park used by occupants of and visitors to a building may be subsidiary and ancillary to that building,[11] Hunt J in *O'Neachtain* found that an open-air car park could not be subsidiary and ancillary to a hut used for collecting fees for using it, stating:

> In this case, I am satisfied that the most likely conclusion will be that the business user of parking cars was carried out on the unbuilt yard area, and

[10] ibid 16-17.
[11] *Fitzgerald v Corcoran* [1991] ILRM 545.

> that the wheeled hut was used as a convenience to the business of parking cars. Tickets could be issued and payment received for parking on the yard without the necessity of having the convenience of this hut. The situation would be quite different if a building had been erected to house the parked cars, as is the case with purpose-built multi-storey car parks. It is also different to the case of *Terry v. Stokes*, in that the business in question in that case was carried on inside the building, with the use of the yard for parking being ancillary to that business. In this case, parking was the sole business carried on under the contractual arrangement, not an activity carried on as an adjunct to some other activity involving motor vehicles.[12]

The above begs the question of whether important lessee statutory rights should really depend on such nice distinctions. The Law Reform Commission, in its Consultation Paper on Business Tenancies,[13] recommended removal of the requirement that premises be a tenement in order to benefit from the provisions of the 1980 Act. However, this recommendation, and the Paper's many other helpful recommendations in respect of the 1980 Act, have never been enacted by the legislature.

It should be noted that a lessee whose property fails to satisfy the definition of 'tenement' is not only excluded from the right to a new tenancy under Part II of the 1980 Act, but also from all other rights contained in the Act, including the modifications of lessee covenants effected by Part V. As a result, the landlord can unreasonably refuse consent to an assignment/a sublease of the property, or even improvements to the property without being called to account.

Entitlement to a New Tenancy under Part II

Not only the content, but also the general structure of the 1906 Act is replicated in the 1980 Act, which is divided into four substantive parts:

> Part II which deals with the right to a new tenancy;
>
> Part III which deals with the right to a reversionary lease;

[12] *O'Neachtain* (n 6) [30].
[13] LRC CP 21—2003.

Part IV which deals with the right to compensation for disturbance and improvements;

Part V which deals with the modification of tenant covenants.

The consequences of the failure to update non-residential landlord and tenant law can be seen throughout the 1980 Act, but in particular Part II, which deals with the right to a new tenancy. To qualify for this right, in addition to the land being a 'tenement', the tenant claiming the right must show the existence of one of three alternative equities.

The first of these equities arises under section 13(1)(a) of the 1980 Act where there has been continuous occupation of the premises for business purposes by the tenant and/or their predecessors in title[14] for five years prior to the determination of the lease or tenancy.[15] The term 'business' includes social, cultural, sporting activities, or the practice of a profession, and it is not necessarily confined to activities carried on for gain or reward.[16]

A non-residential tenant of a tenement can alternatively claim a new tenancy either under section 13(1)(b) where they and/or their predecessors in title have been in occupation of the tenement for 20 years prior to the determination of the lease or tenancy, or under section 13(1)(c) where at least half of the letting value of the tenement, at the date of determination of the lease or tenancy, is attributable to improvements carried out by the tenant and/or their predecessors.

Section 17 of the 1980 Act lists certain circumstances where the right to a new tenancy under Part II may legitimately be restricted even where one or more of the equities in Section 13 are satisfied. These include situations where the tenancy has been terminated for non-payment of rent or breach of covenant or where there is good and sufficient reason, attributable to the conduct of the tenant, for denying a new tenancy.

[14] Defined in the Landlord and Tenant (Amendment) Act 1980 s 3, as 'previous tenants under the same tenancy as the tenant or any tenancy of which that tenancy is or is deemed to be a continuation or renewal.'
[15] The qualifying period of three years applies if the lease or tenancy was entered into before August 10, 1994. The qualifying period was extended pursuant to the Landlord and Tenant (Amendment) Act 1994 s3 (1).
[16] Landlord and Tenant (Amendment) Act 1980 s 3.

Originally, there was no facility for tenants to contract out of the right to a new tenancy under Part II of the 1980 Act. However, section 4 of the Landlord and Tenant (Amendment) Act 1994 inserted a new restriction into section 17 (section 17(1)(a)(iiia)), applicable where a tenant of office premises has renounced their right to a new tenancy in writing following independent legal advice. Section 27 of the Civil Law (Miscellaneous Provisions) Act 2008 subsequently widened the scope of section 17(a)(iiia) to make it applicable to all cases where section 13(1)(a) applies.

In *Dublin Port Company v Automation Transport Limited*, McDonald J upheld the validity of a poorly drafted section 17(1)(a)(iiia) renunciation, stating:

> While there are a surprisingly large number of such errors and inconsistencies, it seems to me that these are very clearly mistakes in the document and it is equally clear what corrections ought to be made. Accordingly, the document should be read in the manner outlined in para 52 above. When read in that way, it seems to me that the document is clear on its face. There is no ambiguity in its terms such as to attract the application of the *contra proferentem* principle. Para. 4 of the renunciation contains a clear and unequivocal renunciation by the defendant of any right which it might acquire to a new tenancy under the Landlord and Tenant Act. [17]

McDonald J also refused to find the same renunciation invalid for lack of independent legal advice where it contained on its face an acknowledgement that the tenant had received such advice, stating:

> As noted above, no guidance is given in s. 17 (1) (a) (iiia) of the 1980 Act (as inserted by s. 47 of the 2008 Act) as to the nature of the legal advice that must be given to a tenant in relation to a renunciation. Nor was I referred to any authority which provides any assistance as to the nature of the legal advice to be given. However, it seems to me to be clear that the reason why the Oireachtas imposed a requirement that a tenant should receive independent legal advice, was to ensure that, before taking the very significant step of renouncing rights, the tenant should be aware of

[17] [2019] IEHC 499 [57].

> the rights that exist under the 1980 Act to a new tenancy. By stipulating such a requirement, the Oireachtas has made sure that, before abandoning this valuable right, tenants will be apprised of the nature of the right they are asked to renounce. Such an approach is not peculiar to the 1980 Act. The importance attached to such a requirement can also be seen in other contexts. For example, in the case of the abandonment or waiver of a constitutional right, the courts have stressed the need for full knowledge. As Walsh J. observed in *G. v. An Bord Uchtála* [1980] I.R. 32 at p. 80, before anybody can be said to have surrendered or abandoned a constitutional right, it must be shown that he or she is aware of what the rights are and of what he or she is doing. While Walsh J. was concerned, in that case, with the potential waiver of a constitutional right, it seems to me that the basic concern is the same whether one is concerned with the abandonment or waiver of a constitutional right or of a legal right.
>
> Furthermore, it seems to me that para. 3 of the renunciation in this case clearly records that advice was given to the defendant here that under existing landlord and tenant legislation, it would have an entitlement to a new tenancy in the premises should it continue to occupy the premises for a period of five years or more. On the face of the renunciation, it is therefore clear that the defendant was told of the right which it would have, absent the renunciation. That seems to me to encapsulate the nature of the advice which a tenant should be given so that the tenant will be aware of the effect of the renunciation.[18]

He also rejected the argument that the advice given to the tenant in relation to the renunciation was not 'independent', saying:

> In my view, when the Oireachtas spoke of '*independent*' legal advice, it clearly had in mind advice which is independent of the landlord. In this context, s. 17 (1) (a) (iiia) must be seen in context. It is a provision that deals with the rights of a landlord and tenant *inter se*. It is situated within Part II of the 1980 Act. The entire of that part is concerned with the right to new tenancies as between landlord and tenant. Part II is not concerned with third parties at all. Thus, when s. 17 (1) (a) (iiia) refers to '*independent legal*

[18] ibid [63]-[64].

> *advice in relation to the renunciation*,' it seems to me to follow that what the Oireachtas had in mind was legal advice in relation to the renunciation which is independent of the other party to the landlord and tenant relationship — namely the landlord. It is crucial that the advice should be given by someone who is independent of the landlord so as to ensure that the tenant is not influenced to grant the renunciation as a consequence of advice that is given by a lawyer associated with the landlord. This is consistent with the approach which the courts take in a range of circumstances involving the validity of *inter partes* transactions. Thus, for example, in the case of improvident transactions, as the decision in *Carroll v Carroll* illustrates, the courts will frequently set such transactions aside where it is shown that the only advice available to the donor was advice from a solicitor who also acted for the donee.[19]

This decision of McDonald J, subsequently affirmed by the Court of Appeal,[20] shows a practical, purposive approach as regards the interpretation of section 17(1)(a)(iiia). However, as a subsequent decision, also by McDonald J in *KW Investment Funds v Stillorgan Leisure Ltd*[21] illustrates, there remain uncertainties regarding its scope. In that case, a lessor sought an interlocutory injunction to recover possession of premises from a lessee who was claiming a new tenancy under Part II of the 1980 Act. Although the lessee in this case fell within the scope of section 13(1)(a) and had executed a renunciation of Part II rights following independent legal advice, they also qualified for a new tenancy under the alternative 20-year occupation equity set out by section 13(1)(b). For this reason, McDonald J refused interlocutory relief, holding that there was an arguable case that the restriction in section 17(1)(a)(iiia) did not apply to such a tenant. The case was subsequently settled, meaning that no final decision was ever delivered on the point; however, in circumstances where, over time, more landlords will be seeking to rely on renunciations by tenants who have been in occupation for over

[19] ibid [74].
[20] *Dublin Port Company v Automation Transport Ltd* [2024] IECA 41.
[21] [2020] IEHC 132.

20 years, this is an aspect of section 17(1)(a)(iiia) which requires definitive statutory clarification.

In addition, section 17(2) of the 1980 Act also permits restrictions on a tenant's right to a new tenancy where the landlord is *inter alia* carrying out rebuilding or reconstruction, requires vacant possession for the purposes of incorporating the property into a scheme of development or simply requires possession of same on the basis of good estate management. However, in contrast to the restrictions in section 17(1), a landlord who relies on section 17(2) to deny a tenant a new tenancy will have to pay that tenant compensation for disturbance under Part IV of the 1980 Act.

Section 59 of the 1980 Act defines compensation for disturbance as 'the pecuniary loss, damage or expense which the tenant sustains or incurs or will sustain or incur by reason of his quitting the tenement and which is the direct consequence of that quitting.' This is the sole extent of the guidance given to facilitate the assessment of this head of compensation. Although claims under Parts II and IV of the 1980 Act fall within the exclusive first instance jurisdiction of the Circuit Court, the usual Circuit Court monetary limits do not apply to Part IV claims; instead a Circuit Court judge has, uncharacteristically, unlimited jurisdiction. Consequently, compensation for disturbance is assessed by judges unfamiliar in dealing with large sums, in circumstances where there is little or no statutory guidance as to the method of compensation. Valuation evidence is heavily relied on, and most cases settle. As Circuit Court cases have traditionally been unreported, where a written judgment is given on compensation for disturbance, it is not generally available. It is unsatisfactory that there is so little statutory or judicial guidance regarding the assessment of such potentially large claims.

Procedure for Claiming a New Tenancy under Part II of the 1980 Act

A further problem with Part II of the 1980 Act relates to the procedure for claiming the new tenancy.

Section 16 of the 1980 Act provides:

> Subject to the provisions of this Act, where this Part applies to a tenement, the tenant shall be entitled to a new tenancy in the tenement beginning on the termination of his previous tenancy, and the new tenancy shall be on such terms as may be agreed upon between the tenant and the person or persons granting or joining in the grant of the new tenancy or, in default of agreement, as shall be fixed by the Court.

Section 23 of the 1980 Act further provides:

> (1) This section applies where the Court fixes the terms of a new tenancy under this Part.
>
> (2) The Court shall fix the duration of the tenancy at thirty-five years or such less term as the tenant may nominate save, where the right to a new tenancy arises in respect of a tenement referred to in section 13 (1) (a) (as amended by section 3 of the Landlord and Tenant (Amendment) Act, 1994), the duration of the tenancy shall be fixed at twenty years or such less term as the tenant may nominate provided that it shall not be fixed for a term of less than five years without the landlord's agreement.

Section 28 of the 1980 Act further provides:

> Where an application is pending under this Part for a new tenancy or to fix the terms of a new tenancy and the pre-existing tenancy was terminated otherwise than by ejectment or surrender the tenant may, if he so desires, continue in occupation of the tenement from the termination of the tenancy until the application is determined by the Court or, in the event of an appeal, by the final appellate court, and the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy, but without prejudice to such recoupments and readjustments as may be necessary in the event of a new tenancy being granted to commence from such termination.

Therefore, if the tenant satisfies the criteria for the grant of a new tenancy and the parties cannot agree the terms, the court will fix the terms of the new tenancy. It should be 35 years or less in terms of duration, unless the tenancy arises pursuant to section 13(1)(a) (which confers a business equity), in which case it should be for between 5 and 20 years, at the election of the tenant. The rent fixed is the 'gross rent', namely that rent which a willing lessee would give, and a willing lessor would take based on vacant possession.[22]

Section 28 of the 1980 Act provides that a tenant who has claimed a new tenancy can remain in occupation until their claim is determined by the Circuit Court, paying rent at the rate applicable immediately prior to the determination of their earlier tenancy until they are granted a new tenancy, at which point any rent increase (or decrease) under the new tenancy will be backdated to such date of determination. However, Part II of the 1980 Act omits to expressly deal with the question of backdating the rent differential in the case of a tenant who remains in occupation under section 28 and then withdraws their application for a new tenancy, or a tenant who remains in occupation but is ultimately held not to be entitled to a new tenancy.

In *Harrisrange v Duncan,*[23] McKechnie J held that a tenant who had remained in occupation under section 28 and whose claim to a new tenancy proved unsuccessful could not be liable for mesne rates as they were not a trespasser, so that the landlord's claim against the former tenant was limited to rent payable under the former lease only. McKechnie J did state, 'of course if a tenant attempted to use section 28 solely as a device or pretence that would constitute an abuse of the process and could be dealt with accordingly.'[24]

In *Howard v Crown Paints*[25] a tenant remained in occupation of premises at Malahide Road, Coolock, following the determination of a lease which had expired in August 2018. Shortly before its expiration, the tenant had served on its landlord a Notice of Intention to Claim Relief claiming the right to a new tenancy of the premises under Part II of the 1980 Act. No agreement in relation to the market rent for the new tenancy was reached between landlord and tenant, and proceedings to have this matter determined by the Dublin Circuit Court were slow to progress due to *inter alia* postponement of court business due to COVID-19. In November 2022 the tenant notified the landlord that it was withdrawing its claim to a new tenancy and would be vacating the premises at the end of the

[22] 1980 Act, s 23(5).
[23] [2002] IEHC 14.
[24] ibid [26].
[25] [2024] IECC 10.

following month, which it did. Although the landlord had continued to receive rent from the tenant following the expiration of the lease at the rate payable immediately prior to its expiration, this rent fell far short of the August 2018 market rent which would have been payable by way of backdating had a new tenancy been granted.

The landlords in *Crown Paints* brought an application before the Circuit Court seeking the rental differential from the date of expiry of the lease to the date of the Defendant vacating the premises. In this regard they argued that where a tenant, entitled under Part II, stayed in occupation under section 28 for a period of 6 years following the expiration of their previous lease before withdrawing their claim, they should be deemed to have held under a Part II tenancy for that period. Secondly, they relied on the judgment of Charleton J in *Ulster Investment Bank Ltd v Rock Rohan Estate Limited*[26] to argue that there was an estoppel binding the tenant.

These arguments were rejected by HHJ O'Connor who held that, under section 28, a tenant who stayed in occupation and subsequently withdrew their claim was only liable to pay the rent payable prior to the expiry of the lease, stating:

> Section 28 of the 1980 Act cannot be used to create a new lease where it is not required by the tenant. The tenants can exercise their right to withdrawal, provided they have not used Section 28 of the 1980 Act to circumvent the Act. In other words, provided the tenant has not misbehaved. An example of misbehaviour is where the tenant has deliberately delayed the court process to frustrate the determination of a court decision to the tenant's advantage and the landlord disadvantage. I have not seen evidence that would justify this court taking the view that the tenant has misbehaved.[27]

He also found:

> In regards the argument of estoppel, it would appear to rely on the argument that the conduct of the tenant would give rise to an unconscionable situation whereby the tenant received a tenancy at

[26] [2015] IESC 17, [2015] 4 IR 37.
[27] *Howard* (n 25) [28].

> allegedly below market rent. In simple terms it states that it is unfair that the tenant does not pay an additional rent when it states it 'resiles' from taking a new tenancy. The term 'resiles' is not accepted by the Defendant. I accept the tenant remained in occupation of the premises. However, there is no provision in the 1980 Act which imposes an obligation for a tenant to take a retrospective expired lease for less than 5 years at a new market rent when the parties have both acknowledged that they failed to agree the terms of a new tenancy. There is no promise or conduct which in my view would give rise to estoppel by imposing an obligation on a tenant when there is so much uncertainty between the parties.[28]

HHJ O'Connor made clear that he regarded himself as bound by the judgment of McKechnie J in *Harrisrange*, who in turn felt himself limited by the wording of the 1980 Act. However, an outcome whereby a tenant claiming under a statutory provision entitling them to a new lease at market rent is allowed to enjoy the benefit of a period of post-lease occupation for a rent significantly less than this sum hardly seems fair to their landlord. It is suggested that this is another area where the 1980 Act would benefit from updating.

The Right to a Reversionary Lease under Part III of the 1980 Act

The rarely invoked Part III of the 1980 Act gives a tenant who satisfies the requirements set out by section 9 of the Landlord and Tenant (Ground Rents) (No. 2) Act 1978 the right to apply for a new 99-year lease at a below-market rent, usually the rent payable immediately prior to the determination of their previous lease or 1/8 market rent, whichever is the greater.

However, as satisfying the requirements to buy out under section 9 of the1978 Act also entitles a tenant to buy out the fee simple and any intermediate interests for a usually nominal price, there are only three situations in which Part III might fall to be invoked.

The first would be where the tenant's previous lease has expired. Since the generally accepted practice is that a Ground Rents application can only be made

[28] *Howard* (n 25) [32].

while a previous lease is ongoing, a tenant in this situation would usually apply for a reversionary lease before making their Ground Rents application.

The second situation where a tenant might wish to rely on Part III would be where one or more of the restrictions on the right to buy out the fee simple set out in section 16(2) of the 1978 Act applied. The most common applicable restriction is section 16(2)(a), which applies where the lease is a business lease, or a lease of premises divided into a certain number of flats and contains a rent review clause falling within the scope of that provision.

The third situation would be where the tenant cannot afford the purchase price which would be payable under the Ground Rents Acts. As this purchase price is, at a maximum, 1/8 of the market value of the property, this is unlikely to occur.

Given the limited function of Part III, and its close connection with the Ground Rents legislation, it might be best for the right to a reversionary lease in the above situations to be accommodated within the scope of the Ground Rents Acts rather than languishing in obscurity in an entirely different piece of legislation.

Tenant Covenants under Part V

Part V of the 1980 Act modifies tenant covenants in leases to prevent them being used harshly by a landlord.

Section 65(2) of the 1980 Act significantly modifies the tenant's liability to pay damages for breach of a repair covenant by providing that the maximum sum recoverable in respect of such damages is the loss caused to the landlord's reversion, so as to preclude the landlord from suing the tenant for the full cost of remedying the disrepair where the diminution in their reversion due to the disrepair is less than this sum. Surprisingly, section 65 only applies to limit the landlord's entitlement to damages. It does not preclude them from obtaining an injunction to compel the tenant to carry out repairs; nor does it preclude forfeiture of a lease for disrepair. As such, it is of primary relevance in circumstances where the lease has come to an end and the alternative landlord remedies of injunctive relief and forfeiture are no longer feasible.

Of more practical use in the case of an ongoing lease are the subsequent provisions of Part V. Section 66(1) provides:

> A covenant in a lease (whether made before or after the commencement of this Act) of a tenement absolutely prohibiting or restricting the alienation of the tenement, either generally or in any particular manner, shall have effect as if it were a covenant prohibiting or restricting such alienation without the licence or consent of the lessor… subject to a proviso that such licence or consent shall not be unreasonably withheld.

In *Perfect Pies Ltd v Chupn Ltd,*[29] a tenant succeeded in obtaining a declaration that their landlord was acting unreasonably in delaying or failing to agree to their request to assign the leasehold interest. Haughton J held it was unreasonable for a landlord to refuse consent to an assignment on grounds which had nothing whatever to do with the relationship of landlord and tenant. Such a refusal - being an attempt by a landlord to use the opportunity of a request for consent to assignment to secure a collateral advantage or benefit over and above what the existing lease offers – would be unreasonable. Here, the landlord had unreasonably withheld its consent to the assignment to the company based on an ulterior motive, namely the desire to obtain possession of the premises, and had relied on spurious reasons (non-repair and lack of consent to licensees) to decline the application for consent to the assignment.

Section 67(1) of the 1980 Act is framed in similar terms to section 66, the only difference being that it precludes a landlord from unreasonably refusing consent to a change of user. As with section 66(1), although the burden of proof is on the lessee to show unreasonableness, there are numerous cases in which this burden has been held to have been satisfied. One relatively recent example is provided by *Dunnes Stores (Ilac Centre) Ltd v Irish Life Assurance PLC,*[30] which involved a claim by a tenant of a shopping centre that its landlord was acting unreasonably in refusing consent for the change of user of part of a fashion retail unit to that of a food hall. The basis of the landlord's refusal, as set out in correspondence, was that such a user would conflict with its vision for the shopping centre as a primary retail fashion area. However, the lease itself provided that in deciding whether to grant consent to a change of user, the landlord would have regard to the need for diversity within the centre. Clarke J held that the landlord had acted

[29] [2015] IEHC 692.
[30] [2008] IEHC 114, [2010] 4 IR 1.

unreasonably by failing to comply with its expressly assumed obligation under the lease to take account of the need for diversity; in addition, its refusal of consent was at least partly motivated by a desire on the part of the landlord to pressurise the tenant into surrendering the unit.

It appears that Irish judges have no hesitation in finding that a landlord has acted unreasonably in refusing consent to alienation or change of user. Unfortunately, it takes time for applications of this nature to be heard, during which time prospective assignees or sublessees may well withdraw or plans for a change of user may become redundant due to the delay.

Where this occurs, one would expect as a matter of fairness and common sense that, if the landlord's refusal is ultimately found to be unreasonable, the lessees in question should be able to obtain compensation for the loss caused to them as a result. A claim for such compensation was, however, rejected by the Supreme Court in *Meagher v Luke J Healy Pharmacy Ltd*.[31]

The High Court in that case had found that the landlord had acted unreasonably and awarded damages to the lessee in respect of same.[32] The Supreme Court did not dispute the finding that the landlord had acted unreasonably but found that it had had no authority to award damages for the breach, as section 66 did not impose a statutory duty but rather regulated the construction of covenants freely entered between a lessor and a lessee. Although the common law in *Treloar v Bigge*[33] permitted an award of damages for breach of an express covenant not to unreasonably withhold consent, no such express covenant was present here, as the lease merely contained a covenant on the part of the lessee not to assign the said premises or any part thereof without obtaining the previous consent in writing of the lessor. The inability to award damages in such a case appears to be another obvious lacuna in the 1980 Act, which would benefit from reform.

Conclusion

As outlined above, the 1980 Act, despite its relatively recent date, is in fact merely a re-enactment of a statutory scheme of considerable antiquity. Like most

[31] [2010] IESC 40, [2010] 3 IR 743.
[32] *Meagher v Luke J. Healy Pharmacy Limited* [2005] IEHC 120.
[33] L.R. 9 Exch. 151.

legislation of the period, this scheme is beautifully drafted, and still, by and large, workable today.

However, the modern world is very different from that of 1906, and the 1980 Act could benefit from some updates, starting with the removal of the requirement that the lease premises be a 'tenement' as defined by section 5. Statutory clarification as to whether the renunciation facility in section 17(1)(a)(iiia) is operative as against a tenant holding under a tenancy which has been in existence for more than 20 years would also be of great benefit. In addition, there should be a provision for backdating of market rent as against a tenant who stays on under section 28 of the 1980 Act pursuant to a claim to a new tenancy, but does not ultimately accept or succeed in claiming such a tenancy.

It would also be of assistance if the provisions regarding the entitlement to a reversionary lease under Part III were removed from the 1980 Act and incorporated in a modified form into the more appropriate location of the Ground Rents Acts. Proper statutory guidance should be provided to Circuit Court judges engaged in the valuation of compensation for disturbance, and there should be a facility to award damages against a landlord who has unreasonably withheld consent under sections 66-67 of the 1980 Act, irrespective of the terms of the lease.

If effected, these changes should ensure that the 1980 Act remains functional well into the 21st century – a great testament to the enduring power of Edwardian statutory drafting.