

Our leasing laws need an overhaul

Irish Law on business leases has come under fire on all sides of the corporate divide. In the first of two special articles, Brian Doyle (Chartered Surveyor and lecturer at the Galway-Mayo Institute of Technology) points out where the flaws are.

The Law Reform Commission's recently published consultation paper on the legal aspects of business tenancies pulls no punches. It states quite clearly that current leasing law and practice is out of line with other jurisdictions and needs a radical overhaul.

Reform is long overdue with the result that commercial leasing practice in Ireland, often brought about as a result of cumbersome legislation leads to confusion, delay and unnecessary cost.

The consultation paper pointing to anomalies in Irish law says that the current system does our reputation "as a trading and commercially orientated nation no good at all" and refers to the "embarrassment" of explaining our rather odd legislation to international investors.

Landlord and tenant legislation is complex, and attempts by the legislature to rectify the deficiencies have only added to the complexity.

Changes have been introduced to the relationship of landlord and tenant in 1980, 1984, 1989 and 1994. Even the frequency of this intervention begs the question. Why so many changes in such a short period of time?

Unfortunately, changes have been aimed at relatively minor issues while failing to address the major problems –

tweaking at the engine while the whole car needs to be replaced, if not in fact dispatched to the scrap yard.

A fundamental question raised by the Commission is whether there is a continuing need for statutory protection of business tenancies at all. The answer to this question goes to the heart of the issue. An answer was attempted in the 1989 amendment which excluded financial service operations in the IFSC in Dublin from the effects of the landlord and tenant legislation. If the legislation was a hindrance to commercial activity at the IFSC, then it was equally so for the rest of Ireland.

The obvious point is that a multinational supermarket operator or a bank is well able to negotiate its leasing arrangements with the pension fund owners of the shopping centre or office block that it occupies. Taken to its logical conclusion, even the businessman/woman operating the retail outlet is quite able to look after their own best interests.

As the law currently stands, there is an enormous amount of largely irrelevant legislation standing between the parties. That interference slows down the property market and leads to unnecessary time delays and expense. While it may have some short term benefit for the tenant's

security, ultimately it removes their choice of relocating.

If most tenants are tied into their existing locations for the foreseeable future, then this limits the competition forces that would otherwise emerge through developers providing alternative buildings.

Service cost control is minimal where tenants are tied into long leases. The tenant has no choice but to pay. The primary reason why leases are so long in Ireland is that owners have no option but to write as long a lease as possible so as to avoid the intervention of the Courts and the application of the terms under the legislation.

In Ireland therefore, we get business leases for as long as 35 years. More recently, this has moved back to 25 years, still far too long.

The contrast is stark. While business leasing is tied up in unnecessary legislation which regulates the position of two relatively equal parties, residential tenants are, with some basic and very minor exceptions, on their own.

It is strange that a residential tenant should have no statutory support and effectively no security of tenure while business tenants are over protected.

Currently, if a business occupier has been in occupation of a premises for more than five years, he is entitled to remain in possession effectively forever. The definition of business and premises is very wide indeed. It does not matter even where change to business use has occurred without planning permission.

The tenant has a right to remain in the property paying the "gross rent". The

owner can defeat that right, but only on very limited grounds and compensation is then payable. The Circuit Court will assess the "gross rent" and all other terms of the new lease. The Court will also decide on rent reviews every five years.

The delay, expense and uncertainty is considerable. The effect on the capital value of a property that is subject to "statutory lease" can be significant. How do owners avoid the problem? Quite simply by negotiating soft terms on a renewal of lease and making up for it at the next rent review which will be on their terms, after all, they have just written the new lease.

For example, a tenant signs a lease with an "upwards only" rent review clause. Such a clause is not available in a court awarded or "statutory" lease.

What happens when rents fall as is currently predicted in many edge of town office locations. The tenant pays the same as before, they cannot move to more economical positions.

An argument often used to support rights for tenants to remain in possession and renew their leases is that otherwise tenants could face eviction or have that threat used to obtain a ransom rent. This may have some credibility for retail tenants, but not always.

Brian T Doyle. BSc, LLB, MA, FSCS, FRICS is a locally based Chartered Surveyor providing consultancy property services in the Galway-Clare area. He also lectures on property valuation and compulsory purchase law in the School of Engineering at Galway-Mayo Institute of Technology. He can be contacted on 087-6701356 or at btd@oceanfree.net.