EUI Tenancy Law Project: Ireland

Áine Ryall[1]

October 2003

1. Introduction

Overview of housing tenure in Ireland

Homeownership is by far the dominant housing tenure. Recently published figures from the 2002 census indicate that 77.4% of Irish housing units are owner-occupied.[2] The 2002 census results also reveal that the number of private rented dwellings almost doubled in the period 1991-2002[3] and that the private rented sector now comprises 141,000 units, representing approximately 11% of the housing stock.[4] The balance of the stock is made up primarily of public or social housing provided by local housing authorities and, more recently, voluntary and co-operative housing associations. According to the census figures, 6.9% of housing units comprise local authority rented housing.[5]

The dominance of homeownership is attributable to fiscal incentives provided by the State to owner-occupiers, in particular, tax relief on the interest portion of mortgage repayments. Although these incentives have been scaled back considerably in recent years, there remains a strong culture of homeownership among the Irish population. The mid-1990s witnessed the beginning of a sustained period of intense house price

---

[1] Lecturer, Department of Law, University College, Cork, Ireland. I would like to thank the following people for invaluable assistance with advice and materials while I was preparing this report: Steve Hedley, John Mee, Alan Cooke, John Costello and Siobhán Stack. Responsibility for any errors or omissions rests solely with the author. However, I do not accept liability for any shortcomings in the text. This report draws on material for a book that I am currently researching and writing entitled *The Regulation of Residential Tenancies in Ireland*.

[2] *Census 2002: Principal Socio-Economic Results* (Dublin: Stationary Office, October 2003) at 28. Note that Vol. 13 of *Census 2002*, which covers housing, is due to be published in April 2004. See www.cso.ie (web pages of the Irish Central Statistics Office).

[3] *Census 2002: Principal Socio-Economic Results* at 28.

[4] Ibid.

[5] Ibid.

inflation in Ireland.[6] Average house prices more than doubled between 1995 and 2002, although the situation now appears to be stabilising somewhat in line with the decline of the "Celtic Tiger" economy and the recent down-turn in the world economy generally.[7] House prices continue to rise, albeit at a slower rate than at the height of the economic boom. The most recent official figures indicate that the average price of a new house in Dublin in the period March-June 2003 was E289,345.[8] The equivalent figure for a second-hand house, again in Dublin, was E367,314.[9]

The factors that contributed to rapidly rising house prices included: strong economic growth resulting in increased disposable incomes; a marked supply-demand imbalance, especially in Dublin; consistently low interest rates, and demographic factors, including increased net immigration.[10] High house prices resulted in a situation where people who would have bought their own homes in the ordinary course of events suddenly found themselves priced out of the house purchase market and forced to rely on the private rented sector, or public housing, to meet their housing needs. A dramatic rise in the number of asylum seekers entering the jurisdiction from the mid-1990s onwards,[11] together with increasing student numbers at third-level, generated further demand for good quality, reasonably priced private rented accommodation, especially in the major urban centres. Not surprisingly, the resulting gulf between limited supply and fierce demand forced rents into an upward spiral. As usual in these situations, the most vulnerable sections of the population

---

[6] See generally, Downey, D., *New Realities in Irish Housing: A Study on Housing Affordability and the Economy* (Dublin: Threshold/CRUBE, 1998).

[7] Consider, for example, a recent (and controversial) report in *The Economist* concerning the state of the Irish housing market, "Close to bursting: A survey of property" *The Economist* May 31, 2003.

[8] *Housing Statistics Bulletin June Quarter 2003* (Dublin: Stationary Office, 2003) at 22. Note: the *Housing Statistics Bulletins* are available in pdf format at www.environ.ie/housindex.html.

[9] Ibid.

[10] See generally, Bacon, P., *An Economic Assessment of Recent House Price Developments* (Dublin: Stationary Office, 1998); Bacon, P., *The Housing Market: An Economic Review and Assessment* (Dublin: Stationary Office, 1999) and Bacon, P., *The Housing Market in Ireland: An Economic Evaluation of Trends and Prospects* (Dublin: Stationary Office, June 2000). The three "Bacon reports" are available at www.environ.ie/housindex.htm.

[11] There were 11,634 applications in 2002, compared with 39 in 1992. Source: *Annual Report of the Office of the Refugee Applications Commissioner, 2002* at 66.

were hardest hit. Rents are now beginning to moderate due to increased supply in the middle to upper end of the rental market. There is also anecdotal evidence to suggest that rents have actually fallen by as much as 20-25% in certain segments of the market in recent months. However, it is clear that there remains a serious shortage of supply at the lower or "budget" end of the market.

Social housing has been defined as housing that meets the needs of individuals who are not in a position to access housing from their own resources.[12] The Local Authority Social Housing Needs Assessment for 2002 found that, as at March 28, 2002, a total of 48,413 households were in need of local authority housing.[13] This compares with a figure of 39,176 in 1999 (the previous assessment), representing a dramatic increase of 23.5%.[14] The results of the assessment of homelessness undertaken by local authorities in March 2002 present the number of homeless persons in the State at an all-time high of 5,581.[15] Voluntary organisations working with homeless people believe that this official figure is a serious underestimate of the real situation.

The main source of social housing is public rented housing provided by local housing authorities pursuant to the Housing Acts 1966-2002. Dwellings are generally allocated on the basis of a scheme of letting priorities, which takes account of various factors including: household income; household size; suitability of current accommodation arrangements; and any special circumstances (for example, age; health or disability). Rent is calculated on the basis of household income. It is also possible for a tenant of at least one year's standing to apply to the local authority to purchase the dwelling at a discounted price under the terms of the Tenant Purchase Scheme, and this is a very attractive option for tenants. Apart from local authority housing, voluntary and co-operative housing associations are a growing source of social rented housing (supported by the Capital Assistance Scheme and the Capital

[12] *Social Housing – The Way Ahead* (Department of the Environment, 1995) at 5. On the theme of Irish social housing more generally, see Fahey, T., (ed.) *Social Housing in Ireland: A Study of Successes, Failure and Lessons Learned* (Dublin: Oak Tree Press, 1999).
[13] *Housing Statistics Bulletin September Quarter 2002* at 58.
[14] Ibid.

and Loan Subsidy Scheme). Another mechanism whereby State assistance is provided to those whose resources are insufficient to enable them to purchase their own homes is the Shared Ownership Scheme.[16] It should also be noted at this point, by way of general background, that Part V of the Planning and Development Act, 2000 introduced special provisions designed to boost the supply of social and affordable housing. Essentially, these complex provisions require housing developers to contribute to the provision of social and affordable housing by providing land within the proposed development to the local housing authority, or providing houses or sites within the development.[17] Recent amendments to Part V, pursuant to Part 2 of the Planning and Development (Amendment) Act, 2002, now give developers greater choice as to the manner in which they can meet the social and affordable housing requirement. Details of activity under the various social and affordable housing schemes mentioned above are presented in the Annual Housing Statistics Bulletins published by the Department of the Environment, Heritage and Local Government (hereafter "the DoE").[18]

Since the early 1990s, the private rented sector has come to play a critically important role as a provider of social housing. Pursuant to the rent supplement scheme operating under the Supplementary Welfare Allowance system, low-income tenants may claim a discretionary social welfare payment to help meet the cost of their rent. During 2002, 54,213 people claimed rent supplement, representing a dramatic increase of 20.4% on the 2001 figure.[19] The total cost to the Exchequer was E252.2 million.[20] The private rented sector remains highly polarised, with low-income tenants often forced to rely on the "budget" end of the market where there is a limited choice of accommodation available and the standard of accommodation, in terms of size, facilities and overall quality, is variable.

---

[15] *Housing Statistics Bulletin December Quarter 2002* at 69.
[16] Details of these schemes are available at www.environ.ie/housindex.html.
[17] See *Guidance Notes on Planning and Development Act, 2000 Part V Housing Supply* at www.environ.ie/devindex.html.
[18] The 2002 figures are published in *Housing Statistics Bulletin December Quarter 2002* at 54-57.
[19] *Statistical Information on Social Welfare Services, 2002* (Dublin: Stationary Office, 2003) at 76.
[20] Ibid., at 77.

Overall housing output has increased dramatically in recent years (almost 58,000 new houses were produced in Ireland during 2002)[21] and it appears that house price increases are indeed beginning to moderate. However, demand still outstrips supply, and the current shortage of social housing is acute.

a) Origins and basic lines of development of national tenancy law

It is generally accepted that landlord and tenant law is one of the most notoriously complex and involved fields of Irish law. For obvious reasons of space, the current survey cannot hope to do justice to the intricacies of the subject. Reference is therefore made throughout this report to other sources where the reader can find more detailed analyses of the various points arising.

The origins of Irish landlord and tenant law lie in English land law, which was applied in Ireland from the early seventeenth century. The historical development of indigenous landlord and tenant law is a lengthy and complex affair, and is treated in detail elsewhere.[22] Irish landlord and tenant law comprises a complex mix of common law (judge-made law) and both early and modern statute law. By way of example, the Landlord and Tenant Law Amendment Act, Ireland, 1860, (Deasy's Act)[23] and the Conveyancing Act, 1882, remain important sources of law in this field.

In terms of charting more recent developments, it seems appropriate to begin with an overview of the early rent control legislation. During the First World War, the British Parliament introduced measures designed to alleviate hardship caused to tenants by rapid war-time rent inflation.[24] These measures (which essentially provided for rent

[21] *Housing Statistics Bulletin December Quarter 2002* at 10.
[22] The leading works are Wylie, J.C.W., *Irish Land Law* (3rd ed.) (Dublin: Butterworths, 1997) and Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998).
[23] See Deale, K., *The Law of Landlord and Tenant in the Republic of Ireland* (Dublin: Incorporated Council of Law Reporting, 1968).
[24] Beginning with the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915 and continuing *via* a series of subsequent enactments. For an excellent account of the history of rent control in Ireland see de Blacam, M., *The Control of Private Rented Dwellings* (Dublin: Round Hall, 1992) (2nd ed.), chapter 1.

control and security of tenure, subject to limited exceptions) also applied in Ireland. Although intended as a temporary measure, the controls persisted into the post-war period, (subject to periodic modifications designed to bring about a gradual but steady degree of decontrol) culminating in the scheme established in the Rent Restrictions Act, 1960 (later amended by the Rent Restrictions (Amendment) Act, 1967). The extremely complex provisions set out in this legislation are described in detail elsewhere.[25] It is important to emphasise here that the protections offered by the rent restrictions legislation did not apply to all rented premises, but only to those falling within the scope of the 1960-1967 Acts, in other words, "controlled dwellings" as defined in section 3 of the 1960 Act.[26] The rent restrictions legislation survived until the early 1980s, when a number of its core provisions were the subject of a constitutional challenge.

Bunreacht na hÉireann 1937 (the Constitution of Ireland), refers to private property rights in two separate articles. Article 40.3.2 commits the State to protect the property rights of every citizen, as best it may, from "unjust attack". Article 43 recognises the right to private property, but confirms that this right is by no means absolute. Article 43.2.1 envisages that the right to private property may be "regulated by the principles of social justice." Article 43.2.2 goes on to provide that the State "may as occasion requires delimit by law the exercise of [the right to private property] with a view to reconciling [the] exercise [of this right] with the exigencies of the common good." The courts have been called upon to interpret the private property provisions in a number of cases.[27] For present purposes, one of the most significant decisions is *Blake v. Attorney General* (1981).[28] Here, the Supreme Court ruled that Parts II and IV of the Rent Restrictions Acts 1960-1967 were unconstitutional in that they amounted to an "unjust attack" on landlords' property rights. Part II severely restricted the rents payable for controlled dwellings, while Part IV restricted a

[25] Coghlan, J., *The Law of Rent Restriction in the Republic of Ireland* (3rd ed.) (Dublin: Incorporated Council for Law Reporting, 1979).
[26] See Coghlan above, n. 25, at 19-43.
[27] For a detailed analysis of the jurisprudence up to November 1993, see Hogan, G., and Whyte, G., *Kelly: The Irish Constitution* (Dublin: Butterworths, 1994) at 1061-1091. See further Hogan, G., "The Constitution, Property Rights and Proportionality" (1997) XXXII *Irish Jurist* 373.
[28] [1982] IR 117.

landlord's right to regain possession of such a dwelling. It must be noted however, that the impugned statutory scheme was particularly harsh and it is not really surprising that it succumbed to constitutional challenge. The main fault in the legislation was that it did not provide for any element of compensation for landlords whose properties were subject to rent control, and there was no possibility for rent review. Nor was the application of the scheme related to the financial capacity or financial needs of the landlords and tenants involved. Furthermore, the legislation created an almost permanent alienation from the landlord of the right to regain possession of the premises.

Following *Blake*, the *Oireachtas* (Parliament) enacted a more moderate statutory scheme to protect the tenants who had previously enjoyed the protection of the Rent Restrictions Acts. This legislation, the Housing (Private Rented Dwellings) Acts 1982-1983, was designed to gradually bring about a "phasing out" of the formerly rent controlled sector. It provides for a measure of security of tenure and rent control. The legislation applies to an ever-decreasing number of properties, as older tenants die or landlords regain possession of formerly controlled dwellings. It appears from a survey conducted by the DoE in November 2000, that approximately 1,700 formerly rent controlled dwellings remain governed by the protective measures set down in the 1982-1983 Acts. The detailed provisions of this special legislative scheme are considered elsewhere.[29] Essentially, the 1982-1983 Acts, provide that the original tenant (and any surviving spouse) of a formerly rent controlled dwelling is entitled to retain possession of the dwelling for life. The landlord is, however, entitled to seek to recover possession in certain carefully defined circumstances. Family members of the original tenant may also enjoy a limited right to retain possession for a specified period on the death of the original tenant. Rents are not generally market rents, but are determined either by agreement between the parties or, in default of agreement, by a special statutory body known as the Rent Tribunal. The key point to note for present purposes is that, subject to certain limited exceptions, the right of a family member of the original tenant to retain possession of a formerly controlled dwelling

[29] The leading work is de Blacam, above, n. 24. For a more recent analysis see Ryall, Á., "Housing (Private Rented Dwellings) Act, 1982: the implications of the expiry of

expired on July 25, 2002.[30] In other words, the legislation was only ever intended to provide protection for a limited period, spanning 20 years (i.e. 1982-2002). The central implication of the expiry of the statutory protection is that the tenants affected must rely on general landlord and tenant law to protect their interests. As will be seen below, the general law provides very limited protection for tenants.

The evolution of modern residential tenancy law

Beyond the specific case of formerly controlled tenancies (above), there was very little regulation of private rented tenancies up until the early 1990s when the Government of the day began to take a new interest in the private rented sector. This interest was sparked by the sector's potential as a provider of much needed social housing.[31] Tenants do not (currently) enjoy any real measure of security of tenure, and apart from dwellings protected under the 1982-1983 Acts (above), market rents apply. In terms of security of tenure, Part II of the Landlord and Tenant (Amendment) Act 1980 provides that a tenant who has achieved 20 years continuous occupation in a rented premises is entitled to apply for a new statutory tenancy on the determination of his previous tenancy, subject to certain exceptions. Any new tenancy is for a period of up to 35 years, and may be renewed if the provisions of the 1980 Act continue to apply to the premises at the date of any subsequent application for renewal. Market rent applies. In the event of disagreement between the parties, the terms of the tenancy, including the rent, are fixed by the Circuit Court. The main difficulty with the right to a new tenancy articulated in the 1980 Act, from the point of view of the residential tenant, is that there is absolutely nothing to prevent a landlord from terminating the tenancy before a tenant succeeds in reaching the 20-year threshold, thereby preventing the tenant from qualifying for the right to apply for a new tenancy in the first place.[32] In practice, it is extremely rare for a residential tenant to qualify for a new tenancy under the scheme established in the 1980 Act. The scheme of the legislation effectively forces any sensible landlord to give notice

---

statutory protection for family members" (2001) 23 *Dublin University Law Journal* 120.

[30] The implications of this problem are considered in Ryall, above, n. 29.

[31] See generally, *A Plan for Social Housing* (DoE, February, 1991) at 26-29 and *Social Housing - The Way Ahead* (DoE, May 1995) at 35-36.

before the 20-year threshold is reached. The general position then is that Irish tenants living in the private rented sector do not enjoy any measure of medium or long-term security of tenure and pay market rents.

The *Blake* decision (above) served to create a belief among legislators and policy makers that the scope for reform of residential tenancy law (particularly in terms of rent control and security of tenure) was severely limited by the strong constitutional protection afforded to private property rights. However, this view is misplaced and overlooks the important qualifications to the right to private property set out in Article 40 and Article 43, and the extreme nature of the statutory scheme that was successfully challenged in *Blake*. It is interesting to note that in its most recent ruling concerning private property rights and the Constitution, the Supreme Court upheld the constitutionality of the social and affordable housing provisions set out in Part V of the Planning and Development Act, 2000.[33]

In 1982, a ground-breaking report published by Threshold (an active NGO in the field of landlord and tenant law and policy) accurately described the private rented sector as "the forgotten sector" of Irish housing policy.[34] The report documented the plight of tenants living in private rented accommodation and highlighted systemic problems including: lack of security of tenure; unpredictable rent increases and poor standards. Following a sustained campaign by Threshold, a series of basic, but important reforms were introduced during the early 1990s. The main provisions are articulated in the Housing (Miscellaneous Provisions) Act, 1992 (together with a series of detailed regulations made thereunder) and include: the right to a minimum period of (written) notice to quit (at least 4 weeks); minimum standards of rented accommodation (these are very basic and suffer from vague drafting) and the right to a rent book.[35] A

---

[32] Consider, for example, *Hynes and Conlon v. Walsh*, unreported, Circuit Court, Dublin Circuit, June 6, 1994, Judge McGuinness (as she then was).

[33] *In the matter of Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill, 1999* [2000] 2 IR 321.

[34] O'Brien, L., and Dillon, B., *Private Rented: The Forgotten Sector* (Dublin: Threshold, 1982).

[35] Housing (Miscellaneous Provisions) Act, 1992, sections 16, 17 and 18. For a detailed analysis see Ryall, Á., "Recent Developments in Residential Tenancy Law"

system of registration was also introduced whereby a landlord is required to register each tenancy with the local authority.[36] Furthermore, the old common law remedy of distress, whereby a landlord was entitled to seize a tenant's property in lieu of rent due, was abolished.[37] Tax relief for rent paid by all private rented tenants was introduced for the first time in 1995.[38] These various measures were collectively described by the DoE as the *Tenants' Charter*[39] or the *Charter for Rented Housing*.[40]

However, the *Charter* did not address the core issue of lack of real security of tenure. The shortcomings of the law governing security of tenure were highlighted graphically in 1993 when a number of long-standing tenants (some of whom were elderly) who lived in apartments owned by a State company (Irish Life Assurances plc.) were served with notice to quit before they had managed to reach the 20 year threshold prescribed in the 1980 Act. This episode generated considerable media interest at the time. Following pressure from Threshold and a number of other tenants' representatives, the Department of Justice was forced to establish a Working Group to consider the security of tenure issue in November 1993. The Group finally reported in July 1996, and made a number of recommendations, including proposed amendments to the 1980 Act. No action was taken on foot of those recommendations.

The period of unprecedented house price inflation which began in the mid-1990s had a dramatic impact on rent levels. By the late 1990s, rent affordability and lack of protection for tenants generally, was a live political issue. In June 1999, following a period of intense and sustained lobbying on the part of voluntary and community groups representing tenants' interests (with Threshold leading the campaign), the Government was forced to establish an expert Commission on the Private Rented Residential Sector. The Commission was charged with examining the operation of

---

(Part I) (1997) 2 *Conveyancing and Property Law Journal* 51 and (Part II) (1998) 3 *Conveyancing and Property Law Journal* 4.

[36] Housing (Miscellaneous Provisions) Act, 1992, section 20, and regulations made there under.

[37] Housing (Miscellaneous Provisions) Act, 1992, section 19.

[38] Prior to this, only tenants over the age of 55 were entitled to claim rent relief.

[39] *Social Housing – The Way Ahead* (DoE, May 1995) at 35.

[40] Title of information leaflet for landlords and tenants published by the DoE (revised edition, March 2001).

the sector and was asked to produce proposals for reform. It reported in July 2000 and made a number of important, but moderate recommendations to improve security of tenure and rent certainty. In preparing its report, the Commission considered the regulatory schemes applicable in a number of jurisdictions including: the Netherlands, New Zealand and certain Australian and Canadian states.[41] A summary of the Commission's main recommendations is available at www.environ.ie/housindex.html. The Commission's recommendations are examined in detail elsewhere.[42] For present purposes it is sufficient to note that the majority of its recommendations were accepted by the Government in January 2001[43] and legislation designed to give effect to these recommendations is forthcoming.[44] In preparing the draft legislation, the DoE had the benefit of the detailed consultation papers published in 2002 by the Law Commission for England and Wales on aspects of the regulation of the private rented sector in that jurisdiction.[45]

Residential Tenancies Bill 2003

The Residential Tenancies Bill 2003 was published on June 3, 2003. The text of the Bill, and the explanatory memorandum, is available at http://www.gov.ie/oireachtas/frame.htm. The new Bill closely follows the recommendations made by the Commission on the Private Rented Residential Sector.

When introducing the Bill, Environment Minister Martin Cullen described it as a "Consumers' Bill" designed to bring about "a major and overdue advancement in tenants' rights." Beyond protection for tenants, the underling aim of the new

---

[41] Galligan, Y., *et al.*, *The Private Rented Sector Abroad: A report on the comparative position in Australia, Canada, The Netherlands, New Zealand and the United Kingdom* (March 2000).

[42] Ryall, Á., "Residential Tenancy Law: An Assessment of the Recommendations of the Commission on the Private Rented Residential Sector" (2001) 6 *Conveyancing and Property Law Journal* 5.

[43] "Molloy announces Major Reforms of the Private Rented Residential Sector" Department of the Environment and Local Government, Press Release, January 5, 2001.

[44] See Ryall, Á., "Reform of Residential Tenancy Law: A Critical Appraisal of Recent Government Proposals" (2001) 6 *Conveyancing and Property Law Journal* 31.

[45] *Renting Homes 1: Status and Security – A Consultation Paper* (March 2002) and *Renting Homes 2: Co-occupation, Transfers and Succession* (August 2002). Both papers are available in pdf format at www.lawcom.gov.uk.

legislation is to underpin the development of a more attractive, professional and efficient private rented sector.

At the time of writing, October 2003, the Bill is slowly making its way through the legislative process. The core features of the Bill are as follows:

Security of tenure

The Bill proposes to improve security of tenure for tenants by providing that where a tenant clocks-up 6 months continuous occupation of a dwelling to which the Bill applies, that tenant will qualify for a new statutory tenancy lasting for a further period of 3½ years (i.e. a 4-year tenancy in total). This statutory tenancy is to be known as a "Part 4 tenancy" (because the provisions dealing with this new form of statutory tenancy are found in Part 4 of the Bill). During the first 6 months of a tenancy, a landlord will be free to terminate the tenancy without specifying a reason. However, once a tenant has qualified for a Part 4 tenancy, a landlord may only seek to terminate where certain carefully defined conditions are satisfied. The prescribed "grounds for termination" are set out in a Table to section 34 of the Bill and include: where the tenant is in breach of the tenancy agreement (e.g. non-payment of rent, anti-social behaviour etc.); where the dwelling becomes overcrowded; where the landlord wishes to sell, substantially refurbish or change the use of the premises; or where the landlord requires the premises for his own use, or for use by a family member. Section 55 of the Bill envisages a remedy in damages for abuse of the section 34 termination procedure where a tenant is unjustly deprived of possession of the dwelling by the landlord (up to a statutory maximum of E20,000).

The initial 6 month qualifying period, is, in effect, a "probationary period" during which the landlord is given the opportunity to "vet" the tenant's performance. The scheme envisaged by the Bill is cyclical in nature. A tenant may therefore qualify for a series of consecutive Part 4 tenancies. Where a landlord does not serve notice to quit before the expiry of a Part 4 tenancy, a new "further Part 4 tenancy" will come into existence. The date of commencement of this new tenancy is the date of expiry of the previous Part 4 tenancy. During the first 6 months of the "further Part 4 tenancy", the landlord remains free to terminate without specifying a reason.

However, once the initial 6 months have passed (without the landlord serving notice), the statutory protection kicks-in again for a further period of 3½ years. This cycle may continue on a rolling-basis.

Notice to quit/notice of termination

The Bill proposes to make substantial changes to the periods of notice to quit required to be given in order to validly terminate a tenancy (Part 5 of the Bill). In effect, the period of notice required will depend on length of tenancy and will range from 28 days to 112 days (see the Table to section 65 of the Bill). Special, shorter periods of notice will apply in cases where a landlord, or tenant, is in breach of the tenancy agreement. The formalities to be complied with in drafting a notice of termination are also tightened considerably in the Bill (section 61). In a largely cosmetic change, the Bill refers to "notice of termination" throughout, rather than the current vernacular "notice to quit". It should also be noted here that the remedies of forfeiture and re-entry are to be abolished and, once Part 5 of the Bill comes into force, tenancies may only be terminated in line with the procedure set out in that Part (section 57).

Rent and rent reviews

Part 3 of the Bill provides that the rent set for a tenancy may not exceed "market rent".[46] Once set, the rent cannot be reviewed more frequently than once in every 12-month period (unless there has been a "substantial change" in the nature of the accommodation provided under the tenancy). The various components of Part 3 aim to provide an element of rent certainty for tenants.

Other significant features of the draft legislation

Part 2 of the Bill sets out standard tenancy obligations for landlords and tenants. These will apply to all tenancies falling within the scope of the Bill. The new provisions will override any conflicting covenants in existing tenancy agreements.

[46] "Market rent" is defined in section 24(1) of the Bill as follows:
… the rent which a willing tenant not already in occupation would give and a willing landlord would take for the dwelling, in each case on the basis of vacant possession being given, and having regard to-
(a) the other terms of the tenancy, and

Section 14 of the Bill prohibits a landlord from "penalising" a tenant where a tenant has taken certain steps to enforce his rights. Section 15 deals specifically with the landlord's obligations to certain third parties that could be "potentially affected" by the tenant's breach of covenant/obligations. Section 16(h) expressly requires the tenant not to behave within the dwelling "in a way that is anti-social" (this concept is very broadly defined in section 17(1) of the Bill). Part 7 of the Bill introduces a new and more onerous system of registration of tenancies.

The Private Residential Tenancies Board

One of the most interesting and innovative elements of the Commission's recommendations was the proposal that a Private Residential Tenancies Board (PRTB) should be established with a view to providing an informal, cheap and speedy forum for resolving disputes arising in the course of the landlord tenant relationship. The Board was launched on a pilot basis in October 2001. A voluntary mediation service for landlords and tenants, operated by the Board, was established on a pilot basis in the Dublin area in November 2002,[47] and this service was extended nation-wide in February 2003.[48] The Residential Tenancies Bill will place the Board and its dispute resolution service on a firm statutory footing (Part 8 of the Bill). Once the Board is formally established on a statutory basis, it will take over the current role of the courts in most residential tenancy disputes. It is anticipated that the Board may receive in the region of 7,500 referrals annually (once it is up and running on a formal statutory basis).[49]

In addition to its primary dispute resolution function, the Board will also have a number of other important roles, including, for example, administering and enforcing the new registration system established under Part 7; publishing guidelines on rent

---

(b) the letting values of dwellings of a similar size, type and character to the dwelling and situated in a comparable area to that in which it is situated.

[47] "Cullen Launches New Landlord and Tenant Mediation Service" Department of the Environment and Local Government, Press Release, November 6, 2002.

[48] "Ahern Announces National Mediation Service" Department of the Environment and Local Government, Press Release, February 2, 2003.

[49] "The Private Residential Tenancies Board", presentation by Brian O'Neill, Director, at a seminar *Residential Tenancies Bill 2003* organised by Threshold, Dublin, September 16, 2003.

levels; producing a precedent for a model lease; monitoring and policy advice; and undertaking research on issues of relevance to the private rented sector.

It should also be noted that the Bill proposes to prospectively abolish the right to claim a new tenancy after 20 years occupation pursuant to Part II of the Landlord and Tenant (Amendment) Act, 1980 (above). However, certain transitional arrangements are to be put in place to protect tenants who are already close to acquiring rights under this legislation.

The likely implications of the forthcoming legislation for landlords and tenants is considered in more detail elsewhere.[50]

It is important to note that the Bill may be subject to amendments as it makes its way through the legislative process. At the time of writing, it is not anticipated that the Bill will be enacted before the end of 2003. Furthermore, it is likely that the various elements of the forthcoming legislation will be brought into force gradually, with a view to giving landlords and tenants time to familiarise themselves with the new rules.

The questionnaire is therefore completed on the basis of existing landlord and tenant law as at October 1, 2003.

Recent developments in terms of the right to property

Although Ireland has ratified the European Convention on Human Rights (ECHR), the Convention is not (at the time of writing) directly enforceable in the Irish courts.[51] However, this position is set to change. The European Convention on Human Rights

[50] Ryall, Á., "Residential Tenancies Bill, 2003: A commentary from the tenant's perspective" (2003) 8 *Conveyancing and Property Law Journal* 54-59 and Territt, J., "Residential Tenancies Bill, 2003: A commentary from the landlord's perspective" (2003) 8 *Conveyancing and Property Law Journal* 60-63. See further Buchanan, L., "Residential Tenancies Bill: a balanced bill" *Cornerstone* (Dublin: The Homeless Agency) October 2003 at 11-12 and McNamara, F., Residential Tenancies Bill: an unbalanced bill" *Cornerstone* (Dublin: The Homeless Agency) October 2003 at 13-15.

Act 2003 was enacted in June 2003. This Act aims "to enable further effect to be given, subject to the Constitution, to certain provisions of the [Convention]", and is scheduled to come into effect on December 31, 2003.[52] Under the particular model of "incorporation" adopted by the Government, the Convention remains subordinate to the Constitution. Essentially, section 2 of the Act requires that the Irish courts, in so far as is possible, interpret and apply any statutory provision or rule of law (including common law) in a manner that is compatible with the State's obligations under the Convention. "Every organ of the State" is required to perform its functions in a manner compatible with the Convention (section 3) and a person who has suffered injury, loss or damage as a result of a contravention of this obligation may bring an action for damages.[53] Section 5 provides that the High Court or Supreme Court may, in certain circumstances, make "a declaration of compatibility" (i.e., a declaration that a particular statutory provision or rule of law is incompatible with the State's obligations under the Convention). There is the possibility of an *ex gratia* compensation payment where a person claims to have suffered injury, loss or damage as a result of any such incompatibility.

In a separate development, the All-Party Oireachtas Committee on the Constitution (a Parliamentary Committee) is in the process of completing a review of the private property provisions. A number of recommendations had been presented by the Constitution Review Group back in 1996, but were not acted upon.[54] The Committee is examining Article 40.3.2 and Article 43 in order to determine:

---

[51] *Doyle v. Commissioner of An Garda Síochána* [1999] 1 IR 249 at 269 and *Adam and Iordache v. Minister for Justice, Equality and Law Reform* [2001] 3 IR 53 at 81.

[52] European Convention on Human Rights Act 2003 (Commencement) Order 2003 (S.I. No. 483 of 2003). For commentary on the likely impact of the Act on Irish law generally, see the various papers presented at a conference *New Human Rights Legislation,* October 18, 2003 available at www.lawsociety.ie.

[53] The concept of "organ of the State" is defined in section 1(1) of the Act as including:

> … a tribunal or any other body (other than the President or the Oireachtas [Parliament] or either House of the Oireachtas or a Committee of either such House or a Joint Committee of both such Houses or a court) which is established by law or through which any of the legislative, executive or judicial powers of the State are exercised.

[54] *Report of the Constitution Review Group* (Dublin: Stationary Office, 1996).

> … the extent to which they are serving the good of individuals and the community, with a view to deciding whether changes in them would bring about a greater balance between the two.

It remains to be seen what changes the Committee will propose and whether steps will be taken to amend the existing provisions in the event of any such recommendation. Any proposed amendments to these constitutional provisions would require prior approval in a referendum.[55]

Law Reform Commission Landlord and Tenant Project

This project was established in July 2001 with the aim of reform and consolidation of landlord and tenant law. A detailed Consultation Paper on the law governing business tenancies was published in March 2003.[56] As regards residential tenancy law, while the Commission will not review the issues previously considered by the expert Commission on the Private Rented Residential Sector (above) it is anticipated that the Commission will soon turn to an examination of general and specific issues that were not addressed by the expert Commission.[57]

[55] Constitution of Ireland, Article 46 (Amendment of the Constitution).
[56] Law Reform Commission, Consultation Paper *Business Tenancies* (March 2003) LRC CP21-2003 available at www.lawreform.ie.
[57] Ibid., at 2-3.

b) Basic structure and content of current national law

aa) Private tenancy law

Sources of law

As noted in the introductory section, Irish landlord and tenant law comprises a complex mix of common law and both early and modern statute law. Landlord and tenant law is generally described as a particular sub-category of land law (or property law). In terms of *specific* statutes dealing with landlord and tenant law, the key modern statutory provisions include: the Landlord and Tenant (Amendment) Act, 1980; the Housing (Private Rented Dwellings) Acts, 1982-1983 and the Housing (Miscellaneous Provisions) Act, 1992 (which introduced the *Charter for Rented Housing*). Aspects of the law of contract and the law of torts (which again comprise a mix of common law and statute law) are also relevant to the relationship of landlord and tenant (e.g. the rules on contractual capacity; the doctrine of frustration; the tort of private nuisance and the tort of negligence). Other relevant areas of law include: equality law; consumer protection law; fire law/building control; the rules governing succession and planning and development law. As regards consumer protection law, the most relevant provisions are the rules governing unfair terms in consumer contracts. The European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995[58] purport to implement Directive 93/13/EEC on unfair terms in consumer contracts[59] into Irish domestic law. The English High Court recently ruled that the directive, and the English implementing regulations,[60] apply to contracts for the transfer of an interest in land, including tenancy agreements.[61] The Office of Fair Trading (UK) has produced detailed guidance notes on unfair terms in tenancy agreements in tenancy agreements[62] and an information leaflet on "unfair tenancy terms". No equivalent literature has been produced by the Office of the Director of Consumer Affairs (ODCA). The Director is responsible for enforcing the Irish regulations. There appears to be very little awareness of the potential application of

[58] S.I. No. 27 of 1995, as amended by the European Communities (Unfair Terms in Consumer Contracts) (Amendment) Regulations, 2000 (S.I. No. 307 of 2000).
[59] [1993] OJ L 95/29.
[60] Unfair Terms in Consumer Contracts Regulations 1999 (S.I. 1999 No. 2083).
[61] *Khatun v. London Borough of Newham and Office of Fair Trading*, unreported, High Court, October 10, 2003. This case is currently under appeal.
[62] *Guidance on unfair terms in tenancy agreements* OFT 356 (November 2001).

the directive, and the implementing regulations, in the particular context of standard form tenancy agreements in Ireland.

Disputes over rental deposits (up to a maximum of E1,269.74) may be referred to the Small Claims Court, which is essentially a forum attached to the District Court (the lowest court in the hierarchy of courts) for dealing with consumer disputes. Lodging a small claim currently costs E9.

Tenancy and licence distinguished

It is important to distinguish between tenancies and licences. A tenancy creates a property interest in the demised premises whereas a licence is a mere permission entitling the occupier to enter on and use the premises in question in accordance with the terms of the licence agreement. The importance of the distinction lies in the fact that certain statutory protections (such as the rights arising under the *Charter for Rented Housing* and the right to apply for a new tenancy pursuant to the scheme set down in the 1980 Act) only apply to tenancies. It should also be noted here that the Residential Tenancies Bill 2003 will only apply to tenancies.[63] It is not uncommon for landlords to offer licences instead of tenancies in an attempt to avoid statutory controls. However, the label that the parties choose to put on their agreement is not conclusive. The courts will search for the real nature of the bargain. In practice, it can be very difficult to determine whether a particular factual matrix operates to create a tenancy or a licence. The courts have developed a series of guidelines or indicators with a view to determining whether or not a tenancy exists. All of the Irish case law on this topic concerns business tenancies and is therefore of limited value in the residential context. The key indicator of a tenancy is whether or not the occupant enjoys "exclusive possession" of the demised premises (i.e. possession exclusive of the landlord). The distinction between lease and licence in Irish residential tenancy

[63] See section 3 of the Bill.

law is examined in detail elsewhere.[64] A recent High Court decision where the point was considered in some detail is *Smith v. CIÉ.*[65]

Categories of residential tenancies and basic rules

Apart from leases for a period greater than one year (which would be uncommon in practice – the usual period being 12 months), there is no legal requirement that a tenancy agreement must be in writing. However, the Housing (Rent Books) Regulations, 1993[66] provide that certain basic terms of the tenancy, including: the parties; the premises; the term; the rent and any deposit paid, must be recorded in a rent book, or other similar document.

Residential tenancies may be sub-divided into a number of categories. First, fixed term tenancies, usually for a period of 6 or 12 months. Such tenancies may be renewed on expiration of the original term where the parties so agree. A survey of 1,280 registered landlords in Dublin carried out by Threshold in October/November 1999, revealed that 80% of the landlords surveyed used fixed term tenancies.[67] A more recent survey conducted on behalf of the Irish Property Owners Association (the main body representing landlord interests), indicated that only 57% of tenants claimed to have written tenancy agreements, with 42% of the tenants surveyed indicating that the length of their lease ranged between 6 and 12 months.[68] The second category of residential tenancies comprises periodic tenancies. The most common form of periodic tenancy in the private rented sector is the weekly or monthly periodic tenancy. A weekly tenancy arises where the rent is calculated on a weekly basis. A tenancy is a monthly tenancy where the rent is calculated on a monthly basis. These

---

[64] Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998), paras. 2.06-2.19 and 2.26-2.38 and Ryall, Á., "Lease or Licence?: The Contemporary Significance of the Distinction" (2001) 6 *Conveyancing and Property Law Journal* 56.

[65] Unreported, High Court, October 9, 2002, Peart J.

[66] S.I. No. 146 of 1993.

[67] Memery, C., and Kerrins, L., *Investors in the Private Rented Residential Sector: A Profile of Landlords in Dublin City* (March 2000) at 6. For further detail see Memery, C., and Kerrins, L., *Who Wants to be a Landlord?: A Profile of Landlords in Dublin City* (Dublin: Threshold, November 2001).

[68] *Private Rental Sector - Tenant Research,* research undertaken by Millward Brown Irish Marketing Surveys Ltd. for the Irish Property Owners Association (May 2002).

tenancies are not created for any specific or fixed period. Rather, the landlord may give notice at any time, without specifying a reason. The minimum period of notice is 4 weeks and notice must be given in writing.[69] It appears from observation and from anecdotal evidence that periodic tenancies are more common at the lower end of the market, while leases predominate at the middle to upper end. Statutory tenancies are a further distinct category and there are two main types of statutory residential tenancy. First, a statutory tenancy arising under the 1980 Act (very rare in practice for residential tenancies) and a statutory tenancy under the scheme of the 1982-1983 Acts (a declining category of tenancy).

Regulation of Business Tenancies

Business tenancies are regulated separately. The main provisions are found in the Landlord and Tenant (Amendment) Act, 1980, as amended by the Landlord and Tenant (Amendment) Act, 1994. However, a number of provisions of general landlord and tenant law apply to both business and residential tenancies. The regulation of business tenancies is currently under review by the Law Reform Commission and a detailed Consultation Paper suggesting major reforms was published in March 2003.[70]

bb) Social regulation affecting private tenancy contracts

A brief account of the various mechanisms by which the State provides, or assists in the provision of, social housing was presented in the introductory section. The main source of social housing is public rented housing provided by local authorities pursuant to the Housing Acts 1966-2002. Generally speaking, local authority tenants occupy their dwellings as weekly periodic tenants. The contract is usually reduced to writing. In strict legal terms these tenants do not enjoy any measure of security of tenure as the local authority landlord may terminate the tenancy by serving 4 weeks written notice at any time. In practice, however, local authority tenants who pay the rent and observe the other terms of their tenancy agreement enjoy long-term security of tenure. As noted earlier, a tenant of at least one-year's standing may apply to the

[69] Housing (Miscellaneous Provisions) Act, 1992, section 16.
[70] See n. 56 above.

local authority to purchase the dwelling under the terms of the Tenant Purchase Scheme.

There is an element of overlap between the legal rules applicable to public and private residential tenancies. In particular, the provisions of the 1992 Act governing minimum notice to quit, rent books and minimum standards also apply to local authority tenancies. Section 62 of the Housing Act 1966 (as amended) prescribes the procedure to be followed where a local authority seeks to regain possession of a dwelling. This section provides for a summary procedure by which the local authority may regain possession quickly, once certain formalities are complied with. The Housing (Miscellaneous Provisions) Act, 1997 created new remedies to deal with "anti-social behaviour" in the context of dwellings let by local authorities and voluntary and co-operative housing associations.[71]

As local housing authorities are public bodies, administrative law/public law governs decisions taken by the authority. A decision taken by a local authority may be challenged on the usual public law grounds, for example, that the authority did not have the power to make the contested decision (*ultra vires*) or on the basis that the authority did not observe the rules of fair procedures/constitutional justice.

Incentives and subsidies

Tenants

Tenants living in private rented accommodation are entitled to claim rent relief. However, the amount of relief is small. In the case of a single person, the maximum relief is E254 for the 2003 tax year. Higher relief is available to tenants over the age of 55.

Landlords

The availability of generous tax incentives under the terms of various designated schemes (e.g. the urban renewal and town renewal schemes) was a major factor contributing to the expansion of the private rented sector in the 1990s. These

[71] See generally, Memery, C., and Kerrins, L., *Estate Management and Anti-Social Behaviour in Dublin* (Dublin: Threshold, 2000).

incentives continue to be available in certain designated areas throughout the State, but are due to expire on December 31, 2004.

As a general rule, interest paid on loans applied in the construction, purchase or repair of rented residential premises is tax deductible. The entitlement to this deduction was severely restricted in April 1998. The rationale behind this move was Government concern that investors were competing with first-time buyers in the house purchase market and contributing to house price inflation. The direct result of the restriction on tax relief was to put a squeeze on the supply of rented accommodation at a time when supply was already short, and only served to force rents to even higher levels. With the aim of encouraging landlords back into the market, the deduction was restored, subject to certain conditions, in the Finance Act, 2001, and restored generally in the subsequent Finance Act, 2002.

Relief is also available in respect of refurbishment of certain rented accommodation. A special tax incentive scheme is available to landlords who provide qualifying rented accommodation for students. "Rent-a-room relief" is available where a person lets a room (or rooms) in their principal private residence as residential accommodation, up to a maximum of E7,620 per annum. Certain expenses are allowable against rental income, including, for example, the cost of any service provided by the landlord; repairs; maintenance; insurance; management costs and legal fees. A landlord may also claim a wear and tear allowance based on the cost of furniture and fittings where the premises is furnished.

c) Summary account of "tenancy law in action"

General situation

Because of the general lack of security of tenure, tenants are not in a strong position when it comes to enforcing their (limited) rights. Where a tenant does not have the benefit of a fixed term contract, there is nothing to prevent a landlord from serving notice to quit or demanding a rent increase in retaliation for a complaint by a tenant. Obviously, tenants at the middle-to-upper end of the market have more bargaining power. However, in a climate where the supply of good quality, reasonably priced

rented accommodation is scarce (particularly in the main urban centres) tenants will be reluctant to risk antagonising their landlords.

Representative associations

The role of organisations representing landlords and tenants has developed considerably in recent years. There are two main players. First, Threshold, an active NGO and charity that provides a free housing advice service to both landlords and tenants. One of its objectives is to campaign for legislation providing for rent certainty and security of tenure for tenants. Secondly, the Irish Property Owners Association (IPOA), which is effectively an organisation representing landlords' interests. Both organisations had representatives on the expert Commission on the Private Rented Residential Sector and it is clear that both groups will campaign vigorously to see that their objectives and interests are protected in the forthcoming residential tenancy legislation.

The role of standard contracts

There are currently two standard form contracts available for use by landlords and tenants. The first was drafted by the Dublin Solicitors Bar Association (hereafter "DSBA") in the 1960s and is still commonly used by solicitors and landlords. Its terms are very pro-landlord and it is a long and complex document. It is not user-friendly from the point of view of either landlord or tenant. The DSBA drafted a modern standard form lease in 1999 (hereafter referred to as "the modern DSBA standard form tenancy agreement"). This is a far more balanced contract, which takes account of the rights and obligations created pursuant to the *Charter for Rented Housing*. Its terms are also drafted in clear and understandable language. The DSBA asked for Threshold's input when it was drafting this lease, and a number of Threshold's comments and recommendations are reflected in the final text. Threshold also produced a standard form rent book when the rent books regulations were first introduced in 1993. This model rent book has proved extremely popular and is widely used in practice.

Remedies

One of the greatest practical difficulties experienced by Irish landlords and tenants is that where things go wrong in the course of the landlord tenant relationship there is no general system of effective and efficient remedies. Attempting to enforce a claim through the courts can be a long and expensive process. Landlords frequently complain that the cost and delay involved in seeking a court order where, for example, a tenant fails to vacate the premises following termination of a tenancy, or fails to pay the rent due, is a serious problem. On the other hand, tenants often complain that there is no effective remedy where a landlord fails to take action on foot of a complaint by the tenant (the most common scenario being urgent repairs). Legal aid is not generally available in respect of landlord and tenant disputes. Section 28(9)(a) of the Civil Legal Aid Act, 1995 provides that legal aid shall not be granted in respect of certain "designated matters" including "disputes concerning rights and interests in or over land".[72]

Specific provision has been made for certain types of disputes, the most important being the Small Claims Court (which deals with disputes over deposits) and the Equality Tribunal which deals with complaints under the equality legislation. Apart from these specific cases, landlords and tenants depend on the general courts to uphold and enforce their rights. As noted earlier, one of the most significant recommendations made in the report of the Commission on the Private Rented Residential Sector was the proposed establishment of a Private Residential Tenancies Board to deal with landlord-tenant disputes. The Board is currently operating on a pilot basis. It will be put on a firm statutory footing in the forthcoming residential tenancies legislation. It is hoped that (assuming it is provided with adequate personnel and resources) the Board will deliver an effective dispute resolution process and deflect landlord and tenant disputes from the over-stretched courts system.

As regards enforcement of landlord and tenant legislation by public bodies, pursuant to the Housing (Miscellaneous Provisions) Act, 1992, local authorities are charged with enforcing the provisions governing rent books, minimum standards and

[72] There are some limited exemptions to this general rule. See Civil Legal Aid Act, 1995, section 28(9)(c)(i).

registration of rented dwellings. Where a landlord fails to respond satisfactorily to an enforcement notice served by the local authority, the authority may prosecute the landlord as failure to comply with the legislative requirements is a criminal offence. In practice, however, enforcement activity by under-staffed and under-resourced local authorities is not very intensive. Statistics published by the DoE reveals a very low level of enforcement activity.[73] However, the figures for 2002 do indicate a marked increase in the number of investigations carried out by local authorities compared with previous years. Prosecutions remain very rare. It is striking to note the high level of non-compliance with the registration requirement. As noted earlier, it is estimated that there are over 141,000 units of rented accommodation in the State. However, the most recent official statistics reveal that only 22,459 tenancies were registered as at June 30, 2003.[74] The Residential Tenancies Bill proposes to revoke the current registration regulations and put in place a new and more onerous registration system which will be operated and enforced by the Board (see Part 7 of the Bill).

[73] Details of enforcement activity are published by the DoE in the Annual Housing Statistics Bulletins. The most recent figures are presented in *Housing Statistics Bulletin December Quarter 2002* at 66.

[74] *Housing Statistics Bulletin June Quarter* 2003 at 47.

Notes:

1. The questionnaire is completed on the basis that the tenant has either a periodic tenancy or a fixed term lease, as these are by far the most common forms of private residential tenancy agreements in the Irish rental market. As noted in the introduction, special and very complex rules apply to statutory residential tenancies under the Landlord and Tenant (Amendment) Act, 1980 (which are extremely rare in practice) and statutory tenancies to which the Housing (Private Rented Dwellings) Act, 1982-1983 apply (a declining category of tenancy). These special situations are not addressed in the answers to the questionnaire.

2. Irish Statutes (Acts of the Oireachtas) and Statutory Instruments (S.I.s) are available at www.bailii.org or www.irishsstatutebook.ie.

3. Recent Irish High Court and Supreme Court decisions are available at www.bailii.org.

4. **Abbreviations:**

AC	Appeal Cases
All ER	All England Reports
DoE	Department of the Environment, Heritage and Local Government
DSBA	Dublin Solicitors Bar Association
IR	Irish Reports
ILRM	Irish Law Reports Monthly
ODCA	Office of the Director of Consumer Affairs
OFT	Office of Fair Trading
NLJ	New Law Journal
S.I.	Statutory Instrument
WLR	Weekly Law Reports

2. Questionnaire

<u>Question 1: Choice of the Tenant</u>

L offers an apartment for rent in a newspaper. T replies and shows interest. However, L rejects T after she tells him that she:

a) **has a husband and three children.**
b) **is a Muslim, and L is afraid of terrorism.**
c) **has a small dog.**
d) **is a hobby piano player and wants to play about 1 hour every evening from 8-9 pm.**
e) **does not have full capacity and is under custody.**

Does T have a claim against L?

<u>Variant</u>: In order not to lose any chances to get the apartment, T answers with a lie, which is later discovered by L. Can L avoid the contract for deceit or claim damages?

As a general rule, prospective landlords and tenants are free to choose the parties with whom they wish to deal. In fact, given the current state of the Irish housing market, where demand for rented premises far outstrips supply, it is generally a landlord's market. However, in certain specific cases, the law intervenes and constrains a prospective landlord's freedom of contract.

The most relevant piece of legislation here is the Equal Status Act, 2000, which prohibits direct and indirect discrimination on specified grounds, subject to certain exemptions.[75] The Act came into force on October 25, 2000. Nine "discriminatory grounds" are prescribed in section 3(2): gender; marital status; family status; sexual orientation; religion; age; disability; race (which embraces "race, colour, nationality or ethnic or national origins") and membership of the Traveller community.[76] Discriminating against a person as retaliation for the fact that s/he has taken steps to enforce their rights under the Act is also prohibited (section 3(2)(j)). The Act applies to *inter alia* the disposal of "any estate or interest in premises" (section 6(1)(a)) and

[75] The text of the Act is available at www.odei.ie.

[76] "Traveller community" as defined in section 2(1) of the Equal Status Act means:

> ... the community of people who are commonly called Travellers and who are identified (both by themselves and others) as people with a shared history, culture and traditions including, historically, a nomadic way of life on the island of Ireland.

so covers the provision of rented accommodation, whether by a public or private landlord.[77] The prohibition on discrimination does not apply in cases where the landlord (or a "near relative" of the landlord) resides, or intends to reside in the immediate future, in the demised premises and where the premises in question are "small premises" (defined as premises with accommodation for not more than three households or where there is not normally accommodation for more than six persons in addition to the landlord or near relative).[78] Another significant exemption arises where accommodation is let to a person of one gender and embarrassment or infringement of privacy can reasonably be expected to result from the presence of a person of another gender.[79]

Where a person believes that they have experienced unlawful discrimination, they may make a complaint to the Office of the Director of Equality Investigations (the ODEI - the Equality Tribunal).[80] The Tribunal is a quasi-judicial body with responsibility for investigating and determining claims of discrimination under the equality legislation. In terms of redress, an Equality Officer may make an award of compensation (up to E6,349) and/or order that a certain course of action be taken by a person or persons specified in the order. A separate body, the Equality Authority, provides free advice and assistance concerning rights under the equality legislation.[81]

(a) Subject to the exemptions noted above, T could lodge a complaint of unlawful discrimination with the Equality Tribunal on the basis of both the marital status and family status grounds. However, depending on the particular factual scenario, L may be able to establish that the primary reason for refusing to enter into a contract with T was based on the fact that the premises in question are not suitable for a family (for

[77] Note, however, that pursuant to section 6(6), certain public landlords (i.e. local housing authorities and voluntary and co-operative housing associations standing approved under section 6 of the Housing (Miscellaneous Provisions) Act, 1992) are not prevented from treating people differently based on: family size; family status; marital status; disability; age or membership of the Traveller community, in the context of housing accommodation.
[78] Section 6(2)(b) and 6(4).
[79] Section 6(2)(e).
[80] For further details see www.odei.ie.
[81] See www.equality.ie.

example by reason of over-crowding) if the premises comprised a small flat or apartment.[82]

(b) Discrimination on the grounds of both religion and race is prohibited pursuant to the Equal Status Act, subject to the exemptions noted in the introduction above. The fact that L claims to be afraid of terrorism is not recognised as a justification for discrimination.

(c) and (d) L is entitled to refuse to enter into a contract with T in both cases without

falling foul of any legal requirements. Both of the standard form tenancy agreements commonly used by landlords in practice (see general introduction) contain express terms prohibiting the keeping of pets, although it may be possible to come to an agreement with the landlord on this issue (the DSBA agreement makes provision for this at Clause 2.20). There is also a standard term in these agreements whereby the tenant undertakes not to cause a nuisance to any occupiers of the premises or any neighbours.

(e) Particular rules apply to contracts entered into by "minors".[83] Pursuant to section 2(1) of the Age of Majority Act, 1985, a person attains majority (or has full legal capacity) at the age of 18, or upon marriage. The general rule at common law is that a contract entered into by a minor is voidable.[84] However, this general rule is subject to certain exceptions, the most relevant of which (for present purposes) concerns contracts for "necessaries", a concept that has been held to include accommodation.[85] Whether or not a contract for necessaries is binding on the minor will depend on the particular circumstances of the case. McDermott cites authority for the proposition

[82] Consider, for example, *Cassidy and Wesemann v. Doherty*, Equality Officer's Decision No. DEC-S2003-40/41, delivered May 21, 2003 available at www.odei.ie.
[83] Irish law on the contractual capacity of minors is treated in detail in McDermott, P., *Contract Law* (Dublin: Butterworths, 2001) at paras. 17.04-17.43.
[84] McDermott, above, n. 83, at para. 17.07.
[85] McDermott, above, n. 83, at para. 17.11 (see in particular the authorities cited at n. 22 of this para. concerning "board and lodging")

that if the goods or services in question are provided to the minor "on unfavourable terms", then the contract may not be enforceable.[86]
Pursuant to section 3(3) of the Equal Status Act, treating a person who has not reached the age of 18 differently to another person does not amount to discrimination on the age ground.

L is therefore entitled to refuse to rent the premises to a T who has not reached the age of 18 without falling foul of the Equal Status Act.

Disability

Apart from minority, another reason why T may not have full capacity is by reason of disability. The general rule here is that a person of unsound mind has capacity to enter into a contract and will be bound by it unless the existence of the disability was known to the other party.[87] In the event that the other party was not aware of the disability, there is early Irish authority to the effect that a "fair and *bona fide*" contract will not be set aside by the courts.[88] Where a person of "unsound mind" is made a ward of court, and put under the care of a "committee", then only his "committee" is entitled to enter into a contract on his behalf.[89]

The Equal Status Act prohibits discrimination on the grounds of disability (this concept is defined broadly in section 2(1) of the Act).

It should be noted that, to date, the Equality Tribunal has only considered one case concerning alleged discrimination in the specific context of access to housing.[90] It is also worth noting that, in practice, a common reason for private landlords discriminating against tenants is the fact that a tenant's main source of income is a social welfare payment and/or the tenant is claiming rent supplement from the local

[86] McDermott, above, n. 83, at para. 17.12.
[87] McDermott, above, n. 83, at para. 17.44 citing *Imperial Loan Co. v. Stone* [1892] 1 QB 599.
[88] McDermott, above, n. 83 at para. 17.48, citing *Hassard v. Smith* (1872) IR 6 Eq 429.
[89] See Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at para. 6.15.
[90] See above, n. 82.

Health Board (i.e. employment status/financial status). Such discrimination is not prohibited under the equality legislation.

Variant

As a general rule, where a false representation is made knowingly (fraudulent misrepresentation) and it has the result of inducing another party to enter into a contract, the party who was misled may sue for rescission of the contract and/or may sue for damages in the tort of deceit.[91]

Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22 (the race directive).

In terms of "formal" implementation, it appears that the provisions of the Equal Status Act, 2000 adequately transpose the requirements of the directive into Irish domestic law, at least in so far as access to housing is concerned. Further details on forthcoming Irish measures to implement the directive were not available at the time of writing.[92]

Additional remarks

Article 40.1 of the Irish Constitution sets out a fundamental right to equal treatment in the following terms:

> All citizens shall, as human persons, be held equal before the law.
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral function.[93]

The equality guarantee may be deployed to challenge a particular legislative provision on the grounds that it is unfairly discriminatory. It is clear that Article 40.1 may be

[91] See generally, McDermott, P., *Contract Law* (Dublin: Butterworths, 2001), chapter 13 on misrepresentation. On the tort of deceit see McMahon, B., and Binchy, W., *Law of Torts* (3rd ed.) (Dublin: Butterworths, 2000), chapter 35.

[92] See generally Department of Justice, Equality and Law Reform, *Annual Report, 2001* at 39-41.

[93] On this provision generally see Hogan, G., and Whyte, G., *Kelly: The Irish Constitution* (3rd ed.) (Dublin: Butterworths, 1994) at 712-743, in particular 716-717, where the difficult question of "addressees of the equality principle" is considered. Article 40.3 (personal rights) also has potential relevance in the area of equality see *Murtagh Properties Ltd. v. Cleary* [1972] IR 330.

invoked against the State and against public authorities (including local housing authorities in their capacity as "public" landlords). Since the landmark decision of the Supreme Court in *Meskell v. CIÉ*,[94] it is accepted that an action for damages in respect of the breach of a constitutional right may lie against parties other than the State (i.e. constitutional rights have horizontal effect in certain cases).[95] However, the specific question of whether or not the equality guarantee could be invoked by a tenant to argue that alleged discrimination on the part of a private landlord is unconstitutional has not been considered by the Irish courts to date.[96]

As noted in the introduction to this report, the European Convention on Human Rights Act 2003 is due to come into force on December 31, 2003. Article 14 of the Convention prohibits discrimination. It remains to be seen whether the Irish courts will accept that the 2003 Act enables certain Convention provisions to have "indirect horizontal effect."[97] There have been some interesting developments in this direction in the United Kingdom following the enactment of the Human Rights Act, 1998.[98]

[94] [1973] IR 121.
[95] See also *Conway v. INTO* [1991] 2 IR 305.
[96] See Casey, J., *Constitutional Law in Ireland* (3rd ed) (Dublin: Round Hall Sweet & Maxwell, 2000) at 474-475 and Forde, M., *Employment Law* (2nd ed) (Dublin: Round Hall Sweet & Maxwell, 2001) at 9-16.
[97] This expression is borrowed from a paper entitled "The European Convention on Human Rights Act, 2003: What that Act will Mean", delivered by the Minister for Justice, Equality and Law Reform at Law Society/Human Rights Commission Conference *New Human Rights Legislation*, Dublin, October 18, 2003. Paper available at www.lawsociety.ie.
[98] *Douglas v. Hello!* [2001] 2 All ER 289 and *Venables v. News Group Newspapers Ltd*. [2001] 1 All ER 908.

Question 2: Sharing with Third Persons

L rents an apartment to T. After some months, T wants to take into the apartment:

a) her husband and children.
b) her boyfriend.
c) her homosexual partner.
d) her parents.

Is this possible against the will of L? If not, what are L's remedies?

Variant 1: T dies. The persons listed under a) – c), who were sharing the house with T during the last years, want to continue the contract with L under the same conditions.

Variant 2: Students' house: From the very beginning the apartment was inhabited by a group of students with L's consent. However, the contract was concluded only between L and T, who is one of the students and was selected by L because she had the best financial background. After the departure of one of the students from the house, T wants to accept another student called A. Is this possible against the will of L, who does not like A?

Generally speaking, T is free to invite other persons to come and live in the apartment. The status of such persons *vis-à-vis* T (i.e. husband; boyfriend, partner etc.) is irrelevant. Such persons would usually be classified as guests/licencees. It must be noted, however, that in the case of a periodic tenancy, it is open to L to serve notice to quit where s/he is unhappy with the arrival of any new occupants and this would be L's remedy. In a periodic tenancy situation, L is not required to specify any reason for giving notice to quit.

Where there is a written lease or tenancy agreement, there is usually a specific covenant preventing T from *inter alia* sharing possession of the premises without first obtaining the landlord's written consent. The modern DSBA standard form tenancy agreement (see introduction) contains a clause obliging the tenant to "use the property as a residence only for the named tenant and his dependants."[99] However, a subsequent clause in this lease provides *inter alia* that T is not entitled to "assign

[99] Clause 2.17. The explanatory memorandum to the lease explains the purpose of this clause in the following terms:

> The wording of this clause is intended to prohibit the tenant from taking in lodgers or paying guests. It is also intended to prohibit more than one family from occupying the property.

sublet, *share* or part with the possession of the whole or any part of the property" (emphasis added).[100]

In the event of breach of covenant by T, it would be open to the landlord to take steps to forfeit the lease, assuming that the lease contains a standard forfeiture and re-entry clause.[101] The older DSBA standard form lease contains such a clause. Certain pre-conditions apply before L may forfeit in the case of breach of covenant other than non-payment of rent. Pursuant to section 14 of the Conveyancing Act, 1881, L is obliged to serve notice (in effect a "warning notice"), on T specifying the breach complained of and giving T a reasonable time from the service of the notice to remedy the breach. In the event of T failing to comply, L may proceed to forfeit the lease, usually by issuing ejectment proceedings. It is possible for T to apply to the court for relief against forfeiture. The court has a discretion to grant relief depending on the conduct of the parties and the particular circumstances of the case.[102]

The modern DSBA standard form tenancy agreement provides that in the event of T's breach of covenant, L may terminate the tenancy by serving at least 4 week's notice (Clause 4.1(ii)).

Public law requirements concerning available space for each inhabitant of a dwelling

Section 63 of the Housing Act, 1966 sets out a statutory definition of "overcrowding" for the purposes of that Act (i.e. where housing authorities are assessing housing need for the purpose of determining priority for entitlement to public housing). Section 63 provides that a house (essentially any building used or suitable for use as a dwelling) is deemed to be overcrowded where at any time:

> … the number of persons ordinarily sleeping in the house and the number of rooms therein either –
> (a) are such that any two of those persons, being persons of ten years of age or more of opposite sexes and not being persons living together as husband and wife, must sleep in the same room, or

[100] Clause 2.26.
[101] On the remedy of forfeiture generally see Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998), chapter 24.
[102] Ibid., at paras. 24.19-24.24.

(b) are such that the free air space in any room used as a sleeping apartment, for any person is less than [400] cubic feet … .

L's entitlement to look for higher rent in case of increased occupancy

As regards L's entitlement to seek a higher rent on the basis that the usage of the apartment will be higher on account of an increased number of persons living there, the answer depends on the terms of the tenancy agreement. In the case of a periodic tenancy, L is entitled to seek a rent increase at any time, without specifying a reason. If T was not agreeable to a rent increase, L could give notice. Where there is a fixed term tenancy, the rent is usually fixed for the duration of that term, so L may not unilaterally seek an increase until the expiry of the tenancy. However, it would be open to the parties to agree to a rent increase in light of increased occupancy.

Variant 1: In the event of T's death, the general rules of succession apply. The tenancy vests in T's personal representatives pending distribution of T's estate.[103] In the case of a periodic tenancy, it is open L to give notice to quit, at any time, terminating the tenancy without giving a reason. L may be happy, of course, to enter into a new tenancy agreement with any remaining occupants on the termination of the original tenancy, but L is under no obligation to do so. The terms of any new tenancy would fall to be determined between the parties.

In the case of a fixed term tenancy, L is not entitled to terminate the tenancy except in the case of breach of covenant. However, L is not under any obligation to renew the tenancy at the end of the fixed term. L may be happy to enter into a new tenancy agreement with any remaining occupiers on the expiry of the original tenancy, but L is under no obligation to do so. The terms of any new tenancy would fall to be determined between the parties.

Variant 2: In the case of a periodic tenancy, L is entitled to give notice to quit terminating the tenancy without giving any reason. So, in this particular scenario, L could simply give notice terminating the tenancy if he was not happy with the new

[103] See generally, Spierin, B., *The Succession Act 1965 and Related Legislation: A Commentary* (Dublin: Butterworths, 2003).

student. In practice, it is very unlikely that T would put the tenancy at risk by insisting on a new student of whom L did not approve.

In the case of a fixed term tenancy, there is usually a covenant prohibiting T from sharing possession of the premises, although it may be possible for L and T to come to some agreement on this issue (the actual terms of the original agreement will be determinative here). Where there is a covenant in the lease prohibiting T from sharing possession of the premises, and T goes ahead and makes an arrangement with A, without L's prior agreement, this would amount to a breach of covenant and would entitle L to commence the forfeiture procedure (assuming the lease contains the standard forfeiture and re-entry clause). On the forfeiture procedure see above. The modern DSBA standard form tenancy agreement provides that in the event of breach of covenant, L may terminate the tenancy by giving at least 4 week's notice.

On the particular case of sub-letting see Q. 3 below.

Question 3: Sub-renting
Does, and if yes under what conditions, T possess the right to sub-rent a room in his apartment to S? Can T make the permission conditional on an increase of the rent? What are L's rights if T sub-rents a room without permission (termination, damages)?

In the case of a periodic tenancy, T could sub-let a room (unless there was a prior agreement between the parties against sub-letting) but L has the right to terminate the tenancy by serving notice to quit without giving a reason if he is unhappy about the sub-let. The result is that, in practice, it would be unwise for T to sub-let without obtaining L's prior approval. Also, L may seek a rent increase at any time (subject to giving one week or one month's notice of the increase, depending on whether it is a weekly or a monthly periodic tenancy) without having to specify a reason. So there is nothing to stop L making his consent to a sub-lease conditional on a rent increase.

In the case of a fixed term tenancy, there is usually a standard covenant prohibiting T from sub-letting without first obtaining L's written consent. However, pursuant to section 66 of the Landlord and Tenant (Amendment) Act, 1980, any such covenant in a lease of "a tenement" (defined in section 5 of the 1980 Act) is subject to an important statutory proviso that L's consent "shall not be unreasonably withheld"

(section 66(2)(a)). Were L to withhold consent, T could challenge L's decision on the basis that was "unreasonable". The onus is on T to establish unreasonableness. The test to be applied in determining this issue is an objective one - what view would a reasonable landlord take of T's request?[104]

Subject to the proviso articulated in section 66(2)(a) noted above, if T sub-lets a room without first obtaining the requisite permission, then T would be in breach of covenant. On L's remedies in the event of breach of covenant see Q. 2 above. It is also open to L to seek an injunction to restrain a breach of covenant.

[104] See, for example, *OHS Ltd. v. Green Property Co.* [1986] IR 39; *Wanze Properties (Ireland) v. Mastertron Limited* [1992] ILRM 747 and *Gunne Estate Agents (Dublin) v. Pembroke Estates Management Limited*, unreported, Circuit Court, May 15, 2000, Judge Buckley.

Question 4: Formal Requirements and Registration

a) **Does the tenancy contract require a specific form (e.g. in writing) – if yes, what is the rationale of this requirement? What is the consequence if this form is not observed?**
b) **If an oral contract is valid, are there any additional requirements to be satisfied to render it enforceable before a court?**
c) **Does the contract need to be registered in a public register? What are the consequences in private law, especially in court actions, if the registration does not take place?**

(a) Only tenancies for a period greater than from year to year are required to be in writing. Section 4 of Deasy's Act provides as follows:

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

In practice, a residential tenancy for a period more than from year to year would be rare. The usual term for residential tenancies is 6 months or 12 months. It is common for parties to renew their agreement on expiry of the original term. Wylie has expressed the firm view that a tenancy for a period of "one year certain" falls within the scope of the concept "from year to year or any lesser period" and so may be created orally.[105] In practice, leases for a period of 6 months or 12 months will usually be in writing and take a standard form. Periodic tenancies are usually oral. The consequence of a failure to comply with section 4 of Deasy's Act (where it applies to the tenancy in question) is that the tenancy is invalid and unenforceable.

Beyond the specific case of tenancies for a period greater than from year to year, there is no general requirement that a tenancy agreement must be in written form. However, pursuant to regulations made under section 17 of the Housing (Miscellaneous Provisions) Act, 1992,[106] landlords are obliged to provide tenants with a rent book (or other documentation to the like effect) which sets out certain mandatory information. The mandatory information includes: the premises; the parties; the rent (and when and how it is to be paid); the term of the tenancy; rent paid

[105] Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998), at para. 15.33.
[106] Housing (Rent Books) Regulations, 1993 (S.I. No. 146 of 1993).

in advance; deposit paid; and an inventory of the furnishings and appliances provided by the landlord for the exclusive use of the tenant. The landlord is also obliged to provide a receipt for rent and other monies paid. A statement of information for landlords and tenants, in the prescribed form, must also be included in the rent book.

In the early 1990's, the DoE, when reviewing the regulation of the private rented sector, considered making it a mandatory requirement that all tenancies should be in writing. This idea was eventually rejected as it was feared that mandatory written tenancy agreements could result in tenants entering into inappropriate agreements (in particular binding themselves to fixed term agreements when a flexible, periodic arrangement would be more appropriate to their needs).[107] The rationale behind the introduction of the rent books regulations was to ensure that there was at least a written record of the basic terms of all tenancies, and, more importantly, to ensure that tenants had a right to a receipt for rent paid. It is generally accepted that there is less scope for disputes between landlords and tenants where there is a written record of certain basic matters.

A query arises as to the consequences for the validity of a tenancy agreement where a landlord fails to provide a rent book in accordance with the regulations. The Housing (Miscellaneous Provisions) Act, 1992 provides that failure to provide a rent book is an offence (section 34(1)). Beyond that, there is nothing in the 1992 Act, or the rent books regulations, to suggest that a tenancy is void where no rent book is provided.

(b) Contracts of tenancy for periods not greater than one year may be created orally. Apart from payment of the relevant stamp duty (a tax), there are no further requirements to render such contracts enforceable before a court.[108] In practice, however, it may prove difficult to establish the terms of an agreement without the benefit of some written record.

(c) Pursuant to section 20 of the Housing (Miscellaneous Provisions) Act, 1992, and regulations made thereunder, landlords are required to register their tenancies with the

[107] *A Plan for Social Housing* (DoE, 1991) at 28.

[108] There is an exemption from stamp duty in the case of a lease of an apartment or house for any indefinite term, or term not exceeding 35 years, where the annual rent

local housing authority.[109] The 1992 Act is silent on the consequences of non-registration in terms of the validity/enforceability of the tenancy agreement. However, failure to register is an offence.[110] In practice, compliance with the registration requirement is very poor.

---

does not exceed IR£15,000 (*circa*. E19,050). See generally, *Stamp Duty* (2001) (SD 1) published by the Revenue Commissioners, available at www. revenue.ie.

[109] Housing (Registration of Rented Houses) Regulations, 1996 (S.I. No. 30 of 1996) (as amended).

[110] Housing (Miscellaneous Provisions) Act, 1992, section 34(1).

Question 5: Extra Payments and Commission of Estate Agents

During the negotiations, L requests from T who wants to become the tenant the sum of 100 Euro (the monthly rent being 1000 Euro) for the drafting of the contractual documents. Is this legal?

<u>Variant 1:</u> The sum of 500 E is requested from T by F who is the current tenant in the house,

a) because F promises to make L accept T as her successor;
b) because F agrees to leave the apartment one month before the final deadline, so as to allow T to move in earlier.

<u>Variant 2:</u> Estate agent A, who was first approached by T and subsequently acted as an intermediary in the conclusion of the contract, requests the sum of 2000 Euro from T as commission. The agency contract concluded between T and A foresees a commission of two monthly rents for A's services, whereas L is not supposed to pay for A's services. Is this claim lawful?

Section 32(1) of the Landlord and Tenant (Ground Rents) Act, 1967 specifically provides that L may not pass the "solicitor's costs of the lease" onto T.[111] Any provision in a contract that purports to pass on this cost is void. The prohibition set down in this section does not appear to apply where L simply drafts the documents himself, without involving a solicitor. So, it is possible that L could seek to impose an extra charge in such a case. In practice, landlords rarely charge an "extra payment" in respect of the costs of drafting the lease.

Variant 1:
The scenario presented would be rare in practice. Consideration is quite normal in the sale of commercial leasehold interests, but highly unusual in residential tenancies. While an existing T cannot undertake to "make" L accept any proposed assignee, there might be a notional value to T in F vacating a month earlier than necessary in order to facilitate T occupying the property. However, within reason, F and T are free to agree terms, although T should bear in mind both what F is offering and what can actually be delivered.

Variant 2:
In practice, L will usually engage the services of an estate agency to find a tenant for his property and L will pay the agency a fee. In these circumstances, L cannot force T

[111] See Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998), at para. 13.19.

to discharge fees or expenses due to the landlord's estate agent and any contract with such a stipulation is void.[112]

However, where T, of his own volition, specifically retains an estate agent to act on his behalf to seek and/or negotiate for a property, a contract of agency comes into place between them and a fee and expenses, as agreed, will be payable to the agent by T. It is up to the parties to agree terms (and it is advisable that these terms be confirmed in writing in advance).

Certain commercial bodies, that purport to offer a specific service in terms of finding suitable accommodation for tenants (colloquially know as "accommodation agencies"), often require an "up-front" fee for their services. Problems have arisen in practice as some of these agencies do not hold licences as required by the legislation regulating auctioneers and estate agents.[113]

[112] Auctioneers and House Agents Act, 1973, section 2.

[113] The relevant legislative provisions are the Auctioneers and House Agents Act, 1947; Auctioneers and House Agents Act, 1967 and Auctioneers and House Agents Act, 1973. The problems arising from the general lack of regulation of the activities of so-called "accommodation agencies" were considered in a report published by Threshold in 1995. See *Vetting the Letting* (Dublin: Threshold, 1995).

Set 2: Duration and Termination of the Contract

Question 6: Contract Unlimited in Time

a) **L and T have concluded a tenancy contract which does not contain any limitation in time. Under which conditions and terms is L allowed to give notice? In particular: Can L give notice if she wants to renovate the house to increase the rent afterwards, or if she wants to use it for herself or for family members?**

b) **Let us assume that in a trial, L wins a title for eviction which acquires *res iudicata* effect. How will the execution of the title be normally enforced? Does T have any legal defences in the execution procedure if she does not find another apartment and risks becoming homeless once the title is executed?**

(a) For the purpose of this question it is assumed that the tenancy at issue is a weekly or monthly periodic tenancy. Such a tenancy has the potential to continue for successive monthly/weekly periods until terminated. As noted in the answers to previous questions above, L is (currently) entitled to terminate a periodic tenancy at any time by serving notice to quit. L is not obliged to give a reason.

In the case of a fixed term tenancy, unless the tenancy agreement provides otherwise, L is locked into the fixed term (unless T is in breach of covenant).

(b) If T refuses to vacate voluntarily after L succeeds in acquiring a court order, L or his solicitor, passes the order to the City or County sheriff for execution. The sheriff will then enforce the order by removing T and T's belongings from the premises. In practice, it is not uncommon for a judge to put a stay on an order (i.e. to provide that it may not be enforced until a certain specified period has elapsed) in order to give T a chance to find alternative accommodation, particularly if T is of limited means and has young children. However, a claim on T's part that s/he will experience difficulties in securing alternative accommodation is not a defence to ejectment proceedings.

Question 7: Contract Limited in Time and Termination
L and T have concluded a contract limited to one year. Under which conditions and terms is such a contractual stipulation possible?

Short term, fixed term contracts for 12 months/one year are the norm in Ireland in the case of private residential tenancies. In practice, it is common for L and T to renew their agreement after the initial term has expired, but L is not required to agree to any such renewal.

Question 8: Justification for Time Limit

a) **L and T have concluded a contract limited to one year with automatic renewal for another year, provided that no party has given notice three months before the annual deadline. No particular reason for this limitation is mentioned in the contract. After 6 years, respecting the delay of three months before the annual deadline, L gives notice of termination without alleging any reasons. Is this lawful?**
b) **Does the restriction of notice under a) (which is possible only once per year) apply to T, too?**

a) Yes. There is (currently) nothing to prevent L from giving notice of termination, without specifying a reason, in such circumstances. The parties' rights and obligations are determined by the terms of the tenancy agreement. Obviously, however, T will not be obliged to vacate the premises until the three months notice period has expired.

b) T is also bound by the terms of the contract and so, yes, the restriction on giving notice would apply to T.

Question 9: Termination in Special Cases
L and T have concluded a contract with or without time limit.

Note: for the purpose of this question it is assumed that the tenancy is either a periodic tenancy or a fixed term tenancy.

a) L dies. Can her heirs give immediate notice to T?

The answer depends on the type of tenancy. On L's death, his estate vests in his personal representatives. In the case of a periodic tenancy, L's personal representatives can give notice at any time, without having to specify a reason. In the

case of a fixed term tenancy, termination is only possible when the term has expired or where T is in breach of covenant (and even then, T may be able to secure relief against forfeiture).

b) The house is sold. Has the buyer a right to give anticipated notice?

The purchaser's entitlement to give notice (which depends on the terms of the tenancy agreement) will only arise when he acquires title to the property on completion of the sale. The buyer cannot give "anticipated" notice before the sale is completed. Depending on the terms of the tenancy agreement, it may be open to L to give notice before the sale. For example, if it is a periodic tenancy, there is no restriction on L giving notice. In the case of a fixed term tenancy, notice may only be served once the agreed term has expired or if T is in breach of covenant (subject to any relief against forfeiture).

c) A bankruptcy procedure is carried out against L at the end of which the house is auctioned off. Can the buyer give anticipated notice?

Same as b) above.

Question 10: Tenancy "For Life"

L rents an apartment to T, with the contract containing the explicit clause "for life". May, and if so under what circumstances, L give notice before T's death?

While it is possible to create a lease "for life" under Irish law,[114] the scenario outlined above would be extremely rare in practice.[115] In the unlikely event that such a tenancy was created, L is not entitled to give notice during the lifetime of T, unless T is in breach of the terms of the tenancy agreement.

[114] See also the "special categories" of tenancy discussed in Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998), at paras. 4.40-4.46.
[115] A lease "for life" should be distinguished from "a right to residence for life". On right of residence see Wylie, J.C. W., *Irish Land Law* (3rd ed.) (Dublin: Butterworths, 1997), at paras. 20.13-20.24.

Question 11: Immediate Termination under Unusual Circumstances

L and T have concluded a tenancy contract with or without time limit. Under what conditions and terms may one party give immediate notice under unusual circumstances? In particular:

a) Can L give immediate notice if T did not pay the two last monthly rents?

b) Can L give immediate notice if T, by repeatedly insulting his neighbours, has endangered peace in the house?

c) Is a contractual clause ("clause résolutoire") valid according to which the contract is automatically terminated in case T does not pay two consecutive monthly rents or commits any other "gross" breaches of her duties?

Note: for the purpose of this question is it assumed that the tenancy is either a periodic tenancy or a fixed term tenancy.

The answer depends on whether the tenancy is a periodic tenancy or a fixed term tenancy. In the case of a periodic tenancy, either party is entitled to give notice at anytime without giving a reason. The only restriction is section 16 of the Housing (Miscellaneous Provisions) Act, 1992, which sets a minimum period of at least 4 weeks if a notice to quit is to be valid. The notice must be in writing. No special provision is made for "unusual circumstances."

In the case of a fixed term tenancy, L's entitlement to terminate the tenancy before the agreed term has expired will be governed by the terms of the agreement between the parties. The standard form letting agreements contain important provisions entitling L to take steps to terminate the tenancy in the event of breach of covenant by the T. See Q. 2 above.

a) In the case of a periodic tenancy, L's remedy is to serve notice to quit (at least 4 week's written notice must be given).

In the case of a fixed term tenancy, the terms of the agreement between the parties will determine L's remedies. The standard form letting agreements address the situation where T is in breach of the covenant to pay the rent as it falls due. For example, in the modern standard form agreement drafted by the DSBA, clause 4.1 provides that L may end the tenancy if T is 7 days late in paying the rent. This clause requires L to give T at least 4 week's notice of termination. Other standard leases usually contain a forfeiture and re-entry clause. In the case of non-payment of rent, L is not required to give T notice. L may proceed directly to forfeit the tenancy by re-

entering, usually by commencing ejectment proceedings (subject to relief against forfeiture).

b) In the case of a periodic tenancy, L is entitled to give notice at any time without specifying a reason. So L could give notice here.

In the case of a fixed term tenancy, L is only entitled to give notice where T is in breach of covenant. Whether or not T is in breach here will depend on the terms of the agreement between L and T. The activity complained of in the scenario outlined in b) above does not appear to fall squarely within the terms of any of the standard covenants (e.g. not to create a nuisance or annoyance). So, it is not clear on what basis L could purport to terminate before expiry of the fixed term. Such a clause would also have to be read subject to the rules on relief against forfeiture.

T's neighbours may, however, have other civil and criminal law remedies against T. For example "harassment" is an offence pursuant to section 10 of the Non-Fatal Offences Against the Person Act, 1997.

c) Such a clause would be very rare in practice. In any event, it is likely that it would fall foul of section 16 of the Housing (Miscellaneous Provisions) Act, 1992. This section provides that at least 4 week's written notice must be given in order to validly terminate a residential tenancy.

Set 3: Rent and Rent Increase

Question 12: Settlement Date and Modes of Payment

When is the rent due? Is there any restriction on modes of payment? Does and if yes, under which conditions, have L a right of distraint (pledge) on T's furniture and other belongings to cover the rent and possible other claims against T?

The date on which the rent falls due will be determined by the agreement between the parties. The usual practice is that rent is paid on either a weekly or a monthly basis, and in advance. There are no restrictions on mode of payment. In the case of a fixed term tenancy, it is standard practice to collect the rent *via* a standing order from T's bank account.

Under the rent books regulations, the following particulars must be recorded in the rent book or tenancy agreement: the rent reserved under the tenancy; when and how it is to be paid and the amount of any rent paid in advance.[116] L is required to enter details of rent payments in the rent book or to supplement the tenancy agreement with receipts for rent paid.[117]

Distress

Section 19 of the Housing (Miscellaneous Provisions) Act, 1992 abolished the old common law remedy of distress in so far as "any premises let solely as a dwelling" are concerned.[118]

[116] Housing (Rent Books) Regulations, 1993 (S.I. No. 146 of 1993) Article 5(2).
[117] Ibid., Article 6.
[118] On the remedy of distress generally see Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998), at paras. 12.14-12.23.

Question 13: Requirements for Rent Increase

What are the ordinary substantive and procedural requirements for an increase in the rent? Are there rules on a maximum increase in private and criminal law (e.g. on profiteering)? By whom are these rules enforced? (public ministry or national or local administrative agency etc.)

The rent payable falls to be determined by the parties. Market rent applies. In the case of a periodic tenancy, the landlord may demand a rent increase at any time, without giving a reason. The only limitation here is that in the case of a weekly tenancy, one week's notice of the rent increase is required. Similarly, one month's notice of a rent increase is required in the case of a monthly tenancy. While it is open to T to seek to negotiate any proposed rent increase with L, L may give notice to quit if T is not willing to pay the new rent. There is (currently) no legal requirement that notice of a rent increase must be in writing. Any change in the amount of rent payable must be entered in the rent book, within one month of the operative date of such change.[119]

In the case of a fixed term tenancy agreement, the rent is generally fixed for the duration of the agreed term (unless the agreement provides otherwise). However, L may make renewal of the lease conditional on a rent increase.

Question 14: "Index-clause"

a) Is it possible to contractually link the annual increase of the rent with the annual average increase of the cost of living (or similar index) as established by official statistics?

b) Is a progressive rent arrangement, providing for an annual increase of X percent, lawful?

Rent is (currently) determined solely by agreement between the parties. The parties are free to apply any formula they wish in order to determine the rent, subject to the basic requirement of certainty in contract law and the rules governing unfair terms in consumer contracts.

[119] Housing (Rent Books) Regulations, 1993 (S.I. No. 146 of 1993) Article 6(2).

Question 15: Rent Increase by Contractual Amendment

By ordinary letter, L tells T that the rent will be increased by 10% in three months time to compensate for the general increase of the cost of living. No further explanation is provided to support this claim. Without protesting, T pays the increased rent for 3 months without any reservation. After this time only, she gets doubts and consults a lawyer. Can T get some money back? If yes, can T off-set the sum to be repaid against future rent instalments on her own motion without judicial intervention?

As noted in Qs. 13 and 14 above, the amount of rent payable falls to be determined solely by the parties. So it is up to L and T to agree on the rent. In the case of a periodic tenancy, L may demand a rent increase at any time without giving a reason. See Q. 13 above.

In the case of a fixed term tenancy, the rent is usually set for the duration of the term. Unless there is a specific clause providing for variation of the rent during the term, it is not open to L to seek a rent increase.

T may have a remedy under the law of mistake where T pays the increased rent in the mistaken belief that L is entitled to demand a rent increase.[120]

[120] See McDermott, P., *Contract Law* (Dublin: Butterworths, 2001) at paras. 12.07-12.21.

Question 16: Deposits
What are the basic rules on deposits?

There are no specific rules governing deposits as such. Under the rent books regulations, the amount of the deposit paid and the conditions on which the deposit is returnable, must be recorded in the rent book or tenancy agreement.[121]

The general practice is that L will usually demand a deposit the equivalent of one month's rent. The deposit falls to be repaid at the end of the tenancy provided that the rent and any other charges are paid up to date and T has not caused any damage beyond normal wear and tear. In the event of a dispute over the deposit, T may bring a claim in the Small Claims Court.

Question 17: Utilities
What are the general rules on utilities? Which utilities may the landlord make the tenant pay by contractual stipulation? Is it legal to establish in the contract a monthly lump sum to cover certain or all utilities?

There are no specific rules on utilities. The contract between the parties will determine who is liable for various utility charges. In practice, where there is a fixed term tenancy, all of the utility bills will be in T's name and T will contract with the relevant utility company (e.g. telephone, gas, electricity etc.).

L and T may agree to set a monthly lump sum in the tenancy contract to cover certain utilities. This practice would be more common in periodic tenancies at the lower end of the market where L may factor the cost of certain utilities into the weekly or monthly rent.

Under the rent books regulations, the amount and purpose of any payments (other than rent) made to L "for services provided by the landlord or otherwise" and when and how each such payment is to be made, must be recorded in the rent book or tenancy agreement. Details of each payment must also be recorded in the rent book.[122]

[121] Housing (Rent Books) Regulations, 1993 (S.I. No. 146 of 1993) Article 5(2)(h).
[122] Ibid., Article 7.

Set 4: Obligations of the Parties in the Performance of the Contract and Standard Terms

Question 18: Control of Standard Terms

What kind of control exists for clauses contained in standard contracts used by a landlord acting in a non-commercial capacity?

Note: Directive 93/13/EC (OJ 1993, L 95/29) on Unfair Terms in Consumer Contracts prescribes a mandatory control of standard terms which is however restricted to contracts among consumers and commercial parties. However, this control or parts of it might have been extended to contracts among two non-commercial parties either by the national legislator (as it is the case in Germany) or by national case law. Please note, moreover, that, according to the Directive, a landlord acting in a non-commercial capacity is someone who is not renting apartments on a professional basis. Thus, whilst the objective of seeking profits alone does not disqualify someone as a non-commercial landlord, renting out more than 3 apartments would probably do so.

The European Communities (Unfair Terms in Consumer Contracts) Regulations, 1995[123] purport to implement Directive 93/13/EEC on unfair terms in consumer contracts[124] into Irish domestic law. There are no specific domestic provisions governing clauses in standard contracts used by non-commercial landlords. Such contracts are governed by general contract law. However, certain aspects of the law of contract, such as the doctrine of unconscionable bargain, and the rules governing the construction of exclusion clauses, may be relevant here.[125]

Question 19: Frequent Standard Terms

The terms of a standard contract used by L (acting in a non-commercial capacity) provide that:

a) **The tenant must not withhold rent or off-set rent instalments against any alleged claims of her own, except if authorised by a judge.**
b) **The cost of small reparations, up to 100E per annum, has to be met by the tenant.**
c) **At the end of the tenancy, the apartment has to be repainted by a professional painter at the expense of the tenant.**
d) **If the tenant becomes a member of a tenants' association, the landlord has the right to give notice.**

Are these clauses lawful? If not, may the standard terms be challenged by a tenants' association, too?

---

[123] S.I. No. 27 of 1995.
[124] [1993] OJ L 95/29.
[125] See McDermott, P., *Contract Law* (Dublin: Butterworths, 2001) at paras. 14.148-14.181 and chapter 10 (exemption clauses).

Please note: Directive 98/27/EC (OJ 1998, L 166/51) provides that certain "qualified institutions" promoting consumer rights (Art. 3) shall be given the right to file collective actions *inter alia* against abusive terms in consumer contracts as defined in Directive 93/13/EC. It should, therefore, be examined if and how the national legislators have implemented this directive (or are planning to implement it).

a) Most standard tenancy agreements contain a clause obliging T to pay the rent as and when it falls due and such a clause is lawful. A statutory right of set off may arise under section 87 of the Landlord and Tenant (Amendment) Act, 1980 in respect of the cost of repairs (provided certain conditions are satisfied). See Q. 26, Variant 1, below. L cannot contract out of this statutory provision, and if L purports to do so, any such contractual stipulation is void.[126]

b) There is nothing to prevent a non-commercial landlord from including such a term.

c) Same as b) above.

d) Such a clause would be unheard of in practice.

However, it should be noted here that an attempt by a landlord to impose limitations on T should T wish to join a tenants' association, may be in breach of the constitutional right to freedom of association set down in Article 40.6.1.iii of the Constitution and Article 11 ECHR.[127]

Note too that membership of a tenants' association (or indeed trade union membership) is not included as one of the prohibited grounds of discrimination in the Equal Status Act, 2000.

Note: Directive 98/27/EC on injunctions for the protection of consumers' interests was transposed into Irish law by the European Communities (Protection of Consumers' Collective Interests) Regulations, 2001 (S.I. No. 449 of 2001).

[126] Landlord and Tenant (Amendment) Act, 1980, section 85.
[127] Hogan, G., and Whyte, G., *Kelly: The Irish Constitution* (Dublin: Butterworths, 1994) at 969-987.

Question 20: Changes to the Building by the Tenant

T is a tenant in a building with 4 flours and 10 apartments. He asks L for the permission to install a parabolic TV antenna on his balcony. L refuses the permission by alleging that otherwise, he would have to give the permission to every tenant, which would ruin the view of the house aesthetically. In addition, he argues that 15 TV programs are already accessible via the cable TV connection of the house, which should be more than sufficient to satisfy the tenant's demand.

Variant 1: Assuming that no Turkish programs can be received through the existing cable TV connection, does it matter if T is a Turkish immigrant who does not speak the national language well?

Variant 2:

On his balcony, T exhibits a huge poster with the slogan "Peace in Palestine and Iraq." Can L force him to remove it?

It is common for L to include a standard term in a tenancy agreement prohibiting T from altering the property in any way. For example, clause 2.14 of the DSBA standard form lease provides that T agrees:

> Unless the Landlord previously approves in writing, not to alter the property in any way nor add to it (and this includes any wiring or cabling there) nor to allow anyone else to do so nor to erect any television or radio aerial satellite dish there.

However, section 68(1) of the Landlord and Tenant (Amendment) Act, 1980 implies a proviso that L's consent to any proposed "improvements" may not be unreasonably withheld.[128]

Variant 1.

This would not make any difference. The law as stated in the answer above applies.

Variant 2.

Again, L will usually address this situation in a covenant in the lease. For example, Clause 2.23 of the DSBA standard form lease provides that T agrees:

> Not to display any notice or advertisement either on the outside of the property or visible from outside it.

[128] Note the definition of "improvement" for the purpose of this section set out in section 67(3) of the 1980 Act.

It appears here that T would be in breach of this covenant. If T refused to remove the poster, it would open to L to terminate the tenancy (subject to relief against forfeiture). However, T could argue that L's action breached his right to freedom of expression (Article 40.6.1.i of the Constitution) and Article 11 ECHR (post December 31, 2003, when the European Convention on Human Rights Act 2003 will come into force.)

There is also a planning law issue here as T's poster is not "exempted development" as exhibiting a "huge poster" on any structure does not fall within any of the categories of exempted development set out in the Planning and Development Regulations 2001.[129]

[129] S.I. No. 600 of 2001.

Question 21: The Landlord's Right of Possession of the Keys

Does L have the right to keep one set of the keys of the apartment rented to T? Under which conditions is L allowed to enter the apartment without T's previous permission? If these conditions are not fulfilled, does L commit a criminal offence when entering the apartment without T's previous permission?

L is entitled to retain a set of keys. According to Lord Donaldson MR in *Aslan v. Murphy (Nos. 1 and 2*):

> It is not a requirement of a tenancy that the occupier shall have exclusive possession of the keys to the property. What matters is what underlies the provisions as to keys. … A landlord may well need a key, in order that he may be able to enter quickly in the event of emergency, fire, burst pipes or whatever. He may need a key to enable him or those authorised by him to read meters or to do repairs which are his responsibility.[130]

The conditions under which L is permitted to enter the apartment without T's prior consent are usually regulated by the terms of the agreement between the parties. For example, the modern DSBA standard form tenancy agreement provides that T agrees as follows:

> Upon receiving reasonable notice from the Landlord, to allow the Landlord at all reasonable times, to enter the property to inspect its condition or to carry out repairs or renovations which it is the Landlord's duty to do.

There is also an express term in this standard agreement by which T agrees that upon receiving notice from L in writing, T will:

> … allow anyone who reasonably needs access in order to inspect, repair or clean neighbouring property, or any sewers, drains, pipes, wires or cables serving neighbouring property, to enter the property at any reasonable time.

Apart from any express provisions in the tenancy agreement, emergency situations may arise (e.g. fire, burst pipe, gas leak etc.) in which L or his agents may need to gain access to the premises and it is not possible to get T's prior consent. In such cases, the defence of necessity may be available to L in the event that T brings an action for trespass to land. However, it should be noted here that the courts will not accept the defence of trespass lightly and L's intervention must be objectively justifiable.

[130] *Aslan v. Murphy (Nos. 1 and 2)* [1989] 3 All ER 130 at 135-136.

Subject to the terms of the contract between the parties, and genuine emergency situations, a landlord who enters the demised premises without T's consent leaves himself open to criminal and civil proceedings.

Question 22: The Landlord's Liability for Personal Injury
As the stairs in the house are not well maintained and in a slippery state, C, T's child, falls and breaks her leg. Is L liable, and if yes under which legal basis?
Note: This case is supposed to deal with the distinction among contract and tort liability for general "security obligations" (Verkehrssicherungspflichten) of the landlord.

Here, liability may arise under contract or tort. The key issue is who retains "control" over the stairs. This will depend on the terms of the tenancy agreement. For the purpose of this answer, it is assumed that the stairs are in a common area of the building over which L retains control.

Contract
The general rule in contract is *caveat emptor* or, in other words, the tenant takes the premises as he finds them. However, in the case of furnished premises let for occupation, there is an implied warranty (at common law) that the premises are fit for occupation at the commencement of the tenancy.[131] There may also be certain express warranties on the part of L in the lease or tenancy agreement by which L undertakes to keep the premises in a certain state of repair. Furthermore, section 18 of the Housing (Miscellaneous Provisions) Act, 1992, and regulations made there under, impose certain (statutory) repair obligations on L. In particular, Article 10 of the standards regulations requires L to maintain every stairway in the premises that is used in common "in good repair and in a clean condition."

It is unlikely that the situation here would amount to a breach of the implied warranty that the premises are fit for occupation. Whether L is in breach of any express covenant depends on the terms of the tenancy agreement. It appears from the facts here that there may well be a breach of the obligation imposed under Article 10 of the standards regulations.

On the facts outlined above, C is not a party to the contract. However, C's parent, T, has entered into a contract with L. It is therefore open to T to bring an action to recover expenses incurred as a result of L's breach of contract (e.g. C's medical expenses).

[131] *Siney v. Dublin Corporation* [1980] IR 400.

Tort

Following a review of the relevant authorities, McMahon & Binchy usefully summarise the basic position as follows:

> [T may sue L] in negligence if [T] can show proximity, reasonable foreseeability of damage and breach of duty. The existence of a contractual relationship does not exclude a tortuous obligation as well.[132]

Similarly, Wylie has noted that:

> … a landlord may be liable in negligence to his tenants, in that he owes a duty of care to prevent any part of the building in which the demised premises are situated, but over which he retains control, from becoming a source of danger or causing damage to his tenant, to his property or by way of personal injury.[133]

C therefore has a claim against L in negligence.

Set 5: Breach of Contract[134]

Question 23: Destruction of the House

a) L and T conclude a tenancy contract. Before T takes possession of the apartment, it is destroyed by a fire for which neither party is responsible.
b) Does it make a difference if the apartment is destroyed after transfer of possession to the tenant?
c) Does it make a difference if the apartment has already been destroyed at the time of the conclusion of the contract without the parties' knowledge?

a) Section 40 of Deasy's Act provides that T is entitled to surrender the tenancy and be relieved of liability for obligations arising under the agreement in the event that the premises is "destroyed, become[s] ruinous and uninhabitable, or incapable of beneficial occupation or enjoyment, by accidental fire or other inevitable accident."[135] T's only obligation before he can invoke the right to surrender in such an eventuality

[132] McMahon, B., and Binchy, W., *Law of Torts* (3rd ed.) (Dublin: Butterworths, 2000), at para. 13.44.
[133] Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at para. 14.11, footnotes omitted.
[134] The expression "breach of contract" is used here in a factual sense so as to encompass any problems which may happen at the performance stage. Therefore, this set of questions is supposed to cover situations dealt with under headings such as impossibility, delay and guarantees (warranties) in national legal systems.

is to pay "all rent and arrears due or accruing due or tendering the same." The right to surrender and "walk away" from the tenancy agreement does not apply where the fire or other inevitable accident is a result of T's "default or neglect" (i.e. T is not entitled to surrender where his negligence has caused the damage).

It is critical to note that section 40 will only apply where there is no express covenant in a lease or tenancy agreement committing T to repair. Many written tenancy agreements will contain an express repair covenant obliging T to keep the interior of the premises in good repair and so, section 40 will not apply. The result is that T's obligations under the tenancy agreement continue in the event of destruction of the demised premises. It is therefore critical that both L and T insure their respective interests in the premises.

The modern DSBA standard form tenancy agreement does not contain a repairing covenant on the part of the T. Rather, T is required to "take good care" of the premises. The effect of this provision is that section 40 applies in the event of destruction of the premises by fire other inevitable accident.

The question arises as to whether T could rely on the doctrine of frustration (in the event that he cannot rely on section 40). Wylie has noted that the application of the doctrine of frustration to leases "is likely to be very rare."[136] McDermott has expressed the view that "[f]rustration is most likely to apply where one has a short lease for a particular purpose."[137]

To summarise then, the consequences for L and T in the scenario outlined above will turn on whether or not there is an express repair covenant on the part of T.

b) It does not make a difference.

c) This scenario is governed by the law of mistake, in particular the rules governing "common mistake of fact".[138] Where both parties were under a fundamental and

---

[135] Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at paras. 25.04 and 15.28.
[136] Ibid., at para. 26.14.
[137] See McDermott, P., *Contract Law* (Dublin: Butterworths, 2001) at para. 20.67.
[138] Ibid., at para. 12.22 - 12.52.

mistaken assumption of fact at the time they entered the contract then the contract is void.

Question 24: "Double Contracts"
L concludes a tenancy contract with T1. Shortly after, he concludes another tenancy contract over the same apartment also with T2, who is not aware of the earlier contract concluded with T1. Equally unaware of the second contract concluded with T2, T1 then takes possession of the apartment. The two contracts are only discovered when T2 wants to take possession of the apartment as well. What are the legal consequences for both contracts and the rights of the parties?

The first contract in time will take priority. T2 will have an action for breach of contract against L. The remedy here is damages.

Question 25: Delayed Completion

L is an investor and buys an apartment from a big building company. According to the contract, the apartment should be ready from 1/1/2003. However, the purchase contract contains a (lawful) clause according to which the builder is not responsible for delay unless caused by him. L rents the apartment to T from 17/1/2003 without any special arrangements in the case of delay. However, as the neighbour N challenges, though unsuccessfully in the end, the building permit granted by the competent authority to B in an administrative law procedure, the apartment is not available until 1/1/2004. Has T any claims against L? Has L claims against N?

T has a clear case against L for breach of contract.

L does not have a claim against N, unless L can rely on some established tort (e.g. abuse of process).[139] However, it is likely that L would recover any legal costs incurred in defending the failed challenge to the building permit from N (assuming N is a mark for costs), unless N's challenge involved an important public interest point.

[139] On the tort of "malicious abuse of the civil process" McMahon, B., and Binchy, W., *Law of Torts* (3rd ed.) (Dublin: Butterworths, 2000) at paras. 36.19-36.28.

Question 26: State and Characteristics of the House (Guarantees)
L rents an apartment to T. T wants to diminish the rent because

a) stains of mildew have been found in some corners.

The general rule at common law is that T is not entitled to withhold the rent where L is in breach of his obligations under the tenancy agreement.[140] T's remedy is to pursue L for breach of contract/covenant or pursue any statutory/public law remedies that may be available to him.

The are a number of different sources of law governing standards in rented dwellings.

First, at common law the general rule is *caveat emptor*.[141] However, there is an important exception to this general rule - in the case of a letting of furnished accommodation, there is an implied warranty that the premises are fit for occupation at the commencement of the tenancy.[142] It is unlikely that stains of mildew in some corners of the premises would render it unfit for human habitation.

Secondly, Wylie cites section 107 of the Public Health (Ireland) Act 1878 as a potential mechanism by which T could seek, indirectly, *via* a complaint to the local authority (environmental health section), to have L to carry out certain repairs where the premises are allegedly "a nuisance or injurious to health."[143] The availability of this remedy will depend on the seriousness of the alleged dampness.

Thirdly, and most significantly, section 18 of the Housing (Miscellaneous Provisions) Act, 1992, and regulations made thereunder,[144] provides *inter alia* that the landlord is obliged to maintain the structure of the premises "in a proper state of structural repair."[145] This is defined as meaning that the premises in question are:

> … essentially sound, with roof, floors, ceilings, walls and stairs in good repair and *not subject to serious dampness* or liable to collapse because they are rotted or otherwise defective.[146]

---

[140] Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at para. 15.19, citing *Corkerry v. Stack* (1947) 82 ILTR 60 and *Riordan v. Carroll* [1996] 2 ILRM 263.
[141] Ibid., at para. 15.04.
[142] The exception was acknowledged by the Supreme Court in *Siney v. Dublin Corporation* [1980] IR 400, per O'Higgins C.J.
[143] Wylie, above, n. 140, at para. 15.06.
[144] Housing (Standards for Rented Houses) Regulations, 1993 (S.I. No. 147 of 1993).
[145] Ibid., Article 5(1).
[146] Emphasis added.

Again, whether or not L is in breach of the standards regulations will depend on the seriousness of any alleged dampness. T's remedy here is to make a complaint to the local authority on the basis of the standards regulations. Breach of the standards regulations is an offence. In practice, in the case of a periodic tenancy, T may be reluctant to make a formal complaint as T will not enjoy security of tenure and there is a risk that L may serve notice to quit if T complains to the authority.

The standard form letting agreements contain a covenant in which L undertakes to keep the structure of the premises in repair and T may call on L to perform his obligation under this covenant (which is in addition to L's statutory obligation under section 18 and the standards regulations). Where L fails to comply with the requirements of any express repair covenant, T may initiate proceedings to require the landlord to perform his obligation (i.e. specific performance/injunction) and or damages. L must be aware of the breach of covenant before liability will arise.[147] Note too the potential relevance of the statutory right of set off provided for in section 87(1) of the 1980 Act (see Variant 1 below).

<u>Variant 1</u>: By letter, T asks L to renovate the walls affected by mildew within 2 weeks. As L does not reply, T has the repair done by a specialist and wants to off-set the costs from the monthly rent rates. Is this lawful?

Section 87(1) of the Landlord and Tenant (Amendment) Act, 1980 provides for a statutory right of set-off against rent for the cost of repairs in certain circumstances.[148] The right of set-off arises where the landlord refuses or fails to execute repairs that are his responsibility (whether under covenant or otherwise by law) and the tenant has called on the landlord to carry out the repairs. If these two conditions are satisfied, then the tenant is entitled to carry out the repairs at his own expense and then recoup the costs from the landlord by setting off the cost of the repairs against any subsequent rent payments.

[147] Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at para. 15.16.

[148] Note that the premises in question must be a "tenement" within the meaning of section 5 of the 1980 Act.

<u>Variant 2</u>: T did not discover the mildew stains when inspecting the house before entering into the contact, even though these had already been present. Does this preclude her from claiming a rent reduction?

The fact that T did not notice the stains prior to entering the tenancy agreement does not preclude him from pursuing the remedies outlined above.

b) a noisy building site for a big road is opened by the city administration next to the apartment.

This eventuality is beyond the control of L and T. It is open to the parties to agree to a rent reduction in light of the changed circumstances. However, L is under no obligation to agree to any such reduction. In the case of a periodic tenancy, it is open to T to serve notice to quit and move elsewhere. Where there is a fixed term tenancy agreement, T may opt to leave on expiry of the term.

c) The tenants of the neighbouring apartment in the house have repeatedly and despite T's complaints organised loud nightly parties from 11 p.m. to 5 am.

This is not a valid ground for seeking a rent reduction. T is obliged under the tenancy agreement to pay the rent as and when it falls due. As regards T's potential remedies in this scenario see Q. 26 below.

To the extent the landlord is held liable under a)- c): Could his liability have been lawfully excluded by a disclaimer clause contained in the contract?

In the case of a), although the 1992 Act and the standards regulations do not expressly prevent the parties from contracting out of the minimum standards provisions, it is very likely that a court would rule that the regulations are binding on the parties notwithstanding any contrary provision in a tenancy agreement.

Question 27: House to be used for Specific Purpose

L rents a big apartment to T under the assumption shared by both parties but not explicitly stipulated in the contract that some rooms will be used by T as a surgery. However, the local authorities deny the permission for the surgery to be opened in the studio for fire protection and zoning law reasons. What are T's claims?

This is an unusual scenario because, in practice, it is highly unlikely that T would commit to such a tenancy agreement without first ensuring that the necessary planning permission is in place. Also, the purpose(s) for which the parties intend the premises to be used would normally be stipulated in the contract.

In the unlikely event that such a scenario did arise, T may be entitled to seek to avoid the contract on the basis of the doctrine of frustration.[149] However, the courts will not accept a plea of frustration lightly. T may run into difficulties here as the courts will not generally allow a party to rely on the doctrine of frustration where that party should have anticipated the happening of a particular event and included an express clause dealing with that eventuality in the contract.[150]

If L misrepresented the situation to T, then T would have a claim for breach of contract. T may also have a professional negligence action against his legal advisors (if any).

[149] On the doctrine of frustration in the context of landlord and tenant law generally see Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at para 26.14-26.15 and McDermott, P., *Contract Law* (Dublin: Butterworths, 2001) at para. 20.67.

[150] See McDermott, above, n. 149, at para. 20.11, citing *McGuill v. Aer Lingus and United Airlines*, unreported, High Court, October 3, 1983, McWilliam J.

Set 6: The Relationship among the Tenant and Third Persons

Question 28: Neighbour Relations

T and N are tenants of neighbouring apartments in the same house. How can T react if N continuously plays excessively loud music or constantly produces bad smells penetrating into T's apartment?

Note: For the purpose of the following answer, it is assumed that T and N have different landlords, as this would be the most typical scenario in practice.
"L" below is N's landlord.

It is open to T to make a complaint to N's landlord concerning N's conduct (assuming that T knows who L is and can make contact with L). In the case of a periodic tenancy, L could request that N cease causing a nuisance, and if N failed to respond, L could service notice to quit terminating the tenancy. It will be recalled from the answers to earlier questions that L does not need to give a reason for terminating a periodic tenancy.

In the case of a fixed term tenancy, there will usually be a standard clause in the lease obliging T "not [to] do or allow to be done any act or thing which is likely to be or become a nuisance danger or annoyance to the landlord or other occupiers of the premises or adjoining occupiers" (with particular reference to the use of television, radio and other electrical equipment). In the scenario outline above, N appears to be in clear breach of covenant. The remedy available to L depends on the terms of the tenancy agreement. The older DSBA standard form agreement contains a forfeiture and re-entry clause. This clause enables L to determine the tenancy early by forfeiture (before the full term has expired). L must comply with certain formalities to effect a valid forfeiture.

In the case of breaches of covenant other than non-payment of rent, section 14 of the Conveyancing Act 1881 imposes various procedural requirement or restrictions on the exercise of L's right of re-entry or forfeiture. Section 14 provides:

> 14(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in

> any case, requiring the lessee to make compensation in money for the breach and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

It is clear from the terms of section 14 that L is required to serve notice on N specifying the breach/breaches of covenant and requiring N to remedy the breach. N must be given "a reasonable time" after service of the notice to remedy the breach. What is "reasonable" will depend on the nature of the breach and the particular factual scenario. Should N fail to remedy the breach within this period, L may proceed to forfeit the tenancy usually by issuing ejectment proceedings. Pursuant to section 14(2) of the 1881 Act, the court has the power to grant relief against forfeiture depending on *inter alia* the conduct of the parties and all the other circumstances.

The modern DSBA standard form tenancy agreement contains a clause permitting L to terminate the tenancy by serving 4 week's notice in the event of breach of covenant on the part of T.

The key point to note in relation to the above solutions is that T cannot force L to take action against N, as there is no privity of contract between T and L (L is N's landlord here, and not T's landlord). However, it is interesting to note that section 15 of the Residential Tenancies Bill 2003 provides that a landlord owes a duty to each person who could be "potentially affected" to enforce the tenant's obligations under the tenancy agreement.

Potential liability in tort

T would be entitled to sue N in tort (private nuisance). It is clear under Irish law that the occupier of a premises has *locus standi* to sue in private nuisance. The fact that T is the tenant as opposed to the owner of the premises is irrelevant. Here N may be sued as the creator of the nuisance. The general rule is that the landlord of the demised premises is not liable in respect of a nuisance on those premises as he is not

the occupier.[151] There are, however, a number of exceptions to this rule, none of which appear to be relevant to the scenario under consideration here.[152]

T would have to establish that the interference caused by N was unreasonable. The standard definition of private nuisance was set down by Henchy J. in the leading Supreme Court decision *Hanrahan v. Merck, Sharp and Dohme (Ireland) Limited* [1988] I.L.R.M. 629 at 640:

> As I have pointed out earlier in this judgment, by reference to the cited passage from the judgment of Gannon J. in *Halpin and Others v. Tara Mines* [cite] where the conduct relied on as constituting a nuisance is said to be an interference with the plaintiffs comfort in the enjoyment of his property the test is whether the interference is beyond what an objectively reasonable person should have to put up with in the circumstances of the case. The plaintiff is not entitled to insist that his personal nicety of taste or fastidiousness of requirements should be treated as inviolable. The case for damages in nuisance — we are not concerned here with the question of an injunction — is made out if the interference is so pronounced and prolonged or repeated that a person of normal or average sensibilities should not be expected to put up with it.

This passage was recently approved by the High Court in *Sheeran v. Meehan*, unreported, High Court, February 6, 2003, Herbert J. at 15-16 (a case concerning noise nuisance caused by neighbours playing their stereo at excessive volume). Ordinary use of a flat or apartment as residential premises will not constitute an actionable nuisance.[153]

Public law remedies

Beyond the tort of private nuisance, T may also have a remedy under section 108 of the Environmental Protection Agency Act, 1992 (noise nuisance) and the Environmental Protection Agency (Noise) Regulations, 1994.[154] Pursuant to section 108(1), a person may complain to the District Court about:

---

[151] See McMahon, B., and Binchy, W., *Law of Torts* (3rd ed.) (Dublin: Butterworths, 2000) at paras. 24.74-24.77.

[152] Ibid. See further Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at para. 15.13.

[153] *Southwark LBC v. Mills* [1999] 4 All ER 449.

[154] S.I. No. 179 of 1994.

> … any noise which is so loud, so continuous, so repeated, of such duration or pitch or occurring at such times as to give reasonable cause for annoyance to a person in any premises in the neighbourhood ... .

The court is empowered to order the person responsible for the noise to take measures for the prevention or limitation of the noise. Breach of any such order is a criminal offence. Before making a complaint to the District Court pursuant to section 108(1), a complainant is required to serve the prescribed notice of the intention to make such a complaint on the person alleged to be making the noise. The section 108 complaint procedure has proved to be very successful in practice, particularly in cases where neighbours make complaints concerning unreasonable noise nuisance caused by students living in private rented accommodation.

Public law remedies

As regards the bad smells emanating from N's apartment, T may have a remedy under the Public Health (Ireland) Act, 1878.[155]

Breach of covenant of quiet enjoyment and non-derogation from grant

Note that in the case of a "multi-let" building owned by L, L may be in breach of the covenant of quiet enjoyment where other tenants create a nuisance (i.e. where L is both T and N's landlord).[156] Wylie has also noted recent developments in England where the courts have drawn on the doctrine of derogation from grant in cases involving alleged failure on the part of L in the management of a multi-let property.[157]

[155] See Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at para. 15.06.
[156] Ibid., at para. 15.13.
[157] Ibid.

Question 29: Damages caused by Third Parties

T has rented a house from L. The house is damaged negligently by a lorry during construction work undertaken at a neighbour's house, which causes repair costs of 10000 E and entails T being unable to use two rooms for 2 weeks. The lorry has been driven by E, an employee of the building company B. Does T have claims against the building company B or the neighbour N who commissioned the building company?

Both L and T would have claims against the building company (B) in negligence. The building company is vicariously liable for the torts of its employee (E) (where the employee is acting in the course of his employment).[158]

As regards the potential liability of the neighbour for the negligence of the building company's employee, it is very likely that the building company is an "independent contractor" *vis-à-vis* the neighbour.[159] Generally speaking, a principal will not be held liable for the torts of an independent contractor.[160]

[158] On vicarious liability in Irish law see McMahon, B., and Binchy, W., *Law of Torts* (3rd ed.) (Dublin: Butterworths, 2000), chapter 43.

[159] On the distinction between an employee and an independent contractor see *Phelan v. Coilte Teo.* [1993] 1 IR 18 and *Denny v. Minister for Social Welfare* [1998] 1 IR 34.

[160] See McMahon & Binchy above, n. 158, at paras 43.49-43.53. A case in point is *Rowe v. Herman* [1997] 1 WLR 1390.

Question 30: Unwelcome Help among Neighbours (Negotiorum Gestio)

When T has left his rented apartment for holidays, neighbour N notices a strong gas-like smell coming out of T's door. Assuming that the gas pipe in T's apartment has a leak and that a danger of explosion may be imminent, N breaks open the apartment door, thereby destroying his chisel worth 10 E and causing a damage of 200 E at the apartment door. After entering the apartment, N discovers, however, that the gas-like smell stems from the garbage bin which T had forgotten to empty before leaving. Has N a claim against T or vice-versa?

The common law recognises the tort of trespass to land. The leading Irish commentators, McMahon and Binchy, define the tort in the following terms:

> … intentionally or negligently entering or remaining on, or directly causing anything to come into contact with, land in the possession of another without lawful justification.[161]

So, N has committed a trespass. However, the common law acknowledges a number of defences to an action for trespass, including the defence of necessity. According to McMahon & Binchy:

> It seems that necessity will afford a good defence where there was an emergency (not caused by the prior negligent conduct of the defendant himself) of such a nature as would justify a person reasonably to take the action that the defendant took, even where, in the light of hindsight, the action was not necessary.[162]

On the facts presented in the above scenario, it would appear that N could rely on the defence of necessity, in the event that T sued in trespass.[163] However, it should be noted that the courts do not accept the defence of necessity lightly.[164] As Lord Goff observed in *Re F*., "officious intervention cannot be justified by the principle of necessity."

---

[161] McMahon, B., and Binchy, W., *Law of Torts* (3rd ed.) (Dublin: Butterworths, 2000) at 653, footnotes omitted.

[162] Wylie, J.C.W., *Landlord and Tenant Law* (2nd ed.) (Dublin: Butterworths, 1998) at 672-673.

[163] See *Re F* [1990] 2 AC 1 at 75 per Lord Goff, cited in Markesinis and Deakin's *Tort Law* (5th ed) (Oxford: OUP, 2003) at 453.

[164] See *Burmah Co. Ltd. v. Lord Advocate* [1965] AC 75 and, more recently, *Monsanto plc. v. Tilly* 149 *NLJ* 1833.

The next question is whether T is required to compensate N for the damage caused to his chisel. A decision from 1888, *Re Pike*,[165] is clear authority that the reasonable costs and expenses incurred by a person, or persons, who intervene in an emergency situation are recoverable.[166] However, there is no modern Irish authority on this point.[167]

As regards a potential claim by T against N, McMahon & Binchy note that the decision in *Burmah Oil Co. v. Lord Advocate* suggests that compensation may be payable even where the action in question was done for the benefit of the public.[168] However, the point is far from settled.

[165] (1888) 23 LR (Irl.) 9 (Ch).
[166] I am grateful to Steve Hedley for directing me to this authority.
[167] In *Monsanto plc. v. Tilly* 149 *NLJ* 1833, Stuart Smith LJ expressly left open the question of whether an intervenor in a case of necessity would be entitled to reimbursement or remuneration.
[168] [1965] AC 75. See the analysis presented by McMahon & Binchy, above, n. 161 at para. 23.51.