

Survey debates business tenancies

The Law Reform Commission makes a very useful survey of several other countries in its recent consultation paper.

The contrast between European practice, where there is largely some security of tenure for business tenants, and practice in the USA, Australia and New Zealand where generally there is non or very little, is most revealing.

The point should not be lost that in those countries where there is an absence of statutory intervention in the commercial leasing market tenants seem to manage quite well.

Indeed, the flexibility that the frequent location change can have should not be underestimated, especially when considering the significant location changes that are common in many urban areas. Changes in road design, transport networks, even car parking arrangements can have considerable consequences for retailers.

Tenants should be free to move as necessary or at least free to negotiate their lease structure as they see fit. Currently they would be lumbered with a long lease to get rid of first.

Of course, it works both ways. Some tenants can build up significant premium values in their lease. However, these are relatively rare and are usually confined to only the very prime positions in the retail market.

As landlords could be faced with empty and perhaps older premises, their efforts in managing the premises properly, controlling costs and frequently refurbishing the building could have significant benefit for all.

The Commission argues that all business tenants should be able to contract out of the legislative protection provided they have independent legal advice. The Oireachtas did take this recommendation on board the last time they visited this topic in 1994, but for some strange reason they limited contracting out to office users only. The ability to contract out is useful. But why was it confined to office users?

Perhaps it was felt that if all tenants could contract out of the legislation, there would be little point in having it on the statute book in the first place.

Offering a choice of contracting out or not could lead to considerable difficulties, for example if a handful of tenants in a shopping centre had such a benefit while their neighbours did not.

Indeed, it would not be surprising to see the choice being offered or withheld depending on market conditions at the time of leasing. Perhaps a "contracting in" procedure would be more

equitable.

The Law Reform Commission has opened a very worthwhile debate. Many other aspects of business tenancies are examined in the consultation paper and many worthwhile suggestions are introduced, including recommendations on improvements compensation, alienation and timing of notices etc.

One area that they did not consider, however, is the role of the courts. Landlord and tenant matters could perhaps be decided in other ways. The delay, cost and adversarial nature of a court hearing may not be the most appropriate or efficient dispute resolution mechanism.

Other property issues are competently resolved by the Valuation Tribunal (rates) or through Property Arbitrators (compulsory purchase).

Considerable benefit could arise from using either of these to resolve business tenancy disputes, with an appeal to the courts on a point of law.

Another area that may be usefully examined is the area of turnover rents. As the legislation currently exists, all rents are based on market conditions only. Payments based on a percentage of turnover are difficult, if not impossible, to manage in the current statutory environment, yet turnover rents can have considerable advantages.

Tenancies in unusual locations – for example airports, museums, sports venues and many seasonal operations to name just a few could be better served if the legislation either recognised this relationship or at least did not operate against it.

The Commission should also examine the industry wide practice of using "upward only" rent review clauses.

This is anticompetitive and can lead to many difficulties for tenants. In other EU states such practice is illegal.

If market forces dictate that rents should fall then so be it. Perhaps the building should be refurbished, the car parking improved or the service charge requires attention.

One result of the wide scale practice of using these clauses is that owners have little incentive in growing their business or controlling costs.

The consultation paper is a most worthwhile intervention on a topic that is fundamental to all business property owners and occupiers. It may well set the stage for better practice into the new century.

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