Neutral Citation Number: [2010] IEHC 494

THE HIGH COURT

2009 106 CA

BETWEEN

WINTERTIDE LIMITED

APPLICANT

AND

CORAS IOMPAIR ÉIREANN AND

TEDCASTLE McCORMICK AND COMPANY LIMITED

RESPONDENTS

JUDGMENT of Ms. Justice Dunne delivered the 28th day of July, 2010

This is an appeal from the judgment and order of the Circuit Court (His Honour Judge Matthews) in relation to a claim for a new tenancy on behalf of the applicant herein.

Introduction

The original notice of intention to claim relief under the Landlord and Tenant (Amendment) Act 1980 was served on the first named respondent herein (CIE) by notice dated the 17th December, 2000. A similar notice of intention to claim relief was also served on the second named respondent Tedcastle, McCormick & Co. Ltd. (Tedcastle) on the 13th December, 2000. The reason for two similar notices of intention to claim relief will become clear in the course of this judgment. Having served the respective notices of intention to claim relief, an application was brought before the Circuit Court pursuant to the provisions of the Landlord and Tenant (Amendment) Act 1980, to determine the right of the applicant to a new tenancy in the premises known as the Paper Store, more particularly delineated and shown coloured yellow on a map annexed to an indenture of lease dated the 30th day of July 1993 made between Irish Press Newspapers Ltd. (the second named respondent's predecessor in title) and to fix the terms of a new tenancy or, in the alternative, the amount of compensation for disturbance and/or improvements to which the applicant might be entitled.

The application made for a new tenancy on the basis of a business equity was first made by Gypsum Industries Ltd. Subsequently Gypsum Industries Ltd. assigned their interest in the property to Wintertide Ltd. and Wintertide Ltd. was substituted as the applicant in the proceedings. At the time of the assignment by Gypsum to Wintertide in January 2002, the tenancy of Gypsum, which was in fact a sub-tenancy in the property, had expired. In other words, Gypsum had sought a new tenancy and subsequently assigned its interest, such as it was, to Wintertide. An order was made by the County Registrar on the 28th November, 2002, amending the title of the proceedings by substituting Wintertide Ltd. for Gypsum Industries Ltd.

The proceedings went into abeyance for a considerable period of time until ultimately an Answer was delivered to the notice of application by CIE on the 10th March, 2009. The Answer accepted that Gypsum had a *prima facie* right to a new tenancy at the time it served its notice of intention to claim relief, but went on to plead:-

> (a) That the claim of Gypsum Industries Ltd. was at all times defeasible by reference to the criterion of "good estate management" and other restrictions contained in the Landlord and Tenant (Amendment) Act 1980, and
>
> (b) That no claim by Gypsum Industries Ltd. is now maintainable because it has ceased to be a party to the action and has purported to alienate its interest in the lands.

Attached to the answer was a statement of the issues which raised a question as to the *locus standi* of Wintertide. Ultimately, by agreement of the parties, the Circuit Court was asked to determine the question of the entitlement of the applicant, Wintertide, to a new tenancy as a preliminary issue. The Circuit Court ruled on that issue in April 2009 to the effect that the applicant was entitled to a new tenancy. It is that ruling which is the subject of this appeal on behalf of CIE. The appeal raises two broad issues. The first of those relates to what might be described as the "scheme of development" and "good estate management" exceptions under s. 17(2) of the Landlord and Tenant (Amendment) Act 1980. The second issue that arises is the issue of the entitlement of Wintertide to pursue the claim for a new tenancy as opposed to its predecessor in title.

The Premises

The first thing to do is describe the premises at issue in these proceedings. The premises comprise "All that the property being the Paper Store comprising approximately 11,000 sq.ft. being part of the lands of Sheriff Street in the City of Dublin" described in a lease dated the 20th July, 1981, between Coras Iompair Éireann of the one part and Irish Press Limited of the other part as indicated for the purposes of identification, but not by way of definition or delineation on the map annexed thereto and thereon coloured yellow." The lease referred to was a 21 year lease, the term of which ran from the 1st January, 1980 and would have expired on the 31st December, 2000. The lessor was CIE and the lessee was Irish Press Ltd. Subsequently, part of the premises were sublet to Gypsum Industries Ltd. by lease dated 30th July, 1993, and the term of that sub-lease was for the unexpired balance of the original term of the lease. There was an error in the sub-lease as to the date of expiry but it is accepted by all concerned that the sub-lease was to expire on the 31st December, 2000. Consent was given by CIE to the creation of the sub-lease.

Subsequently Irish Press Ltd. transferred its interest as sub-lessor in the premises and its interest in the adjoining and remaining part of the premises, the subject of the original lease, to Tedcastle on or about the 15th April, 1996.

The property now occupied by Wintertide consists of the premises the subject matter of the sub-lease of the 30th July, 1993, the balance of the Paper Store which was subsequently assigned to Tedcastle McCormick & Co. Ltd. by Irish Press Newspapers Ltd. in or about the 15th April, 1996, together with the sub-lessor's interest in the Gypsum sub-lease. Tedcastle's interest in the premises was assigned for "all such statutory or rights of renewal if any and for all such estate right title and interest" as it had to Wintertide on the 16th January, 2002.

In addition to those lands, Gypsum had separately acquired a 250 year lease from CIE on the 16th September, 1969, in respect of a site beside the Paper Store and fronting on to Sheriff Street. It is not in dispute that prior to the expiration of the sub-lease, Gypsum had served a notice of intention to claim a new tenancy on Tedcastle and CIE. The interest of Gypsum in the property held under the 250 years lease has been acquired by Wintertide. Accordingly, Wintertide has acquired an interest, such as it may be in the property formerly known as the Paper Store and the property held under the 250 year lease fronting on to Sheriff Street.

The Issues

The question that now arises to be considered in these proceedings relates to the entitlement of Wintertide to step into the shoes of Gypsum to pursue the claim to a new tenancy in respect of that part of the premises which was the subject matter of the sub-lease.

For the purpose of explaining one of the issues raised in the course of theses proceedings it is necessary to set out to some extent the procedural history of these proceedings. An *ex parte* application was made by Gypsum to the County Registrar to substitute Wintertide as the applicant in these proceedings on foot of an affidavit of Labhaoise Ní Fhaoláin sworn on the 27th November, 2002, setting out the details of the assignment of Gypsum's interest in the premises, such as it may have been to Wintertide. The County Registrar by order of the 28th November, 2002, made the order sought amending the title of the proceedings by substituting Wintertide in lieu of Gypsum. A perfected copy of that order was sent to CIE on or about the 19th March, 2003. CIE did not appeal the order or take any steps to set it aside on any grounds. The first time an issue was formally raised as to the entitlement of Wintertide to claim a new tenancy was when the Answer was delivered by CIE in these proceedings. It has been argued on behalf of Wintertide that CIE are now estopped from raising any issue as to the validity of the assignment by Gypsum to Wintertide by virtue of the fact that an order was made substituting Wintertide for Gypsum in November, 2002. Mr. Owens, S.C. on behalf of CIE argued that the order of the County Registrar was not a final order of a court of competent jurisdiction deciding whether Wintertide was a tenant as defined in the 1980 Act and that in those circumstances, contrary to the assertion put forward by Mr. Simons, S.C. on behalf of Wintertide, there was neither an estoppel or *res judicata*.

It is clear that no steps were taken by CIE to challenge the order made herein by the County Registrar in November 2002. However the order made by the County Registrar was an order made *ex parte* simply to the effect that the title of applicant be amended to read "Wintertide Limited" in lieu of Gypsum Industries Limited. Such an order could not have had the effect of deciding the core issue between the parties. I accept that there has been considerable delay on the part of CIE in filing an Answer to these proceedings setting up its substantive defence to the proceedings, but that delay does not change the nature of the issue between the parties. If there was a complaint about delay in filing an Answer it was always open to Wintertide to bring an appropriate application before the court. It is clear from the Answer delivered, the statement as to issues appended to the Answer and the letter of the 18th March, 2003, referred to in the statement as to issues, that an arrangement was entered into between Wintertide and CIE to adjourn these proceedings generally with liberty to re-enter and for the payment of a sum by way of *mesne* rates in the sum of €92,056 per annum in respect of the premises. That payment was stated to be without prejudice to the issues arising in the proceedings. No doubt that arrangement does go someway towards explaining the delay. It is also clear from the letter of the 18th March 2003 that CIE did not accept that Wintertide was entitled to pursue the claim for a new tenancy. In any event as I have indicated, I am satisfied that CIE is not precluded by reason of their failure to take any steps to set aside the order of the County Registrar herein from challenging the entitlement of Wintertide to claim a new tenancy. The change of title of the proceedings cannot and could not have conferred any substantive right on Wintertide. It should be noted that in this context reliance was placed by Wintertide on the provisions of O. 22, r. 3 of the Circuit Court which provide:-

> "In case of an assignment, creation, or devolution of any estate or title *pendente lite*, the action, proceeding, or matter, may be continued by or against the person to, or upon whom, such estate or title has come or devolved."

That provision is no answer to the point made by Mr. Owens. The issue in this case relates to whether the assignment of such interest as was held at the time by Gypsum could come within the definition of "an assignment, creation or devolution of any estate or title". It is that issue which must now be decided.

In essence the arguments of each side can be summarised very succinctly. Wintertide argues that Gypsum was entitled to a new tenancy, a point conceded by CIE (subject to the argument that the claim of Gypsum was at all times defeasible by reference to the criterion of "good estate management" and other restrictions contained in the Act), Gypsum assigned its interest in the property such as it may have been to Wintertide and therefore Wintertide is entitled to the new tenancy. The argument of CIE is that Gypsum's interest in the sub-lease came to an end by effluxion of time, that Gypsum was entitled to claim a new tenancy and that at the time it assigned *inter vivos* whatever interest it may have had to Wintertide, it was no longer a tenant and accordingly Gypsum is not a predecessor in title of Wintertide just as Wintertide is not the successor in title of Gypsum. It is contended that Wintertide has never been a tenant of the property for the purposes of the 1980 Act.

I now want to examine in some detail the arguments of both sides in relation to this issue. In order to do so, it is necessary to look at the statutory provisions and in particular to consider some of the definitions contained in the Act. The definition of "predecessor in title" is as follows:-

> "Predecessor in title –
>
> > (a) When used in relation to a tenant, means all previous tenants under the same tenancy as the tenant or any tenancy of which that tenancy is or is deemed to be a continuation or renewal, and
> >
> > (b) When used in relation to a landlord, means all previous landlords."

The definition of tenant is as follows:-

> "'Tenant' means the person for the time being entitled to the occupation of premises and, where the context so admits, includes a person who has ceased to be entitled to that occupation by reason of the termination of his tenancy."

It is also relevant to set out the provisions of ss. 27 and 28 of the Act. Sections 27 and 28 provides as follows:-

> "27. Where a tenancy is continued or renewed or a new tenancy is created under this Part, the continued, renewed or new tenancy shall for the purposes of this Act be or be deemed to be a continuation of the tenancy previously existing and shall for all purposes be deemed to be a graft upon that tenancy, and the interest of the tenant thereunder shall be subject to any rights or equities arising from its being such graft.
>
> 28. Where an application is pending under this Part for a new tenancy or to fix the terms of a new tenancy and the pre-existing tenancy was terminated otherwise than by ejectment or surrender the tenant may, if he so desires, continue in occupation of the tenement from the termination of the tenancy until the application is determined by the Court or, in the event of an appeal, by the final appellate court, and the tenant shall while so continuing be subject to the terms (including the payment of rent) of such tenancy, but without prejudice to such recoupments and readjustments as may be necessary in the event of a new tenancy being granted to commence from such termination."

There can be no issues as to certain matters that arise in this case, namely,

> 1. That Gypsum was entitled to make an application for a new tenancy and had a *prima facie* entitlement to a new tenancy, subject, of course, to the right to CIE to object to a new tenancy on criteria set out in the Act.
>
> 2. That the tenant was entitled to remain in possession of the premises pending the determination of the application for a new tenancy. (see s. 28 of the Act).
>
> 3. That a new tenancy is deemed to be a continuation of the old tenancy for the purposes of the Act, in other words, it is a graft upon that tenancy. (see s. 27 of the Act).
>
> 4. Prior to the termination of the tenancy by efflux of time, Gypsum would have been entitled to assign its interest in the premises.

The arguments of Wintertide are straightforward and succinct. They say that as Gypsum could assign its interest up to the date of termination and equally could assign a new tenancy once it had been granted, it could also have assigned its "interregnum rights" and it is artificial for CIE to say otherwise. Reliance was placed by counsel on behalf of Wintertide on the decision of Finlay P. in *Dublin Corporation v. Smithwick and Others* [1976/7] I.L.R.M. 280 at p. 285, where, in the course of the judgment, Finlay P. commented as follows:-

> "It seems to me in general that there would be considerable injustice in forcing upon a person who is the owner of land, who has applied for permission and has had it refused and is then entitled to apply for compensation, the additional burden that he is prevented in order to acquire his compensation from disposing of his land if that is the most immediate best way of saving his loss. Having regard to my view of the other sections of the Act I am not forced to interpret the Act in that way and I am satisfied I should not do so and the first point made by the plaintiff fails."

In that case the first and second named defendants were lessees of a dwelling house in respect of which they sought and were refused planning permission for the development of office accommodation. The refusal was on the ground that it was envisaged that the area in which the house was situate would, in the future, be zoned for residential purposes. On appeal, the refusal was confirmed, and the defendants applied for compensation and for an order pursuant to s. 58, since a material change of use had been sought. The Minister made a s. 58 order, following which the defendants sold the property. The plaintiff challenged the right of the defendants to receive compensation, on the ground that s. 55 required an applicant to have a legal interest in the land affected not only at the time permission is refused, but also up to the time compensation is assessed, since other provisions of the Act could be construed so to mean. As is clear from the passage quoted above, the relief sought by Dublin Corporation was refused. Although that case relates to a different area of law the point that was emphasised on behalf of Wintertide was the fact that despite their subsequent assignment of the property, the relevant issue to consider was whether at the time of refusal the applicant had an interest in the effected property. Thus it was noted that notwithstanding the sale of the property subsequent to the making of the Minister's order. They were entitled at that stage to compensation and the fact that they subsequently conveyed their interest in the property did not act to prevent them from obtaining compensation.

In relying on that decision it was pointed out that under the provisions of the Act, a tenant not entitled to a new tenancy is entitled to the payment of compensation and reference was made in this regard to ss. 19 and 58 of the Act. It is argued by Wintertide that the right to compensation under the Act is assignable as part of the tenants interest having regard to the analogous situation dealt with in *Dublin Corporation v. Smithwick*.

Accordingly it is contended that Gypsum was entitled to assign all its right title and interest in the premises and that it did so for valuable consideration in January 2002.

Reference was also made to the decision in *Crofter Properties Ltd. v. Genport Ltd*. [2007] I.E.H.C 80, in which Finlay Geoghegan J. referred to the decision of McKechnie J. in *Harrisrange Ltd. v. Duncan* [2003] 4 I.R. 1 and went on to say at p. 89 as follows:-

> "The parties did not dispute the analysis of McKechnie J. as to the nature of the right of occupation conferred on Genport by s. 28 of the Act of 1980 and I respectfully also agree with that analysis. I would also draw attention to the temporary nature of the right. It is a personal right to continue in occupation whilst an application for a new tenancy is pending in the Circuit Court or on appeal and no more. It does not confer on Genport any estate or interest or other proprietary right in the land. The proprietary rights of Genport appear to be rights in the nature of a chose in action arising under ss. 20 and 21 of the Act of 1980 by reason of the service of the notice of intention to claim relief and commencement of proceedings claiming a new tenancy and the statutory provisions in accordance with which that claim will be determined."

In regard to the passage referred to above, it was stated in argument that the comments as to the distinction between a personal right to occupation and a proprietary right referred to in the passage quoted above were *obiter* comments. Emphasis was however, placed on the finding referred to in that passage that the proprietary rights of Genport in the case appeared to be rights in the nature of a chose in action. On that basis it was submitted that Gypsum having assigned "all the right title and interest" which it held in the premises that this included the right to pursue the claim for a statutory tenancy and that accordingly the applicant herein, Wintertide, was entitled to pursue that claim.

By way of response, CIE accepts that Wintertide is in succession to Gypsum but argues that Wintertide is not the "successor in title"

of Gypsum within the meaning of the Act. Mr. Owens contended that Wintertide could not be described as a "tenant" within the meaning of the Act. He did make reference to s. 77 of the Act which provides for the survival to rights on death so that on the death of a person who has claimed any right under the Act, his personal representative or successor in title may act in his place for the purposes of all matters consequential upon the claim. There is no similar provision for the situation that occurs in this case namely that a person is entitled to claim a right under the Act but has left before completing the application concerned.

Mr. Owens conceded that certain rights under the Act could be assigned, that is, the right to compensation for disturbance and improvements but he strongly argued that the right to a new tenancy could not be assigned. The right conferred by s. 28 to remain in occupation was a personal right confined to the existing tenant and assignment of the right to occupy could not confer the right to apply for a new tenancy.

In the course of his written submissions, Mr. Owens referred to the case of *Rosney v. Humphries and Another* [1952] 88 I.L.T.R. 44, as being a case which appeared to support the applicant's arguments. In the oral submissions, Mr. Owens explained that the fact of that case as described in the written submissions were incorrect. In the written submissions it was wrongly suggested that the assignment that occurred in that case in favour of a trustee for the creditors of the tenant, took place after the expiry of the tenant's interest. In fact, the report of the facts show that the assignment took place prior to the expiry of the tenant's interest in the lease. Accordingly that decision is in fact of no assistance to Wintertide. In truth the decision is of no assistance one way or another on any aspect of the matter because whilst there is a lengthy report of the facts there is no report of the arguments made in that particular case and more to the point the only report of the judgment is to the effect that the judge in the case reserved judgment and granted the application at a later date. Accordingly that decision is of no assistance whatsoever.

Finally I should note that there was some argument between the parties as to the issue of consent for the assignment by Gypsum to Wintertide but at this point I do not think it is necessary to refer to those arguments.

I now want to consider the arguments of the parties on the issue of the entitlement of Wintertide to claim a new tenancy. I think it is necessary for this purpose to consider again the provisions of s. 28 of the Act and to refer to those provisions in full. Section 28 provides:-

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

The provisions of s. 28 of the Act have been considered as referred to above in two decisions which were referred to in the course of argument. The first of those decisions, *Harrisrange Limited v. Duncan* [2003] 4 I.R. 1, was referred to in the course of the judgment of *Crofter Properties Limited v. Genport Limited* [2007] I.E.H.C. 80. I think it would be helpful at this point to refer to the judgment of McKechnie J. in the first instance in the former case. In that case the defendants tenancy expired by a flux of time on the 30th September, 1997. The plaintiff issued ejectment proceedings in the Circuit Court. In his defence and counterclaim, the defendant sought a new tenancy as well as compensation for disturbance and improvements. The Circuit Court granted possession to the plaintiff and dismissed the defendant's counterclaim. That decision was appealed and upheld by the High Court.

The plaintiff also issued summary proceedings in the High Court claiming *mesne* rates at market value in respect of the period from the expiration of the lease to the final determination of the original proceedings by the appellate Court together with interest pursuant to the Courts Act 1981. The defendant argued that the plaintiff was precluded from seeking *mesne* rates in respect of this period having regard to the terms of s. 28 of the Landlord and Tenant (Amendment) Act 1980. It was submitted that where a tenant remained in occupation pending the determination of an application for a new lease, and where a new lease was not granted, the Landlord was only entitled to the rent at the rate set under the expired lease. In those circumstances it was agreed by the parties that the issue in relation to the proper construction and effect of s. 28 of the Act of 1980 should be dealt with at the hearing of a motion as opposed to plenary hearing. It was in that context that McKechnie J. considered the construction of s. 28.

Having referred to the provisions of s. 28, McKechnie J. continued at p. 10 of his judgment:-

> "As appears from its wording, this section applies only as and from the date of the tenant's application to the court and not from any earlier date, even where a notice of intention to claim relief has been served: see *Baumann v. Elgin Contractors* [1973] I.R. 169 at p. 176. The section therefore operates where an application for a new tenancy or to fix the terms thereof is pending and where the pre-existing tenancy was not terminated by ejectment or surrender. In such circumstances, the tenant may, if he so decides, continue in occupation until the application is finally determined. But whilst so continuing, he is subject to the terms of the expired lease, including the obligation to pay the rent reserved thereunder."

McKechnie J. went on to outline his view of the position of the tenant following the application for a new tenancy in a passage which was quoted with approval by Finlay Geoghegan J. in the decision in *Crofter Properties Limited v. Genport*. I propose to refer to that particular passage also as it is, I think, an important statement of that position in law. He stated at p. 12:-

> "In my opinion, the right conferred by these sections does not create or establish any new statutory tenancy. It most certainly does not create any new contractual tenancy as where, for example, a tenant remains in possession after the expiry of his term and rent is paid and accepted, then without more the parties by operation of law are presumed to have agreed to a yearly tenancy on the same terms and conditions as are applicable: see *Phoenix Picture Palace Ltd. v. Capital & Allied Theatres Ltd.* Ir. Jur. Rep. 55. The right is simply one to continue in occupation and no more. Such continuation is of course on the terms as decreed by the various sections but though such terms and conditions may differ, this does not change the nature of the right so conferred. Such a right is, I think, personal, that is personal to the pre-existing tenant and, quite unlike a contractual tenancy, does not create any estate or interest capable of being transferred or transmitted either *inter vivos* or on death. It is also quite unlike any traditional statutory tenancies which existed previously, such as those under s. 32 of the Rent Restrictions Act 1960, as amended by both s. 10 of the Rent Restrictions (Amendment) Act 1971. Such a tenancy so created, which is now of course governed by the Housing (Private Rented Dwellings) Act 1982, as amended, is expressly capable of conferring rights on identifiable persons in certain specified circumstances. That is not the situation under discussion, which incidentally is also quite unlike the old renewable fifteen year 'judicial tenancies', which arose under the Land Law (Ireland) Act 1881, as amended: see Wylie, *Land Law* at para. 149. As I have said, in my view the right in this and similar situations is a bare one, and, by itself, does

not confer on the tenant any estate or interest in the land. Consequently, though in other areas of landlord and tenant law the above phraseology could and indeed would convey quite different meanings, nevertheless I do not believe that there is any significant difference between them in the context of these sections."

I have already referred to the passage of Finlay Geoghegan J. in the course of her judgment in *Crofter Properties Limited v. Genport Limited* in which she refers with approval to the analysis of McKechnie J. as to the nature of the right of occupation conferred by s. 28 of the Act of 1980 and it is not necessary for me to reiterate that passage. She noted that the right conferred by s. 28 of the Act of 1980 was a personal right to continue in occupation. She went on to note that the proprietary rights of Genport in that case appeared to be rights in the nature of a chose in action. It is relevant to note that in the *Crofter* case the nature of the issue that arose was whether the right to continue in occupation pursuant to s. 28 of the Act could be brought to an end by breaches of the terms of the lease. It was concluded in that case that the terms of the section could not be construed as automatically bringing to an end a tenant's right to continue in occupation in the event that the tenant found to be in breach of the terms of the tenancy. She went on at p. 91 of the judgment to reiterate as follows:-

> "As already stated, the right under s. 28 of the Act of 1980 is a temporary bare right of occupation."

She went on to say at p. 93 of the judgment:-

> "It is undisputed that Sachs Hotel was a tenement within the meaning of s.5 until the date of expiry of the lease. However, the premises are no longer held by Genport as an occupier 'under a lease or other contract of tenancy expressed or implied or arising by statute'. The premises are only occupied pursuant to s. 28, which does not give rise to any such express or implied contract of tenancy. Hence since the date of application to the Circuit Court on the 18th January, 2002, the premises have not been a tenement within the meaning of s. 48(1) and Genport is not entitled to serve an improvement notice pursuant to such section."

The relevance of the last passage is the interpretation of a tenement under the provisions of s. 5 of the Act, it is provided at s. 5(1) as follows:-

> "In this Act 'tenement' means
>
> (a) Premises complying with the following conditions:
>
> they are held by the occupier thereof under a lease or other contract of tenancy express or implied or arising by statute."

As pointed out by Finlay Geoghegan J. following the expiry of the lease the premises are no longer a tenement as they are not held by the occupier thereof under a lease or other contract of tenancy express or implied or arising by statute.

I find my self in agreement with Finlay Geoghegan J. who accepted the analysis of McKechnie J. in relation to the construction of s. 28 of the Act. I also agree with comments of Finlay Geoghegan J. in relation to the construction of "tenement" and the fact that that construction has a bearing on s. 28 as set out above in the passage referred above from the judgment of Finlay Geoghegan J. on that point. It is in those circumstances that I have to consider whether the assignment by Gypsum of "all the right title and interest" which it held in the premises can entitle Wintertide to presume the claim for a statutory tenancy. It is clear that following the expiry of a lease, the right conferred by s. 28 is a personal right to continue in occupation pending the determination of an application for a new tenancy. As McKechnie J. stated the right to remain in occupation does nor create any estate or interest capable of being transferred or transmitted *inter vivos* or on death. He went on to state that it does not confer on the tenant any estate or interest in the land.

It is clear from the structure of the Act that the position of the tenant once the tenancy has been terminated is limited. They have the right to remain in occupation pending an application for a new tenancy, but as, for example, it was found by Finlay Geoghegan J. in *Crofter*, they do not have the right to serve an improvements notice. It may appear to be an anomaly that during the currency of a lease, a tenant is entitled to assign the benefit of that lease subject to the terms and conditions of the lease to another party and that following the creation of a new lease on an application for a new tenancy under the Act, the tenant would likewise be in a position to assign the benefit of the new tenancy. However, the position under the Act is clear that s. 28 merely provides for a right of occupation pending the determination of the application for a new tenancy. In those circumstances it seems to me that the tenant does not have any estate or interest capable of being transferred or assigned to the other party. I note with interest that the Law Reform Commission in its report on the law of Landlord and Tenant (LRC 85-2007) set out its proposals for a draft Landlord and Tenant Bill. In its proposed draft bill, s. 93 proposed at subs. (1) as follows:-

> "Except where s. 86(1)(a) applies, where a tenant has served a notice under s. 87 the existing or previous tenancy shall, subject to subs. (2) continue in force until any occupation under s. 88 is determined by the court or, in the event of an appeal, by the final appellate court."

In the explanatory note to that proposed draft provision it noted that "The existing or previous tenancy continues, not just a right of occupation…. This was a dubious distinction, as illustrated by the recent ruling by Finlay Geoghegan J. in *Crofter Properties Limited v. Genport Limited* [2007] I.E.H.C. 80 that a tenant continuing in occupation is still subject to the terms of the tenancy and so the landlord can invoke the right to re-entry for breach of covenant and seek an injunction to stop the defaulting tenant continuing in occupation pending determination of his or her application."

I mention the report from the Law Reform Commission because it illustrates the fact that there is clearly a difference between the continuation of the existing tenancy as proposed by the Law Reform Commission and the provisions of s. 28 which provide that the tenant has a right to continue in occupation of the tenement. Indeed in this context it is perhaps relevant to look again at part of the judgment in *Crofter* at p. 92 of the judgment. Finlay Geoghegan J. commented on the overall context of the scheme contained in Part II of the Act of 1980 and went on to say:-

> "There is no provision in Part II of the Act of 1980 which expressly envisages that a tenant who has an application for a new tenancy pending before the Circuit Court, might at the time of such determination not be in occupation of the tenement. On the contrary, the statutory scheme appears premised on the assumption that a tenant remains in occupation after the termination of the old tenancy, and where a new tenancy is granted, there is a seamless transfer from holding under the old tenancy to holding under the new tenancy in such a way as to avoid disruption to a tenant while ensuring the rights of the landlord are respected. The new tenancy commences on the termination of the old

> tenancy (s. 16) and is a graft on the previous tenancy (s. 27). The court may under s. 23(7) require a tenant to expend a specified sum in the execution of specified repairs and postpone the grant of the new tenancy until that requirement has been complied with.
>
> Accordingly, it appears to me that in the context of the above statutory scheme a right of occupation under s.28 should only be terminated in exceptional circumstances where there appears a risk of a serious injustice to the landlord if the tenant is permitted to remain in occupation whilst continuing to act in breach of the terms of the tenancy. This approach is also confirmed by the temporary nature of the bare right of occupation conferred by s. 28."

I think it is clear from the above that following the termination of a tenancy and pending the determination of an application for a new tenancy, the position of the tenant is no longer the same as it was under the tenancy. The bare right of occupation gives limited rights to the applicant and indeed as can be seen from the decision in *Crofter* restricts the normal rights available to the landlord in respect of breach of covenant in the lease. In the circumstances it seems to me that the assignment by Gypsum to Wintertide cannot entitle Wintertide to step into the shoes of Gypsum for the purpose of making the application for a new lease. Gypsum cannot by the assignment of "all the right title and interest" which it held in the premises confer the status of tenant on Wintertide. Gypsum by virtue of the scheme contained in 1980 Act, was in a position at the time of the termination of the tenancy and pending the determination of the application for a new tenancy in a position which was protected by statute. The extent of the protection given by the statute was to permit Gypsum to remain in occupation of the premises. Gypsum is no longer in occupation of the premises and in all of the circumstances despite the assignment of whatever interest it held in the premises, I am satisfied that the assignment could not and did not have the effect of transferring any estate or interest in the property to Wintertide.

A number of other issues were considered before me in relation to the issue of CIE's consent to the assignment and the fact that no such consent was obtained, the necessity for such consent, and more particularly in relation to the provisions of s. 17 of the Act in respect of the issue of a permitted scheme of development and the issue of good estate management. In the light of the finding to the effect that Wintertide is not now in a position to apply for a new tenancy those issues need not be considered by me at this point.

Accordingly, I will allow the appeal in this case.