

Neutral Citation Number: [2006] IEHC 27

**THE HIGH COURT**

**Record Number: 2000 No. 11774P**

**Between:**

**John E. Shirley, JES Holdings Limited and Lucy Shirley  
Plaintiffs**

**And**

**A. O'Gorman & Company Limited, Ireland and The Attorney General**

**Defendants**

**Judgment of Mr Justice Michael Peart delivered on the 31st day of January 2006:**

The hearing of the issues arising in these proceedings became necessary as a result of my judgment, delivered on the 31st May 2005, in the appeal from an order of the Circuit Court, wherein I determined that the first named defendant was entitled, by virtue of coming within certain of the provisions of the statutory scheme for the enlargement of tenants' interests to acquire the fee simple interest in certain business premises in Carrickmacross from the second named plaintiff herein, the landlord, and for that purpose I determined the appropriate consideration payable under the scheme to be the sum of €30,000 in accordance with the statutory mechanism for so doing as provided by s. 7 of the 1984 Act .

However, at that hearing of that appeal before me it was agreed by all parties that no order should be drawn up in this regard until such time as these separate proceedings have been determined, since the plaintiffs herein (the landlord) have therein contended that the statutory scheme under which the first named defendant has been found entitled to acquire the fee simple interest in the said business premises, including the mechanism provided therein by which the consideration payable is to be determined, is incompatible with the Constitution, being in their submission an unjust attack on their property interests, and since that is an issue which could not be determined within the Circuit Appeal case itself.

In the event that the plaintiffs are successful in so arguing, then it is acknowledged by all concerned that the benefit of any such finding of unconstitutionality is something from which the plaintiffs can derive benefit in relation to the said appeal. If the plaintiffs are unsuccessful in this challenge to the constitutionality of the statutory scheme, then the Circuit Court order shall simply be affirmed save as regards the variation in the purchase price.

For the full factual background to the present claim made by the plaintiffs, my judgment delivered on the 31st May 2005 should be referred to. I propose to refer to the three plaintiff parties collectively as the plaintiffs, there being no relevant distinction to be drawn between them for the purposes of this action. The second named plaintiff is a foreign registered limited liability company registered in which the first and third named plaintiffs are shareholders therein. The second named plaintiff company owns the fee simple interest in what I will loosely refer to as the Shirley properties, and there are over thirty individual properties which are subject to leasehold interests granted at various times and to which the statutory scheme impugned in these proceedings has or will have relevance. I have been informed that there are some applications pending to acquire the fee simple in some of these other Shirley properties, and those applications await the determination of these proceedings. No doubt further applications in respect of the other properties would be in due course made at the appropriate time under the leases in question.

While the second and third named defendants have raised a locus standi point in relation to the plaintiffs on the basis, inter alia, that the second named plaintiff is not an Irish registered corporation, I am completely satisfied that as the owner of the properties in question (including as shareholders in the company), and in particular the property the subject of the O'Gorman lease, all of the plaintiffs in their respective capacities are entitled to mount this constitutional challenge to the statutory scheme. The court has been referred by Mr Fitzsimons to a number of decisions in this regard, but the Court is content to respectfully refer to the judgment of Keane J. (as he then was) in **Iarnrod Eireann v. Ireland [1996] 3 IR 321**, and I refer in particular to the passage from that judgment appearing at p. 345 thereof as follows:

*"Undoubtedly, some at least of the rights enumerated in Article 40, s.3, sub-s.2 - the rights to life and liberty - are of no relevance to corporate bodies and other artificial legal entities. Property rights are, however, in a different category. Not only are corporate bodies themselves capable in law of owning property, whether movable or immovable, tangible or intangible. The 'property' referred to clearly includes shares in companies formed under the relevant companies' legislation which was already a settled feature of the legal and commercial life of this country at the time of the enactment of the Constitution. There would be a spectacular deficiency in the guarantee to every citizen that his or her property rights will be protected from 'unjust attack', if such bodies were incapable in law of being regarded as 'citizens, at least for the purpose of this Article, and if it was essential for the shareholders to abandon the protection of limited liability to which they are entitled by law in order to protect, not merely their own rights as shareholders but also the property rights of the corporate entity itself, which are in law distinct from the rights of its members..."*

The position is beyond any real argument in my view as far as these plaintiffs are concerned, and it is unnecessary for me to set out the arguments and the case law to which I have been referred by Counsel. Equally the fact that the second named plaintiff is a company registered outside this jurisdiction does not impinge adversely upon its locus standi in these proceedings. Mr Fitzsimons has referred to a passage of the judgment of the Supreme Court in **Re: Article 26 and the Illegal Immigrants (Trafficking) Bill 1999 [2000] 2 I.R. 360** at p. 385 as follows:

*"It would be contrary to the very notion of a state founded on the rule of law, as this State is, and one in which, pursuant to Article 34 justice is administered in courts established by law, if all persons within this jurisdiction, including non-nationals, did not, in principle, have a constitutional right of access to the courts to enforce their legal rights..... It may be that in certain circumstances a right of access to the courts of non-nationals may be subject to conditions or limitations that would not apply to citizens. However, where the State or State authorities make decisions which are legally binding on, and addressed directly to, a particular individual within the jurisdiction, whether a citizen or non-citizen, such decisions must be taken in accordance with the law and the Constitution. It follows that the individual legally bound by such a decision must have access to the courts to challenge its validity. Otherwise the obligation on the State to act lawfully and constitutionally would be ineffective."*

In my view the entitlement of the plaintiffs, or any of them to make the challenge in these proceedings is clear.

<b>The</b>	<b>plaintiffs'</b>	<b>outline</b>	<b>argument:</b>
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The starting point for the plaintiffs' constitutional argument is the relevant Articles of the Constitution itself which they contend provide for them a guarantee of protection against the mischief, as they see it, of the impugned statutory provisions.

**Article 40.3** provides as follows;

*"1. The State guarantees in its laws to respect, and as far as is practicable, by its laws to defend and vindicate the personal rights of the citizen.*

*2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."*

**Article 43** provides as follows:

*"1. 1. The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.*

*2. The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.*

*2. 1. The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*

*2. The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."*

The legislative provisions which constitute what has been referred to as the statutory scheme enjoy the presumption of constitutionality, and the plaintiffs seek to rebut that presumption by their evidence and submissions.

Eoghan Fitzsimons SC for the plaintiffs immediately draws attention to the fact that the right to private property is not an absolute right, and that it may be "regulated by the principles of social justice". He hopes by his submissions and by adducing appropriate evidence, which I shall come to in due course, to demonstrate to the Court that the impugned statutory scheme no longer pursues any aim which accords with any principle of social justice, even if it may be seen to have done so in times past when circumstances in the State were not as they are now.

Mr Fitzsimons pays particular attention to the word "accordingly" which appears at the commencement of Article 43.2.2, and submits that its meaning must be that it is only when seeking to pursue a principle of social justice that the Oireachtas may pass a law which delimits the exercise of these rights for the purpose of "reconciling their exercise with the exigencies of the common good". In that regard he has referred to a passage from the judgment of the Supreme Court in **Re: Article 26 and the Employment Equality Bill 1996 [1997] 2 IR 117 at 367:**

*"In reading Article 43 of the Constitution it is important to stress the significance of the word 'accordingly' which appears in Article 43, s.2, subsection 2. It is because the rights of private property 'ought' in civil society to be regulated by 'the principles of social justice' that the State may, as occasion requires delimit their exercise with a view to reconciling it with 'the exigencies of the common good'. It is because such a delimitation, to be valid, must be not only reconcilable with the exigencies of the common good but also with the principles of social justice that it cannot be an unjust attack on a citizen's private property pursuant to the provisions of Article 40, s.3 of the Constitution (see judgment of Walsh J. in Dreher v. Irish Land Commission (1984) ILRM 94)"*

In addition to passing these two tests of pursuing principles of social justice and the exigencies of the common good, Mr Fitzsimons also submits that any legislation which seeks to delimit the exercise of rights of private property must also not offend against the principle of proportionality. In other words, the measures being taken in the legislation under scrutiny must encroach upon the rights of the property owner no more than is necessary for the attainment of the objective sought to be achieved. Mr Fitzsimons submits that even if this Court was to find that there is identifiable some social justice principle which justifies the regulation of the plaintiffs' property rights by delimiting them in accordance with the exigencies of the common good, the mechanisms by which that is achieved by the statutory scheme, including the price-fixing mechanism contained in s. 7 of the Landlord & Tenant (Amendment) Act, 1984 ("the 1984 Act"), go far beyond what is necessary or required for any such purpose, and are disproportionate, arbitrary, unjust and unconstitutional. Section 7(4) of that Act provides as follows:

*"7 (4) (a) Where at the relevant date, the land is held under a lease that has expired or is held at a rent which, whether under the terms of the lease or by operation of a statute, is subject to a review which is due but has not been made, the purchase of the fee simple shall, subject to the other provisions of this section, be a sum equal to one-eighth of the amount which, at that date, a willing purchaser would give and a willing vendor would accept for the land in fee simple free of all estates, interests and incumbrances, but having regard to any covenant which continues in force by virtue of section 28 of Act (No.2) of 1978, and assuming that the lessee has complied with any other covenants or conditions in his lease that could affect the price.*

*(b) Deduction shall be made from that amount equal to the value of the goodwill, if any, in the premises of the person acquiring the fee simple.*

*(c) A deduction shall also be made from that amount equal to any addition to the value of the premises resulting from such works as would qualify for the special allowance mentioned in section 35 of the Act of 1980.*

*(d) In determining the amount referred to in paragraph (a) any addition to value deriving from contemplation of substantial rebuilding, or a scheme of development (such as are mentioned in section 33(1)(b)(i) and (ii) of the Act of 198 shall be disregarded."*

Evidence given on behalf of the plaintiffs by valuer, David Freeman, has indicated that the present market value of the entire premises on the open market as of 1998, including the supermarket erected by the tenant, but excluding any goodwill value attaching to the premises, would be in the region of €1,200,000. This figure was disputed by Mr Good, a valuer called on behalf

of the tenant. He said the premises would fetch something more like £300,000, and not €1,200,000. In contrast to those figures, there has been evidence from Mr Freeman that the market value of the original Carrick House premises (excluding any tenant's works), as of 1998, is in the region of €330,000, and from Mr Good that on the same basis the value would be between £150,000 and £180,000. I do not propose revisiting these conflicts in evidence. I dealt with the conflicts in the valuation evidence in so far as I had to for the purpose of the Circuit Appeal. It is safe to say, however, for the purposes of the present case, that the value of the entire premises now, which includes the developed supermarket premises, and any further addition to that value by virtue of any potential development value, is far in excess of any notional 1998 market value of the stand-alone Carrick House premises as originally demised, the latter being the figure by which the price for the acquisition of the fee simple is to be calculated on the basis of one-eighth thereof.

It will be seen from my judgment delivered on the 31st May 2005 that I concluded that the first named defendant is a person to whom s. 8 of the Landlord and Tenant (Ground Rents) (No.2) Act, 1978 gives an entitlement to enlarge its leasehold interest in these business premises by acquiring the fee simple interest therein from the plaintiffs, since the said defendant came within the provisions of s. 9 (1) of that Act, and in particular met one of the conditions set forth in s.10 of that Act, namely subsection (2) thereof which provides:

*" that the lease is for a term of not less than fifty years and the yearly amount of the rent or the greatest rent reserved thereunder (whether redeemed at any time or not) is of an amount that is less than the amount of the rateable valuation of the property at the date of service under section 4 of the Act of 1967 of notice of intention to acquire the fee simple, or the date of an application under Part III of this Act, as the case may be, and that the permanent buildings on the land demised by the lease were not erected by the lessor or any superior lessor or any of their predecessors in title; provided that it shall be presumed, until the contrary is proved, that the buildings were not so erected."*

The first named defendant acquired the 1945 leasehold interest in the premises in 1974 from a Mr Connolly. There was evidence before me that at the time of purchase there was a butcher's shop and supermarket run from the premises, and that in 1979 and thereafter, following certain grants of planning permission, the first named defendant greatly extended and altered the premises into, inter alia, a much larger supermarket. In my said judgment I have set out in detail the nature of subsequent planning permissions and developments on foot thereof, and I concluded that one consequence of this process of development was that the so-called Carrick House premises as originally demised, had been caused to lose its original identity for the purpose of s. 9 (2) of the 1978 Act. As also set forth in that judgment there was evidence that the cost of the various developments by the first named defendant between the years 1979 and 1996 was in excess of €300,000, and that the area covered by buildings had been enlarged as a result from 283 sq. metres to an area of some 1339 sq. metres.

The rent under the lease (as adjusted in 1970 from £55 per annum in exchange for the removal of the residential use restriction) is £75 per annum. The Rateable Valuation at the date of service of the notice to acquire the fee simple in 1998 was £211.50, having been adjusted upwards by the rating authority from time to time in order to take account of the various developments carried out. It is important to the present case to note that at the time of the granting of the said lease in 1945 the rent of £55 per annum, and the later adjusted rent of £75, exceeded easily the amount of the rateable valuation of the premises. It is safe to assume that the increase in the rateable valuation from time to time was a consequence of the tenant's works and development of the premises that the rateable Valuation. This is relevant to the plaintiffs' submissions, since one of the conditions which a tenant must satisfy in order to be entitled under the 1978 Act to acquire the fee simple is, as provided by s. 10(2) thereof, that *"the yearly amount of the rent or the greatest rent reserved thereunder (whether redeemed at any time or not) is of an amount that is less than the amount of the rateable valuation of the property at the date of service under section 4 of the Act of 1967 of notice of intention to acquire the fee simple"*.

In other words, it follows that a premises may slip quietly and by virtue only of a tenant's own efforts by way of development (albeit ones to which the landlord gives his consent), from being one which is outside the statutory scheme of entitlement by which the tenant may acquire the fee simple from the landlord, to being a premises which falls within that statutory scheme. This is a point to which I shall return in due course.

### **Some evidence on behalf of the plaintiffs:**

I have carefully considered all evidence adduced, and the fact that I do not hereunder refer to all of that evidence is not to be taken as any indication that I have failed to have regard to any part of it.

The plaintiffs called Mr Aidan Daly who is the owner of the leasehold interest in a premises at 23 Main Street, Carrickmacross. This interest was created by a 99 year lease from the plaintiffs, and Mr Daly has made an application to the plaintiffs to acquire

the fee simple under the statutory scheme. He has let out that premises to another commercial entity and is in receipt of an annual rent in the sum of about €31,000. He stated that he was the leasehold owner of another premises in the same town, also from the plaintiffs, and that he was in receipt of about €42,000 from that premises. In addition to these two premises held on leases from the plaintiffs he has three or four other premises also in the town. In his evidence he described himself as a retired retailer.

The plaintiffs also called Mr O'Gorman, who through the first named defendant company is the owner of the leasehold interest in the subject premises. He confirmed the evidence which he had given in the Circuit Appeal hearing, and therefore, inter alia, that he no longer operates his supermarket business out of these premises which are presently unoccupied, and that he operates his supermarket business from another larger premises which he has developed at the other end of Carrickmacross.

His evidence is that he purchased these new premises for the sum of about €1.5 million about three years ago, and that he spent approximately another €5 million on the premises before opening it as a supermarket. He has other premises in Ardee and Cootehill. He confirmed that 2004 was a good trading year and he had already produced accounts showing good figures for the previous year. Mr Fitzsimons asked Mr O'Gorman what plans he had for the subject premises in the event that his application to acquire the fee simple was successful. He replied that he had a number of plans for it, such as to open it as a DIY/general hardware outlet. He had other ideas but said also that he had not given it much thought yet. Mr Fitzsimons asked if one of the possibilities was that he might sell the premises, to which he answered: "No, not necessarily, no". He was also asked if letting the premises, as Mr Daly had done, was another possibility, to which he replied: "Again, we would have an open mind. I just haven't given it much thought, really". He was asked if he was familiar with the other business premises on the same side of the street as the subject premises (the side on which the plaintiffs are the freehold owners) and he said that he was, and he confirmed that he would think that all these premises were prosperous businesses. There was other evidence during the course of the Circuit Appeal hearing that two of such premises were occupied by Bank of Ireland and Allied Irish Banks Plc, respectively.

The plaintiffs also called Prof. Tony Fahy, who stated in evidence that he is a professor in the Social Policy Research Division in the Economic and Social Research Institute, and that he had a background in sociology, having completed his primary degree in Sociology and History, and his Ph.D. in Sociology. He stated that much of the work that he has been engaged upon in recent years has related to social policy issues generally, and that he has a particular interest in the question of the distribution of property as a social policy instrument. Mr Fitzsimons asked him to explain the concept of distributive or social justice, and he did so in the following way (T6, Q60):

*"...generally it would refer to situations where people who are disadvantaged in society are held to have an entitlement to have their disadvantage addressed by society at large, by the State, and to have the cost of that borne in some way out of the public purse. So it is, if you like, it is to rectify extreme inequalities or extreme forms of disadvantage, whether it be poverty or illness or disability of one sort or another. "*

Prof. Fahy was asked to describe social policy in this State in a general way as it related to land distribution including prior to 1922. He considered that in Ireland it could be argued that property distribution, as opposed to redistribution of current resources such as cash, services or other benefits, has been an important part of social policy, unlike in some other jurisdictions such as Great Britain and some other European countries, and that legislation here such as the Land Act 1903 as well as subsequent land legislation which transferred ownership in agricultural land from a small landlord class to a large tenant class could be seen as important examples of this policy. He stated that there was a social justice element to this policy of land distribution since many of the beneficiaries were impoverished tenant farmers, and that in addition there was a broader social good justification for it, since owner occupation could be seen as enabling even those less impoverished farmers to operate their holdings more efficiently, and the whole agricultural economy to be more productive. He stated also that the statutes under which this policy operated did not involve expropriation in value terms from large property owners who were required to distribute their property, since the 1903 Land Act was framed on the basis of an agreement reached between the landlord class and the tenant class at the land conference of 1902 - that agreement being reached on the basis of purchase by the tenant at a price to be agreed, but that in recognition of the likelihood that there would be a gap between what the tenant would agree to pay and what the landlord thought he should get, the British government was prepared to offer to the landlord a 12% bonus on the price agreed in order to bridge that gap between the two sides. He considered that it was a scheme based largely on market value but with an element of subsidy built into it which was to be borne by the State. He was of the view that the landlords were content with the terms of the scheme, and stated that in fact at the same time there grew up in Great Britain a movement among the landlords to have a similar scheme introduced there, although for reasons of cost the movement did not succeed in its objective there. Even in this State the extent of that subsidy was described by Prof. Fahy as being "massive", and he stated that in fact it constituted about three quarters of the country's gross national product at the time. He stated that the bulk of the

transactions which took place under the scheme were done on a voluntary basis by the landlords, and that there was no need to have a compulsory element included in the legislation, as originally sought by the Irish parliamentary Party in the House of Commons in the late 1880s, once it became known that the British Government were going to provide the subsidy. He stated also that by 1922 about 75% of the landholdings had been transferred under the scheme, and that the Land Act 1923 had brought in a compulsory scheme in order to deal with the balance, whereby the Irish Land Commission took ownership of them on the basis of what Prof. Fahy considered to be a fairly generous compensation package for landowners.

Mr Fitzsimons asked Prof. Fahy to say whether from his perspective he saw a difference between the 1903 Act scheme and the type of statutory scheme set up under the more recent legislation such as the Landlord and Tenant Act, 1967 and subsequent Acts such as the 1978 Act and the 1980 Act. In reply he referred to the Ground Rents Commission set up to look into the question of freehold acquisition. He was of the view that this Commission never compared the costs and benefits of the then existing situation, with the costs and benefits of any new situation which might be contemplated and the costs involved in making the transition, but rather was guided in its consideration of the matter (and principally in relation only to residential property only), by the notion that people in this State generally expected to own their own homes and that this was generally thought to be a good thing. He considered that this was the justification for the legislation which was introduced.

The second principle which guided the Commission's deliberations, according to Prof. Fahy, was something set forth in the Government's terms of reference to the Commission, namely that whatever scheme of acquisition may be recommended, no element of the cost of the scheme should fall on the State. He considered this to be what he described as *"a dramatic departure from a tradition that had gone back to the 1903 legislation, and that had in fact been present in other measures that had arisen since then, having to do for example with the purchase of residential properties, say, from local authorities.....the assumption was there that this was a cost that would fall on the State and that the State should bear it"*.

Prof. Fahy referred to the fact that in its report the Commission had stated, inter alia, that the right to purchase should be given to a lessee of a dwelling, or a combined dwelling and business premises, and that in general it had not proposed that any scheme should extend to the purchase of the reversion of a lease of a purely business premises. He stated that there was no suggestion from any quarter at the time that there would be a social good or social justice benefit by extending a scheme to commercial property. He stated that the Commission had not addressed the question of social justice, and that Ground Rent Acts, including the statutory scheme referred to herein, do not in their provisions address the issue of social justice in the sense of distribution on a need basis to certain sectors or persons in society.

Mr Fitzsimons asked Prof. Fahy if he saw any logic to the price-fixing provisions contained in s. 7 of the 1984 Act. He stated that he could not see a clear logic to it, and that it seems to be a departure from the practice up to that point in time and that it is motivated by a concern to avoid putting any cost upon the State. He opined that the legislation emerged from a view that, even though people may not be in any particular need as such, it was desirable that they should own their homes, and that it was more a matter of what he termed "broad natural justice rather than distributive justice". The question of who should bear the cost of such a scheme was not addressed, according to Prof. Fahy, and he stated also that he did not think that any rationale was given for the solution which was arrived at, other than that the State should not bear any of the cost arising out of it.

Mr Fitzsimons asked Prof. Fahy to assume for the moment that the evidence would satisfy the Court that the operation of the price-fixing mechanism contained in s. 7 of the 1984 Act does in fact penalise landlords in the sense that they receive less than the value of the premises, and to comment on such a result from a social justice perspective. He stated that generally speaking if a measure had a social justice or social benefit then the principle is that the State should bear the cost and that it should not be arbitrarily levied upon particular individuals.

Prof. Fahy stated also that he found it hard to think of any other instances in which the transfer of property rights would occur or be sought to be justified on social policy grounds. He referred, however, to the provision in the Planning and Development Act, 2000 where a developer of land may be required to hand over up to 20% of his land for social and affordable housing, but he distinguished that situation from the present one since what the landowner was being asked to hand over was part of his land in respect of which planning permission had been granted, and he likened that cost burden to a capital gains tax, since some of the so-called "windfall effect" of the planning permission on the land overall was being given up for the common good. He could not see such a provision as being in any sense an arbitrary transfer of an existing property right from one person to another.

He was asked also, and again on an assumption as to the Court finding that there was an undervalue of the property under the statutory scheme, if there was any logic from a social justice point of view in the statutory scheme in the context of a transfer of

property rights from one prosperous commercial entity (the landlord) to another prosperous entity (the tenant in the subject property). He replied that he could not see any such, even though there were instances where the Government would give substantial grants to commercial enterprises, through, say, the IDA, where there would be a benefit to the economy such as a growth in employment. But he pointed to the fact that in such instances the cost of that grant to the commercial entity was borne by the general taxpayer, and not by any particular individual. He considered that the consequence under the statutory scheme whereby one prosperous entity should be required to transfer property to another prosperous commercial entity at less than full value is so at variance with anything else in Irish public, social or economic policy that *"it would be hard to imagine that this would have been intended as a consequence of the legislation."*

When cross-examined by Seán Moylan SC on behalf of the first named defendant, Prof. Fahy agreed that there were forms of justice to be considered besides what has been referred to as distributive justice in the direction of the tenant. In that regard he pointed to the right of the landowner not to have his property arbitrarily taken away from him in order to simply help some other individual less well off. He stated that such a situation would be unjust even though it would not be what he called "redistributively unjust in the other direction", and he could not think of an example of where such a thing had occurred outside the ordinary general taxation scheme where certain classes of income earners and property owners might be levied with some form of tax or levy which would then be used or transferred to those in need. Mr Moylan suggested to him that what occurred under the Land Commission regime after the 1923 Act was introduced resulted in a very large amount of land being sold to tenants under the compulsory scheme. He referred to the part of the scheme whereby in the 1930s land could be compulsorily purchased from the owner simply because it was being under-used. Prof. Fahy stated that this would have been a radical departure from what had previously pertained, that it was much debated at the time, but that it was not really pursued. Mr Moylan however put it to him that from the 1950s to the 1980s the Land Commission had acquired land on a compulsory basis from owners on the basis that that land would be distributed to others in the immediate vicinity of the land, and that this was on the basis of social justice. Prof. Fahy stated in response that if this happened it was very unusual. But when pressed by Mr Moylan on the basis that it was a common occurrence, Prof. Fahy stated that in so far as it happened it would have been "on the basis of adequate compensation at market values". He added that in so far as the Land Commission did compulsorily acquire land from the 1950s onwards, albeit on the basis of open market value, it has been argued that they did so in order to sustain the value in land at that time and that the public policy purpose served at the time by that policy was to hold up the value of farm land. He added also that at the time it was often the case that the Land Commission was the only buyer in the market. He was asked by Mr Moylan about the situation pertaining in the period of the late 1960s up to the 1980s where, it was suggested to him, Land Commission values had become much less than the open market value. Prof. Fahy was of the view that by that time the Land Commission activities had wound down considerably to the point where it was a minor player in the rural economy. But Mr Moylan suggested to him that he was incorrect in this statement and that the Land Commission was a major player even at that time and to such an extent that there was a constitutional action taken in relation to the use by the Land Commission of payment for land by Land Bonds (the Dreher case) Prof. Fahy stated that there was certainly a dispute surrounding the market value of land bonds and whether their actual value equated to their nominal value. Mr Moylan suggested that the right of the Land Commission to acquire the land was not in dispute, but rather simply the method of payment by means of the transfer of Land Bonds since this resulted in less than market value being paid. Prof. Fahy concluded this cross-examination by stating that the activity of the Land Commission at that time in the 1970s and 1980s was not an important element of social or rural policy.

Gavin Ralston SC on behalf of the second and third named defendants also cross-examined Prof. Fahy in relation to his evidence. Prof. Fahy accepted that if the Court was to find that the impugned statutory provisions in fact provided fair market value to the owner of the fee simple then he could not object to same, but he maintained his view that this legislation was a departure from the tradition of social and economic policy in this country whereby "adequate compensation" was paid to the owner. Mr Ralston referred him to the provisions of s. 7 (3) of the 1984 Act which provides that the purchase price shall be the sum which in the opinion of the arbitrator a willing purchaser would give and a willing vendor would accept for the fee simple at the relevant date, and suggested to Prof. Fahy that this provision constitutes a fair definition of an open market value. But Prof. Fahy stated that while that might be so on the face of it, he was somewhat unclear about the meaning of a willing purchaser and willing vendor since, as he stated, *"a vendor may be willing to sell a piece of property in the knowledge that a particular piece of legislation more or less obliges him to sell, even if he would feel aggrieved that the valuation on the property was below the market value"*. In answer to Mr Ralston he agreed however that even if the price fixing mechanisms under the scheme did not give the exact market value to the owner but gives more or less that value it would be unobjectionable, and stated also that the only way to establish the market value is to put the property on the market and see what a bidder will pay, and that outside that procedure there is always room for dispute as to what the market value is.

Moving from the question of market value, Mr Ralston asked Prof. Fahy if he was aware of what was the common law position prior to the enactment of the landlord and tenant legislation in this country in relation to a tenant who erected buildings on

property, to which he responded that he was not, and he stated, when it was put to him, that it seemed "odd" that the common law position was, as stated by Mr Ralston, if a tenant erected a building on his property, that at the end of his tenancy or his lease the tenant had to give the entire, including such buildings, back to the landlord. Mr Ralston stated that this was precisely the what happened and what the impugned legislative provisions were designed to prevent happening, and suggested that in the light of this Prof. Fahy would perhaps revise his view about the social justice of the legislation, to which he responded that the comments which he was making in relation to social policy were made on the assumption put to him by Mr Fitzsimons, namely that the Court would make a finding in relation to undervalue. But Mr Ralston pointed out to Prof. Fahy that in addition to making his comments in the context of an undervalue, he had also expressed the view that he could see no social justice need for property to be transferred from one person to another, and that it would appear that in so expressing such a view he was unaware that the purpose of that legislation was to give protection to tenants who have invested in the construction of buildings, and that this was the intention at the heart of the legislation. Prof Fahy accepted that if such an intention was behind the legislation, it would be justified on general policy grounds, including in relation to commercial property if the same situation regarding tenants' improvements existed, since that would be an injustice to the tenants in question which was sought to be addressed by the legislation. In a later part of his cross-examination he accepted that in a circumstance where a tenant has expended money on erecting buildings and the landlord has had no direct input other than to provide the land by way of lease, the landlord would get a windfall since the buildings would have fallen to the landlord at the expiry of the lease and without compensation to the tenant.

It is worth noting at this point that at the conclusion of Mr Ralston's cross-examination, Mr Fitzsimons revisited this particular part of his evidence in re-examination, and asked him whether he was aware that prior to the enactment of the impugned provisions the common law position did not in fact pertain in this country since prior thereto tenants had rights to a new lease under the 1931 Act or the 1958 Act. Prof. Fahy said that he did not fully understand the common law position, and the subsequent legislative enactments in this area, and that he did not fully take into account matters such as this when answering questions put by Mr Ralston.

Mr Ralston also referred Prof. Fahy to the provisions of the Landlord and Tenant Act, 1931, and the Landlord and Tenant (Reversionary Leases) Act, 1958 which gave a tenant the right at the end of the term of his lease to a new 99 year lease, and suggested that what the legislation impugned in the present proceedings was doing was simply an extension of these provisions in ease of tenants. Prof. Fahy stated that it was certainly arguable that a common good purpose or social justice purpose is served in this way and he would not dispute that, but that there was also a second matter to be considered and to which he had already referred, namely who should pay for the benefit, and that as he had already stated in his evidence the tradition had always been that the State would pay for it rather than any individual or group of individuals. He went on to say that he would not wish to argue that no good common purpose is served by the legislation, but there is the question which the Court must decide as to whether the beneficiary is receiving something at below market value and, if so, the fact that the State is not making up the shortfall in value to the owner.

Mr Ralston then turned to the question of whether on the policy ground of modernisation of land law in this country this legislation could be justified. Prof. Fahy agreed that such modernisation could be a justified reason for the legislation since it is in the interests of commercial and industrial life that property legislation be efficient and effective. Mr Ralston referred to a passage from Prof. Wylie's book on Irish Land law in which the learned author referred to the long leasehold interests in urban property as being one of the last vestiges of feudal law in Ireland, and he referred also to what have become known as "pyramid titles" where a number of superior interests in the property exist above the lowest interest of the tenant occupier. Prof. Fahy agreed that there would be a social justice interest in removing such a system of ownership in order to modernise the system. But again, Prof. Fahy came back to the other question as to who should bear the cost of altering the system. He agreed that absent any difficulty regarding the level of compensation to the owner the scheme could be justified. But he was of the view that where the State did not bear the cost of the transfer or make up any shortfall in value to the owner, as had been provided for under previous legislative schemes already referred to, this could not be seen as justified and fair.

Prof. Fahy was also asked if he would accept the proposition that for the most part a landlord who owns a property which is let subject to a ground rent is entitled simply to an income stream from that property. He agreed and likened the situation to that pertaining to the income derived from the ownership of shares and that it was a return on capital owned. But Mr Ralston pointed to the context of the tenant in occupation and working the property and that the equity lies with such a tenant. Prof. Fahy stated in response that the equity of both the landlord and such a tenant was recognised by policy whereby the State stepped in certain circumstances and made up any shortfall in value to the owner.

In his re-examination, Mr Fitzsimons asked Prof. Fahy to leave aside the question of adequate compensation and to say from



his perspective what, if any, is the justification from the social justice point of view that compulsorily requires lessors to sell the fee simple to lessees. Prof. Fahy responded as follows:

*"Well, I would draw a distinction between a social justice argument and a common good argument. I think they are slightly different things. A social justice argument would make a case for something on the basis of some kind of a social need on the part of the person receiving the benefit and I don't -- I find it very hard to see that there is a social justice argument in this case. I am not sure that anyone is making one. Now, it is somewhat different, though, to make a common good argument for this legislation. In the case of a common good the beneficiary may not be in particular need, but the measure is followed through with because the beneficiary can provide a larger common good. In other words, if a business ... say for example, a business person is running a successful business -- is employing a lot of people and he makes an argument that if I am not enabled to make this purchase my business is in danger -- now, I won't be impoverished by that, but look at all the people who will lose their jobs. The local economy will go down and, therefore, in order to benefit the common good of this area -- the State might say we are not particularly concerned only with the good of this individual, but for the broader common good, it might be necessary. I think it is an arguable issue in this instance whether there is a common good or not. I wouldn't adjudicate on that. It would need to be examined very carefully, and as far as I know in broad policy terms, the Ground Rents Commission certainly didn't examine it in those terms."*

Mr Moore McDowell, lecturer in Economics at University College Dublin, and Economics Consultant gave evidence also on the plaintiffs' behalf. He was asked by Mr Fitzsimons to comment on the concept of the common good from the economic perspective. He stated that in so far as economics has anything to do with social justice or the common good, or in so far as changes in the law are designed to promote the common good, his starting point as an economist would be that it should be subject to some sort of complete and competent evaluation of the consequences of the law as it stands, or of proposed changes in the law. He went on to say that he, as an economist, would not be happy to describe something as being for the common good unless this kind of evaluation exercise had been conducted. He stated also that unless there was a clear failure of ordinary market forces, the use of non-market allocation of resources (i.e. government intervention to affect resource allocation) was generally an inefficient method, even though it might be rationalised on the basis that it is advancing the economic welfare of society, since sometimes the market fails or social justice considerations indicate that resources in the State ought to be redistributed. He is of the view that the market itself performs the function of resource allocation at lower cost and with a higher probability of extracting the highest value from scarce resources.

In relation to changes in the land tenure legislation in this country, and particularly the legislation from 1967 onwards, he referred to the Ground Rents Commission report, and stated that having read that report he could find no evidence of any analysis of the costs of the status quo or what would be the costs implications of changes, from an economics perspective. He felt that the Commission was simply of the view that there was a widespread demand for the abolition of ground rents and that therefore they should be abolished. As a result the 1967 Act was introduced which gave the tenant the option of purchasing the property in question, and that this new right created by the legislation in favour of the tenant to purchase the fee simple interest at a price less than full market value was consequently at a cost to the landlord. He perceived this new provision as a device to transfer real wealth in some amount from the landlord to the tenant. Mr McDowell in his statement of evidence, as opposed to his oral evidence, states that the value of this option to the tenant can be seen as the difference between the price fixed under the statutory scheme (determined by me at this stage to be the sum of €30,000) and the higher open market value, which he states as being "£500,000", but which Mr Freeman would put at €1,200,000 - the difference in the latter being of no relevance, in reality, to the point being made.

He stated that there could be circumstances in which such a transfer could be to the common good, and gave as an example the objective of reducing transaction costs relating to land by simplifying the nature of title to land. But he pointed to the fact that this is not referred to in the Commission report or the legislation. Apart from this potential objective of simplifying the conveyancing process upon a sale of land, he stated he could not as an economist see how the common good was advanced by a law requiring one person to transfer his property to another person at less than its commercial value.

In relation to the situation where a tenant had built on property of which he had a 50 year lease and at the end of the term was required to hand back the land including the house built thereon to the landlord, Mr McDowell was of the view that provided the tenant went into the transaction with his eyes open to the fact that at the end of the term he would have to give up the property to the landlord, he could not see that there was an injustice in that situation, since the tenant would have made a commercial judgment at the time that it was an appropriate thing to do.

When cross-examined by Donal O'Donnell SC for the second and third named defendants Mr McDowell accepted that he did not have an expert knowledge of the law of landlord and tenant law and that he was addressing the question of the common good at all times from the perspective of an economist. He also accepted that issues of the common good were not determined solely by economists, and that the Oireachtas may determine what is or is not in the interests of the common good.

Mr McDowell, while stating that he had no expertise in the area of landlord and tenant law, said that for about 150 years and since the introduction of what is commonly referred to as Deasy's Act in 1860 the relationship between landlord and tenant had been subject to regulation by statute, not just in urban and residential areas but generally, and that the existence of such a regime of regulation also has an effect on the economic values of the assets in question.

He accepted also that even if some part of the legislative framework was removed there would still remain in place the remainder of the regulating legislation such as the right to renewal of the tenancy and that this also affects the landlord's rights since he no longer enjoys his common law right to recover his land at the conclusion of the tenancy.

He was asked to identify which statutory provision compelled a transfer at less than market value to the tenant. He commenced his response by stating that if the tenant exercises his right to purchase the fee simple it was because it is in the tenant's interest to do so - in other words because it is at a price which is less than the market value. He stated that the exercise of the option is itself evidence that the transaction is not taking place at the market value. There was much debate during this cross-examination between Mr O'Donnell and Mr McDowell about whether such a transaction under the statutory scheme must be one taking place at less than open market value, and certainly Mr McDowell maintained his view that where the legislature stepped in to force a landlord to sell his fee simple to the tenant, it was implicit that the landlord was otherwise unwilling to do so, and that therefore the price at which the transaction was taking place under the scheme must be one which was less than the amount that the landlord would accept in an open market sale. Mr O'Donnell was at pains to try and agree what was meant by the term 'market value' and suggested that the market value might be the value which persons other than the owner would place on the property, and in that way distinguish it from the price which the owner placed on it, which could be irrationally high for a number of reasons. It is difficult to identify from Mr McDowell's answers precisely how he would agree a meaning to the term 'market value', but he did say at some stage of the cross-examination that the market price is what it would fetch on the open market, as opposed to what the owner would think it should fetch - it was, he said, the price at which a transaction took place between the vendor and the purchaser. There is not much to be gained by exploring this facet of his evidence further, since there does not seem to be much meaningful distinction between what he has stated in this regard and the classic statutory phraseology of the market price being what a willing purchaser will pay and a willing vendor will accept for the property - the wording in fact which appears in s. 7(3) of the 1984 Act. But clearly Mr McDowell maintains his position that whatever price an owner accepts under a compulsory scheme must, almost by definition, be less than the open market value, and that this is a transfer of wealth from him to the tenant purchaser.

Mr Alan McMillan, a chartered surveyor, gave evidence also, stating that his area of expertise relates to compulsory acquisition and rating of property. He was referred to the fact that the subject property has a current rateable valuation of the euro equivalent of £191.50, same having been fixed in 1995. Mr McMillan gave evidence of how the rating system worked following the introduction of the Valuation Act, 1986 in the wake of the decision in *Brennan v. The Attorney General* [1984] ILRM 355. He stated that in the many years since the 1852 Act had been introduced, many anomalies and inequities had appeared, and following the Brennan decision striking down that legislation on constitutional grounds, the 1986 Act was introduced, and s.5 thereof required that there should be some form of uniform or constant relationship between what was termed 'net annual value' and market value. He stated that the Commissioner of Valuation had in 1989 carried out a survey of ground floor premises in Grafton Street, Dublin, and had thereafter issued a directive to his valuers to adopt a formula of discovering what was the current open market rental value of a property, and then fixing the rateable valuation to be .63 of 1% of that figure. This formula was first applied, according to Mr McMillan, to certain parts of Dublin city centre, but was later extended to the entire Dublin area, and to cities such as Cork, Limerick, Galway, Waterford, as well as Drogheda, The Burren, and the urban district of Dundalk. He was able to say also that a slightly different formula was applied to the Ennis urban area, where the factor of .4 of 1% of current open market rental valuation was applied instead of .63 of 1%. Generally elsewhere, he stated, that the Commissioner applied a factor of .5 of 1%. He was asked how that factor of .5 of 1% was arrived at, and Mr McMillan stated that this was a mystery to him, even though he thought that some samples were carried out in the same way as samples had been carried out in relation to some Dublin city centre properties in order to arrive at the factor of .63 of 1% which is applied there and to the other locations mentioned.

Mr McMillan stated that a factor of .5 of 1% was applied in Carrickmacross. He gave some evidence of attempts by the valuers to apply the factor of .63 of 1% but the owners had successfully appealed, and .5 of 1% was applied. Mr Fitzsimons asked Mr

McMillan to firstly make an assumption that there was some logic to the exercise carried out in relation to Grafton Street premises in 1989 and by which the formula of .63 of 1% of open market rent was arrived at in order to calculate a rateable valuation of premises, and then to say what the relevance of such a formula would be to premises in Carrickmacross in 1995. He stated that he could discern no relationship between values on the Main Street in Carrickmacross or anywhere outside Dublin, and circumstances pertaining in Grafton Street or Henry Street in Dublin. He was asked also to express his expert opinion on the relevance today of an exercise carried out in Grafton Street or Henry Street in 1988 to property in Carrickmacross, and he said that there was none since the Grafton Street/Henry Street areas are very specialised areas and that it was difficult to see how the figures for that area could apply beyond that area.

When cross-examined by Mr Ralston, Mr McMillan was asked to refer to the definition of the term 'net annual value' as it was contained in s. 11 of the 1852 Act. He stated it as follows:

*"...and such valuation in regard to houses and buildings shall be made upon an estimate of the net annual value thereof - that is to say the rent for which one year with another the same might in its actual state be reasonably be expected to let from year to year. The probable average cost of repairs, insurance and other expenses, if any, necessary to maintain the hereditament in its actual state and all rates, taxes, and public charges, if any, except tithe rent charge being paid by the tenant."*

He agreed that this was a good description of the letting value and also that the basis of valuation has basically remained the same even under the new legislation since this s.11 definition from the 1852 Act is in large measure reproduced in s. 48 of the 2001 Act. There was much discussion between Mr McMillan and Mr Ralston as to the way in which the present system operates. Mr McMillan is certainly still of the view that the system operates in an unequal and unfair way, by resulting in premises of the same net annual value (based on open market rental values) having different rateable valuations depending on which town or city they are situated in, and that this is anomalous. Mr Ralston on the other hand was suggesting to him that the current system was still linked back to net annual values, and that by the use of the provisions of s. 5 of the 1986 Act (i.e. what was formerly referred to as the principle of the "the tone of the list" - a concept which allows the valuer to adjust downwards the valuation thrown up by the calculation based simply on the net annual value, by reference to valuations applied already to similar premises in the same location) consistency of valuation was achieved by the system of valuation under the new regime, and that in any event any owner aggrieved by a valuation can appeal to the Appeal Tribunal and ultimately to the court. But Mr McMillan still maintained that inequities existed whereby a different basis of calculation existed which could result in different valuations applying to similar premises depending upon where they happened to be located.

Shane O'Hanlon is an auctioneer and valuer in the town of Carrickmacross with experience there since 1998, and he gave his evidence on this constitutional issue on behalf of the first named defendant. He has expressed a view that occupiers of shop or business premises on the west side of main Street in Carrickmacross (i.e. the side in respect of which the plaintiffs own the fee simple interests) have been less inclined to spend money modernising and maintaining their premises than those who occupy freehold premises on the east side of the same street. He says that this is because of uncertainty resulting from their holding only leasehold interests, and has resulted also in business closures, relocations and so forth on that side. This is by way of contrast to premises on the opposite side which are maintained to a high standard. He also expressed the view that the market in leasehold property was of less interest to business people than in freehold property, and that the restricted availability of freehold property in the town has had the effect that the town has failed to attract any major or international high street operator, such as Tesco or Dunnes Stores, and that this in turn has produced an outflow of people from the town itself to adjoining towns and that smaller operators in the town lose out as a result.

Mr O'Hanlon also stated that as a result of the high level of what he called dereliction on the west side of the street the town had been deprived of urban renewal status, since an expert report had disclosed that there would be a small uptake of the opportunity to redevelop. He stated that of the fifteen sites which were designated for refurbishment on the main Street, nine of them were located on the west side. He believed that the occupiers of those west side premises were reluctant to spend money on their premises because they did not own the freehold interest. He gave other evidence as to the lack of repair of certain premises on the west side, including some premises where the second named plaintiff had regained the leasehold interest with a view presumably of reletting same on new leases.

Mr Fitzsimons cross-examined Mr O'Hanlon and it emerged from that examination that Mr O'Hanlon is a Councillor in the area and a member of the local Chamber of Commerce, and that he had spoken to a number of other members of that Chamber including Mr Daly who gave evidence in the case at an earlier stage and who himself has an application to acquire the freehold title to a premises which he holds from the plaintiffs, as well as speaking with Mr O'Gorman. But he denied that at any stage in his discussions with Mr Daly, the latter had told him about or discussed his application to acquire the freehold of his premises.

He stated that his discussions with Mr Daly surrounded the prevailing condition of premises in the town and the effect this had on business in the town. Mr Fitzsimons suggested that if he was in court as an expert on such matters these would be matters of which he was already aware, but Mr O'Hanlon stated that Mr Daly was simply re-affirming his own beliefs. It emerged from his evidence also that he had not been instructed in relation to this case by the first named defendant's solicitor until the 12th May 2005 which was well after the hearing of the Circuit Appeal and this case had commenced, and that his discussions with Mr Daly were on two days after that. It also emerged that while in the past he has been a public representative in the area, he is no longer although he is a member of the Fianna Fáil Party, and he does not rule out running for election again at some stage in the future. Mr Fitzsimons suggested that his support for the first named defendant in this case would attract support for him from the business community in the town.

Mr Fitzsimons suggested to him also that it was clear from the fact that Mr O'Gorman had expended very large sums of money on the subject premises over the years that he at least did not share his views that the holding of a leasehold interest in a premises was a reason not to spend money on the same. But Mr O'Hanlon said that Mr O'Gorman's situation was not comparable to the other properties, since his was the biggest site available in the town and he held it on a nominal rent. He said that the low rent was one of the factors affecting Mr O'Gorman's decision to invest on the site, and he agreed that it was a relevant factor. He agreed that the same applied to Mr Daly who held his premises on a low rent and had built a sizeable extension at the rear thereof, albeit not on the same scale as Mr O'Gorman. Mr Fitzsimons referred him to the fact that in fact all the properties on the Shirley side of the street are held on low rents, and he responded that in his report he had referred to the fact that in cases where these tenants had more than 40 years to run on their leases that they had invested in their premises, but that those with shorter terms left on their leases have not been expending money.

Mr Fitzsimons also referred Mr O'Hanlon to a part of his report in which he referred to what is referred to as the Pat Lamb premises as being unlettable because of the condition it was in. But Mr Fitzsimons stated that his instructions were that in fact in recent times these premises had been let at a rent of €14,000 per annum. Mr O'Hanlon had not been aware of this and was glad to hear it because he stated that the premises had been idle for over two years. He was referred also to a premises referred to as Boyle Bookmakers and to which he had referred in his report as being a premises left in a derelict state and that since it occupies a prominent position in the town that it portrays a poor image of the town. Mr Fitzsimons suggested that if the plaintiffs owned this building they were entitled to do as they wished with it and he questioned the relevance of this part of his report to issues in this case. Mr O'Hanlon expressed the view however that for a town the size of Carrickmacross that all potential development opportunities should be availed of in the overall interests of the town. Mr Fitzsimons referred to another building referred to in Mr O'Hanlon's report namely the An Post building which he felt was in a deplorable state of repair. Mr Fitzsimons asked him if he had inspected the planning register for the purpose of his report, to which Mr O'Hanlon stated that he had not and Mr Fitzsimons stated that he was instructed that in fact the Shirley estate had obtained planning permission for a full frontage redevelopment to these premises, and that it has lodged an additional application for a development to the rear thereof. There was further discussion about another premises, the Finnegan property. But at the conclusion of this cross-examination Mr Fitzsimons suggested to Mr O'Hanlon that he had come to Court and painted a picture of a very unfair picture of the town of Carrickmacross as a semi-derelict place where people do not wish to do business, and yet this is contradicted by the evidence of both Mr O'Gorman and Mr Daly, and others. Mr O'Hanlon disagreed and referred to positive comments which he had made in his report about the town.

Prof. John Wylie was called to give evidence on behalf of the second and third named defendants. While he is obviously well known to the Court for his many works in his area of expertise, he nevertheless stated that he had taught at Queens University Belfast in the subject of Land Law, and was currently Professor of Law at Cardiff University. He agreed also that he was the author of a significant number of textbooks on the law of both the Republic of Ireland and Northern Ireland in the area of land law, and landlord and tenant law, and specifically the author of works on Irish Conveyancing law and Irish landlord and tenant law. He stated also that he was working in a consultancy role with the Department of Justice, Equality and Law Reform in relation to legislation in the area of land law reform, as well as leading a team in the Law Reform Commission in that area. Mr O'Donnell at the outset stated that he did not wish to ask Prof. Wylie about the law itself but rather about the social, historical and administrative background to a number of legislative changes which occurred here in the area of ground rents and provisions relating to reversionary leases and the acquisition of ground rents.

At this point, Mr Fitzsimons raised a question as to Prof. Wylie's competence to express views as to the reasons for legislation, as opposed to the law itself and objected to that evidence being given by him. He acknowledged readily Prof. Wylie's eminence as a lawyer in these areas, but submitted that his qualifications go no further than that and that he cannot be produced as a witness to give evidence in relation to economic matters and social matters in the same way as Prof. Fahy, a sociologist, had been called by the plaintiffs. Mr Fitzsimons also submitted that in spite of his eminence as a lawyer in the area generally, he

ought not to be permitted to give evidence as to the reason why certain legislation was introduced or the logic behind it, and such evidence would be inadmissible in the same way as the Court cannot be referred to material such as Dáil Reports in order to explain or interpret legislation. I ruled that I would allow his evidence but only so that it did not stray beyond what was permissible, so that he could provide evidence of the historical context for the legislation under examination.

At any rate, having been asked certain matters about the object of the 1931 Act, Prof. Wylie was asked to state what he understood to be the justification for permitting tenants to go further than the entitlement to a reversionary lease under the 1958 Act, but to actually acquire the fee simple interest in the premises in question under the mechanism provided by the 1967 Act. He thought that there were a variety of explanations for the legislation. He stated that there was firstly the desire of the people to own property which they and their predecessors had been occupying for a long time and in respect of which they had paid for substantial buildings.

He stated also that there were wider issues such as the fact that titles had become complicated by the ground rent system, and referred to what he called “pyramid titles”, and he felt that this all made the investigation of title quite complicated and had an effect in the whole area of conveyancing. These complications could give rise to delays in the completion of transactions, and in as much as the economy is driven by land transactions he was of the view that these complications had an impact on the economy of the country.

Prof. Wylie also stated that where a tenant held under a lease at the expiration of which the tenant had an entitlement to a reversionary lease, or where there was simply a long lease, the landlord’s interest is effectively the right to get a rent from the property, and that is the sum of what his interest entitles him to, and he expressed the view that if there was to be a purchase scheme, there needs to be some method by which the price can be ascertained.

He also referred to another difficulty which sometimes confronts a tenant in some cases, namely identifying who is the landlord, and that it was necessary to have some system in place which was straightforward to operate, as well as having a system which an arbitrator could operate simply.

Prof. Wylie was also asked to describe the equivalent system in the law of England and Wales, and also Northern Ireland. From that evidence it emerged that in the former jurisdiction legislation of this kind had been introduced in 1966 against a background where many 99 year type leases were coming to an end so that occupiers of houses would lose their homes. He stated that under that legislation the price mechanism was designed so that the value of the land upon which the house was built was given to the landlord by the tenant, and the value of the house on the land being retained by the tenant. In relation to Northern Ireland, it appears that there was some legislation introduced in 1971, but which Prof. Wylie stated was not successful, and that another Act was introduced in 2001 and that the price for the freehold is calculated on the basis of a multiplier of the ground rent, that multiplier being set by statutory instrument.

Mr Fitzsimons during cross-examination referred to the fact that it had been stated that he was in a consultancy role with the Department of Justice, Equality and Law Reform, as well as with the Law Reform Commission in the area of conveyancing and ground rents, and asked him whether it could be taken from that that it is the view of the authorities that this area of law was in need of reform. Prof. Wylie said that was the case, and he confirmed that in saying this he was referring to the Acts of 1967, 1978, 1980 and 1984, and that changes were needed. He also confirmed for Mr Fitzsimons that the relevance of this legislation is now probably only of relevance to business leases, since most people had availed of the Land Registry scheme in respect of dwellings, and he also confirmed that the legislation to which he referred to in England and Wales related only to residential dwellings. He was also asked if he could confirm that under the Land Purchase Acts landlords had received full compensation for their land acquired under that scheme. Prof. Wylie appeared not to favour the expression “full compensation” and preferred to refer to it in terms of “what was the value of the landlord’s interest”. He accepted that landlords had appeared content with the compensation received and stated that there was very little evidence of controversy based on landlord dissatisfaction.

He confirmed that the rent-fixing mechanism for a proprietary lease under Part V of the 1931 Act was “the higher of either the existing rent or one quarter of the gross rent”. He also confirmed that under s.18 of the 1958 Act, the fraction was reduced from one quarter to one sixth, and later under s. 26 of the 1967 Act from one sixth to one eighth, and that this one eighth fraction was retained for the purpose of s. 7 of the 1984 Act.

Prof. Wylie was asked about when the linkage between the rent and the rateable valuation of the property was introduced for the purpose of eligibility to acquire the fee simple, and he was referred by Mr Fitzsimons to the fact that under s. 4(3) of the 1958 Act there was a provision which linked the rent and rateable valuation at the time of the grant of the lease, as opposed to

the rateable valuation as of the date of service of the notice to acquire the fee simple as specified in s. 10(2) of the 1978 Act already referred to.

He also confirmed that the Landlord and Tenant Commission Report had not identified any desire for the acquisition of business leases as opposed to residential leases. He was also asked about the expression "ground rent". He stated that this was not a term which was defined in any act and was not a term of art but was a phrase which means *"a rent which is reserved on a long term lease which is relatively low because all that is being leased is the ground, in other words it does not reflect any buildings because it is contemplated those buildings will be added later."*

After he had described the term in this way, Mr Fitzsimons referred Prof. Wylie to the fact that the lease in the subject case had been made in respect of existing buildings, and that the premises had not been erected by the lessee or any subsequent assignee, and suggested that the rent in these circumstances could not be described as a ground rent, but rather a going rent. Prof. Wylie appears to accept this, and also that after the end of the Second World War in 1945 rents were extremely low. It is worth remembering that the lease granted in this case and with which this case is concerned is one dated 11th October 1945, and that the rent reserved thereunder was £55 per annum.

Prof. Wylie agreed that his thesis is that the logic for legislation under consideration was the perceived need that the tenant should be able to recover what he had put in place in terms of buildings, or to ensure that persons who erected the premises as lessees under building leases and proprietary leases would lose what they had invested in the property. He was also asked to accept that his thesis would not apply where there had been a break in the letting history of the premises where the current lessee or his predecessors in title had not erected the premises. In response Prof. Wylie stated that he would accept this, but with the qualification that if the current lessee who took an assignment had paid a price in addition to the rent on taking the assignment, this reflected the fact that those buildings were in existence and part of what the tenant was acquiring. Mr Fitzsimons noted that in such a situation the capital sum or price would not have been paid to the landlord but to the predecessor in title in respect of the lessee's interest, and Prof. Wylie agreed, and further agreed that the object of the Acts on his thesis is to ensure that the tenant is not disadvantaged as regards the landlord, and he also agreed that the law had passed "way beyond that".

Conor O'Cleirigh gave evidence on behalf of the second and third named defendants, and stated that he is a Chartered Valuation Surveyor and a member of the Irish Auctioneers and Valuers Association. He has many years of experience in that regard, and in particular relating to the operation of the ground rents Acts. He referred to his report prepared for this case. He stated that while in the past ground rents were considered to be a very secure form of investment when inflation rates were very low, fixed rents such as ground rents became regarded as a poor hedge against inflation following the success of the what he called "landlord and tenant measures" and the onset of inflation, and therefore of little interest to property investors. He felt that these factors led to a situation where there developed a shortage of so-called willing purchasers of ground rents, and such rents as were bought were bought by tenants under the statutory scheme, or by local authorities under Compulsory Purchase Orders. He also expressed the view that the result of the tenant's right to renew a building lease at one eighth of the gross rent on a long term basis meant that a landlord is thereby limited to obtaining an income stream from the property with no real opportunity to obtain possession.

He described the mechanisms for fixing price under s. 7 of the 1984 Act, and there is no need to set that out, as I have already done so during the course of my judgment in the Circuit Appeal, and referred to the fact that thereunder, inter alia, an arbitrator when fixing the purchase price was required under s. 7(3) of the Act to have regard to what a willing purchaser would give and what a willing vendor would accept, and in this regard he stated that the idea of such willing parties excluded any consideration of what a so-called 'special purchaser' might be willing to pay - in other words a person who for some special reason was prepared to pay over and above the market or going rate for the property. He agreed that an existing tenant would be regarded as being in the category of a special purchaser, i.e. somebody who may be prepared to pay over and above what a person in the market would be willing to pay. He went on to say that in fact the demand for the purchase of ground rents in the market is so low that it is difficult to get any evidence of what a purchaser would pay in the market place, and that there have been very few transactions where blocks of ground rents have been purchased, but he felt that where these had taken place, a multiple of five or six or even less would be the norm, and that the notion of the willing purchaser referred to in s. 7(3) had led in fact to a situation where prices were being fixed at levels above that which could be achieved in an open market sale - in other words in an arbitration under the section a landlord was doing better by way of the concept of the willing purchaser than he/she would in an open market sale of his fee simple interest.

Mr O'Cleirigh then gave evidence about the mechanism for fixing the price under s. 7 (4) of the Act - the provision under which

the price was fixed in this case, and referred to the fact that under this sub-section in respect of expired leases it differs from the mechanism under s. 7(3) in as much as it involves a calculation of the open market value of the property and taking one eighth of that, as opposed to capitalising the ground rent on the basis of a willing vendor and a willing purchaser. He stated it as his view that by taking the capital value of the property and reducing it to one eighth thereof under that subsection is "a more clearer, a more ascertainable figure"(sic). I should at this point just refer to one aspect of Mr Fitzsimons's cross-examination because he referred to this phraseology and to the fact that while he expressed himself in this way during his oral testimony when he was being brought through his report, in fact his report uses the phrase "a much fairer and more ascertainable figure". Mr Fitzsimons suggested to him that what he intended to mean was in fact "clearer" since it is simply a mathematical calculation, and Mr O'Cleirigh accepted that he had stated "clearer" in his oral testimony, but that he did not mean that the word "fairer" was not also appropriate, and he concluded his answer in relation to this point by saying that what he meant is that the mechanism is "fairer, clearer and more ascertainable".

Mr O'Cleirigh then gave an amount of evidence concerning the basis of fixing the rateable valuation of property, and the suitability of using the rateable valuation as a means of establishing for the purpose of s. 10 (2) of the 1978 Act that a rent is so low that it is likely to be a ground rent as opposed to an occupational rent. His evidence, and in accordance with his report, is that the valuation of property for rating purposes is based on what is referred to as "the net annual value". This phrase was defined in s. 11 of the Valuation Act, 1852 as being:

*"the rent for which one year with another the same might in its actual state be reasonably expected to let from year to year, the probable average annual costs of repairs, insurance and other expenses necessary to maintain the hereditament in its actual state and all rates and taxes being paid by the tenant".*

A similar definition is contained also in the later legislation. He gave evidence also that because this Act made no provision for rising rental values, and so by s. 5 of the Valuation Act, 1986 certain provisions were introduced which enabled the net annual value to be ascertained by reference to the historical values, but the valuer can take into account the values of other similar properties and adjust the net annual value downwards in order to take account of s.5 of the 1986 Act. This feature is what is often referred to as "the tone of the list". Mr O'Cleirigh is of the view that it enables there to be consistency in net annual values being arrived at, and in fact he also states in his report that it establishes a level of valuation which is by the standards of today an artificially low valuation base. He states also in his report that the way in which the net annual value is calculated is a fair reflection of an historic rental value of any premises, and also that in his experience, in a situation where a lessee under a building lease has no doubt as to his statutory entitlement to purchase the fee simple, the rent reserved in the lease will invariably be less than the rateable valuation.

Mr Fitzsimons cross-examined Mr O'Cleirigh and questioned whether it was as difficult as Mr O'Cleirigh was saying it was to achieve a sale of a ground rent, and he referred in particular to a recent ground rent sale (the rent he thought was €145 per annum) which had been reported in the newspapers as being sold for €500,000. Mr O'Cleirigh stated that his recollection was that the rent in question was in fact €440 per annum and that the lease in question had about 51 years left to run and also that there were no rent reviews under the lease. It was his view also that it was an occupational lease, and that while it may have been reported in the newspaper as being a ground rent, in fact he regarded it as an occupational rent. Mr Fitzsimons suggested therefore that it was a lease of a kind which the first named defendant held under, being one in which the building was already on the property when the lease was entered into, and was not therefore a building lease. Mr O'Cleirigh stated in response that since he had not seen the first named defendant's lease he did not know that, but that the property referred to was an unusual one for reasons which he stated, and he said that as a result it would not be a fair comparison.

Mr O'Cleirigh agreed with Mr Fitzsimons's suggestion to him that in general business people were happy to pay what he termed commercial rents for premises since that rent was simply a business expense factored into the business, and he agreed also that in general business people will if they feel that it is in their interests to do so will invest in the premises from which they operate whether by way of renovation, construction, decoration and so on, and that the object of so doing is to further that business and that they can claim tax relief in respect of same.

Mr Fitzsimons then asked him about commercial leases, and referred to the fact that under the 1931 Act such leases are renewable on the basis of a 35 year lease with five year rent reviews, even though the market now prefers 20 year leases. Mr O'Cleirigh agreed that these leases produce a valuable income streams for the lessors, the rent being an open market rent with 5 year reviews, with an arbitration procedure if the rent cannot be agreed, and that in an arbitration situation the open market rent is based on comparable rents in the same area, and that in that case there were no deductions made from the rental value, save in respect of any improvements carried out by the tenant. In other words there was no reduction of that rental value to take

account of any development value of the premises or tenant's goodwill, and there was no fraction applied.

In relation to the scheme for assessing rateable valuation by reference to the net annual value of a premises, Mr Fitzsimons suggested to him that the purpose of the original Act of 1852 which was in operation until the passing into law of the 1986 Act, was to raise funds for the relief of the poor, to which he stated that he was not sure but that it had its origins in the Poor Law Relief Act, and it might have been the purpose. He agreed however that in more recent times it became the system by which a local authority raised money which would be an addition to what they received from the central fund. He also agreed with what Mr McMillan had stated with regard to the reduction from the net annual value in certain areas by the factor of .63 of 1% to which Mr McMillan referred, and that it was .5 of 1% in other areas.

In addition to the evidence of these witnesses to which I have referred specifically, there was some other evidence given during the course of the hearing which is relevant to the constitutional issue case brought by the plaintiffs. Some of that evidence was given by John E. Shirley, Philip Shirley and Lucy Shirley and which related to the issue raised by the second and third named defendants as to the standing of the plaintiffs to mount the constitutional challenge at all - the locus standi issue to which I have already referred and decided. Other evidence relevant to the constitutional issue has been heard from David Freeman, valuer called by the plaintiffs herein and also Peter Murtagh. This evidence related to various valuations placed on the premises at issue and on various different bases, and to which I have referred. I have referred to this evidence already in the Circuit Appeal and I do not feel it necessary to refer to it again.

### **Submissions:**

Mr Fitzsimons referred to the valuation evidence given by Mr Murtagh and Mr Freeman on behalf of the plaintiffs as to the value of the subject premises on a number of different bases. Some of that evidence was in respect of what has been referred to as the original Carrick House as it existed in 1945, both on the basis of market value thereof now in its original state, and also on the basis of what would be the value to the landlord of the premises if a reversionary lease thereof was granted to the tenant upon the expiry of the 1945 lease. Mr Freeman, for example, stated in respect of the latter that the value of such a reversionary interest (i.e. the right to receive a rent for 99 years with 5 year reviews) would be €61,500. He also expressed the view that the value to the landlord in the event that the tenant did not have the right to a reversionary lease but only to a commercial lease with 5 year reviews under the 1980 Act, and that valuation was stated to be €457,142. If the supermarket premises was included in the premises for lease purposes, he stated that the net value to the landlord would be in the order of €1.275 million. In respect of the former value (i.e. the original Carrick House alone) he placed a value of €330,000 as of the date of service of the notice to acquire the fees simple, and in respect of the entire of the premises, including the supermarket a value of €1.2 million. Similar valuation evidence was given by Mr Murtagh albeit that the figures differed to some extent. Mr Fitzsimons referred to these and other various valuations of which evidence was given, and to the fact that as found by me in the Circuit Appeal, the price fixed under the statutory scheme for the purchase of the plaintiffs' fee simple interest under the scheme is €30,000 - less than half of the lowest valuation basis, namely the value of the landlord's reversionary interest in the premises confined to the land itself and the original Carrick House thereon. Some valuation evidence called on behalf of the defendants would take issue with rental values used by both Mr Freeman and by Mr Murtagh for the purpose of their calculations. However, I do not propose to examine in detail all the valuation evidence and cross-examination thereon, since it is convenient simply to proceed on the basis that I am satisfied having regard to all the valuation evidence which I have heard that regardless of what basis is used, the position of the plaintiffs under the statutory scheme by which the price is fixed - i.e. an entitlement to a sum of €30,000 - is significantly lower than if the plaintiffs were entitled to have their interest valued on any other basis, the lowest of any other such basis being of the order of €61,500. The manner in which the price of €30,000 was arrived at by me is fully set forth in my judgment in the Circuit Appeal dated 31st May 2005.

It is worth recalling also that in my said judgment, I found that it was by virtue of the various developments carried out by the first named defendant after he acquired same from the previous lessee - some of that development prior to 1990 being carried out without the prior consent of the landlord (albeit later granted retrospectively), and more after 1990 without any landlord consent retrospective or otherwise - that the rateable valuation of the premises granted by the 1947 lease became as a result of revaluations in the light of those developments greater than the rent reserved under that lease, and even as adjusted upwards to £75 in October 1970 in exchange for the removal of the residential user restriction, thereby enabling one of the conditions set forth in s. 10(2) of the 1978 Act to be met. This consequence has come about only because with the introduction of s. 10(2) of the 1978 Act the relevant date in relation to the level of the rateable valuation and the rent was changed so that it became the date of service of the application to acquire the fee simple.

Without meeting the condition that the rent is less than the rateable valuation at the date of service of the notice to acquire the



fee simple, the lease would not come within the provisions of s. 10(2) and therefore, since s.10(1) is inapplicable for the reasons described in my said judgment the third named defendant would not be a person to whom that Part of the same Act applies, i.e. a lessee for the purpose of the Act, since one of the conditions of s. 9 of that Act, namely s.9(d) would not have been met. This alteration in the date is something which the plaintiffs submit is unfair and punitive.

I also found in my said judgment that by virtue of the nature of the developments carried out by Mr Connolly, and in due course by the first named defendant after 1970, are not simply improvements to the original Carrick House, but constituted additions and that they accordingly come within the meaning of permanent buildings as opposed to being merely improvements to the original permanent buildings (i.e. Carrick House).

Before moving further into Mr Fitzsimons's submissions I need to refer to one point raised by him during the course of his submissions. It is in relation to my findings in relation to s. 10(2) of the 1978 Act in my earlier judgment in the Circuit Appeal. He suggested that it was not clear from that judgment whether it was my intention to find that the reference in s. 10(2) of the Act to "permanent buildings" meant all the buildings on the land. His submission is that it does in fact mean all the buildings on the land and not just the original buildings as they existed at the time the lease was granted, but he suggests that if he is incorrect or if I had in fact in mind in my previous judgment that it did not mean all the buildings on the land, the position of the plaintiffs would be even worse since it could result in a situation where a tenant could acquire the freehold even in a situation where he had not constructed all the buildings - an interpretation which would, as suggested by Mr Fitzsimons, neutralise the presumption contained in s. 10(2).

So, for the sake of clarification, I should in fairness state that it was indeed my intention that my judgment would be clear that in my view the reference to "permanent buildings" means all permanent buildings on the land. My reference on page 29 of my judgment in the Circuit Appeal to Carrick House by now being ancillary and subsidiary to the additions constructed by the first named defendant are certainly apt to confuse, and were certainly not intended by me to be interpreted as meaning that by being so "ancillary and subsidiary" this qualified all the buildings even in a situation where Carrick House was constructed by some person other than the lessee. The use of different words would have avoided that confusion.

Mr Fitzsimons also relies upon the existence of the presumption in s. 10(2) of the 1978 Act since in order to avoid the premises coming within the terms of that sub-section by rebutting that presumption, the lessor is required to prove, as opposed to satisfy, the Court as a matter of probability, that the lessor or a predecessor in title, erected the permanent buildings, that being an almost impossible task in most cases and especially in a case such as the present one where the original buildings were clearly erected, according to the evidence of Mr Semple, during the eighteenth century. The chances of proving that it was the lessor who erected them must be remote since records of who constructed them would rarely have survived the passage of time to the present day. He submits that this is an unreasonable and unfair burden to impose on a landlord.

The plaintiffs also refer to something which I stated in my earlier judgment in relation to the so-called "special allowance" which, as provided in s. 7(4)(d) of the 1978 Act is one of the deductions (the others being tenant's goodwill and development value) which is made from the figure amounting to one eighth of the amount which a willing purchaser would pay and a willing purchaser would accept when arriving at the price to be paid by the tenant for the fee simple. Section 35 of the Landlord and Tenant (Amendment) Act, 1980 provides that this special allowance shall be "such proportion of the gross rent as, in the opinion of the court, is attributable to works of construction, reconstruction or alteration carried out by the lessee.....which add to the letting value of the land..." At page 38 of my said judgment I expressed myself as follows in relation to this special allowance:

*"The rationale for the deduction of the special allowance is to protect the lessee from a situation in which he would be paying rent in respect of his own works to the premises, which he has already paid for."*

For the purposes of what I was required to decide in the Circuit Appeal it was unnecessary to express any view as to the rationale of that provision, and Mr Fitzsimons submits that in fact a consideration of what may be the rationale may be necessary for the purpose of the constitutional issue, and he urges upon me therefore that in so considering that provision and its purpose or rationale in the constitutional issue, I should allow myself to do so again having regard to some of the evidence which I subsequently heard after my said judgment was delivered, such as some evidence of Mr McDowell and of Mr O'Gorman as to the nature of the transaction which a businessman enter upon if he decides to take a lease of property and expend money thereon in the knowledge that he will have to hand back the premises in their entirety at the expiration of the term. Mr McDowell was of the opinion in this regard that if such a person does this with his eyes open he does it on the basis that he will get his money back over the term of the lease. In such circumstances, Mr McDowell was of the view that if the

investor in question was getting his money back within the term of the lease in question it was not an injustice therefore if the property built thereon by the lessee reverted to the landlord at the expiration of the term of the lease. This would be some evidence against the rationale expressed by me already and I will keep it in mind, as well as evidence given by Mr O'Gorman during his cross-examination and to the effect that when he carried out the works on the property after he acquired the leasehold interest he did so on the basis that it was a building lease and that he would be simply entitled to a renewal thereof at the end of the term on the appropriate terms. The plaintiffs are submitting that the mechanism for fixing the price, which includes the deduction for the special allowance and the other allowances made thereunder is unconstitutional in that they constitute an unjust attack on the plaintiffs' property rights.

The plaintiffs have also referred to the fact that from the wording of the long title to the 1978 Act it is evident that the regime provided for in that Act applies only to certain leases. That title provides as relevant:

"AN ACT TO PROVIDE FOR THE ACQUISITION OF THE FEE SIMPLE IN LAND BY CERTAIN LESSEES AND TENANTS AND THE CONSEQUENTIAL TERMINATION OF THEIR LIABILITY FOR THE PAYMENT OF GROUND RENT....."

Mr Fitzsimons refers to the fact that in respect of other categories of business tenants there is an entirely separate regime under other legislation where they have rights of renewal but subject to rent reviews and open market rents, with certain allowances for their improvements. He suggests that therefore this is indicative of the fact that the state does not have a policy as such that all business tenants should own their premises in fee simple and be entitled to acquire the fee simple interest from their landlords.

Mr Fitzsimons submits that the impugned legislation amounts to an unjust attack on the plaintiffs' property rights contrary to Article 40.3.2 of the Constitution. He submits that if this particular legislation was not in place his clients, even though being required nevertheless to grant to the first named defendant a reversionary lease at the end of the term of the lease, would have, on the evidence adduced an asset worth a minimum of €61,500, and in addition would retain their ongoing interest in the premises in the future, as well as having the benefit of rent reviews every five years. He suggests that this evidence alone is sufficient to rebut the presumption of constitutionality of the legislation and shift the onus onto the State to justify the attack.

Mr Fitzsimons accepts that part of the presumption as to constitutionality of the legislation is the presumption also that the objective of the statutory scheme in question is reconcilable with principles of social justice and with the exigencies of the common good, and that the onus is upon the plaintiffs to rebut same. But he goes on to say that it is not necessary that he rebut the presumption by evidence as such, but that the plaintiffs can rely on what the second and third named defendants state by evidence or submission in relation to the social policy behind the legislation in question. In this regard he has referred to the fact, as he submits, that the social justice objective is not apparent from the legislation itself. He has also suggested that it is perfectly permissible for the State to come to Court and adduce evidence as to the proportionality of the legislation, and that if no evidence is produced then the presumption of constitutionality falls away in the absence of any clear indication from the legislation itself that it accords with the principles of social justice. In his written and oral submissions Mr Fitzsimons has stated that an example of a system of property ownership which would not accord with principles of social justice would be one where all the property in the country was held by a few very wealthy people, and that on such a basis social justice can be said to be a form of distributive justice involving the transfer of assets from the wealthy to the underprivileged, and that legislation which aimed at achieving such a transfer of property in order to achieve a more balanced distribution of wealth in the country could be said to accord with principles of social justice as provided in Article 43.2 of the Constitution.

He submits also that the impugned scheme might have been framed in such a way as to confine its effect to the transfer of property from the wealthy to the underprivileged, but it was not, since in its present form it has applicability to almost every building in the State which is held under leases for terms such as those under which the plaintiffs' properties are held, as well as others, for example, held under yearly tenancies for more than twenty five years.

He points also to the fact that under the impugned scheme there is no distinction made between residential and business premises, and while he suggests that it might conceivably be possible to put forward an argument that society has an interest in ensuring that homes are owned absolutely and that this would be encompassed within the principles of social justice, such an argument would be very difficult to mount, and would require evidence to establish it.

He suggests that such argument cannot be even attempted in respect of business premises, and he emphasises that the case which the plaintiffs are making against the constitutionality of the scheme is in so far as it relates to business premises, and the

fact that if successful it might have an effect also in relation to residential premises is not relevant.

In this regard, the plaintiffs rely upon the evidence of Prof. Fahy which I have already set out in some detail. Particular reference is made to his evidence that he could think of no social justice principle which would encompass the transfer of an asset from one prosperous commercial entity to another prosperous commercial entity, although he could envisage that some common good element exists where the government for instance will make large financial grants to a prosperous entity on the basis that there is what he called a "boost to the economy, some growth in employment", but he pointed to the fact that in such an instance, the cost of that grant is being borne by the general taxpayer, and not by any particular individual. In this regard Mr Fitzsimons draws attention to the evidence of the commercial strength of the first named defendant, and to the fact that some other tenants of the plaintiffs are very prosperous commercial entities such as Bank of Ireland and Allied Irish Banks Plc, and of course also Mr Aidan Daly who gave evidence, and inter alia to the effect that two of his premises in the town of Carrickmacross which he has on 99 year leases from the plaintiffs are let on to third parties at commercial rents of about €30,000 and €42,000 respectively. He has other properties also let out in the town.

Mr Fitzsimons also pointed to the fact that from the evidence heard from Mr O'Gorman and others, it is clear that he would have no difficulty in carrying on in business in the town without owning the freehold, and that therefore the only purpose of the impugned statutory scheme is the enrichment of parties who are already prosperous entities.

It is submitted that the plaintiffs have rebutted the presumption that the entire legislative scheme accords with some principle of social justice, and that this alone is sufficient for the plaintiffs to succeed, as it would constitute an unjust attack on the plaintiffs' property rights in contravention of Article 40.3.2. Alternatively, the plaintiffs submit that if the Court was to conclude that the application of the scheme to business premises, as distinct from private residential dwellings, could not be said to accord with principles of social justice, then the scheme ought to be struck down on the basis that it offends against the principle of proportionality.

In relation to the question of the common good, Mr Fitzsimons submits that the constitutional provision speaks not simply of "the common good" but "the exigencies of the common good" (emphasis added), and he submits that the word "exigencies" means needs, requirements, or necessities. He submits that the State must demonstrate that the common good in some way requires the legislation in question. He again points to the fact that in the long title to the relevant statutes there is nothing to indicate an intention or objective which could be said to constitute the common good, and that they could easily have done so if there was such an intention or objective. He points also to the absence of any statistical or other evidence of a pressing social need or any need in society which might ground an argument that a proportion of business tenants are impoverished such that there might be seen to be a common good element in legislation which requires a transfer of property from the well-off to the less well-off. He submits also that in the event that there were such a need identified in relation to poorer persons, an appropriate scheme which could pass constitutional muster, so to speak, might be a means-tested scheme, so that it did not needlessly give an entitlement to prosperous commercial entities.

In relation to the question of the existence of any demand in society for the legislative scheme impugned herein, or in other words a common good concept in the legislation, Mr Fitzsimons referred to the Ground Rents Commission Report in 1964, and to certain parts of the evidence given by Mr McDowell in this regard. He refers to the following paragraph in the Report at p.19 thereof:

*"There was some support for the proposition that the right to purchase should be given only to a lessee of a dwelling or of a combined dwelling and business premises. In general it was not proposed that there should be a right to purchase the reversion of a lease of a purely business premises."*

He states also that it appears that the Commission did not receive any representations from the business community at large for legislation which entitled them to acquire the freehold of their business premises, and he submits further that since the 1967 Act, the scheme has been made even more rigorous against landlords with the introduction of the successive statutes to which reference has already been made, and that there have been no further Commissions of inquiry into the question and which might have made recommendations relating to business premises. This is a factor which he suggests that the Court should have regard to when considering whether there is any evidence that the scheme meets any demand or exigency of the common good, and that in his opinion the presumption of constitutionality is rebutted as a result even if the Court has found that the legislation pursues a principle of social justice for the purpose of meeting the requirement in that regard contained in Article 43.2.1 of the Constitution.

As I have already adverted to earlier, the plaintiffs contend that even if it has been shown, which of course they say it has not, that the impugned legislation pursues an identifiable social justice principle and that it can be shown to meet an exigency of the common good, it may still be found to be unconstitutional if the manner in which its provisions exceed what is regarded as proportionate to the objective to be achieved. Another way in which this submission is put is to say that the legislation must interfere with the property rights of the citizen to the least extent required in order to achieve the desired objective. The argument is put also on a second footing also, namely that if the burden of the statute or the statutory scheme falls disproportionately heavily on a particular group of citizens, such as the group of landlords into which the plaintiffs fall. In this regard, Mr Fitzsimons has referred the Court to the case of **Blake v. The Attorney General [1982] I.R. 117** – a case which found that certain provisions of the Rent Restriction Acts were unconstitutional, inter alia on the basis that certain provisions “constituted an unjust attack on the property rights of the plaintiffs contrary to Article 40, s.3, sub-s. of the Constitution since those provisions restricted the exercise of the property rights of one group of citizens for the benefit of another group without providing compensation for the first group, and in a manner which disregarded the financial capacity or needs of the members of the groups and which failed to limit the period of such restriction or to provide a method by which a landlord could have a rent reviewed.”

At page 139 of his judgment, O’Higgins CJ expressed himself as follows:

*“In the opinion of the Court, the provisions of Part II of the Act of 1960 (as amended) restrict the property rights of one group of citizens for the benefit of another group. This is done without compensation and without regard to the financial capacity or the financial needs of either group, in legislation which provides no limitation on the period of restriction, gives no opportunity for review and allows no modification of the operation of the restriction. It is therefore both unfair and arbitrary. These provisions constitute an unjust attack on the property rights of landlords of controlled dwellings and are therefore contrary to the provisions of Article 43, s.3, sub-s. 2 of the Constitution.”*

Mr Fitzsimons suggests that this reasoning is akin to the application of a proportionality test, and again states that the plaintiffs’ attack is not in relation to the application of the scheme to residential leases but to leases of business premises.

The plaintiffs refer also to the judgment of Hamilton CJ in **In the Matter of Article 26 of the Employment Equality Bill [1997] 2 I.R. 321 where at p. 367** he stated:

*“The Bill has the totally laudable aim of making provision for such of our fellow citizens as are disabled. Clearly it is in accordance with the principles of social justice that society should do this. But prima facie it would also appear to be just that society should bear the cost of doing it. It is important to distinguish between the proposed legislation and legislation to protect the health and safety of workers ..... But the difficulty with the section now under discussion is that it attempts to transfer the cost of solving one of society’s problems on to a particular group. The difficulty the Court finds with the section is not that it requires an employer to employ disabled people, but that it requires him to bear the cost of all special treatment or facilities which the disabled person may require to carry out the work unless the cost of the provision of such treatment or facilities would give rise to ‘undue hardship’ to the employer.”*

Mr Fitzsimons refers to the fact that in that case the social principle in relation to assisting the disabled in society would have been clearly apparent from the legislation itself, but nevertheless the manner in which this was sought to be achieved bore down unfairly and therefore unjustly on another section of society, namely employers. In this regard reference is made to the fact that under the impugned scheme in the present case, the cost of transferring property from one prosperous commercial entity to another is borne by the landlord since, first of all, he/she is not receiving full value for his property under the scheme, by the way in which it is designed, and secondly that shortfall in value is not made good to the landlord by the general taxpayer/society at large. This is in contrast to the legislation of which Prof. Fahy gave evidence, such as the Land Purchase Acts where there was a scheme for the compulsory acquisition of property for which the tenant did not pay full market value, but the scheme allowed for that shortfall to be made good to the landlord by the public purse.

Mr Fitzsimons has submitted also that even if the Court were to be satisfied that the legislative scheme as a whole passed the tests of social justice, common good and proportionality, the Court should also scrutinise certain specific parts of the scheme namely the provisions contained in s. 10(2) of the 1978 Act, and s. 7 of the 1984 Act, both of which have already been set forth fully. He submits also that either or both of these sections are found to be unconstitutional, then the effect of such a finding must mean that the entire scheme impugned must fall also since they cannot be discretely severed from the overall scheme.

It will be recalled that in order to have entitlement to acquire the fees simple, the applicant must satisfy the requirements of s. 9 of that Act, and that one of the requirements of s. 9 is that one or other of the two alternative conditions contained in s. 10 must be met, and that in the Circuit Appeal herein I determined that the first named defendant met the condition contained in s. 10(2) of the Act which, by way of convenient reminder is as follows:

*"that the lease is for a term of not less than fifty years and the yearly amount of the rent or the greatest rent reserved thereunder (whether redeemed at any time or not) is of an amount that is less than the amount of the rateable valuation of the property at the date of service under section 4 of the Act of 1967 of notice of intention to acquire the fee simple, or the date of an application under Part III of this Act, as the case may be, and that the permanent buildings on the land demised by the lease were not erected by the lessor or any superior lessor or any of their predecessors in title; provided that it shall be presumed, until the contrary is proved, that the buildings were not so erected."*

In that regard I found that the landlord had not rebutted the presumption that the permanent buildings (all the permanent buildings, including Carrick House itself) had not been erected by the lessor. It is also the case that the lease in question was for a term of not less than fifty years, and also that at the date of the service of the s. 4 notice the rent was less than the amount of the then rateable valuation, even though at the time of the granting of the lease itself this was not the case. It will be recalled that the rateable valuation was gradually revised upwards solely as a result of development works by the tenant, some of which received retrospective consent from the landlord. These increases in valuation resulted in a premises creeping by chance, as it were, into the grasp of s. 10(2) of the Act.

Mr Fitzsimons refers to the fact that the 1978 Act altered the previously existing scheme in a number of ways. Firstly he recalled that in respect of an entitlement to a reversionary lease upon the expiry of a building lease, one of the eligibility criteria in the 1958 Act was as provided in s. 4(3)(a)(i) thereof, namely that the rent reserved by the lease was *"less than three-fourths of the rateable valuation of the land thereby demised together with the buildings thereon, as first fixed or revised subsequent to the date of the lease pursuant to the Valuation (Ireland) Act, 1952, as amended and adapted, or (ii) in the case of a lease granted on or after the 1st day of January 1914 the rent reserved by the lease is less than that rateable valuation."* (emphasis added). Under the 1978 Act the appropriate date for the purpose of comparing the rent to the rateable valuation became the date of service of the notice to acquire the fee simple. In this way, as I have said, the premises were thus enabled to creep from being premises which would not have been caught by the scheme had the valuation been as of the date of the lease (or perhaps if there was provision for rent reviews by which the rent would have always be likely to have exceeded the rateable valuation). Mr Fitzsimons submits that there is no logical connection between a rent fixed in 1945 (or presumably the adjusted rent) and a rateable valuation fixed many years later, and no rationale has been put forward for this by the State. He makes the point also that the rent in question was not in fact a ground rent as such, but an occupational rent at the time, but has now become classified as one with the passage of time and as a result of the developments by the tenant. He says this is arbitrary, based on irrational considerations and unfair.

Mr Fitzsimons also submits that by linking the entitlement to acquire the fee simple to the rateable valuation, the legislature has effectively vested in the valuation authority the power to determine whether a person is or is not entitled to acquire the fee simple in property. Again he submits that this is arbitrary and unfair, and also points to the added fact that there is no entitlement on the landlord's part to appeal against any revaluation of the premises which is made by the Commissioner. Other ways in which this link to rateable valuation offends, according to Mr Fitzsimons, are that no distinction is made between those landlords who received a capital sum as well as yearly rents and those who did not, and also that it fails to have regard to the fact that additions, extensions and improvements to the premises by the tenant are likely to cause an increase in the rateable valuation, but that the rent will remain the same, and in this regard he refers also to the legislative provision in s. 68 of the 1980 Act whereby a provision in a lease by which making an improvement was absolutely prohibited was to have effect as if it were a covenant prohibiting the making of an improvement without the consent of the landlord, and where there is a covenant against making improvements without the consent of the landlord, this was to be subject to the proviso that such consent could not be unreasonably withheld, thereby eliminating effectively the landlord's right to withhold consent to an improvement which would have the capacity to cause a revaluation thereby bringing the premises within the compulsory acquisition scheme impugned herein.

But the plaintiffs, aside from pointing to these effects on them of the linkage of the purchase scheme to the rateable valuation of the premises, also point to a much more fundamental reason why the linkage is unfair and arbitrary, and that is their submission that the very way in which rateable valuations are fixed under that legislation is itself unfair, arbitrary, irrational and inconsistent, and that this further undermines the use of it as a means for determining an entitlement to acquire the fee simple in that it leads to different treatment of individuals dependent only on what part of this country the premises in question happen to

be. This infringes principles of equality and non-discrimination in their submission. In this connection Mr Fitzsimons refers to and relies upon some of the evidence given by Mr McMillan as to how the valuation system operates, and it will be recalled from the summary of that evidence which I have already outlined that the Commissioner of Valuation operates a non-statutory formula for arriving at a rateable valuation, which appears to be dependent on a fraction of either .5 of 1% or .63 of 1% of net annual value, and that the only factor determining which fraction is used is the town in which the premises are located. That fraction of .63 of 1% was arrived at by reference to calculations based on an examination of rental values in Grafton Street, Dublin. It will be recalled also that Mr McMillan stated that in Ennis for example the fraction was .4 of 1% and that in all other places the fraction was .5 of 1%. He also stated that in as much as these fractions were linked back to an examination of rental values in places like Grafton Street and Henry Street in Dublin he could see no relevance of such an exercise to a location like Carrickmacross. Mr Fitzsimons emphasises the non-statutory nature of the study carried out by the Commissioner, and suggests that if perhaps some legislative provision authorised him to do so, some justification might be argued, but that is not the case. He points to the fact that the evidence of Mr McMillan as to how the system works remains uncontroverted, and that such a defective and unfair and irrational system for arriving at a rateable valuation has not become part of the qualifying mechanism for eligibility to purchase the fee simple from the plaintiffs and other similar landlords.

In relation to these submissions as to the inappropriateness of linking the scheme to the rateable valuation, Mr Fitzsimons has referred to the judgment of Barrington J. in **Brennan v. The Attorney General [1983] ILRM. 449** in which the learned judge found the system then in place by which the rateable valuation of agricultural was fixed was, inter alia, obsolete and contravened the constitutional guarantee of basic fairness of procedures, as well as being an unjust attack on the plaintiffs' property rights, and, in addition, delimited the plaintiffs' property rights in a manner either inconsistent with the principles of social justice, or in a manner which was not required by the exigencies of the common good. Mr Fitzsimons referred the Court to a passage from that judgment appearing at p. 486 as follows:

*"If the Oireachtas were today to introduce legislation providing for the valuation of the lands of Ireland, such legislation would enjoy the benefit of the presumption of constitutionality. But if such legislation were to provide that the lands of Ireland were to be valued by reference to crops grown, and the scale of agricultural prices obtained in the years 1849-1852, such provision would be so eccentric and ludicrous that the courts would have, I suggest, no difficulty in holding that it failed to respect the property rights of individual farmers. Yet it is the continuing effect of the 1852 Act and of amending legislation."*

Secondly, it is submitted that the Act altered the nature of the presumption referred to. The 1958 Act contained a presumption in s. 4 thereof in relation to a building lease, to the effect that where it is shown that the buildings were erected by the lessee it shall be presumed, where there is no express evidence of an agreement that upon the erection of the permanent buildings that a building lease would be granted, that there was such an agreement and that the buildings were erected in pursuance thereof. In the case of s. 10(2) however this has been extended in the manner appearing. The 1978 Act, in s. 10(2) thereof, as has been seen, created a presumption against the landlord which the plaintiffs submit is even more onerous against them, namely that unless the contrary is proved, it is to be presumed that the permanent buildings were not erected by the landlord or his predecessors in title. Again it is submitted that this is an unfair and unduly onerous burden to overcome, and Mr Fitzsimons has referred to the manner in which I referred to this presumption in my earlier judgment. He points also to the fact that the presumption is very specific as to requiring the landlord to prove that he erected the buildings, and not simply that the landlord provided the buildings or made them available to the lessee, and in this regard he refers to the fact that there was evidence in the Circuit Appeal from which it could easily be inferred that the landlord had provided the building at the time which was Carrick House, irrespective of who actually constructed same originally. Certainly it might have been possible to conclude from the evidence adduced by the plaintiffs that it was, as a matter of probability, the landlord rather than any lessee who erected Carrick House, but that was in my view an insufficient level of proof given the way in which the presumption is couched in the section. Mr Fitzsimons submits that this presumption is also disproportionate to any objective of the legislation. He submits that the Oireachtas could not have intended to deprive a landlord of premises which he himself had provided to the lessee, and that the presumption is therefore arbitrary and punitive, in as much as it appropriates to a lessee, and without proper compensation to the landlord, a benefit which that lessee does not deserve.

In relation to the presumption the plaintiffs also argue that it fails to take into account the difficulties which can be faced by owners of freehold in rebutting such a presumption, since records simply may not exist. They further argue that this presumption has a retrospective effect and that this makes the situation even worse, since it is only after the presumption is introduced that a landlord comes to realise that records as to the construction of the premises are required to be kept.

#### **Section 7 of the 1984 Act:**

The plaintiffs submit that this section is a key provision in the overall scheme, since without it, the scheme would effect an expropriation of property without any compensation whatsoever, and that it therefore must be viewed as a compensation provision, but that simply because it may be a compensation provision does not of itself validate the statute constitutionally. The scheme must nevertheless accord with social justice principles and the exigencies of the common good. But they also submit that the scheme must make provision not just for compensation, but for adequate compensation, and that the present scheme under section 7 fails in this regard. Mr Fitzsimons submits that what is required is reasonable compensation and that this would equate to full market value, and he refers again in this regard to the scheme which existed under the 1919 Act to which reference was made earlier in the evidence of Prof. Fahy.

The plaintiffs rely on the judgment of the Supreme Court in **Re Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill, 1999 [2000] 2 I.R. 321** where the constitutionality of the provisions which required developers to transfer to the local housing authority up to 20% of the land for which planning permission was being sought in exchange for compensation at the level of agricultural value rather than its development value, was upheld on the basis, inter alia, that there was already a windfall effect in relation to the retained land by virtue of the granting of the planning permission. Mr Fitzsimons relied on a passage in the judgment of the Court at p. 350 thereof as follows:

*"...it is important to bear in mind that, where the property of the citizen is compulsorily acquired by the State or one of its agencies for what are deemed by the legislature to be important social objectives, it has in general been recognised that he or she is entitled to at least the market value of the property so taken as constituting fair compensation for the invasion of his property rights. However, that this generally recognised right, though unquestionably of importance, is not absolute was made clear in two decisions of this court [Dreher v. Irish Land Commission, and O'Callaghan v. Commissioners of Public Works] ..... There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property. As Walsh J. in Dreher v. Irish Land Commission [1984] I.L.R.M. 94 pointed out, even that may not be a sufficient measure of compensation in some cases ....."*

As I have already stated, the Court in that case dealt with the matter on the basis that the landowner was in any event receiving a windfall from the permission affecting the retained land, and regarded the provisions under review as meeting the compensation requirement, and Mr Fitzsimons submits that there is no evidence of any social policy objective which would justify the fixing of compensation at less than market value, as is the result of the impugned provisions in s. 7., and that the evidence has established that this will happen to the plaintiffs and owners like them, since even on the lowest market value namely that given by Mr Freeman on the basis of a reversionary lease, the figure is €61,500, whereas the Court found that the price under s. 7 of the Act is only €30,000 - less than half, and that this alone is an unjust attack, and enough to rebut the presumption of constitutionality of the section.

The plaintiffs submit that the s. 7 scheme is disproportionate and that the Oireachtas could easily have provided that an owner from whom property was being acquired under the statutory scheme should receive the market value of the property, the same to be fixed on the recognised basis taking into account all relevant factors. This would not offend, in their submission, since it would not be arbitrary, irrational and disproportionate.

Finally, the plaintiffs set out both in their oral submissions and written submissions seven reasons why s. 7 of the 1978 Act is in their view arbitrary, irrational and disproportionate:

- There is no requirement under s. 7(3) that any addition to value deriving from contemplation of redevelopment be taken into account in determining the purchase price of the fee simple, and that this appears to be a deliberate omission given the provisions of s. 7(4) and s. 7(9) of the Act.
- The provision that the purchase price shall in cases to which this provision applies (including to the first named defendant) be "a sum equal to one eighth of the amount which, at that date, a willing purchaser would pay and a willing vendor would accept for the land in fee simple", since there is no evidence given of any logical or rational explanation for the particular fraction used, and that in so far as it may be referable or explained by the provisions of s. 35 of the 1980 Act providing that the rent under a reversionary lease should be fixed at one eighth of the gross rent, it cannot be justified by reference thereto, since there is no association between the two provisions, and it is therefore arbitrary and irrational.

- Certain provisions provide for deductions in the value prior to the further reduction to one eighth of the value, and these deductions all favour the lessee and take no account of the fact that works carried out on the premises may have required the consent of the landlord, and the provisions take no account of the fact that these works may have resulted in the rateable valuation of the premises being increased to a level that thereby gives the lessee an entitlement to acquire the fee simple.
- The exclusion under s.7(4) from the computation of the purchase price of any addition to value deriving from contemplated development of the premises, and that this fails to have regard to the entitlement of the landlord under s. 59 of the 1980 Act whereby the lessor can recover possession at the expiration of the lease if he or she has their own scheme of development for the premises, thereby depriving the lessee of an otherwise entitlement to a reversionary lease. This results in a situation where a lessee who might otherwise have been deprived of his interest in the premises receives the entirety of the redevelopment value of the property at no cost whatsoever. This amounts to expropriation from for example the plaintiffs herein and with no compensation, that part of the value of the premises which can be attributed to development potential.
- The provision in s. 7(9) of the Act, whereby in respect of leases with less than fifteen years to run (i.e. the lease of the first named defendant and the lease under which the Bank of Ireland hold premises from the plaintiffs) an application to acquire the fee simple is made, say, when there is fourteen years to run, the provisions as to price are to apply as if the lease had already expired, and that even in such a situation any addition to value deriving from development potential is excluded in assessing the price.

The plaintiffs submit that these examples demonstrate that in terms of impairing the plaintiffs' property rights to the least extent necessary for the achievement of any demonstrated constitutionally permissible objective, s. 7 of the 1978 Act goes too far, and that it is arbitrary, irrational and disproportionate, and could easily have been drafted in a manner which was proportionate, thereby affecting the rights of the plaintiffs to a lesser extent.

Donal O'Donnell SC on behalf of the second named defendants ("the State) has submitted that the plaintiffs are incorrect in the way that they have characterised the evidence and the legislative scheme, and that when looked at in what he submits is the appropriate way, the matters of which the plaintiffs complain do not amount to an unconstitutional regime for the acquisition of fee simple interests by persons such as the first named defendant. He accepts that the State is obliged to defend and vindicate the constitutional rights of the citizen, and that the impugned legislation involves ultimately the acquisition of the landlord's interest in property. He accepts also as a general principle that for such provisions to be constitutionally sound there must be a proper object in view i.e. a social justice principle. He also accepts that such a regime should provide fair and adequate compensation, but that there can be circumstances where such compensation might not necessarily be full market value compensation, and in this regard he refers to the case of *Dreher v. Irish Land Commission* to which reference has already been made, as well as the *O'Callaghan* case.

But what he described as the State's "principal ground" of defence in these proceedings is that the impugned legislative regime does permit the acquisition of the landlord's interest and does in fact provide a fair and adequate form of compensation for that acquisition. As a fall-back argument in this regard he submits that even if he is wrong that the scheme provides fair and adequate compensation, it is not necessary that such compensation be precisely in line with market values. Mr O'Donnell submits that it is important to analyse and examine what exactly it is that is being acquired from the landlord under the scheme. He submits that the landlord's interest which is being acquired is not the land itself but an interest in the land - the fee simple interest, and he describes this as being a limited interest following upon the landlord's decision at an earlier stage to grant a leasehold interest to a lessee, and that such a decision has consequences for the landlord, such as the consequence that at the end of a term of years the lessee is likely to enjoy an entitlement to a reversionary lease, which prevents the landlord effectively from ever regaining possession of the property. That entitlement to a reversionary lease has an effect on the value of the limited interest of the landlord thereafter, which Mr O'Donnell characterises as an entitlement to an income stream from the property, and severely constrains what the landlord may do with the property and his interest therein.

He refers in this regard to the evidence given by Mr O'Cleirigh that the open market value of such an interest is poor, and that the days when such an interest was an attractive investment are over given the arrival of inflation, and his evidence also that in fact the price-fixing mechanism under the impugned scheme produces, because it operates on an assumption that there is a willing vendor and willing purchaser, a price which in his opinion was ahead of the market value. He refers also to what is stated by Keane J. (as he then was) in ***Irish Life Assurance Company v. Dublin Land Securities* [1986] I.R. 332** in relation to ground rent values and the difficulties surrounding the sale of them. I do not propose setting out the learned judge's remarks in detail, but merely refer to the fact that Mr O'Donnell has submitted that what is stated is consistent with the views expressed



by Mr O'Cleirigh.

He also refers to some of the evidence given by Prof. Wylie as to the nature of the various estates and interests in land tenure.

Mr O'Donnell submits that the problem is not so much with the details of the scheme itself but with the underlying value of the interest in the property retained by the landlord after having decided to grant a leasehold interest to somebody else.

Mr O'Donnell submits also that the fact that the leasehold interest in the property may have increased greatly for any reason and enures to the benefit of the tenant is not something of which the landlord can be seen to complain, and that the fact that some other person may be enriched cannot be classified as an attack on the property rights of somebody else who receives the value of the interest which they have. Mr O'Donnell has pointed to the fact that since 1931 a scheme of lease renewal has been in place which eroded the landlord's right to possession at the end of the term, and that such a scheme has always been permissible, and he suggests that it was always in line with a social policy, and that one cannot equate the landlord's interest after he has granted a lease, as being in any way the equivalent of a fee simple in possession, and therefore in value terms the two are very different.

Mr O'Donnell submits that the plaintiffs' have not been specific as to what particular provisions of the statutory scheme they suggest are unconstitutional, even though he accepts that s.10(2) of the 1984 Act and s. 7 of the 1978 Act are specifically referred to as part of the plaintiffs' challenge. He submits that these provisions are part of an overall scheme, and that in his view it is difficult to complain about those specific provisions to which I have referred, when the remainder of the scheme is left intact. He characterises the plaintiffs' challenge as an outright attack on the entire scheme.

In as much as the plaintiffs appear to be challenging the scheme only in as much as it refers to business leases, Mr O'Donnell submits that this is of no importance or relevance since the legislation impugned makes no real distinction between the two in the way in which it defines a qualifying lease for the purpose of the acquisition scheme. He submits, and refers to the evidence of Prof. Wylie in this regard, that the social policy justification refers to both types of lease equally without any distinction, and he refers to the social injustice to any tenant under a qualifying lease that at the end of the term the premises had to revert to the landlord. He also referred to Prof. Wylie's evidence regarding the policy objective of tidying up the system of conveyancing in the State by the elimination of what were referred to as "pyramid titles" and that this applied also to both types of lease in equal measure. He referred also to the desirable objective of ridding lessee's of old premises of the need to apply for landlord's consent to alter the premises which may have great value to the tenant, and that this is an uneconomical way of arranging matters of this kind, so that some person whose interest in the premises is confined to perhaps receiving a small rent can nevertheless control in this way what happens at a premises, those premises perhaps being of very substantial value.

Mr O'Donnell also submits that the plaintiffs cannot, as he suggests that they have sought to do, make a distinction between what he called "poor people in dwelling homes and rich people in business premises". He submits that there are homes which may on account of their location have very high values, and in contrast there can be small shopkeepers in business premises which are low in value, and that the distinction for the purpose of this challenge simply cannot be made, and furthermore that the legislative scheme makes no such distinction, and there can be no element of means-testing to the scheme.

Mr O'Donnell states that it is significant that the limit of the plaintiffs' challenge is back only as far as the 1967 Act and not back to the 1931 Act, and that the challenge at its broadest is to the right to acquire the freehold, and that there is no challenge to the right of a lessee under a building lease to a reversionary lease of 99 years at one eighth of the gross rental value. He suggests that the reason for this limitation to the challenge is that everybody would be agreed that there would be a significant social injustice if a tenant was not entitled to a reversionary lease where he/she held under a building lease and at the end of the term the land was to return to the landlord.

He accepts, however, that there is some of the evidence given by Mr McDowell which would suggest that Mr McDowell would not agree that there was such an injustice to that situation, on the basis that in such a situation the lessee would have entered such a transaction with his eyes open and realising that at the end of the term he would be obliged to return all the property, including buildings erected by him, to the landlord, and that a businessman in such a situation would have made his decision to take such a lease in the belief that during the term of the lease he would be able to recoup his cost of building the premises, and that therefore he would be at no loss if at the end of the term he was obliged to return the property in its entirety to the landlord. Mr O'Donnell suggests that such an approach, being one from the perspective purely of economics, would be seen as working an injustice on the lessee from a constitutional rights perspective, and the very situation which the legislature sought to address in its various legislative interventions beginning with the 1931 Act, - an Act, as already stated, which is not under challenge in

these proceedings.

In relation to the argument that a landlord in the position of the plaintiffs at some stage in the past made a decision to restrict his interest in the property to an income stream argument by means of a fixed rent, and without any obligations to repair and maintain, Mr O'Donnell submits that the legislative scheme recognises that reality by means of the fraction mechanism based on market value, firstly in the 1931 Act by means of a rent fixed at one eighth of the gross rent, and later in the context of acquisition by means of value or price arrived at by reference to the provisions of s. 7 of the 1984 Act, including the fraction mechanism, which has been adjusted from time to time and is now at one eighth. Mr O'Donnell submits an explanation or justification of this fraction mechanism in the following way.

It is submitted that the price mechanism challenge only kicks in so to speak if the whole question of acquisition itself has passed the constitutional test of meeting a social justice principle and the exigencies of the common good. Therefore the mechanism where by that is achieved must be looked at in the context where the idea of acquisition itself is acceptable. In that connection, Mr O'Donnell has submitted that there must be a reasonable margin of appreciation or discretion given to the legislature as to how this is achieved, and provided a reasonable balance is struck between the competing rights and interests, the Court should not feel obliged to condemn the scheme, even if in certain cases an anomaly is shown to exist or certain people affected feel hard done by in particular situations, and that this is bound to happen in any scheme of general application.

As far as the fraction of one eighth itself is concerned, Mr O'Donnell refers to the fact that it is linked to the previous reference to the same fraction of one eighth set forth in the 1980 Act in relation to the reversionary lease rent calculation, so it is not something simply picked out of the air in some irrational way. He explains it by stating that the objective is to provide the landlord with the income stream to which his fee simple interest entitles him to receive during the term of the lease, and that this figure remains unchanged even though the value of the entirety of the land rises. In this way the proportion of that value which any capitalised valuation of the rent represents decreases so long as value of the property rises. He submits that this is a perfectly reasonable rationale for the fact that over the years since the introduction of the scheme the level of the fraction used to arrive at a valuation of the landlord's interest has reduced from one quarter, to one sixth and now to one eighth, and that if that were not so, the landlord would end up with a price which represented the relationship of a higher rent than that reserved with overall value of the property. That in his submission would work an injustice in the other direction. He submits that the Oireachtas is entitled to deal with the matter in this way so as to achieve a balanced and fair result to all parties. He also refers to the evidence of Mr O'Cleirigh in this regard who gave it as his view that such a method of valuation was clear, fair and reasonable. I have already summarised his evidence earlier.

The State contends that it is a matter for the Oireachtas to determine social justice principles and what does or does not accord with the exigencies of the common good. Mr O'Donnell urges that this Court cannot substitute its own views in that regard for the views of the Oireachtas, and that only if the Court was of the view that the view formed by the Oireachtas was so arbitrary, and so unjust that it could not be consistent with the Constitution, that the Court should interfere.

Mr O'Donnell has referred also to the fact that the Oireachtas has dealt with legislation of this kind on a large number of occasions, referring to the Acts of 1931, 1958, 1967, 1974, 1980, 1984, 1990 and now very recently in 2005, and he refers also to Prof. Wylie's evidence that further reform of the law in this area is under consideration. He submits that the Oireachtas has recognised on these various occasions a social justice principle, and that it is necessary in the interests of the common good to bring in these pieces of legislation so as to adjust the scheme as it has thought fit from time to time. He has also referred to the historical background to land tenure in this country going back many hundreds of years and, in that context, to the origin of the ownership by landlords of estates here such as that of the plaintiffs, granted to the 1st Earl of Essex in the middle of the sixteenth century, part of which reached the Shirley family in the 17th century through inheritance. He submits that this is part of the background to the 1937 Constitution and to the inclusion therein of provisions permitting the delimitation of property rights. He refers to the fact that at the time of that Constitution there was already in progress as a result of Land Purchase legislation a system of land redistribution, and referred also to Prof. Wylie's evidence that one of the underlying objectives of the legislation was a desire to place in Irish hands land which had been granted a long time previously to a small group of landlords. He submits therefore that a procedure for the acquisition of land interests is one which is constitutionally permissible so long as it is fair.

As part of his submissions Mr O'Donnell has referred also to the contents of the Meredith Report in 1928, and which led to the passing of the 1931 Act. He submits that there is evidence therein of the difficulties perceived to exist for tenants under the common law, and what steps were recommended to be introduced to remedy the situation as it was seen to be at that time, in relation to rights to renew, how fair rents would be fixed, how account should be taken of buildings and improvements made by

the lessee and other relevant matters. I do not propose setting out in detail all the passages from the Commission's Report to which the Court was referred. Reference was also made to a work by the late Mr Justice Kingsmill Moore on the Law of Landlord and Tenant, which was published after the passing of the 1931 Act, and to certain passages therein which made reference to what was regarded as the uneven bargaining position between landlords and tenants both at the commencement of a tenancy and at the end thereof. Again I do not propose to do more than just refer to the fact that Mr O'Donnell has referred to same for support for his submission that the legislature decided that it was necessary to introduce measures to deal with the position of tenants *vis-a-vis* landlords which was seen as favouring landlords at that time, as a result of the way in which matters were regarded and dealt with by reference to the common law. Mr O'Donnell submits also that what the plaintiffs are trying to achieve by the present proceedings is something which the legislation from 1931 onwards was designed to prevent, a situation where the landlord would gain the benefit of the increase in value of the property which had occurred during the term of the lease, albeit that there was provision for a landlord to resist an application to renew the lease if he had a bona fide scheme of development in mind for the property. In this latter regard, Mr O'Donnell submits that that was something which the Oireachtas was entitled to change in due course if it was of the view that there was an injustice to the tenant. The fact that this and other matters were addressed by the Oireachtas in the 1958 Act is part of the ongoing development of the law in that area in the light of experience of how the scheme operated over time.

As another example Mr O'Donnell referred to the introduction of a rebuttable presumption in favour of the lessee as to the erection of buildings. But he points out also that the presumption only becomes of any relevance once other conditions are fulfilled, such as that the lease is for not less than fifty years, and that the rent is not more than a certain fraction of the rateable valuation. He submits that there is nothing unfair or unconstitutional about a measure which addresses in favour of the lessee a situation in which that lessee is at a distinct disadvantage in relation to the establishment of a matter essential to eligibility or entitlement to acquire the landlord's interest in the property. He refers also to the fact that the presumption contained in the 1978 Act is not materially different to that which was introduced in the 1958 Act. He submits also that the use of the length of the lease and the use of the relationship which the rent bears to the level of the rateable valuation is simply a rule of thumb, so to speak, or means of arriving at the probability that the lease is a building lease and therefore that it is a ground rent, and it is submitted that there is nothing unfair in using these criteria for that purpose.

He accepts that the date at which the rateable valuation must be looked at for the purpose of comparison with the rent is altered by the 1978 Act so that the relevant rateable valuation is that applying at the date of service of the notice, rather than being the valuation "*as first fixed or revised subsequent to the date of the lease pursuant to the Valuation (Ireland) Act, 1852, as amended and adapted*", as had been provided in s.4(3)(a) of the 1958 Act, and he acknowledges that this change is an important matter in respect of which complaint is made by the plaintiffs. But he contends also for a possible interpretation of that provision of the 1958 Act which is wider than the meaning suggested by Mr Fitzsimons. He submits that the words "first fixed or revised subsequent to the date of the lease" does not necessarily fix the valuation to that existing only at the date of the lease, because it refers also to "revised". In other words, it seems to be suggested that the adjective "first" attaches only to the word "fixed" and that the word "revised" stands alone, rather than being interpreted as "first revised". If Mr O'Donnell is correct about that, then there seems to be little if any distinction between the provision in the 1958 Act and the later provision contained in s. 10(2) of the 1984 Act referring to the date of service of the notice to acquire, since the word "revised" would cover any revision of the rateable valuation up to that date. But even if he is wrong about that, he is of the view that there is nothing impermissible about looking at the date of valuation as of the date of service of the notice, and he has referred to the evidence of Mr O'Cleirigh in that regard who stated that in almost every case where a person is found to be eligible under s. 10(1) of the 1978 Act (the permanent buildings were erected by the lessee) the rent is found to be less than the rateable valuation, and that therefore the mechanism used is a fair indicator of the position in that regard, and he refers also of course that the landlord is entitled to put forward proof that the lessor in fact erected the premises, in which case there is no entitlement in the first place.

Mr O'Donnell also refers to s. 16 of the 1978 Act which in effect provides that the general right to acquire the fee simple interest does not apply to a person who has been declared not to be entitled to a reversionary lease because the landlord has a bona fide intention to redevelop the property, and that the landlord enjoys this protection. He refers also to the provisions of s. 30(2) of the 1980 Act which provides that a person who would be entitled to acquire the fee simple interest in the property under s. 9 of the 1978 Act is entitled to apply for a reversionary lease. He draws attention to the fact that this is a reversal of the previous situation where under the 1978 Act a lessee who would have been entitled to a reversionary lease was entitled to acquire the fee simple, whereas under this new provision a person entitled to acquire the fee simple, was entitled to apply for a reversionary lease.

In relation to the plaintiffs' complaints relating to the price-fixing mechanism contained in s. 7(4) of the 1984 Act, namely the price by reference to one eighth of market value less deductions for tenant's goodwill and the special allowance (i.e. tenant's

works which add to the letting value other than repairs and maintenance), and excluding any development value, Mr O'Donnell firstly refers to the distinction between the mechanism contained in s. 7(3) of the Act and that referred to in s. 7(4) thereof. The former makes a general provision that the price shall be the market value but taking into consideration the various matters set forth in paragraphs (a) to (j) thereof, such as the rent or any increase thereof payable, the interest yields on Government securities, the nature and location of the land, the price which has been paid for the fee simple in any sale thereof on or after the 22nd May 1964 (this having been the date of the Ground Rents Commission's Report prior to the passing of the 1967 Act), and other matters set forth therein. However, the following subsection (4) provides that where the lease has expired a different mechanism is to apply and which has been applied in the present case. Mr O'Donnell has submitted that if the plaintiffs' argument was to have weight they would have to have adduced evidence that the price, if fixed under s. 7(3) rather than s. 7(4) would have produced a higher figure, and that there is none such adduced, and again he has referred to Mr O'Cleirigh's evidence that the market value of ground rents is very low, and that in fact s.7(4) produces a higher sum for the landlord than could be fixed under s. 7(3). For that reason, Mr O'Donnell submits that the plaintiffs are wrong in the manner in which they characterise the mechanism for price fixing under the latter subsection as in some way draconian or penal to landlords, and rather that it is a provision which recognises in the landlord's favour a situation where the tenant has allowed the lease to expire and that the landlord may have had an expectation or hope that at the expiry he may get back the property, and that in such circumstances it may be appropriate that the landlord receives a somewhat larger consideration from the tenant than would otherwise have been fixed by s.7(3) of the Act. He submits that s. 7(3) must clearly be a constitutional provision since it specifically refers to the landlord receiving market value, and that if subsection (4) is to be impugned there would have to be evidence that subsection (4) works an unfairness, and he submits that the plaintiffs have not demonstrated this or even attempted to do so. He submits that the Oireachtas can be seen to have engaged in a careful balancing exercise in relation to the competing interests of both the landlord and the tenant in the manner in which the legislation has been worded. He also submits that the case of **Hempenstall v. The Minister for the Environment [1994] 2 I.R. 20** is relevant to matters raised in these proceedings, since in that case, which dealt with property right in relation to taxi licences, it was held, inter alia, by Costello J. (as he then was) at p. 28:

*"...an amendment of the law which by changing the conditions under which a licence is held, reduces the commercial value of the licence cannot be regarded as an attack on the property right in the licence - it is a consequence of the implied condition which is an inherent part of the property right in the licence."*

Mr O'Donnell submits that this would apply equally to the provisions for reversionary leases introduced in 1931 which may have affected greatly the value of the landlord's interest in the property, but that it is a perfectly valid delimitation of rights in accordance with what is regarded as a social justice principle, and is not an unjust attack. He has referred also to **Dreher v. The Irish Land Commission [1984] ILRM 94** in which Walsh J. found that the system of payment to land owners whose land was being acquired compulsorily by the Land Commission, and in which the consideration was paid by means of a transfer of land bonds equal in nominal value to the price fixed, was not unconstitutional even though by the time the vendor was entitled to encash the bonds so transferred the value had reduced from that nominal value and even from the actual value therein as at the date of transfer. The price had been fixed at £30,000, and he received a transfer of bonds of a nominal value of £30,000, yet by the time he was entitled to encash these bonds they had a realisable value on the day of transfer of only £29,400. The scheme was found to be constitutional on the basis that the Minister for Finance had not failed to ensure as far as he could to ensure that the market value of the bonds remained as near par as possible, and that simply because a person was entitled to just compensation that did not mean that he was entitled to market value. In fact the learned judge went on to say that there could be circumstances where just compensation could be either less or greater than market value. However, Mr O'Donnell's central submission in relation to compensation in the present case, is that the landlord actually receives the market value or even more than market value, of his interest - the fee simple interest - in his property under the impugned scheme. His fall-back submission, if you like, is that even if the price fixed by the Court is less, it is fair and that the scheme which so provides and under which the price was fixed, is a fair and reasonable attempt by the legislature to provide a method of calculation of market value or compensation which takes account of the various competing interests and considerations.

### **James v. United Kingdom 8 E.H.R.R 123:**

This is a case to which it is relevant to have regard. It is a case in which issues similar, although not identical of course, were raised in the European Court of Human Rights arising out of the Leasehold Reform Act, 1967 in the United Kingdom under which certain tenants were entitled to acquire the freehold interest from their landlord. The head-note of the reported judgment of that court recites, inter alia, the fact that:

*"...[the landlords] complained that the compulsory transfer of these properties and the calculation of the price received for this transfer amounted to a breach of Article 1 of Protocol No.1; that the circumstances of*

*the transfer were discriminatory in breach of Article 14 of the Convention and that the absence of any appeal system violated Article 13..."*

I should immediately refer to the fact that Mr Fitzsimons has drawn the Court's attention to the fact that the properties at issue in this case were residential only, and did not relate to business premises, and he submits that this is a fundamental difference between that case and the plaintiffs' case, although the plaintiffs wish to rely on some aspects of the judgment themselves. He also refers in that regard to the evidence given by Prof. Wylie on behalf of the second and third named defendants that the current law of landlord and tenant has moved well beyond building and proprietary leases, and the need to ensure that the tenant is not disadvantaged in his relations with the landlord.

Article 1 of Protocol 1 of the Convention provides:

*"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.  
The preceding provisions shall not, however, in any way impair the right of the State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."*

The wording of this provision is different to that in Article 43 of the Constitution, but the principle that the exercise of property rights may be regulated to meet the exigencies of the common good is apparent, and as is pointed out in the judgment in James, this must include meeting a social justice principle and the measures adopted by a State must be proportionate. For all practical purposes, there is no distinction, and for that reason, albeit allowing for the fact that the case related only to residential property, the Court's judgment is clearly one which is relevant to have regard to in the light of the requirement upon Courts in that respect contained in s. 4 of the European Convention on Human Rights Act, 2003.

Mr O'Donnell referred to a number of conclusions arrived at by that Court in James:

1. Compulsory transfer of property from one individual to another may constitute a legitimate means for promoting the public interest, and that the taking of property effected pursuant to legitimate social, economic or other policies may be in the public interest even if the community at large has no direct use or enjoyment of the property taken.
2. The Court will respect a national legislature's judgment when implementing social and economic policies unless that judgment is manifestly without reasonable foundation, and that the elimination of social injustice by leasehold reform legislation was a legitimate aim for the State to pursue and could not be characterised as manifestly unreasonable, and fell within the State's margin of appreciation.
3. A measure depriving a person of his property must be appropriate for achieving its aim and not disproportionate thereto, but does not have to meet a test of strict necessity, and that provided that the means chosen could be regarded as reasonable and suited to achieving a legitimate aim and a fair balance the Court would not question the Court's judgment of the best solution.
4. The taking of property without compensation reasonably related to its value would normally constitute a disproportionate interference which was not justifiable, although this did not give an entitlement to full compensation in all circumstances, and that in determining the level of compensation a State has a wide margin of appreciation to afford a fair balance between the interests of the parties, the general interest of society, and the landlord's right of property.
5. It was not unreasonable for the legislature to determine that landlords generally should be deprived of the enrichment which would otherwise ensue on reversion of property, even if in a number of cases so-called undeserving tenants thereby benefited, and that in the case in question the operation and scale of the legislation in practice and the scale of anomalies under it did not render it unacceptable under Article 1, nor did it place an excessive burden on the applicants over and above the disadvantageous effects for landlords generally.

I have set out the above by means of a summary only of some conclusions reached by the Court in James. The judgment of the Court deals in more detail with each of these matters and others, but there is no need to set out the terms of the judgment in more detail at the moment. Mr O'Donnell relies on much of this judgment in support of his submissions, and points to the great similarity of these conclusions to principles which can be found in our existing jurisprudence to which the Court has been referred, such as *Tuohy v. Courtney*; *Dreher v. Irish Land Commission*; *Heaney v. Ireland* and so forth.

Mr O'Donnell referred to a number of specific passages from the judgment itself. I will not refer to all of these, but to some. For example he referred to a passage at p.142 of the Court's judgment of the relating to the concept of what measures might be regarded as being in the public interest. That passage is as follows:

*" (a) Margin of appreciation:*

*Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken. Here, as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation.*

*Furthermore the notion of 'public interest' is necessarily extensive. In particular, as the Commission noted, the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely. The Court finding it natural that the margin of appreciation available to the legislature in implementing social and economic policies should be a wide one, will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation....."*

In dealing with the landlord's submission that in enacting the English Act of 1967 the government of the day was not doing so for the public benefit but rather for some purely political vote-seeking purpose, the Court stated:

*"The Court notes, however, that leasehold reform in England and Wales had been a matter for public concern for almost a century and that, when the 1967 Act was passed, enfranchisement was accepted as a principle by all the major political parties, although they expressed different views as to how it should be implemented. It was not disputed by the applicants that the main criticisms now made by them of the substantive provisions of the legislation were voiced at the time and fully debated in Parliament before being rejected. The Court does not find that such political considerations as may have influenced the legislative process, socio-economic legislation being bound to reflect political attitudes to a greater or lesser extent, precluded the objective pursued by the 1967 Act from being a legitimate one in the public interest."*

The Court went on at p.144 to consider if the Court should look at the justifications for the legislation put forward by the government, and stated in that regard:

*"...the Court has jurisdiction to inquire into the factual basis of the justification pleaded by the respondent government. That review, however, is limited to determining whether the legislature's assessment of the relevant social and economic conditions came within the State's margin of appreciation.....The applicants' views cannot be qualified as groundless. Nonetheless, there is sufficient evidence to justify the contrary views. In a building lease the original tenant will have built the house, in a premium lease he will have paid an initial capital sum which typically took account of the building cost, and in both kinds of lease the tenant will have been responsible for all running repairs. This means that the long established tenant and his predecessors will over the years have invested a considerable amount of money in the house which is their home, whereas the landlord will normally have made no contribution towards its maintenance subsequent to the granting of the lease..... the United Kingdom Parliament's belief in the existence of a social injustice was not such as could be characterised as manifestly unreasonable."*

This Court was referred also to a passage at p.145 as follows:

*"According to the applicants, the security of tenure that tenants already had under the law in force provided an adequate response and the draconian nature of the means devised to give effect to the alleged moral entitlement, namely deprivation of property, went too far.....It is, so the applicants argued, only if there was no other less drastic remedy for the perceived injustice that the extreme remedy of expropriation could satisfy the requirements of Article 1.*

*This amounts to reading a test of strict necessity into the Article, an interpretation which the Court does not find warranted. The availability of alternative solutions does not in itself render the leasehold reform*

*legislation unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a fair balance. Provided the legislature remained within these bounds, it is not for the Court to say whether the legislation represented the best solution for dealing with the problem or whether the legislative discretion should have been exercised in another way.*

*The occupying leaseholder was considered by Parliament to have a 'moral entitlement' to ownership of the house, of which inadequate account was taken under the existing law. The concern of the legislature was not simply to regulate more fairly the relationship of landlord and tenant but to right a perceived injustice that went to the very issue of ownership. Allowing a mechanism for the compulsory transfer of the freehold interest in the house and the land to the tenant, with financial compensation to the landlord cannot in itself be qualified in the circumstances as an inappropriate or disproportionate method for readjusting the law so as to meet that concern."*

The reference to the 'moral entitlement' to which the tenant was thought by Parliament to enjoy, is a reference to the 1966 White Paper published by the British government prior to the passing of the Act of 1967 there, and in which the government of the day set forth its proposals for reform in this area. That White Paper, as described in the Court's judgment, set forth the government's purpose, and it was clear for all to see. In the present case, Mr Fitzsimons has referred to the fact there is no such exposition of the government's purpose in enacting the impugned statutory scheme, and that the Court must therefore have regard to what, if any, evidence has been adduced in that regard in these proceedings, and he suggests that there is no social justice principle disclosed in any of the evidence put up by the defendants which shows any justifiable social justice principle, or that, if even such a principle has been shown to exist, the exigencies of the common good require the particular measures adopted. Mr O'Donnell submits however in that regard that the Court can look, inter alia, to the 1926 Meredith Report, the 1964 Report of the Ground Rents Commission, the context of the historical background to, and the evolution of, legislation in the area of landlord and tenant rights, as well as the legislation itself in order to discern the pursuit of a social justice objective in the impugned statutory scheme, and that the same is in accordance with the exigencies of the common good, and that evidence in the strict sense by witnesses is not something required, even though he would refer to some of that evidence which has been given in the case.

## **Conclusions:**

### **Social justice principles:**

Article 43 of the Constitution requires that, although all persons have the right to private ownership in property, and although the State guarantees not to abolish that right, the State ought to regulate that right according to what are referred to as "principles of social justice". That is the first part of the Article to be considered. It seems to me that social justice in the context of property rights means that there ought to be at least a fair, as opposed to equal, distribution of property amongst all members of the society, so that justice is achieved. In a democratic society, and one in which an open market operates, one could never achieve a situation where all citizens enjoyed ownership in the property of the State to an exactly equal degree. There will always be those who have more than others.

In an extreme example, where the vast majority of property in the State was permitted by the laws of the State to remain in the ownership of a small group at the top of the tree so to speak, it could be seen as a justifiable interference with the property rights of those in such a protected and privileged position that they be required to make a share of that wealth available for the many at the middle or bottom of the tree, albeit on the basis of purchase or compensation. The passing of laws to facilitate the ownership in property being thus enjoyed by a greater number of persons in society would constitute the pursuit of a principle of social justice. This would be what Mr Fitzsimons has referred to as a form of distributive justice. But he points out that in the case of the plaintiffs they are obliged under the scheme impugned in these proceedings to transfer their property to an already prosperous entity, the first named defendant, and similarly in the case of other properties of which they own the freehold in Carrickmacross, and that there can be no social justice principle which requires that this be done.

It is however necessary to distinguish between the objective of the legislation and the effect which its implementation may have in some instances, such as those just referred to. It has been pointed out in the James case to which I have referred that "*it was not unreasonable for [the legislature] to determine that landlords should be deprived of the enrichment which would otherwise ensue on reversion of the property, even if in a number of cases 'undeserving' tenants thereby benefited*" and that "*the operation of the legislation in practice and the scale of the anomalies under it did not render it unacceptable under Article 1,*

*nor did it place an excessive burden on the applicants over and above the disadvantageous effects for landlords generally."*

Although these remarks are made in the context of Convention rights, I see no reason not to apply the same in the context of constitutionally protected property rights. Even though the first named defendant is without any doubt, on the uncontradicted evidence adduced, a very prosperous legal entity, whose wealth will in no material way be adversely affected in the event of not acquiring the fee simple of the property, it does not detract from the objective of the legislation itself, which provides a scheme of wide and general application. It is relevant in the context of what was stated in the James case, and which I adopt for the purpose of these proceedings, that although there are anomalies in the way in which the first named defendant has been able to avail of the legislation, there has been no evidence produced to this Court that other landlords besides the plaintiffs are similarly adversely affected by anomalies such as those complained of by the plaintiffs. While I am sure that in all probability there would be some others similarly affected, it is also the case that the scheme impugned herein has been in existence for a great many years and has not to my knowledge been challenged during that time as to constitutionality.

The evidence has also been that in the case of the plaintiffs there are about twenty five other properties of which they are the fee simple owners, but I have been referred only to the fact that of these there are a small number of cases of what might be called prosperous or wealthy tenants, such as Mr Daly, Bank of Ireland and Allied Irish Banks. Perhaps some other tenants fall into that category, although the concept of "wealthy" is somewhat elusive of general definition.

The lack of any evidence as to the extent to which so-called wealthy or prosperous tenants are availing or have availed already of the scheme is of relevance, because even though undoubtedly some such anomalies or unintended consequences of the legislation may have occurred, it does not follow that the scheme should be seen as no longer pursuing its intended objective in respect of which the legislation enjoys the presumption of constitutionality. In my view, these features of the operation of the legislation cannot in themselves disturb the integrity of the social justice principles pursued by the legislation, and the presumption of constitutionality in that regard.

It is of course still necessary to identify the social justice principle which existed in 1967 perhaps, but certainly in 1978 and onwards, in order to answer this part of the plaintiffs' submission. What I have said thus far is really to the effect that legislation which has as its object an equitable distribution of property rights amongst all sectors of society is legislation which is pursuing a social justice principle, even if in achieving that objective some persons who do not need to benefit from the scheme in monetary terms, in fact come through some chance, within the specific terms of the scheme.

Mr O'Donnell, on behalf of the State, has sought to demonstrate that the impugned legislation has such a social justice objective, both by evidence adduced, and by reference to the history of the development of the law in this area over many years, and therefore the historical context of the legislation.

The plaintiffs called Prof. Fahy to express expert views as a sociologist in relation to the social justice principles which might be seen to exist in the legislation. I have set out that evidence earlier and I will not do so to any extent again. He stated that the concept of social justice in the context of land distribution referred generally to a situation where disadvantaged people were regarded as having an entitlement to have that disadvantage addressed by society at large, i.e. the State. But it will be recalled that he stated that under previous schemes for the acquisition of land from land owners it was on the basis that the cost of the schemes was borne by the State and not by a particular group of individuals, and that where the State was pursuing a social justice objective it should bear the cost of that. He referred also to the fact that the Ground Rents Commission set up ahead of the 1967 Act did not make recommendations in respect of business premises, and also that the Commission had not addressed the matter in terms of social justice but more from the viewpoint that people in the State expected to own their own homes.

While it is undoubtedly true that that Commission made no such recommendation in respect of business tenancies, it is also true that the position of business tenants had been earlier addressed in the 1931 Act when rights to a new tenancy were created provided that certain conditions were fulfilled, as well as other matters in ease of tenants such as the right to a reversionary lease at the expiration of a building lease or proprietary lease. The Meredith Commission had made no recommendation that there should be a right to acquire compulsorily the freehold. The 1931 Act in Part II thereof had also made certain provisions in respect mainly of urban area tenants in relation to improvements, and its short title refers to the Act being "*An Act to make provision for the further improvement and amelioration of the position of tenants.....*". I refer to these matters in order to introduce the concept that the impugned legislative provisions must not be viewed as an isolated piece of legislation, but rather as part of a continuum of legislation all of which was designed in different ways to improve, as the legislature saw it (and that is important to observe) the position of tenants. I refrain from trying to identify a distinction between "improvement" and "amelioration" since I do not need to, but clearly both words have a meaning which is in ease of the tenant.



The Meredith Commission had been asked in 1927 by the government of the day to *“enquire into and examine the existing law governing the relationship of landlord and tenant in respect of holdings in urban districts, towns and villages, occupied either for residential or for business purposes, with a view to ascertaining what hardships and anomalies, if any, arise under the law, and to recommend.....”*

Clearly that government was concerned about social justice at that time in 1927. Certain legislation was brought in following the report of that Commission. Mr Fitzsimons has pointed to the fact that in neither the 1931 Act, nor in the later 1958 Act which expanded the category of qualifying leases for the purpose of the entitlement to a reversionary lease, is there any entitlement to a reversionary lease where the premises was a business premises and the lease was subject to rent reviews, and there were in addition certain ways in which a landlord could avoid having to grant a reversionary lease, such as where he had in mind a bona fide intention to redevelop the site and so on. In so far as Mr Fitzsimons’s submission may be suggesting that the government may have thus demonstrated a view that it did not consider that business tenants were in a disadvantaged class and therefore not within any concept of social justice, I would not agree that it can be so interpreted for present purposes.

By 1961, the Minister for Justice considered it desirable to set up another Commission to consider matters concerned with ground rents. But it is important also to note, as appears from the very interesting and extensive history of the legislation which is contained within the report itself, that matters relating to the position of tenants were the subject of some ongoing scrutiny by the government and the legislature after 1931. It is not as if matters lay dormant until the late 1960s. For example, in 1936 a tribunal was set up to investigate the existing law in relation to certain occupational tenancies in urban areas. In 1943, the Landlord and Tenant (Amendment) Act, 1943 was passed giving an entitlement to compensation or the right to a reversionary lease to a lessee of a bare site who had erected buildings thereon. These matters can in my view be seen quite easily as continuing to observe and keep in mind broad social justice principles in ease of tenants, who historically had been a disadvantaged class.

The Ground Rents Commission Report on page one thereof refers to the terms of reference of the Commission. It appears that at the end of 1961, the Minister asked the Commission to consider and report on a number of matters, as follows:

*“1. whether leaseholders should be given the right to purchase compulsorily the freehold and other superior interests in their property on the basis that no assistance (by way of grant, loan or otherwise) from public funds towards the cost of purchase is involved;*

*2. whether the creation of further ground rents should be prohibited or restricted; and*

*3. what (if any) legislative provision should be made in relation to these matters. ”*

I note that no distinction is drawn in these terms of reference between business tenants and residential tenants. It merely refers to “leaseholders”. As it turned out the Commission came to a view that it would not propose to the Minister that there should be a right to purchase the reversion of a purely business premises. In that regard the Commission reported as follows at para. 92:

*“There was some support for the proposition that the right to purchase should be given only to a lessee of a dwelling, or of a combined dwelling and business premises. In general it was not proposed that there should be a right to purchase the reversion of a lease of purely business premises.”*

Whatever recommendations are made to government, it is still a matter for the government to decide what if any of the recommendations it will incorporate into legislation. It is equally open to such a government to include in any legislation matters which have not been recommended, where the government nevertheless considers that in order to regulate rights by principles of social justice, it will permit all tenants regardless of whether they are residential or business lessees to be entitled to purchase the freehold interest of their premises. It is still a regulation by principles of social justice so to permit, even if it could be said both at the time and in later years that the class of business tenants in the country, or at least some of them, may not be generally regarded as deserving or needy. A consideration of the question of where that idea fits the “exigencies of the common good” will be dealt with in due course. I am simply looking at the question of whether such legislation can be seen as aimed at principles of social justice in the sense of distributive justice. In my view it can.

Some parts of Prof. Fahy’s evidence must be considered in the light of the fact that he was asked to opine on certain matters on an assumption that the Court would find that the compensation given to the landlord under the scheme would be found by the Court to be an undervalue. On that assumption he stated that a scheme which provided that the landlord should bear a cost of the

scheme could not be socially justified and would be in stark contrast to earlier schemes under which any undervalue was made good to the landlord by the State in one way or another.

He similarly stated that for one prosperous entity to benefit at the expense of another could not be justified. He confirmed however to Mr Ralston that where the landowner was receiving fair market value for his interest it was unobjectionable. In view of the fact that I am satisfied that the landlord does receive fair compensation under the scheme, given the nature of his residual interest in the property, Prof. Fahy's evidence in this regard is immaterial.

I am satisfied that the objective of the legislation must be looked at in isolation from how it is implemented, since the latter relates more to the question of the exigencies of the common good and proportionality. The objective of social justice is clearly evident in any legislation which enables a tenant to acquire the fee simple interest, even though in some or indeed many instances the tenant is no longer as disadvantaged economically as in previous generations. Disadvantage is not to be judged in purely economic terms. For that reason I do not feel that the evidence of Mr McDowell should sway the Court since it looks at social justice solely from the viewpoint of the economic transaction taking place when a landlord grants a lease to the tenant, and attempts to persuade the Court that simply because the tenant must be taken as making a business decision that by the end of the term he will have got his money back from any use he makes of the premises, he is not at any loss as such for which he needs to be protected. I think this view of an economist as such, while expert, and interesting as a viewpoint, is too narrow a view as far as basing any decision thereon as to whether there is a social justice objective in entitling a tenant to acquire the freehold is concerned. Other factors apart from pure economics are concerned come into play and to which a government may have regard in deciding on a social justice policy. There can be other factors or disadvantages affecting the enjoyment of the property, which arise from status of tenant. Ownership is not absolute, and there still exist the remnants of obligations between landlord and tenant, aside from the payment of a rent, which have led to measures being taken from time to time by the legislature, and which have effectively emasculated the effect of certain covenants (i.e. against assignment, sub-letting, making alterations and in respect of user etc), such that a landlord will not be permitted to unreasonably withhold consent. These provisions by which the advantage to the landlord of such covenants is emasculated is further evidence of a leaning by the legislature in favour of lessee empowerment. A measure which enables a tenant to have these restrictions removed completely can be seen as pursuing a social justice objective, which is apart and distinct from any question of wealth redistribution.

I think there is much to be said for a submission made by Mr O'Donnell, namely that if some of the evidence given by Mr McDowell were to be accepted and acted upon by the Court it would result in a situation where the legislation would revert to a position which the legislature had over many years sought to address in the interests of tenants, and certainly since 1931 including in relation to business premises.

Historically of course the main focus of land reform was the redistribution of wealth from the advantaged land owning class to the disadvantaged tenant class, and in respect of land as opposed to either dwellings or business premises. The history of this country over many centuries which led to the existence of such a large disadvantaged class of people does not have to be recited. It is part of the history of this country for centuries, and was referred to by Prof. Fahy in his evidence to an extent, and is also described in both the 1926 Meredith Report and the 1964 Ground Rents Commission Report. That historical backdrop does not and cannot assist in the actual interpretation of any particular provision, but in arriving at a conclusion as to whether the legislature were guided by a principle of social justice when enacting the relevant provisions under discussion, the Court must be entitled to look to aspects of the social history of the country in order to provide some context to the legislation. In that regard also I believe that it is appropriate not only to look at the particular pieces of legislation under scrutiny in these proceedings, but also to look at the entire body of legislation in this area, particularly the 1931 Act and the 1967 Act, and subsequent such Acts since there is much interweaving and cross-referencing between the various Acts.

### **The exigencies of the common good:**

Reference has already been made to the significance to be attached to the word "accordingly" appearing in Article 43.2.2. It is therefore only where the State is pursuing a social justice principle that it may as occasion requires delimit the exercise of property rights with a view to reconciling their exercise with the exigencies of the common good.

It is worth noting also the phrase "as occasion requires" appearing in Article 43.2.2 of the Constitution. Such delimitation of property rights by the State when pursuing a principle of social justice, must therefore at the relevant time (i.e. the hearing of these proceedings) be 'required' for the purpose of reconciling their exercise with the exigencies of the common good. Not only does the phrase suggest that the legislative measures may have a certain in-built obsolescence, since the 'requirement' for same could disappear after a passage of time, but it would seem also to feed into the concept of proportionality in the sense that while

a particular measure may well assist or have assisted in reconciling the exercise of certain property rights with the exigencies of the common good while in pursuit of a social justice principle, it may not be 'required' in order to do so. That is consistent with the proportionality argument that constitutional rights should be interfered with, restricted or delimited as little as is necessary for the attainment of the desired social justice objective. However I will come to the question of proportionality as such in due course.

It is important to reach a conclusion as to the meaning to be given to the words "exigencies of the common good". The plaintiffs accept as they must that it is for them to rebut the presumption that the scheme is reconcilable with the exigencies of the common good. They submit that there is nothing within the text of the relevant legislation to indicate what legislative objective consistent with anything which can be described as a common good is being pursued. They say also that in so far as the State may argue that a common good is achieved by the social justice principle behind the transfer of property from one class of persons to another, this is negated by the circumstances of the present case where the recipients are themselves very wealthy and prosperous business people. They rely on the absence of any identifiable need in respect of business tenants in the Ground Rent Commission's report referred to already. These arguments in my view are predicated on a meaning being attached to the word "exigencies" which equates to something like absolute necessity. That would be going too far in my view, and a meaning far short of absolute necessity would be adequate, since otherwise the legislature would be under such a strict requirement of proof of absolute necessity in every instance where they wish to amend the law in relation to delimiting property rights that the situation would become impossible. Of course the Courts enjoy an ultimate supervisory role in ensuring that legislation passed by the Oireachtas is constitutional, but the Courts should be slow to in any way substitute its own view of what may or may not be required in order to reconcile the exercise of property rights with the exigencies of the common good. Until some point of absolute extremity is reached where legislation is patently and manifestly not in pursuit of any possible common good exigency, the Court should abstain from interfering with the role of the legislature in deciding what measures are needed. The present case is not such a situation. The Oireachtas can be seen over many decades by now as having in mind a social justice objective in the area of the relationship between landlord and tenant. The fact that a measure or a series of measures as part of an overall scheme has a consequence in some cases, such as the present one and other Shirley properties, where some persons already prosperous and even wealthy, are entitled to purchase at a fair price the residual interest of the landlord, as well as poorer persons, does not take the scheme outside of a common good exigency. I certainly have received no evidence to suggest that in anything like a very large number of cases, not to mention even the majority of cases, such a situation arises. The common good does not mean the good of all in the sense of every person without exception. In other words, the fact that some anomaly is thrown up by the scheme, such as where the first named defendant is a wealthy entity, does not mean that the legislation does not meet the exigencies of the common good in a broad sense.

It is also apparent that the Oireachtas have been of the view over decades that legislation of this kind, although each piece is individually distinct, is consistent with the exigencies of the common good. In relation to some such pieces of legislation the plaintiffs make no challenge. Their focus is on the later pieces to which they have referred. Their contention is really that with the passage of time the exigencies seen to exist many decades ago are no longer exigencies in a situation where many tenants are no longer impoverished and in need of a law which requires a landlord to hand over to the tenant his freehold in the property at what the landlord sees as an undervalue far removed from any real market value for the property. But that is not to say that the legislation no longer meets the exigencies of the common good overall. A passage from the judgment of Finlay C.J. in **Tuohy v. Courtney [1994] 3 I.R. 1** appearing at p.47 is apt, where the learned Chief Justice states:

*"The Court is satisfied that in a challenge to the constitutional validity of any statute in the enactment of which the Oireachtas has been engaged in such a balancing function, the role of the courts is not to impose their view of the correct or desirable balance in substitution for the view of the legislature as displayed in their legislation but rather to determine from an objective stance whether the balance contained in the impugned legislation is so contrary to reason and fairness as to constitute an unjust attack on some individual's constitutional rights."*

There is an overlap with issues of proportionality in the passage quoted, but it is also relevant to the extent to which this Court should attempt to interfere in the exercise by the Oireachtas of its undoubted discretion in the matter of when it shall intervene legislatively in the interests or exigencies of the common good. A large measure of appreciation and deference must be allowed by the Courts in such an area. I have already referred to the judgment of the ECHR in *James v. United Kingdom* and I have set out some of the conclusions and have included some quotation. Even though that Court was looking at the legislative intention and policies pursued by the UK from the viewpoint of an international Court and for that reason was stating that these matters are largely matters for the local legislature to determine, this Court sees no reason not to do the same given the fact that the Oireachtas is uniquely positioned to determine what is or is not meeting a common good exigency in the broad sense contended for, and in so far as I am required to have regard to the case law of the ECHR in reaching my conclusions, I gladly do so in this

instance, and am also of the view that the James case in large measure accords in any event with the jurisprudence of the Irish courts, albeit that the James case, as mentioned by Mr Fitzsimons, dealt with only residential tenancies, and not business tenancies.

I am satisfied that the impugned statutory scheme is one which must be seen as intended to reconcile the exercise of the plaintiffs' property rights with the exigencies of the common good, and I am not satisfied that the presumption of constitutionality which attaches to the legislative scheme in that regard has been rebutted. For the reasons set forth at some length already I am satisfied that a social justice principle lies behind the legislation, even one that endures still, and it would be difficult to demonstrate in that situation that nonetheless the legislation does not meet the exigencies of the common good, by saying that there has not been shown to exist a particular need on the part of the first named defendant to have the benefit of the scheme. While the issue of proportionality and that involving the concept of the common good are somewhat overlapping, it is necessary to address the proportionality issue separately.

### **Proportionality:**

The test of proportionality nowadays is generally accepted as being properly expressed by Costello J. (as he then was) in **Heaney v. Ireland [1994] 3 I.R. 593** at p. 607, where the learned judge stated:

*"In consideration whether a restriction on the exercise of rights is permitted by the Constitution, the Courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint in the exercise of protected rights, and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights (see for example Times Newspapers Ltd v. United Kingdom (1979) 2 EHRR 245) and has recently been formulated by the Supreme Court of Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means must pass a proportionality test. They must:*

- (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
- (b) impair the right as little as possible; and*

*be such that their effects on rights are proportional to the objective: Chaulk v. R [1990] 3 SCR 1303 at pages 1335 and 1336."*

The plaintiffs submit that the impugned legislation in these proceedings fails these tests even if the Court is satisfied that it passes the social justice test and addresses exigencies of the common good, since in the manner in which it operates it is arbitrary, unfair and irrational and therefore disproportionate.

As I have already set forth, the plaintiffs contend that the manner in which the 1978 Act in s. 10(2) thereof links the rent to the rateable valuation is unconstitutional in as much as the section for the first time made this link one of the criteria for eligibility to acquire the fee simple. Mr Fitzsimons pointed to the fact that prior to that provision, the 1958 Act in s. 4(3)(a) had availed of the link between the rent and the rateable valuation only so that the tenant could avail of a presumption that a lease was a building lease, whereas in s.10(2) of the 1978 Act it became an eligibility criterion. However in my view the objective in each case was the same – namely in order to make the relevant provisions applicable to land with premises erected thereon by tenants, and with rents at such a low level that it was to be presumed, if necessary, that they were the subject of a building lease. There is nothing irrational, unfair or arbitrary in my view about the introduction of that criterion in s. 10(2) as one of several to be fulfilled for eligibility into the scheme. It is a proportionate measure for the purpose of laying down some method by which it can be determined whether the lease is one to which the entitlement should attach. It is not irrational since one can see the reason why it was included.

It will be recalled also that under the section the relationship of the rent to the rateable valuation was to be looked at as of the date of service of the notice under section 4, rather than as of the date of granting of the lease itself. The plaintiffs submit that this creates unfairness since it permits premises which at the date of the creation of the lease had a rent which was greater than the rateable valuation, and therefore outside the scheme, to become by effluxion of time only (i.e. by increases in the R.V.) within the scheme, and I have already set forth those submissions.

It would be beneficial at this point to refer again to that part of the plaintiffs' case made in relation to the mechanism by which the rateable valuation of premises generally is arrived at, as explained by Mr McMillan in his evidence on behalf of the plaintiffs. Without revisiting his evidence in every detail since I have already set same out quite fully, it will be recalled that he

explained that in Dublin city for example a factor of .63 of 1% of net annual value was used for the purpose of arriving at a rateable valuation, whereas in other locations that factor might be .5 Of 1% or .4 of 1%, and that this produced an anomalous situation where two premises, each identical in every relevant way, could nevertheless have different rateable valuations simply because of what town each was located in. That evidence is availed of by the plaintiffs in this case to demonstrate what they submit is the completely arbitrary nature of the means of selection of landlords who are obliged to part with their fee simple interest in property, and that this anomalous and arbitrary selection is unfair, unnecessary and unconstitutional.

I have considered the evidence in this regard. The method by which rateable valuations are arrived at is not itself under scrutiny or attack in these proceedings. But it is how that system operates to select persons for the purpose of s 9 of that Act which is being referred to, in order to assist the submission that the overall scheme and in particular the provisions of s. 10(2) of the 1978 Act is unfair. I agree that the fact that a different factor is applied to the net annual value in relation a premises depending on where the premises is located appears on its face to be irrational. But it is not necessarily the case in my view, since presumably the particular factor applied to a particular area is designed to take account of different circumstances prevailing in different towns, such as economic, social and other features which might make a premises in one town more valuable than an identical premises in the adjoining town. But again that may not be so in fact, since presumably that element is addressed already before applying the factor, by arriving at the net annual value of the premises in each town in the first place. I do not have to arrive at a definitive conclusion in this regard. But I accept that Mr McMillan's evidence suggests that anomalies might arise in that a tenant in one town occupying under a lease and paying a rent of say £30 per annum may enjoy an entitlement to acquire the freehold in that property because his rent is lower than the rateable valuation at the relevant date, whereas a tenant in an a different town paying the same level of rent would not be so entitled, simply because the rent exceeded the rateable valuation, perhaps by reason of the application of a different factor to the net annual value. In such a situation, the two respective landlords are treated differently, and perhaps simply as a result of some anomalous situation arising from the manner in which rateable valuations are set. I accept that the system would be capable of throwing up some such anomalous situations. It does not in reality affect the present case since the rateable valuation by now is so much greater than the rent that any of the factors, when applied to the net annual value of the premises, would produce a rate many times higher than the rent reserved under the lease.

On the other hand, other anomalous situations might arise under the existing scheme, perhaps more unusual than the situation which has availed the first named defendant but not necessarily so, where the scheme operates to unintentionally exclude a tenant from the scheme by the use of, for example, of the linkage between the rateable valuation and the rent. I accept that the evidence from Mr O'Cleirigh that in a situation where a lessee under a building lease has no doubt as to his statutory entitlement to purchase the fee simple, "the rent reserved in the lease will invariably be less than the rateable valuation". But there could nonetheless be an anomalous and exceptional situation where a lessee holds under a rent which for some reason exceeds the rateable valuation, even by a minute amount. Such a tenant would be excluded from the scheme in a way which the legislature will not have intended, but it could not be said that as a result the entire scheme is unconstitutional.

I made certain findings in my judgment dated 31st May 2005 in the Circuit Appeal. As a result I concluded that the first named defendant was a person who was entitled to enlarge his interest in the premises demised by the 1945 lease by acquiring the fee simple interest therein from the plaintiffs in these proceedings. That conclusion involved a finding based on how the legislation defined "improvements" and "additions" to the original permanent buildings, which have been referred to as Carrick House. I concluded that the works of construction carried out by the tenant were such that they caused the original Carrick House to lose its original identity, and this finding resulted in those works being classified as "additions" rather than mere improvements. That finding in turn led to the unavoidable conclusion that the lessor had not erected all the permanent buildings on the property. There has been some discussion before me in the present proceedings as to whether this was the sole basis on which I arrived at my conclusions as regards the fulfilment of the condition contained in s. 10(2) of the 1978 Act as regards the permanent buildings, or whether I in fact relied upon the so-called presumption contained at the end thereof that until the lessor proved the contrary to be the case it was to be presumed that the permanent buildings had not been erected by the lessor. I am satisfied that I did not rely on the presumption, but that having so found without reporting to same, I expressed some views to the effect that if I had been required to so rely on it I would not have been satisfied that the landlord had successfully rebutted it in the light of the requirement that the contrary be "proved" rather than that the Court simply be satisfied on some probability test, that the lessor had erected the buildings. I do not believe that the manner in which I expressed the matter was such as to prevent the plaintiffs for the purpose of their challenge to the scheme on proportionality grounds in these proceedings from arguing that the presumption as worded sets the bar so high as far as proof is concerned that it is an overly onerous obstacle to place in the path of a lessor, especially given the length of the leases in question and the likelihood that records of construction would not survive, even had the lessor reason to think at the time the lease was granted that such records of who paid for the erection of the permanent buildings would be required some fifty years later or more perhaps.

In the present case of course we know that Carrick House was constructed in the late eighteenth century which makes the availability of adequate records not just unlikely but improbable. The plaintiffs herein in fact had discovered some records of the history of the property going back to those times, but nothing therein satisfied me that it had been proved that the lessor had erected the house.

I mention this again now because it has relevance to the current issue of constitutionality. There is certainly no proof whatsoever that any tenant or lessee of the property was in possession on foot of a building lease as such, or any agreement to build. There is no evidence of any kind that any lessee actually built the property. If there had been I would have been able to find that the condition provided for in s. 10(1) of the 1978 Act had been met.

The eligibility of the first named defendant to acquire the fee simple was derived simply because, by virtue of the very precise way in which the conditions and definitions for eligibility are crafted in this very detailed legislation, he was able by chance to come within them. This extends to the fact that by chance also, in a sense, the rent over the years had become less than the rateable valuation as of the date of service of the notice - that "chance" being the result of the rent remaining constant (apart from the increase in 1970 to £75) while the rateable valuation increased as a result of the extensive works of development carried out by the tenant himself.

One way or another, the first named defendant met the requirements under the various provisions. That is his undoubted right under the scheme as worded, and I duly assessed the price of his exercise of that entitlement at €30,000.

But for the purpose of these proceedings the Court is, I feel, able to look at what I might loosely call the reality of the situation. By that I mean that the probability is that it was the lessor who in the late 18th or very early 19th century erected the original buildings on this site, and also that it was the lessor who in due course altered the buildings to the condition they were in when the lease of 1945 was granted, although I note that in a lease of 1919 wherein the rent was fixed at £50, a covenant was inserted which required the tenant to expend a sum of not less than £500 in carrying out works set forth in a schedule to that lease.

There was some evidence that various tenants, such as doctors and a solicitor occupied Carrick House for relatively short periods from time to time, and that when these tenancies came to an end the lessor resumed possession and then re-let same. In this way while it was never proved that the original buildings were erected by the lessor, it is the case that upon the granting of the lease the buildings were "provided" (as Mr Fitzsimons referred to it) by the lessor in 1945. That being the case, one could not say that the lease in this case was ever to be regarded as having been a building lease in the sense well understood and to which a ground rent would attach.

It is because of these factors that Mr Fitzsimons has submitted that the rent in the 1945 lease is not what is usually referred to as a ground rent - in other words a rent which is so low that it cannot be seen as being a rack rent or rent one would expect to see in an occupational lease or tenancy. The rent reserved in the 1945 lease was £55 per annum, and there is uncontroverted evidence that rents after the Second World war were significantly low, the implication being that £55 per annum can be seen as being not a bad rent at that time from the landlord's point of view, and representing far more than it would have been if it were to be simply a ground rent in the accepted sense of that term. I must say that I agree that there is little question but that this rent was not a ground rent in the sense we have come to use that term. I note that Prof. Wylie in his evidence stated that in fact the term "ground rent" is not a term of art, and that it is not defined in the legislation. He stated that *"it is used generally speaking to mean a rent that is reserved on a long term lease which is relatively low because all that is being leased is the ground - in other words it does not reflect any buildings because it is contemplated those buildings will be added later."*

I would not be satisfied by any evidence which I have heard that this rent was in 1945 so low as to amount to a ground rent in that sense. Nevertheless, by the way in which the scheme operates, this rent, by becoming over the years lower than the rateable valuation applicable on the date of service of the notice of application to acquire the fee simple, has achieved the very same significance, as far as assisting the tenant's eligibility to so acquire that interest, as a classical ground rent. In so far as the scheme might be seen as not having been intended to benefit tenants who were not tenants under building leases or proprietary leases, this is certainly an anomaly in my view, and produces a purely fortuitous situation for the tenant in this case. Nevertheless the legislation says what it says and the tenant is entitled to avail of its provisions if he comes within them and I have found that he does. But I think it is important to set out these matters so as to provide a proper backdrop to the consideration of the constitutionality of the impugned overall scheme and the particular sections which form part of the scheme and about which the plaintiffs complain.

The plaintiffs submit that if one of the purposes of the statutory scheme to acquire the fee simple is to protect a tenant from a situation where at the end of the term of a lease the premises erected thereon by the tenant, and at no cost to the lessor, would have to be handed over to the landlord, as was the invidious position under the common law, then the legislation in question was not put in place for any purpose applicable to the first named defendant since he did not erect Carrick House, and neither did any of his predecessors in title, nor in fact any lessee at any particular time in the history of the premises. In other words he ought not to have the benefit of the legislation provided for in the scheme, which they say forces them in the first place to part with what is rightfully theirs, and secondly at a price which is less than market value in any event. They say that the first named defendant in effect is getting a benefit which the legislation did not intend him to get, and that it is by some unfair, and arbitrary chance that this is so and that it is unconstitutional. I agree with those submissions as far as the element of chance or good fortune of the tenant is concerned. But it is yet another matter to conclude therefore that the scheme is an unjust attack on the plaintiffs' property rights on proportionality grounds, having regard inter alia to the fact that what I regard as fair compensation is paid.

I am of the view that simply because the scheme throws up an anomaly or anomalies in this way is insufficient to render it unconstitutional – the more so where adequate and fair compensation is paid to the landlord in any event. Where there is a statutory scheme of general application under which a great number of premises are intended to be included, and certain criteria are decided upon by the Oireachtas for eligibility into the scheme, it is reasonable that a certain margin of appreciation be permitted to the Oireachtas in the manner in which the scheme is devised. In any such scheme there will inevitably be premises which happen for one reason or another come within the scheme even though the particular category of premises was not the intended target of the legislation. It would be virtually impossible to avoid such a situation arising no matter how carefully and painstakingly the criteria for eligibility into the scheme are crafted.

In relation to the price fixing provisions in s. 7 of the 1984 Act, I am satisfied firstly that what is being valued in reality is the residual interest of the landlord in the premises, and that for all reasonable purposes this can be seen as the income stream to which the landlord is entitled, since, again for all practical purposes, the landlord no longer has an interest which will ever entitle him to possession of the premises. I accept that there could be the occasional situation in which a landlord regains possession, but that would have to be regarded as the exception rather than the rule.

I accept completely, as I must, that under normal circumstances where a person is being deprived compulsorily of his property in the interests of the common good he or she must, as stated by the Supreme Court in **Re Article 26 and Part V of the Planning and Development Bill 1999 [2000] 2 I.R. 321 at 350** “be fully compensated at a level equivalent to at least the market value of the acquired property”. That in the present case means the market value of the landlord's residual interest in the property.

I arrived at my conclusions as to the basis on which that value should be arrived at when I dealt with the Circuit Appeal. I am completely satisfied that the very detailed provisions contained in the provisions as to what factors are to be taken into account and what factors are to be excluded from consideration represents a balanced approach to valuation of the residual interest of the landlord, and that the figure arrived at ensures that fair, reasonable and appropriate compensation is paid to the landlord for that interest. The fact that some already prosperous tenant thereafter may achieve a windfall by the onward sale of the freehold premises is not something which can affect the constitutionality of the scheme, even in the case of the first named defendant who one may safely say, for the reasons already stated, was not a category of lessee whom it was intended to benefit under the scheme.

On the basis of the nature of the interest being acquired under the scheme, I find nothing irrational, arbitrary or disproportionate about the manner in which the purchase price is arrived at. The exclusion of any increase in value of the premises attributable to development value is logically related to the nature of the landlord's remaining interest – the right to receive rent. In relation to the use of the one eighth fraction, it has a rational connection to that interest as I have already referred to, but in addition the use of the fraction has in fact arrived at what I have concluded is a fair price. Indeed there has been evidence that the fraction is part of a mechanism by which a price is arrived at which is ahead of what the sale of the ground rent on the open market would achieve. In relation to redevelopment value, the plaintiffs have pointed to the fact that while under s. 33(1) of the Landlord and Tenant (Amendment) Act, 1980 Act a lessor has the right to prevent a lessee from obtaining a reversionary lease in circumstances where the lessor has his own scheme of development for the property, the lessor is completely excluded from any participation in that added value where the lessee exercises his right to acquire the freehold. That submission of course must be looked at in the light of the fact that s.59 of the same Act, a lessee has been found to be disentitled to a reversionary lease by virtue of the provisions of s. 33(1) thereof, shall be paid compensation by the lessor, and the measure of that compensation is described in s. 59(3) as being “*the pecuniary loss, damage or expense which will, in the opinion of the Court,*

*be suffered by the disentitled person as a direct consequence of the disentitled person having been declared not to be entitled to a lease".* In addition there are severe consequences for any lessor who fails to pay the compensation to the tenant. I do not think that the comparison which the plaintiffs make with the provisions in s.33(1) of the 1980 Act has any meaning in the context of whether the provisions of s. 7 are disproportionate as to their effect on the landlord.

For all these reasons, I dismiss the plaintiffs' claim.