The Royal Commission on the Tenancy Laws

During the course of the Royal Commission on the Tenancy Laws which concluded its sittings early in August 1961, the Council made written submissions for the amendment of the Landlord & Tenant (Amendment) Act 1948, it being felt that the Bar was well able to assist in the solution of the legal problems raised by the Act. The submissions were prepared by a committee consisting of St. John, Q.C., Byers, Q.C., Hutley and Horton, who prepared a lengthy and very thoughtful report during the short vacation.

The Chairman of the Commission (Mr. D. L. Mahoney, Q.C.) has written to the Council thanking it for the assistance it gave by making the submissions.

What follows is a synopsis of the report.

General

The Committee felt that it was beyond its function to advocate either de-control or the retention of the present restrictions but recommended that if consideration were to be given to further de-control, it should be done in progressive steps and that dwelling-houses and business premises should be dealt with separately. For that purpose it was recommended that "dwelling-house" should be defined so as to exclude premises used for any purpose under the lease other than for residence from the definition as it was considered desirable that a combined shop and dwelling should be business premises for the purposes of the Act.

The Committee's recommendations were, in the main, directed to removing ambiguities and obscurities and not to the sections of the Act which have the most substantial effect upon the rights of lessors and lessees.

However, the Committee did feel that Section 5A should be amended so as to include, in all its subsections, business premises as well as dwelling-houses, and an addition to that section was suggested to enable lessors and lessees to remove premises from the operation of the Act by agreement in writing appropriately executed and witnessed and subsequently registered, so as to bring to an end resort to the cumbersome procedure of vacating premises and then re-entering them. Should it be intended to gradually reduce the premises to which the Act applies, it was suggested that, at some date in the future, the benefit of the protective provisions of the Act should remain applicable only to the persons in whom a tenancy is vested at that time, it being made plain that those benefits and privileges should thereafter be entirely personal to the persons in whom they were vested and that they should not be transmissible in any way either inter vivos or upon death. It seemed to the Committee that such a course, if it accorded with legislative policy, would eliminate many of the difficulties that follow upon the vesting of estates in the Public Trustee upon death of a tenant, and the class of protected tenants would gradually diminish without any person being deprived of accommodation. In connection with that suggestion it was recommended that Sections 83 and 83A of the Act should be retained so that the legitimate interests of a family in the tenancy of residential premises would be protected.

Apart from such general recommendations the Committee dealt with the Act in particular aspects in which it appeared to it to need clarification or amendment:

Home Unit Companies

It was considered that the Act is ill-adapted to apply to the relationship of landlord and tenant existing between home unit companies and their shareholders and it was recommended that the Act should not apply to such relationships although it might well continue to apply to the relationship between an individual shareholder and his sub-tenant. At the least, it was recommended, that an amendment should be introduced so as to make it clear that the fair rents provisions do not apply to the relationship between a home unit company and its shareholders and that the provisions of Section 36 of the Act could have no application to money received upon the sale or allotment of shares in such a company. The Committee formulated a suggested definition of "home unit company".

Particular Sections of the Act

Section 5A. It was recommended (i) that where in litigation it is alleged that the conditions precedent to a "5A lease" being effective to take the premises out of the operation of the Act were not fulfilled, the burden of proving that the premises remained subject to the Act, should, where a lease had been registered, lie upon the person alleging that the Act continued to apply to the premises, and (ii) that the definition of "residential unit" should be clarified so as to make it clear that it does not relate to separate flats in a block of flats.

Section 6A. As well as suggesting certain minor amendments to this Section, it was pointed out that the most recent decisions as to the distinction between a lease and a license greatly limited the operation of Section 6A (3) (a), to which, in any event, the Courts had had grave difficulty in giving any coherent and rational interpretation.

Fair Rents

The difficulty of proving what rent was actually payable on the 1st of November, 1951, was pointed out and it was recommended that some consideration be given to facilitating proof of the fair rent where there has been no determination.

Section 21 (1A) provides in its present form that the Fair Rents Board may have regard, in fixing the rent, to the amount payable for land tax where the premises are "used for business or commercial purposes". In the Committee's view there seemed little justification for such a limitation which prevented a lessor of premises used for other purposes not only from recovering rates and taxes under a covenant to pay them in the lease but from having the amount of them added to the fair rent under Section 21.

Attention was drawn to the effect of the principle established by *Duffy* v. *K-Dee Pty. Limited* (71 W.N. 181) and similar cases which the Committee thought was indefensible and it was recommended that, if a formula could be worked out, the fair rent of part of premises should bear the same proportion to the fair rent of the whole area as the lesser part of the premises bears to the whole.

Restriction on Eviction

The Committee considered a suggestion that the grounds set out in Section 62 (5) of the Act should be abolished and that the right to possession should fall to be determined solely by the exercise of a discretion vested in the Court of Petty Sessions or other appropriate tribunal, but came firmly to the view that such a change would be undesirable as it would enlarge the already wide discretion vested in Magistrates to a point where it was almost unlimited, and the law and the outcome of litigation would be left in a state of complete uncertainty.

Recommended Amendments in Procedure

Some limited form of pleading was considered to be desirable by the Committee and it was recommended that a notice to quit should as at present be accompanied by particulars of the grounds relied upon, that an information should be exhibited based on that notice to quit, and that, upon receipt of the summons and within a prescribed period, the tenant should be required to file and serve a defence answering the allegations contained in the notice to quit and information and setting out the matters upon which the tenant relies, except in so far as those matters relate exclusively to hardship. A right to amend such a filed defence should, it was thought, be given subject to conditions, but, even with such a right, it was felt that such amendments in the procedure would result in expedition in the hearing of actions and a consequent diminution in the costs of those proceedings, would tend to prevent the litigation by both sides of groundless actions, and would dispense with the unnecessary attendance of witnesses brought to establish matters not really in dispute.

Costs

It was recommended that the Courts should be given at least a limited jurisdiction to award costs because the present system, under which no costs are allowed, is open to grave abuses: lessors often initiate hopeless proceedings to harass tenants and even withdraw them without leading evidence; adjournments are sought without prior notice; lessees put lessors to proof of matters not really in dispute. In all these ways, the many people involved in a hearing are put to great trouble, expense, and loss of time, particularly in the country, where magistrates' visits are infrequent. It was recommended that, even if in ordinary cases, the general rule should continue that no costs are to be awarded, nevertheless magistrates should be given a discretionary power to award costs in cases where there has been an abuse of the process or procedure of the Court or where costs have been unnecessarily thrown away by reason of the conduct of the party or his representative. The futility and lack of grounds for many of the appeals that are instituted by lessees in order to gain time, led the Committee to the view that the Court of Appeal should have power to award costs against the unsuccessful party so as to provide some deterrent against appeals brought merely to harass.

Section 62. Because of the decisions in *Holloway* v. *The Public Trustee* (76 W.N. 530) and *Ex parte Twentyman*; *Re Powell* (76 W.N. 534), it was recommended that the inference, contained in the words "has failed to", of a duty on the part of the lessee to pay rent, perform a covenant or take care of the premises should be removed by amending Section 62 (5) (a), (b), (c), so as to read e.g. "rent has not been paid in respect of a period etc.", "some other term or condition of the lease has not been performed or observed etc." and "reasonable care of the premises has not been taken".

Recommendations on other grounds in this Section were made, in particular, one to overcome the effect of the decision in *Rossell* v. *Gammey* (78 W.N. 16), and another to facilitate proof of what is the "basic wage for adult males as last adjusted in accordance with the provisions of Section 61M" of the Industrial Arbitration Act 1940, a matter of considerable difficulty in practice.

New Ground in Section 62

Since tenants often become or continue tenants of premises by fraud or trick or unconscionable dealing, it was recommended that a new ground should be inserted in Section 62 which would enable the lessor upon proof of such conduct to obtain an order for possession.

Modes of Appeal

The present modes of appeal, that is, by stated case or by statutory prohibition, were regarded as unsatisfactory and inconsistent, since there is no appeal to the Full Court when stated case is resorted to, which is not so if statutory prohibition is used. Accordingly, it was recommended that all appeals from magistrates be instituted by Notice of Appeal setting out the grounds thereof, while, if it is desired to preserve the same checks upon the exercise of the right of appeal as presently exist, provision might be made that an appeal could be commenced only by leave (obtained ex parte) of a Judge of the Supreme Court. A further appeal should lie from a single Judge to the Full Court.

Miscellaneous

Section 68. The phrase "refuse to make an order" in this Section is ambiguous and it was recommended that it be amended.

Section 70 (2) (f). This sub-section should, it was thought, be re-drafted so as to make it clear that the onus lies upon a lessee to establish that his means are such that he is not reasonably able to provide reasonably suitable alternative accommodation.

Section 70A. The severity of the sanction attached to non-compliance with every minute detail of this Section was pointed out and its repeal or at least its amendment recommended to prevent minor non-compliance with its provisions having the effect of depriving the Court of jurisdiction.

Section 71. In respect of this Section it was recommended, first, that the Court should have power, upon determining a head tenancy, to substitute a relationship of landlord and tenant between the lessor and sublessee, and, secondly, that the Section should be amended to clarify what the legal situation is to be where the order is "discharged" pursuant to Section 71 (1) (b).

Death in Relation to Tenancy Proceedings

To minimise the problems, which arise when a tenant dies without administration being taken out in his estate, it was recommended that the Act should provide that, unless and until representation is taken out, the persons in occupation should be deemed to be the tenants of the premises holding on the same terms as the deceased

and liable under the covenants of the lease; and that proceedings may be brought against any one adult person in occupation.

As a consequence of any such provision it was recommended that Section 83A be amended so as to make it clear that orders made under Section 83A (2) would terminate any rights of the Public Trustee in the premises.

Abatement and Evidence on Commission and Discovery

The problem of abatement of proceedings was considered and it was recommended that provisions for revivor of abated proceedings similar to those existing in respect of actions in higher Courts should be incorporated into the Act.

The absence of a power to take evidence on commission and to obtain discovery has caused difficulty and hardship in some cases and it was recommended that the power to allow the taking of such evidence and the ordering of discovery should be incorporated into the Act and perhaps in appropriate cases conferred on the District Court which has the machinery to exercise such powers.

The report of the Commission was tabled in the Legislative Assembly on 1st November, 1961.

The Moneylenders and Infants Loans Act

In the past year there have been several reported cases which disclosed, or, perhaps, emphasised that the provisions of the Moneylenders and Infants Loans Act do not operate to protect only the weak against the strong.

Concerned at the possibility of widespread use of the Act for purposes other than those for which it was designed, the President (Bowen Q.C.) joined with the President of the Law Society (Mr. J. J. Watling) in making a statement which was published in the Press on 26th May, 1961, drawing attention to the inadequacies of the Act. A committee consisting of Holmes, Q.C., Waddell and Howell, was appointed to report on the evils of the legislation. In addition the President (Bowen, Q.C.) saw the Minister of Justice (the Hon. N. J. Mannix) and discussed the question of amendment of the Act with him. The committee prepared a preliminary report which, to use the words of the report itself was "intended to be no more than an introduction to the approach which should be made to the extremely complex problem of re-drafting the whole of the Act". On 29th June, 1961, the Council adopted this report and the substance of it was sent to the Minister. At the same time, the Council appointed another Committee (St. John, Q.C., Howell and Bainton) to formulate specific proposals for the amendment of the Act.

On 26th July, 1961, the Minister announced that he would recommend to State Cabinet that the Act be amended in certain respects and indicated what these amendments would be.

On 21st August, 1961, the report of St. John's Committee was, after detailed consideration at a special meeting of the Council, adopted and forwarded to the Minister.

The main recommendations of the report are briefly set out below for the information of members of the Bar:—

(1) The committee considered that failure by a lender to comply with some technical requirement of the Act should not result in the loss of his principal and security. The committee suggested that compliance with the requirements of the Act could be sufficiently ensured if failure were to result in loss of interest.

(2) The committee recommended that the Act should not continue to apply to the so-called "ad hoc" moneylender, that is, one who from time to time lends money at a rate of interest exceeding 10% per annum. As an alternative, the committee took the view that, if the Act were to continue to apply to the "ad hoc" moneylender, then as the rate of 10% per annum was now so little above the ruling commercial rate, the rate prescribed by the Act should be raised to at least 15% per annum.

(3) The Minister's earlier intimation that he was considering an amendment which would take loans to corporations out of the ambit of the Act was welcomed but it was suggested that, as many companies are but small family trading companies, it might be expedient to continue the application of the re-opening provisions of the Act to loans to corporations which, but for the proposed amendment, would be within the ambit of the Act.

(4) The committee also welcomed the Minister's statement that loans over a certain figure (the Minister had suggested £10,000) should be excluded from the ambit of the Act. However, as there were many loans of a commercial nature below £10,000, it was considered that this figure could with advantage be reduced to a much lower figure, £3,000 being suggested.

(5) The committee recommended that the Act should not continue to apply to commercial transactions, such as discounting, which were within the ambit of the Act because of the extended definition of "loan". It was pointed out that, since transactions of this nature had been well known and in use by the commercial community for many years, the operation of the Act upon them resulted in commercial people being driven to adopt less satisfactory expedients, a result which was outside the purpose and scope of the Act.

(6) The committee urged that, bearing in mind the apparent purpose of the Act, loans of any nature to any person at a rate of interest less than the bank rate for the time being should be outside the ambit of the Act.

(7) In the light of recent litigation concerning the Act and of the large number of persons known to be