



ANALYSIS OF RESPONSES TO DISCUSSION PAPER ON THE GROUND RENTS ACT (NI) 2001

Introduction

In November 2005 the Office of Law Reform (“OLR”) published a Discussion Paper which sought views on the operation of the Ground Rents Act (Northern Ireland) 2001 (“2001 Act”).

The Paper was placed on OLR’s website¹ and was also distributed to a wide range of consultees, including members of the legal profession, individual members of the public, practitioners in the field and organisations which had expressed an interest in the 2001 Act.

The Discussion Paper set out a number of questions on issues which had previously been raised and responses were requested by 28th February 2006.

This Paper summarises the responses to the questions posed in the Discussion Paper and makes recommendations on the way forward.

Please note —

- the background information on the 2001 Act is not rehearsed, as it was set out in the Discussion Paper; and
- OLR has been replaced by the Civil Law Reform Division of the Departmental Solicitor’s Office (“CLRDR”).

¹ The Discussion Paper is available at www.dfpni.gov.uk

Responses

A total of 23 responses were received during the review period. The following table provides a quick overview of who responded:

| Source of response | Number of responses | % of total responses |
|--|---------------------|----------------------|
| Rent-payers | 1 | 4% |
| Rent-owners and Rent-owner agents | 6 | 26% |
| Legal sector | 11 | 48% |
| Practitioners involved in the redemption process | 3 | 13% |
| Interested organisations | 2 | 9% |

A full list of respondents is set out in Annex A.

Responses to issues raised

Question 1:

Do you believe that a multiplier of 9 is appropriate, taking account of the twin needs to compensate rent-owners for the loss in annual rental income and to encourage rent-payers to redeem their ground rents?

If not, why not?

Responses:

15 respondents addressed the issue of the multiplier and most expressed dissatisfaction with the level at which the multiplier has been set (currently 9 times the annual ground rent).

The majority of the respondents said the multiplier is too low, 3 respondents said it is too high and 2 attempted to balance both views, referring to the multiplier as “reasonable” or “appropriate”

Of the responses to this question, 6 came from members of the legal sector, 5 from rent-owners and/or their agents, 2 from practitioners involved in the redemption process and 2 from interested organisations.

Multiplier – too low

In the main, those who said the current multiplier is too low, did so because they felt it did not generate a redemption sum, which, if invested, would produce a sum equal to the annual rental income.

Two respondents also suggested that the multiplier is too low to adequately compensate rent-owners, taking account of the level of costs involved in obtaining the capital redemption sum.

A number of respondents proposed alternative multipliers, with figures ranging from 10 to 15.

Multiplier – too high

It has been suggested that, in the run up to the introduction of the 2001 Act, developers deliberately increased the annual ground rents on their developments to secure an enhanced return under the redemption scheme.

The 3 respondents who said the multiplier was too high felt it was discouraging rent-payers from redeeming under the voluntary scheme and could make a property subject to an “increased” rent difficult to sell, as and when the compulsory scheme is introduced.

One respondent specifically proposed that the multiplier be reduced to 6 to accommodate those who had bought properties subject to an “increased” rent.

Question 2:

Have you any comments with regards to the costs issue?

Responses:

There were 15 responses to this question, of which 6 came from members of the legal sector, 5 from rent-owners and/or their agents, 2 from practitioners in the field and 2 from interested organisations.

The responses revealed a general dissatisfaction with the costs regime, with 2 responses saying the costs imposed on rent-payers are too high, 5 responses saying the costs imposed on rent-owners are too high and disproportionate to the benefit received upon redemption, 2 responses suggesting the costs are too high for both parties and 6 responses providing general comment on the issues.

Rent-payer costs – too high

The respondents who complained about the costs for rent-payers were not themselves rent-payers, so it is difficult to get a feel for the impact of costs on individuals.

One of the respondents suggested that the costs, both in terms of legal fees and the fees set by the Land Registers of Northern Ireland (“LRNI”), are too high and “serve as a major disincentive to redemption, and particularly so where the rent is low”.

Another respondent asked why the rent-payer should have to pay for the rent-owner’s certificate of entitlement and said “it is inequitable to expect the rent-payer to pay Land Registry fees for a certificate which will be issued to the rent-owner to enable him to recoup the redeemed rents”. He went on to suggest that this matter should be given further consideration.

It was also suggested that the 2001 Act is unclear and should be clarified as to the liability of the rent-payer for the rent-owner’s LRNI costs.

Rent-owner costs – too high

Most of the responses regarding rent-owner costs came from individual rent-owners and the general opinion is that the costs imposed on rent-owners are “inequitable”, “unjustified” and “should be borne by the rent-payer”.

One respondent asserted that “LRNI have no grounds to charge a fee to a rent-owner under section 6(2) of the 2001 Act, as the rent-payer should provide payment on behalf of the rent-owner”.

That view was echoed by another respondent who suggested that a ground rent redemption was analogous to a compulsory purchase instigated by the rent-payer. On that basis, it was suggested that any related LRNI fees should be borne by the rent-payer.

A third respondent considered that “as the 2001 Act is meant primarily to benefit rent-payers by giving them a freehold title, all the LRNI costs should be borne by the rent-payer”.

Two respondents noted that the costs/fees incurred by rent-owners often eliminated the capital amount to be received from the rent-payer (particularly where the ground rent being redeemed is low). As a result, significant monies paid by rent-payers remain unclaimed by rent-owners (as evidenced by LRNI statistics).

One respondent specifically suggested that rent-owners’ objections to the 2001 Act might be quelled if the multiplier was increased to 12 and the LRNI fee payable by rent-owners was removed.

Both rent-owner and rent-payer costs – too high

2 respondents weighed up the interests of both rent-payers and rent-owners and concluded that the costs for both parties are too high.

One respondent labelled the fees for both parties “exorbitant” and “scandalous”. The other felt the costs which are currently imposed on rent-payers are “considerable”, but went on to say that the impact of those costs should be substantially reduced when the compulsory scheme is introduced. This is because the work relating to the redemption process would be undertaken in the context of a property purchase and the cost of the redemption would, therefore, be a small part of the overall cost of the conveyance.

There were concerns that the introduction of the LRNI fees had contributed to the considerable decline in the number of applications for the payment out of the capital amount. (Rent-owners have had to pay a fee to LRNI for a certificate of entitlement).

There were also concerns about legal fees and, again, it was suggested that an increase in the multiplier would help to offset such charges.

General comments

Many of the respondents suggested that the costs of the redemption process are disproportionate to the value of the ground rents and the capital amount produced by the multiplier. It was, therefore, proposed that the costs should be reduced or eliminated completely, in order to encourage participation in the redemption process.

It was also proposed that the administration of the redemption process be simplified, in order to avoid unnecessary costs for both parties.

One solicitor's firm assessed the legal costs and stated that ground rent redemptions are an "ineffective cost exercise" for solicitors, with the result that clients are not encouraged to redeem their ground rents.

Another respondent suggested that the costs imposed on both parties could go beyond the LRNI fees and legal costs arising from the initial application for redemption. In particular, if an application for merger is made, there could be a cost to the rent-owner in connection with producing title for his/her freehold interest and the rent-payer could incur the cost of having that title investigated. That respondent stated that "even if professional fees are marked down, the costs to be incurred in applying the current process are totally disproportionate to the value of the ground rents and the redemption monies".

Overall, the tone of the responses on the issue of costs was negative with most respondents complaining that the costs involved (particularly the LRNI fees) are too high. Only one respondent believed that "the LRNI fees are not exorbitant".

It was suggested that the issue of costs should be considered again, particularly if and when any further legislation is being considered.

Question 3:

Do you think that further provision should be made with regard to the recording of apportionments or the endorsement of title deeds?

Responses:

There were 13 responses to this question: 6 came from the legal sector, 4 from rent-owners and/or their agents, 2 from practitioners in the field and 1 from interested organisations.

The majority of the respondents stated that further provision should be made in relation to the recording of apportionments and/or the endorsement of title deeds.

2 respondents endorsed the current provisions relating to apportionment.

In general, it was felt that further provision in relation to the recording of apportionments would provide certainty and clarity and “evidence” the redemption and its effect on superior rent-owners. Many respondents felt that there might be problems in the conveyancing process if rent-owners had not apportioned funds or raised the issue of apportionment with the superior rent-owners.

Various solutions to the perceived problem were suggested, including the endorsement of title deeds and:

- the creation of a Land Registry map which would show the ground rent redemptions.
- the inclusion of redemptions and apportionments of ground rent on the Statutory Charges Register.
- a requirement that all superior rent-owners must serve notice of redemption on their immediate superior rent-owner;

- the issuing of a copy of the certificate of redemption to the rent-owner who could place it with the relevant title and pass it on to the superior rent-owners when apportioned redemption monies are being passed on.
- the introduction of a Government financed unit, which would keep a reliable index of redemptions, apportionments and title amendment.
- enhanced public funding to allow the LRNI to carry out the apportionments and record all redemptions and apportionments. This would reduce the need for reliance on endorsement of title deeds.

However, it was also suggested that —

- the current provisions (which stipulate that monies paid into LRNI by the rent-payer must be held on trust for others where monies are attributable to different parties) should be retained and
- that it would be impractical for the apportionment of monies to superior interests to be registered with LRNI or endorsed on the title deeds.

Question 4:

Do you have any comments to make with regard to covenants and/or the effects of redemption?

In particular, do you think the Act should provide for enforceable covenants to be registered in LRNI's register of subsidiary interests or that sections 16 and 17 of the Act should be clarified?

Responses:

There were 18 responses to this question: 11 came from members of the legal sector, 4 from rent-owners and/or their agents, 1 from a practitioner in the field, 1 from a rent-payer and 1 from an interested organisation.

Covenants

By and large, the respondents suggested that the continuing enforceability of covenants could complicate the conveyancing process and proposed that the whole area of restrictive covenants be re-considered.

3 respondents specifically said that all covenants should disappear with the acquisition of the freehold. They believed that rent-payers might be encouraged to redeem their ground rents if provision was made for the removal of covenants after redemption.

It was also suggested that the legislation should be reviewed and revised to facilitate the removal of all covenants upon redemption.

Another respondent stated that “the Lands Tribunal will release covenants in residential properties where planning permission is in place for alternative use. Therefore, there is no benefit in retaining the covenants apart from the freehold in cases where: it is residential property only; and the covenants have not been created for the benefit of a freeholder living nearby”.

Some respondents suggested alternative ways of addressing the issue of covenants. For example, it was suggested that covenants should be redeemed in the same manner as ground rents, with appropriate compensation being payable to rent-owners.

Sections 16 & 17

The majority of respondents who commented on sections 16 and 17 said the legislation should be amended to clarify the position with regard to covenants.

However, some respondents recognised that it would not be appropriate to remove all covenants and suggested that consideration should be given to narrowing the scope of those covenants which survive redemption (as set out in section 16(2) of the 2001 Act).

In particular, one respondent proposed that such covenants “should be kept to a bare minimum to assist in simplifying the conveyancing process”.

Effects of redemption

All respondents stated that a number of misconceptions exist as to the effects of redemption, particularly amongst rent-payers.

The main problems which respondents identified related to the distinction between “the freehold” and “a freehold” and the practical effects of the certificate of redemption, particularly in terms of the conveyancing process.

4 respondents said that, in the initial stages of the redemption process, rent-payers are uncertain as to the practical effects of redemption. This is because they frequently believe that ground rent redemption “transfers” the freehold, free from covenants. One respondent acknowledged that that confusion tended to be sorted out “fairly quickly”. However, he went on to say that “greater clarification [should be] provided at the outset of the process”.

4 respondents stated that the effect of the certificate of redemption caused the most difficulty and confusion for rent-payers. This is because LRNI has not been accepting the certificate as a good root of title for the compulsory first registration process (“CFR”). Accordingly, when an application for CFR is made, the new title is registered as a “qualified title”.

Another respondent suggested that “the drafting of documents on unregistered title has become even more difficult because of the areas of uncertainty created by the ground rent redemption certificate”.

One respondent called for clarification on whether the certificate of redemption could be used as a good root of title for the grant of an absolute title in property.

Only one respondent suggested a means of remedying the situation. In his view, the LRNI application form for redemption should be made clearer in order to clarify the position as to the effects of redemption for rent-payers.

Generally, respondents felt that the effects of redemption were not adequately outlined in the legislation. One respondent went as far as to suggest that “the legislation ha[d] created a conveyancing

chaos. The creation of “a freehold” rather than “the freehold” is entirely incomprehensible to the general public and incompatible with our conveyancing system”.

Registration of enforceable covenants in LRNI’s Register of Subsidiary Interests

7 respondents commented on the registration of enforceable covenants. In general, it was felt that registration would —

- provide protection for covenant-owners and purchasers of residential property;
- provide greater certainty in future dealings with the property; and
- simplify the conveyancing process.

4 respondents recommended that enforceable covenants be registered in LRNI’s Register of Subsidiary Interests. Only 1 respondent considered that such registration would complicate the conveyancing process.

1 respondent stated that “further provision should be made in order to protect the position of former rent-owners who have a continuing economic interest in enforcing restrictive covenants. This aspect must be properly addressed, otherwise rent-owners’ human rights are likely to be infringed”.

Question 5:

Should sections 1 & 2 of the Act be amended to clarify the position with regard to intermediate rent-owners?

Responses:

There were 12 responses to this question: 5 came from members of the legal sector, 4 from rent-owners and/or their agents, 2 from practitioners in the field and 1 from an interested organisation.

Sections 1 & 2 should be amended:

5 respondents agreed that sections 1 & 2 should be clarified as to the position of intermediate rent-owners. It was suggested that the legislation should be revised and should clearly set out the rights

of intermediate rent-owners and the impact that redemption will have on their titles, which are both superior and subsidiary.

1 respondent suggested that section 1 should be clarified as to the position of rent-owners generally. This respondent considered that it should be made clear that the voluntary scheme, as set out in section 1, is only voluntary in so far as rent-payers are concerned.

Sections 1 & 2 should not be amended:

3 respondents believed that sections 1 & 2 did not require further clarification because intermediate rent-owners have already applied for, and completed, the redemption process.

These respondents considered that further clarification would only be required if LRNI were to ever cease processing applications from intermediate rent-owners.

Question 6:

Do you agree that leasehold estates with a short residuary term should remain outside the remit of the legislation?

Responses:

There were 9 responses to this question: 5 came from members of the legal profession, 2 from practitioners in the field, 1 from a rent-owner and 1 from an interested organisation.

The vast majority (8) agreed that such leasehold estates should remain outside the remit of the legislation. This is because they are provided for under the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971.

Only one respondent advocated the opposite view, saying that leases with short residuary terms should be brought within the 2001 Act because “the procedure under the 1971 Act is more cumbersome, time consuming and expensive for the rent-payer”.

Ultimately, that respondent felt that, if the primary legislative objective (i.e. to eliminate ground rents on residential properties and thereby simplify title ownership and the conveyancing process) is to be achieved, all leasehold estates, regardless of the

length of the lease, should be subject to the provisions of the 2001 Act.

Question 7:

Do you have any additional comments or queries in relation to the operation of the Ground Rents Act (NI) 2001?

Responses:

13 respondents provided additional comments in relation to the operation of the legislation. 5 of the responses came from members of the legal sector, 4 from rent-owners, 2 from practitioners in the field and 2 from interested organisations.

The following section details the main points which were raised.

The role of LRNI

One respondent asked why all redemption monies must be paid to LRNI and not simply in cases where the rent-owner/ agent is unknown or can't be found.

Another respondent was concerned that rent-owners/ agents are not notified by LRNI that a redemption has actually occurred.

Level of involvement of the legal profession

Some respondents suggested that there was a lack of enthusiasm amongst the legal profession for participation in the redemption process.

Introduction of compulsory redemption scheme

Several respondents suggested that the compulsory redemption scheme ("CRS") should be introduced because little progress will be made in achieving the stated objective of the Act (ie. the abolition of ground rents on residential properties) until the compulsory provisions come into operation.

Another respondent argued against the introduction of the compulsory scheme on the basis that it "would create additional expense and delays for little or no tangible gain" and "should be

strongly resisted, at least until the issue of the disposal of covenants can be satisfactorily resolved”.

One respondent expressed concern about the impact of the compulsory scheme on LRNI.

Costs

3 respondents suggested that the introduction of LRNI fees had effectively discouraged householders from redeeming their ground rents.

Other respondents commented generally on the level of costs involved in the process, with one respondent stating “there are no savings with this process – just more expenses!”

Internet-based ground rent redemption register

The creation of a register of ground rent redemptions, which could be viewed via the internet, was advocated.

Nature of the current redemption scheme

Many respondents (particularly rent-owners) stated that the current redemption process was very complex and called for its simplification. One respondent felt that LRNI’s application forms were particularly confusing.

One respondent stated that “the current redemption scheme does not work because the resultant benefits flowing from it are insufficient to warrant an application in the vast majority of cases”.

Another respondent requested that section 28 of the 2001 Act be amended to clarify that the rent reserved by Housing Associations (eg. by virtue of equity sharing leases) was not a ground rent for the purposes of the legislation.

Impact of legislation on human rights

One respondent suggested that the provisions of the 2001 Act could adversely impact upon individuals’ human rights (i.e. rent-owners have no right to object to the voluntary redemption scheme and to rent-payers obtaining the freehold).

Assessment of responses and proposals for the way forward

Multiplier

It is clear that the vast majority of the respondents who addressed this issue considered that the current multiplier is too low and should be increased.

It is, however, worth bearing in mind that the multiplier was the subject of much discussion as the legislation made its way through the Assembly and was fixed on the basis of expert advice.

It is also worth bearing in mind that the primary objective of the legislation is to eliminate ground rents, thereby simplifying the conveyancing process. The legislation does not, therefore, purport to realise the full market value of the ground rent for the rent-owner, just as it does not purport to provide a freehold title free from any encumbrance for the rent-payer.

Having considered the competing interests of the rent-owners and the rent-payers (some of whom are subject to fairly large rents), we remain of the view that a multiplier of 9 is appropriate and still capable of providing reasonable compensation.

We will, however, undertake to monitor the operation of the multiplier.

Cost of redemption

Approximately two-thirds of the respondents addressed the issue of costs and the overwhelming majority expressed their dissatisfaction with the level of costs arising from the redemption process.

As the fees levied by solicitors and lending institutions are private contractual matters, which fall to be agreed between the parties, it would not be appropriate for us to comment on that side of the process.

We can, however, speak to the issue of the LRNI fees and, in that regard, would ask commentators to bear in mind that LRNI must conduct its business in a cost-effective manner and must, therefore, set its fees at a level that will cover the cost of the application.

Against that background, there are no plans to either abandon or amend LRNI's current fee structure. We would, however, wish to highlight the fact that, as from the 1 April 2007, LRNI withdrew the fee which was previously charged to rent-owners upon an application for a certificate of entitlement.

Apportionment provisions

More than half of the total number of respondents addressed the issue of apportionment and the majority considered that additional arrangements should be put in place.

We have discussed the issues at length with LRNI and have concluded that the current provisions are satisfactory and should be retained. It is not, therefore, anticipated that further provision will be made for the recording of apportionments.

In this regard, it is worth pointing out that a failure to apportion the redemption monies will not jeopardise the title transfer process and should not, therefore, complicate the conveyance process. This is because apportionment is not a pre-requisite of the transfer process.

It is also worth pointing out that redemption monies are held on trust for superior rent-owners and the duties flowing from that fiduciary relationship are no less strict in this context than they are in general law. We will, therefore, be revising the guidance to make clear the responsibilities which rent-owners have to superior rent-owners and we trust that, as the legislation further beds in, the arrangements in this regard will be better understood.

Covenants and Effects of redemption

It's fair to say that, next to the issue of costs and the level of multiplier, the issue of covenants has provoked the most comments.

Some respondents suggested that the general law on covenants should be re-visited, some felt covenants should automatically fall on redemption and others felt the list of continuing covenants should be further reduced.

Taking all of the above into account we have concluded that the law on covenants may merit further consideration.

In the meantime, we will issue revised guidance to make clear to rent-payers that they are not removing all restrictions on their property and should not, therefore, assume that, post-redemption, they can freely develop their land or change its usage.

In our view, the misconceptions which have grown up around the issue of covenants have adversely impacted on the redemption process and prevented the legislation from operating to the full.

The most damaging development is that people have started talking about “a freehold”, as opposed to “the freehold”. This has led some people to believe that they are not getting anything for their money and has contributed to the debate about qualified title.

In our view, the 2001 Act is completely clear about the consequences of the redemption process. On redemption, the rent payer’s title is enlarged and the superior interests are extinguished. The rent-payer has, therefore, acquired the “full title”, albeit that that title may be subject to ongoing covenants.

Obviously, the continuing covenants will fall to be tracked through any subsequent conveyancing processes. However, they should not impinge on the status of the overall title.

The misconceptions about covenants have, to some degree, prompted the registering of a qualified title on foot of a certificate of redemption. As we understand it, that development is also linked to the operation of rule 23 of the Land Registration Rules (Northern Ireland) 1994. However, two points arise in this regard. Firstly, as stated earlier, the legislation is clear about the consequences of redemption. Essentially, the 2001 Act provides for a statutory transfer of the “full title” and it is not appropriate for secondary legislation to operate in a way which impedes the policy intention of the primary legislation.

Secondly, if the rent-owner's title was not qualified pre-redemption, it is not appropriate to qualify the rent-payer's title post-redemption simply because the transfer has been effected by statute.

Ultimately, the aim of the 2001 Act is to simplify title and administrative procedures should not be intervening to make the title even more complicated. LRNI has, however, agreed to review its secondary legislation with a view to realising the overall legislative intent.

Intermediate rent-owners/payers

Although 12 respondents provided a response in relation to the position of intermediate rent-owners, only 8 respondents actually addressed the question posed. Of those, the majority (5) considered that sections 1 and 2 should be amended, while 3 believed that those sections do not require clarification.

There is nothing on the face of the legislation to prevent applications from intermediate rent-owners/payers and, arguably, such applications are facilitating the overall policy objective by removing some of the tiers within the ground rents schemes.

As LRNI has been accepting and processing redemption applications from intermediate rent-owners/payers and, as the legislation does not preclude such applications, CLRD has concluded that the current provisions should be retained.

50 year rule

Only 9 respondents addressed the 50 year rule and, of those who responded, the vast majority agreed that leasehold estates subject to short residuary terms should remain outside the remit of the 2001 Act.

We accept that short leases are subject to different considerations. For example, it could be argued that there is a legitimate expectation that the land which is subject to the lease will shortly revert back and, for that reason, an enhanced level of compensation may be thought appropriate.

Given that fact and, given that there are other ways of negotiating the release of the lease (e.g. under the Leasehold (Enlargement and Extension) Act (Northern Ireland) 1971 or a private contractual

arrangement), we have concluded that the 50 year rule should stand.

Other issues

One of the other issues raised during the review was the commencement of the CRS.

It was initially envisaged that the commencement of the CRS would begin in 2002 and be linked to the introduction of the compulsory first registration scheme. It was, however, subsequently determined that the introduction of the CRS should await the appraisal of the VRS.

That appraisal has duly been undertaken and although it has not revealed any fundamental flaws in the redemption process it is not considered appropriate to introduce the CRS at this time. Rather, further efforts will be made to highlight the availability of the VRS and the possibility of a broader review of the law in this area will be considered.

ANNEX A

LIST OF RESPONDENTS

- Mr James Wilson
- Ms Maggie Hughes
- Murray McCourt Kelly Solicitors
- J.D. Rodgers
- Macauley Wray Solicitors
- David Russell & Co Solicitors
- Donaghy Carey Solicitors
- Colin Wilkinson & Co Valuers & Auctioneers
- Mr Alan Robinson
- Limavady Solicitors Association
- Coleraine & Ballymoney Solicitors Association
- Mr Tom Brown
- Grent Trust Limited
- Northern Ireland Co-Ownership Housing Association Limited
- Land Registers of Northern Ireland
- Northern Ireland Federation of Housing Associations
- Manaus Charity
- MacFarlane & Smyth Estate Agents
- Belfast City Council Legal Services Department
- Royal Institution of Chartered Surveyors
- Mr John Neill
- Law Society of Northern Ireland
- Northern Ireland Housing Executive