LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

BT/102/1989

JOYLAND AMUSEMENTS (NORTHERN IRELAND) LIMITED - APPLICANT

AND

A S & D ENTERPRISES LIMITED - RESPONDENT

Lands Tribunal for Northern Ireland - The President Judge Peter Gibson QC and Mr A L Jacobson FRICS

Belfast - 14th December 1990

This was an application under Section 8 of the Business Tenancies Act (Northern Ireland) 1964 ("the 1964 Act") by the tenant of No 19 North Street, Belfast, for a new tenancy. The background was that the Applicant (the tenant) had made a request for a new tenancy under Section 5 of the 1964 Act to the Respondent (the landlord). That request was dated 19th June 1989. It was posted on 22nd June 1989 and delivered on 23rd June 1989. The Respondent did not serve a notice on the Applicant within two months opposing an application to the Lands Tribunal within the requirements of Section 5(6) of the 1964 Act, and the application by the tenant to the Lands Tribunal for a new tenancy was made on 20th October 1989.

There were two separate and distinct issues between the parties viz:-

First, whether the request by the Applicant for a new tenancy had been made in the proper form, namely whether it had been made by notice in the prescribed form as required by Section 5(3) of the Act and the Business Tenancies Notices Regulations 1964. (SR & O No 215.)

Secondly, bearing in mind that the Applicant's Section 5 request was dated 19th June 1989 and the application to the Lands Tribunal was made on 20th October 1989, whether the application to the Lands Tribunal had been made out of time. Under Section 8(3) of the 1964 Act any such application must be made not less than two nor more than four months after the "making" of the tenant's request for a new tenancy.

On these issues the relevant statutory requirements of the 1964 Act are as follows:-

First Issue

"5(3) A tenant's request for a new tenancy shall not have effect unless it is made by notice in the prescribed form served on the landlord and sets out in general terms the tenant's proposals as to -

(a) the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy);

(b) the rent to be payable under the new tenancy;

(c) the duration of the new tenancy; and

(d) the other terms of the new tenancy."

"5(6) Within two months of the making of a tenant's request for a new tenancy in accordance with this section, the landlord may serve notice on the tenant that he will oppose an application to the Lands Tribunal under section 8 for the grant of a new tenancy, and any such notice shall state on which of the grounds mentioned in section 10 the landlord will oppose the application."

Second Issue

"8(3) An application under this section shall not be entertained by the Lands Tribunal unless it is made not less than two nor more than four months ... after the making of the tenants request for a new tenancy under section 5."

Mr John Gillen QC for the Respondent submitted:-

On the first issue that -

(i) The tenant's request for a new tenancy was invalid as it had not been made in the prescribed form.

The prescribed form is set out in the Business Tenancies Notices Regulations 1964 (SR & O 215), Regulation 3D of which requires Form 4 to be used. It was argued that this procedure was mandatory not directory. There are, for example,

no such words used (as in comparable English legislation) as "forms substantially to the like effect". In England (in the Landlord and Tenant Act 1954) a Section 26 tenant's request for a new tenancy must be made by means of the forms required by 1957 SR & O 1157 or by forms substantially to the like effect.

(ii) The largest portion by far of Form 4 lies in the notes thereto - and the words used on that form are "Your attention is drawn to the notes below". He submitted that the tenant's notice was invalid as it omitted the entirety of those notes. Mr Gillen accepted that if a minor portion of those notes had been omitted then the form would be substantially the same. If such a minor omission had occurred the Respondent would not have taken any issue on this point.

(iii) He relied upon two authorities in particular. First the case of Sun Alliance and London Assurance Co Ltd v Hayman [1975] 1 All ER 248 and secondly the decision in Tegerdine v Brooks Estate Gazette 7th January 1978 Volume 245 page 51, where at page 52 Cairns LJ (referring to the Sun Alliance case) said:-

"That was a decision of this court, concerned with whether or not a notice under this section was valid having regard to the fact that it referred to the "receipt" of the notice, whereas under regulations, as amended, it required to refer to the giving of a notice. It is perfectly true that in that case the court said that it was immaterial whether or not the tenant had been misled by the form of the notice. I, of course, accept that proposition. It is immaterial whether the tenant has been misled. But it is, in my opinion, relevant whether the departure from the form prescribed is such as to be immaterial to the whole of the facts of the case, and if it is, in my view, such departure is not one which will render the notice a notice which does not substantially conform with the regulations."

(iv) In this case however the notes omitted included such fundamental matters as note 4 which informs the landlord that if he wished to oppose an application to the Lands Tribunal for a new tenancy he must do so within two months. This in itself was an omission of considerable import, especially when it was remembered that all of the notes had been omitted. If that situation had existed in the Tegerdine case the court could not, he submitted, have come to the same conclusion. There is no question that the notes in this case are relevant, and if the omission goes to

a relevant matter the Lands Tribunal must apply their minds to the notice, not to the landlord. If the notes were irrelevant they would not be there at all.

On the second issue, namely that the tenant's application for a new tenancy was out of time, Mr Gillen submitted -

(i) The Applicant's request for a new tenancy was dated 19th June 1989. The application to the Lands Tribunal was dated 20th October 1989. The tenant was therefore out of time by one day, as the 1964 Act draws a distinction between the "making" of a request and the "serving" of that request.

(ii) If it had been intended that the application to the Lands Tribunal should not be later than four months after the serving of the notice of request then the legislation would have stated that, and would not have made a distinct contrast between the service of the landlord's notice to determine and the making of the tenant's request for a new tenancy.

Mr Michael Lavery QC for the Applicant submitted:-

On the first issue -

(i) There is a significant difference between a notice to determine the tenancy which has to be given by the landlord under Section 4 of the 1964 Act, and a request for a new tenancy which has to be given by the tenant under Section 5. One example is that in the Business Tenancies Forms Regulations there is underlining of words in Form 3 (landlord's notice) which does not occur in Form 4 (tenant's request). The only reason for the draftsman's underlining is that Parliament must have intended to draw a difference between the treatment of landlords and that of tenants. The whole rationale of the Act was to confer upon tenants protection that they otherwise do not have under common law, and the Tribunal should therefore be slow to penalise a tenant for an omission of this sort.

(ii) The covering letter to the Section 5 request for a new tenancy itself referred (albeit in general terms) to the notes. He relied upon the decision in Stidolph v The American School in London Educational Trusts Ltd Estate Gazette 30th August 1969 Volume 211 at page 925 as establishing that the Court or Tribunal should look at the contents of that covering letter, and take it into account.

(iii) The notes were merely a broad restatement of the law - something everyone was supposed to know, and in many instances did know. In effect in many cases the notes were quite irrelevant, and this applied particularly to cases where the parties, as in this case, were represented by professional agents, who should be taken to know the law.

(iv) These are notes. As such they are merely explanatory and do not go to the substance of this matter.

(v) In any event Section 25 of the Interpretation Act (Northern Ireland) 1954 states:-

> "Where a form is prescribed or specified by any enactment, deviations therefrom not materially affecting the substance nor calculated to mislead, shall not invalidate the form used."

Mr Lavery contended that this was a wider expression than the words used in England. He submitted that Section 25 contains two concepts, that of calculation to mislead and that of material deviation. It was in effect accepted that there was no question of any intention to mislead and he contended that the tenant's omission did not materially affect the substance of his request for a new tenancy.

On the second issue Mr Lavery submitted that a tenant's request for a new tenancy cannot be made until it is served. It was artificial and incorrect to draw a distinction between the "making" of a request (ie its preparation) and the "service" of that request.

DECISION

As appears there are two issues between the parties. The Tribunal finds no difficulty with the second and accordingly will deal with it at once. There is no dichotomy between the service of the landlord's notice to determine a business tenancy under Section 4 and the making of the tenant's request for a new tenancy under Section 5. Apart from the 1964 Act a landlord, in appropriate cases, was always required to serve a notice to quit if he wished to bring a tenancy to an end. The 1964 Act does not alter this obligation in any way and a landlord must serve a notice to determine a business tenancy in the form specifically prescribed. Under the Act, however, a tenant must make a request for a new tenancy. The

argument put forward on behalf of the landlord is that the Act thus creates a difference between the "making" of such a request and the "service" of that request. The Tribunal finds this a somewhat startling proposition and has no hesitation in rejecting it. Such a distinction is not only artificial but runs contrary to the clear intention of the Act, namely that notices to determine by a landlord, and requests for a new tenancy by the tenant (which are, apart from the matters set out in Section 6 of the Act, the only means of determining a tenancy which has the protection of the Act and is therefore being statutorily continued under Section 3) must be served upon the other party. Indeed, if Mr Gillen were correct in his submission, it could well lead to a situation where a tenant could "make" (ie prepare) his request for a new tenancy but "serve" it at the last possible moment, thus effectively depriving the landlord of the chance of opposing that request. More to the point specific guidance can be found in the Act itself, in particular Section 5(3) which reads -

> "A tenants request for a new tenancy shall not have effect unless it is made by notice in the prescribed form served on the landlord ..." (the Tribunal's underlining).

The Tribunal has thus concluded that the date on which the tenant's request took effect was 23rd June 1989, being the date on which the Post Office delivered that request to the landlord's known agent. The application to the Lands Tribunal on the 20th October 1989 therefore was made within the proper time, namely "not less than two months nor more than four months ... after the making of the tenant's request ...", as provided for by Section 8(3) of the Act.

This was not, of course, the main issue between the parties which, in essence, was whether the tenants request for a new tenancy had been made in the proper form? It was common case that it omitted the entirety of the notes forming part of the prescribed form 4 set out in the Business Tenancies Notices Regulations 1964, but despite this the tenant contended that his request for a new tenancy satisfied the statutory requirements. The first point relied upon was that the Act of 1964 altered the balance between landlords and tenants of business premises, and that such tenants should be treated more favourably than their landlords. It is of course true that the Act of 1964 altered the balance found at common law, and previous statute law, between landlords and tenants of business premises, but that is not to say that the Act introduced an uncertain concept of "favouring the tenant". It did no such thing. Having granted business tenants, inter alia, a degree of security of tenure, it then proceeded to ensure that each party knew precisely where they stood by laying down provisions for the service of certain forms within specific time limits.

In the field of commercial law certainty is, in the Tribunal's view, of fundamental importance, and certainly no authority was cited which indicated that a tenant's request for a new tenancy should be construed otherwise than in accordance with the normal rules of construction, or that the Tribunal would be entitled to give to it a meaning which it does not in fact bear under the ordinary rules of grammar or construction.

The Tribunal has thus concluded that the tenants right to request a new tenancy must be exercised in the proper form. To that extent the Act is mandatory, and indeed the argument between the parties was based not so much on this ground as on whether or not the request made by the tenant was, in the circumstances of the case, a proper request. In the view of the Tribunal the request cannot be made proper merely by a general reference in a covering letter. If it could then the whole concept of certainty would be seriously eroded. It seems clear to the Tribunal that if the tenant's request is to be treated as a proper request it must be by virtue of Section 25 of the Interpretation Act (Northern Ireland) 1954. This, of course, reads -

> "Where a form is prescribed or specified by any enactment, deviations therefrom not materially affecting the substance nor calculated to mislead, shall not invalidate the form used."

It is clear that it was the existence of Section 25 which led the draftsman of the 1964 Act to omit the words "substantially to the like effect" which are found in the corresponding legislation in England. There is no provision corresponding to Section 25 in England, and accordingly the draftsman of the English Rules had to spell this matter out in explicit terms. It was not, however, necessary for the Act of 1964 or Rules made thereunder to do so. It was not contended that the omission of the notes in the tenant's request for a new tenancy was in any way calculated to mislead. That being so what is the meaning of the words "... deviations ... not materially affecting the substance ..." of the tenant's request for a new tenancy? In particular did the omission of the notes materially affect the substance of the tenants request. The Tribunal cannot find any authority on the construction of Section 25 of the Interpretation Act which is directly in point, and none was cited in argument. The Tribunal considers however that the correct approach is to be found in that of Barry J in Barclays Bank Ltd and Another v Ascott [1961] 1 All ER 782 at 786 C, (whose words were adopted by Cairns LJ in the Tegerdine case, and which themselves follow the judgment of Hodson LJ in Bolton's (Houses) Furnishers Ltd v Oppenheim [1959] 3 All ER 90) namely

> "... the question which the court really has to consider is whether the notice given by the landlord has given such information to the tenant as will enable the tenant to deal, in a proper way, with the situation (whatever it may be) referred to in the notice. It is clear ... that this notice should be construed liberally, and provided that it does give the real substance of the information required, then the mere omission of certain details ... will not invalidate the notice."

In the present case all of the guidance notes had been omitted. Such a departure from the prescribed form could not on any view be considered immaterial. To use the approach of Barry J, the landlord has been given no information as would enable him to deal, in a proper way, with the situation which the notice created. The departure of the tenants request from the prescribed form is, therefore, in this case fatal to the tenants case as it renders invalid the tenants request for a new tenancy. The Tribunal considers that it is of paramount importance in commercial affairs of this sort that the parties know where they stand. Prescribed forms of this nature should therefore be followed, unless of course, an omission or departure is immaterial in the manner the Tribunal has indicated. Any other result could well lead to an unfortunate degree of confusion and uncertainty.

The Lands Tribunal finds in favour of the Respondent on the first issue. Thus the tenant's request for a new tenancy was invalid. As previously indicated, however, the Tribunal finds in favour of the Applicant on the second issue.

The Tribunal makes no order as to costs.

ORDERS ACCORDINGLY

The President Judge Peter Gibson QC
and Mr A L Jacobson FRICS
LANDS TRIBUNAL FOR NORTHERN IRELAND

13th February 1991

Appearances:-

Mr John Gillen QC and Mr Mark Horner of Counsel (instructed by Messrs King & Gowdy, Solicitors) for the Respondent.

Mr Michael Lavery QC (instructed by Messrs T G Menary & Co, Solicitors) for the Applicant.