LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

In the Matter of the Business Tenancies Act (Northern Ireland) 1964

And in the Matter of Business Premises at Chalet D'or, 48-50 Fountain Street, Belfast

BT/12/1993

BETWEEN

JAMES BOYD - APPLICANT

AND

ROBERT MICHAEL FOREMAN AND E PATRICIA FOREMAN - RESPONDENTS

Lands Tribunal for Northern Ireland - Michael R Curry FRICS FSVA IRRV ACI.Arb

Belfast - 25th March 1996

Appearances

Jim Mallon instructed by Hart & Co on behalf of the Applicant

Steven Shaw instructed by Tughan & Co on behalf of the Respondents

This is the Decision of the Tribunal on preliminary issues. The Reference came about in this way. The Tenant had occupied the ground floor of the building as a restaurant for many years: the current lease was for 10 years from 1st March 1981. In accordance with the Business Tenancies Act (Northern Ireland) 1964 the Landlords gave Notice to Determine, dated 16th October 1992, and, on the Notice, stated that they would not oppose an application, by the Tenant, to the Lands Tribunal for the grant of a new tenancy. The Tenant gave Notice that he was not willing to give up the tenancy and applied, by Notice of Application dated 12th February 1993, to the Lands Tribunal for the grant of a new tenancy outlining his proposals for a new lease, which included a duration of 10 years. There were negotiations between the parties and various applications were made to the Tribunal to allow time for negotiations. But they broke down and in August 1995 the Tribunal was informed that a Hearing was likely to be required.

A number of case management conferences, in the form of Mentions before the Tribunal, took place to crystallise the issues. The Landlords abandoned a potential issue as to the validity of Notices and it was agreed that the issues of the duration of the new lease, whether or not it contain a break clause and its commencement date were best severed from the other issues (such as rent and the other terms of the lease which, in turn would depend on the decisions on these matters), and heard first.

A timetable having been agreed, the Registrar made a Timetable and Directions Order which included directions for the exchange of expert evidence. The Hearing was fixed for 25th March 1996. To sweep up, the parties agreed that there should be a pre-hearing review in the form of a further mention, on 26th February 1996, after the exchange.

By the date of the pre-hearing review, no expert evidence had been received from the Tenant and there was no appearance by him at the mention. At the suggestion of the Tribunal, the Landlords agreed to an extension of time until Friday 1st March 1996 for the submission of his evidence. Evidence from a Chartered Valuation Surveyor was received on that date. The exchange took place on Monday 4th March 1996.

On 19th March, the Tenant informed the Tribunal that he intended to apply for an adjournment on the day of Hearing on grounds that "Although our Engineer has embarked on his inspection and report .... it will possibly not be available" for the Hearing. The Landlords being opposed to an adjournment, the Tribunal heard the application prior to the Hearing, on 21st March 1996.

In the view of the Tribunal, a meticulous investigation of engineering questions was not required to decide the issues for determination in this Reference and it is not always necessary to have opposing experts on every aspect. If the Landlords were successful with their proposals for a short duration, relevant engineering issues could be addressed in detail, if appropriate, on determination of that new lease, which in turn could only be brought to an end in accordance with, and a further new lease opposed by giving proper notice and establishing grounds under, the 1964 Act. That would be the proper time for meticulous investigation of these matters if they were controversial. The Tenant had earlier been provided, by the Landlords, with information about proposed works but the Tenant's engineer was not instructed until a few days before the date for exchange of expert evidence. Even then, instead of applying for an extension of time prior to and for that exchange, the tenant remained silent and obtained the Landlords' expert evidence.

Lands Tribunal proceedings not only require cards face up on the table but, apart from the Rating cases, also require the parties to show their hands at the same time.

In view of these matters, the focus of the dispute on the duration of the new lease and the time that had elapsed since the Notice to Determine, the Tribunal concluded that granting an adjournment of the Hearing would be unjust and prejudicial to the Landlords and there would be no injustice to the Tenant by proceeding. The Tribunal has a discretion and refused the Application.

However, the Tribunal reminds all experts:

1. the primary duty of the expert witness is to the Tribunal,

2. the duty is to be truthful as to fact, honest as to opinion and complete as to coverage of relevant matters,

3. the expert's evidence must be independent, objective and unbiased. In particular it must not be biased towards the party who is responsible for paying him. The evidence should be the same whoever is paying for it.

By the time the Hearing commenced the parties agreed that the only matters for the Tribunal to determine, at that Hearing, were the commencement date and the duration of the new lease.

At Section 14(1), the 1964 Act provides as follows -

> "Where the Lands Tribunal makes an order under this Part for the grant of a new tenancy, the new tenancy shall be -
> (a) .....
> (b) in the absence of agreement, a tenancy for such period, (arguably, this permits the grant of a periodic tenancy, as under s 33 of the 1954 Act in England) not exceeding fourteen years, as may be determined by the Lands Tribunal to be reasonable in all the circumstances, and shall begin on the coming to an end of the current tenancy."

The question is "what is reasonable in all the circumstances?" and that test differs from the tests relevant to rent and other terms which give primacy to the market and the current tenancy respectively.

As Mr Mallon's opening progressed it became apparent that he was raising issues which would best be determined as preliminary points before any evidence was heard. The Tribunal directed that the witnesses could leave, submissions on these issues would be dealt with first, and, when it had given its decision, consideration then could be given as to how best to proceed on another day.

The issues, although inter-connecting may be considered under the following broad headings:

1. Was this an improper back door approach to opposing the grant of a new tenancy? (Back door)

2. Had the Landlords complied with the requirements of the Act and of the Rules and Regulations where a Landlord who does not oppose the grant of a new tenancy nevertheless wishes to be heard on the question of a short duration and other matters? (Statutory Notice Requirements)

3. Did an estoppel arise from the Notices or the conduct of the Landlords? (Estoppel)

4. What is the effect of these on the scope of admissible evidence where the agenda is a short duration? (Scope of evidence)

Both Counsel made their submissions very much against the background of "Business Tenancies in Northern Ireland" 1994 by Professor Norma Dawson and the author's views, dealing with duration of the new tenancy, may help to set the contentions of the parties in context:

> "Maximum apart, section 14(1)(b) confers on the Lands Tribunal a very wide discretion to select a period which is "reasonable in all the circumstances". All relevant factors must, therefore, be considered and due weight given to them. These will vary from case to case but the following points may be borne in mind:
>
> (a) The policy of the 1964 Act. This must be the overriding consideration when the Lands Tribunal is called upon to exercise any of its powers. The Tribunal's decision ought to promote rather than frustrate legislative policy. The principal policy objective is, of course, security of tenure for business tenants, but not at all costs. The landlord's superior right to possession of the premises for redevelopment or for his own use is expressed in the grounds of opposition to renewal. These are not merely grounds of opposition; they are statements of policy which must be fully reflected in the terms of the new tenancy determined by the Tribunal.
>
> If the landlord:
>
> (i) has failed to establish grounds of opposition for redevelopment or for his own use because his plans were insufficiently advanced for him to establish the necessary intention, or

(ii) did not rely on grounds of opposition for redevelopment or for his own use but is likely to be able to establish one or other of these grounds within the foreseeable future, or

(iii) was precluded from relying on grounds of opposition for his own use because he bought his interest in the premises less then five years before the date of the relevant notice but his intention to use the premises himself is clearly genuine,

due weight must be given to these matters.

"It is clear, as matter of law, that the ... Act is not to be used to inhibit development." J H Edwards & Sons Ltd v Central London Commercial Estates Ltd (1983) 271 EG 697

"The policy of the Act is to give a landlord (who has purchased more than five years ago) an absolute right to get possession for his own business leaving it to the court to do what is reasonable if he has purchased less than five years." Wig Creations Ltd v Colour Film Services Ltd (1969) 20 P&CR 870

Thus, the Act requires the Lands Tribunal to balance the tenant's right to security of tenure, which militates in favour of the longest possible term, against the right of the landlord, who may require the premises for his own purposes within considerably less than 14 years. Where the landlord has redevelopment or own-business plans for the holding, it does not always follow that a short-term tenancy is appropriate. It is possible for a longer term to be granted with a break clause exercisable by the landlord when he is ready to implement his plans. [In this Reference neither party sought a break clause.]

Where the landlord does not have any plans to redevelop or use the holding, the tenant's right to security of tenure must be given its full weight (see eg Sally v Michaux, BT/79/1990 and Ready Mixed Concrete (Ulster) Ltd v McCaffrey, BT/63/1990.)

(b) The duration of the original term and any period of continuation. It has been established that the duration of the current tenancy has some bearing on that of the new term (see London and Provincial Millinery Stores Ltd v Barclays Bank Ltd [1962] 2 All ER 163, 172.)

The period of continuation of the current tenancy under section 3 may also be relevant (see Frederick Lawrence Ltd v Freeman, Hardy & Willis Ltd (No 2) (1960) 176 EG 11, London and Provincial Millinery Stores Ltd),

(c) The personal or professional circumstances of the parties and the relative hardship caused to either party by a particular term ....

(d) In general terms, current local letting practice will have a bearing on the question of duration and the use of break clauses.

(e) Where the applications is really that of a purchaser rather than of the sitting tenant, a very short tenancy may be granted ...."

(editing by the Tribunal)

Back Door

There was an underlying concern on the part of the Tenant that, although the Landlords had given notice that they would not oppose the grant of a new tenancy, the Landlords now were using this Reference as a back door attempt to oppose the grant and obtain possession.

If that were so, this Tribunal would not permit it and makes clear beyond any doubt that this Reference was not to decide whether or not the Landlords were entitled to possession. The Landlords' Notice to Determine stated that they would not oppose an application for grant of a new tenancy, so the die was cast: the Tenant was entitled to a new lease and the Tribunal has no power to decide whether the Landlords could successfully oppose the grant of a new tenancy at the end of that new lease: that is a distinctly different matter for another Reference, another day. The Landlords may go round the block but they arrive back at the front door.

The Tribunal's view, which is supported by authorities, is that seeking to restrict the new lease to a short duration is not an improper back door attempt to oppose the grant of a new lease. There are a number of examples, including Decisions of the Court of Appeal recognising that when all the circumstances were taken into account, a new tenancy for a short duration may be appropriate. See, for instance:

Reohorn v Barry Corp [1956] 2 All ER 742 (tenant granted term of six months, thereafter terminable on six months' notice),
London and Provincial Millinery Stores Ltd v Barclays Bank Ltd [1962] 2 All ER 163 (tenant granted one year),
Nursey v P Currie (Dartford) Ltd [1959] 1 All ER 497 (renewal for three months),
Peter Millett & Sons Ltd v Salisbury Handbags Ltd (1987) 284 EG 784 (three-year term, with break clause)
Upsons Ltd v E Robins Ltd [1955] 3 All ER 349, (tenant granted one year).

It was suggested that this was an attempt to substitute another tenant for the 'protected' tenant. The Tribunal does not accept that, although it does recognise that if the Landlords succeed in restricting the duration of the new lease and, for example on redevelopment grounds, successfully oppose a renewal at the end of that lease, the holding, when redeveloped, then, but only then, may be let to another.

Statutory Notice Requirements

In the Landlords Notice to Determine, the Landlords had stated "we would not oppose an application to the Lands Tribunal under Part 1 of the Act for grant of a new tenancy".

It has been a criticism of the 1964 Act that, although a Tenant's Request for a New Tenancy must set out proposals for the property, duration and rent under the new lease, there is no equivalent requirement for a landlord's Notice to Determine to set out his proposals. If a Landlord does not oppose the grant of a new tenancy, all he has to do is to state that. That criticism was recognised by the Law Reform Advisory Committee for Northern Ireland (LRAC No 2 1944) and has been addressed in the Business Tenancies (NI) Order 1996 which is expected to come into operation in the near future. But that does not make a Notice to Determine under the 1964 Act defective if it does not set out such proposals, when there is no requirement to do so. Nor can there possibly be any requirement to amend a notice, that for its purpose already complies with the Act, by including information that is not required. The issue of whether or not that notice could be amended, to set out the Landlords' proposals for a new tenancy or opposition to anything other than a short or very short lease, simply does not arise.

For completeness, the Tribunal makes it clear firstly that the Notice to Determine is a notice of considerable commercial importance and legal significance and secondly it is not a notice which is the subject of the Lands Tribunal Rules. Once a valid Notice to Determine has been served, it cannot be withdrawn or amended by application to the Tribunal. An analogy with pleadings must not be taken too far, although minor errors or omissions may be disregarded and, for example the landlord may later abandon (but not add to) grounds of opposition. However, if the landlords had wished to change their mind and oppose the grant, the Tribunal would have no power to permit an amendment to that effect (or allow withdrawal and service of a new notice) and could not permit the landlords to argue against any grant. But there is a clear difference between, on the one hand, opposing any grant and, on the other hand, not opposing a grant but seeking to limit the duration of the new lease.

Note 5 of the Notice to Determine provides:

"If the landlord states in this Notice that he will not oppose an application to the Lands Tribunal for the grant of a new tenancy, it will be open to the tenant and the landlord to negotiate on the terms of the tenancy. If all the terms are agreed between them an application to the Lands Tribunal will not be necessary; if some but not all of the terms are agreed, the agreed terms will be incorporated in any tenancy granted by the Lands Tribunal and the other terms will be such as the Lands Tribunal may determine...."

Terms were not agreed so an Application, by the tenant, to the Lands Tribunal was necessary. Among other things, that set out the tenant's proposal for the duration of the new lease and that was the first and only notice to do that.

The Tribunal finds there is nothing in the 1964 Act, nor principle in the decided cases, that requires a landlord to set out counter proposals, by notice or otherwise, for the duration of the new lease let alone give grounds for those proposals. There is no need therefore to consider further the practical difficulties which Mr Shaw illustrated might arise from a requirement to give such grounds.

The Tribunal concludes that there was no notice not served, nor defect in the notices nor amendment not sought that would prevent it, when it has heard the parties on the issue, from considering whether a short duration was appropriate.

Estoppel

The Tribunal has made clear that it accepts that a landlord, having given Notice to Determine in accordance with the 1964 Act, with a clear and unambiguous statement that he will not oppose the grant of a new tenancy cannot, at the date of Hearing oppose the grant of a new tenancy. But it also accepts that these landlords were not seeking to do that: they sought instead to argue for a lease of short duration at the end of which they may serve, if they then wish, a new Notice opposing the grant of a further new tenancy.

The Tribunal was invited to consider the policy of the Act but finds there is nothing in the Act or the policy of the Act which would prevent a landlord arguing for such a lease. While the legislation is designed to protect the tenant, part of the policy, as is clear from the decided cases, is that when a landlord is able to demonstrate a real probability that he soon will be able to oppose a new lease, by relying on grounds of redevelopment, the Act is not to be used to inhibit development and the then absolute right of a landlord to possession for redevelopment. If it is reasonable in all the circumstances, the Tribunal may fix a short duration. The Tribunal finds there was no representation in the Notice to Determine which

would create an estoppel so as to prevent the Landlords from seeking a short duration of new lease. The Application to the Tribunal was of course made by the Tenant.

Mr Mallon relied not just on the Notice but on behaviour up to the date of hearing. If, as Mr Shaw conceded, the Tenant had produced a letter from the Landlords indicating that they were prepared to grant it a long term then Mr Mallon might have a point. But there was no allegation of any representation of fact, or promise by the Landlords and no corresponding action by the tenant regarding a long duration. There was no suggestion that the landlords saw the Tenant spending money on his property and stood idly by so as to then take advantage of that expenditure. There was nothing brought to the attention of the Tribunal that would have justified an assumption, by reason of the policy of the Act or otherwise, by the Tenant that the landlords would not contend for a short duration.

On the contrary, as early as 10th September 1993 the Solicitors for the Tenant wrote to the Registrar and indicated that their client was making an effort to purchase the premises but if that were unsuccessful "....it would look like a question of the term of years would be the outstanding thing to be determined at this stage".

Later, it was obvious from the case management conferences that this was still the primary area of disagreement. Mr Mallon suggested that parties might not be bound by agreements reached by them at such Mentions before the Tribunal if not separately later confirmed in open correspondence between the parties: the Tribunal has no hesitation in rejecting that view.

The Tribunal concludes there is simply no foundation on which to raise an estoppel.

Scope of Evidence

Mr Mallon submitted that the Lands Tribunal Rules limited the case that could be made by the Landlords. Rule 8 provides:

> "a party shall not be entitled ...to rely upon any ground not stated in his notice of reference..."

The Tribunal does not find that rule supports Mr Mallon's contention. The Notice to Determine is not the Notice of Reference: the Tenant made the reference, not the Landlords.

He objected to the introduction of evidence relating to redevelopment of the building. He contended that the landlords were bound by the Notice to Determine and by giving a

solemn undertaking not to oppose the grant of a new tenancy could not bring evidence which would go to that. "All the circumstances" did not entitle an unrestricted calling of evidence and if the landlords had intended to rely on evidence about the state of the building they should have amended their Notice. The Tribunal does not agree. Evidence often may be relevant to more than one issue and if one of the issues is not a proper issue for the Tribunal, that does not make the evidence inadmissible in respect of the other issues.

In Upsons Ltd v E Robins Ltd (1955) the Court of Appeal considered whether, opposition on grounds of own occupation having been withdrawn at the Hearing (the landlord had not been the landlord for more than 5 years), the desire of the landlord to have the premises for his own occupation should be taken into account.

> "I see no reason for cutting [those words "in all the circumstances"] down by reference to the earlier [section 10(1)(g)] which deals only with rights, and not with matters which come within the discretion of the court".
>
> per Denning LJ

The Tribunal considers it makes no difference that in this reference, the landlords did not oppose the grant of a new tenancy. In London & Provincial Millinery Stores v Barclays Bank Ltd there was no Landlord's Opposition but the Court of Appeal recognised all proper factors must be taken into account. In that case these included the urgent need for reconstruction, the intention to reconstruct and the fact that the tenant had been in occupation for more than four years since the expiration of the contractual term of the original lease. The Tribunal does not accept the analysis put forward by Mr Mallon that the duration of the new lease was dictated by the life of the building. The finding relied upon was that the site was "ripe for redevelopment".

The Tribunal concludes that this Application was not an improper back door approach to opposing the grant of a new tenancy. The Landlords had complied with the notice and other requirements of the Act. No estoppel arose from the Notices or the conduct of the Landlords. The Tribunal must consider all the circumstances including evidence relating to the condition of the holding (and, if relevant, the building) and the Landlords' intentions are not an issue to be excluded.

ORDERS ACCORDINGLY

Mr M R Curry FRICS FSVA IRRV ACI.Arb
LANDS TRIBUNAL FOR NORTHERN IRELAND

29th April 1996