

**LANDS TRIBUNAL FOR NORTHERN IRELAND**  
**LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964**  
**BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996**

**IN THE MATTER OF AN APPLICATION**

**BT/128/2008**

**BETWEEN**

**KATE McALEESE – APPLICANT**

**AND**

**NORMAN MENARY – RESPONDENT**

**Re: First Impressions Day Care Nursery, 162 Coleraine Road, Portstewart**

**Lands Tribunal - Mr M R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI**

**Background**

1. The current dispute is connected with a Tenancy Application ('the 2006 Tenancy Application') to the Lands Tribunal (BT/46/2006) in which the applicant who occupied premises under a lease ('the 1999 lease') had sought an order that she was entitled to a renewal of the 1999 lease. The applicant had requested a new tenancy from 1<sup>st</sup> September 2006 for a period of 5 years. The respondent opposed the grant of a new tenancy on the grounds that on the termination of the current tenancy he intended to occupy the holding himself. The matter proceeded to a hearing in late June 2007 and some evidence was given. After discussion, the parties resolved their differences and the agreed terms included renewal rather than non-renewal - a new lease terminating on 28<sup>th</sup> December 2008 but less than the 5 years sought ('the 2007 lease'). The agreement reached at the Hearing was recorded on 28<sup>th</sup> June 2007 and was made a Consent Order of the Tribunal by the Registrar on 25<sup>th</sup> July 2007.
2. It appears that at the end of the 2007 lease the tenant quit the premises without making a further Tenancy Application.
3. The applicant now seeks compensation on the grounds she was induced into withdrawing the 2006 Tenancy Application by the respondent misrepresenting his position and/or concealing facts (ie that at that time the respondent did not intend to use the premises for his own business).
4. The Business Tenancies (Northern Ireland) Order 1996 ('the 1996 Order') contains provisions enabling the Lands Tribunal to award compensation in some circumstances. Article 27 of the 1996 Order provides:

“(1) Where the Lands Tribunal –

- (a) makes an order that the tenant is not entitled to a new tenancy; and
- (b) is subsequently satisfied that it was induced to make the order by misrepresentation or by the concealment of material facts or that the intentions of the landlord as represented by him to the Lands Tribunal regarding any of the matters specified in Article 12(1)(e), (f), (g) or (h) have not without reasonable excuse been fulfilled,

the Lands Tribunal may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the refusal.

(2) Where—

- (a) the tenant has quit the holding—

- (i) after making but withdrawing a tenancy application; or
  - (ii) without making such an application; and

- (b) the Lands Tribunal is satisfied that he did so by reason of misrepresentation or the concealment of material facts,

the Lands Tribunal may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of quitting the holding.”

(Emphasis added)

5. The respondent has questioned the jurisdiction of this Tribunal to award compensation on these grounds in the particular circumstances.

### **Procedure**

6. The Tribunal agreed to take this question of jurisdiction as a preliminary point. It is only this limited question relating to the determination of the 1999 lease that has been addressed.
7. By consent, the Tribunal dealt with the question without an oral hearing. The Tribunal received comprehensive written submissions from Mr Adrian Colmer BL on behalf of the applicant and Messrs Mark Orr QC and Stephen Mooney BL on behalf of the respondent.

### **Position of the Parties**

8. The 2006 Tenancy Application was disposed of by way of a Consent Order. Article 27(1) deals with a ‘non-renewal’ Order and does not apply because the Tribunal did not make such an

order. Article 27(2)(a)(ii) does not apply because a Tenancy Application relating to the 1999 lease was in fact made by the Applicant.

9. The dispute is focussed on Article 27(2)(a)(i). The respondent suggested that the application was not 'withdrawn' and therefore it does not apply.
10. The applicant suggested that a much broader meaning should be given to "withdraw"; it simply means the disposal of proceedings and the Article does apply.

## Discussion

11. In the instant case there was no "withdrawal" of the application in accordance with Rule 34 of the Lands Tribunal Rules (Northern Ireland) 1976 ('the Rules') and neither the terms of settlement nor the Consent Order made by the Tribunal contained any agreement to "withdraw" the tenancy application. It would appear to follow that the pre-condition of 'withdrawal' in Article 27(2)(a)(i) of the 1996 Order was not met. But on behalf of the applicant it was suggested that Goldblum v Goldblum [1938] 4 All ER 477 supports the view that it was.

### *The Goldblum case*

12. In the view of the Tribunal the Goldblum case is of little assistance to the present case.
13. In that case the English Court of Appeal considered the meaning of the word "withdraw", in the text of a separation deed in matrimonial proceedings. Sir Wilfred Greene MR held as follows:

"... both the phrases "proceedings are to be discontinued" and "withdraw the said petition" mean, in my opinion, nothing more than that the petition will be got rid of by proper procedure in the Divorce Court, which is dismissal by consent."

(Emphasis added)
14. The issue was not one of statutory interpretation and the main point in issue was not the definition of the word "withdraw". The issue was a question of what was intended by a deed that had used incorrect legal language; the provisions of the deed included agreement that "proceedings are to be discontinued" and that "Dessa Goldblum will ... withdraw the said petition" but in the context of divorces and judicial separation there was no procedure to allow that to be done. The phrase used by the Court "got rid of by proper procedure" was a robust interpretation of what was intended by the improper wording of the deed of settlement rather than an attempt to define the term "withdraw".

### *The Mischief*

15. The Tribunal accepts that where Parliament intends that an enactment shall remedy a particular mischief, it should find a construction which applies the remedy provided by it in such a way as to suppress that mischief.

16. The relevant provisions were introduced to give effect to the recommendations of the Law Reform Advisory Committee for Northern Ireland (*Report No 1 on Business Tenancies* LRAC No 2 1994). That Report referred to the Law Commission Report: *Landlord and Tenant Business Tenancies - a Periodic Review of the Landlord and Tenant Act 1954 Part II* (Law Com. No. 208). The Law Commission concluded at 2.87:

“We see some merit in extending the right to compensation: it is logical that a remedy for misrepresentation should apply however the victim decides to proceed and if the lack of a remedy without going to court were to be even a slight incentive to start proceedings unnecessarily it is better eliminated. Accordingly, *we recommend* that the provision for compensation for misrepresentation should not only apply where the court is misled into refusing an application to renew a tenancy, but also in cases where the tenant is induced not to apply to the court or to withdraw his application.”

(Emphasis added)

17. The underlined part would appear to suggest a wide ambit. But, at 2.85, the Commission identified the relevant concern more precisely as that which had been addressed in the earlier working paper:

“the amendment of the Act in 1969 which aimed at ensuring that a tenant faced with an incontestable refusal to renew would not lose his non-renewal compensation by quitting without applying to the court was not carried through to the [misrepresentation] provision.”

18. It seems to the Tribunal that the particular mischief identified by the Commission was that the provisions for compensation for misrepresentation did not mirror the circumstances that would give rise to non-renewal compensation (Article 23 of the 1996 Order).

19. The Law Reform Advisory Committee agreed with the recommendation of the Law Commission and recommended accordingly. The Committee at 5.3.2 and 5.3.3 of the Report referred to the fact that, at that time, compensation for misrepresentation could only be claimed by a tenant who had actually applied to the Tribunal and been refused a tenancy. It was not available where the tenant had voluntarily quit when the landlord opposed renewal and it was later found that the landlord had misrepresented his intentions.

20. The Tribunal concludes that 'withdrawal' of the tenancy application alone is not sufficient; it must also be in circumstances of non-renewal.

*The wording of the 1996 Order*

21. In the view of the Tribunal the wording of the 1996 Order supports the view that the broad interpretation should not be adopted. Article 27 of the 1996 Order uses the term "withdrawing" only and no other terms such as "settle" or "compromise".

22. The term "withdraw" also appears in Article 21,

"(1) Where a tenant has made a tenancy application and—

(a) the tenant withdraws, or fails to pursue, the application before the Lands Tribunal comes to a decision on it; or

(b) the tenant, after the making of an order for the grant of a new tenancy, applies to the Lands Tribunal under Article 20(2) for the revocation of the order and the order is revoked,

the landlord may apply to the Lands Tribunal for an order that the tenant pay the landlord such sum as appears sufficient as compensation for damage or loss sustained by the landlord as the result of the tenant's action or inaction referred to in sub-paragraph (a) or (b).

(2) A sum ordered to be paid under paragraph (1) may include an increase of rent for any period for which the current tenancy is ordered to continue under Article 20(2), and paragraphs (3) and (4) of Article 11 shall apply to such an increase as they apply to a variation of rent by way of increase under that Article."

23. It would lead to an absurdity if the term "withdraw" is equated with "disposal".

24. The Tribunal agrees with the respondent that as the term "withdraw" is used in both Articles 21 and 27 the same meaning should be conveyed to each of them.

25. In light of the intention of the legislature to bring the provisions for misrepresentation into line with the provisions for compensation on non-renewal it is not surprising that the usage of the term "withdraw" in Article 23, which deals with non-renewal compensation, also is consistent with the narrower interpretation.

*Practical and public policy grounds*

26. A settlement is designed to bring closure to a case and resolve all issues (save situations where there has been no compliance). Any party that seeks to have a specific terms included into a settlement can seek to do this at the time and so, for example, parties are free to agree the consequences of not fulfilling intentions or not to agree to the terms. (See for example Reynolds & Clarke *Renewal of Business Tenancies* 3<sup>rd</sup> ed. at 7-248.)
27. The Tribunal accepts that it is a principle of legal policy that the property and other economic interests of a person should be respected, and legislation should not, therefore, be construed so as to interfere with or prejudice established private rights under contracts or the title to property unless it is clearly intended to do so. The entitlement to a new lease of course arose from the 1996 Order not directly from the 1999 lease but in any event the narrow interpretation does not exclude all rights to compensation. There is compensation under the 1996 Order in applicable circumstances and there may be a contractual remedy available.

*The Lands Tribunal Rules*

28. The Tribunal accepts that the means by which proceedings may be “withdrawn” in the Rules (Northern Ireland) 1976 (‘the Rules’) may be of some assistance in the construction of “withdraw” in the 1996 Order itself.
29. Rule 34 provides:
- “(1) A reference instituting proceedings or any application, notice or counter notice under these rules may be withdrawn by sending to the registrar a written notice of withdrawal signed by all the parties to the proceedings or by their solicitors or agents.
- (2) In the absence of consent to a proposed withdrawal by all the parties to the proceedings, a party wishing to withdraw his notice of reference or application, notice or counter notice under these rules shall apply in writing to the registrar under the provisions of rule 12 and the registrar, or the President on appeal from the registrar, may permit such withdrawal on such terms as to costs or otherwise as he may think fit.”

(Emphasis added)

30. The Tribunal accepts the applicant’s suggestion that the use of the permissive word “may” in Rule 34 means that a withdrawal may also be effected by other means but does not accept it follows that withdrawal of proceedings simply means disposal of proceedings.
31. Rule 32 deals with Consent Orders and provides:
- “Where the parties to any proceedings have agreed upon the terms of any order to be made by the Tribunal, particulars of the terms, signed by all the parties or by their solicitors or agents, shall be sent to the registrar, and an order may be made by the Tribunal in

accordance with such terms in the absence of the parties, unless the Tribunal for any reason requires their attendance.”

32. The Tribunal agrees with the respondent that in the rules a “consent order” and “withdrawal” are deemed to be different creatures. Many cases are disposed of by being withdrawn by direction or Consent Order of the Tribunal after the parties have appeared in front of it and announced their agreement to withdrawal. Such agreements may provide for renewal or non-renewal. The Tribunal does not accept the applicant’s suggestion that unless the word “withdraw” is equated with “disposal” that would contradict the Rules and practice of the Lands Tribunal.

**Conclusion**

33. The Tribunal concludes that the Tenancy Application was not “withdrawn” and therefore Article 27(2)(a)(i) of the 1996 Order does not apply.
34. This conclusion does not address the circumstances at the determination of the 2007 lease.

**ORDERS ACCORDINGLY**

**Michael R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAMI**  
**LANDS TRIBUNAL FOR NORTHERN IRELAND**

**25<sup>th</sup> October 2010**

**Appearances:**

**Applicant: Adrian Colmer BL instructed by Martin, King, French & Ingram, Solicitors.**

**Respondent: Mark Orr QC and Stephen Mooney BL instructed by Doris & McMahon, Solicitors.**