

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/14/2010

BETWEEN

NOEL COX & SUSAN COX – APPLICANTS/TENANTS

AND

MARTIN CLANCY – RESPONDENT/LANDLORD

Re: Petrol Filling Station and Retail Shop, Belcoo, County Fermanagh

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

Background

1. The subject premises are in the village of Belcoo at the border with the Republic of Ireland. The Respondent/Landlord, Mr Clancy, and his wife also have controlling interests in Bloodstone Developments Limited ('Bloodstone'), which owns a filling station and retail shop in the village of Blacklion, Co Cavan, a short distance across the border. The Belcoo premises were built about 1987 and Blacklion about 1997.
2. Until about 2005, Mr Clancy had operated both premises. Then the Applicants/Tenants ('the Coxes') reached agreements with Mr Clancy and Bloodstone to take leases of both. The Coxes trade as Cox Foodmarkets, operating six supermarket stores under the name of "Spar" in accordance with trading agreements with Henderson Wholesale Limited - individual Spar members retain their independence but belong to a global organisation with commensurate collective buying and marketing power, and other supporting resources. At Belcoo, apart from red diesel and kerosene, the filling station operation ceased some time ago and only the retail shop is trading. At Blacklion, in addition to the supermarket trade, the filling station operation continues.
3. The Coxes hold the Belcoo premises under a lease, dated 8th June 2006, between Martin Clancy and themselves for a term of 4 years and 9 months from 17th June 2005.
4. Mr Clancy had been involved in the building trade for a long time and from 2005 devoted his attention to property development.

5. From late 2008 the property development companies, in which Mr Clancy held a 50% interest, began to be hit badly by the collapse in the property market. At about the same time the Coxes noted that turnover in the Blacklion premises had reduced dramatically. They attributed that to the reduction in consumers travelling to the Republic for fuel and the increase in consumers travelling to Northern Ireland for grocery shopping.
6. The contractual terms of both leases were due to expire in 2010 and discussions began in early 2009 in regard to renewal of both tenancies and other options. The Coxes proposed a reduction in rent at Blacklion. Agreement could not be reached. They had no right to and decided not to renew the lease in respect of those premises. They are now operated by Bloodstone, which has a supply only agreement with 'Costcutter' – another organisation offering national distribution and trading terms but focussed on small local shops.
7. By a Landlord's Notice to Determine dated 11th September 2009 the landlord gave notice terminating the tenancy of the Belcoo premises on 16th March 2010 and opposing a tenancy application on ground 12(g) ie:

“Subject to Article 13(4), that on the termination of the current tenancy the Landlord intends that the holding will be occupied for a reasonable period –

- (i) for the purposes, or partly for the purpose, of a business to be carried on in it by him or by a company in which he has a controlling interest; or
- (ii) as his residence.”

8. By a Tenancy Application dated 8th February 2010 the Coxes applied to this Tribunal for the grant of a new tenancy.

Procedure

9. It had been suggested that the lease contained an option that would make these proceedings academic. The Tribunal directed that it would deal with the Tenancy Application unless there was an application for a stay of the proceedings. No such application was made.
10. The Tribunal received:
 - Affidavits, with exhibited correspondence, and oral evidence from Mr Noel Cox and Mr Martin Clancy;
 - Oral evidence from Mr Donal Vincent Fee, a solicitor of Murnaghan & Fee; and
 - Submissions from Nessa Fee BL and Wayne Atchison BL.

Positions

11. At the hearing it was confirmed that the landlord did not intend to occupy the holding as his residence and that he intended that the holding would be occupied not by a company in which he has a controlling interest, but by himself.
12. The issue for the Tribunal, at this stage, is Mr Clancy's intention.

Discussion

13. The Tribunal was referred to Dawson: *Business Tenancies in Northern Ireland* 1994; Fife & Hilditch: *Renewing Business Tenancies* 3rd Edition; Reynolds & Clarke: *Renewal of Business Tenancies* 3rd Edition; Cunliffe v Goodman [1950] 2 KB 237 endorsed by the House of Lords in Betty's Cafés Ltd v Phillips Furnishing Stores Ltd [1958] 1 All ER 607 and by the Northern Ireland Court of Appeal in McDevitte v McKillop (1994) NIJB 91; Mirza v Nicola [1990] 30 EG 92; Sharma v McHugh [1991] BT/88/1991; Wong v Jan [2004] BT/18/2003; Dogan v Semali Investments Ltd [2005] 3 EGLR 51; and Patel v Keeles [2009] EWCA Civ 1187 endorsed by this Tribunal in Tarwood v Giordano [2010] BT/38 & 39/2009.
14. In Betty's Cafés [1958], the House of Lords adopted for the purposes of ground (f) the definition of intention given by Asquith LJ in Cunliffe v Goodman [1950]. In that case, Asquith LJ said:

“An intention, to my mind, connotes a state of affairs which the party “intending” ... does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about, by his own act of volition’.”
15. The landlord must seek to establish his ground of opposition at the date of hearing (see Betty's Cafés Ltd v Phillips Furnishing Stores Ltd [1958]; McDevitte v McKillop [1994] and Dogan v Semali Investments Ltd [2005]). Earlier different intentions of indecision, of themselves, do not matter as long as there is a settled and firm intention established at the trial.
16. In Reynolds & Clarke: *Renewal of Business Tenancies* 3rd Edition at 7-129 et seq, the authors set out the widely accepted distinction between two aspects of intention. The first is a subjective assessment of the state of mind of the landlord. The second involves an objective assessment of the realistic prospects of implementing the intention held. The latter is not principally concerned with the genuineness of the landlord's decision, but whether it is practicable to carry it out.

17. The first aspect is a high hurdle (see Patel v Keeles [2008] and Tarwood v Giordano [2010]):

“If the landlord succeeds in showing that the requirements of [Article 12(g)] are satisfied, the tenant will have no right to renew his tenancy and will have to vacate the premises. Any goodwill attaching to his business at those premises will then either be lost or be acquired by the landlord when he starts to trade from the premises. In those circumstances, the courts have set a high hurdle for establishing the necessary subjective intention.”
18. The second aspect – “a reasonable prospect” – is a low threshold (see Dogan v Semali Investments Ltd [2005]).
19. In regard to the first aspect Mr Clancy gave clear evidence that he intended to occupy the premises for the purposes of his business and to do so indefinitely.
20. That intention was corroborated by correspondence from Costcutter stating that Mr Clancy had been discussing a franchise for the Belcoo site since the autumn of 2008 and by correspondence from Mr Clancy’s accountants (since 1993) confirming that since 19th May 2009 Mr Clancy had been discussing with them re-entering his Belcoo premises and running the filling station once again. However it was undermined to an extent by his conduct of negotiations with the Coxes. Mr Cox gave evidence that Mr Clancy, when discussing lease renewal in early September 2009, had said that he had no intention ever to be back trading in retail again and, after Mr Clancy served notice objecting to the grant of a new tenancy, he invited discussions about other options to continue. Mr Clancy’s explanation was that he was stringing the Coxes along in case they might cease paying rent and in case they made him an offer he could not refuse.
21. Not without slight reservations, the Tribunal accepts that Mr Clancy’s state of mind at the date of hearing was that he genuinely intended what he said he intended to do and that is to occupy the holding for a reasonable period for the purpose of a business to be carried on in it by him.
22. The Tribunal now turns to the second aspect – a reasonable prospect.
23. There was some discussion about the condition of fixtures at the Belcoo premises and the how they might be left. For purposes of this application the Tribunal assumes they will be yielded up in accordance with the terms of the lease.

24. The Tribunal was referred to a number of matters in regard to Mr Clancy's prospects of actually operating the business at the Belcoo premises:
- a) Bloodstone has a supply only agreement with Costcutter and Mr Clancy was very clear that he would be entering into a franchise agreement with Costcutter at Belcoo. His discussions with Costcutter were supported by correspondence that said only that it had been in discussions "for approx 18 months on and off". A specimen agreement was produced but that had been obtained by his solicitor. When questioned, Mr Clancy had no idea of what the requirements for a franchise would be or how much that would cost either in shop fitting or fees;
 - b) Mr Clancy had discussed restarting the business with his accountants but there was nothing produced from them to suggest that anything more had been done;
 - c) Mr Clancy and Mr Clancy differed about the prospects for the forecourt; the Coxes had found the man hours involved relative to the volume of trade made it uneconomic and ceased after the first delivery at the commencement of their lease. Mr Clancy appeared to have no knowledge of the requirements of the HM Revenue and Customs scheme for Registered Dealers in Controlled Oils or whether he would have any difficulty in complying with them; and
 - d) In support of his ability to run the business, Mr Clancy said that Bloodstone was now operating the premises at Blacklion as a filling station, shop and deli/coffee shop with increased turnover. He had been in business in the Belcoo premises before the 2006 lease but as more of a 'Country Store'. He intended to engage a person experienced in retailing as manager for both premises; the intended manager had not been appointed but was still willing to accept appointment. The operation of premises on both sides of the border, in tandem, would provide a degree of protection from the effects of currency fluctuations and differences in taxation regimes.
25. Mr Clancy agreed that he had been down on his luck for a few years and his means were strained at the moment. His income came from the Belcoo property and, now, the Blacklion business.
26. The development companies in which he was a 50% shareholder had suffered in the market collapse. Their current position was not clear as the most recent accounts filed were for the year ended 30th June 2006. But at that time the companies had substantial liabilities and there was nothing to suggest that matters had improved. In 2008 one of the companies had owed Cox supermarkets over 20,000 euros for fuel and that was settled by agreed deductions from the rent at Blacklion. Mr Clancy thought the companies were "heading for NAMA" (The National Asset Management Agency - a *bad bank*, acquiring property development loans from

Irish banks in return for government bonds.) He thought he probably had some commitments as a guarantor.

27. Also, Mr Clancy had invested in a residential property in Northern Ireland; that had not worked out and he had defaulted in mortgage payments. Recently, repossession proceedings had been adjourned with liberty to restore.
28. Mr Clancy said that he intended to use Bloodstone's profits to help with the initial running costs for Belcoo but he produced no evidence of a surplus in that company. It may well be successful but the Tribunal would require further information before accepting that it had the capacity to do so.
29. Mr Clancy accepted that he would need capital to set up the business. He said he had some savings but did not disclose what they were. He had not sought a bank facility. He had borrowed from a sibling to fund the restart of the Blacklion business and hoped to do the same thing for the Belcoo business. But there was no evidence that his siblings could or would agree to do that.

Conclusion

30. In conclusion on the two aspects, the Tribunal, not without slight reservations, accepts that Mr Clancy's state of mind at the date of hearing was that he genuinely intended to occupy the holding for a reasonable period for the purpose of a business to be carried on in it by him.
31. Mr Clancy's preparations have been casual and tentative. He has experience that would be relevant to the business and he planned to supplement this by employing an experienced manager and by the acquisition of a Costcutter franchise. But those both come at a price. Most importantly, there is a lack of evidence of access to the financial resources for this and the working capital essential to bring about his intention. The Tribunal is not persuaded that, at present, he does have a reasonable prospect of implementing the intention held.
32. The Tribunal concludes that the Respondent/landlord has failed in his opposition to the grant of a new lease and that the Applicants/Tenants are entitled to a new lease. The shortcomings in the case for opposition are issues that may be resolved in a relatively short period of time and that may be reflected as a factor in determining the duration of the new lease.

ORDERS ACCORDINGLY

27th August 2010

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

Appearances

Applicants: Wayne Atchison BL instructed by Cooper Wilkinson, Solicitors

Respondent: Nessa Fee BL instructed by Murnaghan Fee, Solicitors