

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996
COMMUNICATIONS ACT 2003
IN THE MATTER OF A PRELIMINARY ISSUE
BT/152/2020
BETWEEN
HUTCHISON 3G UK LIMITED AND EE LIMITED – APPLICANTS
AND
DEREK MILLEN – RESPONDENT

Re: Lands off Damhead Road, Knockantern Wood, Coleraine

Lands Tribunal – Henry Spence MRICS Dip Rating IRRV (Hons)

Background

1. The subject reference concerns Hutchison 3G UK Limited and EE Limited (“the applicants”) tenancy of premises known as Lands off Damhead Road, Knockantern Wood, Coleraine (“the reference property”) which are in the ownership of Mr Derek Millen (“the respondent”).
2. The tenancy is on foot of an agreement between the respondent and Orange Personal Communications Services Limited, made on 21st May 2008 and expiring on 29th August 2017. By way of an assignment, dated 27th January 2012, the applicants have succeeded to “Orange’s” interest in the reference property.
3. By a tenant’s request for a new tenancy, dated 21st February 2020, the applicants requested a new tenancy on the terms detailed therein. The respondent did not respond to this request for a new tenancy. Subsequently, on 3rd December 2020, the applicants served a Tenancy Application on the respondent.

4. Invoking its powers under Article 10 of the Business Tenancies (Northern Ireland) Order 1996 (“the 1996 Order”), which gives the Tribunal the statutory authority to extend time limits, on 16th February 2021 the Tribunal directed the respondent to serve a Landlord’s Notice to Determine to be submitted by 2nd March 2021. On 4th March 2021 the respondent served a “Notice of Opposition”.
5. Previously, however, on 7th October 2019, the solicitors then acting for the applicants had served on the respondent a “Statutory Notice Requiring a Change to the Terms of an Agreement Under the Electronic Communication Code”, in accordance with paragraph 33(1) of Part 5 of Schedule 3A of the Communications Act 2003 (“the Code Notice”).
6. Paragraph 5 of the Code Notice advised: “we are asking you to agree, from the date set out in paragraph 6 below (9th April 2020), that the Agreement should be terminated and a new agreement should have affect between us on the terms set out in Annex 1”.
7. The effect of this notice on the subject proceedings, if any, is the issue to be determined by the Tribunal.
8. The respondent considered it to be a valid Notice to Determine and if this were so, Article 7(4) of the Order provides:

“(4) A tenant’s request for a new tenancy shall not be made –

(a) if the landlord has already served a notice to determine; or

(b) except with the consent of the landlord, if the tenant has already served a notice under Article 8.

and no such notice is as mentioned in sub-paragraph (a) or (b) shall be served by the landlord or the tenant after the making by the tenant of a request for a new tenancy.”

On that basis the respondent contended that the applicants had not served a valid and effective request for a new tenancy, as the applicants had already served a Notice to Determine by issuing the Code Notice and their tenancy application was therefore invalid.

9. The applicants' position was that the Code Notice had no effect on the subject proceedings.

Procedural Matters

10. The applicants were represented by Mr Adrian Colmer QC, instructed by DWF solicitors. Mr Mark McEwan BL, instructed by Anderson Gillan Barr solicitors, represented the respondent. The Tribunal is grateful to counsel for their helpful submissions.

The Applicants' Submissions

11. It was not disputed that the applicants had served the Code Notice but the question was did that statutory notice have any effect? Mr Colmer QC considered that the question called for the consideration of three matters (i) the 1996 Order; (ii) the Electronic Communications Code and (iii) the Code Notice.

(i) The 1996 Order

12. It was established at hearing that the respondent relied upon Article 8(3) of the Order:

“8(3) A tenancy which but for this Order would have come to an end by effluxion of time and which is continuing by virtue of Article 5 may be brought to an end on any date by not less than 3 months' notice served by the tenant on the immediate landlord, whether the notice is served before or after the date on which but for this Order the tenancy would have come to an end by effluxion of time.”

13. Mr Colmer QC submitted that this provision permitted the tenancy to be brought to an end by the tenant giving not less than 3 months notice, whether before or after the expiry of the

term and this did not cover the situation whereby a landlord wished to bring the tenancy to an end.

(ii) The Electronic Communications Code

14. Mr Colmer QC summarised:

- (a) The Code Notice was served by the applicants under paragraph 33(1) of Part 5 of Schedule 3A of the Communications Act 2003 (“the 2003 Act”). Paragraph 33 was part of the Electronic Communications Code (“the Code”) which was enacted by the Digital Economy Act 2017 (“the 2017 Act”).
- (b) The effect of the 2017 Act was to insert the Code into the 2003 Act by way of the insertion of Schedule 3A. On foot of the Digital Economy Act 2017 (Commencement No.3) Regulations 2017, the Code came into force on 28th December 2017.

15. Mr Colmer QC referred to the situation regarding Electronic Communications agreements made after 28th December 2017. Article 4(1) of the 1996 Order, states that the Order does not apply to “a tenancy the primary purpose of which is to grant code rights within the meaning of Schedule 3A to the Communications Act 2003 (the electronic communications code) where the tenancy is granted after that.”.

16. With regard to the application of the Code to tenancies which were already in place when the Code came into effect, Mr Colmer QC noted that these were dealt with by transitional provisions within the 2017 Act at para 1(4) of Schedule 2 which defined “subsisting agreement” as an agreement in force between an operator and any person when the new Code commenced.

17. He then referred to paragraph 6(4) of Schedule 2 to the 2017 Act which states that Part 5 of the Code, which is the part containing paragraph 33, does not apply to a subsisting agreement that is a lease of land in Northern Ireland, if it is a lease to which the 1996 Order applies.

18. Mr Colmer QC also referred the Tribunal to Cornerstone Telecommunications Infrastructure Limited v (1) Ashloch Limited (2) Ap Wireless 11 (UK) Limited [2019] UKUT 0338 [LC] in which the Upper Tribunal in England and Wales commented on the effect of paragraph 6 of Schedule 2:

“... a tenant under a 1954 Act (or 1996 Order) tenancy – which had either not expired or was continuing under section 24 of the Act (or Article 5 of the 1996 Order) when the new code commenced, cannot make use of Part 5 to renew or modify their tenancy.”

19. Mr Colmer QC submitted, therefore, that any notices to renew which had been served under paragraph 33 of the new code were not effective to terminate a subsisting agreement.

(iii) The Code Notice

20. Mr Colmer QC noted that the respondent sought to rely on the Code Notice to argue that the service of that notice effected a termination within the terms of Article 8(3) of the 1996 Order.

21. He submitted, however, that this argument fell at the first hurdle because, as a matter of law, paragraph 33 of the Code, under which the Code Notice was served, had no application at all to the subject tenancy agreement, which was a subsisting agreement governed not by the code but by the 1996 Order.

22. Article 8(3) concerned the giving of notice by the tenant to bring the tenancy to an end and Mr Colmer QC submitted that the Code Notice did no such thing, as it was merely a request to agree new terms. It was the beginning of a process and he submitted it did not end anything.

23. In conclusion Mr Colmer QC submitted that the respondent may not avail of Article 8(3) and the tenancy agreement was continued under Article 5 of the 1996 Order. The applicants were, therefore, entitled to apply to the Tribunal for a new tenancy.

The Respondent's Submissions

24. Mr McEwan BL submitted that, by a document entitled "Statutory Notice" (the Code Notice) and dated 27th October 2019, the solicitors then acting for the applicants appeared to have terminated any agreement between the parties with effect from 9th April 2020.

25. He referred the Tribunal to paragraphs 5 and 6 of that notice:

"5. We are seeking you to agree, from the date set out at paragraph 6 below, that the agreement should be terminated and a new agreement should have effect between us on the terms set out in Annex 1.

6. The day from which we propose the agreement should be terminated and from which the new agreement set out in Annex 1 should have effect is 9th April 2020."

26. He did not consider this Code Notice to be the commencement of negotiations between the parties as the document was not marked "Without Prejudice", rather it was advising the applicants that the tenancy would terminate on 20th April 2020 and negotiations would follow the termination.

27. He asked the Tribunal to also note that there was no prescribed form for a tenant to terminate a tenancy and a tenant could write a simple letter requesting termination.

Conclusion

28. The overriding factor in the subject reference was that the applicants' Code Notice was headed "Under the Electronic Communications Code" and clearly issued under paragraph 33 of the Code. The applicants and respondent had every right to ignore this notice because it

was not legally binding on them. The agreement between them was a subsisting agreement in force prior to the enactment of the Code and as such was governed not by the code but by the 1996 Order.

29. If the Tribunal is wrong in that the Tribunal agrees with Mr Colmer QC, the “Code Notice” was not a termination of the tenancy per se, rather it was an attempt by the applicants to initiate discussions on the terms of a new tenancy.

30. On that basis the Tribunal directs that the applicants’ Code Notice has no effect on the subject proceedings which are subject only to the statutory requirements of the 1996 Order. The validity of the applicants’ tenancy application is to be decided at a further hearing, if required.

6th January 2022

**Henry Spence MRICS Dip.Rating IRRV (Hons)
Lands Tribunal for Northern Ireland**