

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

IN THE MATTER OF AN APPLICATION

BT/18 & 22/2023

BETWEEN

NTH RETAIL LIMITED – APPLICANT

AND

MPS RETAIL LIMITED – RESPONDENT

Re: Premises at 50 Dundalk Street, Newtownhamilton, Newry, County Armagh

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

Background

1. NTH Retail Limited (“the applicant”) is the owner and landlord of a retail convenience store located at 50 Dundalk Street, Newtownhamilton (“the reference property”).
2. MPS Retail Limited (“the respondent”) is the tenant of the reference property having been in occupation since 1st March 2017, pursuant to a lease of that date (“the lease”).
3. The lease was for a term of 6 years commencing on 1st March 2017 and which was due to determine on 28th February 2023.
4. On 8th August 2022 the applicant initiated proceedings by serving a Notice to Determine the tenancy in accordance with the terms of the Business Tenancies (Northern Ireland) Order 1996 (“the Order”). Under the notice the applicant sought to determine the tenancy on the following grounds:

“1. We hereby give you notice terminating your tenancy on the 28th day of February 2023.

2. The landlord requires the premises as per Article 12(1)(g) of the Order.”

5. Article 12(1)(g) of the Order refers to the “own use” grounds to determine a tenancy and the Tribunal, in the subject reference, is therefore solely concerned with the validity of the applicant’s intentions to use and occupy the reference property for itself.

Procedural Matters

6. The applicant was represented by Mr Michael Lavery BL, instructed by Ferris & Co Solicitors. Mr Wayne Atchison BL, instructed by P A Duffy & Co Solicitors, represented the respondent. The Tribunal is grateful to counsel for their helpful submissions.

7. The Tribunal also received written submissions from Ms Jacqueline Hughes, a director of the applicant company and Mr Colm Devlin, a director of the respondent company. Ms Hughes also gave oral evidence at hearing. The Tribunal is grateful to both for their helpful submissions.

The Statute

8. The Tribunal considers the following extracts from the Order to be relevant to the subject reference:

“Tenancies to which this Order applies

3.-(1) Subject to the provisions of this Order, this Order applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by the tenant, or for those and other purposes.”

And

“6.-(6) A notice to determine shall state whether or not the landlord is willing that the tenant should have a new tenancy and –

(a) ...

(b) if he is not so willing, shall state whether the landlord would oppose a tenancy application by the tenant and which of the grounds mentioned in Article 12 he would do so.”

And

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

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

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

And

“Tenancy application by landlord or tenant

10.-(1) In this Order ‘tenancy application’ means either –

(a) an application by the landlord for an order that the tenant is not entitled to a new tenancy; or

(b) an application by the tenant for an order for the grant of a new tenancy.

(2) Where a landlord has served a notice to determine, a tenancy application may be made to the Lands Tribunal at between the date of service of the notice and the date of termination.”

And

“Opposition by landlord to a tenancy

12.-(1) The grounds on which a landlord may make a tenancy application, or may oppose a tenancy application by the tenant, are such of the following grounds as may be stated in the landlord's notice to determine under Article 6, or as the case may be, in the landlord's notice under Article 7(6)(b), that is to say –

.....

(g) 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 purposes, 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;”

And

“Duration of new tenancy

17.-(1) Where the Lands Tribunal makes an order for the grant of a new tenancy, the new tenancy shall be:

(a) a tenancy for such period as may be agreed between the landlord and tenant; or

(b) in the absence of agreement, a tenancy for such period, not exceeding 15 years, as may be determined by the Lands Tribunal to be reasonable in all the circumstances.”

Authorities

9. The Tribunal was referred to the following authorities:

- McCandless v Lynch [2001] 9BNIL, 50 (Lands Tribunal)
- Wong v Jan [2004] 3BNIL, 77 (Lands Tribunal)
- Cox v Clancy [2010] 8BNIL, 50 (Lands Tribunal)
- Tarwood Limited v Giordano [2010] 5BNIL, 32 (Lands Tribunal)

- Stranaghan v Townsley [2012] 4BNIL, 49 (Lands Tribunal)

10. And to the following texts:

- Renewal of Business Tenancies, Reynolds & Clark 6th edition at 1-052
- Business Tenancies in Northern Ireland, Dawson page 20

Issues

11. The applicant, in its notice to determine, has stipulated only one ground of opposition to a new tenancy. That is the ground contained in Article 12(1)(g), that the applicant intends to occupy the reference property for itself.
12. The applicant must, therefore, prove to the Tribunal that it has a firm intention to occupy the reference property and that it has the means to carry out that intention. It is, therefore, the intention of the applicant which is the sole focus of the subject reference.
13. At hearing, however, several other issues were raised and discussed. These include:
 - (i) Respondent not currently in occupation of the reference property
 - (ii) Respondent locked out of the reference property
 - (iii) The post office licence
 - (iv) Dilapidations
 - (v) Rent Review
 - (vi) Ms Hughes status within the applicant company
 - (vii) Respondent's occupation of alternative premises

14. Mr Atchison BL submitted that the Tribunal did not need to concern itself with any evidence as to dilapidations or issues in respect of the post office etc. He considered these to be ulterior matters which could and should be litigated in another arena if necessary and the sole focus of the Tribunal should be the ground in Article 12(1)(g) of the Order, the applicant's intention to occupy.
15. The Tribunal mostly agrees with Mr Atchison BL but the issues were raised and discussed at hearing so the Tribunal will deal with them, particularly with regard to any relevance they may have as to the applicant's intentions.

(i) Respondent not in occupation of the reference property

16. On 27th July there was a fire at the reference property and it has remained unoccupied since that date. Mr Lavery BL referred to Article 3 of the Order which stipulates that the premises are to be occupied by the tenant for the purpose of a business carried on by the tenant. He asked the Tribunal to note that since the fire the respondent was no longer in occupation of the reference property and was operating its business from alternative premises across the street. As such he submitted that the respondent was no longer subject to the protection of the Order with regard to the reference property.
17. Mr Atchison BL submitted that it was well established practice that a tenant does not lose the protection of the Order simply by ceasing physically to occupy the premises owing to fire or the like and they may well continue to be occupied for the purpose of the tenant's business although they were de facto closed to the public for some period of time e.g. where there is a need for repairs.
18. He further submitted:
 - (i) The respondent was continuing in occupation of the reference property for a business carried on by it.

- (ii) Owing to the fire the respondent is unable to openly trade from the reference property but it continues to claim and exert its right to occupancy and thereby continues to enjoy the protection of the Order.
- (iii) The respondent retains possession of the keys, has exclusive possession of the keys and retains fixtures and fittings.
- (iv) The respondent has asserted its rights for reinstatement under the lease.

19. Mr Atchison BL also pointed out that the occurrence of fire was an insured peril under Clause 11.1 of the lease and as such, pursuant to Clause 11.2, the applicant was responsible for “taking all necessary steps to make good as soon as possible damage to the property caused by insured risks”.

20. It was also not disputed that the respondent was up to date with its rental payments on the reference property and the Tribunal is satisfied, as per Mr Atchison BL, that the respondent is in occupation of the reference property and is, therefore, entitled to the protection of the Order.

(ii) Respondent locked out of the reference property

21. On 28th July, the day after the fire, the applicant changed the locks on the reference property thus preventing access to the respondent.

22. On 4th August 2023 this resulted in High Court action by the respondent. The High Court found in favour of the respondent on the basis that it enjoyed certain inalienable legal rights to be in occupation and possession of the reference property. These included:

- (i) it had an actual estate and interest in the reference property.
- (ii) which entitled it to exclusive possession including inter alia as against the applicant.
- (iii) the protection of security of tenure pursuant to the business tenancy.

(iv) the covenant expressly affording the respondent the right to “quiet enjoyment” pursuant to Clause 10 of the lease.

23. The judgment of the High Court confirmed the respondent’s unalienable rights with regard to the reference property and it has enjoyed possession and occupation since the judgment. The Tribunal considers, however, that this issue has no relevance with regard to the applicant’s intentions.

(iii) The post office licence

24. Ms Hughes gave evidence that the applicant has obtained a post office licence in 2004. She alleged that there was a verbal agreement with the respondent that it could use the licence for its period of occupation but the licence would be returned to the applicant at the end of the lease.

25. When questioned by Mr Atchison BL, however, Ms Hughes accepted that a post office licence was granted entirely at the discretion of the post office and it was not a transferable asset.

26. Mr Atchison BL also pointed out that there was no mention of a post office licence in the existing lease and any new lease was not contingent on a post office licence.

27. With regard to the applicant’s intentions, Ms Hughes accepted that it would be more difficult to trade the reference property without the post office licence but she asked the Tribunal to note that she had previously run the business without a post office licence.

(iv) Dilapidations

28. Ms Hughes advised the Tribunal that on 2nd May 2023 the respondent had been served with a dilapidations report claiming £249,212 dilapidations and a more recent report claiming £430,000 dilapidations.

29. On that basis she submitted that the respondent had failed to keep the reference property in good and reasonable repair, as required under the repairing covenants in the lease.
30. Mr Atchison asked the Tribunal to note that there was no evidence of any letters or communications to the respondent complaining about the state of repair and no proceedings had been issued.
31. The applicant, in its Notice to Determine, had not cited any breaches of lease covenants for its opposition to granting a new lease to the respondent. This issue is not therefore relevant with regard to the applicant's intentions.

(v) Rent Reviews

32. Ms Hughes advised the Tribunal that the lease provided for rent reviews after 3 and 5 years and she had been seeking a slight increase in rent but the respondent had failed to engage.
33. Mr Atchison BL noted that the applicant had been seeking a 20% increase in rent which was not a slight increase. He also pointed out that Clause 20.2 of the lease allowed for arbitration to settle rent review disputes and this had been offered by the respondent.
34. The Tribunal finds that this issue has no relevant to the subject proceedings.

(vi) Ms Hughes status within the applicant company

35. When questioned by Mr Atchison BL, Ms Hughes confirmed that she was not the owner of the applicant company and she did not hold any shares in the company. The Tribunal finds this to be of relevance to the subject proceedings and it will be referred to later in the Tribunal's judgment.

(vii) The respondent's occupation of alternative premises

36. Ms Hughes had suggested in her evidence to the Tribunal that the applicant had moved in to alternative premises across the street and its reason for not giving up the reference property was to prevent the applicant setting up in competition.
37. At hearing, however, Ms Hughes accepted that the premises currently being occupied by the respondent were much smaller and not on a par with the reference property. The Tribunal considers this issue to have no bearing on the subject proceedings.

The Applicant's Intentions

38. Ms Hughes advised the Tribunal that she had previously occupied the reference property as a convenience store and post office. In 2016, however, Ms Hughes had health issues which required her to take a break from the business and in 2017 she let the reference property to the respondent for a term of 6 years.
39. She stated that it was always her intention to reoccupy the reference property at the end of the current lease. She was content to go back in and "start from scratch". The Tribunal was also advised that, to that end she had a "new wholesaler on board".
40. She considered that the respondent had a grudge against her and was trying to prevent her from trading. She gave the Tribunal assurances that "she 100% intended to reoccupy the reference property for herself".
41. Mr Atchison BL submitted that the applicant had:
- (i) At best only a verbal agreement with a wholesaler. There was nothing in writing and there was no representative from the wholesaler company at the hearing to give evidence. There was no record of any supply agreements.
 - (ii) Nothing from the applicant company to confirm its intentions. There was no resolution from them and no record of a board meeting. There were no minutes

confirming the limited company's intentions with regard to their future occupation of the reference property.

- (iii) Nothing from the applicant's accountants to confirm the company's financial position.
- (iv) No business plan, particularly in light of the fact that the applicant did not have a post office licence.
- (v) No agreement with the post office.

The Tribunal

42. The Tribunal refers the following extracts from its decision in Cox v Clancy BT/14/2020 and which are relevant to the subject reference:

"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 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: *Renewals 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."

And

“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.”
43. In the subject reference, at a mention of the 12th May 2023, the Tribunal directed that the applicant should submit a “statement of case with proofs”. The Tribunal agrees with Mr Atchison BL there are absolutely no proofs before the Tribunal which confirm either of the applicant’s “subjective” or “objective” intentions.
44. Ms Hughes, who is a non-shareholding director of the applicant company, gave “100%” assurances that she intended to occupy the reference property. There was, however, nothing from the applicant company to confirm this. There was no board decision or minutes to confirm the company’s subjective intention.

45. In addition, even if they had that intention there was nothing to confirm that the applicant had a reasonable prospect of carrying out the intention. There was no confirmation of finance being available, no supply agreement with a wholesaler and no business plan.

Decision

46. On that basis the Tribunal finds that the applicant has failed to prove its ground of opposition to a new tenancy, as required under Article 12(1)(g) of the Order.

47. The primary purpose of the Business Tenancies Order is to afford protection to business tenants. That said, the Tribunal has no desire to prevent a landlord from obtaining possession of its holding when it has a genuine intention to occupy for itself.

48. The applicant's opposition to a new tenancy was premature to say the least. As in Cox v Clancy, however, the Tribunal considers that those issues "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".

49. The Tribunal will allow the parties a period of three months to agree the terms of a new lease. If these are not resolved within that period of time the Tribunal will convene a new hearing.

26th January 2024

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