LANDS 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/19/2000

BETWEEN

TING KIU TSANG MO & PIK YUK TSANG – APPLICANTS

AND

R BAMFORD & SONS – RESPONDENTS

Premises: 83 Saintfield Road, Belfast

Lands Tribunal – Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI

Belfast – 25th April 2006

1. The tenants used premises as a hot food carry out. They were held under a lease dated 29th April 1992. The contractual term of the lease expired in or about March 1998. From 1998 or earlier the landlord was contemplating a scheme to demolish these and adjoining premises and carry out a development on the site. The tenants were aware of this; and in late 1998 the tenants suggested a new 5-year lease subject to a landlord's redevelopment option to break after 2 years, together with a first refusal on new premises in the development. That was not accepted. Negotiations in regard to the prospect that the tenants might be offered and might take a lease of new premises in the development continued and remain part of the context.

2. In August 1999 the landlord served a Notice to Determine under the Business Tenancies (NI) Order 1996, which opposed a Tenancy Application on grounds of Article 12(f)(i) of the Order ie

   > "that on the termination of the current tenancy the landlord intends to demolish a building or structure which comprises or forms a substantial part of the holding and to undertake a substantial development of the holding".

   On 21st February 2000 the tenants made a Tenancy Application to this Tribunal.

3. On 11th April 2000 the Landlord applied for planning permission for development and in January 2001 consent was obtained. In April 2002 the landlord gave instructions to his architect to proceed with the project, and by July 2002 evidence that adequate funding was available was produced. The application was adjourned generally. At or about the end of November 2002 the tenants quit the holding without formality and in or around March 2003 the premises were demolished. On 13th September 2004 a lease of a unit in the new development was made. In that lease there are some differences in the personalities of landlord and tenant but none that are of material consequence for the purposes of this application.

4. In October 2004 the tenants indicated that they were minded to apply to withdraw the Tenancy Application and on 28th February 2005 they made formal application for leave to withdraw. The landlord does not oppose the application in principle but the parties have been unable to reach agreement on terms as to costs and otherwise. Although Article 12(f)(i) is a compensatory ground, the landlord claims that the tenants are not or should not be entitled to compensation and that it is entitled to its costs.

5. The Tribunal first turns to the question of compensation. In Lloyds Bank Limited v City of London Corporation [1983] Ch.192 the Court of Appeal in England confirmed that it is within the court's jurisdiction to impose, as a term of permitting withdrawal, a condition that the tenant does not seek compensation. However, in this case the landlord further suggests that the tenants are not entitled to compensation and therefore the exercise of the Tribunal's discretion does not arise.

6. So far as is relevant Article 23 of the 1996 Order provides:

"(1) Where a landlord—

(a) has served—
  (i) a notice to determine a tenancy to which this Order applies, or
  (ii) in response to the tenant's request for a new tenancy, a notice under Article 7(6)(b) stating that he will oppose a tenancy application by the tenant,
  (iii) and the notice states that a tenancy application by the tenant would or will be opposed, on any of the grounds specified in sub-paragraphs (e), (f), (g), (h) and (i) of paragraph (1) of Article 12; and

(b) either—

(i) *in consequence of the landlord's notice* the tenant does not make a tenancy application or, if he has made such an application, withdraws it, or

(ii) on hearing a tenancy application by the landlord or a tenancy application by the tenant, the Lands Tribunal, on any of the grounds mentioned in sub-paragraph (a), grants the former application or dismisses the latter; and

(c) the circumstances are such that paragraph (7) does not apply,

then, subject to the provisions of this Order, the tenant shall be entitled on quitting the holding to recover from the landlord by way of compensation a sum determined in accordance with the following provisions of this Article."

Tribunal's emphasis.

7. The landlord contends that

   (a) Article 23 should be interpreted as stipulating a sequence of steps over time because the word "then" should be given its meaning as an adverb of time rather than contingency (ie meaning "the next step" rather than "in that case"). As the tenants have failed to withdraw their application prior to quitting the holding, they have lost their right; and

   (b) The reason for the application to withdraw is not "in consequence of the landlord's notice"; it is because the tenants have been granted a lease of a unit in the new development. The proximate or direct cause is not the landlord's notice and in the circumstances they are not entitled to compensation.

8. The tenants contend that

   (a) The word "then" in effect relates to "quitting the holding".

   (b) The words "in consequence of the landlord's notice" have no particular significance and do not import the concept of causation.

   (c) The grant of any new lease is irrelevant.

9. The Tribunal was referred to a number of authorities and also a report - *Business Tenancies* the report of the Law Reform Advisory Committee for Northern Ireland LRAC No. 2, 1994 which led to the 1996 Order, an article in a legal journal - *Compensation for disturbance under the Business Tenancies (NI) Order 1996 – Some*

Queries (2002) 53 NILQ 100 by Norma Dawson, Professor of Law, QUB and a textbook - *Business Tenancies in Northern Ireland* (1994) Dawson.

10. In the Report the committee refine compensation as meaning compensation for the loss of the right to a new tenancy.

11. The Tribunal disagrees substantially with both parties' contentions.

12. Article 23 differs significantly in detail from the recommendations in the Report for changes to the Act of 1964 but the Tribunal is of the view that the primary mischief that the changes to the Article seek to address is clearly that of unnecessary and wasteful applications to the Lands Tribunal. These were required under the earlier Act, as a formal refusal of a grant of a new tenancy was required to secure the right to compensation. An interpretation of Article 23 that reduces the need for applications should be preferred thus improving what was already "simple and mechanical formulae" (per Professor Dawson in the textbook).

13. Clearly the word "then" is capable of more than one meaning. It may be used as an adverb of time ('at or after that time') perhaps requiring steps to be taken in a particular sequence or it may be used in the sense of contingency ('in that case').

14. Where, as here, a sentence takes the form 'Where … condition (a) and … condition (b) etc then … (c).' then the word is more likely to import the sense of contingency.

15. The Tribunal does not accept that word "then" in effect relates to "quitting the holding" in a sense of timing because the point in time at which the entitlement to payment crystallises is already defined by "on quitting the holding". If the word is interpreted in that sense it adds nothing. Further as a matter of syntax "then" would appear instead to qualify the intervening phrase "shall be entitled". As the time at which the entitlement crystallises is defined later ("on quitting etc.") if the word is to have any meaning then it is more likely to have the sense of contingency rather than timing.

16. Where, as in this case, a tenant applies to the Tribunal to withdraw a Tenancy Application and the application is opposed the tenant does not have unilateral control over when it is withdrawn. If it were a requirement that quitting must follow withdrawal

in time then there would be a risk that unnecessary and wasteful applications would be replaced by unnecessary and wasteful overholding pending the outcome of the proceedings. Why should the tenant's right to compensation for loss of his tenancy depend on him remaining in occupation until the landlord consents to or the Tribunal orders withdrawal of the Tenancy Application, if one has been made? The Tribunal cannot see the merit in a construction that leads to this result and does not accept that the wording compels this conclusion.

17. The Tribunal therefore prefers the sense of contingency rather than timing.

18. The Tribunal now turns to the expression "in consequence of the landlord's notice". In the Article Professor Dawson refers to it as a rogue phrase that has crept in. In *Reynolds & Clark – Renewal of Business Tenancies (2002)* a textbook dealing with the equivalent English legislation, which does not include the phrase, at 11.1.2.4 the learned authors suggest it is implied. Professor Dawson questions whether the words now require additional proof from a tenant or whether it will be presumed that the tenant failed to make, or later withdrew, a tenancy application *in consequence of the notice*. Among other things she points out that if this is to be presumed the words become otiose, unless, of course, the presumption is rebuttable.

19. The words "in consequence of" are capable of a range of meaning. At one end of the scale they could mean only the proximate cause and not a remote cause and at the other end they could include an action or in-action that was barely traceable to the event. The more strict interpretation of the phrase where it occurs in maritime insurance contracts (see eg Hall brothers Steamship Co v Young [1939] 1 K.B. 748) may be contrasted with the more generous statutory interpretation in the compulsory purchase cases (see eg Prasad v Wolverhampton BC [1983] 2 All ER 140 CA).

20. Having regard to the primary mischief that the changes are intended to address, the Tribunal sees no reason to adopt a narrow interpretation that would encourage litigation on causation with all the associated difficulties. But it accepts that it could not have been intended that a tenant should obtain compensation for the loss of the right to a new tenancy where that loss was unconnected with the notice.

21. It is dangerous to speculate. But suppose a landlord had commenced proceedings for re-entry or forfeiture for breaches of covenant, perhaps relating to non-compensatory grounds, and then serves a protective Notice to Determine on both compensatory and non-compensatory grounds. If the landlord succeeds in the first proceedings, then the presumption might be rebutted; where the right to a new tenancy had already been forfeited along with the right to the current tenancy then it would seem to be contrary to the purpose of the legislation to compel the landlord to compensate the tenant for the loss of that right.

22. The Tribunal therefore prefers the broad interpretation of a rebuttable presumption that if a tenant failed to make, or later withdrew, a tenancy application he did so in consequence of the notice. That maintains a simple scheme that should not require unnecessary and wasteful applications in the ordinary case but protect landlords against having to pay compensation in the exceptional case where it can be shown that the action or in-action was not in consequence of the landlord's notice.

23. In the instant case the tenants began preparations for relocation before the Notice to Determine was served. In the circumstances it was no more than prudent that they should do so. The fact that the tenants wished to take and eventually took a new tenancy in the development does not displace or sever the traceable link between the Tenancy Application, the application to withdraw and the landlord's notice.

24. That being so, the conditions for entitlement to compensation will be completed when the Tribunal permits the tenants to withdraw their application.

25. In regard to the exercise of discretion Templeman LJ said

> "In my judgment, when a tenant applies for leave to discontinue an application for a new tenancy, the correct judicial principle which the Court ought to apply in considering the exercise of its discretion under Ord.21, r.3 involves the Court in enquiring whether the landlord had been prejudiced. The fact that the landlord will be obliged to pay compensation is not in itself evidence of prejudice because the Landlord and Tenant Act 1954 provides for compensation to be paid if the landlord has served the counter-notice."

26. In that case Templeman LJ goes on to consider whether the landlord has been prejudiced by delay or events. This Tribunal sees no reason to depart from that approach and in this case does not find any evidence that the landlord has been prejudiced so as to justify withholding the right to compensation. The Tribunal imposes no condition affecting the landlord's obligation to pay such compensation.

27. The landlord claims its costs because the tenants are seeking to withdraw their tenancy application and are therefore acknowledging that they were unlikely to succeed on the substantive issues (see Napier & Others v Nurse [1996] R/1/1996 and Priestly v Brown [1997] BT/8/1996). Costs should follow the event unless there are special circumstances connected with the proceedings that would warrant a departure from that general rule (see Oxfam v Earl & Others [1997] BT/3/1995).

28. The tenants say that the landlord did not put sufficient cards on the table at the appropriate time (see NIHE v Extravision [2000] BT/60/1999). The landlord says that each time a card was dealt to it, it was immediately placed face up on the table. The Tribunal accepts that there were no cards kept hidden by the landlord but on the other hand it is clear that the landlord was not dealt sufficient cards to comply with Article 12(f)(i) until about July 2002. The Notice to Determine may have been premature but even if it was not, the tenants were quite entitled to wait to see if the landlord's intentions crystallized before they decided between going on or withdrawing.

29. The landlord further suggests that as the tenant had attempted to link the negotiations of the terms of the new lease in the development with the tenancy application proceedings, some of those costs are costs of and incidental to the proceedings and should be recoverable. Doing the best it can with the material in front of it, the Tribunal concludes that the negotiations for the new lease were a separate strand of bargaining between the parties and none of the related costs should be treated as incidental to the proceedings. Even if they were that might be regarded as a discrete issue and it would not necessarily follow that the landlord should be regarded as having succeeded.

30. On balance the Tribunal accepts that, by virtue of the tenant's application to withdraw, the landlord should be treated as having succeeded. But as the landlord was not in a

position to comply with the Article until July 2002, it should not recover costs from before that date.

31. Accordingly the Tribunal orders that the tenants are permitted to withdraw their application on condition that they pay the costs of the landlord in connection with the application from 31st July 2002 until 28th February 2005 when the tenants made formal application for leave to withdraw.

ORDERS ACCORDINGLY

9th October 2006 **Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI**
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances

Applicants: Brian T White of Comerton & Hill, Solicitors.
Respondents: H T Shaun Fisher of Crawford & Lockhart, Solicitors.

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ADDENDUM

In the Matter of Costs

1. The parties were unable to agree the assessment of costs. They were invited to and did make written representations to the Tribunal. The landlord claimed £1,824.98 plus VAT for professional charges.

2. The Tribunal has reviewed the landlord's solicitor's file and although it is not complete in regard to the detail of some of the attendances, the Tribunal accepts that the costs sought are reasonable and closely reflect the relevant work done.

3. The landlord also claimed a later disbursement in obtaining a certified extract from the Valuation List dated 6th November 2006 setting out the Net Annual Value for purposes of computation of compensation under the Order. The disbursement was incurred outside the period for which costs have been awarded and, in accordance with the Tribunal's decision on allocation, is not allowed.

4. The Tribunal assesses the relevant costs at a lump sum of £1,800 plus VAT at 17.5% £315.00 – Total including VAT £2,115.

ORDERS ACCORDINGLY

16th May 2008 **Michael R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI**
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:

Applicants: Brian T White of Comerton & Hill, Solicitors.
Respondents: Lisette Watson of Crawford & Lockhart, Solicitors.