LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

BUSINESS TENANCIES ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

BT/33/1998

CAMPBELLS (CATERERS) LIMITED - APPLICANT/TENANT

AND

SCOTTISH PROVIDENT INSTITUTION - RESPONDENT/LANDLORD

RE: 11 DONEGALL SQUARE WEST, BELFAST

Lands Tribunal - Mr Michael R Curry FRICS FSVA IRRV ACI.Arb

Belfast - 23rd October 1998

In 1993, a landlord, Scottish Provident Institution ("The Institution") served a Notice to Determine, under the Business Tenancies Act (NI) 1964, on a tenant, Campbells (Caterers) Limited ("Campbells"), of ground floor premises ('the shop') in Belfast City centre. The current lease was made on 6th December 1989. The Institution did not oppose the grant of a new tenancy, Campbells were not willing to give up possession and, to allow time for negotiations, an open ended extension of the time limit, for the lodging of an application to this Tribunal, was agreed. Differences could not be resolved and, at the beginning of June 1998, Campbells made application to the Tribunal.

There was an issue in connection with the user covenant in the new lease and the parties asked the Tribunal to determine that as a preliminary point. The indications were that the potential advantages of doing so would far outweigh the potential disadvantages, so the Tribunal agreed.

Mr Mark T Horner QC instructed by Messrs Peden & Reid, Solicitors, appeared for Campbells. Mr Nicolas Hanna QC appeared for the Institution.

The current lease contained a covenant on behalf of the tenant:

> "to use the demised premises as a cake shop and tea shop only..."

That was qualified by a restriction:

> "... and not to cook or permit to be cooked any food in the demised premises or any part thereof".

Mr Langley Humphreys, Director and Company Secretary of Campbells, gave evidence by way of a written statement. Campbells were bakers and restaurateurs, having been established in 1933. They had occupied the shop for some 40 years and also operated a restaurant at Arthur Street, nearby, and a bakery and stores at Mount Street, Belfast. He said that cooked food sold in the shop was always cooked elsewhere, at those other premises, before being transported to the shop. During this and the previous lease, their sales had included hot food, not cooked at the shop, but brought in warm and kept warm, or reheated or heated only, often by microwave. Examples included sausage rolls, scones, soup, stew, toasted scones and tea cakes. They did not cook breakfasts or similar meals.

In connection with the management of the building, rent reviews and the previous lease renewal, Mr Wylie of the Institution's agents, Messrs A & R A Wylie, Young & King, had inspected the activities being carried on without complaint or adverse comment. The Institution was fully aware of what was being done, through his inspections.

The question, as put to the Tribunal, was which of the following clauses should be included in the renewal lease as the tenant's user covenant?

1. Not without the prior written consent of the landlord (such consent not to be unreasonably withheld or delayed) to use the demised premises otherwise than for the sale (for consumption on or off the demised premises) of hot or cold food or drink. or

2. Not to use the demised premises otherwise than for the sale (for consumption on or off the demised premises) of hot and/or cold food and drink and without prejudice to the generality of the foregoing the tenant may heat food cooked elsewhere for sale on the demised premises, but may not cook food on the demised premises.

For the purposes of determining this preliminary point, the parties agreed that the Tribunal assume that the former would result in a significantly greater rent.

Campbells said that the potential effect of that greater rent was compounded by an 'Offer back' provision in the current lease: if, for instance, they found it difficult to meet the new rent from their business, the effect of the alienation covenant apparently would be to compel them to offer a free surrender to the Institution.

The Tribunal has reservations about whether such an 'Offer back' provision escapes the anti-avoidance provisions of the Act. In any event, it finds it very difficult to envisage circumstances in which it would approve such a provision in the new lease that would now be made after the coming into operation of the Business Tenancies (NI) 1996 Order, requiring approval by this Tribunal of agreements to surrender. For purposes of the preliminary point it assumes there will be no such provision in the new lease.

The competing proposals may conveniently be analysed as follows:

Apart from a slight drafting difference, there was no dispute about part, 'the Core':

> "Not ... to use the demised premises otherwise than for the sale (for consumption on or off the demised premises) of hot and cold food and drink ...".

Campbells proposed the following, (for convenience only) 'the Clarification':

> "... and without prejudice to the generality of the foregoing the tenant may heat food cooked elsewhere for sale on the demised premises, but may not cook food on the demised premises".

The Institution proposed a provision permitting change of user, 'the Consent for Change':

> "[Not] without the prior written consent of the landlord (such consent not to be unreasonably withheld or delayed) ...".

Mr Horner referred the Tribunal to a number of authorities. Section 16 of the Act mirrors Section 35 of the equivalent English legislation, the Landlord and Tenant Act 1954. The leading case was O'May & Others v City of London Real Property Company Limited (1982) 1 All ER 660 and that had been followed by this Tribunal in McLean v Scottish Provident Institution (BT/80/1986). He also referred the Tribunal to some of the earlier cases considered in O'May and a discussion in a textbook; "Renewal of Business Tenancies" by Reynolds and Clarke 1997. The cases were Gold v Brighton Corporation (1956) 3 All ER 442, Cardshops Limited v Davies & Another (1971) 2 All ER 721 and Charles Clements (London) Limited v Rank City Wall Limited (1978) 1 EGLR 47.

Mr Hanna took no issue with the law as stated by Mr Horner: it was clear and well settled.

There was no real dispute about the Core. Use as a "cake shop and tea shop" is updated to a modern equivalent, in the context of the actual user: "the sale (for consumption on or off the demised premises) of hot and cold food and drink".

Mr Hanna made no concession but made no submission in regard to the inclusion of the disputed Consent for Change proposal.

The principles in the authorities are clear and, in these circumstances, the appropriate conclusion is beyond dispute. The desire to increase the rent is a perfectly legitimate negotiating objective for a landlord but not by forcing on a tenant an unwanted advantage that, in the circumstances, would have conferred no real benefit on him and to which he did not agree. Campbells did not want the qualified consent, did not need it for the purpose of protecting them in their character as the occupying tenant carrying on their trade at the shop, it would increase the rent and there was no special reason for it. The Tribunal must reject the Institution's proposal for the inclusion of Consent for Change of user.

Mr Horner submitted that the question in the preliminary point, as put to the Tribunal, obliged it to make a flip flop choice between the two options, each as a whole. If the Tribunal were to reject the aspect of the proposal dealing with Consent for Change, the whole of the Institution's proposal must be rejected, the Tribunal compelled to adopt Campbell's proposal and that would be the end of the matter. But, there was a difference as to the extent of agreement between the parties in regard to the options put forward.

Further, Mr Hanna submitted that the Tribunal could not be fettered to such a choice and retained a residual discretion.

The Tribunal often derives considerable assistance from the efforts made by parties to crystallize their own proposals in a composite and complete fashion and would not wish to discourage that practice and instead encourage deliberate ambiguity and obscurity.

In particular circumstances, for example when sitting as an arbitrator, the Tribunal may find it is bound to make a flip-flop choice on an issue (see the example in Trustees of Henry Smith's Charity v A.W.A.D.A. 47 P&CR 607 given by Sir John Donaldson M R at 615) and generally it will be slow to depart from clear proposals that suit the parties, with their intimate knowledge of the background, without good reason to do so. But the Tribunal as a Court must be presumed to retain a discretion. It would conclude it was confined to such a choice only in circumstances where the parties had a clear power to exclude the Tribunal's jurisdiction, and even then only on the basis of an express agreement between the parties in plain words or if otherwise compelled to do so. In this reference, it is not clear that there was a meeting of minds to attempt to confine the choice to a flip-flop, and further, although slow to disturb agreement between the parties, the Tribunal also considers it retains a discretion. That is, of course, quite a different matter from the parties' power to exclude the jurisdiction of the Tribunal by reaching agreement on actual rent, duration and other terms, as provided for in the Act.

The question then is whether the Core is to be qualified by the Clarification. The Institution's proposal, to include the Core only, represented a change in permitted user: the ban on cooking was to be removed. Campbells' proposed Clarification relied on making a difference between the cooking and heating of food. Was there one? Were both parties seeking a change of permitted user and, if so, how were the competing proposals to be balanced? Was Campbells' proposal workable, or contrived and impractical? Was the Institution's proposal reasonable and sensible practice? What were the consequences, if any, of Campbells heating food, unhindered for years, at the shop? For the same reasons the Tribunal rejected the Consent for Change, must it reject the removal of the ban on cooking?

The crucial question was whether it was possible to make a real distinction between cooking and heating.

The Institution said any heating of food was cooking and so both the current and the proposed were very restrictive provisions. Heating was necessarily cooking: there was no distinction. Mr Hanna relied on abstracts from the Shorter and Oxford English Dictionaries, in which the definitions of cook included 'to prepare or make fit for eating by application of heat'. If cooking was forbidden so also was any heating, so Campbells' proposal would prevent it carrying out what it wanted to do. He substituted his dictionary definitions for the word "cook" in the Campbells' Clarification to show it produced a nonsense.

Mr Horner pointed out that the O E D definitions included the phrase "to make fit for eating". So once food was cooked, it was fit for eating but it could then be reheated: the distinction was easily drawn. The application of heat did not necessarily constitute cooking. Examples were preparing coffee and warming soup and, on one view, preparing tea itself. Reheating food by microwave did not involve the application of heat.

Mr Hanna said Campbells could still make tea because cooking was applying heat to food, not water and tea was a beverage.

Campbells said that the very real and easy distinction between cooking and heating was one that had been accepted by the landlord for at least the term of the current lease. If cooking was synonymous with applying heat then the current wording would have prevented hot apple tart, tea cakes, pies etc. being sold. In practice both parties had been able to draw a distinction between food being cooked and food being heated. The distinction was obvious and, for example, Campbells had been, and should continue to be allowed to heat soup and sausage rolls prepared elsewhere but would not be allowed to make soup or sausage rolls on the premises.

The Institution's proposal to include only the Core would give Campbells the unrestricted right to cook food.

The Tribunal accepts that the Core without the Clarification is a practical and reasonable user provision.

The Tribunal concludes that although cooking involves heating (and it does not accept that processing in a microwave does not, in the ordinary use of language, amount to heating),

heating, in everyday language, may or may not result in cooking. Cooking irreversibly changes the state of the food from uncooked to cooked and not all heating gives rise to that change in state, for example, as here, if heat is re-applied after the food already has been cooked. The examples indicate that difficulties, if any, were only likely to arise if ordinary words were given a highly technical rather than everyday meaning, and only if that technical interpretation were correct.

If a tenant is to be prevented

> "from using the premises in the future in the way in which he has used them in the past, it is for the landlord to justify the restriction: and there ought to be strong and cogent evidence for the purpose"
>
> (see Gold v Brighton Corporation).

> "There must in my view be a good reason based in the absence of agreement on essential fairness for the court to impose a new term not in the current lease by either party on the other against his will. Any other conclusion would in my view be inconsistent with the terms of the section. But, subject to this, the discretion of the court is of the widest possible kind, having regard to the almost infinitely varying circumstances of individual leases, properties, businesses and parties involved in business tenancies all over the country" (see O'May).

Although the primary policy of the Act is to protect the tenant in his business, that object cannot be considered in isolation from what he is permitted to do under the current lease. If a tenant's business involves a substantial breach of the user provisions in the current lease, when the fundamentally important test of essential fairness is taken into account, the Tribunal would require very persuasive reasons to justify an amendment to permit a forbidden use. To refine the statement of the policy of the Act, it is not to protect any business of a tenant but rather the tenant in his permitted business. That being so, in this case, the actual user cannot be considered in isolation and regard must be had to the current user provisions.

In the current lease the parties had agreed to qualify a use, as a cake shop and tea shop, which would ordinarily have permitted cooking, by a restriction not to cook any food in the

shop. There was no evidence about the origins of that agreement and whether it was made against a background of possible nuisance, possible adverse effects on services, estate management considerations relating to the protection of other tenants or other reasons.

Mr Horner submitted that the tenant's proposal for changed words did not represent a change of permitted user but simply an updating of the definition to reflect modern circumstances, thereby avoiding petrification. The description "a cake shop and tea shop" was somewhat anachronistic. The proposed clause was not a radical change, it was merely a clarification.

1It is inevitable that some terminology will not survive unscathed the passage of time, social and technological change but it follows that updating terminology is almost certain to lead to some difference in meaning. It was not disputed that the user in the current lease reflected the language of a different era but the Tribunal finds Campbells' Clarification of the Core to be so similar in effect that it must be treated as not representing any change of any significance. On the other hand the Institution's proposal to exclude any restriction on the Core would be a very significant change.

Mr Hanna submitted that the mere fact that the landlord had acquiesced in the past did not affect the future but, whether or not allowed under the provisions of the current lease, Campbells were permitted, without any objection, to use the premises in the way they did.

Although that may not be a safe guide to construction of the current provisions, the significance is this. There is no indication that the distinction the Tribunal has found, between heating and cooking, has caused any problems over decades. Having reached the conclusions it has with regard to the construction of the user provisions, the issue of any difficulty in policing the Clarification is answered by the absence of disputes over decades: the previous equivalent can be assumed to have worked quite well.

The Tribunal finds that qualifying the Core by the Clarification does not result in a nonsense. It is satisfied that the Core and Clarification are sufficiently wide in their combined effect to adequately encompass the permitted business, no more nor no less, and to protect it to the appropriate extent.

Mr Hanna submitted that Campbells said their business had changed and they wanted to do something they could not do on a strict interpretation. Campbells could not say he was seeking no change. He accepted the O'May principle but distinguished the circumstances because in that case the tenant was resisting change whereas in this case both Campbells and the Institution were arguing for change. The competition was as to which was more appropriate and O'May underlined the unfettered discretion of the Tribunal, apart from the requirement to have regard to the terms of the current tenancy.

There is a distinction between heating and cooking and, having regard to the provisions in the current lease and the absence of objection by the Institution over the years, the Tribunal is not persuaded that the business of the tenant offended against the current provision, or that the distinction is unworkable. The Tribunal finds there was no material change in the user being sought by Campbells so there was no onus on them to justify a change.

It was not a question of which was the better proposal for change. But, for the avoidance of doubt, even if Campbells' proposal were regarded as a change, it would be insignificant in comparison with the Institution's proposal to give Campbells the right to cook food. Campbells did not want that, did not need that to protect themselves in their business and it would result in an increased rent. The Institution's unqualified Core goes too far beyond the scope of the current user and, if it were a question of balance, the Tribunal would clearly prefer the Campbells' proposal.

The Tribunal concludes that the permitted business is satisfactorily described in the Core qualified by Campbells' Clarification. It is a practical and workable clarification and is sufficient to protect the tenant's permitted business. The Tribunal determines, as a preliminary point, that a clause to the following effect shall be included in the renewal lease as the tenant's user covenant:

> "Not to use the demised premises otherwise than for the sale (for consumption on or off the demised premises) of hot and cold food and drink and without prejudice to the generality of the foregoing the tenant may heat food cooked elsewhere for sale on the demised premises, but may not cook food on the demised premises."

When all the other terms of the new lease are agreed or determined, if that form of words presents a difficulty when placed in context, the Tribunal will consider an appropriate application.

ORDERS ACCORDINGLY

27th November 1998 **Mr Michael R Curry FRICS FSVA IRRV ACI.Arb**
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:

Mr M T Horner QC instructed by Messrs Peden & Reid, Solicitors for the Applicant.

Mr N Hanna QC instructed by Messrs Cleaver Fulton & Rankin, Solicitors for the Respondent.