

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/33/2011

BETWEEN

SAMUEL STRANAGHAN & MICHAEL SIMPSON – APPLICANTS

AND

IRIS MAY TOWNSLEY – RESPONDENT

Re: 1a Castle Street/1 High Street, Carrickfergus

PART I

Lands Tribunal - Mr M R Curry FRICS Hon.Dip.Rating

Background

1. Prior to Mr Pollock's death in 1985, he and his wife (now Mrs Townsley – the respondent) occupied a small ground floor unit, at 1a Castle Street/1 High Street, Carrickfergus, for the business of an amusement arcade. They also owned the remainder of the building. In addition they had another arcade at Whitehead. After he died, the business was operated for a time by Mrs Townsley. She had support from her late husband's friend, a Mr Townsley (now her husband). In about 1992, she let the premises to Messrs Stranaghan and Simpson (the applicants) for a term of 20 years from January 1992 and moved, with her family, to Florida. She became a US citizen and she and Mr Townsley have been business partners there for the last 14 years or so. They have been married for about 9 years. They return regularly to Northern Ireland.
2. The premises are on a corner. The glazed primary frontage is to High Street and the former widow openings in the return frontage (to Castle Street) have been obscured (boarded over). The remainder of the building currently is let in parts by Mrs Townsley to a taxi business, a drug and alcohol advice centre and, on the upper floors, a bridal wear boutique.
3. Messrs Stranaghan and Simpson continue to occupy the premises as a small amusement arcade trading as one of their "Twilight Zone" amusement centres. They also have a business as suppliers of gaming machines.

4. In April 2011, with the contractual term of the current lease coming to an end, they requested a new tenancy. In response Mrs Townsley objected on the grounds set out in Article 12(g) of the 1996 Order, namely that:

“... on the termination of the current tenancy the landlord intends that the holding will be occupied for a reasonable period ... for the purposes, or partly for the purposes, of a business to be carried on in it by [her] or by a company in which [she] has a controlling interest.”

Procedure

5. The Tribunal received:
- Written material from the respondent (see below);
 - A response, from the applicants, to the written material;
 - Oral evidence from Mrs Iris May Townsley, Mr Thomas Edward Townsley, and one of the tenants - Mr Michael Simpson; and
 - Submissions from Mr John Coyle BL and Ms Jacqueline Simpson BL.
6. In accordance with the usual directions of the Tribunal, Mrs Townsley had been directed to provide, in advance of the Hearing, any written material on which she intended to rely to substantiate her intentions. Before the Hearing, she produced:
- Gaming Machine Licences or Renewals from 1987, 1989 and 1991;
 - A draft application, prepared in August 2011, for transfer of the current Amusement Permit for the premises;
 - A quotation for replacement windows and partitioning; and
 - Bank statements for 2 accounts held in a bank in Orlando, Florida.
7. Later, at the Hearing, she produced ‘Lists of Entries’ (both dated December 2011) for 2 accounts held by her in a bank in Northern Ireland.
8. From its viewing the Tribunal noted the approximate size of the premises, the number of gaming machines (about 20) and their arrangement. It also noted the other occupiers of the building. Representatives for both parties were present, informed of these observations and were given an opportunity to comment. Neither did so.

Positions

9. Mr Coyle BL suggested that the evidence available demonstrated a genuine and settled intent with a reasonable prospect of implementing the intention. Ms Simpson BL suggested it did neither.

Discussion

10. The Tribunal was referred to:

- The Business Tenancies (NI) Order 1996;
- Cunliffe v Goodman [1950] 1 All E R 720;
- Betty's Cafés Ltd v Phillips Furnishing Stores Ltd [1959] AC20;
- Capocci v Goble [1987] 2 EGLR 102;
- Mirza v Nicola [1990] 30 EG 92;
- Dolgellau Golf Club v Heart [1998] 2 EGLR 75;
- Patel v Keeles [2009] EWCA Civ 1187;
- Somerfield Stores Ltd v Spring (Sutton Coldfield) Ltd [2010] EWHC 2084 (Ch);
- Tarwood Ltd v Giordano [2010] BT/38 & 39/2009;
- Dawson: *Business Tenancies in Northern Ireland* SLS 1994; and
- Hill & Redman's *Law of Landlord and Tenant* Loose-leaf.

11. The Tribunal also referred the parties to:

- Cox v Clancy (Part 1) [2010] BT/14/2010.

12. In Betty's Cafés [1959], the House of Lords adopted 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”.

And later:

“In the present case ... neither project moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision”.

13. There is a 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. The first aspect is a high hurdle; the second aspect – “a reasonable prospect” – is a low threshold.

14. The amount of time Mr and Mrs Townsley spend in Northern Ireland has varied over the years. Mrs Townsley has a family home in Larne. In recent years they have been returning regularly to obtain NHS treatments and prescriptions, in light of the costs of health care in Florida.

15. The Tribunal accepts that Mrs Townsley had a vision for an amusement arcade business at the premises. She wished to cater for a more up-market customer by making the premises more pleasant - she would fit plush carpeting, provide coffee and sandwiches and open up the outlook towards Carrickfergus Castle. She would not return to reside in Northern Ireland but instead would continue with their business in Florida and operate the arcade business in Northern Ireland using a combination of return visits, direct monitoring of the gaming machines through internet links and with support from her husband and perhaps also her son and daughter.
16. Mr Townsley had other ideas including making use of a part of the pavement (which apparently was owned by Mrs Townsley) for other coin operated vending machines and ideas from Florida for other coin operated machinery. Clearly these were no more than ideas for the future.
17. The Betting Gaming Lotteries & Amusements (NI) Order 1985 and the Betting and Gaming (NI) Order 2002, require authorisation for gaming by means of gaming machines at premises. In support of that Mrs Townsley produced a draft application form seeking approval for a transfer of the licence that belonged to Messrs Stranaghan and Simpson (they were unlikely to agree) and in her former name – Mrs Pollock. But it was not suggested that Mrs Townsley would have any personal difficulty in obtaining an amusement permit.
18. For many years Mrs Townsley, originally with her husband, then on her own, and later with Mr Townsley, had operated an arcade business from these premises. So, in fact they had experience of the business in these premises, but that was 20 years ago. Now, in Florida, Mrs Townsley and Mr Townsley had a full-time business in buying, refurbishing and selling or renting out property. He was a builder and she dealt with furnishings and the book-keeping. They clearly were experienced in business.
19. The Tribunal was told that recently Mrs Townsley and Mr Townsley had visited the premises and sought to obtain trading information from the employees of Messrs Stranaghan and Simpson. That had been refused and following a solicitor's letter, Mrs Townsley had undertaken not to enter the premises for any purpose other than that permitted under the lease.
20. It appears that if Mrs Townsley is successful in her opposition, Messrs Stranaghan and Simpson would intend to transfer their Twilight Zone business to other premises. So Mrs Townsley could not assume that their goodwill or customers would remain behind. Mr Townsley said that he had identified another leading supplier of gaming machines in Northern Ireland. They had made contact with that company and would rely on the supplier's advice in

regard to choice of machines. They were as yet undecided as to whether they would rent machines or install them on a profit sharing basis. Particularly in regard to the latter option, the Tribunal accepts that it is reasonable to assume that the machines themselves would be profitable. But there was no evidence that Mr and Mrs Townsley had made any estimate of net revenue for either option (or for machines incorporating an internet monitoring facility) in these circumstances.

21. Mrs Townsley said that she and Mr Townsley had visited a considerable number of other arcades in Northern Ireland, and had taken photographs of their interiors. That supports the view that they had renewed an interest in the amusement arcade business. But they produced no evidence as to whether or not, or how their visits and photographs supported their ideas for the positioning of the business in the market, catering, fitting out, furnishing, restoring the windows or remote monitoring through internet links. Although the idea of reinstalling the glazing might improve the prospect towards the Castle, and Mr and Mrs Townsley had visited many other arcades, there was no evidence that they had explored whether such exposure would or would not appeal to the more up-market customer she intended to attract. Nor was there evidence they had considered what effect, if any, replacing the obscured perimeter wall with glazing would have on the number of machines that would be installed.
22. In regard to refurbishment of the premises Mr and Mrs Townsley had obtained a quotation for unquantified glazing and partitioning. He thought that the premises required a substantial amount of building work – perhaps £7,000 to £10,000. It was suggested that Messrs Stranaghan and Simpson had obstructed any attempt to prepare more detailed plans. But with Mr and Mrs Townsley's knowledge of the premises and their experience of building and fitting out, they should have been able to give more comprehensive estimates of approximate total costs.
23. In summary, despite their stated experience of business projects in Florida, Mr and Mrs Townsley did not produce any evidence that they had considered even broad estimates of the revenue, costs, capital requirements or viability of the proposed new business.
24. There was no evidence that they had explored the practicability or otherwise of managing a coin operated gaming machine arcade business through internet links.
25. There was no evidence that Mrs Townsley had made any enquiries as to compliance with any regulations or other provisions that might apply to premises providing catering.
26. Mrs Townsley produced Bank statements from some six months earlier (one dated June 2011, the other July 2011) for 2 accounts held, one jointly with her husband, in a bank in Orlando,

Florida. Their business had been affected by the downturn in the property market. In terms of funds available in Northern Ireland the evidence was limited to a 'List of Entries' for December 2011 only for 2 accounts held by her in a bank in Northern Ireland.

27. The Tribunal does not accept that Mrs Townsley's proposed replacement windows with a view to providing a more attractive return frontage to the building as a whole is of much assistance in assessing the intention to occupy.
28. The primary question in this case was whether Mrs Townsley had moved "out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision". The Tribunal accepts that a landlord may convince the Lands Tribunal of the genuineness of his intention without corroborating evidence. But the Tribunal has to be convinced. Mr Coyle BL suggested that Mrs Townsley's plans were detailed in terms of market research and costings but the Tribunal agrees with Ms Simpson BL that they fell far short of that and can only be regarded as exploratory and tentative at the time of hearing. Mr Coyle BL suggested that the Tribunal was replete with evidence in terms of her financial standing. Mrs Townsley's financial standing may or may not be adequate but the Tribunal agrees with Ms Simpson BL that the evidence received by the Tribunal was out of date and incomplete.
29. On balance the Tribunal concludes that Mrs Townsley has not as yet shown that she has "moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory". That is not to say that she may not be able to do so in the not too distant future.
30. An objective assessment of the realistic prospects of implementing the intention held suggests that there would be hurdles to be overcome but again, on the limited evidence before the Tribunal, they may not be too high.

ORDERS ACCORDINGLY

25th April 2012

**Michael R Curry FRICS Hon.Dip.Rating
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances

Applicants: Ms Jacqueline Simpson BL instructed by Comerton & Hill, Solicitors.

Respondent: Mr John Coyle BL instructed by James J Macaulay, Solicitors.