

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/TENANTS

AND

IRIS MAY TOWNSLEY – RESPONDENT/LANDLORD

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

PART II

Lands Tribunal - Henry M Spence MRICS Dip.Rating IRRV (Hons)

Background

1. The subject premises are located on the corner of High Street/Castle Street in Carrickfergus town centre and are occupied by the applicants as a small amusement arcade trading as one of their “Twilight Zone” amusement centres.
2. The applicants hold the premises under a lease dated 31st January 1992 for a term of 20 years from 1st September 1991. By a tenancy application dated 11th April 2011 the applicants applied to this Tribunal for the grant of a new tenancy. The respondent, by notice dated 4th May 2011, advised that she was not prepared to grant a new tenancy and would oppose the application on the ground that upon determination of the existing tenancy she intended to occupy the premises herself for the purposes of carrying on a business (Article 12(1)(g)(i) of the 1996 Order – “own business”).
3. The matter came before this Tribunal and on balance the Tribunal concluded “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.” [See Part 1 decision dated 25th April 2012.]
4. The parties then attempted to agree the terms of a new lease but failed to do so and the matter was listed for hearing on 19th March 2013 for the terms of a new tenancy to be determined. Prior to hearing the parties agreed on the following:

- i. There would be a new tenancy for 10 years commencing on 1st November 2011.
 - ii. The rent for the new tenancy would be £6000 per annum, commencing 1st November 2011.
 - iii. There would be a rent review at the end of the third, sixth and ninth years.
5. The parties failed to agree, however, as to the timing of a mutual option to break the tenancy and it is this issue which requires the determination of the Tribunal.

Procedural Matters

6. The Tribunal received written submissions only from Bernard Brady BL on behalf of the applicants and from Julie Ellison BL on behalf of the respondent.

Positions of the Parties

7. On behalf of the applicants, Mr Brady sought a mutual option to break at 5 years (1st November 2016); on behalf of the respondent Ms Ellison sought a mutual option to break at 3 years (1st November 2014).

Statutory Framework

8. The relevant provision is contained in Article 19 of the Business Tenancies (Northern Ireland) Order 1996 (“the 1996 Order”):

“19.—(1) The terms of a tenancy granted in pursuance of an order of the Lands Tribunal (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed between the landlord and the tenant, or as, in the absence of agreement, may be determined by the Lands Tribunal; and in determining those terms the Lands Tribunal shall have regard to the terms of the current tenancy and to all relevant circumstances.”

Case Law

9. The Tribunal was referred to the following cases:
 - Adam v Green [1978] EGLR
 - Peter Millett v Salisbury Handbags [1987] 2 EGLR
 - National Car Parks Ltd v Paternoster Consortium Ltd [1990] 1 EGLR 99
 - Cox v Clancy (Part II) BT/14/2010 [“Cox v Clancy”]

The following extracts from Cox v Clancy are relevant to the subject reference:

“(8) ...The focus therefore is the question of the future time at which a new lease might be terminated, giving Mr Clancy a fresh opportunity to then oppose the grant of a further tenancy.”

“*The policy of the 1996 Order*

(11) The Tribunal agrees with the views expressed by Prof Dawson: *Business Tenancies in Northern Ireland*, at page 165:

‘Maximum apart, [Article 17(1)(b)] confers on the Tribunal a very wide discretion to select a period which is “reasonable in all circumstances”. All relevant factors must, therefore, be considered and due weight given to them.’

and:

‘The principal policy objective is, of course, security of tenure for business tenants, but not at all costs. The landlord’s superior right to possession of the premises for redevelopment, or his own use, is expressed in the grounds of opposition to renewal in [Article 12(1)(f) and (g)] – these are not mere grounds of opposition, they are statements of policy which must be fully reflected in the terms of the new tenancy determined by the Tribunal. If the landlord failed under [Article 12(1)(f) and (g)] because his plans were insufficiently advanced for him to establish the necessary intention ... but is likely to be able to establish one or other of these grounds within the foreseeable future ... due weight must be given to these matters.’

and later, at page 166:

‘Where the landlord has redevelopment or own-business use plans for the holding, it does not always follow that a short-term tenancy is appropriate. It is possible for a longer term to be granted with a break clause exercisable by the landlord when he is ready to implement his plans’.

“(12) The Tribunal also agrees that the views expressed (in regard to a redevelopment break clause) by Reynolds & Clark: *Renewal of Business Tenancies* are relevant – at 8-77 paragraph (2):

‘The legal test for determining whether or not a redevelopment break clause should be incorporated in the new lease has been formulated as whether redevelopment is “on the cards” or there is a “real possibility” of redevelopment occurring: Adam v Green; NCP v Paternoster Square. However, there is no indication in the formulation of the legal test for incorporating a break clause that the landlord’s desire to redevelop necessarily trumps the tenant’s desire for security of tenure.’

and at (3):

‘The function of the Court to strike a fair balance between the two competing aspirations necessarily presupposes that the landlord may have to wait for some time

(though not so long as to prevent redevelopment) before being able to regain possession: Davy's of London (Wine Merchants) v City of London Corporation. Thus albeit the landlord may satisfy the Court that the break should be incorporated in the new lease the Court may defer the date from which the break is to operate as part of the balancing exercise'."

"The Timing of a Landlord's option to break

(14) The Tribunal now turns to evidence about when the prospect of Mr Clancy overcoming the obstacles to implementing his intention to occupy might reasonably be expected to crystallise, the circumstances of the parties and the relative hardship caused to either party by a particular timing of a Landlord's option to break.

Claimants' Case

10. Mr Brady sought a 5 year break clause on behalf of the applicants. He submitted:

- i. In Cox v Clancy (Part II) the Lands Tribunal endorsed the views expressed by Reynolds & Clark "... however, there is no indication in the formulation of the legal test that the landlord's desire to redevelop necessarily trumps the tenant's desire for security of tenure.'
- ii. The Tribunal also agreed with the views of Professor Dawson that the principal policy objective of the business tenancies legislation was the security of tenure for business tenants, but not at all costs. The landlords rights to possession of the premises for redevelopment for his own use, were expressed in the grounds of opposition to renewal, contained in Article 12(1)(f) and (g). These were not simply grounds of opposition, but statements of policy which must be reflected in terms of the new tenancy.
- iii. The function of the Tribunal in such cases is to strike a fair balance between the two competing aspirations. This, it has been held, presupposes that the landlord may have to wait for some time, though not so long as to prevent redevelopment, before being able to regain possession. Thus, while the landlord may satisfy the Tribunal that the break should be incorporated in the new lease, the Tribunal may defer the date from which the break is to operate as part of the balancing exercise.
- iv. In the present case, the Tribunal must therefore strike a fair balance between the applicants and the respondent. The applicants contend that a fair balance would

not be struck, if the Tribunal were to accede to the respondent's desire for an option to break at the end of 3 years. If a 3 year break clause were imposed, it would become operable for the first time on 1st November 2014. The respondent would be entitled to exercise the break clause in about 18 month's time and this would deprive the applicants of any real security of tenure.

- v. The respondent's conduct throughout the process was a relevant consideration to the Tribunal. A full year has passed since the Part I decision and during that time the respondent consistently failed to follow the Tribunal's directions. The respondent failed to furnish a draft lease; failed to provide an experts report and repeatedly sought adjournment of the hearing. To award the respondent a 3 year break clause in these circumstances will "reward" the respondent's undue delay in dealing with the applicants' claim.
- vi. There was no evidence at the date of the original hearing that the respondent had considered even broad estimates of the revenue, costs, capital requirements or viability of the proposed new business. There was no evidence she had explored the practicability of managing such a business through internet links. In short, the respondent could not demonstrate that there had been even a cursory assessment of taking on the premises for the purposes of running her own business. Applying the legal test, the respondent had not adduced evidence that it was a realistic possibility that she would be in a position to operate an arcade business from the premises in around 18 months time.
- vii. The landlord in Cox v Clancy also failed to establish his ground of objection. The Tribunal found that his preparations had been casual and tentative. These preparations included employing an experienced manager and the acquisition of a retail franchise. It is plain that the evidence advanced by the respondent in the present case fell far short of even the "casual and tentative" evidence of that in Cox v Clancy.
- viii. The balancing operation which the Tribunal must carry out would be most fairly exercised by incorporating a mutual option to break at 5 years. Thus the applicants would not be deprived of their statutory entitlement to security of tenure, and the respondent would be afforded a reasonable period in which to properly formulate her plans, if such is her objective.

Respondent's Case

11. Ms Ellison sought a 3 year break clause on behalf of the respondent. She referred to the previous extracts from Cox v Clancy and further submitted:

- i. In the original Part I hearing on the subject premises the Tribunal found, applying the definition of intention given by Asquith LJ in Cunliffe v Goodman [1950]:

“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.”

Further

“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.”

It was the respondent's intention to once again occupy and operate an amusement arcade business on the premises. This has not changed in the intervening period and as such the respondent seeks to have a further opportunity within a reasonable time period to demonstrate the necessary intention and to overcome the hurdles to implementation.

- ii. A break clause where the landlord seeks to occupy was considered in the English case Peter Millett v Salisbury Handbags [1987] 2 EGLR. In this case the Judge ordered a 3 year term (the previous lettings had been for short periods) with a landlords break clause, exercisable by 6 months notice, expiring at any time, but only if a company in the same group as the landlord intended to occupy the shop for the purposes of a business.
- iii. The respondent acknowledges that the authorities indicate the landlord may have to wait for some time before being able to regain possession and, further these proceedings are not an opportunity to reverse the decision of the Tribunal that a new lease should be granted. Accordingly a break clause after 3 years is reasonable in all the circumstances. It strikes the requisite balance between providing security of tenure to the tenant but also gives effect to the landlord “superior right to possession ... for his own use”.

- iv. The respondent will be in a position to present sufficient evidence as to her intention, including the evidence which the Tribunal noted was not addressed at the first hearing. The time period proposed by the respondent provides more than sufficient time for these issues to be addressed, hence the Tribunal's finding that these hurdles may not be too high.
- v. In relation to the applicants' security of tenure, the Notice to Determine specified a date of termination at 1st November 2011. The applicants have therefore already had the premises for almost 18 months. The Tribunal heard evidence that the applicants intended to move premises and set up elsewhere in the vicinity if a further tenancy was not granted. A break clause at 3 years, with notice being given in advance, would provide ample time for the applicants to relocate.
- vi. The proposal that the break clause become exercisable after 3 years takes in to consideration the time period between the first hearing and the determination of the terms of a new lease. As it has been agreed the new lease would commence on 1st November 2011, the timing of the hearing and any delay is itself rendered irrelevant. In any event, there has been no prejudice to the applicants as a result of any delay in the proceedings as the applicants have been in occupation throughout.
- vii. A further relevant consideration is the finding of the Tribunal in this case that the respondent current "business had been affected by the downturn". An early break clause is therefore necessary to mitigate any financial hardship which would be caused by the respondent from having an opportunity to go in to occupation before November 2016. The financial circumstances of the applicants are such that a break clause exercisable in November 2014 (3 years) is likely to improve the respondent's financial position.
- viii. There is no evidence that prejudice will be caused to the applicants if the break clause is exercisable at 3 rather than 5 years.
- ix. In Cox v Clancy, by contrast, there was a solus agreement which would have cause hardship to the applicants if forced to leave the premises. The duration of the lease was therefore determined at 5 years with the landlord's option to break at that time. Cox v Clancy can be distinguished from the instant case on this basis and a break clause at 3 years is appropriate.

DECISION

12. As outlined in Cox v Clancy the function of the Tribunal is to strike a fair balance between the two competing aspirations, taking into account all of the circumstances - the tenants right to security of tenure and the landlords right to take possession of the premises for his own use.
13. Neither party adduced evidence or put forward a compelling argument that their proposal should be preferred. On balance the Tribunal concludes that a mutual break clause should be exercisable after 4 years. This gives the applicants' adequate security of tenure and time to seek alternative premises if required. It also affords the respondent adequate time in which to formulate her plans, if that is her intention.
14. The Tribunal therefore concludes that a mutual option to break should not be exercisable earlier than 1st November 2015. Notice to break should be served in accordance with the provisions of the 1996 Order and in the case of the landlord should be confined only to the grounds of own business occupation [Article 12(1)(g)(i) of that Order].

ORDERS ACCORDINGLY

14th June 2013

**Henry M Spence MRICS Dip.Rating IRRV (Hons)
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

Claimants: Bernard Brady BL instructed by Comerton & Hill, solicitors.

Respondent: Julie Ellison BL instructed by James J Macaulay, solicitors.