LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
LANDS TRIBUNAL RULES (NORTHERN IRELAND) 1976
BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996
IN THE MATTER OF AN APPLICATION FOR COSTS
BT/43/2015

BETWEEN

CAR PARK SERVICES LIMITED – APPLICANT

AND

BYWATER CAPITAL (WINETAVERN) LIMITED – RESPONDENT

Re: Lands at Winetavern Street/Gresham Street, Belfast

PART 2 – COSTS

Lands Tribunal – The Honourable Mr Justice Horner and
Henry Spence MRICS Dip.Rating IRRV (Hons)

BACKGROUND

1. On 17th June 2015 Car Park Services Limited ("the applicant") made a tenancy application to the Lands Tribunal requesting the grant of a new tenancy on lands which they occupied at Winetavern Street/Gresham Street, Belfast ("the reference property").

2. Bywater Capital (Winetavern) Limited ("the respondent") contended that the applicant was not entitled to make either a tenant's request for a new tenancy or its subsequent tenancy application to the Lands Tribunal.

3. Prior to hearing the parties had agreed that the Tribunal should determine three questions as preliminary issues:

    (i) Did the agreement between the applicant and the respondent create a lease or a licence? ("Issue 1")

(ii) If the agreement did create a lease, was the applicant entitled to request a new tenancy under Article 7 of the Property (Northern Ireland) Order 1996 ("the Order")? ("Issue 2")

(iii) If the applicant was not legally entitled to request a new tenancy under Article 7, was the respondent nevertheless estopped from disputing or had it waived its right to dispute, its entitlement so to do? ("Issue 3")

4. By its decision dated 16th September 2016 the Tribunal concluded:

(i) This was a licence, not a lease.

(ii) If the Tribunal was wrong in that conclusion and it was a lease, then it was a tenancy to which Article 7(1) applied and the applicant was entitled to make a request for a new tenancy.

(iii) If the Tribunal was wrong on its conclusion on Issue 1 and Issue 2, then the respondent was not precluded from taking the point that the Tribunal had no jurisdiction to hear such an application.

5. The respondent now seeks its costs in the reference.

PROCEDURAL MATTERS

6. The parties had agreed to deal with the issue of costs by way of written submissions. Mr Edwin Johnson QC wrote on behalf of the applicant and Mr Nicholas Hanna QC provided a submission on behalf of the respondent.

STATUTE

7. Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 provides:

"Costs

33.-(1) Except in so far as section 5(1), (2) or (3) of the Acquisition of Land (Assessment of Compensation) Act 1919 applies and subject to paragraph (3) the costs of and incidental to

any proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President.

(2) If the Tribunal orders that the costs of a party to the proceedings shall be paid by another party thereto, the Tribunal may settle the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed by the registrar on a scale specified by the Tribunal, being a scale of costs for the time being prescribed by rules of court or by county court rules."

AUTHORITIES

8. The Tribunal was referred to the following authorities:

- Oxfam v Earl & Others BT/3/1995
- Campbell v Finnegan & Finnegan BT/57/1998
- Fujitsu v Brunswick BT/90/2002
- Tarwood v Giordano BT/38 & 39/2009
- Reilly v DRD R/10/2011

THE RESPONDENT'S SUBMISSIONS ON COSTS

9. Mr Hanna QC referred the Tribunal to Oxfam v Earl & Others BT/3/1995 in which the Tribunal considered its discretion under Rule 33:

> "The Tribunal must exercise that discretion judicially and the starting point in the question of costs is the general presumption that, unless there were special circumstances, costs follow the event i.e. that in the ordinary way the successful party should receive its costs …
>
> Unless there are good reasons for a special award, such as extravagant or unsatisfactory conduct of the proceedings (including the role of the expert witness) or failure on an important issue, costs will follow the event so 'the loser pays all'."

10. The effect of the Tribunal's decision was that the applicant's tenancy application was invalid and would be dismissed. Mr Hanna QC considered therefore that the respondent was the

successful party and was entitled to its costs unless the applicant could show that there were "special" or "exceptional" circumstances.

11. He did not consider however that there were special circumstances in the subject reference as the applicant had sought to make an application which, in light of the Tribunals determination, it had no right whatsoever to bring. He submitted that the case was only before the Tribunal, including the question of whether the applicant was a periodic tenant and could make a tenancy application, because of the applicant's wrongheaded attempts to re-categorise its status from that of a licensee to that of a tenant. He further submitted that if there were any "special" or "exceptional" circumstances in the present case they were seen in the applicant's attempts to bring a case that it was not entitled to bring and on this basis the applicant, as the losing party, should pay the respondent's costs.

12. If, however, the Tribunal was minded to hold that "special" or "exceptional" circumstances existed, such as would justify a departure from the normal rule, then Mr Hanna QC submitted:

(i) the authorities showed that a successful party would always be awarded some element of its costs.

(ii) the largest reduction in the quoted authorities was 50%.

(iii) in the cases where the reduction was 50%, the issue on which the losing party succeeded took up the majority of the hearing.

(iv) the respondent had succeeded on two issues out of three and that if all issues were of equal weight the largest possible reduction it would be possible for the applicant to attempt to contend for would be 33% i.e. the respondent is awarded 66% of its costs.

(v) the issues in the case were not however of equal weight. The primary focus of the current case was on Issue 1, namely whether the agreement was a lease or a licence. This was reflected in: (a) the decision itself where the majority of the judgement related to the issues on which the respondent succeeded; and (b) the evidence given by the three witnesses at hearing which solely related to Issue 1.

(vi) if the case had been restricted solely to Issue 1, then it would have been concluded in one day. Issues 2 and 3 meant the case ran on into another day. Those issues were effectively a draw – both parties succeeded on one of those issues.

(vii) if the Tribunal was minded to depart from the normal practice, the appropriate order to make would be to award the respondent its costs for a one day hearing and

make no order as to costs for counsels' refreshers or any other costs of counsel or solicitors after day one.

THE APPLICANT'S SUBMISSIONS

13. In the instant case the respondent failed on an important issue, namely Issue 2 and accordingly, so far as costs were concerned, Mr Johnson QC considered that there were "special" circumstances.

14. The next question was what effect these "special" circumstances should have on the Tribunal's discretion as to costs and in answering that question he submitted that the Tribunal should bear in mind the following four points:

(i) Issue 2 was, in common with Issue 1, a threshold point. If the applicant was wrong on Issue 1 it had no right to apply to the Tribunal. If the applicant was wrong on Issue 2 it had no right to request a new tenancy under Article 7, and thus no right to make an application to the Tribunal pursuant to that request. In that sense Issue 1 and Issue 2 were of equal status. Both were concerned with the fundamental question of whether the applicant actually had the right to apply to the Tribunal. Both these preliminary issues were, in that sense at least, of equal weight.

(ii) the respondent's submissions on costs sought to down play the time spent on Issue 2 in the case. It was acknowledged by the respondent that Issues 2 and 3 took the hearing into a second day, but the respondent also invited the Tribunal to embark on a paragraph counting exercise in relation to the judgement of the Tribunal. This was potentially misleading. The Tribunal may have dealt with Issue 2 with admirable succinctness in its judgement, but the legal argument generated by Issue 2 occupied a substantial part of the overall argument in the case, and included the lodging of supplemental written submissions. The respondent's supplemental submissions ran to 9 pages. Pages 2 to 7 dealt with Issue 2. Pages 8 and 9 dealt with Issue 3. This reflected the fact that Issue 2 raised both an important question on the interpretation of the 1996 Order, and a key issue in the case.

(iii) the Tribunal could also test the importance of Issue 2 in this way. So far as Issue 1 was concerned, it was the intention of the applicant to state a case for the Court of Appeal on Issue 1. This application will be confined to Issue 1, because the applicant

won on Issue 2. If the applicant had lost on Issue 2, an appeal on Issue 1, in isolation, would be futile. The same analysis does not apply to Issue 3. The applicant lost on Issue 3, but Issue 3 did not have the same role in this case as Issues 1 and 2.

(iv) the respondents submissions on costs sought to characterise the application to the Tribunal as one which the applicant had no right to bring because it was, on the Tribunal's decision, a licensee and not a tenant. The respondent stated that "the case was only before the Tribunal because of the applicant's wrongheaded attempts to re-categorise its status from that of a licensee to that of a tenant". There were 2 ways to answer. The first answer was the answer already given. It was also said by the respondent that the applicant had no right to be before the Tribunal because the applicant, if it had a tenancy, had only a periodic tenancy. The respondent lost on that issue. The second answer was that the description of the application as "wrongheaded" sought, no doubt inadvertently, to characterise the applicant's case on Issue 1 as a case which should never have been brought, as opposed to a case which failed. The applicant was, on the Tribunal's decision, wrong on Issue 1, not wrongheaded, just as the respondent was wrong on Issue 2, but not wrongheaded.

15. In conclusion Mr Johnson QC submitted that the fair and appropriate order as to costs was that the applicant should pay half the respondent's costs of the preliminary issues hearing.

DECISION

16. The Tribunal agrees with Mr Johnson QC this was not a case which should never been brought, rather it was a case which failed. The Tribunal considers that the applicant was quite entitled to bring its case for adjudication.

17. The parties had agreed that the Tribunal should determine three questions as preliminary issues. The applicant, although he had lost the case, was successful on one of those issues, namely Issue 2. The Tribunal therefore considers this to be a "special" circumstance which would have an impact on the allocation of costs. The Tribunal also considers that the three issues to be decided were interrelated and it would be a very difficult task to accurately apportion the exact time spent on each specific issue, as suggested by Mr Hanna QC. Taking a

robust approach the Tribunal directs that the applicant should pay two thirds of the respondent's costs, such costs to be taxed in default of agreement.

STAY

18. In his submission Mr Johnson QC had requested the Tribunal to order a stay of its costs order pending final disposal by the Court of Appeal of the intended appeal by the applicant. The Tribunal sees no merit in this request.

ORDERS ACCORDINGLY

6th January 2017

The Honourable Mr Justice Horner and
Henry Spence MRICS Dip.Rating IRRV (Hons)
LANDS TRIBUNAL FOR NORTHERN IRELAND