

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/48/2022

BETWEEN

DANIEL SEMELAK T/A SEMO AUTO – APPLICANT

AND

BRUNSWICK MANOR LIMITED – RESPONDENT

Re: Unit 94 Dunlop Commercial Park, 3 Balloo Link, Bangor

Lands Tribunal – Henry Spence MRICS Dip Rating IRRV (Hons)

Background

1. Mr Daniel Semelak (“the applicant”) is a car mechanic by trade and he began trading as Semo Auto around 16th May 2015. The applicant currently trades from premises located at Unit 94 Dunlop Commercial Park, 3 Balloo Link, Bangor (“the reference property”) which he leases from Brunswick Manor Limited (“the respondent”).
2. The reference property has been let to the applicant for a period for a term of 3 years from 1st February 2019, expiring on 1st February 2022.
3. The respondent alleges that it sent the applicant a Notice of Termination, dated 21st October 2021, by recorded delivery, which stated that the tenancy would be terminated on 30th April 2022.
4. The applicant claims that he did not receive the Notice of Termination and that the signature on the recorded delivery receipt was not his. He submits that he first became aware of the

respondent's intention to terminate when he received a notice by ordinary post, on 13th April 2022, whereupon he took immediate steps to appoint legal representation. He then instructed his solicitors to file an application for a new tenancy as soon as possible, which was issued on 6th May 2022.

5. The respondent submits that this new tenancy application is out of time as the tenancy was ended on 30th April 2022 by the original Notice of Termination.
6. The applicant's position is that the Notice of Termination was not properly brought to his attention in October 2021 and in the alternative, submits that this is a case where it is appropriate for the Lands Tribunal to extend the time for filing a new tenancy application.
7. There are, therefore, two issues to be considered by the Tribunal:
 - (i) whether notice was validly given in October 2021; and
 - (ii) if notice was validly given, should the time limit for submission of a new tenancy application be extended, as permitted under Article 10(5) of the Business Tenancies (Northern Ireland) Order 1996 ("the Order").

Procedural Matters

8. The applicant was represented by Mr Nick Compton BL, instructed by John Boston & Co Solicitors. Mr Mark McAdam, solicitor, of CMG Cunningham Dickey Solicitors represented the respondent. The parties have agreed to have these preliminary issues decided by way of written representations and the Tribunal is grateful to the legal representatives for their helpful submissions.
9. The Tribunal also received a sworn affidavit from the applicant and from Mr Robert Dunlop, a director of the respondent company.

The Statute

10. Article 10 of the Order provides:

“10.-(1) In this Order ‘tenancy application’ means either –

(a) an application by the landlord for an order that the tenant is not entitled to a new tenancy; or

(b) an application by the tenant for an order for the grant of a new tenancy.

(2) Where a landlord has served a notice to determine, a tenancy application may be made to the Lands Tribunal at any time between the date of service of the notice and the date of termination.

(3) Where a tenant has served a notice containing a request for a new tenancy, a tenancy application may be made to the Lands Tribunal at any time between the date of service of a notice served by the landlord under Article 7(6)(b) and the date specified in the tenant’s request for the beginning of the new tenancy.

(4) On a tenancy application by either party, the Lands Tribunal may exercise any power that would have been exercisable by it on a tenancy application by the other, and accordingly –

(a) neither the landlord nor the tenant may make a tenancy application if the other has done so; and

(b) the landlord may not withdraw a tenancy application made by him unless the tenant consents to its withdrawal.

(5) The Lands Tribunal, on an application made by the landlord or the tenant in relation to a tenancy, may by order –

(a) vary (by extension or reduction) the time limit mentioned in paragraph (2) or paragraph (3) (and any extension may be made after the expiration of the time limit);

(b) set an alternative time limited for the purposes of paragraph (3) where the landlord has not served a notice under Article 7(6)(a) or (b).”

Issue (i) Was Notice Validly Given in October 2021?

11. Mr Compton BL submitted:

(i) Article 41 provides that notices served under the Order should be made in writing. Otherwise S24 of the Interpretation Act (Northern Ireland) 1954 provides for how service may be effected. The methods are set out at sub-paragraphs 2(a) to (e) (of which post is one). Dawson, Business Tenancies in Northern Ireland (SLS, 1994) notes at p91:

“Service by recorded delivery post is permitted in lieu of registered post. If it is proved that one of these methods has been used; then service is effective even though the notice was not actually received by the addressee.”

(ii) The recorded delivery receipt annexed to the applicant’s affidavit did not show where or to whom the Form 3, Notice of Termination, was sent. The applicant requires the respondent to prove that the Form 3 notice, if sent by recorded delivery, was sent to the correct person at the correct address, in accordance with the provisions of Article 6 of the Order. Provided it can be proven that the Form 3 notice was sent to the correct person at the correct address, it is accepted that valid service has been effected, notwithstanding that the applicant avers he did not receive a copy of the notice (see Chiswell v Griffon Land and Estates Ltd [1975] 2 All ER 665).

12. Mr Robert Dunlop in his affidavit advises:

(i) He prepared, signed and dated the Form 3 notice. He also prepared and signed letters to the applicant, addressed to the reference property and to his home address. These letters also contained a copy of the Form 3 notice. Copies were attached to his affidavit.

(ii) The letters enclosing the Form 3 notice were posted using the Royal Mail “Signed For” service, bearing item reference numbers.

(iii) Proof of posting the letters were submitted to the Tribunal.

- (iv) The notice served at the reference property shows that Royal Mail delivered the item at 11.06 on 1st November 2021. This item was addressed to “Daniel Semelak” and was signed for by “Semo”.
- (v) The notice, which was delivered to the applicant’s home address, shows that it was signed for by an I Semelek and delivered at 1.56 on Friday 29th October.

13. Mr McAdam submitted:

- (i) Mr Dunlop’s evidence showed that the Form 3 notice was served by post at the reference property on 1st November 2021 and at the applicant’s home address on 29th October 2021. On that basis not only was the applicant deemed to have been served but that the applicant did in fact, on balance, receive the Form 3 notice.
- (ii) The evidence in Mr Dunlop’s affidavit shows that Royal Mail delivered the Form 3 notice at both the reference property and the home address. It was highly unlikely that both letters failed to be delivered.
- (iii) It is noted that the applicant states that the signature on the Royal Mail delivery receipt is not his signature. It is understood that Royal Mail did not ask recipients to physically sign for deliveries during “Covid”. The recorded delivery receipt is still evidence that the letter was delivered to the appropriate address. Royal Mail has not returned the letters to the respondent as undelivered.
- (iv) On balance it is conceivable that the applicant did know about the Form 3 notice and simply did nothing about it.

(ii) Extension of Time

14. Mr Compton BL submitted:

- (i) The Tribunal considered the effect of Article 10(5) in J Harvey v Schofield BT/27/1998. In that decision the Tribunal noted that its discretion is not fettered in the sense that there are any matters defined in the Order as matters to be taken into account. Although the Tribunal noted that parties put themselves at risk if they do

not adhere to time limits. In Harvey v Schofield the Tribunal extended time for a new tenancy application where the explanation for delay was described as “weak”. It was noted there would be a complete loss of substantial property rights if the application to extend time was refused.

- (ii) It was noteworthy that the applicant avers he first became aware of the respondent’s decision to terminate the tenancy in mid-April. A Form 4 request for a new tenancy was then filed on 29th April, before the apparent ending of the tenancy and an application for a new tenancy was filed at the beginning of May. The applicant took immediate steps to deal with the situation he was facing. He immediately took legal advice and sought to invoke the Tribunal’s jurisdiction. If he would have known about the Form 3 notice in October 2021, he would have taken those steps then i.e. within time. This is not a case where the applicant knew about a problem and decided to do nothing about it.
- (iii) In any case, the relevant delay is only a number of days. Refusal to extend time would deprive the applicant of significant statutory protections.
- (iv) The interests of justice strongly support extending time so that the applicant is put into the position he would have been in had he received the Notice in October 2021. It is preferable for the application to be determined on its substantive merits rather than disposed of on a technicality.
- (v) In contrast to the decision in Harvey v Schofield there is a reasonable explanation for the failure to adhere to the applicable time limit and this is a fortiori, an appropriate case to extend time.

15. Mr McAdam’s submissions:

- (i) The Tribunal decisions referred to by Mr Compton BL states that parties will put their position at risk if they do not adhere to time limits or take appropriate steps to extend time limits. It is, therefore, the responsibility of the applicant to demonstrate to the Tribunal that it should exercise its discretion to grant an extension of time.

The Tribunal should exercise that discretion judicially and the applicant should show good reason.

- (ii) The applicant has not demonstrated good reason as to why the Tribunal should exercise its discretion.
- (iii) The applicant's main argument for an extension seems to be that he was not aware of the respondent's decision to terminate the tenancy, until mid-April 2022. For the reasons set out previously the respondent does not accept this argument. The applicant is deemed to have been served the Form 3 notice and the applicant now seems to accept that. He was, therefore, aware of the respondent's decision to terminate the tenancy on 29th October 2022. There was no good reason for the delay in taking steps to respond in the intervening six months or so.
- (iv) The applicant states that he only became aware of the respondent's decision to terminate the tenancy when he received the respondent's "reminder" letter of 13th April 2022 but still did not file his tenancy application until 6th May 2022. He had ample time to file the application during the period from 13th April to 30th April. He has not provided a good reason for not doing so.
- (v) Mr Dunlop states that he received a telephone call from the applicant on 14th April 2022 indicating that he would write with proposals. No proposals were ever received. Correspondence was received from the applicant's solicitor on 25th April 2022 but the tenancy application was not brought until 6th May 2022, after the date of termination. The applicant was in a position and ought to have submitted an application to the Lands Tribunal before the expiry of the time limit.
- (vi) It is submitted that the subject reference can be distinguished from Harvey v Schofield as there have been no negotiations at all between the applicant and respondent with regard to a new tenancy, there is no "understanding" between the parties that a new tenancy will be agreed. On the contrary, the respondent will not agree to grant a new tenancy. The reasons the respondent will not grant a new tenancy are detailed in the Form 3 notice.

- (vii) The subject reference is more akin to Vixcroft v Argos BT/59/2018, where the Tribunal declined to exercise its discretion to extend the time limit. In that case, similar to the subject reference, there had been no negotiations for a new tenancy.
- (viii) The applicant refers to being deprived of significant statutory protections if the time limit is not extended. The applicant should have been aware of the risks of not adhering to the time limits and so cannot complain if he loses these protections. As per Vixcroft v Argos, the applicant still has some protection under the Order and, as an example, the applicant will not lose any right to compensation under the Order.
- (ix) In the interests of justice the Tribunal should also take into consideration the implications to the respondent which has complied with its obligations, if the time limit is extended. The respondent will not be able to obtain possession of the reference property from the applicant, who has substantially breached his obligations. Those breaches have caused and continue to cause loss and inconvenience to the respondent.
- (x) In summary, no good reason has been provided by the applicant to extend the time limit for filing the tenancy application and the respondent respectfully requests that the time limit is not extended.

The Tribunal

- 16. In his submissions Mr Compton BL accepts that, if it was proved that the Form 3 notice was sent to the correct person at the correct address, then valid service had been effected, notwithstanding that the applicant alleges he did not receive a copy of the notice.
- 17. On behalf of the respondent Mr Dunlop has provided Royal Mail posting and delivery receipts of the Form 3 notice to the applicant's home address and to the reference property. The Tribunal is in no doubt therefore, that the Form 3 notices were sent to the correct person at the correct addresses and they were therefore validly served in late October/early November 2021. The applicant therefore fails on issue (i).

18. The applicant claims that, for whatever reason, he only became aware of the respondent's Notice of Termination in mid-April 2022 and at that point he took immediate action, having his solicitors submit an application for a new tenancy on 6th May, a few days after the date of termination stipulated in the October 21 Notice of Termination.
19. The Tribunal once again cautions that parties put themselves at risk if they do not adhere to the statutory time limits.
20. The Tribunal agrees with Mr Compton BL, however, a refusal to extend the time limit would deprive the applicant of substantial property rights and in the interests of justice the Tribunal directs that the application should be determined on its substantive merits rather than disposed of on a technicality.
21. In the circumstances of this reference, where the applicant's tenancy application was only six days out of time, the Tribunal exercises its statutory powers under Article 10(5) of the Order and grants the extension of the time limit for submitting the tenancy application, as requested by the applicant.
22. In its evidence the respondent contests that the applicant's tenancy application is fatally defective. This may be considered at a further hearing. The Tribunal will now convene a mention of the reference in order to quickly progress the substantive issues.

30th August 2022

**Henry Spence MRICS Dip.Rating IRRV (Hons)
Lands Tribunal for Northern Ireland**