**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/54/2020**

**BETWEEN**

**TRANSCOLD REFRIGERATION LIMITED – APPLICANT**

**AND**

**COOLTECH REFRIGERATION (NI) LIMITED – RESPONDENT**

**Re: Premises at 7(b) Springhill Road, Carnbane Industrial Estate, Newry**

**PART 2 - COSTS**

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

## Background

1. Transcold Refrigeration Limited ("the applicant") occupies premises at 7(c) Springhill Road, Carnbane Industrial Estate, Newry and Cooltech Refrigeration (NI) Limited occupies the adjoining, intercommunicating premises at 7(b) ("the reference property").

2. The managing director of the applicant company is Mr Paul Fegan and the managing director of the respondent company is his brother, Mr Konrad Fegan.

3. For many years, due to a close family relationship, the companies worked together on a trust basis and the informal arrangements between them included:

(i) The applicant paid all of the outgoings, including rent, for the reference property and unit 7(c) and the respondent paid to the applicant, a proportionate amount of all bills in respect of rent and common facilities.

(ii) The businesses assisted each other where possible.

(iii) There were shared services such as electric, phone and mobile phone facilities. Expenses were shared and money passed between the companies on an informal basis.

4. Subsequently, in 2018, the applicant signed a new lease with the landlords for the occupation of unit 7(c) and the reference property, for a term of 10 years at an annual rent of £20,400.

5. When the new lease came into force the informal arrangements continued between the parties as before, until there was a breakdown of the relationship between family members and the companies, sometime in 2019.

6. The applicant considered itself to be the landlord of the respondent and on 26th May 2020 it served a "Notice to Determine" the respondent's occupation of the reference property, on grounds contained in Article 12 of the Business Tenancies (Northern Ireland) Order 1996 ("the Order") and in particular the grounds contained in Article 12(1)(g) relating to "own use".

7. The parties had agreed that there were three main issues to be decided by the Tribunal

(i) Was the applicant the respondent's landlord.

(ii) If the applicant was a landlord was the applicant's Notice to Determine premature.

(iii) If the Tribunal finds (i) and (ii) in favour of the applicant, has the applicant demonstrated sufficient intention to use the reference property in the manner required under the Order.

8. In April 2020 the Tribunal issued its decision and found:

   (i) The applicant was the respondent's landlord.

   (ii) The applicant's Notice to Determine was not premature.

   (iii) The applicant had not demonstrated sufficient intention to use the reference property in the manner required under the Order.

9. The applicant had "won" on issues (i) and (ii) but the respondent was successful on issue (iii). The respondent considered issue (iii) to be the substantive issue in the reference and on that basis it was now seeking its costs.

**Procedural Matters**

10. The Tribunal has received written submissions on costs from Ms Lisa Moran BL on behalf of the respondent and from Mr Keith Gibson BL on behalf of the applicant. The parties had agreed that the matter should be decided by way of the written representations. The Tribunal is grateful to counsel for their helpful submissions.

**The Law**

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

> "(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."

12. In Oxfam v Earl & Ors [1995] BT/3/1995 the Tribunal clarified how it should exercise its discretion (at page 8):

"The Tribunal must exercise that discretion judicially and the starting point on 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."

And

"The next question for a Tribunal is whether there were special circumstances which would warrant a departure from that general rule. But these must be circumstances connected with the proceedings, for example, to reflect an unsuccessful outcome on a major issue."

**The Respondent's Submissions**

13. On behalf of the respondent Ms Moran BL submitted:

(i) The respondent was entitled to its costs as the successful party in the application brought by the applicant and costs should follow the event.

(ii) The applicant's reference was dismissed on the basis, inter alia, that the applicant had not demonstrated a genuine intention to make use of the reference property for its business purposes.

14. Ms Moran BL considered the following legal issues to be relevant:

(i) She referred to Oxfam v Earl and submitted that there were no "special circumstances" arising in the subject reference to warrant a departure from the general rule.

(ii) The substantive issue before the Tribunal was the applicant's intention to possess the reference property for its business purposes. This involved the greater proportion of the evidence and required retention of expert evidence on both sides, both experts being required to give evidence. On that issue the Tribunal concluded:

"102. Based on the above the Tribunal finds that the applicant has not demonstrated sufficient intention to use the reference property in the manner required under the Order. With regards to the undertaking given by the applicant, in the circumstances of the subject reference, the Tribunal finds that it has 'grounds for doubting the landlord's veracity' and the Tribunal, therefore, disregards the undertaking."

(iii) The Tribunal did not accept the applicant's evidence in this regard and on the substantive application, the application was dismissed. Therefore, in plain terms, the applicant was the "loser" and the respondent the "winner".

(iv) The "no fault nor principle" approach does not apply in the circumstances of this application, where there is a clear factual and evidential dispute as to the intention of the applicant. No offers were made in advance of the hearing. The matter had to proceed before the Tribunal for determination of the factual and evidential disputes. Therefore, the general rule should apply.

(v) While the respondent had raised other issues which were not accepted by the Tribunal these matters did not and would not amount to exceptional circumstances so as to depart from the general rule and in particular:

a) Issue as to the status of the applicant as landlord – this issue did not substantively prolong the hearing. It did not require expert evidence to be retained. The parties gave evidence in relation to the landlord/tenant status at hearing and those parties were required to give evidence in any event in relation to the "intention" issue. The issue was addressed largely in legal argument, as part of the overall concluding submissions in writing. It was not addressed in a separate preliminary hearing requiring additional days.

b) Issues in relation to the timing of the application and whether the application was premature – these matters were addressed as legal argument in the submissions and did not prolong the hearing or require additional evidence. These did not require separate hearings. These issues would not amount to exceptional circumstances as to depart from the general rule.

15. Ms Moran BL concluded, in all material respects, the respondent was the successful party in the application and the general rule should apply and the respondent should recover its costs from the applicant.

**The Applicant's Submissions**

16. On behalf of the applicant Mr Gibson BL submitted:

    (i) The headline point upon which the respondent's submissions focussed was the ultimate conclusion of the Tribunal that the applicant had not demonstrated sufficient intention to use the reference property in the manner required under the Order and the respondent had been "the winner".

    (ii) The easiest decision, therefore, would be to say that, in the absence of proving that intention, the applicant had lost entirely and, as such, "the event", with the net result that costs must follow. Such a course would however, ignore the fact that the respondent denied there existed a landlord/tenant relationship between himself and the applicant in the first instance.

    (iii) The case itself was not, therefore, focussed on intention solely but on the three issues which the Tribunal identified at paragraph 9 of its decision.

    (iv) Contrary to the respondent's submissions, the issue over whether or not the applicant was the respondent's landlord occupied a considerable amount of the Tribunal's time. Certainly, if one reverts to the affidavit evidence that was lodged before the Tribunal, the vast majority focussed on what the respondent defined as the "status of the applicant", pertaining to the landlord/tenant relationship. Of the 11 paragraphs in the respondent's replying affidavit, only two paragraphs (10 and 11) were addressed towards rebutting the actual use/intention which the applicant would make of the reference property.

    (v) At hearing, the Tribunal heard not only from Mr Paul Fegan the applicant, but also his manager, Mr David Harshaw and, in response, the father of both Paul and Konrad, Mr John Fegan. The evidence of Mr Harshaw did of course deal with the use of the

premises but also primarily dealt with the interaction between him and Konrad as regards negotiation of the rent, which was obviously indicative of a landlord/tenant relationship. Indeed the separate day on which the evidence of Mr John Fegan was heard was tailored solely to this particular issue regarding the identity of the landlord.

(vi) The issue over the Notice to Determine, whilst not taking up a great degree of Tribunal court time, did occupy the parties with regard to submissions.

(vii) The applicant, therefore, had to succeed on all three grounds in order to be successful whereas the respondent only had to knock out one. This alone justifies the special circumstances described by the Tribunal in Oxfam v Earl.

(viii) Some guidance as to the issues in respect of making an Order for costs can be found in Oxfam v Earl but also in Reynolds & Clarke "Renewal of Business Tenancies", 5th edition at paragraphs 10 to 18. There the learned authors suggest that the Court must have regard to all the circumstances including the conduct of the parties, whether a party has succeeded in part of his case, even if he has not been wholly successful. This quite obviously is the subject case, the applicant has enjoyed a measure of success but has not been wholly successful. As per Reynold & Clarke the conduct of the parties includes:

a) Conduct before as well as during the proceedings, in particular the extent to which the parties followed any relevant pre-action protocol.

b) Whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue. In the subject reference the applicant submits that it was quite clear that the respondent had a tenancy of some description with the applicant and the fact that it chose to contest this matter is something which the court should not reward by a full award of costs.

c) Whether a claimant who has succeed in his claim, in whole or in part, exaggerated his claim.

(ix) In all the circumstances, therefore, whilst the easy decision would be to simply make an Order for costs in favour of the respondent, when one looks at the detail, it is respectfully submitted that the position is considerably more nuanced.

17. Mr Gibson BL accepted that the issue of costs was undoubtedly a matter for the discretion of the Tribunal but the possible Orders which the Court may make in respect of costs include:

(i) An Order that one party may pay a proportion of the other party's costs.

(ii) A stated amount in respect of the other party's costs.

(iii) Costs from or until a certain date only.

(iv) Costs in respect of a distinct part of the proceedings.

(v) Costs up to and including a particular stage or step.

18. Mr Gibson BL concluded that the respondent in its submissions and by way of its conclusions, suggests that in all material respects the respondent was the successful party in the application. This is not correct. In one respect the respondent was successful but in the other two the applicant was successful.

**The Tribunal**

19. Prior to the substantive hearing the parties had agreed three issues to be decided by the Tribunal. The Tribunal agrees that the main issue to be decided was issue (iii), relating to proof of the applicant's intentions with regard to his future occupation of the reference property. The parties obviously considered and the Tribunal agrees, however, that the other two issues were relevant to the outcome of the proceedings.

20. The Tribunal refers to Oxfam v Earl:

"… but these circumstances must be circumstances connected with the proceedings, for example, to reflect on unsuccessful outcome on a major issue."

21. In the subject reference the respondent was successful on the main issue but it was unsuccessful on two other relevant issues. On that basis the Tribunal directs that the applicant should pay its own costs and 50% of the respondent's costs. Such costs to be taxed by the Tribunal in default of agreement.

**17th June 2022**

**Henry Spence MRICS Dip.Rating IRRV (Hons)**

**Lands Tribunal for Northern Ireland**