

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/59/2018

BETWEEN

VIXCROFT (LONDONDERRY) LIMITED – APPLICANT/LANDLORD

AND

ARGOS LIMITED – RESPONDENT/TENANT

**Re: Level O, Unit 1 and Level 1, Unit 1A together with Stores 1C,
Richmond Centre, Londonderry**

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

Background

1. Argos Limited (“the respondent”) is the tenant of premises at Level O, Unit 1 and Level 1, Unit 1A together with stores at 1C, Richmond Centre, Londonderry (“the reference property”), which were held under two leases, one dated 2nd December 1991 and a supplemental lease dated 28th February 1996. Both leases expired on 2nd August 2016.
2. On 11th August 2016 Vixcroft (Londonderry) Limited (“the applicant”), as landlord of the reference property, served on the respondent a Notice to Determine under Article 6 of the Business Tenancies (Northern Ireland) Order 1996 (“the Order”), in respect of both leases. This notice specified a determination date of 28th February 2017.
3. The effect of a landlord’s Notice to Determine is to terminate the tenancy on the specified determination date. If a tenant wishes to extend the lease, it must make a tenancy application on or before the determination date, as required under Article 10(2) of the Order. In the subject reference, the statute required any Tenancy Application to be made by the respondent on or before 28th February 2017.

4. The respondent, however, took no action with regard to the applicant's Notice to Determine. Subsequently, on 2nd July 2018, the applicant served a Form EB "General Form of Application under the Business Tenancies (Northern Ireland) Order 1996", on the respondent and the Lands Tribunal.
5. The service of the applicant's Form EB prompted negotiations between the parties re the terms of a new lease. These negotiations commenced in October 2018. The negotiations subsequently "broke down", however, and on 5th December 2018 the respondent made an application under Article 10(5) of the Order seeking an extension of time to serve a Tenancy Application. It is the application which is the subject of the current reference to the Tribunal.
6. As the tenant had continued to pay rent and observe the conditions of the lease, both parties were agreed that a periodic tenancy had been created when the leases expired and this periodic tenancy enjoyed the protection of the Order.

Procedural Matters

7. Mr Douglas Stevenson BL, instructed by Carson McDowell, solicitors appeared on behalf of the applicant. Mr Keith Gibson BL, instructed by Cleaver Fulton Rankin, solicitors represented the respondent. The Tribunal is grateful to counsel for their detailed and helpful submissions.

Position of the Parties

8. The parties were agreed that it was the responsibility of the respondent to demonstrate that the Tribunal should exercise its discretion under Article 10(5) of the Order to grant an extension of time for submission of a Tenancy Application.
9. The applicant's position was that the respondent had offered no plausible reasons as to why the Tribunal should exercise its discretion and grant an extension of time.

10. The respondent considered that, in the circumstances of the subject reference, the Tribunal should exercise its discretion under Article 10(5) of the Order.

The Legislation

11. Article 6 of the Order deals with “Termination of tenancy by the landlord”. The relevant section is:

“6.-(1) Subject to Article 11 the landlord may terminate a tenancy to which this Order applies by a notice to determine served on the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (in this Order referred to as ‘the date of termination’).”

In the subject reference the validity of the applicant’s Notice to Determine was not disputed.

12. Article 10 of the Order provides:

“Application to the Lands Tribunal

Application to the Lands Tribunal for an order for the grant of a new tenancy or for a declaration that the tenant is not entitled to a new tenancy

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

(a) an application by the landlord for a declaration 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) ...

(4) ...

(5) The Lands Tribunal, on an application made by the landlord or tenant, may –

(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) ...”.

Authorities

13. Both parties referred the Tribunal to J L Harvey Limited v Schofield & Anderson Limited BT/27/1998. The Tribunal considers the following sections to be relevant:

“A Tenancy Application, under the Business Tenancies (Northern Ireland) Order 1996, had been made to the Tribunal but it was out of time as it was about 12 days after the Date of Termination specified in the Landlord’s Notice to Determine. The Landlord had not opposed the grant of a new tenancy but the parties had been unable to agree its terms.”

And

“Then suddenly, without prior warning, a letter dated 5th May 1998 came from the Respondent’s Solicitors requiring vacant possession. He said that at no time during the discussions with the Respondent’s Agent did he receive the impression that the Respondent was going to seek vacant possession at the end of April 1998. Instead, he operated in good faith at all material times on the understanding that a new tenancy was going to be granted.”

And

“The Tribunal has had regard to the position under the previous legislation and its review in the Report of the Law Reform Advisory Committee (LRAC No 2, 1994) which led to the new Order.”

And

“The Report indicated two relevant mischiefs in the earlier Act, which the 1996 Order sought to redress by giving the Tribunal the power to extend time limits. The first was

to give parties more time to conclude genuine negotiations without the need to refer the matter to the Tribunal. The second was to avoid the potential loss of substantial property rights on a technicality.

The Tribunal's discretion is not fettered in the sense that there are any matters defined in the Order as matters to be taken into account."

And

"The Tribunal concludes that its discretion is not confined to situations in which somebody only a day or so out of time could lose all protection."

And

"No indication of what was to follow was given and these factors may have lulled the Tenant into a false sense of security."

And

"It goes without saying that parties put their positions at risk if they do not adhere to time limits or take appropriate steps to extend time limits. The Tenant ought to have kept to the time limits and ought not to have been taken by surprise but did respond promptly to the solicitor's letter and within 12 days of the time limit.

The explanation for the failure to comply is weak but, on balance, having considered all the circumstances, and in particular, the degree of default in the context of the conduct of the parties, who were negotiating to some extent at least, and the complete loss of substantial property rights if the application were refused, the Tribunal is persuaded to exercise its discretion in favour of granting the extension of time."

And

"It was not suggested that the Tenant was stalling with a view to commercial advantage by, in effect, extending the current lease, but, if that were the case, the 1996 Order would appear to have given the Tribunal greater power to address that."

Discussion

14. The respondent accepted that its Tenancy Application was out of time by a period of about two years but Mr Gibson BL considered that the time which had passed reflected the fact that both parties had taken no steps whatsoever to bring the tenancy to an end. When the applicant did decide to do something, rather than lodging a further Notice to Determine, Mr Gibson BL suggested that the applicant had approached the matter in a conciliatory fashion by serving an EB Notice. This brought about negotiations between the parties, some 16 months after the date of determination, but these negotiations came to nothing.

15. Mr Gibson BL referred the Tribunal to Harvey v Schofield wherein the Tribunal reviewed the contents of the Law Reform Advisory Committee Report on Business Tenancies which, he submitted, stressed that the Tribunal's discretion to grant an extension of time under Article 10(5) of the Order was unfettered. He pointed out that, in Harvey, the Tribunal granted an extension of time, noting that the substantial loss of property rights if the application was refused was an overwhelming concern.

16. In conclusion he submitted that the respondent's argument for an extension of time was essentially fourfold:
 - (i) the applicant acquiesced in the occupation by the respondent and accepted payment of rent.
 - (ii) the applicant restarted negotiations using its July 2018 application, and on foot of same, negotiations recommenced.
 - (iii) no prejudice had been identified as against the applicant in allowing an extension of time.
 - (iv) on the other hand the respondent would be prejudiced insofar as, should the application be refused, the respondent would continue to pay £112,750 per annum in the face of the applicant's Notice to Determine which offered a new lease at £85,000 per annum with effect from 1st March 2017

17. Mr Stevenson BL asked the Tribunal to note that the respondent's current periodic tenancy still engaged the protection of the Order. He pointed out that the respondent could continue to occupy the reference property on the same basis as it had been doing for the past number of years and if any of the parties wished to determine that periodic tenancy they could take the steps as detailed in the Order. He submitted, therefore, that there was no loss of property rights to the respondent.
18. With regards to the Tribunal's power to extend time under Article 10(5) of the Order, Mr Stevenson BL contended that the power should not be used in a "willy-nilly" fashion, but rather, if the Tribunal was to be persuaded to exercise its power to extend, a party must show very good reason. He also referred the Tribunal to Harvey v Schofield in which the parties had been in continuous negotiations but this was not the case in the subject reference. He also noted that in Harvey the application was only 12 days out of date and even in those circumstances the Tribunal still took some persuading to grant the extension.
19. Mr Stevenson BL submitted that, in the subject reference, the respondent, due to the fact that it was considering a move to alternative premises, took a commercial decision not to make a tenancy application and in the interim was content to become a periodic tenant under the same terms as the expired leases, including the rent of £112,750 per annum.
20. Mr Gibson BL had referred to the subsequent negotiations between the parties, as reason for an extension of time. Mr Stevenson BL pointed out, however, that there were no negotiations between the parties until some 16 months after the determination date had passed. He submitted, therefore, that negotiations were not the reason why a Tenancy Application was not made on or before the determination date.
21. He noted that the respondent also sought an extension of time as it considered it would be prejudiced if it could not back date a rent reduction to the determination date. Mr Stevenson BL contended that what the respondent was now saying was "at the time that the determination date passed I decided not to make a tenancy application, I was not willing to

commit to the grant of a new lease, I chose instead to stay on in the premises and to pay the passing rent. I am now not happy with that decision and I want to revisit that decision and the rent". The tenant, a large commercial firm, took a commercial decision not to make a tenancy application and, he submitted, that it could not now use Article 10(5) to unwind that decision.

Conclusion

22. In Harvey v Schofield the Tribunal accepted that it had an unfettered discretion with regard to granting an extension of time under Article 10(5) of the Order but that discretion must be exercised judicially and a party seeking an extension must show good reason.

23. The Tribunal agrees with Mr Stevenson BL, the respondent, a significant UK wide commercial organisation, took a commercial decision not to seek a new lease on the reference property at the determination date, as it was "contemplating a possible relocation", as confirmed in paragraph 9 of its Form EB of 5th December 2018. It was content to remain in occupation as a periodic tenant on the same terms as the expired leases, including the rent of £112,750 per annum. They now wished to revisit that decision, mainly to have a possible reduction in rent back dated.

24. At the date of determination the respondent could have:
 - (i) sought an extension of time from the applicant or the Tribunal for lodging its tenancy application; or
 - (ii) sought a short term lease at the applicant's offer of £85,000 per annum rent, which would have facilitated its consideration of moving to alternative premises; or
 - (iii) sought a longer term lease with a break clause, again at the applicant's offer of £85,000 per annum rent. This would also have given the respondent time to consider a move to alternative premises.

It did none of these. It had no communication with the applicant until some 16 months after the determination date and now, some two years later, it was seeking an extension of time to lodge a tenancy application, mainly for monetary gain.

25. As the Tribunal cautioned in Harvey v Schofield:- “It goes without saying that parties put their positions at risk if they do not adhere to time limits or take appropriate steps to extend time limits.” In the circumstances of the subject reference, where there was no “loss of property rights”, as the respondent still had protection under the Order, the Tribunal declines to exercise its discretion under Article 10(5) to grant an extension of time to the respondent for lodging a Tenancy Application. The respondent’s application is dismissed.

ORDERS ACCORDINGLY

1st March 2019

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

Appearances:

Applicant – Mr Douglas Stevenson BL instructed by Carson McDowell, Solicitors.

Respondents – Mr Keith Gibson BL instructed by Cleaver Fulton Rankin, Solicitors.