LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

IN THE MATTER OF APPLICATIONS

BT/65 & 66/2019

BETWEEN

JAMES P COREY TRANSPORT LIMITED – APPLICANT 1

OWEN JACOBSON – APPLICANT 2

AND

BELFAST HARBOUR COMMISSIONERS – RESPONDENTS

Re: Premises at Stormont Road, Belfast Harbour Estate, Belfast

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

Background

1. James P Corey Transport Limited ("applicant 1") and Owen Jacobson ("applicant 2") occupy adjoining premises at Stormont Road, Belfast Harbour Estate ("the reference properties") on foot of agreements made with the Belfast Harbour Commissioners ("the respondents").

2. The subject applications concern a preliminary issue to decide if the applicants occupy the reference properties as licensees or as tenants. The applications are being heard together for the preliminary issue due to the fact that both applicants have the same legal representation and in light of common factual matters.

3. Both applicants have had long established businesses within the Harbour Estate. Applicant 1 is involved in road haulage and applicant 2 manufactures modular buildings. Both have been in occupation of the reference properties since 2007, from which they currently carry on their sole businesses.

4. It was not disputed that the reference properties were individually gated and locked by each applicant at close of business each day. Neither applicant provides a key to the respondents or any third party. Each have installed CCTV at their own expense which is controlled by each applicant. Both have erected buildings on site but some of the buildings are moveable and came from a previous site on the Harbour Estate.

5. Both applicants pay a monthly rent for their current premises and have done so since 2007, although, at hearing, the Tribunal was advised that the respondents have now stopped accepting the rent. The amounts were:

   (i) Applicant 1 - £1,500 per month including VAT

   (ii) Applicant 2 - £1,830.84 per month including VAT

6. Neither applicant has a written agreement on their current premises, having refused to sign agreements put forward by the respondents. Prior to 2007 the applicants had occupied premises at McCaughey Road, within the Harbour Estate, under written agreements made in 1995.

7. The respondents are the owners of the Belfast Harbour Estate and on 22nd October 2018 they served the applicants with notices to quit, as they wished to carry out port redevelopment works. The notices gave the applicants up to 31st December 2018 to vacate.

8. At the same time the respondents served the applicants with "Notices to Determine" under Article 6 of the Business Tenancies (Northern Ireland) Order 1996 ("the Order"). The respondents' covering letter stated that they considered the applicants to be licensees and the Article 6 notices had been served without prejudice to that position. The notices opposed a new tenancy on "redevelopment", "own use" and "statutory authority" grounds and also on the basis that one of the applicants was consistently late in paying the rent. It was accepted, however, that at the date of the hearing both applicants were up to date with their rent. On 4th June 2019 the applicants submitted Tenancy Applications to the Lands Tribunal.

9. Neither of the reference properties were separately rated and their rates assessments were included in the overall rates assessment for the Harbour Estate.

10. The only written agreements in existence were the 1995 agreements relating to the applicants' previous premises at McCaughey Road. It was accepted that neither applicant had sought legal advice when signing the 1995 agreements.

11. In the year 2000 the respondent had proposed to move the applicants from their McCaughey Road premises and the applicants sought assistance from a local MLA, Mr Alban Maginness, who advised the respondents that both applicants regarded themselves as business tenants. The proposed move, however, did not take place at that time.

Procedural Matters

12. The applicants were represented by Mr Richard Shields BL, instructed by Shean Dickson Merrick Solicitors. Mr Douglas Stevenson BL instructed by Carson McDowell Solicitors appeared on behalf of the respondents. The Tribunal is grateful to counsel for their helpful submissions.

13. Factual evidence was received from

    (i) Mr Michael Robinson, a director of Belfast Harbour Commissioners

    (ii) Mr James Corey, on behalf of applicant 1

    (iii) Mr Owen Jacobson, applicant 2

Position of the Parties

14. Mr Shields BL's position was that both applicants clearly occupied their premises under a tenancy rather than a licence. Mr Stevenson BL submitted that both applicants were licensees and their respective tenancy applications to the Lands Tribunal should be dismissed.

The Authorities

15. Both parties referred the Tribunal to a recent Northern Ireland Court of Appeal case, Car Park Services Limited v Bywater Capital (Winetavern) Limited [2018] NICA 22, which adjudicated on a similar issue, as to whether an agreement created a lease or a licence.

16. The Tribunal was also referred to:

    (i) Street v Mountford [1985] AC 809

    (ii) Dresden Estates Ltd v Collinson [1988] 55 P&CR 47CA

    (iii) Hardjiloucas v Crean [1988] 1 WLR 1006

    (iv) AG Securities v Vaughan [1990] AC 417

The 1995 Agreement

17. The terms of the agreement were:

> "LICENCE TO OCCUPY OPEN STORAGE WITHIN THE BELFAST HARBOUR ESTATE ("THE HARBOUR ESTATE")
>
> I refer to your request for open storage accommodation in the Harbour Estate and inform you that in consideration of the licence fee referred to below the Commissioners ("the Commissioners") permit you in accordance with the provisions of this Licence to share with the Commissioners and the Commissioners' licensees the open storage area ("the Storage Area") briefly described in the Schedule to this Licence ("the Schedule") and comprising

the area set out in the Schedule which Licence commences as set out in the Schedule and will continue until determined at the pleasure of the Commissioners as set out below.

This Licence is subject to the following conditions:-

1.1 That you use the Storage Area for the storage of materials and goods of the nature set out in the Schedule in transit through the Port of Belfast and as ancillary thereto for temporary offices and parking of vehicles ("the Permitted User").

1.2 All materials and goods stored must have been imported or must be intended for export in either case through the Port of Belfast and in the case of export must be so exported within a reasonable period and in the case of import must be distributed from the Storage Area within a reasonable period.

1.3 That you pay a charge for the Storage area commencing at the initial rate set out in the Schedule which charge shall be payable one month in arrears such charge being subject to periodic review by the Commissioners at their discretion which shall be absolute.

1.4 That your occupation of the Storage Area complies with the Belfast Harbour Acts, Bye-Laws 1867 to 1979 made thereunder and any statutory amendment or re-enactment thereof and the requirements of the Health and Safety Inspectorate.

1.5 That you pay to the Commissioners the cost of electricity and/or water consumed at the Storage Area such payment to be made within one month of the date of furnishing account.

1.6 That no material, goods, plant or equipment be placed against any fence of the Storage Area and loading of the surface of the Storage Area shall not exceed weighting which the surface is designed to bear which design weighting you shall obtain by enquiry from the Engineering Manager or his deputy and in the event of breach of this condition you will immediately make good all damage to the Storage Area to the satisfaction of the Commissioners and at your own expense.

1.7 That you indemnify the Commissioners against all losses, damages and expenses which may be sustained or incurred by the Commissioners and all actions, proceedings, claims and demands which may be brought or made against the

Commissioners in respect of any damage done to any property whether belonging to the Commissioners or not and any injury caused to any person whether in the employment of the Commissioners or not and any other damage or injury whatsoever where such loss, damage, expense or injury in any way arises out of or is in any way either directly or indirectly attributable to or caused by your use or occupation of the Storage Area except in so far as such loss, damage, expense or injury is attributable to the act or default of the Commissioners, their servants or agents.

1.8 That if the Storage area is gated you ensure that all gates of the Storage Area are and remain closed except when vehicles and persons are entering or exiting from the Storage Area.

1.9 That on any termination of this Licence the Storage Area is returned to the Commissioners in a condition comparable to that at the date of commencement of this Licence.

2. The Commissioners may without terminating this Licence change the allocation of the Storage Area to another Storage Area in the Harbour Estate by giving to you notice in writing specifying the other Storage Area provided that in the event of the other Storage Area not being acceptable to you you may terminate this Licence.

3.1 This Licence may be terminated by the Commissioners giving to you notice in writing given at any time.

3.2 Any termination of this Licence shall be without prejudice to any claims by the Commissioners for antecedent breach of the conditions of this Licence or any of them.

4. If this Licence shall be terminated then immediately you shall remove all items from the Storage Area making good any damage done to the Storage Area.

5. The Storage Area is and at all times shall remain the sole property of the Commissioners.

6. All goods laid down on or passing over the quays of the Commissioners or placed in the Storage Area or elsewhere within the Harbour Estate are at your sole risk in

every respect. The Commissioners have no custody of such goods and will not be responsible for loss thereof or damage thereto for whatever cause arising. Persons in charge of goods should protect them from such loss, damage or injury. Special care is necessary in the case of goods susceptible to taint or stain or damage from other goods.

7. If on the termination of this Licence any property remains on the Storage Area, the Commissioners may remove such property and if you have not collected it within fourteen calendar days after termination of this Licence the Commissioners may sell it as your agent and retain the proceeds of sale and the indemnity in paragraph 1.7 shall apply to any claim by any third party resulting from any such sale.

8.1 This Licence is personal to you and is not in any circumstances transferable nor may it be underlet or underlicensed nor does it permit any partner or other person connected with you to use the Storage Area.

8.2 This Licence does not and is not intended to create or grant to you any estate or interest in the Storage Area or to give rise to the relationship of landlord and tenant.

8.3 You shall not be or become entitled to any estate or priority interest in or to exclusive possession or occupation of the Storage Area.

9. Any notice to be served on the Commissioners pursuant to this Licence shall be served at the Belfast Harbour Office and any notice to be served on you may be left at the Storage Area or by ordinary first class post to your address last known to the undersigned."

The Legal Principles

18. The legal principles were outlined by Stephens LJ in the Car Park Services Limited Northern Ireland Court of Appeal decision at paragraph [20]:-

"[20] The leading authorities on the distinction between a tenancy and a licence are *Street v Mountford* and *AG Securities v Vaughan* [1990] 1 AC 417. The following

principles can be extracted from those authorities though I have altered references to the Rent Acts so as to refer to the 1996 Order:

(a) 'To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments' (page 818 E-F of *Street v Mountford*). So where there is a grant of exclusive possession to the occupier for a term and at a rent then, save in exceptional circumstances (none of which apply in this case), there is in law a tenancy whatever label the parties may have chosen to attach to it.

(b) By virtue of that definition one of the three hallmarks of a tenancy is exclusive possession by which is meant that the tenant can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. 'A reservation to the landlord, either by contract or statute, of a limited right of entry, as for example to view or repair, is, of course, not inconsistent with the grant of exclusive possession' (page 827 E of *Street v Mountford*).

(c) '(The) consequences in law of the agreement once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence' (pages 819 E-F of *Street v Mountford*).

(d) 'The professed intentions of the parties' 'cannot alter the effect of the agreement' (pages 819 H and 826 E-F of *Street v Mountford*).

(e) 'Since parties to an agreement cannot contract out of the (1996 Order) a document which *expresses the intention, genuine or* bogus, *of both parties* or of one party to create a licence will nevertheless create a tenancy if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy' (page 458 E-F of *AG Securities v Vaughan*) (emphasis added). It is clear that both parties can genuinely intend to create a licence but nevertheless a tenancy will have been created if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy.

(f) 'The duty of the court is to enforce the (1996 Order) and in so doing to observe one principle which is inherent in the (Order) and has long been recognised, the principle that parties cannot contract out of the (Order)' (page 459 D of *AG Securities v Vaughan).*

(g) In order to determine whether exclusive possession was granted by the agreement it is necessary to minutely examine the detailed rights and obligations contained in the agreement (page 823 B of *Street v Mountford*). The purposes of the minute examination is not to assign some of the provisions of the agreement to the category of terms which are or are thought to be usually in the category of terms to be found in a tenancy agreement or of assigning other provisions to the category of terms which are or are thought to be usually in the category of terms to be found in a licence (page 826 C to *Street v Mountford*). Rather what is required is a minute and careful consideration of the terms of the agreement to determine whether there is a grant of excusive possession to an occupier. An illustration of the minute examination of the terms of an agreement is contained in the speech of Lord Jauncey in *AG Securities v Vaughan*. He stated that an obligation to pay for all gas and electricity consumed in 'the flat would be an entirely reasonable arrangement so long as they alone were using the power but would become curious, to say the least, if others nominated by the Licensor were sharing the flat and consuming power' (see page 476 letters B-C). Lord Jauncey did not consider it appropriate to consider whether the curiosity could be cured by the implication of a term that if others were nominated then the total costs would be shared and I proceed on the basis that this was because it was not appropriate for there to have been such an implication.

(h) 'The (1996 Order) is irrelevant to the problem of determining the legal effect of the rights granted by the agreement' (page 819 G of *Street v Mountford*). 'Although the (1996 Order) must not be allowed to alter or influence the construction of agreement, the court should, ... but astute to detect and frustrate (pretence) whose only object is to disguise the grant of a tenancy and to evade the (Order)' (see page 825 H of *Street v Mountford* and page 462 H of *AG Securities v Vaughan*).

(i) 'An express statement of intention is not decisive and ... the court must pay attention to the facts and surrounding circumstances and what people do as well as to what people say' (page 463 H – 464 A of *AG Securities v Vaughan*).

(j) In order to construe the agreement regard should be had to the circumstances which existed at the time when it was entered into (page 475 E of *AG Securities v Vaughan*). 'Subsequent actings of the parties may not be prayed in aid for the purpose of construing the agreements' (pages 475 F and 469 B-C of *AG Securities v Vaughan*). The matrix of facts ordinarily excludes the previous negotiations of the parties, (see *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 at 912-3). However in *AG Securities v Vaughan* Lord Templeman stated that '(in) considering one or more documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, *the course of negotiations* and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation' (see page 458 G-H) (emphasis added). The context here is legislative protection of tenants and for my part the course of negotiations might for instance demonstrate that the intention contained in the concluded agreement in fact is the product of pressure to evade the Order. Another instance is that a financial inducement to contract out of the Order by using the device of a licence might have been offered which could be evidence of a mutual intention to do what is prohibited. I also note from paragraph [27] of his judgment that Sir John Gillen makes reference to issues that 'may have arisen' in 'the course of negotiations' giving examples of them. My view and it appears that Sir John Gillen agrees is that the course of negotiations can be considered. However it is not necessary to resolve the issue as to whether this is an area of exception to the ordinary rule that the matrix of facts excludes the parties previous negotiations as neither party relied on any aspect of the negotiations.

(k) Subsequent actings of the parties 'may be looked at for the purposes of determining whether or not parts of the agreement are a sham in the sense that they were intended merely as 'dressing up' and not as provisions to which any effect would be given' (pages 475 F and 469 C of *AG Securities v Vaughan*)."

19. At paragraph [21] Stephens LJ also noted:

> "[21] A person may be the sole occupier of property and yet not have exclusive possession. Exclusive possession is as in (b) above."

20. Mr Shields BL referred the Tribunal to the following additional extracts from the Court of Appeal decision:

> "[40] ... It can be discerned from the identification of the car parking site and the schedule to the agreement that the site extended to *all* that plot of ground situate at Winetavern Street/Gresham Street, Belfast. Accordingly the right to use the car parking site is the right to use *the entire site* by which is meant *all the land*. I consider this to be the most significant part of this clause as an indicator of exclusive possession ..."

And

> "[43] ... I do not consider that short term use was envisaged. ..."

And

> "[44] Clause 3 provides for the payment of rent every 4 weeks. Clause 3(b) requires the keeping of proper and accurate accounts. Clause 3(c) requires the provision of a detailed account *at the end of each four week period*. At the very least it was intended that there would be a number of four week periods indicating again that this was not intended to be a short term stop gap measure. I do not consider that this clause when seen in the context of the surrounding circumstances is neutral but rather is a pointer towards exclusive possession."

And

> "[70] *Wylie, Irish Land Law 3rd Edition* at paragraph 17.009, in dealing with the concept of exclusive possession, expresses the view that the courts increasingly look to the degree of 'control' a person has over the use of the premises to ascertain if in fact he can 'call the place his own'."

And

"[71] From these authorities I deduce that exclusive possession is enjoyed by a person when he has actual possession of the lands to the extent that he can call the lands his own. This means that he can exclude all persons from the land including the landlord. In determining whether a person exerts such control the court needs to carefully consider the acts carried out by the person, having regard to the nature of the land in question."

And

"[93] I therefore conclude that the only relevance of the 1996 Order when determining whether an agreement is a licence or a lease is that it places a duty on the court to be astute to ensure that any agreement entered into between parties is not a sham or otherwise a devise designed to evade the 1996 Order ..."

And

"[96] The agreement was a commercial transaction entered into by businessmen who had the benefit of legal advice and had equal bargaining power ..."

And

"[101] There is no clause in the agreement in this case which has 'an air of unreality' about it ..."

Discussion

21. At paragraph 20(g) of the NI Court of Appeal decision Stephens LJ stated: "what is required is a minute and careful consideration of the terms of the agreement to determine whether there is a GRANT OF EXCLUSIVE POSSESSION TO AN OCCUPIER" (Tribunal emphasis).

22. The only written agreements between the parties were the 1995 agreements which, for both parties, were essentially the same apart from the fact that in the case of applicant 1 the agreements referred to "Storage Area" and the agreement for applicant 2 referred to "Storage Shed".

23. It was also essential to consider the circumstances at the time of the agreements coming into force. It was accepted at that time the applicants did not have legal advice.

24. Mr Robinson, on behalf of the respondents, gave evidence as to why occupiers at the Harbour Estate were granted occupation in terms of what he considered to be "storage licences". He advised that this was due to the fact that the business of the Harbour Estate was one which was in a continual state of flux and different parts of the Harbour may be required at different times for Harbour development. He considered, therefore, that the respondents required the ability to move occupiers periodically to facilitate the business of the Harbour Estate. Mr Stevenson BL submitted that a licence recording the ability of the respondent to move occupiers was therefore in keeping with the requirements of the Harbour Estate and the subject agreements.

25. Mr Robinson considered the subject agreements to be "standard open storage licences" that offered flexibility to both parties and facilitated continued port development. When asked by Mr Shields BL, however, he could not give any example of how this "flexibility" benefitted the applicants.

26. Mr Shields BL referred the Tribunal to factual matters given in evidence by Mr Robinson on behalf of the respondents. He submitted that Robinson accepted:

    (i) Both applicants enjoyed exclusive occupation of their premises.

    (ii) The applicants alone occupied the entirety of their premises.

    (iii) The applicants had occupied their respective premises for lengthy periods of time, and they had done so for the purposes of carrying on businesses.

    (iv) He could not explain the rationale behind the 1995 licences. He said they were entered into for the benefit of both parties but when pressed he could not say what benefit the licences offered the applicants.

    (v) The 1995 licences described a situation which plainly did not exist (permitted use only for storage shed and open storage respectively).

(vi) Neither applicant had the benefit of legal advice when they signed the 1995 agreements.

27. Based on Mr Robinson's evidence Mr Shields BL submitted that the Tribunal should find:

(i) The 1995 licences were a sham designed to avoid the application of the Business Tenancies Order. The use and occupation described in the 1995 agreements was entirely fictional and at no time reflected the actual arrangements between the parties. This had an "air of unreality" about it.

(ii) Both applicants enjoyed exclusive possession of their premises, as had been expressly accepted by Mr Robinson in evidence.

28. At paragraph 20(k) of the NI Court of Appeal decision Stephens LJ stated that "the subsequent actions of the parties may be looked at for the purposes of deciding whether or not part of the agreement is a sham". For an agreement to be a sham it must be an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to the true nature and effect of the legal relations between the parties (as per Mustill LJ in Hardjiloucas v Crean [1998] 1 WLR 1006).

29. Mr Shields BL also considered the following facts to be relevant:

(i) Neither applicant occupied the same premises as was occupied in 1995. The respondents sent new draft terms to both applicants in 2007. Neither applicant signed or agreed to those terms. Neither applicant had the benefit of legal advice.

(ii) The draft unsigned terms sent to applicant 1 also referred to a fictional use – only as Storage Area. This too had an "air of unreality", and was designed to avoid the operation of the 1996 Order. The "heads of terms" sent to applicant 2 were in keeping with a lease rather than a licence. For example:

a. Annual payment of rent

b. 10 year duration

c. Applicant 2 responsible for repair and maintenance

d. Applicant 2 to gate and fence and to connect electric/water/sewage

(iii) It ought reasonably to have been clear to the respondents from the correspondence from Mr Alban Maginness that both applicants regarded themselves as business tenants.

(iv) For both applicants, the Stormont Road premises were their sole business premises and neither enjoyed business premises elsewhere. They both employed staff at each premises.

(v) Both applicants had individually erected CCTV, controlled by them (not the respondents) to secure the premises.

(vi) Both applicants' premises were individually metered for electricity. Each applicant individually paid an electricity bill to the respondents. The only access permitted to the respondents by each applicant was a meter-checker attending periodically to read the meter during business hours.

(vii) Both applicants had invested in their respective premises, erecting buildings, connecting to services and storing substantial amounts of plant.

(viii) The respondents had purported to serve on each applicant a "Notice Terminating Your Tenancy" dated 22nd October 2018.

a. The notices were signed in manuscript by the respondents' solicitor.

b. The notices identified each applicant as a "tenant" and the respondent as the "landlord".

c. The notices referred to and acknowledge "the current tenancy".

d. The notices referred to and acknowledged, in respect of each applicant, "your tenancy".

e. The notices asked that "the tenant ought not to be granted a new tenancy".

f. The notices applied the 1996 Order to the applicants.

g. The notices were prepared on behalf of the respondents, having taken independent legal advice from solicitors on the effect of such a notice.

The Tribunal notes, however, that these notices had been submitted "without prejudice" to the respondent's position that the applicants were licensees. The Tribunal, therefore, draws no conclusion from these notices.

30. In conclusion Mr Shields BL submitted that both applicants clearly occupied the reference properties under a tenancy rather than a licence.

31. Mr Stevenson BL relied on the following facts:

(i) Both applicants previously occupied premises at McCaughey Road on foot of licence agreements signed in 1995. These licences were described as "licence to occupy open/closed storage" and granted the applicants the right to "share" the premises with the respondent. The licences also granted the respondent the right to terminate the licences and a right to move the applicants to other premises.

(ii) Mr Robinson gave evidence as to why occupiers at the Harbour Estate were granted occupation on the terms of such storage licences. The business of the Harbour Estate was one which was continually changing. Different parts of the Harbour Estate may be required by the respondents or other users at different times for port reasons. The respondent therefore required the ability to share the use of the premises on occasions with some occupiers or to move certain occupiers around the Harbour Estate.

(iii) The applicants did not dispute that the respondents required the ability to move occupiers. This was for good reason – both applicants had been moved from their original premises at McCaughey Road and then to other premises at McCaughey Road and then to their current premises at Stormont Road. Both applicants were therefore well aware of the respondents' requirements to relocate occupiers from time to time.

(iv) In 2000 there was a suggestion that the applicants would have to move to facilitate the redevelopment of McCaughey Road. The applicants engaged Mr Alban Maginness, an MLA and barrister, to make representations on their behalf. Mr Maginness wrote to the respondents, contending that the applicants were tenants not licensees.

(v) The respondents maintained that the applicants were licensees and that they held copies of the licence agreements signed by the applicants. The respondents' letter was the last in the chain of correspondence and the applicants' argument that they were tenants seems not to have been pursued at that time.

(vi) Under cross-examination both applicants accepted:

a. They had discussed the basis of their occupation of the McCaughey Road premises with Mr Maginness.

b. It was explained to them that there was a difference between being a tenant and licensee.

c. They were aware Mr Maginness sought to contend they were tenants.

d. They knew as a result of the subsequent correspondence that the respondents considered them to be licensees and that the respondents held licences signed by them.

The proposed redevelopment in 2000 did not, however, take place and the applicants remained in occupation at McCaughey Road.

(vii) Mr Robinson gave evidence that, in 2007, the respondents again proposed to redevelop McCaughey Road. This necessitated moving the applicants to Stormont Road. The respondents corresponded with the applicants and the moves happened in late 2007.

(viii) During the course of the moves there was never any suggestion by the applicants that the respondents did not have the right to move them. There was no correspondence in which the applicants contended that they could not, and would not, be moved. That is, the applicants accepted (as they had before when moved around McCaughey Road) that the respondents could move them to other parts of

the Harbour Estate. This was, of course, entirely consistent with the terms of their licence agreements and their status as licensees. Both applicants moved to their current premises at Stormont Road late 2007 without any issue or protest or without seeking to contend that they were tenants.

(ix) At the time of the applicants' move, the Stormont Road premises comprised an empty car park, which was fenced in. It was accepted by the respondents that since that time both applicants were the sole occupiers of the premises at Stormont Road. This did not mean however that they had exclusive possession of the premises. Both applicants erected some structures but it seemed to be accepted by the applicants that these structures could be moved and indeed some came from their previous premises at McCaughey Road.

(x) The applicants had not considered themselves to be in exclusive possession of their premise for the purposes of the Rates (Northern Ireland) Order 1977 as they had not been separately assessed for rates. They seemed, therefore, to have been contending before the Tribunal that they had exclusive possession without having made any similar contention to the Rates Assessor.

32. Based on these circumstances Mr Stevenson BL submitted that the following extracts from the agreements were relevant:

> "I refer to your request for open storage accommodation in the Harbour Estate and inform you that in consideration of the licence fee referred to below the Commissioners ('the Commissioners') permit you in accordance with the provisions of this licence to share with the Commissioners and the Commissioners licensees the open storage area ('the Storage Area') briefly described in the Schedule to this licence."

And

> "2. The Commissioners may without terminating this licence change the allocation of the Storage Area to another Storage Area in the Harbour Estate by giving you notice in writing specifying the other Storage Area provided that in the

event of other Storage Area not being acceptable to you, you may terminate the licence."

And

"3.1 This licence may be terminated by the Commissioners giving to you notice in writing given at any time."

And

"5. The Storage Area is and at all times shall remain the sole property of the Commissioners.

And

"8.1 This Licence is personal to you and is not in any circumstances transferable nor may it be underlet or underlicensed nor does it permit any partner or other person connected with you to use the Storage Area.

8.2 This Licence does not and is not intended to create or grant to you any estate or interest in the Storage Area or to give rise to the relationship of landlord and tenant.

8.3 You shall not be or become entitled to any estate or priority interest in or to exclusive possession or occupation of the Storage Area.

And

"SCHEDULE

Details of Storage Area: Site for portacabin/trailer parking."

33. Mr Stevenson BL made the following submissions about the licence agreement:

(i) The document was described as a licence. Whilst labels were not and could not be determinative of whether there was a grant of exclusive possession, they were not simply to be ignored.

(ii) There was nothing remotely approximating to a grant of exclusive possession. The grant was permission to "share with the Commissioners and Commissioners licensees the open storage area". That was as far removed from the grant of exclusive possession as one could imagine. Sharing was the antithesis of exclusivity. It could be contrasted with the grant in the Car Park Services case, which was the grant of an exclusive right to park cars.

(iii) The applicants were obliged to pay a licence fee, not a rent.

(iv) The agreement could be terminated by the respondents at any time.

(v) There was an express acknowledgement that the reference properties remained the property of the respondents.

(vi) Again, in contrast to Car Park Services, there was no reference to the applicants being entitled to carry out works on the premises, or being obliged to repair the premises, or being obliged to pay rates for the premises, or to be responsible for accidents etc. on the premises (unless caused by its use). That is, there were none of the clauses that one would typically find in a lease.

(vii) The agreements were expressed to be personal to the applicants. This was again consistent with a licence (which was by its nature personal and did not create any estate in land) and inconsistent with a lease, which did create an alienable estate in land.

(viii) There was an express acknowledgement that the agreements did not create the relationship of landlord and tenant, nor did it grant exclusive possession. Whilst the efficacy of such clauses can be debated (and the Court of Appeal in Car Park Services was somewhat divided on the point) such wording further copper fastened the argument that exclusive possession was not being granted.

34. Mr Stevenson BL considered clause 2 to be the most important and which entitled the respondent to move the applicants to other premises within the Harbour Estate. He referred the Tribunal to Dresden Estates v Collinson in which the licence agreement, which he considered to be more akin to a lease than the agreement in the subject applications,

contained a clause stating the licensor was "entitled from time to time on giving the Required Notice to require the Licensees to transfer this occupation to other premises within the Licensors adjoining property". The Court of Appeal in that case stated: "You cannot have a tenancy granting exclusive possession of particular premises subject to a provision that the Landlord can require the tenants to move to somewhere else". Mr Stevenson BL also referred the Tribunal to the Irish case of Governors of the National Maternity Hospital v McGourran [1994] 1 ILRM 521, in which Morris J held that a clause which entitled the hospital to move to substitute premise "could not be found in a lease".

35. If there was any debate about whether the other terms of the agreements granted exclusive possession, Mr Stevenson BL submitted that Clause 2 put the matter beyond any doubt – a clause which permitted an owner to move an occupier to other premises was completely inconsistent with a grant of exclusive possession. Dresden Estates made this clear and Mr Stevenson BL submitted that the subject agreements were, therefore, clearly licences.

36. Mr Stevenson BL then considered the applicants contention that the agreements could be regarded as shams. He referred the Tribunal to the quote of Mustill LJ in Hardjiloucas v Crean which defined a sham as "an agreement or series of agreements which are deliberately framed with the object of deceiving third parties as to the true nature and effect of the legal relations between the parties". He submitted that it should require clear proof to make out the serious charge that an agreement was a sham i.e. making out the parties were practising a deceit.

37. Mr Stevenson BL submitted that there was no evidence whatsoever to suggest that the agreements were a sham. The applicants tried to make much of the clause in the licence which stated that goods being stored at the premises had to be imported or stored for export. Mr Robinson accepted that this might not be the case in applicant 2's sales which were to the Republic of Ireland but explained that it might well be the case of applicant 1, which was moving cargo coming to and from the Harbour Estate. But even taking this point at its weight, Mr Stevenson BL submitted that one clause could not mean that the whole agreement was

some sort of sham, made with the intent of deceiving others, as to the true nature of the parties relations.

38. In fact, Mr Stevenson BL considered that there was no discordance whatsoever between the terms of the agreements and the rights and responsibilities (the legal relations) that the parties wanted to have. He referred the Tribunal to the evidence of Mr Robinson who explained that the respondents needed to have certain occupiers on licence agreements, as the licensed space may need to be shared with the respondents or other operators from time to time, depending on port needs, and the respondents may need to move occupiers to other parts of the Harbour Estate. He considered that a licence agreement recording such sharing of possession and the ability to move the licensees was therefore entirely in keeping with the agreements struck. Mr Stevenson BL submitted that this could be seen most clearly, and most importantly, in both applicants being moved, not once but twice, from McCaughey Road to other McCaughey Road premises and then to Stormont Road. He submitted therefore, that there was no basis for arguing that the agreements were a sham. The Tribunal agrees with Mr Stevenson BL, the agreements were not a deliberate attempt to deceive and create a "sham". The clear evidence of Mr Robinson was that the respondents required flexibility in the agreements in order to facilitate continually changing circumstances within the Harbour Estate. The agreements were created specifically for that purpose.

39. Mr Stevenson BL accepted that the applicants had exclusive occupation of the reference properties but he submitted that exclusive occupation and exclusive possession were not the same thing. The relevant question was, however, did the agreements grant exclusive possession and he submitted that, based on Clause 2, they did not.

40. Mr Stevenson BL also considered that the applicants' obduracy in refusing to return a signed licence for the Stormont Road properties was beside the point. The applicants were bound by the terms of the 1995 agreements and it was on the basis of these agreements that they moved to their current premises at Stormont Road.

41. Based on these facts and circumstances Mr Stevenson BL submitted that both applicants were licensees and their tenancy applications should therefore be dismissed.

Conclusion

42. The applicants currently occupy the reference properties under the terms of the 1995 agreements which were the only signed agreements in writing between the parties. The Tribunal, therefore, derives no assistance from the proposed 2007 agreements which were never signed or returned by the applicants. It is the terms of the 1995 agreements which the Tribunal must consider.

43. The Tribunal notes at the time of occupation of the reference properties in 2007 they comprised an empty car park which was fenced. This was in keeping with the description in the 1995 Agreements as "Open Storage".

44. The Tribunal also notes that the applicants were not legally represented at the time of signing the 1995 Agreements. They were, however, experienced businessmen and should have understood the clear requirements of the agreements which they signed, in particular:

- "permit you in accordance with this agreement to share with the Commissioners and the Commissioners Licensees this open storage area."

And

- "Clause 2 the Commissioner may ... change the allocation of the Storage Area to another Storage Area in the Harbour Estate ..."

Indeed, in concurrence with Clause 2, the applicants had each moved on two separate occasions.

45. The Tribunal draws no conclusions from the fact that the premises were not separately rated from the overall rates assessment of the Harbour Estate. This was an entirely different matter.

46. The terms of the agreements were debatable to varying degrees with regard to the issue of "exclusive possession". The Tribunal agrees, however, with Mr Stevenson BL, clause 2 was the most significant in terms of "exclusive possession" and the applicants had moved twice, based on the requirements of this clause. The Tribunal derives assistance from the decision in Dresden Estates, in which the Court of Appeal found that you could not have a tenancy granting exclusive possession subject to a provision that the landlord could require the tenant to move at any time. Also in the Governors of the National Maternity Hospital the court held that a clause which required the tenant to move "could not be found in a lease". The Tribunal agrees.

47. The Tribunal, therefore, finds both applicants to be licensees and on that basis their Tenancy Applications are dismissed.

18th February 2020 **Henry M Spence MRICS Dip.Rating IRRV (Hons)**
Lands Tribunal for Northern Ireland

Appearances:

Applicants – Mr Richard Shields BL instructed by Shean Dickson Merrick solicitors.

Respondents – Mr Douglas Stevenson BL instructed by Carson McDowell solicitors.