LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL & COMPENSATION ACT (NORTHERN IRELAND) 1964

BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

IN THE MATTER OF AN APPLICATION FOR COSTS

BT/65/2012

BETWEEN

BEAVERBROOKS THE JEWELLERS LIMITED – APPLICANT

AND

PORTLAND (NI) LIMITED – RESPONDENT

Re: Ground & First Floor premises at 39 Castle Lane, Belfast

Lands Tribunal - Henry M Spence MRICS Dip.Rating IRRV (Hons)

Background

1. The applicant is the freehold owner of a building at the corner of Donegall Place and Castle Lane, Belfast. The applicant has traded for some considerable time from part of the building as Beaverbrooks Jewellers.

2. Another part of the building has been sublet to the respondent for a term commencing on 22nd March 2006 and expiring on 28th October 2012. The respondent operates this part of the premises as a jewellery store, specifically as a Swarovski franchise.

3. On 31st July 2012 the respondent served a tenants request for a new tenancy seeking a new lease for a term of 5 years from 8th February 2013.

4. On 25th September 2012 the applicant responded to the tenants request for a new tenancy advising that it intended to oppose the grant of a new tenancy under Article 12(1)(g) of the 1996 Order and that it intended to use the premises for its own use as part of its jewellery store.

5. On 29th November 2012 the applicant lodged a tenancy application with the Lands Tribunal but subsequently on 7th March 2013 the respondent advised the applicant and the Tribunal that it would concede the applicant's intention to occupy the premises for its own use.

6. The applicant is now seeking its costs in the matter.

Procedure

7. The issue of costs was dealt with by written submissions. Mr Douglas Stevenson BL wrote on behalf of the applicant and Mr William Gowdy BL wrote on behalf of the respondent.

Positions

8. Mr Stevenson submitted that the applicant should be entitled to recover from the respondent all of its costs incurred in the proceedings.

9. Mr Gowdy submitted that the Tribunal should make no order as to costs or in the alternative the applicant should be awarded its costs, but only from 14th February 2013.

Statute

10. Rule 33(1) of the Lands Tribunal Rules (Northern Ireland) 1976 provides:

> "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."

Case Law

11. The Tribunal was referred to the following cases:
    - Oxfam v Earl & Others (BT/3/1995)
    - Campbell v Finegan (BT/57/1998)
    - NIHE v Extravision (BT/60/1999)
    - Tsang v Bamford (BT/19/2000)

Chronology of Events

12.
    - 31st July 2012 – respondent requests a new tenancy.
    - 25th September 2012 – applicant indicates that he intends to oppose the grant of a new tenancy under Article 12(1)(g) of the Order "own use".
    - 29th November 2012 – the applicant lodges a tenancy application with the Lands Tribunal for a declaration that the respondent is not entitled to a new tenancy.
    - 28th December 2012 – the applicant provides the respondent with:

- board minutes evidencing the applicant's intention to resume possession of the premises upon termination of the lease.
- approximate costings of the works.
- bank statement evidencing ample funds to carry out the works.
- confirmation that application for Building Control approval would be made shortly.

- 9th January 2013 - first mention before the Lands Tribunal whereupon the applicant's solicitor outlined the applicant's plans that the subject premises would be used to extend the applicant's existing premises at Castle Lane. The case was listed for further mention on 13th February 2013.

- 23rd January 2013 - applicant provides photographs of another unit where the applicant had amalgamated an adjacent unit in a similar way. A copy of the application to Building Control was also enclosed and which noted "As a format of the new interior has not yet been concluded a further application will be made expressly for the fit out works and this will include means of escape, fire alarms, emergency lighting etc".

  At this point the applicant expressly stated in his letter to the respondent "I would hope that we have now demonstrated that our client has both a fixed intention and the means to utilise your client's premises for its own use. As such it would be a waste of time and money to pursue this matter in the lands Tribunal".

- 4th February 2013 – the applicant again wrote to the respondent advising "You'll know from my earlier letter and discussions with your clients, that the Landlords (sic) are pressing on with the Tribunal process, being the only approach they can sensibly take, in the absence of any feedback from your clients, regarding a completion date for possession".

- 12th February 2013 – applicant forwards Notice of Approval from Building Control.

- 13th February 2013 – prior to the mention, the applicant provided further plans showing the proposed layout of the redeveloped premises. More detailed costings for the proposed works were also provided. The applicant again queried why the respondent would not accept that the applicant's intention had been made out.

- 13th February 2013 – further mention whereby the respondent continued to oppose the application and the Tribunal fixed a date for hearing on 20th March 2013.

- 7th March 2013 – respondent concedes the tenancy application and requests adjournment of the hearing.

Applicant's Case

13. Mr Stevenson submitted:

i. The applicant's case had succeeded. The starting presumption therefore is that the applicant should be awarded its costs unless the respondent can show "exceptional circumstances". The burden of showing that there have been exceptional circumstances rests firmly on the respondent.

ii. The applicant is clearly an experienced jewellery retailer; it has approximately 70 stores nationwide. Further, the applicant was not proposing to use the premises as a new stand-alone store, rather the premises were to be incorporated as part of the applicants existing premises. It was therefore perfectly obvious from the outset that the applicant was equipped to run the premises.

iii. Further, by letter dated 27th December 2012, the applicant had provided details of its planned works to amalgamate the premises within its existing premises, evidence of its subjective intention to carry out the works (through the board minutes) and evidence of its objective ability to carry out the works (provision of bank statements). The applicant, therefore, from that date at the latest, had provided evidence of its intention. This was before the first mention of the case before the Tribunal.

iv. After 27th December the applicant repeatedly invited the respondent to withdraw its opposition to the application. Notwithstanding this, the respondent continued to oppose the application, forcing the applicant to attend a further mention, request a date for hearing, brief counsel, consult with counsel and to make further and other preparations for trial.

v. In NIHE v Extravision the Tribunal disallowed an element of the landlord's costs, but this was where the landlord had not provided evidence of its planned works until up to six months after the case was first before the Tribunal. And, in the Tsang case

the landlord only provided evidence of its ability to finance the transaction some two and a half years after the case first came before the Tribunal. In the present case the applicant had provided evidence of its proposed works and its ability to finance those works under cover of its solicitors letter of 27th December 2012. This was before the case was first mentioned in front of the Tribunal.

vi. The present case is therefore very far from the "exceptional case" needed to rebut the assumption that costs should follow the event. The applicant was open in its dealings with the respondent, provided evidence of its intention from the earliest possible juncture and repeatedly asked the respondent to withdraw its opposition. The applicant should be entitled to recover from the respondent all of its costs incurred in the proceedings.

Respondent's Case

14. Mr Gowdy submitted:

i. Under rule 33 any question of the incidence of costs is within the discretion of the Tribunal. This discretion is normally exercised on the basis that costs follow the event, unless the particular circumstances of a given case require a different outcome (see Oxfam v Earl).

ii. Such particular circumstances can be found in cases where a landlord relies on Article 12(1)(g) (or similar intention based grounds) and does not, or cannot, immediately disclose all the documentary evidence in support of his claim to intend to use the premises for his own use, but instead releases the material "on the drip". Such conduct on the part of a landlord is not consonant with the "cards on the table" principle of hearings before the Lands Tribunal. So in NIHE v Extravision the Tribunal concluded that the Housing Executive had failed sufficiently to place its cards on the table and only awarded its costs from the date on which it completed full disclosure.

iii. In Tsang v Bamford the Tribunal again only awarded costs from the date on which the landlord completed full disclosure. The Tribunal noted that this conclusion was not affected by the fact that "…each time a card was dealt to [the landlord], [the card] was immediately placed face up on the table", and noted that the tenant was "quite

entitled to wait to see if the landlord's intentions crystallized before they decided between going on or withdrawing".

iv. The present case is along similar lines. The applicant's intentions have been crystallising and clarifying throughout the course of its application. The respondent was entitled to put those contentions to the test. There was a good deal of uncertainty about the precise scope of the applicant's intentions until the disclosure released on 13th February 2013 – as to the layout planned for the premises, as to the use to which the premises were to be placed, as to the franchise which the applicant wished to represent from the premises.

v. Applying a broad brush test to this case, the fair result is to make no order as to costs, representing the quick response by the respondent's developing case. In the alternative the applicant should be awarded its costs but only from 14th February 2013 (i.e. the day after 13th February 2013).

DECISION

15. The applicant claims its costs because the respondent has withdrawn their opposition to the application and are therefore acknowledging that they were unlikely to succeed on the substantive issues. Costs should follow the event unless there are special circumstances connected with the proceedings that would warrant a departure from that rule (see Oxfam v Earl).

16. The Tribunal was referred to several relevant decided cases but derives particular assistance from Tsang v Bamford and in paragraph 28 of that judgement:

> "The tenants say that the landlord did not put sufficient cards on the table at the appropriate time (see NIHE v Extravision [2000] BT/60/1999). The landlord says that each time a card was dealt to it, it was immediately placed face up on the table. The Tribunal accepts that there were no cards kept hidden by the landlord but on the other hand it is clear that the landlord was not dealt sufficient cards to comply with Article 12(f)(i) until about July 2002. The Notice to Determine may have been premature but even if it was not, the tenants were quite entitled to wait to see if the landlord's intentions crystallized before they decided between going on or withdrawing."

17. The respondent submits that the applicant's intentions have been crystallising throughout the course of its application. As in Tsang v Bamford and NIHE v Extravision the question for the Tribunal is, therefore, when did the applicant have sufficient cards on the table to comply with the statute, in this case Article 12(1)(g) i.e. when should it have become clear that the applicant intended to occupy the premises for its own use?

18. Mr Stevenson submits that by 28th December 2012 the applicant had provided to the respondent details of its planned works, evidence of its intention to carry out the works (board minutes) and evidence of its ability to carry out the works (bank statements). He submitted, therefore, from that date at the latest, the applicant had provided evidence of its intention. This was before the first mention in front of the Tribunal.

19. On the other hand Mr Gowdy submitted that there was a good deal of uncertainty about the precise scope of the applicant's intentions until the disclosures released on 13th February 2013 - further detailed plans and costings.

20. The Tribunal agrees with Mr Stevenson. The applicant was a very experienced jewellery retailer and had provided ample evidence of its intentions. It was proposing an amalgamation of the subject premises with its existing premises and it was, therefore, clear that the applicant was equipped to run the premises and had knowledge of the financial returns it could expect from the amalgamation. There was nothing to suggest that any remaining hurdles would be difficult.

21. By 28th December 2012 the applicant provided board minutes clearly stating the applicant's intention not to renew the lease upon its termination as it intended to occupy the premises. This was a unanimous board decision. On this date it also provided architects estimates of the costs of the proposed works, confirmation that Building Control approval was to be shortly applied for and a bank statement evidencing ample funds to carry out the works.

22. The Tribunal finds that it should have been clear from the information provided on 28th December 2012 to the respondent that the applicant intended to occupy the premises for its own use. It should have accepted the intention was genuine. Allowing the respondent time for consideration of the information received on 28th December the Tribunal orders that the respondent [Portland (NI) Limited] pay the costs of the applicant [Beaverbrooks the Jewellers Limited] from 28 days after 28th December 2012. Such costs to be taxed in default of agreement.

ORDERS ACCORDINGLY

4th July 2013

Henry M Spence MRICS Dip.Rating IRRV (Hons)
LANDS TRIBUNAL FOR NORTHERN IRELAND