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/66/2017

BETWEEN

HOOL LAW LIMITED – APPLICANT

AND

JAMES RONALD BOWDEN AND JAMES ROBERT KIRK – RESPONDENTS

Re: Premises at 15/17 Chichester Street, Belfast

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

Background

1. James Ronald Bowden and James Robert Kirk ("the respondents") are the landlords of premises at 15/17 Chichester Street, Belfast ("the reference property"), under a lease made on 1st September 2008 and pursuant to assignments made in 2015.

2. This reference arises out of the dissolution of the former Harrisons Solicitors which was dissolved on 30th June 2015. Harrisons were the former tenants of the reference property.

3. Following the dissolution of Harrisons, Mr Jonathan Hool, a former equity partner, has applied to the respondents to have the lease assigned to Hool Law Limited ("the applicant"). The respondents have refused and as a proposed assignee, not the tenant, the respondents' position is that the applicant does not have standing to bring a reference to the Tribunal.

4. The lease provides that:

> "The Tenant is not to assign, sublet, licence or allow another party to occupy the whole of the property unless the Landlord gives written consent in advance and the landlord is

not entitled to withhold the consent unreasonably so however where the Landlord reasonably believes that the proposed assignee may not comply with the terms of this lease, the Landlord may require such assignee to provide a suitable guarantor."

The respondents therefore consider that the applicant, who is not the tenant, is not a party to the lease, has no interest under it, and may not rely on its terms.

5. On 29th June 2018 the applicant made an interlocutory application to the Registrar, under Rule 12 of the General Rules Lands Tribunal Rules (Northern Ireland) 1976, "for an order adding Jonathan Harris Edwin Hool, Raymond James Wilson, Iain Michael McGonigle, Craig Malcolm Russell, Victoria McLean and Claire Fisher formerly practising as Harrisons Solicitors as an Applicant to the above application". Mr Raymond Wilson, a former equity partner of Harrisons, has objected to being joined. The remaining salaried partners have not objected. The fact that the applicant and former salaried partners have applied to have the former partnership added as an applicant was considered by the respondents to be tacit acceptance by the applicant that it did not have standing to bring the application.

6. It is this interlocutory application which is before the Tribunal. The issue to be decided by the Tribunal is whether Jonathan Hool (and the supporting salaried partners) have the right to seek relief under Article 26(5) of the Business Tenancies (Northern Ireland) Order 1996 ("the Order"), in that the respondents cannot reasonably withhold its consent to assignment. The respondents, however, has raised an issue that the Lands Tribunal lacks standing to determine the matter of partnership law cited in the application to join the former partners of Harrisons.

Procedural Matters

7. The applicant was represented by Mr William Gowdy BL, instructed by King & Gowdy Solicitors. Mr Bernard Brady BL, instructed by Stephen Scott & Co Solicitors represented the respondents. The Tribunal is grateful to counsel for their detailed and useful submissions.

Statute

8. Article 26 of the Business Tenancies Order provides:

> "(1) This Article applies where-
>
> (a) The tenant under a tenancy to which this Order applies wishes-
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> (i) to alienate, or
>
> (ii) to make any improvement in,
>
> the property comprised in the tenancy; and
>
> (2) That prohibition shall be subject to the qualification that consent is not to be unreasonably withheld; and where there is an obligation on the immediate landlord not to give that consent without the consent of a superior landlord, or an obligation on a superior landlord not to give consent to a consent by any other superior landlord, any such consent to a consent shall be subject to the same qualification.
>
> (3) Where an application is made to a landlord for a consent to which this Article applies, he shall not delay unreasonably in giving or refusing that consent.
>
> (4) A consent to which this Article applies may be given subject to any reasonable conditions.
>
> (5) Any question arising as to whether-
>
> (a) it is unreasonable to withhold a consent to which this Article applies; or
>
> (b) any delay in giving or refusing such a consent is unreasonable; or
>
> (c) any condition subject to which such a consent is given is unreasonable,
>
> shall be referred to and determined by the Lands Tribunal."

9. Rule 12 of the General Rules Lands Tribunal Rules (Northern Ireland) 1976 deals with interlocutory applications. The relevant sections are:

"12.-(1) Except where these rules otherwise provide, any application for an order or directions of an interlocutory nature in connection with any proceedings shall be made to the registrar.

(2) …

(3) …

(4) …

(5) Any party who objects to the application may, within 7 days after receiving a copy thereof, send written notice of objection to the registrar and to the applicant, and before making any order on the application the registrar shall consider any objections which he may have received and, if so required by an party, shall give all parties an opportunity of appearing before him.

(6) …

(7) …

(8) Any party aggrieved by a decision of the registrar on an application under this rule may appeal to the President by giving notice in writing to the registrar and to every other party within 7 days after receiving notice of the decision or within such further time as may be allowed by the registrar, but an appeal from a decision of the registrar shall not act as a stay of proceedings unless so ordered by the President."

10. Section 38 of the Partnership Act 1890 lays out the principles to be applied on a general dissolution of a partnership:

"38. After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, and in relation to any prosecution of the partnership by virtue of section 1 of the Partnerships (Prosecution) (Scotland) Act 2013, but not otherwise.

Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt."

Authorities

11. The Tribunal was referred to the following authorities:

- R v Special Commissioners (1888) 21 QBD at 319-320
- R v City of London Rent Tribunal, ex parte Honig [1951] 1KB 641 at 644 to 645
- IRC v Grahams Trustees [1971] SLT 46
- Boghani v Nathoo [2011] 2 All ER (Comm) 743

12. The Tribunal was also referred to the following text:

(i) Lindley and Banks on Partnership 20th Edition at paragraphs 12-36, 13-63, 13-64, 14-71

Discussion

13. Mr Gowdy BL noted that the Lands Tribunal was a court of record and a statutory Tribunal and its general jurisdiction was conferred under section 6 of the Lands Tribunal & Compensation Act (Northern Ireland) 1964. In addition it had jurisdictions conferred by other statutes such as Article 26(5) of the Order which was the substantive reference in the present case. He submitted that the issue before the Lands Tribunal in the subject reference was whether the respondents had unreasonably withheld its consent to the assignment of the lease from the former Harrisons Solicitors partnership to Hool Law Limited.

14. Mr Gowdy BL considered the issue to be a question of standing –whether Jonathan Hool (and the supporting salaried partners) had the right to seek relief under Article 26(5) of the Order.

15. Although this raised a question of partnership law, Mr Gowdy BL considered the question to be one which was ancillary to the substantive question before the Tribunal.

16. He submitted that it was well established that a statutory Tribunal had jurisdiction to determine whether the facts necessary to give rise to its statutory jurisdiction existed. He referred the Tribunal to the principle expanded in R v Special Commissioners [1888] QBD 313 at 319-320:

> "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them to conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction, which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or to do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all of the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends, and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

17. Mr Gowdy BL noted that the Court of Appeal had considered two types of tribunal; one which had jurisdiction to act when certain facts existed and another which had express jurisdiction to determine conclusively whether the preliminary facts existed and, if so, what relief to grant. However, in either case, he submitted that the Tribunal had jurisdiction to consider and rule whether the preliminary facts existed.

18. He further referred the Tribunal to R v City of London Rent Tribunal, ex parte Honig [1951] 1 KB 641 at 644-645:

> "The question in the present case is whether the tribunal can, first of all, decide the question of the existence of a tenancy. Unless they can do so, they can only proceed in a case in which both parties agree that a contract is in existence. If they did not so agree, it would, of course, always be given to a landlord to dispute the existence of the tenancy, in which case the parties would first of all be relegated to the county court to have that preliminary matter determined. There would be an action in the county court and, if the county court judge decided one way, the tenant would be able to go on with his reference, but if the judge decided the other way he would not. I cannot think that it was intended that anything of that kind should take place in connection with proceedings under this Act.
>
> It is not necessary, however, to embark upon any enquiry of that kind because the principles upon which these tribunals can act appear to me to be well established by decided cases. The first thing to consider is whether the tribunal, in order to obtain jurisdiction, must find that a certain state of affairs exists which is collateral to the main question. The question whether there is a contract or not seems to me to be collateral, and clearly collateral, to the main question which the tribunal have jurisdiction to decide, namely, what is the fair rent under a contract of tenancy. If there is no contract, they cannot, of course, determine that question. If there is a contract, they can determine it, and therefore they must decide for themselves in the first instance whether or not the contract exists."

19. This case concerned a Rent Tribunal, which had statutory jurisdiction to determine the fair rent under a contract of tenancy and the case in question concerned a dispute as to whether or not there was a subsisting contract of tenancy. The Court of Appeal concluded that, in those circumstances, the Rent Tribunal had jurisdiction to decide that issue as a collateral question before determining the fair rent. The Court of Appeal disapproved of the idea that a reference to the Rent Tribunal should be stayed if there were issues as to whether or not there was a subsisting tenancy, so that, the issue could be heard in the County Court, before the reference could proceed.

20. Mr Gowdy BL submitted that it was that approach, deprecated by the Court of Appeal, which the respondents urged in the present case. The issue of partnership law raised was the question as to whether the persons seeking to be joined can claim to be the tenant under the subject lease and he considered this to be plainly a question collateral to the substantive issue in the reference. He submitted that the Lands Tribunal clearly had power to determine that issue without the need for satellite legislation in the High Court. Both parties were agreed that the position in this jurisdiction was analogous to the position in England.

21. Mr Brady BL did not take issue with the Tribunal's jurisdiction but he considered that it did not apply to the present case. He submitted that the subject reference required the determination of the applicability of certain aspects of partnership law, as stipulated in the Partnership Act and the appropriate forum for such a determination was the Chancery Court, not the Lands Tribunal.

22. It was not disputed that the Lands Tribunal had the statutory authority to determine the substantive issue in this reference, that is the application of Article 26(5) of the Order. The Tribunal finds, however, in accordance with the authorities submitted by Mr Gowdy BL, that it has the jurisdiction to deal with the "partnership" issue, as it is clearly "collateral" to the substantive issue in the reference.

23. Mr Gowdy BL referred the Tribunal to paragraphs 12-36 and 14-71 of Lindley and Banks on Partnership 20th Edition:

"12-36 A partner will in general have the implied authority of his co-partners to bring or defend legal proceedings in their joint names or in the firm name, subject to, indemnifying them against costs where he does so without their consent, although this authority will normally cease once a partner has retired. Such authority will not, however, extend to an action which is in substance brought against another partner. However, what a partner seemingly cannot do is bring proceedings in his own name but on behalf of the firm or, perhaps, bring proceedings in the firm name where the other party knows that he is doing so against the opposition of his co-partners ..."

And

"AUTHORITY OF PARTNERS IN LEGAL PROCEEDINGS

Actions by firm

14-71 Any partner may, without the consent of his co-partners, commence proceedings in his and her names or (which amounts to the same thing) in the firm name. However, if his co-partners consent is not forthcoming, such a partner must normally offer them an indemnity against costs. Where, on the other hand, a partner purports to commence proceedings in his own name and against the express wishes of his co-partners it would seem that the proceedings cannot be treated as brought on their behalf. However, once a partner has left the firm this principle ceases to apply vis-à-vis him, unless continuing authority is conferred by the partnership agreement or that partners departure caused a dissolution of the firm."

24. Mr Gowdy BL submitted, therefore, that a single partner had the right to sue in the firms name if it was "necessary to wind up the affairs of the partnership and to complete transactions begun but unfinished at the time of the dissolution". He considered the realisation of a firms assets to be a key task in the dissolution of a firm and, in the subject reference, this included the realisation of the leasehold interest which needed to be assigned. He submitted that a partner pushing for assignment was a necessary act for winding up.

25. He concluded:

(i) Section 38 of the Partnership Act gave Mr Hool the power to act on behalf of the former Harrisons Solicitors in the subject reference.

(ii) The former partners required to be joined to the proceedings so that the substantive issue in the reference could go ahead on its merits thus negating the "locus standi" issue.

26. Mr Brady BL referred the Tribunal to paragraphs 13-63 and 13-64 of Lindley and Banks:

"DUTY OF PARTNERS UNDER SECTION

13-63 The scope and practical consequences of section 38 were considered by the House of Lords in IRC v Graham's Trustees where Lord Reid observed:

'What is meant by transactions begun but unfinished when the partnership was dissolved? If the common law had been clearly settled before 1890, I would interpret this section in light of the earlier law. But it appears that there was then little authority on this matter. So this section should if possible be construed so as to reach a reasonable result. It was argued that 'transactions' meant bargains. But that would deprive this provision of all content, for it is clear that surviving partners have no right to bind the assets of the dissolved firm by making new bargains and contracts. Their right and duty is to wind up its affairs. In my view this must mean that the surviving partners have the right and duty to complete all unfinished operations necessary to fulfil contracts of the firm which were still in force when the firm was dissolved.

Otherwise the position would be intolerable. Suppose the firm was employed to build a bridge and the bridge was half finished when the firm was dissolved. The surviving partners must be bound to finish the work for otherwise they could hold the employer to ransom by refusing to proceed unless he made a new contract more favourable to them, and conversely the employer could refuse to allow the work to

proceed unless the surviving partners made a new contract more favourable to him. That could not be right.'

13-64 The various authorities on this section were reviewed by the Scottish Court in Duncan v The MFV Marigold and then again by Sir Andrew Morritt in Boghani v Nathoo. The latter judgement contains the following helpful summary of the applicable principles:

'(i) The obligations of partners to third parties continue notwithstanding the dissolution of the partnership

(ii) In England, if not in Scotland, the satisfaction of those obligations by performance release or novation or the payment of damages will not usually involve reliance on the terms of section 38.

(iii) Section 38 does not entitle the surviving partners to engage in new bargains or contracts so as to bind a deceased or former partner.

(iv) Even in relation to transaction, not being new bargains or contracts, begun but unfinished at the time of dissolution section 38 applies only if and to the extent that the completion of such transactions is necessary to wind up the affairs of the partnership.

(v) Section 38, if applicable, confers a power; it does not impose any additional duty.'

Where the firm is contractually bound to a third party and the obligations continue following the dissolution, completion of the winding up will only be possible if those obligations are satisfied by performance, release, novation or the payment of damages. On the facts the Chancellor held that the completion of two hotel development projects was not required in order to wind up the partnership affairs, since it would be possible to sell the properties to one of the partners or to a third party on terms which would ensure that the obligation to complete the developments would be novated by the purchaser.

There is, of course, nothing to stop all the partners agreeing to complete a contract on any terms they may choose, but that would fall outside the ambit of section 38."

27. Mr Brady BL submitted that, substantively, section 38 of the Partnership Act concerned the authority of partners after dissolution of a partnership to bind each other as far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of dissolution, but not otherwise. His position was that section 38 clearly did not provide authority to bind former partners to enter into new contracts or bargains.

28. He considered that there was no element of necessity about the proposed assignment to the applicant, or indeed the making of the late application for joinder/amendment, which was sufficient to trigger the power in section 38. His position was that the proposed assignment to the applicant was an entirely new matter, and did not flow as a necessary consequence of the dissolution of the former partners practice. In accordance with principle, the obligations between lessors and lessee would continue notwithstanding the dissolution.

29. He asked the Tribunal to note that the applicant, in paragraph 8 of its Statement of Case, simply stated that "following the dissolution of his partnership with Mr Wilson, Mr Hool wished [emphasis added] to continue in practice through a corporate vehicle and incorporated the applicant". He also noted that the heads of terms, which the applicant referred to, contained no reference to assignment of the lease to such a vehicle.

30. In conclusion he submitted:

    (i) Section 38 did not provide the applicant or any of the parties referred to in the subject reference with the authority for which they contended.

    (ii) The applicants' interlocutory application of 29th June 2018 was without merit and should be dismissed.

Conclusion

31. Was the proposed assignment of the lease to Mr Hool necessary for the winding up of the affairs of Harrisons Solicitors, as contended by Mr Gowdy BL or was it a new venture which did not fall under the provisions of section 38 of the Partnership Act, as contended by Mr Brady BL? This was the substantive issue to be decided by the Tribunal.

32. The Tribunal refers to the "Heads of Terms" between Raymond J Wilson ("Plaintiff") and Jonathan Hool ("Defendant") which "provided a mechanism for the dissolution of the partnership" and which became effective on 30th July 2015. The only term dealing with the existing lease was number 10:

> "The Plaintiff and the Defendant agree that they shall occupy the existing premises on Chichester Street up until 30th June 2015 and thereafter, following consultation and subject to the agreement of the landlord, the Plaintiff shall take steps to relocate to alternative premises within a period of 12 months but shall give the Defendant not less than 2 months notice before vacating. During any period of shared occupation the Plaintiff and the Defendant shall be equally liable for rent and service charges including running costs and rates calculated proportionately to the number of staff retained by each of the parties following 30th June 2015 with provision for adjustment on a monthly basis where staff numbers change. The Defendant shall be solely liable under the lease of the premises after the Plaintiff vacates the premises."

33. The "Heads of Terms" could have, but did not, contain a condition requiring assignment of the lease to the applicant post dissolution.

34. The Tribunal agrees with Mr Brady BL, the assignment of the lease was not necessary and the former partners did not see it as necessary for the winding up of Harrisons Solicitors, as they did not deal with it it in their "Heads of Terms". Rather the Tribunal finds the proposed assignment of the lease to the applicant to be a new venture, to be embarked upon by Hool

Law Limited. As stated in Boghani v Nathoo, the obligations of former partners cease under "novation".

35. The applicant's interlocutory application of 29th June 2015 for an order adding Jonathan Harris Edwin Hool, Raymond James Wilson, Iain Michael McGonigle, Craig Malcolm Russell, Victoria McClean and Claire Fisher, formerly practising as Harrisons Solicitors, as an applicant to the above application therefore fails.

ORDERS ACCORDINGLY

22nd February 2019 **Henry M Spence MRICS Dip.Rating IRRV (Hons)**
Lands Tribunal for Northern Ireland

Appearances:

Applicant – William Gowdy BL instructed by King & Gowdy Solicitors.

Respondents – Bernard Brady BL instructed by Stephen Scott & Co, Solicitors.