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 FOR COSTS

BT/66/2021

BETWEEN

CAR PARK SERVICES LIMITED – APPLICANT

AND

CONWAY ESTATES LIMITED – RESPONDENT

Re: 6/8 Tomb Street, Belfast

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

Background

1. The origin of the subject reference was an agreement between Merit Investments and Properties Limited, now succeeded by Conway Estates Limited ("the respondent") and Car Park Services Limited ("the applicant"). Whilst the agreement appeared to be worded in terms of a licence, it was fairly clear that it operated as a lease and both parties had proceeded on the basis that it was a lease. This was not disputed.

2. On 30th April 2021, a notice under Article 7 of the Business Tenancies (Northern Ireland) Order 1996 ("the Order") was served by the applicant on the respondent. This notice requested a new tenancy for a term of 15 years from and including 1st November 2021, at a rent of £9,000 per annum. On 25th June 2021 the respondent served a counter notice stating that it was unwilling to grant a new tenancy on the grounds of Article 12(1)(f) of the Order, that the respondent intended to carry out works of redevelopment.

3. On 13th September 2021, following the direction of the Tribunal, the respondent filed a Statement of Case (SOC) which included details of the efforts it had gone to in respect of its application for planning, which had not yet been granted.

4. The applicant filed its SOC in response on 5th October 2021. Subsequently, on 11th October 2021 the Tribunal held a mention of the reference and at that mention the applicant advised that it still did not have planning permission but noted it would be requesting that a break clause be included in any new lease, to give it time to obtain planning permission.

5. Following this mention, on 2nd November 2021, the applicant sought withdrawal of its tenancy application.

6. The respondent's position was that the presumption in law, that a tenant who withdrew its tenancy application should be liable for costs, should be applied and the respondent awarded its costs in the reference. The applicant's position was that, based on the circumstances in the subject reference, each side should bear its own costs.

Procedural Matters

7. In the current circumstances the parties had agreed that the application for costs should be decided by way of written submissions only. Mr Keith Gibson BL provided a written submission on behalf of the respondent and Mr Kenneth Crothers, Chartered Surveyor, made a submission on behalf of the applicant. The Tribunal is grateful to both parties for their helpful submissions.

The Statute

8. Article 13 of the Order provides:

> "Provisions Supplement to Article 12
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> 13.-(1) Where the landlord relies on the ground specified in Article 12(1)(f), the Lands Tribunal shall require the landlord to furnish evidence that any permission required under any statutory provision has been granted to him in respect of the demolition and development or the works of construction which he intends to undertake."

9. Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") details the Tribunal's discretion in relation to costs:

> "Costs
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> 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.
>
> (2) If the Tribunal orders that the costs of a party to the proceedings shall be paid by another party thereto, the Tribunal may settle the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed by the registrar on a scale specified by the Tribunal, being a scale of costs for the time being prescribed by rules of court or by county court rules."

Authorities

10. The Tribunal was referred to the following authorities:

- Priestly v Brown BT/8/1996
- Tsang v R Banford & Sons BT/19/2000
- Cheung v Fernheath Developments BT/55/2007
- Davies v Greene R/11/2008
- Colin Kennedy v Dam Developments Ltd BT/30/2013
- H Gillespie (Properties) Ltd v Brian and Jessica White R/9/2015 (Part 1)
- H Gillespie (Properties) Ltd v Brian and Jessica White R/9/2015 (Part 2)

Discussion

11. Mr Gibson BL submitted that the presumption in law was that a tenant who withdraws should pay the costs of the reference and he referred to the Tribunal's decision in Cheung v Fernheath Developments which he considered supported this presumption.

12. Mr Crothers agreed that normally the party who withdrew should pay the costs but subject to the important fact that the presumption was capable of being displaced by having regard to the facts. He asked the Tribunal to note that the circumstances in Cheung were that the onus fell on the applicants to make their case. They failed to do so and as a result caused delay and additional costs by their inaction. This, he submitted, was not the case in the subject reference.

13. The Tribunal agrees with Mr Crothers that the presumption can be displaced and refers to the following extract from its decision in Oxfam v Earl & Ors BT/3/1995:

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

14. The issue for the Tribunal was, therefore, were there any circumstances in the subject reference that would warrant a departure from the general presumption.

15. Mr Gibson BL submitted that there was nothing in the conduct of the respondent in the subject reference which suggested it should not recover its costs.

16. Mr Crothers submitted:

    (i) Whilst it may well have been that it was "always part of the respondent's case that planning permission had not been granted but would be applied for", that

was never conveyed to the applicant until lodgement of the respondent's SOC with the Tribunal on 13th September 2021.

(ii) Until that date the applicant was entirely ignorant of the respondent's intentions. The matter had languished for almost two years from the time of the respondent's planning application and the applicant was not privy to the respondent's plans or actions during that period.

(iii) The parties then had the benefit of the mention on 11th October 2021, when the Tribunal exposed its mind on the prospects of a new lease with a "redevelopment break option" in favour of the respondent. This was followed by a joint consultation between the parties.

(iv) Armed with facts which were then fully to hand, the applicant concluded that whilst it was highly likely to succeed in its quest for a new tenancy, the term of that tenancy was unlikely to be of adequate duration to warrant continuation of the proceedings due to the probable inclusion in any lease of a redevelopment break clause.

(v) The applicant was virtually certain to have succeeded in its tenancy application, however, save as regards the duration or other terms of the new lease.

17. Mr Crothers concluded:

(i) The applicant would have succeeded in the substantive issue of whether it ought to be granted a new tenancy.

(ii) The applicant could or should not reasonably be expected to give up its tenancy on the basis of the skeletal statement of the respondent in its solicitor's letter of 25th June 2021. The applicant was entitled to be properly appraised of not only the landlord's intentions but the foundation upon which these intentions were to be advanced.

(iii) It has long been the practice of the Tribunal to demand a "cards face up on the table" approach to case management.

Conclusion

18. The Tribunal agrees with Mr Crothers, a tenant should not be expected to give up its tenancy until it has been fully appraised of the landlord's intentions and supplied with detailed proofs on which those intentions rely. In the subject reference these were not available to the applicant until the formal submission of the respondent's SOC on 13th September 2021.

19. At no time during the proceedings had the respondent complied with the statutory requirement of Article 13(1) of the Order, to have full planning permission in place, if relying on Article 12(1)(f) "redevelopment grounds".

20. This resulted in a requirement of the respondent to have a redevelopment break clause included in any new lease, to give it time to obtain planning permission. On that basis the Tribunal agrees with Mr Crothers, the applicant was always going to be successful in the substantive issue of being granted a new tenancy, albeit that the prospect of a short lease was not attractive to the applicant.

21. The issue of the redevelopment break clause was clarified by the Tribunal at the mention on 11th October 2021 and the applicant subsequently sought withdrawal on 2nd November 2021.

22. Based on the circumstances in the subject reference, the Tribunal finds that the applicant could not have reasonably been expected to withdraw its application prior to 2nd November 2021.

23. The Tribunal agrees with the applicant's submission that, based on the circumstances in the subject reference, each party should bear its own costs.

28th January 2022 **Henry Spence MRICS Dip.Rating IRRV (Hons)**

Lands Tribunal for Northern Ireland