

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/69/2004

BETWEEN

NATIONAL CO-OPERATIVE CHEMISTS LIMITED – APPLICANT/TENANT

AND

COLIN JOHNSTON & ALISON JOHNSTON – RESPONDENTS/LANDLORDS

Re: 70 Ballygomartin Road, Belfast

Lands Tribunal – Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI

Belfast – 7th September 2005

1. The dispute concerned some terms of a new lease of a shop unit. Most matters were resolved before the hearing. Some others, the repairing and insuring obligations, were resolved on the day of the hearing. Apart from rent, which in the circumstances is a matter best left for another day, there were two outstanding issues, which are inter-related, and these were the duration of the new tenancy and the tenant's request for incorporation of an option by the tenant to break. The landlord seeks a lease of the maximum duration that the Tribunal may award i.e. 15 years without any tenant's option to break. The tenant seeks and prefers an option to break at 5 year intervals or, if no option is to be incorporated, a lease of 5 years duration. The current lease is a lease made 21st January 1985 for a term of 20 years and does not contain an option to break.
2. Mark Orr QC appeared for the Applicant/Tenant. Stephen Shaw QC appeared for the Respondents/Landlords. Mr Ciaran Donnelly and Mr Brian Kidd, both experienced Chartered Surveyors gave expert evidence.
3. Duration falls within the ambit of Article 17 of the Business Tenancies (NI) Order 1996 ('the 1996 Order') which provides that the new tenancy shall be—

- i. "(b) ... a tenancy for such period, not exceeding 15 years, as may be determined by the Lands Tribunal to be reasonable in all the circumstances,"

Correctly in the view of the Tribunal the parties accepted that a tenant's option to break fell within the ambit of Article 19 of the 1996 Order, which provides:

- b. "(1) the terms of a tenancy ... (other than terms of the duration thereof and as to the rent payable thereunder) shall be such as ... may be determined by the Lands Tribunal; and in determining those terms the Lands Tribunal shall have regard to the terms of the current tenancy and to all relevant circumstances."

Article 19, in particular, must be considered in light of the judgment in O'May & Others v City of London Real Property Company Limited [1982] 1 All ER at page 660 and in particular passages from the speech of Lord Hailsham at pages 664 to 666:

"The relevant provisions affecting the terms of the new tenancy are [Art 16] (which deals with the property to be comprised), [Art 17] (which deals with the length of the tenancy), [Art 18] (which prescribes the rent) and [Art 19] (which governs the terms of the new lease)."

And then:

"From these sections I deduce three general propositions: (1) it is clear from [Art 18] that, in contrast to the enactments relating to residential property, Parliament did not intend, apart from certain limitations, to protect the tenant from the operation of market forces in the determination of rent; (2) in contrast to the determination of rent, it is the court and not the market forces which, with one vital qualification, has an almost complete discretion as to the other terms of the tenancy (which, of course, in turn must exercise a decisive influence on the market rent to be ascertained under [Art 18]); and (3) in deciding the terms of the new tenancy, as to which its discretion is otherwise not expressly fettered, the court must start by 'having regard to' the terms of the current tenancy, which ex hypothesi must either have been originally the subject of agreement between the parties or themselves the result of a previous determination by the court in earlier proceedings for renewal.

"A certain amount of discussion took place in argument as to the meaning of 'having regard to' in [Art 19]. Despite the fact that the phrase has only just been used by the draftsman of [Art 18] in an almost mandatory sense, I do not in any way suggest that the court is intended or should in any way attempt to bind the parties to the terms of the current tenancy in any permanent form. But I do believe that the court must begin by considering the terms of the current tenancy, that the burden of persuading the court to impose a change in those terms against the will of either party must rest on the party proposing the change and that the change proposed must, in the circumstances of the case, be fair and reasonable and should take into account, amongst other things, the comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity, and the general purpose of the Act which is to protect the business interests of the tenant so

far as they are affected by the approaching termination of the current lease, in particular as regards his security of tenure.”

And later:

“A further point which was canvassed in argument, and with which I agree, is that the discretion of the court to accept or reject terms not in the current lease is not limited to the security of tenure of the tenant even in the extended sense referred to by Denning LJ in *Gold v Brighton Corp* [1956] 3 All ER 442. There must, in my view, be a good reason based in the absence of agreement on essential fairness for the court to impose a new term not in the current lease by either party on the other against his will. Any other conclusion would in my view be inconsistent with the terms of the section. But, subject to this, the discretion of the court is of the widest possible kind, having regard to the almost infinitely varying circumstances of individual leases, properties, businesses and parties involved in business tenancies all over the country.”

The 1998 Order articles numbers have been substituted for the corresponding sections of the Landlord and Tenant Act 1954.

4. The shop is one of a parade of three neighbourhood shops, owned by the landlords, at what one of the experts described as a tertiary location but on a busy road at a mainly residential area of Belfast. The passing rent is £9,000 a year. A pharmacy had traded at the subject property for a period of at least 35 years.
5. Mr Orr QC suggested that the permitted user was highly restrictive and so confined that only the tenant, the National Co-operative Chemists Limited, could lawfully use the premises. The lessee covenants at (xiii)

“.... not to use the demised premises for any purpose other than as a shop storeroom and preparation room for the purposes of *the lessees pharmacy business* and in particular not to permit or suffer the demised premises or any part thereof to be used for residential or dwelling purposes.”

Mr Shaw QC suggested that the user was restricted but only to pharmacy business. He drew the Tribunal’s attention to the definition of the lessee in the lease:

“National Co-operative Chemists Limited having its registered office at ... Lane, Newton Heath, Manchester M10 6TX (hereinafter called “the Lessee”) which expression shall include its executors, administrators and assigns and in the case of a company its successors and permitted assigns where the context so requires or admits”.

The alienation provisions of the lease also clearly contemplate assignment and underletting subject to qualified consent. The Tribunal was referred to Plinth Properties v Mott, Hay & Anderson (1977) 38 P&CR 361. Having regard to the whole of the lease, and the definition of the Lessee in particular, the Tribunal concludes that

the user is not restricted to only the named tenant but that it is restricted to a class of persons who would use it only as a shop storeroom and preparation room for the purposes of a pharmacy business.

6. Mr Orr QC referred the Tribunal to the *Code of Practice for commercial leases in England & Wales (2nd edition April 2002)* ('the Code') produced by the Commercial Leases Working Group at the request of the Department for Transport, Local Government and the Regions and the *British Property Federation Model Clauses for Leases*. The Group comprises representatives of landlords and tenants of commercial property and the professions, including the Law Society and the Royal Institution of Chartered Surveyors, that act on their behalf. The aims of the Code include the encouragement of greater flexibility and choice of lease terms. In particular it suggests that landlords should consider offering tenants a choice of length of term including break clause where appropriate. Mr Donnelly produced the *ODPM Consultation Paper on Upward Only Rent Review - Summary of Responses* dated June 2005. This Summary was based on the consultation paper *Commercial property leases: options for deterring or outlawing the use of upward only rent review clauses* prepared by the Office of the Deputy Prime Minister ('ODPM') in 2004 following the publication of the interim report by the University of Reading about the impact of the Code.
7. Although compliance with the Code is still voluntary, there is an acceptance by government and leaders of the property industry that it is unfair to prospective tenants and existing tenants not to offer flexible lease terms, including shorter durations. In the view of the Tribunal the existence and content of the Code and the Summary are circumstances are to be given appropriate weight in reaching its determination on the issues.
8. Mr Donnelly relied on some of the factual findings included the review of the submissions set out in the Summary. As this Tribunal cannot test them it concludes that it is much more helpful to consider the conclusions drawn by these experts from the extensive material they have assembled for this case. However as will be seen, the increasing presence of short durations in modern leases suggested in the Summary is generally supported by the expert's conclusions. Although pharmacies present a more varied pattern (such tenants other than the Applicant generally holding under longer leases).

9. Mr Kidd considered that the introduction of a tenant's option to break at 5-year intervals would be contrary to the norm in respect of pharmacy lettings in N Ireland and would also have a detrimental effect upon the value of the landlord's reversion. He did not quantify that effect. Mr Donnelly considered that the market generally in N Ireland now tended towards shorter terms one way or the other. He did not take issue with the proposition that such terms would have some adverse effect on the value of the landlords' interest.

10. In regard to duration the Tribunal has an almost complete discretion and that is not fettered by any requirement to attach particular weight to the duration of the current tenancy or the market. In regard to a tenant's option to break the parties accepted that in exercising its discretion the Tribunal must begin by considering the terms of the current tenancy, that the burden of persuading the Tribunal to impose a tenant's option to break must rest on the tenant and there must be a good reason based on essential fairness for the Tribunal to impose that change. The parties focussed on the terms of the current lease, and the market and trends in the market both generally for shops like this and for pharmacies. There was little evidence of the particular business circumstances of the parties. For the avoidance of doubt the Tribunal makes clear that it considers that in many cases the market alone will not provide anything like a complete guide to the exercise of its discretion. Subject to the above, in regard to both duration and a tenant's option to break the question for the Tribunal is one of what is reasonable in all the circumstances.

11. The experts had agreed facts concerning a comprehensive range of comparables both in Belfast and outside Belfast in provincial towns. Further comparables were added in a Supplemental Statement.

12. At the Hearing Mr Kidd also relied on a transaction of which he had personal knowledge. Recently a local company, Bairds Chemists, sold their business in entirety. As part of that deal the new owner took 20-year leases without break clauses of some 27 properties owned by Bairds. One of the landlords in this application was a director of Bairds Chemists. Mr Kidd was aware of this transaction at the time he prepared his report, as he had been involved as an advisor prior to the date fixed for the exchange of evidence. He said that he did include them in that evidence, as he

was not aware of the full facts at the time. The Tribunal attaches little weight to this evidence, as it was not put forward for consideration, by the other expert, at the proper time or promptly upon clarification of the full facts.

13. There were two other retail units in the parade. One was let for a 3-year term. The other, which had permission for a hot food carry out, was let for a term of 15 years with no breaks. Some of the other transactions related to superior locations but, leaving those aside, a number of conclusions may be reached from the experts' analysis of the transactions. The Tribunal agrees with Mr Donnelly that the evidence in recent times shows that most leases of shops like this have been for terms of 3 to 5 years. But the exception to that is that where some form of licence, permission or valuable business goodwill may attach to the business at its location, lease durations tend to be longer—in the case of pharmacists about 15 years. Almost the only exceptions to those exceptions are leases to the National Co-Operative chemists. These are leases of 10 to 15 years with a tenant's option to break at 5-year intervals. The National Co-Operative travel agents negotiate similar terms suggesting that it is a matter of a common policy of the sister organisations.
14. Suppose this unit were used as an ordinary retail shop. It is clear from the Code, the Model Clauses and, to a lesser extent, the Summary that there is a widespread acceptance that it is unfair to new and existing tenants not to offer shorter durations and the Tribunal attaches considerable weight to that as a circumstance. Both experts accepted that the local evidence is of shorter durations of 3 to 5 years being common for ordinary retail units of this type in such a location. That both supports the aims of the Code and, bearing in mind the limited extent of the material before the Tribunal, is another circumstance to which some weight should be attached. On the other hand some weight must be given to the facts that a fixed duration of 15 years would be broadly consistent, so far as is legally possible, with the 1985 lease and a 5-year lease would detract to some unquantified extent from the relative value of the landlords' interest. The Tribunal, on balance and by only a narrow margin, concludes that if this unit were used as an ordinary retail shop it would not be reasonable to fix as long term as 15 years, in the absence of some exceptional reason to do so.
15. Such an exceptional reason might lie in the nature of the business of the applicant. Clearly, Health Service dispensing is of key importance to a pharmacy business. It is

carried out under contract between the owners of each pharmacy and the Area Health and Social Services Board. In 1987, for the first time, new entry to the list of contracted pharmacists was limited and a new contract (a 'dispensing contract') will now be granted only if the applicant can demonstrate that the provision of the intended pharmaceutical services is 'necessary and desirable'. Each Health and Social Services Board determines what is 'necessary and desirable' subject to an appeal from a Board's decision to a National Appeals Panel. In Mr Kidd's opinion, and Mr Donnelly did not disagree, new contracts are difficult to acquire and contracts are of considerable value and problematical to relocate. With the exception of the tenant there is a clear pattern of pharmacists in Northern Ireland entering into longer leases with no options to break, irrespective of location and level of rent payable. Mr Kidd referred the Tribunal to examples of where local multiple, UK multiple and independent pharmacists had entered into 15 or longer year lease terms without options to break.

16. As things stand, a dispensing contract gives a pharmacist a valuable local quasi-monopoly. It is not readily portable and it follows that, unless there is some good reason to do otherwise, a pharmacist may reasonably be expected to seek security of tenure for a significantly longer term than other users, to protect that value. The landlord in ordinary circumstances may reasonably be expected to agree as the combination of the strength of the tenant's covenant, with the security of its quasi-monopoly and rental income over a longer period, adds to the value of his reversionary interest. However as it is the tenant who has the dispensing contract, not the landlord, the desire for longer duration is primarily tenant-driven rather than landlord-driven. Different tenants may take different views of the future; at another location, the Diamond Rathcoole, the applicant took a 10 year lease with an option to break after 5 years but subsequently another pharmacist entered into a new 20 year lease without break, with the same landlord and in premises only yards away.
17. The evidence suggested that the policy or practice of the tenant (and its associated travel company Co-op Travelcare) is to take a longer lease of 10 to 15 years with a tenant's option to break at 5-year intervals. The evidence also clearly suggested that other pharmacists negotiated such leases or longer but without tenant's options to break. The National Co-op is fully entitled to have a policy of avoiding fixed durations of longer than about 5 years but such a policy is not of itself good reason for a shorter

term. There might be particular reasons for the policy and these could be a relevant consideration, but none were put before the Tribunal.

18. Other pharmacists choose to protect the security of tenure of their business for much longer but the applicant has elected to attempt to secure its future business connected with its dispensing licence for a short term only. The conclusion that the Tribunal has reached in regard to an ordinary retail user in a unit and circumstances such as this is a close call. However the Tribunal is not persuaded that the choice that other pharmacists have made is an exception that is a sufficient reason to treat pharmacists, and this tenant in particular, as being in a category for which it would be reasonable to fix as long a term as 15 years, against the wishes of the tenant.
19. In considering the alternative approach of a 15-year lease with a tenant's option to break, as that option is accepted to be a matter within Article 19 and O'May, the terms of the current lease carry much more weight and the burden is on the tenant to satisfy the Tribunal that as a matter of essential fairness a tenant's option to break should be imposed on the landlord. There is no break clause in the current lease. There is no evidence that the introduction of tenant's option to break would be a fair change for the landlords. The Tribunal concludes that burden tips the balance against making that change.
20. The Tribunal concludes that having regard to the terms of the current tenancy and to all relevant circumstances it should not impose a tenant's option to break against the wishes of the Landlord on a lease of 15 years duration and that a 5-year term rather than a 15-year term is reasonable in all the circumstances.

ORDERS ACCORDINGLY

12th October 2005

**Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

Mark Orr QC appeared for the Applicant/Tenant.

Stephen Shaw QC appeared for the Respondents/Landlords.