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/7/2018

BETWEEN

ROSEMARY GAWN SOLICITORS – APPLICANT

AND

E & O INVESTMENTS LIMITED – RESPONDENT

Re: 6 Greenvale Street, Ballymena

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

Background

1. Rosemary Gawn Solicitors ("the applicant") is the tenant of office premises at 6 Greenvale Street, Ballymena ("the reference property") by way of a lease dated 24th May 2009, granted for a term of two years. The applicant is currently "holding over" on the lease since 2011 but it was not disputed that it was still entitled to protection under the Business Tenancies (Northern Ireland) Order 1996 ("the Order").

2. On 31st August 2017 the reference property was purchased by E & O Investments Limited ("the respondent") for a sum of £80,000. The directors in the respondent company are Gordon McAtamney, his father Kiernan McAtamney and their two wives. Mr Gordon McAtamney advised the Tribunal that he had originally been approached by the then owners, Charles McConnell and Sean McCarroll, to purchase the reference property as he and his father owned the adjoining properties at 8-16 Greenvale Street.

3. Previously, on 20th March 2017, Gordon and Kiernan McAtamney had been granted planning permission to redevelop their premises at 8-16 Greenvale Street. They were subsequently advised by their structural engineer, however, that it would be necessary to include the

reference property in any redevelopment of Nos 8 to 16. This was mainly due to the sloping nature of the street and the problems with "shoring up" the reference property when carrying out the redevelopment works.

4. A revised planning application was submitted in the names of Gordon and Kiernan McAtamney in respect of Nos 6-16 Greenvale Street and planning permission was granted on 5th September 2018. The proposal was described as "the demolition of offices at 6 Greenvale Street and 8-12 Greenvale Street and new extension to premises at 14-16 Greenvale Street".

5. On 15th November 2017 the respondent had served the applicant with a Landlords Notice to Determine on the grounds of Article 12(1)(f) of the Order, in that he wanted to carry out substantial redevelopment of the reference property and he required possession in order to carry out the works.

6. Subsequently, on 12th January 2018, the applicant applied to the Lands Tribunal for the grant of a new tenancy on the reference property, proposing a new ten year lease with a mutual break clause at five years and a rent of £9,000 per annum. It was accepted by the parties that both notices were valid.

7. The issue to be decided by the Tribunal was, therefore, had the respondent proved its grounds of opposition to a new tenancy as required under Article 12(1)(f) of the Order?

Procedural Matters

8. The applicant was represented by Mr Mark McEwen BL instructed by the applicant solicitors. Mr Keith Gibson BL, instructed by MacAllister Keenan & Co Solicitors, represented the respondent. The Tribunal is grateful to counsel for their helpful oral and written submissions.

9. Mr Gordon McAtamney provided factual evidence on behalf of the respondent. Dr Ambrose McCloskey, an experienced structural engineer, gave expert evidence, also on behalf of the respondent.

Position of the Parties

10. The parties were agreed that it was for the respondent, who sought to oppose the grant of a new tenancy, to establish the grounds under Article 12(1)(f) of the Order.

11. The applicant's position was that the respondent had failed to establish its grounds under Article 12(1)(f).

12. The respondent considered that it had clearly established that it had the intention to carry out the redevelopment of the reference property and it also had the objective ability to put its intention in to effect.

Statute

13. "Landlord" is defined in Article 2(2) of the Order:

> "'the landlord', in relation to a tenancy ('the relevant tenancy'), means the person (whether or not he is the immediate landlord) who is the owner of that estate in the property comprised in the relevant tenancy which for the time being fulfils the following conditions, that is to say—
>
> (a) that it is an estate in reversion expectant (whether immediately or not) on the termination of the relevant tenancy; and
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> (b) that it is either the fee simple or a tenancy which will not come to an end within 14 months or less—
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> (i) by effluxion of time, or
>
> (ii) by virtue of a notice already served being a notice served in relation to that tenancy by the immediate landlord or tenant thereof in accordance with the terms of that tenancy, or
>
> (iii) by virtue of a notice to determine, or

(iv) by virtue of a notice under Article 7 requesting a new tenancy,

and is not itself in reversion expectant (whether immediately or not) on an estate which fulfils these conditions;"

14. Article 12(1)(f) of the Order details the grounds on which the respondent seeks to oppose the grant of a new tenancy:-

"12.-(1) The grounds on which a landlord may make a tenancy application, or may oppose a tenancy application by the tenant, are such of the following grounds as may be stated in the landlord's notice to determine under Article 6, or as the case may be, in the landlord's notice under Article 7(6)(b), that is to say –

(a) …

(b) …

(c) …

(d) …

(e) …

(f) that on the termination of the current tenancy the landlord intends—

(i) to demolish a building or structure which comprises, or forms a substantial part of, the holding and to undertake a substantial development of the holding; or

(ii) to carry out substantial works of construction on the holding or part of it; and that the landlord could not reasonably do so without obtaining possession of the holding;"

15. Under Article 13(1) of the Order the respondent is required to:

"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."

16. Article 23 of the Order allows for compensation to be paid where an "order for a new tenancy is opposed on certain grounds" and Article 28 deals with the situation of a "landlord's failure to fulfil intentions".

Authorities

17. The Tribunal was referred to the following authorities:

- Cunliffe v Goodman [1950] 1 All ER 720
- Barnes v Jarvis [1953] 1 WLR 649 at 562
- Betty's Cafes v Phillips Furnishing Stores [1957] 1 All ER I
- Gregson v Cyril Lord Ltd [1962] 3 All ER 907
- P F Ahern & Sons v Hunt [1988]1 EGLR 74
- Cameo UK v Neal [1989] 1 RLR 51
- Secretary of State for Trade & Industry v Longridge [1991] 2 WLP 1343
- Restick v Crickmore The Times Dec 3 1993
- McDevitte v McKillop [1994] NIJB 91 CA
- R v Home Secretary Ex Parte McNaughton [1997] 1 All ER 426 at 438
- R (Westminster City Council) v National Asylum Support Service [2002] UKHL38
- Wong v Jan BT/18/2003 (Part 1)

18. The Tribunal was also referred to the following texts:

- Business Tenancies Northern Ireland (Dawson)
- Reynolds and Clarke Renewal of Business Tenancies (5th Edition) at paras 7-92 to 7-178

- Planning Act (Northern Ireland) 2011

Dr McCloskey's Evidence

19. Dr McCloskey confirmed that upon receiving architects plans for the redevelopment of 8-16 Greenvale Street, along with carrying out a site inspection and assessment, he came to the conclusion that the development was extremely difficult and potentially economically unviable without the inclusion of the reference property. This was primarily due to:

    (i) the narrow footprint and nature of the building construction and the real risks of the reference property becoming unstable during the redevelopment.

    (ii) the need for a level shop floor, as there was a significant difference in the street level between Nos 6 and 16 Greenvale Street.

20. He believed, therefore, that following his recommendations the reference property was purchased by Mr McAtamney to facilitate the redevelopment. Following the purchase the scheme was revised to include the demolition and rebuilding of the reference property as part of the new development. He confirmed that a final version of the drawings were issued for tender/Building Control approval on 1st May 2018.

21. When questioned by Mr McEwen BL, Dr McCloskey confirmed that he had little knowledge of the respondent company and most of his dealings had been with the architect, Mr McDowell.

22. Mr McEwen BL asked Dr McCloskey how he came to the conclusion that the redevelopment was "potentially economically unviable" without the inclusion of the reference property. He confirmed that he had been advised by the QS, Mr Walls, that it would "add significant costs" and could "scupper" the scheme if the reference property was not included, although he was unable to give any precise figures.

Mr Gordon McAtamney's Evidence

23. Mr McAtamney confirmed that to date the respondent had expended the following monies on the development:

(i)	Architects fees	£5,000
(ii)	Structural engineers fees	£5,400
(iii)	Solicitors fees	£2,000
(iv)	Planning fees	£7,500
(v)	Other fees (design & QS)	£6,500
	Total	**£26,400**

This was in addition to the £80,000 outlay for the purchase of the reference property.

24. When questioned by Mr McEwen BL it was established and not disputed by Mr McAtamney that:

(i) The reference property was owned by the respondent company.

(ii) Folio numbers AN197896, AN195215 and AN155727, comprising Nos 8 to 16 Greenvale Street, were in the ownership of Gordon and Kiernan McAtamney.

(iii) The name on the planning application for 6-16 Greenvale Street was "K & G McAtamney". Cert A of that permission stated that K & G McAtamney were "in actual possession of every part of the land to which the said application relates and is entitled to a fee simple absolute". When questioned by Mr McEwen BL, Mr McAtamney accepted that No 6 was not in the ownership of "K & G McAtamney", rather it was in the names of their holding company, E & O Investments Limited.

25. It was also accepted by both parties that:

(i) E & O Investments Limited was the correct respondent in the subject reference.

(ii) The remainder of the lands to be developed, 8-16 Greenvale Street were in the ownership of Gordon Jonathan McAtamney and Kiernan John McAtamney, who

were collectively the K & G McAtamney as detailed in the planning permission. They were also directors of the respondent company.

26. Article 13(1) of the Order required the respondent to furnish evidence that planning permission has been granted to HIM (Tribunal emphasis). Mr McEwen BL submitted that the respondent was not the same legal entity to whom the planning permission had been granted. As this issue had not arisen prior to the hearing the Tribunal sought further submissions as to whether planning permission in the name of two of the directors of the respondent company, rather than the respondent company itself, was compliance with the terms of Article 13(1) of the Order.

Discussion

27. Mr Gibson BL submitted that the legislation required the Tribunal to be satisfied that there was in place planning permission for the lands so that the landlord's intention to develop and his ability to develop could not be called in to question.

28. Mr McEwen BL's position was that the legislation imposed on the landlord an additional burden when the landlord was opposing the grant of a new tenancy on the grounds of Article 12(1)(f), that is the redevelopment objection. He submitted that it was a mandatory requirement of the legislation that the respondent had planning permission "granted to him" and the respondent had therefore failed to meet the requirements of Article 13(1). He accepted that whilst there might be planning permission it was not planning permission granted to the respondent.

29. Mr Gibson BL asked the Tribunal to note that, in respect of planning permission, it did not attach to any particular applicant. He referred the Tribunal to section 57 of the Planning Act (Northern Ireland) 2011:

"57-(1) Without prejudice to the provisions of this Part, any grant of planning permission to redevelop land shall (except insofar as the permission otherwise provides) have effect for the benefit of the land and of all persons for the time being having an estate therein."

30. He submitted that this was not unusual and land was often sold with the benefit of planning permission, secure in the knowledge that the land was being sold or transferred with planning permission attaching to it rather than attaching to the applicant at any particular time. The suggestion, therefore, that the Business Tenancies Order would push back against the entirety of the planning legislation and insist that planning permission should attach not to the land but to an individual in a personal capacity, appeared to him to arbitrary and irrational.

31. In the circumstances of the subject reference he considered the context to be clear and unambiguous, the landlord must have planning permission for the land which he intended to develop. There could be no doubt that planning permission existed in respect of the reference property and so, in context, he submitted that Article 13(1) could be read liberally when interpreting the phrase "granted to him".

32. In order to avail of Article 57 of the Planning Act Mr McEwen BL submitted that a person seeking to rely on the planning permission had to show that the permission benefitted the land and that the person for the time being had an estate in the land. Whilst he accepted that the subject planning permission benefitted the reference property, the person having the benefit of the permission had no estate in the reference property and the respondent therefore could not utilise the permission granted to a third party to demonstrate that it had a valid planning permission.

33. Mr McEwen BL asked the Tribunal to note that the corporate landlord in the subject reference was a separate legal entity from K & G McAtamney who were the individual shareholders and directors of the landlord company. He also submitted that Article 13(1) did

not limit itself to planning permission but utilised the concept of permission granted to the landlord under any statutory provision. He considered that this necessarily included building control approval and Mr McAtamney had accepted in evidence that building control approval had not yet been granted.

34. In conclusion he submitted that the failure of the respondent to make out the grounds of objection meant that the Tribunal must grant a new tenancy to the applicant.

The Tribunal

35. In McDevitte v McKillop [1994] NIJB 9I CA the Court of Appeal cautioned in relation to a landlord's intention:

> "It does demonstrate, however, that if one focusses too closely on the ability to carry out the intention one may attribute too little weight to the genuineness of that intention"

And

> "Where the Tribunal fell in to error was in requiring proof from the appellants under S10(1)(g) that they were ready and able to occupy the premises in question on the termination of the current tenancy rather than that they intended to occupy the premises for the purposes of a business to be carried on by the. In doing so, the Tribunal confused intention with the practical means by which that intention was to be carried out and imposed, in the graphic phrase used by Mr Thompson QC for the appellants 'a bridge too far'."

36. In the subject reference it is therefore the intention of the respondent, E & O Investments Limited, which primarily concerns the Tribunal.

37. In order to facilitate the redevelopment of Nos 6-16 Greenvale Street, Mr McAtamney, a director of the respondent company, had:

(i) Employed an architect, a design consultant, a quantity surveyor and a structural engineer.

(ii) Spent £26,400 on professional fees.

(iii) On the advice of his structural engineer, spent £80,000 on the acquisition of the reference property in order to facilitate the development.

(iv) Obtained planning permission for the development.

(v) An offer of finance from the Ulster Bank.

He had not yet obtained building control approval but the Tribunal is satisfied that this could be achieved.

38. There is, therefore, no doubt that if K & G McAtamney were the named respondents in the subject reference the Tribunal would grant them possession of the reference property, as they had clearly proved their intention to redevelop, as required under Article 12(1)(f) of the Order. They were, of course, directors of the respondent company but the Tribunal accepts Mr McEwen BL's point that the respondent was a separate legal entity to K & G McAtamney.

39. In Margaret McCandless v Eugene Lynch BT/65/2000 the Tribunal noted:

> "The Business Tenancies (Northern Ireland) Order 1996 ('the Order') gives protection to sitting tenants but does not prevent the landlord from recovering possession when the existing tenancy comes to an end …".

The Tribunal is therefore concerned not to prevent a landlord from gaining possession when he has a genuine intention.

40. Mr Gibson BL submitted that, on the face of it, what the applicant was contending for was that the reference property should be transferred from the current respondent into the

names of K & G McAtamney only to repeat the process before the Tribunal in which both parties had freely engaged. He considered that this could not at any stretch, be considered to be an application of common sense.

41. The Tribunal agrees with Mr Gibson BL. Planning permission clearly does exist for the development of the reference property in conjunction with Nos 8-16 Greenvale Street. Taking a purposive approach to the Order, coupled with the fact that a planning permission attaches to the land no matter who the applicant might be and two of the directors of the respondent company were named on the planning permission, the Tribunal finds that the respondent has proved its ground under Article 12(1)(f) of the Order. It would not reflect well on the jurisdiction of the Order, if despite the fact that a planning permission attached to the land, a landlord had to go through the process again just to correct a name on the paperwork.

42. The applicant has been overholding on the reference property since 2011. The Tribunal refers to S P Graham Limited v Dunloe Ewart (Cathedral Way) Limited BT/24/2000:

> "66. Mr Morgan referred the Tribunal to London and Provincial Millinery Stores Ltd v Barclays Bank Ltd & Another [1962] 2 All ER 163. In that case the tenant had had a 7 year lease and the County Court Judge granted the tenant a new tenancy for 9 years. The Court of Appeal held that in exercising its discretion all proper factors must be taken into account and these included the intention to reconstruct and the fact that the tenant had been in occupation for more than 4 years since the expiration of the contractual term of the original ease. The Court of Appeal granted a tenancy for only 12 months, that period being for the purpose of enabling the tenant to find suitable accommodation elsewhere.
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> 67. …. there are examples of the Courts treating any substantial period of overholding as a factor ameliorating any hardship to the tenant resulting from granting a much shorter term than the current contractual duration."

Conclusion

43. Taking in to account the fact that the applicant has been overholding since 2011 the Tribunal directs that it should vacate the reference property within 6 months from the date of this decision.

44. The Tribunal would also caution the respondent in respect of the penalties imposed under Article 28 of the Order, should he fail to fulfil his intentions.

ORDERS ACCORDINGLY

24th January 2019 **Henry M Spence MRICS Dip.Rating IRRV (Hons)**
Lands Tribunal for Northern Ireland

Appearances:

Applicant – Mr Mark McEwen BL instructed by Rosemary Gawn Solicitors.

Respondent – Mr Keith Gibson BL instructed by MacAllister Keenan & Co, Solicitors.