LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

BT/80/2001

BETWEEN

EASON & SON (NI) LIMITED – APPLICANT/TENANT

AND

CENTRAL CRAIGAVON LIMITED – RESPONDENT/LANDLORD

Premises: Unit 28 Rushmere Shopping Centre, Craigavon

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

Belfast – 28th March and 9th April 2003

1. Mark Horner QC appeared for the Applicant/Tenant. Stephen Shaw QC appeared for the Respondent/Landlord. Mr Kenneth Crothers and Mr Francis Paul Cassidy both experienced Chartered Surveyors gave expert evidence. Mr Arthur Tinsley, a director of the Tenant company, gave evidence of fact.

2. The dispute concerned the terms of a new lease of a large shop unit occupied by the tenant (the 'Eason' unit) at an enclosed mall shopping centre ('Rushmere'). Most matters were resolved before the first day of hearing and further matters were resolved on that day. There were two issues outstanding. The first was that while the parties had agreed a new lease for a term of 15 years, the tenant sought options to break at 6 and 11 years on giving 12 months notice (the notice period was agreed to be adequate). An 'unadjusted' rent had been agreed but the second issue was whether in arriving at the rental value of the premises using 4 zones, a further 'end-allowance' should be made, in this case an end-allowance for size.

Break Clause

3. The landlord resisted the break clauses because of the adverse effect it thought it would have on the value of its investment in Rushmere. The Tenant was concerned at

being tied into a 15-year lease for this large unit and sought an option to break "so that it may react appropriately to changing, but as yet uncertain, circumstances".

4. In regard to **the duration** of a new tenancy, Article 17 of the Business Tenancies (NI) Order 1996 (the '1996 Order') provides:

> "17-(1) Where the Lands Tribunal makes an order for the grant of a new tenancy, the new tenancy shall be-
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> a) a tenancy for such period as may be agreed between the landlord and tenant; or
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> b) in the absence of agreement, a tenancy for such period, not exceeding 15 years, as may be determined by the Lands Tribunal to be reasonable in all the circumstances,
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> and shall begin on the coming to an end of the current tenancy."

5. In regard to **the other terms** of the new tenancy, Article 19 provides:

> "19-(1) The terms of a tenancy granted in pursuance of an order of the Lands Tribunal (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed between the landlord and the tenant, or as, in the absence of agreement, 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."

6. An option to break may be either at the option of a landlord or at the option of a tenant. The Tribunal raised the question of whether a tenant's option to break is a matter within the ambit of Article 17 or Article 19 i.e. whether the correct approach is a test of what is "reasonable in all the circumstances" or is to "have regard to the terms of the current tenancy and to all relevant circumstances". If it is the latter then the guidelines of O'May v City of London Property Co [1982] 1 All ER 660, HL apply and the terms of the current tenancy carry much greater weight.

7. Mr Horner suggested that if the tenant had requested a 10-year lease instead of a 15-year lease, that would have been the equivalent of a break clause, and Article 19 would not apply. Treating the break clause as being within the ambit of Article 19 would lead to an absurd result. The Tribunal does not agree; a longer term with a tenant's option to break, as opposed to a shorter fixed term, has a different effect: it

gives the tenant flexibility and the Tribunal accepts Mr Cassidy's unchallenged opinion that the introduction of a tenant's option to break would reduce the value of the landlord's reversion.

8. Although it is usually convenient to consider an option to break in the context of the duration of the new tenancy, in the view of the Tribunal it is clearly a matter relating to other terms i.e. Article 19 (see Lesley and Godwin Investments Ltd v Prudential Assurance Co Ltd [1987] 2 EGLR 95, the speech of Lord Wilberforce in O'May at p 670 and Becker v Hill Street Properties Ltd [1990] 2 EGLR 78 CA).

9. If, contrary to this conclusion, the matter lies within the ambit of Article 17, the Tribunal accepts that ordinarily it should not impose any longer term upon the tenant than the tenant requests (see Halsbury Laws of England 4th Reissue Vol 27(1) at para 599 and CBS United Kingdom Ltd v London Scottish Properties Ltd [1985] 2 EGLR 125). But as the parties have agreed a 15-year lease, the Tribunal does not accept that the absence of a tenant's option to break would equate to the imposition of a longer term upon the tenant than the tenant requested.

10. A landlord's option to break is often considered where a landlord's plans for redevelopment are not sufficiently well advanced; in such circumstances there has been a common practice of considering the incorporation of a landlord's option to break (on terms consistent with the 1996 Order) in the new tenancy. The reason for that is this. Although the guidelines of O'May apply, the underlying policy of the legislation not to restrict landlords in redeveloping their property weighs heavily in the balance against considerations of hardship (and, in particular the need for a reasonable degree of security of tenure) for a tenant. But in this case the option to break is sought by the tenant and not by the landlord and no such underlying policy applies.

11. The Tribunal does not accept Mr Horner's suggestion that although the Tribunal would normally be inclined to follow the original lease the fact that the parties had agreed a 15 year lease instead of the 25 year term of the previous lease means that the Tribunal was starting from a clean sheet.

12. The onus lies on the tenant and the test is whether the proposed introduction of an option to break, where one does not appear in the current tenancy, can be justified on grounds of essential fairness (see O'May). To paraphrase Hoffman J in Lesley and Goodwin v Prudential:

> "The fact that a break clause does not appear in the current tenancy does not necessarily make it wrong that it should be included in the new one, but in the absence of some reason to the contrary there is a powerful reason for not doing so."

13. In this case a combination of factors fall to be considered.

14. Within Rushmere two out of 16 other tenants had been granted breaks. Mr Cassidy explained that one was given as an incentive to introduce a new major fashion outlet to Rushmere, the other he thought was because a prospective tenant of a unit, which had been difficult to let, had been in a strong bargaining position. The Tribunal attaches some but only a little weight to the fact that within Rushmere two out of 16 other tenants had been granted breaks. But the overwhelming pattern is that break clauses are not usually granted and the Tribunal has accepted that a tenant's option to break would reduce the value of the landlord's reversion.

15. Mr Crothers referred to the retail property market in Craigavon and proposals for new developments at Rushmere and within the wider catchment area. But the Tribunal accepts Mr Cassidy's view that there is no great uncertainty in the property market that is peculiar to this tenancy at Rushmere.

16. The user permits the sale of items such as newspapers, periodicals, magazines, books stationery and greeting cards etc. There is a qualified permission for change of use within Use Class 1 of the Planning (Use Classes) (NI) Order 1989. The unit is unusually large and the market for such a unit may be limited. There is increased competition within the tenant's trade particularly as a result of the abolition of the Net Book Agreement, a wider availability of newspapers in supermarkets etc, the arrival of specialist greeting card retailers and the prospect of strong competition from a national multiple. Mr Tinsley illustrated the effects that competition from supermarkets in particular was having on its trade. The Tribunal is not persuaded that there is any significantly greater danger to the tenant from the prospect of increased competition nearby that that which might affect other classes of retailers. It also accepts Mr

Cassidy's suggestion that the agreed new user clause with its qualified permission for change of use permits trade flexibility through the capacity for Class 1 retailing and that provides a degree of comfort in the context of both continuing occupation and alienation.

17. Mr Horner invited the Tribunal to balance the reasons for the introduction of a break put forward by Mr Tinsley against the reasons put forward by the landlord. The test is one of essential fairness but the Tribunal agrees with Mr Shaw that the absence of a break clause in the old lease is a powerful reason for no break clause; rather than starting from a level playing field, the onus lies on the tenant to overcome that powerful position.

18. On balance the Tribunal is not persuaded that the factors outlined above carry sufficient weight to overcome the absence of a break clause in the old lease.

End-allowance

19. Having prepared a valuation based on a zoning approach, a valuer may consider that some adjustment may be required to the answer to reflect some unusual feature (perhaps an irregularity or disability) of the unit to be valued and which is not shared with the comparisons on which the valuation is based. The generic term is an 'end-allowance' and the usual form is a percentage adjustment to the valuation arrived at by zoning.

20. In response to the Tribunal during cross-examination, Mr Crothers confirmed that the end-allowance he considered appropriate in this case was an end-allowance for size (sometimes also termed a 'quantum allowance'). That is in respect of the overall size and not the unusual distribution of areas between the various zones i.e. not the unusually large zone 4 or remainder area.

21. The procedure adopted by the Tribunal in valuation cases requires the experts to first set out all the factual material which each intends to draw to the attention of the Tribunal in a Statement of Case. That statement also includes an annotated valuation. The statements are exchanged and the experts then prepare their Expert Opinion Evidence, with the benefit of sight of all the factual cards on the table.

22. Later, after he had finished his evidence, Mr Crothers prepared a written analysis based on the unusually large remainder area. Mr Shaw objected to its admission, the Tribunal upheld his objection.

23. In his Statement of Case Mr Crothers included a discount or end-allowance for size of 12% of the total valuation and his comparables included rental evidence in respect of Eason and other relatively large shops elsewhere in Northern Ireland.

24. In his Statement of Case Mr Cassidy made no end-allowance for size.

25. In this case it is convenient to take the question of an end-allowance for size in two steps. The first is whether an end-allowance for size is appropriate in principle and the second is, if so, how much of an allowance, if any, should be made.

In principle - outside Rushmere

26. Mr Crothers drew the Tribunal's attention to transactions relating to 5 Eason shops and 2 'Boots' shops elsewhere. He analysed their rents on a basis of 4 zones and said that these represented end-allowances for size, of between 7% and 20.8%, from the general level of rents at those locations. However he did not produce any evidence of differences of size, shape, user or other potential grounds for an end-allowance in relating them to the shops with which they had been compared. In his written opinion Mr Cassidy did not deal with an end-allowance for size but at the Hearing he suggested that a number of these transactions were old and did not reflect relevant circumstances, one related to a unit of irregular shape, one reflected a difference in general levels of rent between two malls and one was a concession because it was the last deal outstanding in a centre. He conceded that he was aware of examples of end-allowances for size but said that the market now preferred larger units and in his opinion such end-allowances were confined to extremely large units.

27. The Tribunal agrees with Mr Shaw that the evidence from outside Rushmere is of limited assistance because although some examples were put forward the Tribunal does not know enough about what happened.

28. The best protection against partisan expert evidence is transparent analysis. Although Mr Crothers was more open in this regard than Mr Cassidy, neither expert fully and

openly set out the primary facts on which they based their opinions. (See e.g. Janet Greer v Northern Ireland Housing Executive [1997] R/19/1996 and Martha Hawe v Northern Ireland Housing Executive [1997] R/19/1997.)

29. The labels, such as quantum or end-allowance for size, that others actually have attached to figures may be secondary or supporting evidence in that they may demonstrate an acceptance of an approach in the market but the primary evidence must come from the experts in the case objectively interpreting agreements on rent and transparently setting out their analyses. (See e.g. Stanley Skelton v James McEvoy [2003] BT/72/2001.)

30. However, on balance, on the issue of an end-allowance for size in principle, there is sufficient evidence outside Rushmere for the Tribunal to accept it as a potentially relevant consideration.

In principle - inside Rushmere

31. In Mr Crothers' opinion there was recent evidence of an end-allowance for size in Rushmere: there was a significant difference (10.2%) in the rents agreed for open market lettings to 'Our Price' (2427 sq ft) and 'Boots' (3863 sq ft). The Tribunal accepts that there was no question of an end-allowance for size agreed as such in that transaction and Mr Crothers' analysis was not based on any acknowledgement by the landlord of such an end-allowance. Mr Horner suggested that there was no other possible explanation. Although it was not acknowledged, the tribunal concludes that objective interpretation of the agreements for the 'Our Price' and 'Boots' units points to an end-allowance for size inherent in the 'Boots' rent.

32. In his written evidence Mr Cassidy did not put forward any examples, but in cross-examination he suggested that the market was now looking for bigger units and drew attention to a proposed new extension to Rushmere in which the indicative tenant layout suggested a range of units of about 3,300 sq ft as well as others of about 2,800 sq ft. Mr Horner pointed out that a large unit (Unit 5) stood idle for 2½ years despite Mr Cassidy's opinion of demand for larger units. Mr Cassidy explained that the delay in achieving a letting did not represent a lack of interest; it arose because a first round of negotiations had been unsuccessful but eventually a solution had been reached. The Tribunal attaches little weight to the indicative layout for future development as

evidence of demand for much larger units and the protracted negotiations to settle a tenant for unit 5 point to a lack of demand for larger units at Rushmere.

In principle - the 1996 Review

33. An end-allowance was agreed in 1996 at the previous rent review. In Mr Crothers' opinion that was evidence of an end-allowance for size. Mr Cassidy suggested there were other factors then at play and, in particular, an argument about the effect of the restricted user clause then in place. Mr Shaw suggested that the end-allowance for the Eason unit in 1996 was not on the basis of size: Mr Crothers had then asked for 35% on grounds of two factors and the case was settled at 12% but on no agreed basis. Mr Cassidy was unable to point to any evidence that a broad or narrow user clause had had any effect on the determination of rental values at that time and the Tribunal accepts Mr Crothers' opinion that the difference is evidence of an end-allowance for size at the last review.

34. Mr Cassidy further suggested that the market demand for units had changed since 1996 and the size requirement of tenants had increased significantly over the past few years. The Tribunal accepts that changes do happen but is not persuaded that his supporting evidence, which relied on the fact that the standard unit when the Rushmere was constructed was approximately ⅓ of the size of units in the proposed extension, outweighs the evidence of the analysis, discussed above, of the more recent lettings of the 'Our Price' and 'Boots' units.

How much of an end-allowance for size, if any

35. The Eason unit is about 5,350 sq ft and the Tribunal accepts that it is very much larger than the Rushmere rental comparisons that were adduced in evidence. The Tribunal accepts that its relative size makes a straightforward application of the zoning method unlikely to be satisfactory.

36. In Mr Cassidy's opinion adopting 4 zones made adequate provision for size because 56% of the unit is within the 4th zone and on his initial valuation 56% of the unit would be valued at £5.63. He suggested that adopting 4 zones and an end-allowance for size would be a double discount for size. He went on to compare the Eason unit with others on an overall basis and showed that it was well below any of the other units but

that may be simply a reflection of the very large proportion of the area in the 4th zone and a conclusion on what effect that had would require properly prepared analysis.

37. Mr Shaw suggested that even if there was an argument for an end-allowance for size, a figure of 12% was pure guesswork and the adoption of 4 zones was sufficient.

38. The Tribunal has concluded that objective interpretation of the open market lettings to 'Our Price' and 'Boots' points to an end-allowance for size, of perhaps 10%, in the 'Boots' rent. The 'Boots' unit is smaller than the Eason unit. At the Eason unit an end-allowance was agreed in 1996 at the previous rent review and the Tribunal has accepted that the 12% allowance was an end-allowance for size. The Tribunal adopts the 12% allowance as before.

39. The Tribunal therefore concludes that there should be no options to break and there should be an end-allowance for size of 12% of the unadjusted rent.

ORDERS ACCORDINGLY

19th June 2003 **Mr M R Curry FRICS IRRV MCI.Arb Hon.FIAVI**
LANDS TRIBUNAL FOR NORTHERN IRELAND

<u>Appearances</u>:

Mark Horner QC instructed by C & H Jefferson appeared for the Applicant/Tenant.

Stephen Shaw QC instructed by Hewitt & Gilpin appeared for the Respondent/Landlord.