

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

In the matter of Business Premises at 22 Castle Place, Strabane

BT/26/2005

BETWEEN

MUNCHIES STRABANE LIMITED – APPLICANT/TENANT

AND

McCAY PROPERTIES LIMITED – RESPONDENT/LANDLORD

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

The Background

1. In September 2003 McCay Properties Limited ('McCay Properties') let commercial premises at 22 Castle Place, Strabane to Munchies Strabane Limited ('Munchies') for use as a café/take away ('the 2003 lease'). The term was for 2 years with an option for a further 2 years. The premises included a small open yard to the rear. This was used by Munchies for waste storage as an integral part of their food safety arrangements.
2. About a year later in September 2004 there was a fire at the premises and the buildings were destroyed. The 2003 lease imposed an obligation on McCay Properties to insure and reinstate in the event of fire damage. Without properly consulting Munchies, McCay Properties erected a new building to a different design. That incorporated much of the former yard and did not include any access to a small remaining yard. Before the new building was completed McCay Properties served Notice under the Business Tenancies (Northern Ireland) Order 1996 ('the 1996 Order') terminating the tenancy on 23rd September 2005 and opposing the grant of a new tenancy on grounds of persistent delay in paying rent that had become due. Munchies had an option for a further 2 years but did not exercise that and in April 2005 made a Tenancy Application under the 1996 Order.
3. At a hearing on 11th January 2006 the parties announced that they had agreed terms for a new lease including a rent of £350 per week. But, as the parties could not agree a variation in rent from the Notice termination date (23rd September 2005) until commencement (see Article 11); that was fixed by an extempore decision of the Tribunal.
4. They had also agreed a scheme for carrying out an order for the new tenancy based on Article 20 of the 1996 Order. The Tribunal's Order was to be perfected in 7 days (Article 20

distinguishes between the decision and the order) and commencement date for the new lease was 4 weeks after the 14 day time limit for the tenant's option to revoke under Article 20. In practical terms the intention was that the option to revoke should expire by 1st February 2006 and the commencement date for the new lease should be 1st March 2006.

5. The fee was paid and a draft Order was prepared by 27th January 2006, but Munchies Limited asked for the Order not to be perfected because of a "problem implementing the agreement". It later emerged that the problem turned on the fact that, although the 2003 lease continued, McCay Properties were withholding the keys for inspection and all other purposes until the new lease and guarantees were executed. At the request of Munchies the matter was mentioned before the Tribunal on 27th April 2006 when it complained that without access to inspect the new building it could not reach an informed view of whether to elect to revoke. Counsel reached an agreement that access would be provided next day with 7 days for election to revoke. Munchies promptly complained that it could not make arrangements to inspect properly at such short notice.
6. In June 2006, the Tribunal facilitated neutral access for Munchies, together with representatives from the Environmental Health Department of Strabane District Council, by itself attending under its own statutory power to inspect.
7. On 5th June 2006 Munchies gave written Notice that it elected not to take up the new tenancy. On 6th June 2006 McCay Properties agreed to that.
8. The premises were later leased to Subway Realty Limited for use as a Subway sandwich outlet. McCay Properties have been unable to provide the contractual commencement date for their lease but the rent commencement date is 16th November 2006.
9. Issues remained in regard to a claim by the Landlord for a loss of rent and costs.
10. The Tribunal received written submissions from Counsel and held a Hearing on 25th September 2007.
 - a. Mr Patrick Cosgrove, Chief Environmental Health Officer of Strabane District Council, gave evidence about the procedure for preparing and approving a scheme for dealing with waste and the need to prevent cross contamination. He accepted that a lack of provision for bin storage would be a real concern.

- b. Mr Dale Shaw Coyle gave evidence of his instructions from McCay Properties to obtain planning consent for a replacement building with a minimal rear yard and no access to it. Also, as a loss assessor instructed by both parties in connection with the fire, his instructions from Munchies always were to seek compensation on a reinstatement of business basis.
- c. Mr David William McCay, a Director of McCay Properties gave evidence. He did not want to give Munchies an opportunity to take control of the premises. He simply did not want it as a tenant. The Tribunal accepts that McCay Properties was prevented from letting to another tenant by Munchies continuing tenancy. Mr McCay had a share in the new Subway operation at the premises. It dealt with the waste problem by using accommodation at the home of his co-director for interim storage coupled with weekly collection by the Council from there.
- d. Mr Eugene Gillen, a Director of Munchies gave evidence. The Tribunal accepts that Munchies had used the rear yard for waste storage, it had a genuine difficulty as a result of the design of the replacement premises and it was obstructed from reaching an informed decision by the conduct of McCay Properties.

The Interim Period

- 11. Broadly speaking Article 11 gives the Lands Tribunal power to vary the rent during the interim continuation of the current tenancy. Article 20 gives the Tribunal power, where a tenant applies to the Tribunal for the revocation of an Order for the grant of a new tenancy, to determine that that tenancy shall continue for such period as may be necessary to afford the landlord a reasonable opportunity for re-letting of the premises. Article 21 then further provides for compensation for a landlord where a tenant withdraws, or fails to pursue, the application before the Lands Tribunal comes to a decision on it; or a tenant, after the making of an order for the grant of a new tenancy, applies to the Lands Tribunal under Article 20(2) for the revocation of the order and the order is revoked.
- 12. This application was withdrawn after the Tribunal had come to a decision but before the making of an Order. Argument focussed on Article 21 and the Tribunal explored the notion of a deemed revocation. But on reflection the Tribunal has concluded that, having regard to the language of the Article distinguishing between a decision and an order and as the parties relied on that in their scheme for the renewal, it should treat Article 21 as probably not applying in this reference.

13. The Tribunal therefore turns to the Article 11 provisions for the interim continuation of tenancies:

“(1) In any case where—

(a) a notice to determine a tenancy has been served under Article 6 or a request for a new tenancy made under Article 7; and

(b) a tenancy application has been made; and

(c) but for this Article the effect of that notice or request would be to terminate the tenancy before the expiration of the period of 3 months beginning with the date on which the tenancy application is finally disposed of,

the effect of the notice or request shall be to terminate the tenancy either at such date as the Lands Tribunal may by order direct or at the expiration of the said period of 3 months and not at any other time.”

The requirements of Article 11(a) to (c) are met.

14. Paragraph (2) includes provision for the effect of withdrawal of applications:

“(2) The reference in paragraph (1)(c) to the date on which an application is finally disposed of shall be construed as ..., except that if the application is withdrawn ... the reference shall be construed as a reference to the date of the withdrawal”

The Tribunal concludes that the effect of the notice to determine shall be to terminate the tenancy either at such date as the Tribunal may by order direct or at the expiration of the period of 3 months from the date of the withdrawal and not at any other time. Having regard to all the circumstance but in particular to the rent commencement date of the subsequent letting of the premises (16th November 2006) the Tribunal adopts more or less the period of 3 months from the date of the withdrawal (5th June 2006) and directs that the tenancy under the 2003 lease ended on 5th September 2006.

15. Paragraph (3) includes provision for a variation in rent and interest on rent.

“(3) Where the term of a tenancy is extended in consequence of the operation of paragraph (1), the Lands Tribunal may by order—

(a) vary the rent payable under the tenancy to such amount, effective from such date (including a date then past), and

(b) direct that interest shall be payable on rent in arrear (including rent in arrear by virtue of a variation under sub-paragraph (a)), at such rate,

as the Lands Tribunal considers proper in all the circumstances. “

16. Following a Hearing in January 2006 the Tribunal had determined, in an extempore decision, a variation of rent from the Notice termination date (23rd September 2005) until the expected commencement of a new lease:
1. From 23rd September 2005 until 3rd January 2006 (Practical Completion of new building) Nil rent; and
 2. From 3rd January 2006 until commencement of new lease £100 per week.

This is substantially less than full market rental value.

17. The Tribunal concludes that McCay Properties should continue to receive some rent for the interim period. But both parties continued to obstruct the other from making positive use of the premises and in these circumstances Munchies should not have to pay and McCay Properties should not be paid a full market rent. There was no suggestion that the interim rent should be further varied and the Tribunal therefore orders that the rent be varied accordingly until the tenancy ended on 5th September 2006.

18. The 2003 Lease made specific provisions for interest on overdue rent and on rent agreed or decided at rent review. The Tribunal adopts the rent review scheme (Clause 8.5(c) and Clause 1.6) and accordingly directs that interest shall be payable on rent in arrear by virtue of this variation at 2% below the rate provided by the Law Society of Northern Ireland Conditions of Sale as varied from time to time.

19. Paragraph (4) requires the Tribunal to order payment

“(4) Where the Lands Tribunal, under paragraph (3), orders a variation of rent by way of increase from a date then past, it shall order the payment of—

- (a) the sum of any arrears of rent created by virtue of that variation; or
- (b) where it also directs that interest shall be payable on rent in arrear, the sum of any arrears so created and interest on such arrears.”

The Tribunal orders accordingly.

Costs

20. The application to withdraw would lead to a presumption that Munchies should pay McCay Properties' costs. But a considerable part of the time and effort involved in the proceedings related to the substantive issue of McCay Properties' opposition to the grant of a new tenancy and also a point was raised in regard to the validity of Munchies' application. McCay Properties abandoned both issues and so should be presumed to have lost on those. As McCay Properties should have maintained adequate and complete rental records the Tribunal does not

accept the suggestion that poor rental record keeping on the part of Munchies is relevant. As, although the Tribunal has reservations about just when Munchies decided not to proceed, it is satisfied that for most of the time, Munchies was genuinely interested in taking a new tenancy the Tribunal would be minded to conclude that it should pay McCay Properties' costs on those issues. The Tribunal does not accept the suggestion that the causation of the accidental fire is relevant. Finally, there should have been better co-operation from McCay Properties to provide for the continuation of the business of Munchies. On balance, the Tribunal concludes that it should make no order as to costs.

ORDERS ACCORDINGLY

7th May 2008

Michael R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI

LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:

Richard Smyth BL instructed by Oliver Roche & Co.

John Coyle BL instructed by John Fahy & Co.