

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
IN THE MATTER OF AN APPLICATION
BT/101/1993
BETWEEN
BARRY McDEVITTE - APPLICANT
AND
PATRICK JAMES McKILLOP AND JOHN PATRICK McKILLOP - RESPONDENTS

Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS

Belfast - 11th and 14th January 1994

This was an application dated 29th October 1993 under Section 8(1) of the Business Tenancies Act (Northern Ireland) 1964 ("the 1964 Act") to the Lands Tribunal for a new tenancy of a grocers' shop at No 65 University Avenue, Belfast.

It had commenced by the Respondent Landlords serving a Landlords' Notice to Determine Business Tenancy, dated 30th July 1993, on the Applicant. That Notice brought the contractual tenancy to a close on 1st February 1994 and opposed an application to the Lands Tribunal for a new tenancy on the following grounds:-

"It is our intention to carry out substantial works of construction on the holding or part thereof and that we could not reasonably do so without obtaining possession of the holding.

OR

that on the termination of the current tenancy we intend that the holding will be occupied by us for a reasonable period for the purposes, or partly for the purposes, of a business to be carried on by us or by a company in which we have a controlling interest".

On 16th September 1993 the Applicant's Solicitor notified the Respondents that the Applicant was unwilling to give up possession of the holding and on 29th October 1993 made this Application to the Lands Tribunal.

Mr David McBrien of Counsel (for the Respondents) called Mr John Nigel Bond (a Retail Development Executive for John Henderson Ltd - Spar and VG food distributors), Mr Thomas John Quinn (Member of the British Architect Technicians), Mr John Patrick McKillop (one of the Respondents), Mr Kenneth James McWhinney (Sales Director of John Henderson Ltd) and Mr Patrick James McKillop to give evidence.

Mr Bond testified that he received verbal instructions to carry out a viability study for No 65 University Avenue (the holding in this Case) and No 67 University Avenue (the Ground Floor flat adjacent) for use as a Spar Supermarket. During his evidence he made many errors eg he told the Tribunal in his evidence in chief that he had been instructed by Mr Patrick McKillop yet in cross examination he said that he had been instructed by Mr John McKillop; in his written and verbal evidence he mistook University Avenue for University Street on a number of occasions and he testified that there was no conflict between this site being used as a Spar outlet and the existing Spar shop in Botanic Avenue but in cross examination he told the Tribunal that he had only mentioned it verbally to the Company's Sales Manager.

His brief consisted normally of the following steps:-

- (a) is the site viable in his opinion?;
- (b) if so, to project the fixed costs (based on the research from 250 (approximately) Spar shops in Northern Ireland);
- (c) to estimate and recommend a shop size to fit the estimated Turnover;
- (d) to prepare drawings of shop layouts;
- (e) to ensure that the Company can supply 60% of the requirements for the shop and to supply a merchandising team and a merchandising layout.

He considered that the trading area would be bounded by Lisburn Road from Bradbury Place, Botanic Avenue from Botanic Station to include Botanic Gardens Park, University Road. All roads off those streets and roads. (The Tribunal finds great difficulty in identifying properly that area for in the bundle of papers supplied the map indicating the trading area was a hopelessly poor photocopy of the Ordnance Sheet with no coloured boundaries. Indeed a blue/green spot which was supposed to indicate the holding was incorrectly placed.)

He considered the Catchment Area, while much larger, was difficult to identify. Nevertheless he calculated (using the 1991 Census figures) that the population of the

Trading Area was 2916 persons and that of the Catchment Area was 3580 (a typographical error on his written evidence shows 32580).

He then multiplied the total calculated population by £11.98p being the estimated expenditure per head per week on groceries according to "Northern Ireland Family Expenditure". This gave an estimated Turnover for the two ground floor areas of Nos 65 and 67 University Avenue at 10 to 15% of the trading area plus 5% of the catchment area. That arithmetic made the lower limit £4774 per week and the upper limit £6080 per week. Further adjustments for other produce, confectionery, tobacco, newspapers and passing trade increased those figures to a minimum of £9809 and a maximum of £12,517 per week respectively.

Although no figures were produced for an alternative site at Dudley Street/ Magdala Street corner Mr Bond came to the conclusion that "of the two sites the one located at the junction of University Street and Rugby Road (sic) is in my opinion the better site ...".

However, on the day before this first day of hearing it came to his notice that the planning application (dated 18th November 1993) might be refused. He consulted Mr Quinn (the next witness) and they agreed between themselves that the alternative was to enlarge the retail portion of the holding into the store at the rear thus enlarging the existing shop from about 400 square feet to 604 square feet. Mr Bond produced a shop layout; then contacted Mr John McKillop who agreed that the matter should proceed on that basis. Counsel for the Applicant put to this witness a copy of the Refusal of the Planning Application dated 6th January 1994.

Mr Quinn testified that he had been associated with Mr Patrick McKillop and designing for him for about one and a half years; Mr Patrick McKillop had requested him to survey the two properties Nos 65 and 67 University Avenue. Provisional arrangements for that survey had been arranged for 1st October 1993 but access to No 65 University Avenue had been refused. After discussions with both Respondents he was instructed to make an application for change of use of No 67 University Avenue from flat to retail shop. The plan accompanying that planning application made on 18th November 1993 was based on plans in the offices belonging to Mr Quinn. He had also produced a Schedule of Works for the extension into No 67 University Avenue. (The Tribunal notes that in that Schedule:- "THE EMPLOYER shall mean Mr Patrick McKillop".)

In addition Mr Quinn had applied on behalf of Mr Pat McKillop to the Belfast Building Control Office on 20th December 1993 for Building Control permission. For calculating the Building Control fees he had estimated a cost of works (ex VAT) of £11,500.

He accepted that he had not known up to the day before the first day of this hearing that a planning refusal had been made on 6th January 1994. On making enquiries he had been told that a refusal was likely. Mr Bond and he had got together, had considered that the existing shop if it were enlarged might meet the requirements of the Client, and having worked on that idea phoned Mr Patrick McKillop who instructed them to go ahead.

He agreed in cross examination that the new idea would require the removal of the Carmel Street main staircase to the upper floor rooms let to students. He did not consider that to be a difficulty for there was a fire escape into the rear yard of No 67 University Avenue which would be converted into the main entrance. He had not consulted with the Fire Authority regarding the feasibility of using that fire escape.

He accepted in cross examination that he considered that he had been working for Mr Patrick McKillop who is not a shopkeeper but a landlord and that he had not been informed that there was a partnership of Mr John McKillop and Mr Patrick McKillop.

Mr John McKillop testified that he had been a grocer for the last 20 years in Cushendall. Having started with a shop of about 450 square feet, some 12 years ago he opened a Spar Supermarket of some 3000 square feet. He had been a member of the Spar Guild of Grocers in Northern Ireland for six years ending some 5 years ago. He also owns some 40 properties in Belfast (jointly with Mr Patrick McKillop). Apart from the shop at No 65 University Avenue, all the properties are let out as flats. He further testified that originally he intended to open a Spar Supermarket at Nos 65 and 67 University Avenue sharing responsibility with his brother Patrick. His idea was to spend three months getting the new business in good shape, and to teach his brother Patrick to run the business and would from time to time assist Patrick while running his Cushendall business.

When he learned that enlargement into No 67 University Avenue was not possible as a result of the planning refusal, he approved going ahead with the plan for enlargement of No 65 University Avenue. If that wasn't feasible he was prepared to open a Spar shop in the holding as it presently is. If it proved to be too small for Spar requirements he considered he could obtain wholesale goods from Spar suppliers even though the advertising name of "Spar" might not be permitted. However, because of his influence with Spar he thought it

unlikely that he would be refused a franchise. No steps had yet been taken for altering No 65 University Avenue ie no application for planning permission, building control nor to fire authority regarding removing main staircase to upper floor and using and amending fire escape in lieu. He testified that his preference was to enlarge the shop in the holding into the rear store. He had taken no steps to advertise for staff nor to set up arrangements with any of the suppliers necessary to stock the shop.

He accepted that his intention had changed once he knew of the planning refusal and that if given the go ahead there was not the remotest chance of being ready by the 1st February 1994 (ie the date stated on the Landlords' Notice to Quit).

Mr McWhinney testified that his firm supplied groceries to 272 Spar (franchised) shops; 159 VG (franchised) shops and 18 Spar (Group owned) shops. Additionally approximately 80 non Group shops were supplied with similar groceries (known internally as "Star Value").

On Wednesday following the first day of this hearing on Tuesday 11th January 1994 he was requested to look at No 65 University Avenue. Mr Bond, when producing his feasibility study, had spoken to him regarding that study, but when Mr John McKillop requested him (on Wednesday morning 12th January) as to whether John Henderson Ltd would supply groceries, he visited No 65 University Avenue for the first time. Before that time he had seen no paper work whatsoever regarding No 65 University Avenue, for normally it is only when a final management decision was to be made that the papers would be submitted to him.

He informed Mr John McKillop that the firm would decide if "Star Value" goods would be supplied to No 65 University Avenue after he had seen Mr Bond's report and after he had visited the premises. He considered the present shop presented an adequate standard for "Star Value" but he had no knowledge of its present Turnover. His firm having traded with Mr John McKillop for a large number of years knew of his credit worthiness but had no knowledge at the moment of the credit worthiness of Mr Patrick McKillop. He agreed that the Spar shop in Botanic Avenue (near to Botanic Station) was Group owned and that it would be expanded in size as soon as an adjacent shop became available. Following the Tribunal requesting him to look at a map in Mr Bond's report he agreed that the Botanic Avenue Spar shop lay inside the areas taken by Mr Bond as the trading area and catchment area for No 65 University Avenue.

Mr Patrick McKillop testified that he owned a fast food shop at No 44 Fitzroy Avenue although he told the Tribunal that he was not there too often. He had manufactured and sold ice cream in a shop in Cushendall for some 7 years prior to coming to Belfast. He and his brother Mr John McKillop had purchased in recent years about 40 premises and he had purchased an additional 9 premises. About 25 of those premises were in East Belfast and the remainder in the University area. All of these properties were let out as flats or rooms - the only shop being No 65 University Avenue. Nos 65 and 67 University Avenue were purchased five to six years ago.

He further testified that since the end of that part of this hearing on Tuesday 11th January he and his brother have decided to run the premises as they are without physical alterations. To endeavour to show their decision Mr Patrick McKillop handed in various letters from suppliers willing to supply goods, viz:-

- (a) John Woods (L) Ltd of Monaghan Road, Armagh - willing to supply "Pat the Baker" and "Linwoods" products.
- (b) Poppin Hosiery of Mealough Road, Carryduff - willing to supply.
- (c) Musgrave Cash & Carry of Dargan Crescent - willing to service requirements.
- (d) Eds Home Bakery of Woodbourne Crescent - willing to supply home baked bread and cakes.
- (e) Harry Dunlop Refrigeration - a quotation for supplying and installing a Dairy Case and a Deep Freeze with a delivery time of 3 weeks.
- (f) News Speed Ltd - willing to continue the same supply of goods at present being sold to No 65 University Avenue.
- (g) Belfast Telegraph - willing to continue supplying Belfast Telegraph, Ireland's Saturday Night and Sunday Life presently being sold to No 65 University Avenue.

Mr Patrick McKillop further testified that he collected the rents from all the premises owned in the University Area but those in East Belfast were collected by an Estate Agent. As far as the shop was concerned no approach for staff had yet been made but the intention was that his wife and himself would devote full time to the shop but additional staff would be required for the proposed opening times of 8 am to 10 pm.

He further told the Tribunal that it had been decided as long ago as four years (ie about one year after the purchase of No 65 and 67 University Avenue) that the brothers wished to open a Spar Supermarket on those premises. Mr McDevitte was approached by him some 3 years ago and was told that it had been decided that the brothers wished to run the business themselves and offered him "a fairly large sum of money" to get out, but Mr McDevitte refused.

He testified that the Respondents, if given vacant possession, were prepared to give an undertaking to carry on a business in the premises.

Mr Mark Orr of Counsel (for the Applicant) submitted:-

1. In the Sales Manager of John Henderson Ltd, Mr McWhinney's evidence three factors were required viz an adequate standard of shop; sufficient finance available and a turnover of sufficient size.

He submitted that the first requirement had been satisfied; the second requirement had not been met properly by the letter from the Northern Bank manager for that letter had dealt with the enlargement of the shop with the amalgamation of No 67 University Avenue ie for a supermarket. The third requirement had not been met for Mr McWhinney had no knowledge of the actual turnover of the existing shop nor had there been any feasibility study or estimate of turnover for the possible trade to be done in the existing shop.

2. The Architectural Technician, Mr Quinn's evidence was solely in connection with enlarging the shop rearwards ie the Respondents' second option. Although he had drawn plans for the first option of incorporating No 67 University Avenue into the shop (that being the first and only option of the Respondents up to the evening before this hearing commenced), no architect's plans were produced for that second option. Nor was there any evidence of enquiries to the planning office, the fire authority or Building Control for that second option.
3. Mr John McKillop's evidence lacked any factual matters regarding occupation of the shop without any structural alterations for enlargement. Mr Patrick McKillop's evidence given on the second day of the hearing produced offers of supplying various groceries etc - all of which were dated for the two days between the first day and the second day

of hearing. However these were all merely offers of supply - there had been no enquiries re insurance, licences, etc. Nor had there been any assessment of the trading potential, turnover, return on capital etc as was done by Mr Bond for this hearing.

4. There is no evidence in front of the Lands Tribunal that there is a fixed and final decision.

Mr David McBrien of Counsel for the Respondents submitted:-

1. The Respondents have wanted to get the Applicant out for more than 3 years.
2. The Respondents for all that time have wanted a business in the holding.
3. Up until the day before this hearing commenced they wished to carry on a business in Nos 65 and 67 University Avenue.
4. That intention in 3 above was affected by an external event which went to the heart of the matter viz the refusal of planning permission.
5. There was one theme behind all their various wishes ie that they wanted to run a business on these premises.
6. The secondary position to extend the retail shop into the rear ground floor portion of No 65 University Avenue had fallen out of the reckoning by the commencement of the second day of this hearing.
7. Mr Patrick McKillop in evidence showed that he and his brother would run their business in the shop as it is physically.
8. Refers to Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1959] AC20; [1958] 1 All ER 607 which established that in respects of grounds in Section 10(1)(f) and (g) of the 1964 Act the intention of the landlord has to be judged at the actual hearing. Refers to Lord Denning at pages 51/52 (of [1959] AC20) or page 623 (of [1958] 1 All ER607) viz:-

"In short it comes to this: the landlord must honestly and truthfully state his ground in his notice, and he must establish it as existing at the time of the hearing."

9. Submits that the evidence shows that the Respondents should have satisfied the Tribunal that they have decided to run a grocery business in the holding without any physical change for:-
- (a) they have shown that finance was available for a much larger expenditure in amalgamation of No 67 University Avenue in order to enlarge the ground floor shop of No 65 University Avenue;
 - (b) ample firms of suppliers are offering to supply groceries etc;
 - (c) staffing presents no problem - in the first three months Mr John McKillop, Mr Patrick McKillop and his wife will staff the shop;
 - (d) the Respondents are prepared to give an undertaking.
10. All the time and effort put in by the two Respondents leading up to this hearing leads to the conclusion that they wish to carry on a business at these premises.
11. It is accepted that the emphasis and thrust of the Respondent's evidence has changed since the first full day of this hearing on 11th January.

On the second day of the hearing, Mr Patrick McKillop's evidence, it is submitted, should satisfy the Lands Tribunal that the Respondents' intention has become a final decision.

12. The Respondents do not wish to drop entirely their objection under Section 10(1)(f) of the 1964 Act for if their objection fails under Section 10(1)(g) of the 1964 Act they wish to fall back on the Lands Tribunal discretion under Section 11(2) of the 1964 Act to decide that although they have failed to establish the ground under Section (1)(f) the Tribunal may determine that it is not more than one year premature and make a declaration to that effect.

DECISION

This hearing became a veritable "hotch-potch" and certainly wasted some of the Lands Tribunal's time. The major cause undoubtedly was due in the main to a Planning Refusal dated 6th January 1994 which came to the attention by some verbal means only on 10th

January 1994 (on the day before this hearing commenced); but a copy of that refusal was handed in to the Tribunal on the 11th January 1994. Nevertheless the Respondents went ahead with some of the evidence already prepared as if the permission would probably be granted and then with some amending evidence.

The facts regarding the Respondents' intentions go back some time before the Landlord's Notice to Determine Business Tenancy dated 30th July 1993 viz:-

1. Early in 1988 (ie more than 5 years before the termination of the Applicant's current tenancy) the Respondents purchased by Assignment Nos 65 and 67 University Avenue.

The shop in the ground floor of No 65 University Avenue was at that time occupied under lease for a term of 9 years from 1st February 1985.

2. Sometime in 1989 Mr Patrick McKillop approached the Applicant to inform him that the Respondents wished to get vacant possession of his shop as they wished to open a supermarket.
3. About 3 years ago Mr Patrick McKillop offered the Applicant "a fairly large sum of money" to get him to give up his tenancy but the Applicant refused.
4. On 30th July 1993 the Respondents served a Landlord's Notice to Determine Business Tenancy. On 16th September 1993 the Applicant gave notice he was unwilling to give up possession of the premises and on 29th October 1993 he applied to the Lands Tribunal for the grant of a new tenancy.
5. Early November 1993 Mr J N Bond was requested "to investigate the area, recommend a suitable site together with recommended size and potential turnover". He was referred to two possible sites only (a) viz "the corner of University Street and Rugby Road" which in course of the verbal evidence became the corner of University Avenue and Carmel Street" and (b) a site at the corner of Dudley Street and Magdala Street.

His report came down heavily with site (a). That report and recommendation was concerned with plans drawn in November 1993 by Quinn Design Associates indicating the existing shop at No 65 University Avenue would be extended into the ground floor of No 67 University Avenue by removing the party wall.

6. A planning application was made on 18th November 1993 (using the plans above) for a "Change of use of existing ground floor flat to provide extension to existing shop", by Mr Quinn on behalf of Mr P McKillop.

Additionally, Mr Quinn on 20th December 1993 submitted an Application to Belfast City Council Building Control which included a Schedule of Works calculating the total estimate of cost of alterations at £11,500 (but that was for the purpose of fixing the fee to Building Control).

7. That planning application was refused on 6th January 1994; but it came to the attention of Mr Bond and Mr Quinn that the application "was likely to be refused" sometime on 10th January 1994 (ie the day before the commencement of this hearing).
8. As a result of para 7 above, Mr Bond and Mr Quinn got together and considered that the next best approach for the Respondents would be to enlarge the retail portion of the holding into the shop at the rear - thus a larger retail shop could be made leaving a small store at the rear. This could be done only by removing the main stairway to the let-out rooms in the upper floors (ie from the gable end at Carmel Street and converting the fire escape (which led into the adjacent house yard) into the main stairway opening onto the entry at the rear). Mr Bond, with this in mind drew a proposed layout for the retail shop, and the whole proposal was put by phone to Mr John McKillop sometime that evening who gave approval.

When the hearing opened on 11th January 1994 this was the evidence submitted to the Lands Tribunal on the first day. It purported to show how the Respondents' intentions, as shown by their objections on the Landlord's Notice to Determine Business Tenancy, had become a final decision. In the words of Asquith L J in Cunliffe v Goodman [1950] 2KB 237, [1950] 1 All ER 720:- "a requirement that the project should have moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision".

As the Tribunal has said earlier, Mr Bond's primary evidence concerned the viability of a Spar Supermarket being formed out of the shop at No 65 University Avenue amalgamated with the ground floor flat at No 67 University Avenue. That primary evidence left much to be desired. When he was shown a copy of the actual refusal of planning permission he

referred to his second proposed shop layout which was possible to obtain by extending the retail shop into the rear store at No 65 University Avenue. He then gave evidence that his viability study would apply to this enlarged (but somewhat smaller) shop in the same way as to the original proposal.

Mr Quinn, in his evidence, had not even prepared the necessary drawing to show how this second proposal could be obtained, but told the Tribunal that the main staircase to the upper floors would be removed and the fire escape converted to the main staircase. He, quite evidently, had not thought that plan through, for although the plan required external alterations as well as many internal alterations he did not know whether a planning application was necessary. Nor did he know whether or not the Fire Authority would need to be consulted.

On the basis of that evidence, the Tribunal would have required much more evidence that the Respondents' intention had become a final decision. But Mr John McKillop's evidence was clear. He accepted that since the day before this hearing commenced his intention to expand the shop into No 67 University Avenue had completely ended ie that he did not consider a planning appeal was worthwhile. His preference was to enlarge the shop in No 65 University Avenue rearwards into the store. To this end he had requested John Henderson Ltd (for Spar Group) to be the main supplier, but had made no approaches to suppliers for bread, milk or newspapers to be supplied. There had been no contract made for equipment etc, and no confirmation from main suppliers. He also accepted that his present intention was only 24 hours old but if the second enlargement proposal was found to be impossible he would still want to open a Spar shop in No 65 University Avenue, but if the shop was too small for a Spar Franchise he would open the shop at its present physical size and request wholesale goods from John Henderson Ltd in the "Star Value" range of Spar groceries even though he could not use the Spar name.

However, that was not the end of the matter. On the second day of hearing (on 14th January 1994) Mr Patrick McKillop told the Tribunal that a decision had now been taken to run the shop in the physical state which exists at present. To sustain that decision he submitted in evidence letters from a number of suppliers to say that they were willing to supply to the Respondents at No 65 University Avenue. But he went on to say that the Respondents had decided as long ago as 4 years past that they wished to get vacant

possession and they even made a monetary offer to buy the Applicant's leasehold interest and business out.

However, he told the Tribunal that the Respondents are "prepared to give an undertaking to carry on a business at the premises".

Up to the end of the first day of this hearing, the evidence before the Tribunal, which had changed the Respondents' intention twice, still showed the Tribunal that there were still two alternatives to be considered by the Respondents ie

- (a) to enlarge the shop rearwards - but that would take some weeks, perhaps months to properly change their intention to a final decision and
- (b) to get vacant possession and occupy it themselves without further reconstruction of the premises - but that required some proof that the intention had become a final decision.

The Tribunal is not satisfied that the factual evidence given on the second day of the hearing genuinely shows that the alternative at (a) above has been abandoned. Mr John McKillop who in his evidence, having abandoned the original idea of enlargement into the adjacent premises, clearly preferred (a) above to the intention shown at (b) above. The Tribunal appreciates that of the two Respondents he was the expert supermarket grocer prepared to teach his brother to run this shop at University Avenue.

The letters from suppliers merely show an intention by each of them to get another outlet for their wholesale supplies. No confirmation had been entered into; no staff had been approached; no insurance had been investigated.

Mr McBrien submitted that the Betty's Cafe decision was authority for an intention to be perfected into a decision while the Case was still at hearing. But the Tribunal has to be satisfied on the facts of the Case that the landlord's intention has become a final decision ie "into the valley of decision".

The evidence given to the Tribunal at the end of the first day when the first and obviously the most important and viable option was destroyed by the planning refusal was that the next option (to extend rearwards) was preferred. Only if that proved impossible would that be rejected for, of course it was more viable than the third and last option, to trade in the

shop without physical alterations to the structure. On the second day of the hearing the third option was said to have been decided, but even then the facts put forward to show that was the final decision are still lacking in some respects and what evidence was given was not entirely persuasive that it was a fixed and genuine intention.

The Respondents' Counsel in his final submission requested the Tribunal to make a declaration, that the intention to extend rearwards although failing to satisfy the Tribunal, would have satisfied the Tribunal had the date of termination specified in the notice to determine been not more than one year late (ie 1st February 1995). The Tribunal, on the facts in front of it cannot and does not make that declaration (in accordance with Section 11(2) of the 1964 Act).

The Tribunal does not uphold the Respondents' objections under either Section 10(1)(f) or Section 10(1)(g). The Applicant is entitled to a new lease - the parties will be given reasonable time to agree the details.

Having heard the parties of the question of costs, the Tribunal rules that the Respondent shall pay to the Applicant costs of the first day of hearing, on the County Court scale, and in default of agreement to be taxed by the Registrar.

ORDERS ACCORDINGLY

Mr A L Jacobson FRICS

Lands Tribunal for Northern Ireland

28th January 1994

Appearances

Mr Mark Orr of Counsel (instructed by Thomas Armstrong Esq, Solicitor) for the Applicant.

Mr David McBrien of Counsel (instructed by Messrs James Boston & Sullivan, Solicitors) for the Respondents.