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/54/2020

BETWEEN

TRANSCOLD REFRIGERATION LIMITED – APPLICANT

AND

COOLTECH REFRIGERATION (NI) LIMITED – RESPONDENT

Re: Premises at 7(b) Springhill Road, Carnbane Industrial Estate, Newry

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

Background

1. Mr John Fegan had formed the company known as Transcold Refrigeration Limited ("the applicant") in 1988, operating as a sole trader providing refrigeration transportation supply facilities. In 1997 he entered into a lease with Hillspring Properties Ltd for the occupation of unit 7(c) Springhill Road, Newry, which was located in the Carnbane Industrial Estate. At that time the business was operated by family members.

2. The original premises at 7(c) Springhill Road, were expanded in or around 2003 to incorporate the adjoining property, 7(b) Springhill Road ("the reference property").

3. In 2008 the "Transcold" business was transferred to Mr John Fegan's son, Mr Paul Fegan, for a "six figure sum". Sometime before that, during the tenure of Mr John Fegan, the premises had been subdivided, with Transcold Refrigeration Limited ("the applicant") occupying unit 7(c) and Cooltech Refrigeration (NI) Limited ("the respondent") occupying the reference property. The managing director of the respondent company is Mr Konrad Fegan, a brother of Mr Paul Fegan.

4. It was not disputed that up until 2019 the relationship between the two companies was based on trust and informality and there was no written sub-lease or agreement between the companies for the occupation of the reference property by the respondent.

5. The existing leasing arrangements with Hillspring Properties Ltd continued up until 4th September 2018 when Hillspring Properties Ltd and the applicant signed a new lease for the occupation of unit 7(c) and the reference property, for a term of 10 years, at an annual rent of £20,400 per annum.

6. After the new lease came into force in 2018 the informal arrangements between the parties continued on a similar basis as before, until there was a breakdown of the relationship between family members and hence the companies in 2019. The applicant considered itself to be the landlord of the respondent and on the 26th May 2020, the applicant served a "Notice to Determine" the respondent's tenancy of the reference property, on grounds contained in Article 12 of the Business Tenancies (Northern Ireland) Order 1996 ("the Order") and in particular grounds contained in Article 12(1)(d) "alternative accommodation" and 12(1)(g) "own use".

7. Prior to 2019 there had been a "trust" relationship between the parties and the informal working arrangements included:

    (i) The applicant paid all of the outgoings for the reference property and unit 7(c), and the respondent paid a proportionate amount of all bills in respect of rent and common facilities.

    (ii) The businesses assisted each other where possible.

    (iii) There were shared services such as electric, phone and mobile phone facilities. Expenses were shared and money passed between the companies on an informal basis.

8. Mr John Fegan gave evidence that there was a verbal agreement between himself and the respondent that the respondent would pay the rent for the reference property to the applicant, on the undertaking that the applicant would pay the rent for the entire premises to Hillspring Properties Ltd. This agreement had continued up until 2019.

9. The parties had agreed that there were three issues to be decided by the Tribunal:

   (i) Was the applicant the respondent's landlord?

   (ii) If the applicant was a landlord, which was denied by the respondent, then was the applicant's Notice to Determine premature.

   (iii) If the Tribunal finds (i) and (ii) in favour of the applicant, has the applicant demonstrated sufficient intention to use the reference property in the manner required under the Order.

Procedural Matters

10. Mr Keith Gibson BL, instructed by Luke Curran & Co Solicitors, represented the applicant. The respondent was represented by Ms Lisa Moran BL, instructed by Donnelly Neary & Donnelly Solicitors. The Tribunal is grateful to counsel for their helpful submissions.

11. The Tribunal also received written and oral evidence from Messrs John, Paul and Konrad Fegan. Evidence was also provided by Mr Brian Clarke and Mr Garrett O'Hare. Mr Clarke and Mr O'Hare are experienced Chartered Surveyors. The Tribunal also received evidence from Mr David Harshaw, manager of the applicant company. The Tribunal is grateful to all for their submissions.

The Statute

12. Article 2 of the Order defines landlord:

"'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

b) that it is either the fee simple or a tenancy which will not come to an end within 14 months or less –

(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."

13. Article 12(1) of the Order outlines the grounds of opposition by a landlord to a new tenancy:

"(a) …

(b) …

(c) ….

(d) that the landlord has offered and is to provide or secure the provision of alternative accommodation for the tenant, and –

(i) That the terms on which the alternative accommodation is available are reasonable having agreed to the terms of the current tenancy and to all other relevant circumstances, and -

(e) …

(f) …

(g) subject to Article 13(4), that on the termination of the current tenancy the landlord intends that the holding will be occupied for a reasonable period –

(i) for the purposes, or partly for the purposes, of a business to be carried on in by him or by a company in which he has controlling interest, or

(ii) as his residence."

Authorities

14. The Tribunal was referred to the following authorities:

- Whip v Mackey [1927] IR 371 at 382
- Cunliffe v Goodman [1950] 1 All ER 720
- Frederick Lawrence Ltd v Freeman Hardy & Willis Ltd (No 1) [1959] Ch 731 (CA)
- Artemiou v Procopiou [1965] 3 All ER 539
- D'Silva v Lister House Developments Ltd [1971] CH 17
- Lightcliffe District Cricket and Lawn Tennis Club v Walton [1977] 245 EG 393 CA
- Bellew v Bellew [1982] IR 447
- London Hilton Jewellers v Hilton International Hotels [1990] 1 GLR 112 CA

15. And to the following texts:

- Wylie Landlord and Tenant 3rd edition
- Wylie Irish Land Law
- Section 3 of Deasy's Act 1860

- Dawson: Business Tenancies in Northern Ireland 1994 at pages 142-144

The Submissions

Mr Paul Fegan

Mr Paul Fegan gave evidence:

16. (i) He is managing director of the applicant company and the applicant's title is held pursuant to a lease for the entirety of the reference property and unit 7(c), for a term of 10 years commencing on 4th September 2018.

(ii) There was no written sub-lease between the parties for the respondent's occupation of the reference property and he accepted that their relationship and occupation of unit 7(c) and the reference property was "categorised by a certain informality".

(iii) Photographs submitted by Mr Brian Clarke show that the area occupied by the respondent appears to be used mainly for storage. The current rent paid by the respondent is £475 per month plus VAT.

(iv) Unit 7(c) is currently occupied and used for vehicle repair and since incorporation on 28th April 2014, the business has consistently expanded. The difficulty which he faces on a daily basis is that the business has simply run out of space. At present the company has responsibility for servicing around 800 vehicles on behalf of customers such as Harmon Transport, McCulla Ireland and Pallas Foods. They also fit and construct refrigeration units for customers such as Thermo King, Frigoblock, Domestic and Blue Tree Systems. Within unit 7(c) they have only two bays and due to the lack of space, work was sometimes being carried out in the yard.

(v) The additional space which the respondent occupied on the ground floor of the reference property would be used to install a jack lift to enable work to be carried out on smaller vehicles. The works required to adapt the reference property had been costed at £35,000. He confirmed that the applicant company had the available resources to carry out the works and he supplied a set of company accounts to verify.

(vi) In respect of the upstairs area, he submitted that the applicant company was hampered by the lack of office space available to it. At present there were three office staff

working in an area of 20ft by 12ft. If the applicant acquired the upper floors of the reference property it could install further desks and IT equipment to provide accommodation for two additional support staff.

(vii) The applicant was prepared and did give an undertaking that it will carry on business in the reference property for a period of at least 7 years should it gain possession, in accordance with the residue of the 2018 lease.

(viii) The applicant was ready to move in to the reference property and he advised that, during the COVID lockdown, demand had increased significantly and the additional space was needed sooner rather than later.

Mr Konrad Fegan

Mr Konrad Fegan gave evidence:

17. (i) He was managing director of the respondent company and he advised the Tribunal that there had been personal and family difficulties between Paul Fagan and himself. He considered the application by Paul Fegan to be fuelled and motivated by those personal difficulties, not business or commercial reasons.

(ii) He left the Transcold family business in or around 2001 to start up the respondent company. The reference property suited the needs of this business and was geographically convenient. He informed the Tribunal that from October 2005 he had leased the reference property from Hillspring Properties Ltd. At this time his father's business utilised the lower part of the reference property as a workshop and he made use of the upper floor. This was reconfigured some years later to the way it was now, with the respondent occupying all of the reference property.

(iii) At all times the rent for the reference property and unit 7(c) had been set by Hillspring Properties Ltd. From commencement of his occupation, the respondent divided the rent on a pro rata basis with Mr John Fegan, based on the square footage occupied by each company. There were shared services between the companies including utilities, electricity, telephone and broadband and the accounts were held in the name of his father. This was simply a matter of convenience having regard to the informal working

arrangements which existed between the parties at that time. There was no intention or determination that the applicant was the landlord.

(iv) Any issues that arose in relation to the reference property he entered into direct discussions with Springhill Properties Ltd.

(v) Upon the transfer of the applicant company to Paul Fegan, his father was very clear that the informal working arrangements that existed prior to the takeover would continue. Indeed those same arrangements and good working relationship did continue up until 2019.

(vi) In 2018, following the applicant having been granted a new lease, the respondent and applicant worked out their respective share of the rent due and there was no sub-letting arrangement between the parties.

(vii) During the period of the respondent's occupation of the reference property the applicant had never raised the issue that the applicant required additional space. He asked the Tribunal to note, however, that from 2019 there had been attempts by the applicant to disrupt his operation of the respondent company, culminating in a Notice to Determine being served on him in August 2020.

(viii) In relation to the applicant's assertion that it required the reference property to expand its business he submitted:

a. During the 30 year existence of the applicant company, servicing had been carried out in the yard which could accommodate 6 to 7 trailers.

b. At present there were only two administrative staff employed by the applicant company, a full time manager and a part time administrator.

c. He was not aware of any plans for expansion of the applicant company. He was aware, however, that in 2016 the applicant was offered an opportunity by Invest NI to expand the workshop area but the applicant declined to do so. He was also aware that in recent times the applicant had experienced difficulty due to its main competitor opening a depot some 18 miles away.

d. The main body of the applicant's customer base was in relation to articulated lorries which did not require the use of a jack lift.

e. There was more than adequate office space for the current employees as there was a second office area within the first floor of unit 7(c), previously used by Mr John Fegan.

Mr John Fegan

Mr John Fegan gave evidence:

18. It was confirmed by Mr John Fegan:

(i) The arrangement he had with the respondent was that the respondent would pay the rent for the reference property to the applicant on the understanding that the applicant would forward the rent, on the respondent behalf, to Springhill Properties Ltd.

(ii) After Paul Fegan's takeover of the applicant company the arrangement with regard to the payment of rent continued without any dispute or difficulty until 2019.

(iii) He had also made arrangements with the respondent that some of the services would be shared and that the applicant would account to Hilltop Properties in respect of service charges for example. In addition the rates would be paid for the entire premises by the applicant, for the benefit of both companies.

(iv) Hillspring Properties Ltd were aware at all times of the occupation of the reference property by the respondent and they never had any difficulty with that arrangement.

(v) It was always his intention that the respondent would have the full right to occupy the reference property on a long term basis and it was never his intention that the applicant would be granted a right to terminate the respondent's occupation of the reference property.

(vi) The companies had always operated a very close working relationship and there was great trust placed between the parties and expenses were shared on a trust basis.

Mr Brian Clarke

19. On behalf of the applicant Mr Brian Clarke FRICS gave evidence:

(i) A notice to determine the tenancy was issued by the applicant on 1st February 2020 but to date the respondent has been unwilling to give up possession of the reference property and this is why the matter has been referred to the Lands Tribunal.

(ii) He was advised and it was his instructions that:

a) The applicant's business had continued to grow and they now had a shortage of space.

b) When they have two lorries in the bays at unit 7(c) there is no space for smaller lorries and vans.

c) They require the additional bay in the reference property to install jack lifts and enable work to be carried out on smaller vehicles.

(iii) Mr Clarke supplied floor plans and photographs of the reference property and unit 7(c) for the benefit of the Tribunal.

Mr Garrett O'Hare

20. Mr Garrett O'Hare, managing director of Bradley NI Chartered Surveyors and Estate Agents, gave evidence on behalf of the respondent with regard to unit 7(c):

(i) At the time of his inspection the parking of two "Transcold" servicing vehicles inside the parking bays took up considerable space which could be used for the servicing of smaller vehicles.

(ii) Directly adjoining the main work bays were a parts store, WC, tool store and office 1 which could accommodate one person. A 55 square metre workshop was also accessible on the ground floor and was situated to the rere of the reference property.

(iii) At first floor level the accommodation included a large administrative office with four desks, associated equipment and storage. There was a third office of 15 square metres which was unoccupied and used for general storage. Mr O'Hare considered that this space could accommodate 3 desks and associated equipment. A fourth office had been repurposed for parts storage. This was 17.5 square metres and he considered that it could accommodate 4 desks and associated equipment.

(iv) Alongside office 4 was a large area of open plan storage beside which was a WC and canteen area.

(v) A second floor provided an additional 68 square metres of workshop storage space.

(vi) There was also an adjoining yard which the applicant had use of for the parking and servicing of vehicles. This yard extended to some 1,400 square metres. At the time of his inspection some 50% of the yard was occupied.

Issues to be Decided by the Tribunal

(1) Was the applicant the respondent's landlord?

The applicant's submissions:

21. Mr Gibson BL submitted it was a matter of agreement that the initial leasehold relationship and grant of possession creating a leasehold interest was between (i) Springhill Properties Ltd and (ii) Mr John Fegan senior. The properties at unit 7(c) and the reference property were let firstly, to Mr Fegan Senior and then to Paul Fegan, who had subsequently acquired the applicant company and as such Springhill Properties Ltd had divested themselves of their interest in the properties, as they had granted tenure to the applicant.

22. Mr Gibson BL then referred the Tribunal to Section 3 of Deasy's Act 1860:

> "The relationship of landlord and tenant should be deemed to be founded on the express or implied contract of the parties, and not upon tenure of service, and a reversion shall not be necessary to such relation, but shall be deemed to subsist in all cases in which there shall be an agreement by one party to hold land from or under another in consideration of any rent."

He submitted, therefore, that having let the reference property and unit 7(c) to Mr John Fegan and then to the applicant, Springhill Properties Ltd could not, at a later stage, let them to the respondent or indeed to anyone else.

23. Reflecting the fact put forward by the respondent that it agreed with Mr John Fegan and later the applicant to sub-let from Springhill Properties Ltd, Mr Gibson BL referred to the following quotes he had noted from evidence given at hearing:

(i) Mr Paul Fegan's evidence during his examination in chief:

- 2006 Konrad was there about one year. Paid rent to Transcold. Continued to pay rent and rates to me.
- Never paid to O'Hanlon & Farrell (Springhill Properties Ltd), nor to father, always to Transcold and he continues to pay rent.

(ii) Mr David Harshaw's evidence:

- I did the discussion
- I came out with my figure
- Konrad came out with another figure
- Paying the rent to Transcold
- Not pro-rata
- Negotiated rent plus a bit extra for fork lifting
- I worked out my side
- Konrad didn't want to pay the amount
- The agreement of a lesser rent we were all happy with
- I put it up without discussion
- He asked for it in writing
- He sent it in email
- Redmond O'Hanlon called in with lease and told me what it would be
- I told him it was too high 20%
- You went with the bad news to Konrad

(iii) The cross-examination of Konrad Fegan:

- Dad said take 7(b)

- No contact with O'Hanlon Farrell
- No point in contacting them to upset the lease or the payments
- No point in contacting Sean Farrell (Springhill Properties Ltd) and making unnecessary paperwork
- I paid my dad who paid the landlord on my behalf

Mr Gibson BL submitted that the above evidence about not having a contract with O'Hanlon & Farrell (Springhill Properties Ltd) was determinative on the issue, a lease being, as per section 3 of Deasy's Act, shaped by agreement.

(iv) Mr Fegan Senior in his examination in chief:

Q. Did Konrad move to 7(b)?

A. He needed a place to work from, Konrad moved in and paid the rent

From the answer Mr Gibson BL deduced the following:

a) Mr Fegan Senior had taken from O'Hanlon & Farrell the entirety of the premises comprising the reference property and unit 7(c).

b) Konrad had a need for premises.

c) His father made the decision to sub-let him the space.

24. In recognition of that agreement Mr Gibson BL concluded that Konrad made himself a sub-tenant and his father the landlord.

25. The respondent had raised an issue in its submissions re consent to subletting. Mr Gibson BL submitted that the absence of consent did not negate or destroy the relationship of tenant and sub-tenant. In support, he referred the Tribunal to Reynolds & Clark, Renewal of Business Tenancies, 5th Edition at paragraph 1-26:

> "It should be noted the Act applies equally to lawful and to unlawful sub-tenancies which have been granted in breach of a covenant against sub-letting."
>
> Extract from D'Silva v Lister House Developments Ltd [1971] CH17

26. Mr Gibson BL's simple analysis was, the fact that the reference property and unit 7(c) were owned by Springhill Properties Ltd, that Mr Fegan Senior and his successors in title rented both units from Springhill Properties Ltd and sublet the reference property to the respondent, was difficult to disregard.

27. He referred to paragraph 8 of the respondent's submissions:

> "The evidence of Konrad Fegan and Mr Fegan Senior was that there was no intention to create a landlord/tenant situation. Rather Konrad Fegan would have the benefit of the premises no longer required by Transcold. Konrad Fegan would have the benefit of the lion's share of Unit 7(b) and Transcold would have the benefit of Unit 7(c)."

28. In phrasing the arrangement as being the respondent having the "benefit of the premises" Mr Gibson BL submitted that was simply another way of describing the relationship that exists between a landlord and tenant, as a tenant has the benefit of premises in the sense of exclusive possession in return for the payment of a sum of money consistently described as rent.

29. Mr Gibson BL also asked the Tribunal to note that, when negotiating the rent, the respondent did not negotiate with Springhill Properties Ltd, rather he negotiated with Mr Harshaw who was an employee of the applicant and this negotiation went very much against the respondent's case that there was an informality between the parties. He submitted that even if the relationship between the parties was informal, the Tribunal still had to discern what their legal relationship was.

30. He concluded that, in the subject reference, the legal principles, when applied, quite clearly showed that the respondent was the tenant of the applicant, who, in turn, was the tenant of Springhill Properties Ltd.

The Respondent's Submissions:

31. The respondent's position was that the applicant was clearly not a landlord. Ms Moran BL asked the Tribunal to note:

    (i) There was no written lease in place between the applicant and the respondent and therefore, the Tribunal was required to consider, what agreement, if any, was or is in place between the parties in relation to the reference property.

    (ii) There was a written document in existence between the applicant and the owner of the various units in relation to the reference property but this was poorly drafted and referred to the reference property as a dwelling house.

    (iii) The onus fell upon the applicant to prove its interest and status as a landlord in so far as the respondent was concerned.

    (iv) No evidence was called on behalf of the applicant to confirm that Springhill Properties Ltd had consented to the sub-letting, as required under clause 13 of the 2018 lease.

32. Ms Moran BL considered that the issue for the Tribunal was whether the parties intended to create a relationship of landlord and tenant.

33. The applicant placed great weight on invoices issued by the applicant to the respondent which referred to "rent" but Ms Moran BL did not consider use of the word "rent" to be determinative and she referred the Tribunal to an extract from the decision in Whip v Mackey:

> "Neither the application of the term 'rent' to the annual payment nor the description of (the grantee) as the 'tenant' would be sufficient to determine the character of the

document as a grant or demise, or agreement for a grant or demise, rather than a licence or agreement for licence."

34. She further referred the Tribunal to Wylie Irish Land Law at para 17.010:

> "The parties to the agreement in question must intend to create the relationship of landlord and tenant and not some other relationship such as that of licensor and licensee. The fact that their agreement uses the terminology appropriate for the landlord and tenant relationship ('landlord', 'tenant', 'rent') or vice versa does not necessarily determine the issue. What the parties intended must be viewed as a matter of substance rather than form."

35. And to Wylie Landlord and Tenant (3rd Edition) at para 2.36:

> "The search for the parties intention then becomes more one of looking to see if they intended to bring in to existence these objective circumstances whatever they may have said in their agreement."

36. Ms Moran BL submitted that the task for the Tribunal was to investigate the intention between the parties in relation to the arrangements for the reference property and the Tribunal had to consider what was the true intention in respect of the relationship to be created or not created in respect of those arrangements.

37. She asked the Tribunal to note the high level of informality in relation to the reference property and unit 7(c). It was not disputed that Mr John Fegan, trading as "Transcold", initially took a lease of unit 7(c) and later took over the reference property as well, but the general lease was not updated, as he simply had the use of the premises and a rent figure had been agreed with Springhill Properties Ltd without the need to make any formal lease arrangement.

38. With regard to the informal arrangements, Ms Moran BL referred the Tribunal to the following:

(i) When Mr John Fegan no longer required all of the reference property he arranged for the respondent to take it over.

(ii) There was no formality to this arrangement, no legal advice was sought and there was nothing in writing.

(iii) The evidence of the respondent and his father was that there was no intention to create a landlord/tenant situation.

(iv) Each party took their respective premises from Springhill Properties Ltd, rather than creating a formal and actionable landlord/tenant situation.

(v) What transpired thereafter was an administrative convenience between the parties in relation to expenses including the overall rent for the two units.

(vi) It was agreed that the respondent would pay, pro rata, his share of the rent to his father who would maintain the overall payments. Again this was not put in writing and no legal advice was sought, rather it was a family arrangement reached for the benefit of both parties.

(vii) Whilst both parties operated separate businesses, the clear evidence was, the relationship between the parties was based on co-operation and sharing between family members who enjoyed a good personal and working relationship.

39. When Mr John Fegan sold the applicant company to Mr Paul Fegan, Ms Moran BL submitted that he was transferring, inter alia, the letting arrangement for unit 7(c) and the respondent remained in occupation of the reference property as tenant to Springhill Properties Ltd. She noted the applicant had agreed in its evidence that there was a casual, informal relationship thereafter and the applicant continued the arrangements that had previously existed with Mr John Fegan.

40. Ms Moran BL also noted that when Paul Fegan acquired the applicant company, there was no fresh negotiation with the respondent, no correspondence, documents, text messages about the arrangement and things continued as before, that is, the sharing arrangements in relation to a range of facilities and services continued.

41. Ms Moran BL also asked the Tribunal to note that the "rent", as described by the applicant, was not treated as a separate income of the applicant's business, being an income from property, as would be required in HMRC returns. The applicant had asserted a rent of £19,000 pa as a business expense and it appeared to her that no separate return was filed listing income from property, if there was a genuine sub-letting in place.

42. She considered the arrangements in place between the parties for almost 20 years to be the epitome of a casual, informal arrangement in the context of good family relations and it could not be described or considered as a formal landlord/tenant relationship with the intention to create legal relations.

43. By correspondence dated 27th March 2019, 4th April 2019 and 5th March 2020 the respondent's solicitors disputed that the applicant was the respondent's landlord. Ms Moran BL asked the Tribunal to note that the applicant did not respond in any way and did not provide an explanation as to why the applicant considered itself to be a landlord in the historical context of the arrangements and the administrative convenience arising. The applicant's response was to issue a Notice to Determine.

44. Ms Moran BL concluded that in the evidence submitted and circumstances outlined, the arrangements in the subject reference could not fulfil the criteria of a landlord/tenant relationship in the absence of an intention to create that relationship and as the applicant could not demonstrate that a landlord/tenant relationship existed, the application must fail on that point.

The Tribunal

45. The Tribunal agrees with Mr Gibson BL, its task was to discern what was the relationship between the parties and apply the legal principles involved to that relationship.

46. The respondent considered itself to be a tenant of Springhill Properties Ltd and paid rent, not directly to them but initially through Mr John Fegan and subsequently via the applicant.

47. The respondent never had any direct contact with Springhill Properties Ltd throughout its occupation of the reference property with regard to rent and never held any legal title or reached any legal agreement with them as to its leasing arrangements of the reference property.

48. The only lease currently in existence in relation to the reference property was the 2018 lease negotiated and agreed between Springhill Properties Ltd on the one part and the applicant on the other part. This related to the lease of unit 7(c) and the reference property for a term of 10 years, at an annual rent of approximately £20,000 per annum. Both units were clearly let to the applicant and Springhill Properties Ltd, therefore, could not have legally created a separate lease with the respondent. In these circumstances Springhill Properties Ltd could not possibly be the respondent's landlord.

49. In addition, when the respondent went to ascertain his portion of the rent to be paid under the 2018 lease, Mr Konrad Fegan held discussions with Mr David Harshaw of the applicant company. There were no discussions with what the respondent considered to be its landlord, Springhill Properties Ltd.

50. These facts draw the Tribunal to the conclusion that the respondent was either a licensee or sub-tenant of the applicant. It was not disputed that throughout the respondent's tenure of the reference property it had exclusive occupation and this is a requirement of a tenancy rather than a licence.

51. The Tribunal accepts that it was never the intention of Mr John Fegan to create a tenant/sub-tenant situation and this carried over to the subsequent tenure by the applicant.

52. The Tribunal must, however, in applying the legal principles, consider what actually happens "on the ground":

(i) The respondent pays a monthly sum to the applicant for its occupation of the reference property.

(ii) The respondent's discussions around what that monthly sum should be are held with the applicant, not Springhill Properties Ltd.

(iii) With regard to rent there was never any direct contact between the respondent and Springhill Properties Ltd, which the respondent considered to be its landlord.

(iv) There was never any legal agreement between the respondent and Springhill Properties Ltd for the occupation of the reference property.

(v) There was a 2018 lease of units 7(c) and the reference property to the applicant, with no mention of the respondent.

(vi) The respondent had the continued, exclusive use of the reference property throughout its occupation.

The only conclusion that the Tribunal can reach, therefore, is that the respondent is the sub-tenant of the applicant.

(ii) If the applicant was a landlord then was the Notice to Determine premature?

53. The Tribunal finds Articles 13(4) and 13(5) of the Order to be relevant:

"(4) The landlord shall not be entitled to rely on the ground specified in Article 12(1)(g) or (h) if the estate of the landlord, or an estate which has merged in that estate and but

for the merger would be the estate of the landlord, was purchased or created after the beginning of the period of 5 years which ends with the termination of the current tenancy, and at all times since the purchase or creation thereof the holding has been comprised in a tenancy or successive tenancies of the description specified in Article 3(1).

(5). The landlord shall not be entitled to rely on the ground specified in Article 12(1)(h) if the controlling interest was acquired after the beginning of the period of 5 years which ends with the termination of the current tenancy, and at all times since the acquisition of the controlling interest the holding has been comprised in a tenancy or successive tenancies of the description specified in Article 3(1)."

The Applicant's Submissions

54. Mr Gibson BL considered the relevant date to be the date of termination which, in the subject reference, was as per the applicant's Notice to Determine, 13th March 2020. He referred the Tribunal to Frederick Lawrence Ltd v Freeman Hardy & Willis Ltd as confirmation. This was not disputed by the respondent.

55. Mr Gibson BL submitted then, as per Article 13(4), it was only "the purchase" which caught a landlord, that was a transfer of money and he referred the Tribunal to Willis v Association of Universities of the British Commonwealth. He submitted, in the subject reference, there was a sale in 2006 when Paul Fegan purchased the applicant company from his father but not in 2014 when the business was incorporated.

56. Mr Gibson BL further submitted that there was no "creation" – if a landlord took a new lease during the relevant period he was not disqualified from relying on the grounds in Article 12(1)(g) of the Order and he referred to Artemiou v Procopiou, where the court in that case held that successive leases defined the interest of the landlord.

57. There was a suggestion in the respondent's submissions that there was an agreement accepted by Paul Fegan, that at some stage he granted a 10 year sub-lease to the respondent. This was denied and Mr Gibson BL pointed out that this was not the applicant's note of the oral evidence nor was it borne out by the respondent's affidavit which stated, at paragraph 4:

> "…. In 2018 the rent terms were set by O'Hanlon & Farrell and, as before, the respondent and the applicant worked out their respective share of the rent due to O'Hanlon & Farrell based on the square footage of each unit."

58. Mr Gibson BL further submitted that nowhere in the respondent's evidence to date had there been any suggestion that there was an agreement with Paul Fegan that the respondent would have a 10 year lease and indeed this went directly and contrary to all of the sworn evidence of Konrad Fegan that he had no sub-letting agreement with the applicant at all.

59. Mr Gibson BL considered it to be the evidence of all of the parties that the sub-tenancy continued as a periodic tenancy based on the monthly payment of rent. He submitted that the notion there had been some express discussion between Paul and Konrad Fegan that Konrad was to get the benefit of a 10 year sub-lease went against the grain of the entirety of the respondent's case, namely that, he had no dealings with Mr Paul Fegan at all.

60. Mr Gibson BL then referred to the respondent's submissions at para 28:

> "28. Paul Fegan, in his cross-examination, accepted that it was intended that the respondent company would get the benefit of a ten year term, as sub-tenant, as the ten year lease granted to the applicant."

61. Subject to the Tribunal's note, Mr Gibson BL denied that such evidence was given but even if it was the emphasis was on "intended", as an intention could not possibly evidence agreement – if there was no concluded agreement then Konrad Fegan could not be said to

possibly be bound. Mr Gibson BL submitted that there was no evidence whatsoever that the "10 year" sub-lease agreement was ever acted on by the respondent.

The Respondent's Submissions

62. Ms Moran BL asked the Tribunal to note:

(i) The applicant company was incorporated in 2014 and the first evidence of a lease created in favour of the applicant was the lease of 2018.

(ii) The subject application was issued in August 2020 and therefore 5 years had not elapsed since 2018 when the lease was granted, on the applicant's case, to the applicant.

(iii) The applicant purports to terminate the alleged current tenancy within a period of 5 years (2021) of the applicant's acquisition of the lease of the premises (2018) and therefore, the application falls foul of Article 13.

63. Alternatively, in his cross-examination, Ms Moran BL submitted that Paul Fegan accepted it was intended that the respondent would get the benefit of the 10 year term, as sub-tenant, as per the 10 year lease granted by Springhill Properties Ltd to the applicant.

64. In his evidence, Konrad Fegan indicated that his understanding was that the respondent would have the benefit of the 10 year lease following the negotiations in 2018, albeit that it was a 10 year lease directly from Springhill Properties Ltd rather than a sub-lease granted by the applicant. Ms Moran BL submitted that Mr Konrad Fegan's evidence was not challenged on this point.

65. Ms Moran BL then referred the Tribunal specifically to Article 6(5) of the Order:

"(5) In the case of any tenancy, other than a tenancy referred to in paragraph (3) or (4), a notice to determine shall not specify a date of termination earlier than a date on

which, but for this Order, the tenancy would have come to an end on the effluxion of time."

66. She also referred the Tribunal to Dawson: Business Tenancies in Northern Ireland:

> "Thus 5.3(1) (under the preceding legislation) operates when the contractual tenancy would normally have come to an end, that is, at the contractual expiry of a tenancy for a final term, or if a break clause is exercised by the landlord in accordance with the contract."

67. In these circumstances, if the applicant was the respondent's landlord, then pursuant to the 2018 arrangements, Ms Moran BL submitted the respondent held a 10 year sub-lease and the applicant could not therefore, pursuant to Article 6(5) of the Order, serve a notice to terminate earlier than the expiry term of the agreement, that was September 2028.

The Tribunal

68. It was not disputed the relevant date in the subject reference was the date of termination 13th March 2020, being the date stated in the applicant's Notice to Determine.

69. Ms Moran BL had asked the Tribunal to note that Mr Paul Fegan stated in his cross-examination "it was intended that the respondent company would get the benefit of a 10 year term, as sub-tenant, as per the 10 year lease granted to the applicant".

70. This was disputed by the applicant but the Tribunal had recorded in its notes of the hearing that Mr Paul Fegan, during his cross-examination, stated he "envisaged Cooltech would get the benefit of the 10 year lease".

71. The Tribunal agrees with Mr Gibson BL, however, this was an invitation that never materialised, due probably to the subsequent fallout and lack of discussions between the

parties. The grant of the 10 year lease in 2018 to the applicant had, therefore, no bearing on the legal relationship at that time between the applicant and the respondent.

72. The respondent paid a monthly rent to the applicant for the use and exclusive occupation of the reference property. In the absence of any legal agreement to the contrary the Tribunal can only conclude that the respondent's tenancy comprised a monthly periodic tenancy.

73. With regard to Articles 13(4) and 13(5) of the Order the, Tribunal agrees with Mr Gibson BL, the estate of the landlord was not purchased or created within 5 years of the date of termination. The estate was purchased by the applicant in 2006 and incorporated in 2014. Even if the incorporation could be construed as a "creation" this was still outside the five year time limit.

74. The Tribunal also agrees with Mr Gibson BL, successive leases define the interest of the landlord, as outlined in Artemiou v Procopiou and the applicant company had leased the reference property since 2008, upon acquisition from Mr John Fegan.

75. The Tribunal therefore finds that the applicant's Notice to Determine was not premature.

(iii) Has the applicant demonstrated sufficient intention to use the reference property in the manner required under the Order?

76. The parties were in agreement that whether or not the applicant had formed the necessary intention was a question of fact, as outlined in Cunliffe v Goodman:

> "An intention … connotes a state of affairs which the party 'intending' … does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides so far as in him lies to bring about and which in point of possibility he has a reasonable prospect of being able to bring about by an act of his own volition. Not merely is the term 'intention' unsatisfied if the person professing has too many hurdles to overcome or too little control of events; it is equally inappropriate if at the material

date that person is in effect not deciding to proceeding but feeling his way and reserving his decision until he shall be in possession of the financial data sufficient to enable him to determine whether the project will be commercially worthwhile … in the present case … neither project moved out of the tentative, the provisional or the exploratory .. into the valley of decision."

The Applicant's Submissions

77. Mr Gibson BL considered that the general tenor of the respondent's case was the requirement for space was manufactured because of a family dispute between the parties. He pointed out, however, evidence showed that the applicant had been making efforts to expand his business, which pre-dated the family dispute by a number of years.

78. Mr Gibson BL referred to the applicant's evidence re its need to expand, prior to service of the Notice to Determine but not limited to:

    (i) An application to Invest NI to lease part of Invest NI property at Carnbane Business Park.

    (ii) In support of the Invest NI application, the applicant had a Bank of Ireland mortgage in the sum of £400,000, in principle.

    (iii) The applicant arranged for a surveyor to attend and carry out test pits/whole site investigation which incurred the cost, not only of the surveyor, but also of the remedial works required.

    (iv) The applicant employed an estate agent to carry out a valuation of the lands being offered by Invest NI.

    (v) The applicant went to the expense of employing a quantity surveyor to carry out a detailed analysis of the cost of site works at the Invest NI lands, should a lease be granted.

79. The point made by the respondent in its submissions was that the acquisition of the reference property would not completely solve the applicants need for additional space. This was not disputed, but Mr Gibson BL submitted that it made no material difference to the bona fides of the applicant's reference to the Tribunal. The applicant clearly had use for the space and, in effect, Mr Gibson BL considered the submissions in turn made the applicant's case for it.

80. Mr Gibson BL considered the applicant's position to be copper fastened by his undertaking to occupy for his own use. He referred the Tribunal to London Hilton Jewellers Ltd v Hilton International Hotels Ltd where the Court of Appeal held that the giving of an undertaking to implement ground (g) (own occupation) "compelled fixity of intention" and "was decisive".

81. Mr Gibson BL accepted that a landlord's undertaking itself might well be undermined by a complete lack of bona fides and he referred the Tribunal to Lightcliffe v Walton in which the Court of Appeal held that the giving of an undertaking under ground (g) did not create a legal presumption that the landlord's stated intention was genuine, and if the Judge had grounds for doubting the landlords veracity, he was entitled to disregard the undertaking altogether.

82. In the subject reference, Mr Gibson BL submitted that there was no doubt as to the bona fides of the undertaking given by the applicant, as he clearly had use for the reference property which, even at the height of the respondent's case, if it was only for storage, was nevertheless for the applicant's own use and occupation.

83. Mr Gibson BL reassured the Tribunal that the undertaking was a failsafe so that if the reference property was not utilised by the applicant, the respondent would be able to come back to Court and insist on compliance or in the alternative, damages or, conceivably for committal/ sequestration.

84. He referred to the following extracts which he had noted from the applicant's evidence where the need for space was considered:

(i) As per Brian Clarke surveyor

- pretty cramped at ground floor
- vehicles in yard area
- is being used for storage
- vehicles being moved in and out

(ii) As per Paul Fegan

- that space would be another bay for trucks and they would fit in that area and we would have state of the art jacks to work underneath
- we have a contract for 80 to 90 trucks
- we could use that bay constantly
- contract with Palace Foods
- major food distributor owned by Cisco Systems in America
- major customers McCulla, Hanlon, Palace and smaller companies
- approved stockists, therma lining, service agent
- 11 staff, 7 workers/engineers, 2 admin, 1 handy man
- they work in different yards
- repairs done in yard
- mobile repair
- garage repairs on premises
- repair out in open air
- its ok with a trailer outside sometimes
- if you're removing a unit off the trailer
- refurbishment you need to do that
- with materials … very difficult
- normally outside is servicing and quick repairs
- winter time every time is hard on lads
- backlog of work
- 4 to 5 engineers back to back
- limits the amount of vehicles in garage storage overspill

- where we do rest of the work is underneath the engine
- when you lift the trailer up it saves time
- storage space is spilling down on to floor

(iii) As per David Harshaw

- extremely difficult
- stock control 30/40% up
- overspilling into workshop
- with two trailers in you can't get the van over the pit
- to move the trailers would take over one hour
- a lot of the work is done outside
- main bays are taken up first thing
- anything overspilled will be worked in the yard
- it depends on how busy the day is
- issue of health and safety
- traffic coming in and out not to do with us
- at the minute the staff are working under wooden ramps. If hit it would be extremely dangerous
- in evening their box vans have to be parked in day and trailers taken out
- I could do with x2/x3 size
- refrigeration unit sitting on the floor £6K
- nowhere else to put it
- I've no storage to put the parts anywhere else
- we hold old parts for six months for customers in case they want to see them
- I would like more to help me in day to day duties
- I do daily running
- I need more help

The Respondent's Submissions:

85. Ms Moran BL advised the Tribunal it was the respondent's case that the applicant did not hold an intention to use the reference property for a business as alleged, rather it was an application motivated by personal difficulties which existed between the brothers and a wish

to oust the respondent from the reference property, rather than a wish to use the reference property for business purposes. She submitted that the Tribunal was required to assess subjectively the state of mind of the applicant and in the circumstances of the subject reference, the motivation of the applicant and the genuineness of its intentions must give rise to significant concern.

86. Ms Moran BL further submitted that the breakdown of the family relationship could not be separated from the intention of Paul Fegan and the speedy following on of attempts to remove the respondent from the reference property could not be coincidental and was a significant factor.

87. Ms Moran BL also considered that Mr Paul Fegan's evidence changed, during the hearing, as to the purposes of acquiring the reference property and there was a clear move away from the need for working/office space, which had been refuted and a move to the need for storage space which had not been raised before in the applicant's evidence.

88. Ms Moran BL considered there to be two elements to the consideration of ground 12(1)(g) on the basis of the decision in Cunliffe v Goodman:

    (i) intention, being a subjective assessment as to the state of mind of the landlord; and

    (ii) an objective assessment as to whether the landlord can actually bring his intention into effect.

She considered the former hurdle to be a higher hurdle than the latter and the onus fell on the applicant to demonstrate the requisite intention. She submitted that the applicant's sole motivation was the removal of the respondent and the basis for the application was one of "shifting sands" which must have a notable effect upon the applicant's credibility and the legitimacy of the applicant's stated intention.

89. A notice to quit, not in the format required under the Order, had been served in February 2019 and required the respondent to deliver up possession of the reference property by 1st May 2019. Ms Moran BL asked the Tribunal to note:

(i) No reason was advanced, no indication given that the applicant required the premises for its own business.

(ii) The notice was served personally by a Ms Lorna McNeill who was not an employee, director or otherwise of the applicant company and it was clearly a personal decision and not a business decision.

(iii) Paul Fegan indicated in his evidence that the service of the notice to quit was discussed between himself and Lorna McNeill personally, as opposed to a decision of the applicant company and its employees/directors.

(iv) The action must be viewed against the backdrop of other events such as complaints by the employees of the respondent company about Lorna McNeill and changing of a telephone code without advising the respondent, which were all designed to compel the respondent to vacate the premises by any means necessary.

(v) There was an effective and accommodating, working relationship for many years until 2019 and the applicant's notice to quit came in shortly after the breakdown in the family relationship.

(vi) There was no attempt at any discussion or involvement with the respondent to explain any business or commercial need which had arisen and the notice to quit did not detail any need for additional space.

90. The area within the reference property was a relatively small space and Ms Moran BL considered it to be common case at hearing, that if the applicant acquired the reference property, then, at most, this area would facilitate two smaller lorries and this would not solve any alleged issue as to the need for additional space for larger lorries, as the reference property would not facilitate larger lorries.

91. Ms Moran BL then referred the Tribunal to areas within unit 7(c) which were unused and underused, as evidenced by Mr O'Hare:

(i) Ground floor office which could facilitate one employee.

(ii) First floor office with four desks, of which only three were occupied at present.

(iii) An area of 15 square metres which was presently unoccupied and could facilitate three additional administrative employees and associated equipment.

(iv) An area of 17.5 square metres which was unoccupied and would accommodate four additional administrative employees.

92. The applicant placed significance on its earlier plans to acquire larger premises from Invest NI but those plans involved a much larger unit with many bays to accommodate the applicant's business and Ms Moran BL considered these plans to be "day and night" as to the benefits which would be acquired by gaining possession of the reference property.

93. Ms Moran BL asked the Tribunal to note the applicant's evidence was that these Invest NI premises would also house the respondent's business but after consideration the respondent was not happy with the arrangements and did not agree to them. If the applicant's business anticipated the need for a substantially larger premises prior to 2019 and the business has only increased since 2019, then Ms Moran BL submitted the benefits of the reference property would be extremely limited and this must feed into the legitimacy of the application before the Tribunal.

94. Ms Moran BL concluded that on the basis of a subjective assessment of the evidence, the applicant could not demonstrate a genuine intention to acquire the reference property for the purposes of its business having regard to:

(i) Initial attempts in 2019 to compel the respondent to vacate without reasons.

(ii) Service of a notice to quit by the main protagonist in the family dispute, who had nothing to do with the applicant company.

(iii) The failure to engage with the respondent in any manner to explain the rationale for the request.

(iv) The shifting nature of the case made by the applicant as to the basis of its need to acquire the reference property.

95. Ms Moran BL submitted, therefore, that the applicant could not demonstrate the requisite intention and the application must fail.

The Tribunal

96. The Tribunal's consideration of the applicant's intentions with regard to the reference property was clearly "clouded" by the family "fallout" which preceded the applicant's Notice to Determine and subsequent reference to the Tribunal.

97. This "fallout" was shortly followed by the service of a hand delivered "Notice to Quit" by a person who was not an employee of the applicant company and who was allegedly involved in the "fallout".

98. The notice to quit gave no details other than it required the respondent to remove itself from the reference property. There were no reasons given and no mention of the applicant wishing to occupy the premises for itself.

99. The Tribunal notes that the applicant had deliberated on the acquisition of much larger Invest NI premises in 2016. The Tribunal also agrees with Ms Moran BL that the acquisition of the reference property by the applicant would be of minimal benefit, only suitable for storage and work on small vans. Mr Gibson BL had submitted that this was nothing to do with the bona fides of the applicant's case as he had use for all of the reference property.

100. The applicant had also provided a guarantee to use the premises for itself and in London Hilton Jewellers Ltd v London Hilton Hotels Ltd the Court of Appeal held that an undertaking "compelled fixity of intention" and described it as "as decisive". In Lightcliffe v Walton, however, the Court of Appeal held that the giving of an undertaking did not create a legal presumption that the landlord's stated intention was genuine and if the Court had grounds for doubting the landlord's veracity, the judge was entitled to disregard the undertaking.

101. The Tribunal finds the following factors to be relevant:

(i) The family "fallout" followed shortly thereafter by the applicant's notice to quit requiring the respondent to vacate the premises, with no reasons given and no mention of the applicant wishing to occupy the reference property for itself.

(ii) If the business was expanding and the acquisition of the reference property was of only limited use to the applicant, why did it not consider looking for alternative, much larger premises elsewhere, as it did in 2016?

(iii) If the applicant required much larger premises why did he negotiate a 10 year lease on units 7(c) and the reference property in 2018?

(iv) Mr Paul Fegan had given evidence to the Tribunal, which was denied but which was verified by the respondent and the Tribunal, that he "envisaged Cooltech would get the benefit of the 10 year lease". It was, therefore, certainly not the applicant's intention to occupy the reference property at the time of signing and during the term of the 2018 lease.

102. Based on the above the Tribunal finds that the applicant has not demonstrated sufficient intention to use the reference property in the manner required under the Order. With regards to the undertaking given by the applicant, in the circumstances of the subject reference, the Tribunal finds that it has "grounds for doubting the landlord's veracity" and the Tribunal, therefore, disregards the undertaking.

8th April 2022

Henry Spence MRICS Dip.Rating IRRV (Hons)

Lands Tribunal for Northern Ireland