

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

BT/72/2001

BETWEEN

STANLEY SKELTON – APPLICANT/TENANT

AND

JAMES McEVOY – RESPONDENT/LANDLORD

Premises: 569 Antrim Road, Belfast

PART I

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

Belfast – 26th February 2003

1. The applicant, a butcher, has been a tenant of these shop premises for some 7 years and his lease dated 28th May 1993 has been brought to an end in accordance with the provisions of the Business Tenancies (Northern Ireland) Order 1996 (the '1996 Order'). Terms of a new lease from 1st November 2001 (the 'relevant date') have been agreed but there remains a dispute between the parties as to the amount of the rent under the new tenancy in accordance with Art. 18 of the 1996 Order.
2. The shop is in a secondary location but on an arterial route and is one of a parade of 10 single storey units built about 50/60 years ago and let to small businesses. The units are a mixture of double and single units and although broadly similar, vary in size. The attention of the Tribunal was drawn to a number of transactions; 2 open market lettings, 2 rent reviews and 2 lease renewals. One rent review and one lease renewal concerned double units.
3. Mr Patrick O'Kane BL instructed by Lundy & Co appeared for the Applicant. Mr Rory Hamilton, Solicitor of James Doran & Co appeared for the Respondent.
4. Mr Frank Cassidy gave expert evidence on behalf of the Tenant. Mr McKillop gave expert evidence on behalf of the Landlord. Both are experienced Chartered Surveyors

and both had a number of years of experience of dealing with shops in the parade. In Mr Cassidy's opinion the rent at the relevant date was £9,700 per annum. In Mr McKillop's opinion the rent was £10,240 per annum.

5. This difference between the experts is small and on a preliminary view implies a degree of precision of analysis of the market that most would say is impossible to achieve; for example, the two open market lettings differed by some 10% and neither valuer put forward any explanation for that difference.
6. It is important that business landlords and tenants should know that they have the opportunity to have genuine disputes, however small, carefully determined by an independent and impartial tribunal. However, expert witnesses also have an overriding duty to assist the tribunal and where the Tribunal is invited to choose between different approaches of experts, it is important that each expert gives adequate consideration to the opposing expert's approach. Experts should have an open mind to the possibility that some parts of the opposing expert's approach could or should flavour the outcome and not largely ignore the other's approach.
7. The core issues in determining the rent were:
 - How should each comparable be analysed – based on the areas now agreed to be correct and/or the historical areas;
 - Does the evidence suggest a dip and later rise in rent or reflect the effect of restricted user; and
 - What relative weight should be attached to the comparables?

How should each comparable be analysed – based on the areas now agreed to be correct and/or the historical areas?

Primary analysis and Secondary effect

8. In the view of the Tribunal, the analysis of rents based on correctly surveyed areas, adjusted as necessary, e.g. to properly disregard tenants' improvements, is an objective interpretation of the agreement that the parties have reached and so is the **primary analysis** of the market.
9. But, circumstances such as evidence persuading the Tribunal that the parties to the negotiations on which comparable transactions have been based relied, by common

mistake, on a significantly different area may, as a **secondary effect**, detract from the primary analysis and/or its reliability. If it is shown that subsequent transactions were, in turn, based on a market acceptance of that common mistake, the secondary effect may be cumulative. Some slight common mistakes may make little difference but if two parties think they are negotiating the price for an orange that is hardly a safe guide to the value of an apple.

10. Where there is not a common mistake, e.g. if one party thinks he is negotiating the rent for what is actually a 350 sq ft shop and the other thinks he is negotiating the rent for a 360 sq ft shop, the rent agreed is of some help as a guide to the value of 350 sq ft shop but the relative weight to be attached requires careful consideration in the context of all the other evidence.

Discrepancies In Terms of Zone A 'ITZA'

11. Both experts reduced the net area of all the shops to Zone A equivalents ('In Terms of Zone A - 'ITZA'). Broadly this converts the actual area of a shop into an equivalent that reflects its frontage and depth.
12. A fundamental difference between the experts arose from a discrepancy in ITZA areas on which analysis of the rents of comparables was based. Mr McKillop had relied on ITZA areas in his records ('the historical areas') but Mr Cassidy would not accept those. Following a Direction of the Tribunal, Mr Cassidy and Mr McKillop had carried out a joint survey of the subject and comparables and had agreed ITZA areas ('the joint survey areas') for all of them.
13. For explanation of the zoning system and ITZA areas see for example Wallshire Ltd v Aarons [1989] 1 EGLR 147 and here, Black v COV VR/4/1998; [2002] RA 79. For convenience, except where clarification is required, the Tribunal later refers to 'ITZA areas' simply as 'areas' and 'ITZA rents per square foot' as 'rents'.

Mistake & Secondary effect

14. It is important to remember that the ITZA area of a shop is a matter of expert opinion (or possibly expert fact) for use as a tool of comparison. It requires the skills of an expert and it is the basis on which experts usually compare one shop with another, but even then, experts may differ in their views as to the correct application of the method,

and it does not always follow that there is a corresponding discrepancy in the actual area of the shop. The hypothetical intending tenant of a shop such as one in this block may well take the size and frontage into account in framing his bid but will also take other matters into account and is unlikely to formally survey the premises to arrive at an equivalent ITZA area himself or employ an expert to do that for him.

15. In the circumstances of this case, it is clear to the Tribunal that that discrepancies in ITZA areas of the shops in this parade should not lead to the conclusion that the shops were essentially and radically different from what the parties thought they were.
16. Questions of secondary effect based on mistake should be approached only with caution and some tolerance and in the view of the Tribunal it is unlikely that a small difference in ITZA area would significantly outweigh the ordinary higgling of the market for a letting of a shop of this scale and character at this location.
17. Where it is shown that both those engaged in the comparable transactions most probably relied on an agreed but significantly incorrect survey, then both those parties at the time treated that as part of the matrix of facts. Analysis based on the incorrect survey may give an indication of the secondary effect – the effect that transaction would have on the mind of parties reaching agreement on later transactions, but only if they negotiated without careful validation of earlier transactions.
18. In the circumstances of this case it is a question of fact and degree but where it is clear that parties relied on a common mistake, the Tribunal accepts that the mistaken analysis of that transaction may be a helpful indication of secondary effect and may displace, to a greater or lesser extent the primary analysis.
19. However, in interpreting an agreement, the Tribunal should be slow to make any assumption that the same ITZA mistake was the deciding factor in the mind of the other party. It is important not to either adopt a subjective interpretation or heap assumption upon assumption.
20. The approach adopted by the Tribunal therefore is to consider which transactions, if any were based on mistake and common mistake and assess the degree of error; and

then, where appropriate, make adjustments to analysis, and make allowances to weight to reflect any secondary effects.

Mistake & Cumulative effect

21. Because valuations usually proceed by comparison, if others do subsequent deals without accurate investigation of the facts of previous deals, then they may be influenced by the secondary effect and it may either become cumulative or balance out.
22. Although the two open market lettings were “occasional windows of reality” (Wallshire Ltd v Aarons) the Tribunal accepts that in this block there is evidence of a ‘micro-market’ that stands to a significant extent on its own. It is a matter of fact and degree but there may be a secondary effect at work i.e. perceptions of later parties (although both should have known the true facts) influenced by a mistaken view of the areas on which previous comparable transactions were based.
23. The actual cumulative effect, if any, is considered as part of *Suggested Rents* below.
24. In any event, this reference illustrates the importance of accurate surveying and the trouble and expense that may flow from inaccuracies and dispute.

The Transactions in this case

25. Mr McKillop had firsthand knowledge of all of the transactions concerning comparables and it now appears that he had based those on areas in his historical records (‘historical areas’), most of which, for good reason or bad, do not correspond with the joint survey areas. Mr McKillop had acted for the landlord in all the transactions and the Tribunal accepts Mr McKillop’s evidence that he had relied on these historical areas and that none of the figures on which he had based his opinions had been disputed at the time. So far as differences between historical areas and the joint survey areas were concerned he said some may be attributable to the difficulties of measuring shops with shop fittings in place and others may be attributable to improvements carried out by tenants in the past.
26. Mr Hamilton persuasively pointed out that although both sides had been fully aware of the issues between them, no evidence had been brought to suggest that others had

relied on other than these historical areas when negotiating the comparable transactions. He suggested that the Tribunal should base its analysis on historical areas rather than the joint survey areas.

27. The Tribunal now considers the areas of each shop individually and the consequences for analysis, leaving aside any question of cumulative secondary effect.
28. There is no dispute about the area of Shop No 559.
29. The transaction at Shop No 571 was an open market letting. The historical area is about 3% more than the joint survey area. Parties to such transactions for shops of this character do not commonly rely on ITZA areas for their negotiations but Mr McKillop thought that the letting particulars would almost certainly have given an incorrect figure for the size of the shop. It would have been to the tenant's advantage to complain about the size and the Tribunal accepts that both parties probably relied on the common mistake of the historical area. But the difference is very small.
30. The transaction of Shop No 561 was a rent review. The historical area is about 6% less than the joint survey area. The Tribunal accepts that Mr McKillop relied on the former in those negotiations and that was not challenged at the time. However it clearly would not have been to the tenant's advantage to draw attention to the actual larger area (the joint survey area) and the Tribunal is not persuaded that both parties relied on the common mistake of the historical area. The Tribunal accepts the joint survey area is the correct basis for the primary analysis and is not persuaded that the primary analysis should be adjusted for any secondary effect.
31. The areas on which Mr McKillop relied for the transactions at the two double units were less than the joint survey areas. He said that the original tenant of Shop No 555/557 had carried out improvements to the premises at the commencement of the lease. They amalgamated two individual units into one. In so doing they dispensed with the need for one of the two toilet areas and the dividing wall and thereby gained retail space. The recent lease renewal had been carried on the assumption that the current tenant was entitled to have such tenant's improvements disregarded and, in fact, the area had been agreed with Mr Cassidy and submitted to the Tribunal before that case was settled. Mr Cassidy who had acted for and was continuing to act for a

number of other tenants in the block did not present any research that suggested Mr McKillop's explanation was wrong. The Tribunal accepts the historical area is the correct basis for the primary analysis and is not persuaded that the primary analysis should be adjusted for any secondary effect.

32. Similarly at the other double unit, Shop No 563/565, the Tribunal accepts that the historical area is the correct basis for the primary analysis and is not persuaded that the primary analysis should be adjusted for any secondary effect. This rent review was settled before the lease renewal of Shop No 555/557. In passing the Tribunal records that it attaches little weight to a letter dated 15th February 2001, from Mr McKillop to the self represented tenant of Shop No 563/565 confirming the rent settlement and ITZA area, as a persuasive indication that there had been a meeting of minds as to the correct figure for ITZA area.
33. Like the transaction at Shop No 561, the transaction at Shop No 553 was a rent review and Mr McKillop relied on an historical area that is about 6% less than the joint survey area. Again it would not have been the tenant's advantage to draw attention to the larger, joint survey area and in fact Mr McKillop gave evidence that the chartered surveyor acting for the tenant made no attempt to discuss the area. The Tribunal is not persuaded that both parties relied on the common mistake of the historical area. The Tribunal accepts the joint survey area is the correct basis for the primary analysis and is not persuaded that the primary analysis should be adjusted for any secondary effect.

Suggested Rents (and cumulative secondary effect)

34. Mr Cassidy relied exclusively on Primary Analysis but not adjusted to reflect improvements to be disregarded and Mr McKillop relied exclusively on Secondary Effect and only on Primary Analysis by coincidence.
35. The Tribunal now considers the comparables in chronological order. Leaving aside for the moment some other matters to be considered, as a first stage it comes to a view on the rent that each transaction suggests would be appropriate for the subject shop.

36. Shop No 559 was let on the open market from August 1999 and the Tribunal accepts the undisputed evidence that this comparable supports a rent for the subject of £33.90.
37. Shop No 571 was also an open market letting from September 1999 and the historical area is about 3% more than the joint survey area. Relying on the historical area, in Mr McKillop's opinion the rent equated to £30.78. Relying on the joint survey area, in Mr Cassidy's opinion it equated to £31.90. The difference is very small but the Tribunal has accepted adjustment is appropriate. The Tribunal concludes that the secondary effect suggests a slightly lower level and adopts £30.78.
38. For the rent review, in November 1999, of Shop No 561 Mr McKillop relied on the historical area and secondary effect, and in his opinion the rent represented £30.78. Relying on the primary analysis, which the Tribunal prefers, in Mr Cassidy's opinion it represented £28.95. As ITZA areas are more likely to be used in the context of rent reviews of shops such as these than for open market lettings, it appears likely that, at that time, some reliance may have been placed on the primary analysis of Shop No 559. Also, if, but only if the tenant did not validate the information, some reliance may have been placed on the secondary effect of Shop No 571 (which would have suggested a marginally low rental level). In the view of the tribunal the cumulative secondary effect (if any) would be negligible. It agrees with Mr Cassidy and adopts £28.95.
39. For the rent review, at February 2001, of Shop No 563/565, the Tribunal relies on the primary analysis and agrees with Mr McKillop's approach. However that contains a slight miscalculation and the Tribunal concludes it supports a rent for the subject of £31.84 (not £31.90). In the view of the tribunal any cumulative secondary effect would be negligible.
40. Similarly, the Tribunal again agrees with Mr McKillop and concludes that the lease renewal, with effect from May 2000, of Shop No 555/557 supports a rent for the subject of £30.26.
41. For the rent review, at February 2002, of Shop No 553 Mr McKillop relied on an historical area that is about 6% less than the joint survey area. Relying on the on the

historical area and secondary effect, in Mr McKillop's opinion the rent represented £32.31. Relying on the primary analysis, in Mr Cassidy's opinion it represented £30.49. The Tribunal has accepted the primary analysis. In the view of the tribunal any cumulative secondary effect would be negligible and adopts £30.49.

42. In summary then:

- The open market letting, from August 1999, of Shop No 559 supports £33.90.
- The open market letting from September 1999 of Shop No 571 supports £30.78
- The rent review, in November 1999, of Shop No 561 supports £28.95.
- The rent review, at February 2001, of Shop No 563/565 supports £31.84
- The lease renewal, with effect from May 2000, of Shop No 555/557 supports £30.26.
- The rent review, at February 2002, of Shop No 553 supports £30.49.

Dip and later rise in rent or the effect of restricted user

43. Mr McKillop's approach was to base the new rents on his analysis of the lower of the two open market lettings (£30.78).

44. Mr Cassidy looked mainly at the rent for Shop Nos 563/565 (£29.06 - based on the joint survey) at February 2001 and the rent review of Shop No. 553 (£30.49 - based on the joint survey) at February 2002, after the relevant date. Assuming a consistent rate of change, he arrived at his figure of £30.14. Further, looking at those in the context of his analysis of the earlier open market lettings of Shops No 559 (£33.90) and 571 (£31.90) he concluded there had been a dip in the market before that rising trend.

45. The Tribunal accepts that evidence of rents after the relevant date may be helpful for the purposes of primary analysis. But the post relevant date class of evidence is controversial (see Duvan Estates v Rossette Sunshine Savouries Ltd [1982] 1 EGLR 20; Segama N V v Penny Le Roy Ltd [1984] 1 EGLR 109; and Re ESC Publishing [1990] BCC 335 also Melwood Units Property Ltd v Commissioner of Main Roads [1979] AC 426; Gaze v Holden (1983) 1 EGLR 147 and Australian Mutual Provident Society v Overseas Telecommunications Commission (Australia) [1972] 2 NSWLR 806. See also the discussion in *Handbook of Rent Review* by Reynolds & Fetherstonhaugh, looseleaf at 7.9). For purposes of secondary effect such rents

cannot be of assistance because they could not be in the minds of the hypothetical landlord and tenant of the subject premises at the relevant date. There is a further and much more important difficulty; without any other supporting evidence Mr Cassidy relied on that transaction as demonstrating a rising trend that had been preceded by a falling market.

46. Although the Tribunal accepts that the post relevant date transaction may be taken into account, it has reservations as to the weight to be attached to it in this case. The Tribunal has grave doubts about its helpfulness as sole supporter of an economic event i.e. a dip and rise of the property market, when there was no other evidence adduced to suggest that was a discernable effect at or before the relevant date.
47. By adopting this approach Mr Cassidy effectively disregarded the four earlier transactions. But, in Mr Cassidy's opinion the user clause in the new lease is very restrictive and it therefore follows that one might expect the rent for premises held under such restrictive terms to be somewhat less than if there were no such restriction. Having concluded that all the other leases had similar restrictions as well and there was no evidence within the block to support any reduction, Mr Cassidy made no adjustment for that factor.
48. The Tribunal has some difficulty with that proposition. The permitted user is narrow and is combined with a positive covenant to keep open:

“Not to use the premises for any purpose otherwise than as a retail butchery during usual business hours and during normal business hours to keep the premises open for business purposes.”
49. Two of the lettings were open market lettings, Shop Nos 559 and 571 but the other four were either rent reviews or lease renewals. From the evidence it appears that the two shops that were let on the open market were not offered on the basis that they were restricted to a particular use. On the other hand clearly the rent reviews and business lease renewals were on the basis of restricted user.
50. It appears to the Tribunal that it would be appropriate to look at these two categories separately to see whether there is any apparent indication that the restriction had any effect. In the view of the Tribunal the evidence shows there is a step change in rent

between the figure suggested by the earlier open market lettings and that suggested by the later reviews and renewals on the basis of restricted users.

51. As outlined earlier, Mr Cassidy attributed that to a fall followed by a rise in the market but Mr McKillop did not agree and Mr Cassidy did not support that proposition with other general evidence from elsewhere. On balance the Tribunal agrees with Mr McKillop and the Tribunal concludes that the effect is as a result of existing tenants not agreeing to pay the full open market rent.
52. Although the restriction on user may or may not have been expressly debated in other negotiations, objective analysis suggests it has an apparent effect on rent. The Tribunal concludes that the rental figures produced on analysis from the two open market lettings therefore should be reduced to reflect their unrestricted use as compared to the restricted user of the subject. Further, less weight should be attached to them as evidence of rental value subject to a restricted use. In the absence of any analysis by the experts, comparing the unrestricted and restricted rents and broadly weighting the evidence (but roughly as below), the Tribunal makes a deduction of 7% to the two open market lettings. This reduces the rents that Shop Nos 559 and 571 support to £31.53 and £28.63 respectively and, in the view of the Tribunal that is consistent with the pattern generally.

Relative Weight

53. Having made the adjustments discussed above, and considered the opinions of the experts, in coming to a view on the relative weight to be attached to each of the transactions the Tribunal has adopted the following approach:
 - Evidence of open market lettings is usually to be preferred to negotiated settlements (see e.g. Wallshire Ltd v Aarons and Zubaida v Hargreaves [1993] 2 EGLR 170 CA) but because these open market rents have required significant adjustment to reflect their lack of restriction on user, the Tribunal has attached no more weight to the adjusted open market lettings than to negotiated settlements that do reflect a restriction on user.
 - The Tribunal has attached slightly less weight to the transaction (Shop No 571) because the Tribunal has accepted that the secondary effect probably influenced the negotiations at the time.

- The Tribunal has very slightly reduced the weight to be attached to transactions involving the tenants of another shop in the block.
- The Tribunal has attached substantially less weight to the letting for a different planning use, of Shop No 571.
- The Tribunal has attached more weight to the transaction at Shop No 565 which was shortly before the relevant date than earlier transactions and much less weight to the transaction which took place after the relevant date at shop No 553.

54. Having balanced all these factors, which involve a degree of intertwining, the Tribunal has attached most weight to its analysis of the adjusted rent of Shop No 563/565 at £31.84. The Tribunal has attached less weight to its analyses of Shops No 559, 561 and 555/557 at £31.53, £28.95 and £30.26 respectively and least weight to its analyses of Shop Nos 571 and 553 at £28.63 and £30.49 respectively.

55. The Tribunal concludes that the market rent in terms of Zone A for Shop No 569 is £30.41 per sq ft, which produces a rent of £9,760.89, say £9,750.

56. It may be that these conclusions are of some general assistance but it is important to note that

- They are based primarily on the evidence in this case and the Tribunal has accepted Mr Hamilton's unopposed invitation to use its expertise to fix the rent;
- The Tribunal hopes this decision will illustrate the need for thoroughness of approach; and
- In deference to the issues of principle between the experts the Tribunal has analysed the evidence with a precision unlikely to be realised in the market.

57. The Tribunal determines that the amount of the rent under the new tenancy from 1st November 2001, in accordance with Art. 18 of the 1996 Order, shall be £9,750 a year.

Interest

58. Mr Hamilton applied for interest on rent, drawing the Tribunal's attention to the provisions in Art. 18 (5) of the 1996 Order, and in the lease, for interest on arrears of rent. However the Tribunal accepts Mr O'Kane's suggestion that any additional rent payable is not in the same category as rent arrears but is more akin to rent becoming

due as a result of a rent review. The rent review provisions in both the current and the new lease make no provision for interest in those circumstances and so the Tribunal concludes that it should not award interest.

ORDERS ACCORDINGLY

2nd April 2003

**Mr Michael R Curry FRICS Hon.FIAMI IRRV MCI.Arb
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:

Patrick O’Kane BL instructed by Lundy & Co appeared for the Applicant.

Rory Hamilton, Solicitor of James