LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL COMPENSATION ACT (NORTHERN IRELAND) 1964

BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

IN THE MATTER OF AN APPLICATION

BT/14/2010

BETWEEN

NOEL COX & SUSAN COX – APPLICANTS/TENANTS

AND

MARTIN CLANCY – RESPONDENT/LANDLORD

Part II

Re: Petrol Filling Station and Retail Shop, Belcoo, County Fermanagh

Lands Tribunal - Mr M R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI

Background

1. The Applicants/Tenants ("the Coxes") hold the premises under a lease, dated 8th June 2006, between the Respondent/Landlord ("Mr Clancy") and themselves for a term of 4 years and 9 months from 17th June 2005 ("the 2005 lease"). By a Tenancy Application dated 8th February 2010 the Coxes applied to this Tribunal for the grant of a new tenancy. The Tribunal, not without slight reservations, accepted that Mr Clancy's state of mind at the date of hearing was that he genuinely intended to occupy the holding for a reasonable period for the purpose of a business to be carried on in it by him (Article 12(1)(g)(i) of the 1996 Order – 'own-business'). The Tribunal was not persuaded that, at the time, he did have a reasonable prospect of implementing the intention held. (See Part I Decision dated 27th August 2010.) The Tribunal ordered Mr Clancy to grant a new lease to the Coxes.

2. The parties have reached agreement on the other terms of a new lease but have not been able to agree the duration or rent. In its Part 1 Decision the Tribunal further concluded that the shortcomings in the case for opposition were issues that may be resolved in a relatively short period of time and that may be reflected as a factor in determining the duration of the new lease.

3. The subject premises are in the village of Belcoo at the border with the Republic of Ireland. Mr Clancy and his wife also have controlling interests in Bloodstone Developments Limited ('Bloodstone'), which owns a filling station and retail shop in the village of Blacklion, Co Cavan, a short distance across the border. Until about 2005, Mr Clancy had operated both premises. Then the Coxes reached agreements with Mr Clancy and Bloodstone to take leases of both.

The Coxes trade as Cox Foodmarkets, operating six supermarket stores under the name of "Spar" in accordance with trading agreements with Henderson Wholesale Limited. At Belcoo, apart from red diesel and kerosene, the filling station operation ceased some time ago and only the retail shop is trading. The Blacklion premises are now again operated by Bloodstone who have a trading agreement with Costcutter Supermarkets Group Ltd. There, in addition to the supermarket trade, the filling station operation continues.

Procedure

4. It was agreed that the issue of duration should be addressed first in the hope that the outcome would assist the valuers in assessing the rent.

5. The Tribunal received:
    - a lease in the form of a travelling draft;
    - oral and written evidence from
        - Mr Martin Clancy;
        - Patrick McGrath of Costcutter Supermarkets Group Ltd;
        - Adrian Huston an experienced Tax advisor and accountant;
        - Mr Noel Cox; and
    - submissions from Nessa Fee BL and Wayne Atchison BL.

Positions

6. On behalf of Mr Clancy, Ms Fee BL sought the shortest possible term – a few months; on behalf of the Coxes, Mr Atchison BL sought a duration of 10 years, and in the alternative with a break clause after about 5 years.

Discussion

7. The Tribunal was referred to:
    - Dawson: *Business Tenancies in Northern Ireland,* 1994;
    - Reynolds & Clark: *Renewal of Business Tenancies*, 3rd Ed, 2007;
    - Upsons v Robins [1955] 3 WLR 584;
    - Betty's Cafes Ltd v Phillips Furnishing Stores Ltd [1956] 3 WLR 1134;
    - Reohorn v Barry [1956] WLR 845;
    - Frederick Lawrence v Freeman Hardy & Lewis [1959] 3 WLR 275;
    - London & Provincial v Barclays Bank [1962] WLR 510;
    - Adam v Green [1978] CA 2 EGLR 46;
    - Michael Chipperfield v Shell UK Ltd [1980] CA 1 EGLR 51;
    - Amika Motors Ltd v Colebrook Holdings Ltd [1981] CA 2 EGLR 62;
    - Orenstein v Duan Unreported May 5 1983 CA ;

- J H Edwards & Sons Ltd v Central London Commercial Estates [1984] CA 1 EGLR 103;
- CBS UK Ltd v London Scottish [1985] 2 EGLR 125;
- National Car Parks Ltd v Paternoster Consortium Ltd [1990] 1 EGLR 99;
- Becker v Hill Street Properties [1990] CA 2 EGLR 78;
- Davy's of London (Wine Merchants) v City of London Corporation Unreported November 27, 2003; and
- Wong v Jan Part II [2005] BT/18/2003.

8. The Tribunal accepts that there is a real possibility of Mr Clancy succeeding with his own-business use plans for the holding. It also made it clear to the parties that, although the prospects of Mr Clancy's ability to deal with the shortcomings highlighted in the Part 1 Decision may be relevant to the question of duration, this was not to be treated as an opportunity to try to reverse that Decision. The focus therefore is the question of the future time at which a new lease might be terminated, giving Mr Clancy a fresh opportunity to then oppose the grant of a further tenancy. The positions adopted by the parties did not sufficiently reflect these circumstances.

9. In all the circumstances, including the matters discussed below, the Tribunal accepts in principle the alternative suggestion of Mr Atchison BL that the new lease should include a Landlord's option to break.

10. Ms Fee BL suggested that that Mr Clancy would suffer severe hardship if he could not resume trading in Belcoo as soon as possible, as his property business has collapsed. She also referred to the hardship from the severance of the shops north and south of the border. Mr Atchison BL suggested that the Coxes' capital investment in the business and a solus agreement with Spar weighed heavily in favour of a longer tenancy.

The policy of the 1996 Order

11. The Tribunal agrees with the views expressed by Prof Dawson: *Business Tenancies in Northern Ireland*, at page 165:

> "Maximum apart, [Article 17(1)(b)] confers on the Tribunal a very wide discretion to select a period which is "reasonable in all the circumstances." All relevant factors must, therefore, be considered and due weight given to them."

and:

> "The principal policy objective is, of course, security of tenure for business tenants, but not at all costs. The landlord's superior right to possession of the premises for redevelopment,

or his own use, is expressed in the grounds of opposition to renewal in [article 12(1)(f) and (g)] – these are not mere grounds of opposition, they are statements of policy which must be fully reflected in the terms of the new tenancy determined by the Tribunal. If the landlord failed under [article 12(1)(f) and (g)] because his plans were insufficiently advanced for him to establish the necessary intention … but is likely to be able to establish one or other of these grounds within the foreseeable future … due weight must be given to these matters."

and later, at page 166:

"Where the landlord has redevelopment or own-business use plans for the holding, it does not always follow that a short-term tenancy is appropriate. It is possible for a longer term to be granted with a break clause exercisable by the landlord when he is ready to implement his plans."

12. The Tribunal also agrees that the views expressed (in regard to a redevelopment break clause) by Reynolds & Clark: *Renewal of Business Tenancies* are relevant - at 8-77 paragraph (2):

"The legal test for determining whether or not a redevelopment break clause should be incorporated in the new lease has been formulated as whether redevelopment is "on the cards" or there is a "real possibility" of redevelopment occurring: Adam v Green; NCP v Paternoster Square. However, there is no indication in the formulation of the legal test for incorporating a break clause that the landlord's desire to redevelop necessarily trumps the tenant's desire for security of tenure."

and at (3):

"The function of the Court to strike a fair balance between the two competing aspirations necessarily presupposes that the landlord may have to wait for some time (though not so long as to prevent redevelopment) before being able to regain possession: Davy's of London (Wine Merchants) v City of London Corporation. Thus albeit the landlord may satisfy the Court that the break should be incorporated in the new lease the Court may defer the date from which the break is to operate as part of the balancing exercise."

The contractual term of the new lease

13. The 2005 lease commenced May 2005 and was granted for 4 years and 9 months. As part of that, there appears to have been an option for a further term of 5 years. The Tribunal is not persuaded that the duration of the new lease should match the duration of the current lease together with the option duration. It prefers a term of some 5 years, roughly matching the original term. The Notice to Determine specified a date of termination at the end of the contractual term - 17th March 2010. Therefore, the Tenant has already had the premises for approximately one year. Taking that period of occupation into account, the Tribunal concludes that, subject to the landlord succeeding in opposing the grant of a new tenancy at the time of

an earlier option to break, the contractual term should terminate on 17th March 2015 i.e. about 4 years from now.

The Timing of a Landlord's option to break

14. The Tribunal now turns to evidence about when the prospect of Mr Clancy overcoming the obstacles to implementing his intention to occupy might reasonably be expected to crystallize, the circumstances of the parties and the relative hardship caused to either party by a particular timing of a Landlord's option to break.

15. Mr Huston had prepared a Business Plan for Mr Clancy to operate a Costcutter store. This was based on information provided by Mr Clancy and, if that was realistic, it would be a very profitable business. The parties agreed and the Tribunal accepts that a properly managed and funded supermarket business would succeed at the premises.

16. Mr McGrath gave evidence that Costcutter were willing to add Belcoo to Mr Clancy's existing agreement relating to Bloodstone; to provide opening stock which could be funded by a Stock Loan; to relay the existing shelving, counters and equipment if the Coxes would leave the premises fit for immediate use and trading (perhaps an unrealistic assumption); or to re-fit (which would be required for a Branded store) financed by a loan from a Finance Company that provided such loans to Costcutter's stores (over a ten year period); or to assist Mr Clancy to source second-hand fixtures and fittings at an estimated cost of perhaps a quarter of the full refit costs and financed in the same way. The Tribunal accepts that these proposed financial arrangements were available. But Mr Clancy would also require additional working capital.

17. In regard to his financial standing and prospects Mr Clancy chose to produce evidence only of two of his personal bank accounts - one sterling account and one euro account. Mr Clancy also had other bank accounts and liabilities, including liabilities as a guarantor and arising from the collapse of his property businesses. The Tribunal agrees with Mr Atchison BL that he did not produce anything like a complete picture.

18. Mr Clancy said that the euro account related to supplying diesel to HGV vehicles in the Republic of Ireland at premises beside Bloodstone's shop but outside its holding. Between the end of August 2010 and the beginning of January 2011, taken at face value the balance showed a healthy upward trend.

19. From the sterling account Mr Clancy personally paid his wholesaler, Costcutter, for goods which he sold on to supply Bloodstone's shop in Blacklion. The yardstick that Costcutter uses for measuring business volumes is not value but 'cases' – a box of crisps or a case of tins of

peas. Since March 2010, the number of cases supplied quarterly for Bloodstone had increased by 20%. The bank statements from the beginning of September 2010 to the beginning of January 2011 showed a severe decline with a closing balance attributable almost exclusively to one exceptional substantial lodgement which Mr Clancy said was in settlement of an insurance claim. Disregarding the insurance claim lodgement, if the account truly represents the revenue and cost of supplying stock to Bloodstone, it would appear to be at a time of growing the business rather than the profits. Of course, that may not be the position as other expenses were met through this account, there would be a degree of flexibility in how Mr Clancy might mark up the cost to Bloodstone of stock for its sales and, if the business plan prepared for Belcoo is a safe guide, Bloodstone should be very successful. But no management accounts or similar were produced to show how Bloodstone was trading. In their absence, Mr Clancy did not give the Tribunal the opportunity to see how well he was managing the development of the new Bloodstone arrangement or to assess the prospect of his building future capital reserves which he may be able to retain and introduce into the Belcoo business.

20. Until a very late stage, Mr Clancy encouraged the Coxes to believe their lease would be renewed. Mr Cox gave evidence of the Coxes investment in the Belcoo business – including evidence on expenditure on alterations, trade fixtures, fittings and equipment etc. They planned accordingly but also went too far. The Tribunal accepts that the Coxes had continued to invest in the business at Belcoo up until at least the year ended March 2009. Mr Cox also confirmed that they had entered into a solus agreement - to buy all their stock from a single supplier - with Henderson Wholesale Limited for a term of 5 years, renewable for a further 5 years, apparently from the beginning of 2009, in consideration of a substantial advance. That advance was not repayable provided that, among other things, the arrangement continued for 10 years. The full advance, together with interest and other penalties, would be repayable if the agreement was breached by the Coxes before the end of the first 5 years. If the agreement were not renewed at the end of the first 5 years 50% of the full advance, together with interest and other penalties, would be repayable. The 10 year term went far beyond the date for termination of their current lease and Mr Cox had to concede it was not prudent for them to enter into such a long term agreement in the circumstances of their tenure. However, in the circumstances at the time, the Tribunal considers that the Coxes could reasonably have expected to plan on the basis of retaining the premises for 5 years.

21. The Part 1 decision was that the Coxes should have a new lease. The Coxes have a number of other Spar/Henderson shops but will face penalties for early termination of their solus agreement. Mr Clancy has a young family and elderly parents who are reliant upon his income. Since the collapse of his property development business, his businesses at Blacklion

and the subject premises are his only means of providing for them. But he suggested that Bloodstone was doing well and if the Business Plan for Belcoo was actuallly based on his experience at Blacklion, it seems it was doing very well indeed. The Tribunal accepts that having filling station facilities on both sides of the border protects against the risk of the effect of fluctuations in exchange rates and differential levels of fuel duty. At present the facilities at Blacklion are in the more favourable location. It also accepts that having a second outlet would modestly improve the terms on which stock for two rather than one might be purchased. But it is not persuaded by the evidence before it that, under the proposed business arrangements, there would be any significant synergy from Mr Clancy and Bloodstone having the two retail stores, committed to purchasing mainly in Northern Ireland, straddling the border. Mr Clancy did not give the Tribunal much material to assess when he would be likely to overcome the obstacles to his own-business intentions for Belcoo. No matter what date is chosen there will be a degree of hardship to the parties.

22. On balance the Tribunal concludes that the Coxes should be allowed to complete only the initial 5 year term of their solus agreement with Spar and that would provide a reasonable opportunity to take advantage of their investment in the business. Accordingly Mr Clancy should have an option to break not earlier than the end of the fifth year of the solus agreement i.e. January 2014. That will allow Mr Clancy to prepare the ground for implementing his intention to occupy and serve notice accordingly in early 2013.

Conclusion

23. The Tribunal concludes that, subject to the landlord succeeding in opposing the grant of a new tenancy at the time of an earlier option to break, the contractual term should terminate on 17th March 2015.

24. The Tribunal also concludes that the date for termination of the new lease, by a Landlord's option to break should be not earlier than January 2014. Such notice should be served in accordance with the provisions of the 1996 Order and confined only to the grounds of own-business occupation (Article 12(1)(g)(i) of that Order).

ORDERS ACCORDINGLY

14th March 2011 **Michael R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI**
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances

Applicants: Wayne T Atchison BL instructed by Cooper Wilkinson, Solicitors

Respondent: Nessa Fee BL instructed by Murnaghan Fee, Solicitors