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/21/2016

BETWEEN

ANDRAS HOUSE LIMITED – APPLICANT

AND

CAR PARK SERVICES LIMITED – RESPONDENT

Lands at 7-13 Hope Street, 1-17 St Andrews Square East and

17-33 Lincoln Street, Belfast

PART 1

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

Background

1. Car Park Services Limited ("the respondent") operates a car park business on a site at 7-13 Hope Street, 1-17 St Andrews Square East and 17-33 Lincoln Street, Belfast ("the reference property"). The respondent occupies the reference property on foot of a lease dated 13th August 2015 ("the lease") for a term of 5 years. The lease was drafted by the solicitors representing the respondent.

2. Clause 3 of the lease provides:

> "In the event of the Demised Premises being required in connection with a scheme of substantial works of construction on the Demised Premises the Landlord may determine this Lease on giving not less than six months' notice in writing to the Tenant. Service of a notice by the Landlord under the Business Tenancies (NI) Order 1996 is to be sufficient notice and good service for the purposes of this Clause."

3. The landlord, Andras House Limited ("the applicant"), now requires possession of the reference property for a scheme of substantial works of construction. On 2nd October 2015, in reliance of clause 3 of the lease, the applicant served a notice headed "Landlords Notice to Determine Business Tenancy under Article 6 of the (Business Tenancies) Order" ("the notice"). The notice was accompanied by a letter from the applicant's solicitors ("the letter") which was served on the respondent and the respondent's solicitors on the same date.

4. Whereas the letter referred to the grounds of Article 12(f)(ii) of the Business Tenancies (NI) Order 1996 ("the Order"), the notice itself did not specify or recite any grounds for removal of the respondent, cited in the Order. The notice did, however, specify that the tenancy would terminate on 5th April 2016. By further correspondence dated 15th February 2016 the applicant's solicitor reiterated that the lease would terminate on 5th April 2016.

5. On 25th February 2016 the respondent challenged the validity of the notice of 2nd October stating: "We would advise that the said notice, copy enclosed, is defective and does not follow the prescribed form. In particular, the Notice does not set out the grounds on which the landlord seeks to rely pursuant to Article 12 of the Order. Article 6(6)(b) of the Order refers. Our client will not be yielding up the premises on 5th April 2016 and trust you note the position."

6. By correspondence dated 1st March 2016 the applicant's solicitor forwarded to the Director of the respondent company a "General Form Application" under the Order, by way of a "Form EB". The application in Form EB sought to invoke Article 40(3) of the Order and requested an Order from the Tribunal amending the notice, by adding the following paragraph:

> "The landlord would oppose a tenancy application by the tenant on the following ground mentioned in Article 12 of the Order namely that on the termination of the tenancy on 5th April 2016 the landlord intends to carry out substantial works of construction on the holding and could not do so without obtaining possession of the holding."

The applicant also requested that: "the said Notice, so amended, shall be deemed to have been served on the tenant on 2nd October 2015".

7. The respondent disputes the jurisdiction of the Tribunal to grant the relief sought and submits that: "the Notice of 2nd October 2015 is irredeemably flawed and beyond repair either by the Landlord or the Tribunal, as sought or at all.".

Procedural Matters

8. Mr Francis O'Reilly QC, instructed by O'Reilly Stewart Solicitors, represented the applicant. The respondent was represented by Mr Stephen Shaw QC, instructed by MKB Law Solicitors. The Tribunal is grateful to the legal representatives for their detailed and helpful submissions.

Position of the Parties

9. Mr O'Reilly QC submitted:

   (i) The Notice to Determine set out the names of the Landlord and Tenant, the address of the premises in question, the Landlord's intention to terminate the Lease and gave 6 months' notice as required by Clause 3 of the Lease

   (ii) The Landlord's solicitors letter of 2nd October 2015 was addressed to the tenant, identified the Landlord and the demised premises, referred to Clause 3 of the Lease and the Landlord's intention to terminate the Lease, set out the relevant grounds under Article 12(1)(f) of the 1996 Order and was signed by those solicitors.

   He therefore considered that the Tribunal should make the direction sought in the reference.

10. To safeguard the statutory rights of the respondent, Mr Shaw QC submitted that the applicant must start the process afresh with a valid notice. He considered the application form before the Tribunal to be wrong-headed and the relief sought beyond the reach of the Tribunal.

Statute

11. The sections of the Order relevant to this reference are:

"**Termination of tenancy by the landlord**

6.—(1) Subject to Article 11, the landlord may terminate a tenancy to which this Order applies by a notice to determine served on the tenant in the prescribed form specifying the date at which the tenancy is to come to an end (in this Order referred to as 'the date of termination').

(2) A notice to determine shall not have effect unless it complies with the provisions of this article and, subject to paragraph (3), is served not more than twelve nor less than six months before the date of termination specified therein.

(3) …

(4) …

(5) …

(6) A notice to determine shall … state whether or not the landlord is willing that the tenant should have a new tenancy and

(a) state whether or not the landlord is willing that the tenant should have a new tenancy and if he is so willing, the general terms of the landlord's proposals as to—

(i) the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy);

(ii) the rent to be payable under the new tenancy;

(iii) the duration of the new tenancy; and

(iv) the other terms of the new tenancy; or

(b) state whether the landlord would oppose an application to the Lands Tribunal by the tenant under Article 10 and, if so, on which of the grounds mentioned in Article 12 he would do so."

And

"**Opposition by landlord to a new tenancy**

12.-(1) The grounds on which a landlord may make an application for a determination that the tenant is not entitled to a new tenancy or may oppose an application made under Article 10 to the Lands Tribunal for an order for the grant of a new tenancy, are such of the following grounds as may be stated in the landlords notice to determine under Article 6, or as the case may be, in the landlord's notice under Article 7(6)(b), that is to say—

(a) …

(b) …

(c) …

(d) …

(e) …

(f) that on the termination of the current tenancy the landlord intends—

(i) to demolish a building or structure which comprises, or forms a substantial part of, the holding and

(ii) to undertake a substantial development of the holding;

and that the landlord could not reasonably do so without obtaining possession of the holding;"

12. Article 40(3) of the Order also provides:

"(3) Where, in any particular case, objection is taken to the sufficiency of any form of notice under this Order, the Lands Tribunal may give such directions in the matter as it thinks fit."

13. The Tribunal was also referred to the Business Tenancies (Notices) Regulations (Northern Ireland) 1997 ("the regulations"). Regulation 3(c) provides:

"3(c) …a notice served under Article 6 of the Order, being a landlords notice to determine a tenancy to which the Order applies shall be in Form 3."

And to Section 25 of the Interpretation Act (Northern Ireland) 1954 which provides:

"25. Deviation in forms

Where a form prescribed or specified by any enactment, deviations therefrom not materially affecting the substance nor calculated to mislead, shall not invalidate the form used."

Authorities

14. The Tribunal was referred to the following authorities from the jurisdiction in GB:

- Barclays Bank v Ascot [1961] 1WLR 171
- Stidolph v American School in London Educational Trusts Ltd [1969] 113 Sol Jo 689
- Hutchinson v Lambeth [1984] 1 EGLR 75 CA

- Morrow v Nadeem [1986] 2 EGLR
- Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749
- Sabella Ltd v Montgomery [1998] 1 EGLR 65 CA
- York & Another v Casey & Another [1998] 2 EGLR 25

15. And to the following authorities from this jurisdiction:

- McMillan v Crossey (BT/21/1985)
- Eastwood v Loughran (BT/70/1986)
- Gallagher v Morgan (BT/118/1986)
- Joyland Amusements (NI) Ltd v A S & D Enterprises Ltd (BT/102/1989)
- Yeun v McHugh et al (BT/35/1994)
- Tarwood Ltd v Giordano (BT/38 & 39/2009)

16. The Tribunal also derived assistance from:

- Germax v Spiegel [1979] EGLR 84 CA
- Graham v Dunloe Ewart (BT/24/2000)

Areas of Agreement

17. The following facts were agreed:

i. The reference property was held under a 5 year commercial lease.

ii. On 2nd October 2015 the applicant served a "Notice to Determine" accompanied by a letter.

iii. That if the notice and the letter were read together the respondent had all of the information to satisfy itself as to the intention and full stance of the applicant.

Discussion

18. Much of the submissions at hearing centred around the application of the "objective test" ["Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749" et al] to questions relating to the validity of notices containing errors/omissions. The Tribunal considers, however, that there are three basic issues which need to be decided prior to any application of the "objective test" to this reference, if any application is required:

    i. Was the respondent estopped from opposing the validity of the notice?

    ii. What details were required to be inserted in the notice?

    iii. What was the status of the accompanying letter?

Estoppel

19. At the commencement of the hearing Mr O'Reilly QC raised an issue of estoppel. This issue had not been mentioned in any of the pre-hearing submissions and Mr Shaw QC had only been given limited detail the night before the hearing. Nonetheless the Tribunal and Mr Shaw QC were content for Mr O'Reilly QC to raise the issue.

20. Mr O'Reilly QC submitted that the respondent, by its conduct, was estopped from challenging the validity of the notice. He pointed out that the notice had been served on 2nd October 2015 but the respondent had failed to challenge the validity of the notice until 25th February 2016, some 5 months after it was issued and some 5 weeks prior to the termination date of 5th April 2016. He referred the Tribunal to the following extracts from the judgement of Nicholls LJ in the case of Morrow v Nadeem [1986] 2 EGLR 73 CA:

> "We were referred on this to another passage in the judgment of Jenkins LJ in *Tennant v London County Council*. The issue in that case, as I have already indicated, was whether a section 25 notice signed by a person on behalf of LCC had been duly signed by the landlord. There the court held that the notice was valid as having been duly signed, but Jenkins LJ added this on the question whether in any event the tenant had waived the objection to the signature of the notice (at p441):

I do regard it as most desirable in cases under the Landlord and Tenant Act 1954, where time may be an important consideration, that parties who wish to take objection to the form or the validity of the proceedings should act promptly and not reserve objections of this sort until the proceedings have been on foot for a matter perhaps of months. Accordingly, had it been necessary for me to arrive at the conclusion on this part of the case, I would have been prepared to hold that any otherwise well-found objection there might be to the notice was, on the facts to which I have briefly referred, waived, so that the objection is no longer available to the tenant as a bar to the proceedings.

I respectfully agree that parties who wish to take objections of the nature of those taken in that case and in this case should act promptly. On the particular facts, however, that was a case where from the outset, from service of the notice, the tenant knew of the matter of which he subsequently complained; and thus he knew for some considerable time of the facts which were subsequently relied on by him as founding the objection. That is not this case: rather this is a case within the passage in the judgment of Romer LJ in *Tennant v London County Council* (at p443) where he said this:

I can imagine a case where a notice terminating a tenancy might be subject to a latent or concealed defect which did not come to light and was not apprehended by the tenant until after he had taken some step which might be construed as accepting the validity of the notice. In such a case I do not myself think that he would be subject to the operation of the principle."

21. Mr Shaw QC asked the Tribunal to note that the extract quoted from Morrow was "obiter dicta" and was therefore not legally binding as a precedent. He also referred the Tribunal to the factual circumstances of the Morrow case:

"The second issue raised concerned waiver. On this we were supplied with an agreed statement of facts, to the effect that protracted correspondence passed between solicitors in the period from 1982 to 1985 on the basis that there was a live and valid application on foot in the Bloomsbury County Court under Part II of the Act, which application arose out

of the notices which are the subject of this appeal, and that no suggestion was made in that correspondence that the validity of the notices was being or would be challenged …".

22. Mr Shaw QC considered the circumstances in Morrow to be were completely different in that correspondence had been ongoing for a period of three years and no hint had been given in that period that the validity of the notice would be challenged. In the subject reference the applicant had been put on notice some 5 weeks prior to the termination date and on that basis Mr Shaw QC submitted that there was no merit in Mr O'Reilly's QC estoppel challenge.

23. The Tribunal agrees with Mr Shaw QC, the circumstances in the subject reference are different to those in Morrow. The applicant had been notified of the challenge to the validity of the notice some 5 weeks prior to the termination date and this had facilitated a Lands Tribunal hearing on the issue on 31st March 2016, also prior to the termination date. The Tribunal therefore dismisses the estoppel challenge.

Details Required in the Notice

24. Mr O'Reilly QC referred the Tribunal to the statutory Form 3 which was headed "Landlord's Notice to Determine Business Tenancy under Article 6 of the Order" and in particular to the two alternatives prescribed in section 2 of that form:

> "2. I am/we are willing that the tenant should have a new tenancy on the following general terms: ….
>
> OR
>
> 2. I/we would oppose a tenancy application by the tenant on the following ground(s) mentioned in Article 12 of the Order: …."

25. He submitted that these alternatives did not apply in the subject reference as the tenant already had an existing tenancy with some four and a half years to run and there was no necessity for the applicant to complete this section of the form. He considered that the two alternatives in the form did not meet the criteria of a redevelopment break clause, such as clause 3 in the subject lease, and the legislation did not acknowledge a redevelopment break

clause. He considered, therefore, that the notice, as submitted by the applicant, met the criteria as stipulated in the 1996 Order.

26. The Tribunal derives assistance from the following extracts from Graham v Dunloe Ewart (BT/24/2000) which was a business tenancies reference concerning a redevelopment break clause:

> "71. The Tribunal concludes that if a redevelopment break clause is included, the terms for a break should reflect the current case i.e. on the basis of Article 12 paragraph (1)(f) and substantial development in accordance with the indicative scheme attached to the joint Position Statement. Accordingly, on the exercise of the break, the landlord would be required to establish its intention in accordance with the requirements of the 1996 Order and, for example, it would require a relevant planning consent for a scheme along the lines of the indicative scheme …
>
> 72. …
>
> 73. The exercise of a redevelopment break would bring the contractual term to an end but bring the matter back to the Tribunal to consider the merits and if appropriate, unless agreement has been reached, to fix a date for the giving up of possession …"

The Tribunal is clear that, in the subject reference (as in Graham), the effect of exercising the redevelopment break clause (clause 3 in the lease) is to bring the contractual term of the lease to an end. The respondent, however, still retains his statutory rights under the Order and it is a statutory requirement that the applicant prove a ground of "opposition by landlord to a new tenancy", as outlined in Article 12 of the Order.

Indeed, any clause in a lease which purported to prevent a tenant from exercising his rights under the Order would be void under Article 24:

> "24. Without prejudice to Article 23(7) or 25, or paragraph 6 of Schedule 2, so much of any agreement relating to a tenancy to which this Order applies (whether contained in the instrument creating the tenancy or not) as –

(a) purports directly or indirectly by any means whatsoever to preclude any person from making an application or request under this Order … shall be void."

27. It was therefore a statutory requirement that, even in the case of a redevelopment break clause, a ground of opposition be included in the notice. The Tribunal therefore dismisses Mr O'Reilly's QC submission that section 2 of the notice did not require to be filled in.

Status of the Accompanying Letter

28. Both parties were agreed that if the notice and the letter were read together the respondent had all of the information required by the statute to satisfy itself as to the intention and position of the applicant.

29. Mr O'Reilly QC referred the Tribunal to the case of Stidolph v American School in London Educational Trusts Ltd [1969] 113 Sol Jo 689. In that case the Court of Appeal in England considered (1) whether a recipient of a statutory notice had received and/or read a letter accompanying the notice and (2) the effect of a covering letter from the landlord's solicitors. In answer to question "(2)", Lord Denning HR stated in his judgement:

> "The prescribed form for a Notice to Quit under S25 was not mandatory to the extent that every detail had to be filled in. If the form or a covering letter attached to it gave the required information to the Tenant and was sufficiently authenticated, that was sufficient notice to comply with S25."

30. Section 25(1) of the Landlord and Tenant Act 1954 (the statute in question in the Stidolph case) provided: "the landlord may terminate a tenancy to which this part of the Act applied but a notice given to the tenant in the prescribed form specifying the date at which the tenancy is to come to an end …". In this jurisdiction Article 6(1) of the Order provides: "Subject to Article 11, the landlord may terminate a tenancy to which this Order applies by a

notice to determine in the prescribed form specifying the date at which the tenancy is to come to an end."

31. Mr O'Reilly QC considered that, while decisions of the Court of Appeal in England did not bind the Lands Tribunal, they were invariably considered to be persuasive authority, especially when there were no contrary decisions from the superior courts in Northern Ireland. To the extent that there were any omissions, errors or deficiencies in the applicant's notice to determine, he submitted that any such omission, errors or deficiencies were rectified by the details and content of the applicant's solicitors letter of 2nd October 2015, which was signed by those solicitors, the letter having accompanied the notice.

32. Mr Shaw QC submitted that whatever the content of the letter, it was distinct from and not part of the notice. He referred the Tribunal to Joyland Amusements (NI) Ltd v A S & D Enterprises Ltd (BT/102/1989). This was a case on which the then President of the Lands Tribunal, Judge Peter Gibson QC, presided. This case concerned a tenant's request for a new tenancy which was not made on the proper form and from which all of the landlord's guidance notes were omitted. An accompanying letter was attached to the form. In his submission Mr Michael Lavery QC for the respondent cited the Stidolph case as an authority which he considered established that the Court or Tribunal should look at the contents of the covering letter and take it into account. Mr Shaw QC referred the Tribunal to the following extract from Joyland in which Judge Peter Gibson QC, being fully aware of the judgement in Stidolph, concluded:

> "The Tribunal has thus concluded that the tenants right to request a new tenancy must be exercised in the proper form. To that extent the Act is mandatory, and indeed the argument between the parties was based not so much on this ground as on whether or not the request made by the tenant was, in the circumstances of the case, a proper request. In the view of the Tribunal the request cannot be made proper merely by a general reference in a covering letter. If it could then the whole concept of certainty would be seriously eroded …"

Mr Shaw QC therefore asked the Tribunal to note that the President of the Lands Tribunal in this jurisdiction, being aware of the decision in Stidolph, chose not to take into account the contents of a letter accompanying the notice. In the subject reference he submitted that the Tribunal should do likewise.

33. The Tribunal notes, however, that the circumstances in Joyland were different to those in Stidolph. In Joyland the accompanying letter was also deficient in that it only made general reference to the "landlord's guidelines" which had been omitted in the notice and it did not recite them. In Stidolph the accompanying letter contained all of the details which were missing/deficient in the notice. The Tribunal also derives assistance from the case of Germax v Spiegel [1979] EGLR 84 CA in which an accompanying letter was also taken into account. In this case the date on which the notice was given was incorrectly stated in the body of the notice but a covering letter made it clear what the correct date was; the notice was held to be valid. In the subject reference the parties were agreed that, if the accompanying letter was taken into account, all of the information stipulated in the statute was available to the respondent.

Conclusion

34. Relying on Lord Denning's judgement in Stidolph (which the Tribunal considers not to be at variance with Judge Gibson's judgement in Joyland), the Tribunal finds that the contents of the letter accompanying the notice can be taken into account and directs that the applicant's notice to determine is valid. The applicant must now, however, prove his statutory ground of opposition, as stipulated in Article 6(6)(b) of the Order.

ORDERS ACCORDINGLY

12th April 2016

Henry M Spence MRICS Dip.Rating IRRV (Hons)
Lands Tribunal for Northern Ireland

Appearances:

Applicant/Landlord – Mr Francis O'Reilly QC instructed by O'Reilly Stewart, solicitors.

Respondent/Tenant – Mr Stephen Shaw QC instructed by MKB Law, solicitors.