

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 2

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

Background

1. Car Park Services Limited (“the respondent”) operates a car park business on the site at 7-13 Hope Street, 1-17 St Andrews Square East and 17-33 Lincoln Street, Belfast (“the reference property”) on foot of a lease dated 13th August 2015 for a term of 5 years.
2. The landlord, Andras House Limited (“the applicant”), by a Notice dated 2nd October 2015 advised the respondent that it required possession of the reference property to carry out substantial works of construction and that the respondent’s tenancy would end on 5th April 2016.
3. The respondent disputed the validity of the notice and the matter came before the Tribunal on 31st March 2016. By a decision dated 12th April 2016 the Tribunal concluded (paragraph 34): “... 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 ...". In this reference, therefore, the applicant must satisfy the Tribunal of its intention to "undertake a substantial development of the holding" as required under Article 12 of the Business Tenancies Order (Northern Ireland) 1996 ("the Order").

Procedural Matters

4. Mr Francis O'Reilly BL instructed by O'Reilly Stewart, solicitors appeared on behalf of the applicant. Mr Stephen Shaw QC instructed by MKB Law, solicitors appeared on behalf of the respondent.
5. The Tribunal also received oral evidence from:
 - i. For the applicant
 - Mr Rana, a director of the applicant company.
 - ii. For the respondent
 - Ms Jobling, a town planner
 - Mr Crothers, as a witness of fact on his examination of the open file on the reference property held by the Planning Authority.
6. After the oral hearing the Tribunal invited written submissions from counsel.
7. In support of its reference to the Tribunal the applicant submitted the following documentation prior to hearing:
 - An application for planning permission to construct a new hotel on the reference property and the subsequent grant of the required planning permission.
 - An application for building approval.
 - Confirmation of the sending out of tender documents for the construction of a new hotel and the receipt of completed tenders.

- Confirmation of financial support and funding for the hotel project, by way of an overdraft facility from Danske Bank.
- A franchise agreement between the applicant and Hilton Hotels Group.

8. Post hearing the Tribunal received:

- Written submissions from both counsel.
- A letter from the Planning Service confirming the applicant's compliance with conditions 2 and 9 of the planning permission. During the hearing the respondent had taken issue with the applicant's non-compliance with both these planning conditions.

Position of the Parties

- Mr O'Reilly BL considered that the applicant would fully satisfy the Tribunal of the requirements imposed upon it by the statute.
- Mr Shaw QC submitted that the applicant had appeared at the hearing with no resolutions, no actionable planning permission, no contractor and no funds.

Statute

- The following sections of the Business Tenancies (Northern Ireland) Order 1996 ("the Order") are relevant to this reference:

"Opposition by landlord to a new tenancy

12.-(1) The grounds on which a landlord may make a tenancy application, or may oppose a tenancy application by the tenant, are such of the following grounds as may be stated in the landlord's 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—

- ...
- ...
- ...
- ...
- ...

- (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 to undertake a substantial development of the holding; or
 - (ii) to carry out substantial works of construction on the holding or part of it;
- and that the landlord would not reasonably do so without obtaining possession of the holding;”.

And

“Provisions supplemental to Article 12

13.—(1) Where the landlord relies on the ground specified in Article 12(1)(f), the Lands Tribunal shall require the landlord to furnish evidence that any permission required under any statutory provision has been granted to him in respect of the demolition and development, or the works of construction, which he intends to undertake.”

And

“Consequences where landlord successfully opposes

14.—(1) The Lands Tribunal shall make an order that the tenant is not entitled to a new tenancy where the landlord makes a tenancy application or opposes a tenancy application on grounds on which he is entitled to make his application or oppose the tenant's application in accordance with Articles 12 and 13 and establishes any of those grounds to the satisfaction of the Lands Tribunal.”

And

“Compensation where order for new tenancy is opposed on certain grounds

23.—(1) Where a landlord—

- (a) has served—
 - (i) a notice to determine a tenancy to which this Order applies, or
 - (ii) ...

and the notice states that a tenancy application by the tenant would or will be opposed, on any of the grounds specified in sub-paragraphs (e), (f), (g), (h) and (i) of paragraph (1) of Article 12; and

(b) either—

(i) in consequence of the landlord's notice the tenant does not make a tenancy application or, if he has made such an application, withdraws it, or

(ii) on hearing a tenancy application by the landlord or a tenancy application by the tenant, the Lands Tribunal, on any of the grounds mentioned in sub-paragraph (a), grants the former application or dismisses the latter; and

(c) the circumstances are such that paragraph (7) does not apply,

then, subject to the provisions of this Order, the tenant shall be entitled on quitting the holding to recover from the landlord by way of compensation a sum determined in accordance with the following provisions of this Article.

(2) That sum depends upon the period immediately preceding the termination of the current tenancy during which the occupation conditions have been complied with (“the qualifying period”) and shall be ascertained by multiplying the net annual value of the holding by, for each of the qualifying periods set out in column 1 of the following Table, the respective multiplier set out in column 2.”

And

“Compensation for misrepresentation etc., or landlord's failure to fulfil intentions

27.—(1) Where the Lands Tribunal—

(a) makes an order that the tenant is not entitled to a new tenancy; and

(b) is subsequently satisfied that it was induced to make the order by misrepresentation or by the concealment of material facts or that the intentions of the landlord as represented by him to the Lands Tribunal regarding any of the matters specified in Article 12(1)(e), (f), (g) or (h) have not without reasonable excuse been fulfilled,

the Lands Tribunal may order the landlord to pay to the tenant such sum as appears sufficient as compensation for damage or loss sustained by the tenant as the result of the refusal.”

Authorities

12. The law relating to a landlords “intention” is adequately summarised in Cox v Clancy BT/14/2010 paragraphs 13 to 18:

“13. The Tribunal was referred to Dawson: *Business Tenancies in Northern Ireland* 1994; Fife & Hilditch: *Renewing Business Tenancies* 3rd Edition; Reynolds & Clarke: *Renewal of Business Tenancies* 3rd Edition; Cunliffe v Goodman [1950] 2 KB 237 endorsed by the House of Lords in Betty’s Cafés Ltd v Phillips Furnishing Stores Ltd [1958] 1 All ER 607 and by the Northern Ireland Court of Appeal in McDevitte v McKillop (1994) NIJB 91; Mizra v Nicola [1990] 30 EG 92; Sharma v McHugh [1991] BT/88/1991; ...”

14. In Betty’s Cafés [1958], the House of Lords adopted for the purposes of ground (f) the definition of intention given by Asquith LJ in Cunliffe v Goodman [1950]. In that case, Asquith LJ said:

‘An intention, to my mind, 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 his own act of volition.’

15. The landlord must seek to establish his ground of opposition at the date of hearing (see Betty’s Cafés Ltd v Phillips Furnishing Stores Ltd [1958]; McDevitte v McKillop [1994] and Dogan v Semali Investments Ltd [2005]). Earlier different intentions of indecision, of themselves, do not matter as long as there is a settled and firm intention established at the trial.

16. In Reynolds & Clarke: *Renewal of Business Tenancies* 3rd Edition at 7-129 et seq, the authors set out the widely accepted distinction between two aspects of intention. The first is a subjective assessment of the state of mind of the landlord. The second involves an objective assessment of the realistic prospects of implementing the intention held. The latter is not principally concerned with the genuineness of the landlord's decision, but whether it is practicable to carry it out.

17. The first aspect is a high hurdle (see Patel v Keeles [2008] and Tarwood v Giordano [2010]):

‘If the landlord succeeds in showing that the requirements of [Article 12(g)] are satisfied, the tenant will have no right to renew his tenancy and will have to vacate the premises. Any goodwill attaching to his business at those premises will then either be lost or be acquired by the landlord when he starts to trade from the premises. In those circumstances, the courts have set a high hurdle for establishing the necessary subjective intention.’

18. The second aspect – ‘a reasonable prospect’ – is a low threshold (see Dogan v Semali Investments Ltd [2005]).”

Discussion

13. Having considered the oral and written evidence the Tribunal finds that there are six issues which require detailed consideration in order to establish the applicant's intentions at the date of hearing (Betty's Café):
 - i. Planning Permission.
 - ii. Building Control Approval
 - iii. Hotel Franchise
 - iv. Finance for the project
 - v. Board Approval

vi. Building Contractor

Planning Permission

14. The applicant had provided a copy of planning permission Z/2014/1627F which proposed a “Hotel development to include 179 No. bedrooms, with support accommodation to include administration, restaurant and staff facilities and associated plant”. This proposal had been approved by Belfast City Council on 2nd December 2014, subject to the imposition of nine conditions.
15. On behalf of the respondent, Mr Crothers gave evidence that there had been no recent activity on the open planning file and he considered that two significant matters lay unaddressed:
 - i. A planning condition relating to exterior finishes (condition “2”).
 - ii. A condition concerning landscaping (condition “9”).
16. Ms Jobling, a town planner, also on behalf of the respondent submitted that such issues were important and vital conditions which if not resolved in advance of works on site would constitute a material planning breach. She considered that these issues could be sorted through appropriate engagement between the planners and the applicant but, based on her experience, the timescale to conclude these negotiations would be in the region of four weeks.
17. Mr Shaw QC submitted that the requirement under Article 13(1) of the Order for the applicant to have “any” statutory consents was absolute and at the material date, due to the failure to comply with conditions 2 and 9, the applicant did not have planning permission capable of lawful implementation.
18. At hearing Mr Rana conceded that, as yet, there was no written agreement that conditions 2 and 9 of the planning permission had been complied with. He gave evidence, however, that lengthy discussions had already taken place with the City Council and verbal agreement had been reached in relation to the materials to be used (condition 2). He also referred the

Tribunal to the plans for the development and based on these plans he considered the amount of landscaping required for the hotel development (condition 9) to be minimal. Based on his discussions with the City Council he considered these to be minor issues which could be resolved in a short timescale and with the minimum of effort.

19. Mr O'Reilly BL submitted that conditions 2 and 9 only required compliance in advance of the commencement of development. He asked the Tribunal to note that Ms Jobling's estimate of a period of four weeks for resolution had proved to be inaccurate in that, immediately following the hearing, the applicant submitted documentary evidence confirming that the conditions had been resolved in six days and they did not attract the title of "significant" as suggested by Ms Jobling.

20. In relation to the post hearing evidence Mr Shaw QC submitted that:
 - i. Such post hearing evidence should not be admitted. It was material that did not exist at the date of the hearing and it offended the principle in Betty's Café that "intention" was to be assessed at the date of the hearing.
 - ii. In the alternative, if admitted, it confirmed the testimony of Ms Jobling and reinforced the key point that at the material date of the hearing the applicant had failed to discharge the burden of proof. To miss by a few weeks was a miss nonetheless. The burden on the applicant had not been discharged.

21. The Tribunal agrees with Mr Shaw QC in that it must concentrate its determination upon the reality of the applicant's intention at the date of the hearing. At that date the applicant had obtained planning permission for the development of a 179 bedroom hotel with ancillary facilities. Mr Shaw QC submitted that in failing to comply with conditions 2 and 9 at the date of the hearing the applicant did not have a planning permission capable of lawful implementation. Mr O'Reilly BL submitted that substantive planning permission had been obtained and conditions 2 and 9 only required compliance in advance of the commencement of development and this compliance had been forthcoming some six days after the hearing.

22. At the date of the hearing, based on his discussions with the City Council prior to the hearing, Mr Rana considered conditions 2 and 9 to be minor issues on which he had reached verbal agreement with the City Council and which could easily be resolved in advance of the commencement of development.
23. Based on her experience as a town planner, although she did not provide any specific examples, Ms Jobling considered conditions 2 and 9 to be significant and which would take in the region of four weeks to resolve.
24. In relation to this specific reference, however, Ms Jobling did not have any knowledge of the applicant's discussions with the City Council and the verbal assurances given by the Council. These were not taken in to consideration in her assessment of the timescale for resolution of the planning conditions. The Tribunal accepts Mr Rana's evidence, which was soundly based on his prior discussions with the City Council, that conditions 2 and 9 were issues on which he had reached verbal agreement and which could easily be resolved prior to the commencement of development. In addition, as submitted by Mr O'Reilly BL, substantive planning permission for the hotel development had been granted and conditions 2 and 9 only required resolution prior to commencing development. The Tribunal is therefore satisfied that, at hearing, the applicant fully intended to implement the planning permission which it had obtained and was capable of doing so. It is not therefore necessary for the Tribunal to adjudicate on the admissibility of the documentary material relating to the post hearing resolution of conditions 2 and 9

Building Control Approval

25. Mr Shaw QC asked the Tribunal to note that, at the material date, the applicant did not have building control approval, though he did accept that it had been applied for.
26. Mr O'Reilly BL submitted that there was no authority for the proposition that Building Control approval needed to exist prior to the commencement of any development.
27. The Tribunal agrees with Mr O'Reilly BL, the respondent had not put forward any authority to confirm that Building Control approval was required prior to commencement of development.

The Tribunal considers that the application for Building Control approval confirmed the applicant's intention to proceed with the scheme.

Hotel Franchise

28. It was generally accepted by the respondent that the applicant had obtained a Franchise Agreement with Hilton Hotels in relation to the operation of the new hotel when completed. Mr O'Reilly BL submitted that this was another clear and evidential feature of the applicant's intentions. The Tribunal agrees.

Financial Matters

29. At hearing Mr Rana confirmed that the scheme could not and would not proceed without funding from a commercial lender, identified as Danske Bank.
30. The financial offer from Danske Bank was detailed in its letter of 18th January 2016 to the applicant. Mr O'Reilly BL submitted that the Tribunal should be satisfied that the funding arrangement between the applicant and Danske Bank was more than sufficient for the purposes of the subject reference. He asked the Tribunal to note that the applicant had already constructed and now operated five other hotels in Northern Ireland and in evidence Mr Rana had stressed the on-going close business relationship with Danske Bank and the enthusiasm of the bank to fund this development. The Tribunal notes Mr Rana's extensive experience in the development and operation of hotels in the Northern Ireland locality.
31. In relation to the financial offer from Danske Bank Mr Shaw QC submitted:
- i. The financial offer was expressly subject to "conditions precedent". The second condition precedent required a professional valuation report by a valuer instructed by the bank, on the subject lands and premises at 355-367 Lisburn Road, Belfast. No such reports had ever been produced for consideration by the Tribunal or the respondent.
 - ii. No attempt had been made to supply these vital papers that Mr Rana claimed were already in existence at the hearing date.

- iii. Absent satisfaction of, or relief from the conditions precedent, the applicant had no access to the funds necessary to commence the development.
- iv. The applicant had simply failed to demonstrate that, at the material date of the hearing, it was able to implement whatever ambition it might have had to construct the hotel.

32. Mr O'Reilly BL considered the "petty minutiae" of referring to the valuation report as being yet another example of the obstructive nature of the respondent, despite Mr Rana's sworn evidence that the relevant valuation report did exist at the date of the hearing. In his post hearing submission to the Tribunal he confirmed that the applicant was now prepared to provide a copy of the report to the Tribunal, but for business reasons, not to the respondent.
33. The Tribunal refers to the "Additional Terms and Conditions" detailed in the Danske Bank's letter of offer:

"Conditions Precedent

Prior to utilisation of the facilities set out in this facility letter the Bank is to be provided with the following – in each case in form and substance satisfactory to the Bank. The Bank in its sole discretion may decide to waive any of these conditions precedent in whole or in part and with or without conditions, without prejudicing the Bank's right to require subsequent fulfilment of such conditions

- ...
- The Bank will have received a valuation, in form and substance acceptable to it, of the property situated at Hope Street, Belfast and 355-367 Lisburn Road, Belfast, addressed to the Bank from a professional valuer instructed by the bank ...".

34. In his evidence to the Tribunal Mr Rana confirmed that valuations had been carried out on both "collateral" properties by valuers instructed by the applicant. He also confirmed that the applicant's finance manager, Mr Brooks, who dealt directly with the bank, advised him that the bank was satisfied with the financial arrangements and there was no indication from the

bank that they were not satisfied in relation to the valuation requirement. Mr Rana also pointed out that it was within the Bank's "sole discretion to waive" any of the conditions.

35. The Tribunal notes that the applicant had an on-going, close business arrangement with the Danske Bank and based on that relationship the Bank had put in place the necessary funding arrangements to facilitate the hotel development. The Tribunal also accepts Mr Rana's evidence that there was no indication that the Bank was not satisfied that the conditions precedent had been met. The Tribunal considers, therefore, that this firm offer of finance from the bank was evidence that the applicant intended to carry out the development as proposed and had the funding arrangements to do so.

Board Approval

36. In further support of its reference to the Tribunal the applicant had submitted a note from a Board meeting of the applicant company dated 26th January 2016:

"At a meeting of the Directors of Andras House Limited ("the company") held at 60 Great Victoria Street, Belfast on 26th January 2016, the following resolution was passed on the motion of Rajesh Rana and seconded by Dermott Brooks

'That the Directors be and they are hereby authorised to accept on behalf of the Company, the Facilities Letter dated 18th January 2016 (produced to the meeting) issued by Northern Bank Limited trading as Danske Bank in the terms and conditions as set out in the said letter.'

We certify that the foregoing is a true and correct copy of the Resolution duly passed at the above Meeting."

37. Mr Shaw QC agreed that there was a Board resolution to accept the finance but he asked the Tribunal to note that there was neither a Board resolution to proceed with the scheme nor award a construction contract.
38. In evidence Mr Rana advised the Tribunal that approval for the scheme and the appointment of a contractor had been discussed at a Board meeting in March 2016 but he did not think it was necessary to provide the documentation. He considered the minutes of the Board meeting of 26th January to be sufficient evidence of the applicant's intentions.

39. The Tribunal notes the absence from the applicant's submissions of any specific Board resolutions relating to approval for the scheme and the award of a construction contract. The Tribunal is satisfied, however, that the Board acceptance of the offer of finance confirmed its intention to proceed with the scheme.

Building Contractor

40. Mr Rana confirmed in his evidence that competitive tenders for the scheme had been received and a contractor had been identified as the most competitive tenderer. Mr Shaw QC submitted, however, that there was no contractual commitment in place to initiate any works by him or anyone else.

41. Mr Rana advised the Tribunal that he was not in a position to inform the preferred contractor that it was successful, as any appointment would be subject to the outcome of the reference before the Tribunal. He pointed out that if the preferred contractor pulled out due to delay or any other matter, the applicant would then run with the second preference contractor and so on.

42. The Tribunal accepts the applicant's caution in appointing a contractor in advance of the outcome of the hearing. The Tribunal considers that the acceptance of tenders and the identification of a preferred contractor demonstrated the applicant's intention and ability to carry out the scheme.

Conclusion

43. Based on its consideration of the submitted evidence the Tribunal is satisfied that the applicant had moved "out of the sphere of the tentative, the provisional and the exploratory – into the valley of decision" (Asquith LJ in Cunliffe v Goodman [1958] 1 All ER 720CA). The Tribunal finds that the applicant landlord, Andras House Limited, has made out the grounds of opposition to the grant of a new tenancy based on Article 12(1)(f) of the Business Tenancies (Northern Ireland) Order 1996.

44. At hearing Mr Shaw QC made Mr Rana aware of the provisions in the Order relating to misrepresentation and the consequence of the applicant's failure to fulfil its intentions. The Tribunal reinforces Mr Shaw's "warning".

Termination Date

45. The questions for the Tribunal in relation to the termination date of the tenancy were:

- i. Should the termination date expressed in the landlord's notice to determine be complied with and vacant possession be given immediately? This was Mr O'Reilly BL's position.
- ii. If not what later date should be adopted?

46. Article 11 of the Order gives discretion to the Tribunal to direct the date at which the tenancy should determine. The Tribunal considers that it would be unreasonable to direct that the respondent should vacate the premises immediately. The Tribunal is, however, conscious of the applicant's desire to proceed with development of the site. Due to the fact that the property comprises an open car park with minimal structures on site the Tribunal orders that the reference property should be vacated six weeks from the date of issue of this decision.

ORDERS ACCORDINGLY

28th July 2016

Henry M Spence MRICS Dip.Rating IRRV (Hons)

Lands Tribunal for Northern Ireland

Appearances:

Applicant: Mr Francis O'Reilly BL instructed by O'Reilly Stewart, Solicitors.

Respondent: Mr Stephen Shaw QC instructed by MKB Law, Solicitors.