**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/99/2017**

**BETWEEN**

**NIGEL HARRA AND OTHERS – APPLICANTS**

**AND**

**ARKEN LIMITED – RESPONDENT**

**Re: 4th Floor, Lindsay House, 10 Callender Street, Belfast**

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

## Background

1. Stephen Philip Prenter, Peter Burnside, Nigel Harra, Ciaran Hunter, Michael Jennings, Sean Lavery, Francis Henry McCartan, Francis Martin, Brian Murphy, Angela Reavey, Alex Ward and Johnny Webb ("the applicants") were the tenants of premises at 4th Floor, Lindsay House, 10 Callender Street, Belfast ("the reference property") by way of a lease dated 20th October 2006 between the applicants and Arken Limited ("the respondent") as landlord.

2. On 30th March 2017 the applicants issued a Form 4 Request for a New Tenancy ("the notice") and a Landlord's Response was received on 22nd May 2017, stating that it was willing to grant a new tenancy.

3. The parties were unable to agree terms and on 27th September 2017 the applicants made a reference to the Lands Tribunal by way of a Form EA Application ("the tenancy application"). The reference was timetabled for hearing on several occasions but was subject to adjournment and included the respondent changing its expert. The Tribunal was informed of the change of agent at a mention on 7th December 2018. On 6th February 2019 the Tribunal issued final directions for a hearing:

- Expert Reports 5th March 2019
- Experts to meet on or before 19th March 2019
- Hearing 3rd May 2019

4. On 13th March 2019 the respondent's solicitor wrote to the Tribunal (copied to the applicants' solicitor) advising that the applicants named on the tenancy application were not the current partners of the tenant company and as such would not be individuals named as tenants on any new tenancy of the reference property.

5. The letter also advised:

> "Essentially, therefore, the Tenancy Application has been made in the name of 6 individuals who currently have no interest in the Premises and who do not enjoy protection under the Order. The inevitable consequence of this anomaly is that the Tenancy Application is void, as are the extant proceedings. As of the date of this letter we are not aware of any ability of the Lands Tribunal to amend the Tenancy Application."

6. Subsequently, on 29th March 2019, the applicant submitted "an amendment of the original application" naming the tenants as Nigel Harra, Michael Jennings, Sean Lavery, Francis Martin, Brian Murphy and Alex Ward. These are the current equity partners of the tenant company.

7. It is the validity or otherwise of the amended tenancy application which is the preliminary issue to be decided by the Tribunal.

**Procedural Matters**

8. Mr David Dunlop BL instructed by DWF (Northern Ireland) solicitors represented the applicant. The respondent was represented by Mr Keith Gibson BL instructed Mills Selig Solicitors. The Tribunal is grateful to counsel for their helpful submissions

**Position of the Parties**

9. Mr Dunlop BL requested the Tribunal to permit the amendment of the existing tenancy application to strike through the names of the former partners so that it was submitted only in the names of the existing partners.

10. On behalf of the respondent, Mr Gibson BL submitted that the notice and subsequent tenancy application were made by parties who, by virtue of the operation of Articles 32(3) and 32(5) of the Business Tenancies (Northern Ireland) Order 1996 ("the Order"), were not the proper applicants and had no interest in the reference property. He considered, therefore, that the notice was defective and did not comply with the Order. The application to amend effectively re-wrote the tenants application and he submitted that statute simply did not provide for this. He suggested that the obvious solution for the tenants was to withdraw their tenancy application and commence afresh with a new request for a tenancy under Article 7 of the Order.

**Statute**

11. It was not disputed that the tenants' application for a new tenancy was made under Article 7 of the Order and in a prescribed format as set out by the Business Tenancies (Notices) Regulations SR (NI) 1997/72 which were made pursuant to Article 40 of the Order.

12. Article 40 provides:

> "40.-(1) Any form of notice or other document required by this Order to be prescribed shall be prescribed by regulations made by the [Department of Finance] subject to negative resolution.

(2) Where the form of a notice is to be prescribed for any of the purposes of the Order, that form may include such explanation of the relevant provisions of this Order as appears to the [Department of Finance] requisite for informing any persons of their rights and obligations under those provisions.

(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. Article 32 of the Order deals with "Partnerships":

"32.-(1) ....

(2) In this Article those of the tenants who for the time being carry on the business are referred to as the 'remaining tenants' and the others are referred to as the 'departed tenants'.

(3) Any notice given by the remaining tenants which, had it been given by all the tenants, would have been a tenant's request for a new tenancy made in accordance with Article 7 shall be treated as such if it states that it is given by virtue of this Article and sets out the facts by virtue of which the persons giving it are the remaining tenants, and references in that Article to the tenant shall be construed accordingly.

(4) ...

(5) A tenancy application under Article 10(1)(b) may, instead of being made by all the tenants, be made by the remaining tenants alone; and where an application is so made-

(a) this Order shall have effect, in relation to it, as if the references therein to the tenant included references to the remaining tenants alone; and

(b) the remaining tenants shall be liable to the exclusion of the departed tenants, for the payment of rent and the discharge of any other obligation under the current tenancy for any rental period beginning after the date specified in the landlord's notice under Article 6 or, as the case may be, beginning on or after the date specified in their request for a new tenancy.

(6) Where the Lands Tribunal makes an order under Article 15 for the grant of a new tenancy on an application made by the remaining tenants it may order the grant to be made to them or to them with the persons carrying on the business in partnership with them and, in exercising its power under Article 19(2), the Lands Tribunal may have regard to the omission of the departed tenants from the persons who will be the tenant under the new tenancy.

(7) ..."

14. Article 19(2) of the Order provides for "Other terms of new tenancy":

"19.-(1) ....

(2) Without prejudice to the generality of paragraph (1), the Lands Tribunal may by order direct the inclusion in the tenancy of such terms as the Lands Tribunal considers appropriate for securing that the obligations of the landlord or of the tenant (or of both of them) under the tenancy are satisfactorily performed, and may, in particular, require the provision of sufficient security (including the finding of sureties acceptable to the party to be protected)."

15. The Tribunal was also referred to the following sections of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules"):

(i) Rule 4

"*Institution of proceedings*

4.-(1) Save where otherwise provided a person may institute proceedings by serving on the registrar a notice of reference as nearly as possible in accordance with Form I together with sufficient copies for service on each other party to the proceedings."

(ii) Rule 8(3)

"Limitation of case and amendment of notice of reference

8.-(1) ...

(2) ...

(3) A notice of reference, or an application to be joined as a notice party under rule 6 may be amended by consent in writing of the parties to a reference upon an application to the registrar under rule 12, or by the Tribunal.

(iii) Rule 12(6)

"Interlocutory applications

12.-(1) ...

(2) ...

(3) ...

(4) ...

(5) ...

(6) When dealing with any application under this rule, the registrar shall have regard, inter alia, to the convenience of the parties and the desirability of limiting so far as practicable the costs of the proceedings, and shall communicate his decision in writing to each party thereto."

(iv) Rule 38

"38.-(1) Non-compliance with any of the provisions of these rules shall not render the proceedings or anything done in pursuance thereof invalid, unless the President or the Tribunal so directs.

(2) No application for a direction under this rule shall be allowed unless made within a reasonable time, nor if the party applying has taken any fresh step after knowledge of such non-compliance.

(3) Without prejudice to paragraph (2) the registrar may treat proceedings, or anything done under these rules as valid notwithstanding non-compliance with the provisions of these rules, and may require a party in default to make good as far as may be practicable his failure to comply with a particular rule."

**Discussion**

16. Having reviewed the submissions from the parties the Tribunal considers the following issues to be of relevance to the outcome of the subject reference:

    (i) The Authorities

    (ii) Article 32 of the Order

    (iii) The Lease

    (iv) The Rules

**(i) The Authorities**

17. The Tribunal was referred to the following authorities from this jurisdiction:

    (a) John E Richardson v Michael Toal G/15 (1990)

    (b) Boots the Chemist Limited v Belfast Office Properties Limited BT/44 & 45/2007

    (c) Barclays Bank PLC v Mel Hughes BT/19/2016

**(a) Richardson v Toal**

18. Mr Gibson referred the Tribunal to the following extracts:

    "DECISION

    .... The procedural steps and the time limits are strict but providing they are followed meticulously they should not give rise to any hardship. Because the Act has conferred additional rights of tenure on tenants it also imposes corresponding duties on them to observe the statutory obligations; the Act seeks to strike a fair balance between rights and obligations as between landlords and tenants. It therefore requires both parties to adhere strictly and carefully to the provisions of the Act."

    and

"The tenant has called in aid General Rule 38 and Rule E2 of the Lands Tribunal Rules (Northern Ireland) 1976 together with Section 25 of the Interpretation Act (Northern Ireland) 1954. But in the opinion of the Tribunal these can be of no avail in changing a Section 5 Request into a Section 8 Application."

and

"If an application of some sort had been made under Section 8 to the Registrar within the four month period the fact that all the requirements of Rule E2 were not strictly complied with might not necessarily have proved fatal; the Tribunal has a discretion in certain circumstances to correct lack of form and might allow such application. But the statutory time limits are strict and are not to be interfered with by the Tribunal; no such discretion as is contained in Section 44 of the 1964 Act is conferred in relation to the procedural provisions contained in Part 1. The limits imposed are strict in that the Tribunal has no jurisdiction to interfere and extend the time although the parties may waive the limits either expressly or by implication."

19. In Richardson the application to extend time limits was refused and the Tribunal held that any discretion to amend should be exercised with extreme care. Mr Gibson BL submitted that in the context of extending time, the Tribunal retained the power to do so but made clear that it would only be afforded in very strict circumstances, normally only where there had been some form of waiver.

20. Mr Dunlop BL considered that this case should be distinguished from the subject reference, as in Richardson, the applicant had failed to comply with every step of the statutory process and had asked the Tribunal to ignore. In the subject reference the applicant was merely asking for an amendment to the notice to allow some names to be struck out. He also asked the Tribunal to note that, in Richardson, the Tribunal considered the application to amend the time limits to be "very prejudicial to the landlord's interest". He submitted that this was not the case in the subject reference as the respondent would not suffer any prejudice by allowing the amendment.

21. Mr Dunlop BL also asked the Tribunal to note that Richardson confirmed that the Tribunal had a discretion with regard to a tenancy application as it stated "the fact that all of the requirements of Rule E2 were not strictly complied with might not necessarily have proved fatal".

22. The Tribunal agrees with Mr Dunlop BL, it has a discretion but that discretion should only be exercised in strict circumstances, as submitted by Mr Gibson BL and not in circumstances where there was prejudice to the landlord.

**(b) Boots v Belfast Office Properties**

23. Mr Dunlop BL considered the findings in this case to be clear precedent for the application in the subject reference. The Tribunal permitted Boots to amend its tenancy application to include an alternative term as part of the terms of a proposed lease in a Business Tenancy renewal. He referred the Tribunal to the following extracts:

> "8. This is an interlocutory application. Rule 12(6) of the Lands Tribunal Rules require:
>
> '(6) When dealing with any application under this Rule the [Tribunal] shall have regard, inter alia, to the convenience of the parties and the desirability of limiting so far as practicable the costs of proceedings, ...'
>
> 9. Compelling the Applicant to make fresh tenancy applications would only lead to increased costs and inconvenience through delay. The Tribunal permits the amendment of the Tenancy Application."

24. Mr Gibson BL considered Boots to be a very short judgement where leave to amend was granted insofar as it pertained to the length of the term, effectively to the relief being sought. He submitted that this was quite different to the subject reference which sought to amend the capacity/identity in which the application was made. He considered that the subject reference went to the heart of the Tribunal's jurisdiction unlike Boots which just went to remedy sought.

**(c) Barclays Bank v Mel Hughes**

25. Mr Gibson BL submitted that this case reiterated the notion that the Tribunal had an extremely limited power to amend. In Barclays Bank the tenant applied, pursuant to Rule 12(6) of the Lands Tribunal Rules to amend a Form EA. The Tribunal found as a matter of fact, that the notice was not served on the landlord, as required under Article 2(2)(b) of the Order, and as such, there had not been compliance with the Order. Mr Gibson BL submitted, therefore, that there was no difference between compliance with Article 2(2)(b) of the Order and Article 32(3) of the Order, which deals with the circumstances in the subject reference. The tenant in Barclays Bank sought to argue before the Tribunal that the provisions of Rule 12(6) of the Rules allowed the Tribunal to amend the notice. At paragraph 36 of its decision the Tribunal stated:

> "36. Under Article 7 of the Order there is a statutory requirement for the Tenant's Request for a New Tenancy to be served on the landlord, as defined in Article 2(2)(b). As per Judge Gibson's guidance, as set out Samuel Johnston Ltd v Andras House, the Tribunal finds that, in the subject reference, the statutory requirement to serve the Notice on the landlord cannot be set aside by Rule 12(6) of the Lands Tribunal Rules which only requires the Tribunal to 'have regard to ... the desirability of limiting the costs'. The Tribunal therefore agrees with Mr Coyle BL, this Rule does not give the Tribunal the authority to waive compliance with the statute."

26. Notwithstanding that position, however, the Tribunal found that there had been an implied waiver (in line with the previous decision of the Tribunal in Richardson) and ordered that Mrs Hughes be joined as a party to the proceedings under the provisions of Rule E5 of the Rules. Mr Gibson BL submitted, and it was not disputed, that the landlord in the subject reference had not acquiesced or waived any objection to the amendment of the applicant's notice.

27. Mr Dunlop BL considered the circumstances in the subject reference to be different to those in Barclays Bank. In that case the applicant had asked the Tribunal to treat a notice served on

the wrong party as if it were valid. He considered that the amendment of the tenancy application in the subject reference did not break the statute, as the only thing wrong with the tenancy application was that it contained additional names of the legal tenants not now seeking new terms. Mr Dunlop BL submitted that the applicants were only asking for the additional names to be struck out.

28. The Tribunal notes the circumstances in Barclays Bank in which an application to amend a tenancy application was denied. The Tribunal also notes that the statutory requirement to serve a notice on the landlord could not be set aside by Rule 12(6) of the Rules.

29. The Tribunal was also referred to two decisions from the jurisdiction in England and Wales:

(i) Malekshad v Howard de Walden Estates Limited (No 2) [2004] 4 All ER 162

Mr Gibson BL asked the Tribunal to note that the position in England & Wales was different and the power to amend a notice was considered by Neuberger J in Malekshad, where there was an express power under paragraph 6(3) of Schedule 3 of the Leasehold Reform Act 1967.

(ii) Dr Sonny Lie v Dr Rajan Mohile [2014] EWCA Civ 728

Mr Dunlop BL noted that Article 32 of the Order was a direct equivalent to Section 41A of the Landlord and Tenant Act 1954. The 1954 Act was amended to afford protection to the Tenant. This was explained in Lie v Mohile where Patton LJ held at paragraph 2:

> "This court held in Jacobs v Chaudhuri [1968] 2 QB 270 that the word 'tenant' for the purposes of section 24(1) meant that all the joint tenants in who the legal estate was vested. On this basis the request and claim for a new tenancy would have to be made by both parties and cannot be validly made by one alone. But the 1954 Act was amended so as to reverse the effect of the decision in Jacobs v Chaudhuri and section 41A now permits an exception to the rule in the case of partnerships where not all of the joint tenants continue to use the demised premises for the purposes of the partnership business ...".

Mr Dunlop BL submitted, therefore, that the provisions of section 32(6) of the Order in this jurisdiction were designed to avoid the technical difficulties identified in Lie, from depriving a business tenant of the right to a new tenancy where there had been changes in the partnership membership.

Mr Gibson BL did not consider the decision in Lie to having any bearing in Northern Ireland which was governed by the provisions as laid out in Article 32 of the Order.

**Article 32 of the Order**

30. By virtue of Article 32(2) a partnership was divided effectively into "remaining" tenants and "departed" tenants and Mr Gibson BL asked the Tribunal to note that the statute made a distinction between the two.

31. He submitted that the notice did not include the detail prescribed by Article 32(3) nor did it contain the names of the correct partners and when the notice was served on 30th March 2017 certain partners were applying for a business tenancy in circumstances where they were not partners. They were therefore strangers to the lease and he submitted they had no statutory entitlement therefore to serve the notice.

32. On 21st September 2017, when the tenancy application was made under Article 32(5), Mr Gibson BL submitted that the same issue arose. He asked the Tribunal to note that the whole purpose of the Order was to protect persons carrying on a business and as a "departed" partner was not carrying on a business, it neither needed or deserved the protection of the Order.

33. Mr Gibson BL considered the provisions of Article 32(3) to be mandatory and as they had not been complied with, the notice which was served on the 30th March 2017 was defective. In

addition, he considered that the requests under Article 32(5) had not been complied with in respect of the tenancy application. In conclusion he submitted that the Tribunal did not have jurisdiction to amend either the notice or the tenancy application in the circumstances of the subject reference. He suggested that the initial notice should be re-served with the correct parties.

34. The tenancy application in the subject reference had been made in the names of the remaining partners but Mr Dunlop BL accepted that the former partners had also been included. However, he referred the Tribunal to the provisions of Article 32(6) of the Order. He considered that this provision gave the statutory authority to the Tribunal to amend the tenancy application to name only the remaining partners in the business.

35. Mr Dunlop BL asked the Tribunal to note that the provisions of Article 32(5) were not mandatory, as it provided the options confirmed by the use of the word "may" under which the tenant could make an application naming only the remaining partners. He considered that Article 32 was introduced to bring flexibility into the renewal of tenancies where partnerships existed and was mainly to cover the situation where remaining partners could not get the agreement of difficult partners.

36. It was, however, accepted by the applicants that they had not complied with the provisions of Article 32(3) of the Order but the Tribunal notes the discretion granted to it by Article 32(6).

**The Lease**

37. Mr Gibson BL referred the Tribunal to clause 3.10 of the current lease which covered "Alienation":

> "3.10 Alienation
>
> 3.10.1 Not to assign or charge part only of the Premises.

3.10.2 Not to assign this Lease without the consent of the Landlord but, subject to the operation of the following provisions of this clause 3.10.2, such consent is not to be unreasonably withheld or delayed;

3.10.2.1 in addition to reasonable grounds, the Landlord may withhold its consent to an application by the Tenant for licence to assign this Lease unless the conditions and criteria set out in this clause 3.10.2.1 are met, that:

(a) at the time of the assignment, there are no arrears of rent or other monies due under this Lease to the Landlord;

(b) on an assignment by the Tenant to a company which is another member of the same group of companies, the ultimate holding company (unless it is the assignee) enters into a guarantee, the operative provisions of which are in the form required in Schedule 5 but, where the guarantee would be rendered void by law, another substantial member of the group of companies enters into the guarantee;

3.10.2.2 on an assignment, if the Landlord reasonably so requires, the Tenant procures a guarantee of the tenant covenants of the assignee from a guarantor who is reasonably acceptable to the landlord, the operative provisions of which are in the form required in Schedule 5.

3.10.3 ...

3.10.4 ...

3.10.5 ...

3.10.6 ...".

38. Mr Gibson BL asked the Tribunal to note that alienation of the lease to the applicants required the consent of the respondent. Mr Dunlop BL submitted that both the terms of the lease and Article 26 of the Order provided that the respondents consent could not be unreasonably withheld. The Tribunal agrees with Mr Dunlop BL.

39. Mr Gibson BL also referred the Tribunal to clause 10.2.2.2 of the lease which required a guarantor which was reasonably acceptable to the respondent. The current lease contained the names of some 13 individuals all of which were covenanted to comply with the terms of the lease. If 6 to 8 names were deleted he considered that this would reduce the strength of each of the covenantors to comply.

40. Mr Dunlop BL did not consider clause 10.2.2.2 to be a problem as Article 19(2) of the Order gave the Tribunal the authority to include in the tenancy agreement "such terms as the Lands Tribunal considers appropriate for securing that the obligations of the landlord or of the tenant (or both of them) under the tenancy are satisfactorily performed ...". The Tribunal agrees with Mr Dunlop BL.

**The Rules**

41. Mr Dunlop BL referred the Tribunal to the following rules:

    (i) Rule 4 which makes it clear that proceedings are commenced by a "notice of reference". This was accepted by both parties.

    (ii) Rule 8(1) which gave the Tribunal leave to amend a notice of reference. Mr Gibson BL submitted that the quoted authorities urged caution, stating that the Tribunal's discretion to amend a notice should only be used in exceptional circumstances. The Tribunal agrees with Mr Gibson BL.

    (iii) Rule 12(6) which required the Tribunal to "have regard to ... the desirability of limiting costs". Mr Gibson BL referred the Tribunal to its decision in Barclays Bank which stated that "the statutory requirement to serve notice on the landlord cannot be set aside by Rule 12(6) of the Lands Tribunal Rules ...". The Tribunal agrees with Mr Gibson BL, the statutory requirements of the Order cannot be set aside by Rule 12(6).

(iv) Rule 38 which states that non-compliance with any of the rules shall not render the proceedings invalid unless the Tribunal directs. Mr Gibson BL referred the Tribunal to Richardson in which the Tribunal stated that Rule 38 could be "of no avail in changing a Section 5 request into a Section 8 Application". The Tribunal notes its findings in Richardson.

**Conclusion**

42. In conclusion Mr Gibson BL submitted that:

(i) The Tribunal had no statutory authority to amend the notice which was served on 30th March 2017.

(ii) In the circumstances of the subject reference the Tribunal should not exercise its discretion to amend the tenancy application to the Tribunal which was served on 21st September 2017.

43. Mr Dunlop BL submitted:

(i) The notice was valid due to the fact that at the date of service on 30th March 2017, all of the named parties were tenants under the lease, up until 1st July 2017. In those circumstances the Tribunal agrees with Mr Dunlop BL, the March 2017 notice was valid.

(ii) The September 2017 application contained all of the right names and it was only at fault due to the fact that it contained additional names of previous tenants. He considered this to be an error of form rather than substance. The Tribunal agrees and refers to its decision in Richardson which confirmed "the Tribunal has a discretion in certain circumstances to correct lack of form and might allow such application". The Tribunal also refers to Boots which was an interlocutory application, similar to the subject reference and in which the Tribunal allowed Boots to amend its tenancy application.

(iii) Rule 12(6) requires the Tribunal to have regard to "the convenience of the parties and the desirability of limiting so far as practicable the costs of proceedings. The subject reference had been ongoing since early 2017 and was subject to several postponements/adjournments, despite directions for a hearing having been issued on several occasions. The Tribunal agrees that Rule 12(6) requires the convenience of the applicant to be taken into account and the Tribunal must have regard to the desirability of limiting costs.

(iv) In the subject reference there has been no prejudice to the respondent, unlike the circumstances in Richardson. The Tribunal agrees, no prejudice to the respondent had been identified.

44. He concluded that in the circumstances of the subject reference the Tribunal should exercise its discretion under Article 32(6) of the Order to grant a new tenancy in the names of the correct parties. The Tribunal agrees.

45. The Tribunal concludes:

(i) The March 2017 notice is valid as it contained the names of all partners who were tenants at that time.

(ii) Exercising its discretion the Tribunal directs that the September 2017 tenancy application is to be amended to remove the superfluous names, as requested by the applicants.

(iii) Applying its discretion under Article 32(6) the Tribunal orders that a new tenancy is to be granted in the names of the remaining tenants and any concerns that the respondent may have regarding guarantor or any other securities will be dealt with by the Tribunal under Article 19(2), if required.

**10th May 2019** **Henry M Spence MRICS Dip.Rating IRRV (Hons)**

**Lands Tribunal for Northern Ireland**

**<u>Appearances</u>:**

**Applicants – Mr David Dunlop BL instructed by DWF (NI) LLP solicitors.**

**Respondent – Mr Keith Gibson BL instructed by Mills Selig solicitors.**