

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/38 & 39/2009
BETWEEN
TARWOOD LIMITED – APPLICANT
AND
ANTONINO GIORDANO & DESIREE GIORDANO – RESPONDENTS

Re: Ground Floor, 21 Ormeau Avenue, Belfast

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

Background

1. Mr and Mrs Giordano ('the Giordanos') own a mainly four storey building at 21 Ormeau Avenue, Belfast. By lease dated 26th August 2003 Mr and Mrs Giordano demised the ground floor of the building ('the premises') to Tarwood Limited ('Tarwood') for a term of six years from 1st May 2003. The upper floors are let as offices.
2. Tarwood fitted the premises out as a music venue and operated the same as "Spring and Airbrake". In 2006 CDC Leisure Ltd ("CDC") acquired Tarwood Ltd which is now a subsidiary company. The venue is well known and its contribution to the local music and entertainment industry is widely recognised.
3. Within the adjacent building, which it owns, Tarwood operates a public house known as 'Katy Daly's' and another music venue known as 'The Limelight'. Each of the three venues has separate access to the public street. In addition, Tarwood can provide internal access to allow patrons to circulate freely within all of them. They are operated together once a week for a regular event aimed at a student audience, and additionally as required.
4. By Notice to Determine dated 7th August 2008 ("the Notice") the Giordanos gave notice terminating the tenancy and opposing any new tenancy on the grounds of Article 12(g) of the Business Tenancies (Northern Ireland) Order 1996 ("the 1996 Order"):

"That on termination of the current tenancy the Landlord intends that the holding will be occupied for a reasonable period for the purposes, or partly for the purposes, of a business to be carried on in it by them or by a company in which they have a controlling interest".

5. The Giordanos said they intended to occupy the premises as a restaurant.

Procedure

6. Evidence was received from Mr Kieran Smyth, a Director of Tarwood Ltd and CDC and from Mr Antonino Giordano. Post hearing, written submissions, including invited submissions on the helpfulness of Patel & ANR v Keeles & ANR [2009] EWCA Civ 1187 and Willis v Association of Universities [1964] 2 All ER were received from Stephen Shaw QC and Mel Power BL.

Position

7. Briefly, the two issues between the parties are:
 - a) the validity of the Notice; and
 - b) the intention of the Giordanos.
8. Mr Shaw QC suggested that the Giordanos' Notice to Determine was invalid. He also suggested that the Giordanos did not have a settled intention to develop a restaurant. Further, the new restaurant scheme was not achievable because there was no realistic prospect of securing the necessary funding and the planning permission dated October 2008 was not valid.
9. Having regard to the range of possible outcomes the Tribunal invited submissions to deal with the possibility that it might order a new short term lease enabling the landlords to break upon notice of their desire to occupy for their own business. Mr Shaw QC suggested that it was not yet appropriate for the Lands Tribunal to consider the duration or any other term of the new tenancy until it had first decided upon the issue of the validity of the Notice and the landlords' grounds of opposition. However, he did say that Tarwood proposed to make contractual bookings for a period not greater than 6 months hence at any given time pending the determination by the Tribunal. The Giordanos had been keen to get the summer trade and then keen to get the Christmas trade and remain very keen to fit the premises out as soon as possible.

Discussion

10. The Tribunal was referred to Dodds v Walker [1981] 1 WLR 1027; Ladyman v Wirral Estate [1968] 2 All ER 197; Whelton Sinclair v Hyland [1992] 2 EGLR 158; *Woodfall – Landlord & Tenant, Hill & Redman on Landlord & Tenant*; Dawson: *Business Tenancies in Northern Ireland*; Lewison: *The Interpretation of Contracts*; Cunliffe v Goodman [1950] 2 KB 237; and referred the parties to Patel v Keles [2009] EWCA Civ 1187.

Validity of Notice- Termination date

11. Mr Shaw QC suggested that the landlords' Notice to Determine dated 7th August 2008 which purported to bring the tenancy to an end on 30th April 2009 was not valid because it brought the tenancy to an end one day prematurely.
12. According to paragraph 4 of the first schedule to the lease the "term" is defined as "6 years from the 1st May 2003". Mr Shaw QC contended that the term began at midnight on 1st May 2003 and therefore the 6 year term provided by the lease would expire at the end of 1st May 2009. Consequently the landlords' Notice to Determine a tenancy was defective since it purported to determine on 30th April 2009 (1 day too soon). Mr Power BL contended that the correct interpretation was that 1st May 2003 was included in the term which terminated on 30th April 2009.
13. The relevant rule and exceptions are helpfully discussed in *The Interpretation of Contracts* 4th Edition at 14.08:

"Where under contract a period of time is expressed to run from a certain day, the day named is generally excluded in computing the period. But where a period of time is expressed to begin on a certain day, the day named is generally included in computing the period. However, the context may displace the general rule."

14. Lewison continues:

"So where an interest (e.g. under a lease) is expressed to run from a particular date, prima facie the interest begins at midnight at the end of named day. Thus in Ackland v Lutley (1839) 9 Ad. & El. 879, Lord Denman said:

'The general understanding is, the terms for years last during the whole anniversary of the day from which they are granted.'

"Since the anniversary of the day named is included, it follows that the named day itself must be excluded. So in Meggesson v Groves [1917] 1 CH158 a tenancy was granted for a term from March 25th. It was held that the term began on midnight on that day. However, the rule is not a rule of law and may be displaced in appropriate circumstances. Thus in Ladyman v Wirral Estate Ltd Fisher J said:

'It seems to me that a general rule can be derived from the authorities, namely, at prima facie, a lease in those terms commences from the first moment of the day following that named, but it seems to be equally well established by the cases that

this is only a prima facie indication, and that it can be displaced if, on the construction of the lease or agreement for lease, a contrary intention can be derived.’

“In that case the lease reserved rent in advance payable on four specified days in the year, and the lease was expressed to run from one of those days. It was held that the named day was included in the term.”

15. Mr Shaw QC contended that this lease must be distinguished from the lease in Ladyman because clause 4 which states:

“The term of years hereby granted (“the term”) is 6 years from the 1st May 2003.”

16. This plainly means that “from 1st May 2003” starts the tenancy term at midnight on that day. By clause 6 the rent is to commence at the same moment as the term commences. Mr Shaw QC suggests that is midnight on 1st May 2003 meaning that 2nd May 2003 was the first day when rent was to be paid. Under clause 5 each [subsequent] rental payment was to be made on the usual quarter days, which means 1st August 2003, 1st November 2003, 1st February 2004 and 1st May 2004 and so on.

17. Mr Power BL contended that the present case is on all fours with Ladyman. The correct and only interpretation is that the 1st May 2003 was included in the term.

18. The Tribunal prefers Mr Power’s BL contention. Clause 5 does not refer to each subsequent rental payment. It refers to all payments, thereby including the first:

“The yearly rent hereby reserved is payable quarterly in advance (payable on the usual quarter days)”

19. The Tribunal concludes that the landlords’ Notice to Determine dated 7th August 2008 which purported to bring the tenancy to an end on 30th April 2009 was valid.

Validity of Notice- Mistake

20. Even if it is the case that an incorrect date for termination was given in the Notice then the question is whether such an error would invalidate it.

21. In Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd Lord Stein said

“the question is not how the [recipient] landlord understood the notices. The construction of the notices must be approached objectively. The issue is how a reasonable recipient

would have understood the notices. And in considering this question the notices must be construed taking into account the relevant objective contextual scene.”

22. Mr Shaw QC suggested, and the Tribunal accepts, that Mannai referred to break notices which may not be the same as a statutory notice. Mr Power BL suggested that the effect of Mannai had not judicially been restricted to consideration only in matters concerning contractual notice and referred the earlier decisions of the Lands Tribunal for Northern Ireland in Musgrave Supervalu•Centra (NI) Ltd v Edmund Irvine BT/14/2003 and Kerr, Sheridan and Others v ABC Credit Union BT/30/1998.

23. More recently, in Lay v Ackerman [2004] EWCA Civ 184 CA Neuberger LJ said

“The correct approach on the basis of the decision and reasoning in Mannai is as follows. One must first consider whether there was a mistake in the information contained in the Notice (as there was as to the date in Mannai, and there was as to the landlord, in the present case). If there was such a mistake, one must then consider how, in the light of the mistake, a reasonable person in the position of the recipient would have understood the notice in the circumstances of the particular case. Finally one must consider whether, as a result, the notice would have been understood as conveying the information required by the contractual, statutory or common law provision pursuant to which it is served.”

24. The view that Mannai applies to Notices to determine is supported by Reynolds & Clarke *Renewal of Business Tenancies* 3rd Ed at 3-183.

25. The Tribunal concludes that a reasonable person in the position of the recipient in the circumstances of this particular case would have understood the Notice to Determine dated 7th August 2008 to bring the tenancy to an end at the conclusion of the contractual term. As a result, the notice would have been understood as conveying the information required by the 1996 Order. Even if there was a mistake, the notice would not have been invalid.

Intention of the Giordanos

26. In McDevitte v McKillop (1994) NIJB 91 the Court of Appeal endorsed the test of intention laid down in Cunliffe v Goodman. In that case, Asquith LJ explored the requirement for an intention to be shown and held:

"An "intention" to my mind connotes a state of affairs which the party "intending" - I will call him X - 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...Not merely is the term "intention" unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events: it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while."

27. In regard to a "settled intention to proceed", Asquith LJ famously went on to hold that a landlord would not have a settled intention if the project did not move:

"out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision".

Intention of the Giordanos – Sale

28. In Patel v Keles, the Court considered whether it could properly conclude that the landlord has not shown the requisite intention to occupy premises where it has found that a sale is merely likely as opposed to intended. It concluded that it could, Arden LJ went on to state:

"..., in my judgment there must be some substance in the intended occupation for the purpose of carrying on the landlord's business and thus I agree with the judge that the occupation must be more than short-term. Parliament could hardly have intended that the landlord should be able to prevent the renewal of business tenancy if that were not so. What is short-term must depend on the facts of the particular case. In any event, if the landlord has a sufficient intention for the purposes of *Cunliffe* to sell the premises within five years, he will be treated as not having the requisite intention to occupy: see *Willis*. However, if the judge, as here, finds that he is likely (indeed "highly likely") to sell, that likelihood is a factor which the court must take into account in deciding whether the landlord has discharged the burden of proving that he has a genuine intention to occupy premises for the relevant purpose at all. This is a multifactorial question to be decided on all the relevant evidence."

29. Mr Giordano stated that the income generated by the premises did not meet the cost of funding the acquisition. Since about 2006 the Giordanos had considered a number of unsolicited approaches from three different parties to purchase the premises. Tarwood was one of them. Recently, in June 2008 Mr Giordano approached Tarwood in an effort to sell the premises but Tarwood found it could not arrange a scheme to finance a purchase. Only weeks before the hearing, Mr Giordano advised his bank that he was keen to sell the premises and at the hearing Mr Giordano made it crystal clear that he was still absolutely willing to sell the premises at the right price.

30. If an offer to purchase were made, clearly the commitment of the Giordanos to their intended business occupation would not override their desire to sell the premises. But the Tribunal accepts that in present difficult market conditions there is no realistic prospect of the Giordanos finding a buyer at a price that would make business sense. The market may improve in a few years time. If it improves sufficiently, but only if so, there is a likelihood of them selling. The future state of the market is, of course, outside the control of the Giordanos.

Intention of the Giordanos - Restaurant development

31. For over 20 years Mr Giordano has been operating as a restaurateur in Northern Ireland and the restaurants he has founded are well known. His restaurants were initially held with a business partner and when they parted company they divided the restaurants. There was nothing to indicate that the restaurants retained by the Giordanos were operating other than successfully.

32. The Giordanos had applied for and obtained planning permission and instructed an interior designer to draw up plans for fit-out works. These showed about 170 covers. There were serious irregularities associated with the planning application as a result of which Tarwood appears to have been unfairly excluded from the process. The plans for fit-out were inconsistent with the actual premises e.g. they were for a two storey unit whereas the premises are partly single storey and the Giordanos do not have possession of the first floor of the relevant part of the building. However, the Tribunal accepts that no formal challenge to the validity of the granting of the permission was made and the preliminary drawings were sufficient to provide a starting point for a person of Mr Giordano's knowledge and skills.

33. Mr Giordano was confident that finance would not be a problem but they would require funding for the entirety of the project and they had not discussed funding with their bankers. There was nothing to suggest that the Giordanos would be refused but funding presently is a matter outside their control.

34. Mr Giordano said that, at the outset, they had been prepared to lease the premises to Tarwood for a limited period, of 5 or 6 years only, because it had been their intention to open a restaurant at the premises. The Tribunal doubts whether a lease of that length is consistent with much of a settled intention at that stage.

35. The income from the entire building does not cover interest on the borrowings. The Tribunal accepts that it makes reasonable business sense for such a landlord, with the relevant skills and in these circumstances, to consider opening and operating a restaurant.

36. Mr Giordano stated that the Giordanos wish to occupy the premises for their own purposes namely the opening and operating of an Italian style restaurant. They are experienced restaurateurs and the Tribunal accepts that they are competent to reach an informed decision to do so.

Intention of the Giordanos – Summary

37. The Tribunal agrees with the view expressed in Patel v Keles:

“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. “

38. The Tribunal concludes that the likelihood of the Giordanos selling is not so slight that it should be disregarded as a factor to be taken into account in deciding whether they have the requisite intention to occupy. But that prospect is not so real that it is likely or highly likely.
39. The Giordanos probably have the ability to open and operate an Italian style restaurant at the premises but the scheme is substantial, the preparations have been casual rather than committed and there are important matters outside their control.
40. The Tribunal concludes that the Giordanos are close to a settled intention to occupy the premises for their own purposes but not quite there yet - there are too many loose ends. They have not succeeded in their opposition.

Conclusions

41. The Tribunal concludes that the Giordanos' Notice to Determine was valid. But the Giordanos do not have a sufficiently settled intention to develop a restaurant. Tarwood is to be granted a new lease.
42. But in regard to issues, regarding the restaurant development only, that need to be addressed, these could be resolved quite promptly. That would appear to be an important factor in considering the duration of a new lease.

ORDERS ACCORDINGLY

16th February 2010

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

Appearances

Applicant: Stephen Shaw QC instructed by Thomas Armstrong Solicitors.

Respondent: Mel Power BL instructed by Mills Selig Solicitors.