LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

BT/97/1996

BETWEEN

JITENDRA KUMAR SEKHRI & MRS KIRAN SEKHRI - APPLICANTS

AND

JAMES BLACK MILLAR - RESPONDENT

PREMISES: 106 CHURCH STREET, BALLYMENA

Lands Tribunal - Mr Michael R Curry FRICS FSVA IRRV ACI.Arb

FURTHER HEARING

Belfast - 18th November 1997

Some time after having given its written Decision, there was an application by the Tenants "that the order of the Tribunal relating to these proceedings be not filed until after the Applicant has been given an opportunity to clarify and establish the terms of his relationship with the Landlord in the Chancery Division of the High Court of Justice in Northern Ireland. The Applicants' grounds are, inter alia, that the Tribunal has reached a view of matters not properly before it."

David McBrien BL instructed by Messrs John P Hagan appeared for the Applicants. Alan Kane BL instructed by Messrs Millar Shearer & Black appeared, without prejudice to his contention that the Tribunal had no jurisdiction, for the Respondent.

After a judgement has been given in a Court, the Court may still retain control and an application, usually for recall, may be entertained but only in extremely unusual circumstances. It does not fall conveniently, if at all, within the Rules but may deserve to be heard in the interests of justice. On the question of whether the Tribunal currently retained control of the Reference, a brief outline of the relevant customs and practices of the Tribunal may help put matters in context.

The Tribunal always has been willing to hear a preliminary point, in the early days usually a point of law. Later, in the 1980's, it became standard practice to hear the 1964 Act cases in two parts i.e.:

Part 1: Landlord's objections to a new tenancy, and/or questions as to the validity of notices

Part 2: The terms of a new lease.

The scheme appeared to work well in terms of resolving disputes between the parties promptly and at proportionate cost. In practice, only a handful of such cases have ever gone on to require a Part 2 Hearing. Clearly, in the ordinary course of events, if Part 1 went one way that would determine all relevant issues between the parties but might give rise to an appeal. If it went the other, the Part 2 issues would remain to be determined but, before those were dealt with, it might be desirable to deal with any appeal against Part 1 matters. In practice, there rarely is a need for Orders associated with a subsequent Part 2 Hearing. If a new lease is ordered, most parties agree terms for a new lease and rely on the lease to record their agreement.

Whether or not the giving of the Part 1 Decision would give rise, of itself, to a right of Appeal and trigger time limits, the usual practice has been that, although the Decision finishes with the words 'Orders accordingly', the Registrar then waits to see whether there is agreement on, or an application to the Tribunal for it to deal with anything further, such as costs or in regard to its discretion to direct a date for termination of the tenancy, before he, as ordered, prepares or perfects an Order of the Tribunal (for convenience a 'Registrar's Order') for issue on payment of the Hearing fee.

On 23rd May 1997 the Tribunal read its Part 1 decision. At the close, the Tribunal invited the parties to try to agree outstanding matters (such as a date for giving up possession and any issue as to costs). In such cases, the practice is that the Registrar does not perfect a 'Registrar's Order' and maintains a watching brief. As nothing had been heard from the parties, on 19th August the Registrar listed the case for Mention. There was some delay. James L Russell & Son advised that they no longer acted for the Applicants and that they had forwarded the Notice to other solicitors. The latter requested an adjournment but later informed the Tribunal that the file had been transferred to another firm of solicitors.

On 26th September, the Tribunal was informed that the Tenants wished to question the terms of the lease in another Court. The Landlord took the view that the Tribunal had no further jurisdiction. The Tribunal invited Counsel to reflect on what the substantive issues were, and the appropriate forum for dealing with them, and listed the case for mention again on 10th October. On that date the Landlord made abundantly clear he was making an appearance without prejudice to his argument that the Tribunal had no jurisdiction. To bring matters to a head, the Tribunal set a date promptly after which the 'Registrar's Order' would be perfected. Before that time limit, the Tenants served notice that they were seeking an order as above, i.e. "that the order of the Tribunal relating to these proceedings be not filed

until after the Applicant has been given an opportunity to clarify and establish the terms of his relationship with the Landlord in the Chancery Division of the High Court of Justice in Northern Ireland."

By letter dated 7th November 1997 the Respondent again made it clear that he was not conceding that the Lands Tribunal had any jurisdiction to consider this application and that it was the Respondent's view that the original application was finally disposed off when the Lands Tribunal made an Order on 23rd May 1997 when its decision was delivered at an open hearing of the Tribunal.

Does the Tribunal have a discretion to recall until the matter goes out of its control? If so, when does that happen? Is it when the Decision is read, which Decision includes the words "Orders accordingly", is it when the 'Registrars Order' is perfected and issued? What is the effect of the time limit for appeal and provisions under the Act for automatically fixing a date for termination and can these overtake the 'Registrars Order'?

As the Tribunal is being asked to take exceptional steps, it considers it should be circumspect and confine itself to only those matters necessary to deal justly with the situation and not decide issues best dealt with in other circumstances or forums. However it must consider whether it has any jurisdiction to hear this application at all.

Mr McBrien submitted and the Tribunal agrees that the authorities are clear that, until the order goes on the books (the Tribunal prefers 'perfected and issued') with or without application, the court could withdraw, alter or modify, provided it exercised its discretion judicially. He referred to Halsbury's Laws Vol 26 para 555, the main authority, which was Re Harrison [1955] CH 260 and the most recent authority, which was Pittalis and Others v Sherefettin (1986) 2 All ER at 227.

The Part 1 Decision of itself may trigger a right of appeal, White v Brunton [1984] 2 All ER 606, but in the absence of an actual Appeal, there must be a question mark over the consequences.

The parties disagreed as to how the time limit for appeal to the Court of Appeal and the automatic date for termination should be calculated. Although the Tribunal heard argument, they are matters more conveniently for, if not only for other forums and, bearing in mind the conclusions it has reached on the merits, the Tribunal considers it can deal sufficiently with the Application without coming to a final view on them. If it is the case that the time limit has expired and/or the date for termination is passed and, as a consequence, it has no control, the Tribunal concludes that it has no jurisdiction to delay the issuing of the Registrar's Order. But, for the time being, the Tribunal has taken a preliminary view and, on

balance, made a working assumption that it does enjoy control in the instant case. That may not be the position in all circumstances but is consistent with practice to date.

At the Hearing, Mr McBrien said that he had anticipated a writ would be issued in the Chancery Division but before that was done a writ was received from the Landlord in the Queen's Bench Division for possession of the premises and for payment of double rent/mesne profits until possession be delivered up. He requested that the Tribunal order that the Registrar's Order be not issued either until final disposal of the High Court proceedings or alternatively order that issuing be delayed, subject to reviews to monitor progress in the High Court.

Mr Kane submitted that the matter had been finally disposed of and the Tribunal had no jurisdiction to hear an interlocutory application because it was exercising statutory functions and any discretion did not apply where there was such a statutory framework. The Tribunal accepts that point has force but underlines that it heard the Application only because of the seemingly grave importance and consequences of it allegedly having "reached a view of matters not properly before it".

The Tribunal questioned what exactly was meant by the Applicant's grounds "the Tribunal has reached a view of matters not properly before it". Mr McBrien submitted that the Tribunal had reached a view on the basis of the 1964 Act and so confined to that statutory framework. Civil proceedings would have a wider ambit and so, he said, the Tribunal was operating in a legal strait-jacket. He drew the Tribunal's attention to a passage in its decision:

"Mr Millar responded saying that sometime during the first year they could discuss a proper lease, he would have no objection to a 10 year lease with a 5 yearly rent review and that Mr Sekhri could retain occupancy of the shop as long as the business was profitable."

It appears Mr McBrien was seeking the opportunity of arguing in another Court that there was an oral agreement for a 10 year lease with a 5 yearly rent review. If that view of the relationship was the correct view, the proceedings in the Lands Tribunal were ill-founded because the lease had not come to an end and the Notices were invalid. He said that was his major substantive point behind this application. The Tribunal wrongly had assumed the lease had come to an end.

So, he contended the Tribunal was not a competent forum to deal with all relevant questions arising from the relationship of landlord and tenant arising in connection with the Act, the Tribunal had made an incorrect assumption, the relevant issue was still open to argument and finally, the Tribunal had a discretion to, and should put the matter on ice.

It is convenient to deal with the issues in that order. But, in circumstances such as this, where the Tribunal is asked to take exceptional steps, the Tribunal repeats that it considers it should be circumspect and confine itself to only those matters necessary to deal justly with the situation and not decide issues best dealt with in other circumstances or forums.

The Tribunal is clear that the Act gives it a wide jurisdiction to consider the terms of a lease. Otherwise it could not begin to carry out its functions under the Act because it could not, for example, deal with issues arising in connection with the timing and validity of notices or alleged breaches of covenant. The decided cases contain many examples of such matters being considered. Indeed, there is one at the heart of the instant case where the primary issue raised was delay in payment of rent under an oral agreement. So the Tribunal had to determine, in the absence of a lease, the relevant terms of the agreement. It could not come to a decision without doing so and, as might reasonably be expected, both sides argued the case and no objection was taken.

The novel proposition put forward by Mr McBrien that the Tribunal was in some way restricted from dealing with some or all such matters would lead to the ridiculous situation that they would first have to be determined in another Court and, if further clarification were needed by this Court, go back there. It has often been said that the Tribunal is a creature of statute. The statutes make no such provisions and if Parliament had intended that to be the procedure, it would have said so. The entire practice of more than 30 years is contrary to Mr McBrien's view. The workings of the Tribunal, in the context of the Act, have been the subject of both academic review (see eg Dawson "Business Tenancies in Northern Ireland" at pg. 3) and review by the Law Reform Advisory Committee, and generally have been approved.

The Tribunal concludes that it was and is the competent forum to deal with all relevant questions, in whatever detail is appropriate, arising from the relationship of landlord and tenant in connection with this Reference under the Act. A safeguard lies with the provision for appeal to the Court of Appeal on points of law.

Mr Kane submitted that there was no new evidence and no reason to exercise any residual discretion the Tribunal may have in favour of the tenants. The matter was fully presented at the Part 1 Hearing. There was a full hearing with sufficient opportunity for anyone to put forward any point. Further, on the particular point now being raised, he referred to a passage from the Decision and submitted that the tenants had bound themselves when Mr Sekhri wrote saying that he hoped they had settled every point but one small concession he requested etc. The terms of the lease were decided.

The Tribunal drew attention to what happened at the beginning of the Part 1 Hearing, at which Mr Sekhri was present (and gave evidence) accompanied by his then solicitors and represented by his then senior counsel. As the Landlord had objected to the grant of a new tenancy, on receipt of the Reference and in accordance with usual practice, the Registrar had written to the parties informing them that the Tribunal would deal with the matter in two parts i.e.:

"Part 1 Landlord's objections to a new tenancy, and/or questions as to the validity of notices

Part 2 The terms of a new lease."

Now, if the issue is a question of validity of notices, the usual practice at the Hearing is that the party challenging the notice goes first. If the issue is the landlord's objection, the usual practice is that the Respondent/landlord goes first. That is because he is the one objecting to the new tenancy, he sets out his objections and that is the case the tenants have to answer.

At the commencement of the Part 1 Hearing, the Applicants'/tenants' Counsel informed the Tribunal that the issue was a net issue, there was no issue in regard to the validity of notices and the only issue was the Landlord's objection to a new tenancy. So the Respondent/landlord went first.

Mr McBrien said that did not accord with his present instructions. That may be an issue which would arise in another place, another time. He submitted that it was open to the Tribunal to take into account the tenants' present position, for example, if evidence was called now to show all evidence given could be set aside and case was not as run, it would be open to the Tribunal to reverse the judgment and find in favour of the tenant.

Mr Kane submitted that Mr Sekhri was there, the tenants were represented at all stages by experienced advisors, and at the hearing the tenants had totally accepted what it was now sought to challenge.

On this application there was no disclosure of fresh evidence and the Tribunal concludes that there were no grounds, still less very solid grounds, for it to conclude that there was fresh evidence which could not have been obtained with due diligence for use at the Part 1 Hearing. At the Part 1 Hearing, the tenants themselves elected not to challenge the validity of the notices i.e. to argue that the lease had not come to an end and the Notice to Determine was premature, an issue which is no stranger to the Tribunal. It would appear that the tenants now really want to try a different spin on a different pitch. The Tribunal concludes that it had not made an incorrect assumption and the question is not still open to argument.

The Tribunal is not persuaded that the proceedings begun in the Queen's Bench Division for possession of the premises have any bearing on the Decision already reached in this Court. On the contrary, they flow from that Decision. Mr McBrien may seek to have the proceedings moved to the Chancery Division but that is not a matter on which this Tribunal is competent to comment. He said another Court was seized of the issues. It may be seized of the issue of the relevant time limits for appeal and/or possession but the Tribunal does not agree that it is seized of the primary issue which he seeks to argue. Those are different issues.

Mr Kane said the matter had moved on. The Tribunal notes that the tenants, on their view of jurisdiction and of the significance of the Registrar's Order, had had the opportunity to bring proceedings in the Chancery Division but had not done so. They had taken no appeal to the Court of Appeal (although it was submitted they were now out of time).

Mr McBrien suggested the Landlord would suffer no detriment or prejudice, if the Registrar's Order was delayed, the status quo could be maintained. The proceedings could continue in the Queen's Bench Division and even if it took 6-9 months then the Landlord would still, if he got an order for possession, get double rent, plus costs. The Tribunal does not agree because if, as Mr McBrien appeared to contend, the issue of the Registrar's Order is an important trigger date for possible proceedings in other Courts, then clearly delay may be of significant detriment or prejudice.

The application was unusual in that it was not a request to recall the Decision but, as Counsel for the tenants described it: "to put it on ice". An Order to delay issue of a Registrar's Order may or may not be of a different character to an Order to Recall. Although it is not the case here, it is possible that delay may be appropriate when a superior Court is expected shortly to make a pronouncement on a fundamental issue relevant to a case. It may be that the same delay, if appropriate, could be achieved more appropriately by Recall and adjournment. But, in either event, the Tribunal does not consider that "to put it on ice" would be a less serious step than to recall and the Tribunal would require equally compelling reasons, which it does not find on the facts of this case.

The application arose not because a superior Court had made a pronouncement which would directly affect the authorities as they then stood but because one party wished to attempt to raise issues directly related to this Decision, in another Court. Having set out its views in regard to its competence to decide such issues, the Tribunal concludes that if it has a power to recall, it should be confined to very exceptional circumstances indeed and not used in the manner proposed here i.e. to facilitate proceedings, in another Court, in

connection with matters properly within the ambit of this Tribunal, whether or not they may be also within the jurisdiction of another Court or Courts in other circumstances.

Mr McBrien said that if the Lands Tribunal were to refuse to delay, then the tenant would be obliged to go to the Court of Appeal as well as the High Court, and there would be a multiplicity of proceedings and costs. That contention has a hollow ring when considered against the underlying assumption of this application.

The Tribunal agrees with Mr Kane that there must be certainty and finality for the parties and it would be totally inequitable to recall or put the matter on ice in these circumstances. It refuses the Application to delay.

When, following the further hearing, the Tribunal gave its decision on the application the Tenants applied for the Registrar's Order associated with that to be put on ice. The Tribunal refused.

Having heard the parties on the question of costs the Tribunal orders that the Applicants do pay to the Respondent his costs on the County Court Scale.

ORDERS ACCORDINGLY

5th December 1997

MR M R CURRY FRICS FSVA IRRV ACI.Arb
LANDS TRIBUNAL FOR NORTHERN IRELAND

<u>Appearances</u>:

David McBrien instructed by Messrs John P Hagan, Solicitor, for the Applicants.

Alan Kane instructed by Millar Shearer & Black, Solicitors, for the Respondent.