

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/11/2010

BETWEEN

ALAN LATIMER & PHILIP McGRENAGHAN – APPLICANTS

AND

CURLEY'S SUPERMARKETS (DUNGANNON) LIMITED – RESPONDENT

Re: Screen 3 Global Cinema, Oaks Centre, Oaks Road, Dungannon

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

Background

1. By a lease ("the Head Lease") made 9th November 1999, Curley's Supermarkets (Dungannon) Limited ("the Respondent") demised premises ("the premises") at the Oaks Shopping Centre, Dungannon to Fairmount Trustee Services Limited & Others ("Fairmount") for a term of 150 years.
2. By a sub-lease dated 23rd October 2000, Fairmount sub-let the premises to Oaks Multiplex Limited (the sub-lessee) for a term of 25 years.
3. The Applicants are the Directors and Shareholders of Oaks Multiplex Limited and by a transfer dated 24th August 2005 the Applicants also acquired Fairmount's interest.
4. Oaks Multiplex Limited now wish to further sub-let part only of the premises to DP Realty Limited trading as Dominos.
5. The Respondent has refused to grant consent for the proposed sub-letting.
6. Article 26 of the Business Tenancies (Northern Ireland) Order 1996 makes provision for the Tribunal to intervene in certain circumstances in regard to restrictions on alienation. The application was for an order that:

- a. Landlord's consent to the grant of a Sub-Lease in respect of the premises is not required or in the alternative, and in the event that the Tribunal determines that Landlord's consent is so required, that such consent is being unreasonably withheld by the landlord.
 - b. That the landlord is unreasonably withholding consent for a change of use of the premises from cinema to home delivery pizza service with ancillary takeaway facility.
6. The Tribunal agreed to deal with a preliminary issue in regard to its jurisdiction in these circumstances but declined to deal with the consequences of the provisions relating to user at this preliminary stage.

Procedural matters

7. The Tribunal received from Kevin Denvir BL and Patrick Good BL:
- skeleton arguments;
 - oral submissions; and
 - further written submissions on matters raised by the Tribunal.

The Positions of the parties

8. Mr Denvir BL suggested that the provisions in the Head Lease are an absolute bar on sub-letting of part only of the premises.
9. Mr Good BL suggested that there were no provisions in the Head Lease restricting sub-letting of part only, or, he suggested at the Hearing, in the alternative there was no impediment to sub-letting part only because that would not amount to the Tenant parting with the possession of the premises.

Discussion

10. The Tribunal was referred to:
- The Landlord and Tenant Law Amendment Act (Ireland) 1860, known as Deasy's Act;
 - Wylie; *Irish Land Law* 2nd Ed. at 17.027;
 - *Halsbury's Laws* Vol 13 4th Ed. Reissue paras 164 to 167;
 - Anisminic Ltd v Foreign Compensation Commission and Ors [1969] 2 AC 147;
 - Investors Compensation Scheme Ltd v West Bromwich Building Society [1988] 1 WLR 896;
 - Lam Kee Ying Stn Bhd v Lam Shes Tond [1975] AC 247;
 - Field v Barkworth [1986] 1 All ER 362 at 365e;
 - L A Pye (Oxford) Ltd v Graham [2002] 3 WLR;
 - Husseyin Akici v L R Butlin Ltd [2005] EWCA Civ 1296; and
 - Clarence House v Nat West Bank [2010] 2 All ER 201 at paras 30 and 31.

11. Section 18 of Deasy's Act provides:

"When any lease has been or shall be made containing an agreement against sub-letting or against letting in conacre, the benefit of which has not been waived before the first day of June one thousand eight hundred and twenty-six, it shall not be lawful for the tenant to sub-let the said lands or any part thereof, or, in case of an agreement against letting in conacre, to let the same in conacre, without the express consent in writing of the landlord or of his agent thereto lawfully authorized, testified by his being a party to the instrument of sub-lease, or by an indorsement on or subscription of such instrument, or by a note in writing signed by such landlord or his agent; and no receipt of rent by any landlord or his agent shall be deemed to be a waiver of any such agreement against sub-letting."

12. Article 26 of the Business Tenancies (NI) Order provides a power for the Tribunal to intervene in certain circumstances:

"26.—(1) This Article applies where—

(a) the tenant under a tenancy to which this Order applies wishes—

(i) to alienate, or

(ii) to make any improvement in,

the property comprised in the tenancy; and

(b) his contract of tenancy contains a prohibition on his doing so without the consent of the immediate landlord."

13. The provisions in the head lease in regard to alienation are:

3.8.1 Alienation prohibited

The Tenant must not hold the Premises on trust for another. The Tenant must not part with the possession of the Premises or any part of them or permit another to occupy them or any part of them except pursuant to a transaction permitted by and effected in accordance with the provisions of this Lease.

3.8.2 Assignment, subletting and charging of part

The Tenant must not assign or charge part only of the Premises.

3.8.3 Assignment of the whole

Subject to clauses 3.8.4 and 3.8.5, the Tenant must not assign the whole of the Premises without the consent of the Landlord, whose consent of the Landlord, whose consent may not be unreasonably withheld or delayed.

3.8.4 to 3.8.6: Not relevant

3.8.7 The Tenant must not sublet the whole of the premises without the consent of the Landlord, whose consent may not be unreasonably withheld.

3.8.8 Terms of a permitted sublease

Every permitted sublease must be granted, without a fine or premium, at a rent not less than whichever is the greater of the then open market rent payable in respect of the Premises to be approved by the Landlord before the sublease and to be determined by the Surveyor, acting as an expert and not as an arbitrator and the Rent, to be payable in advance on the days on which the Rent is payable under this Lease. Every permitted sublease must contain provisions approved by the Landlord-

- 3.8.8.1 for the upwards only review of the rent reserved by it, on the basis set out in schedule 2 and on the Review Dates,
- 3.8.8.2 prohibiting the subtenant from doing or allowing anything in relation to the Premises inconsistent with or in breach of the provisions of this Lease,
- 3.8.8.3 for re-entry by the sublandlord on breach of any covenant by the subtenant,
- 3.8.8.4 imposing an absolute prohibition against all dealings with the Premises other than assignment, subletting or charging of the whole,
- 3.8.8.5 prohibiting assignment, subletting or charging of the whole of the Premises without the consent of the Landlord under this Lease,
- 3.8.8.6 requiring the assignee on any assignment of the sublease to enter into direct covenants with the Landlord to the same effect as those contained in clause 3.8.8
- 3.8.8.7 requiring on each assignment of the sublease that the assignor enters into an authorised guarantee agreement in favour of the Landlord in the terms set out in schedule 5 but adapted to suit the circumstances in which the guarantee is given,
- 3.8.8.8 prohibiting the subtenant from holding on trust for another or permitting another to share or occupy the whole or any part of the Premises,
- 3.8.8.9 imposing in relation to any permitted assignment, subletting or charge the same obligations for registration with the Landlord as are contained in this Lease in relation to dispositions by the Tenant,

3.8.9 to 3.8.11: Not relevant

3.8.12 Sharing with a group company

Notwithstanding clause 3.8.1, the Tenant may share the occupation of the whole or any part of the Premises with a company that is a member of the same group as the Tenant within the meaning of the 1996 Order Article 31, for so long as both companies remain members of that group and otherwise than in a manner that transfers or creates a legal estate. ”

Subletting of part only

14. Clearly, the Tenant may sublet the whole of the premises with the consent of the Landlord, whose consent may not be unreasonably withheld. The first question is whether there is an absolute bar on subletting of part only. If so, that would not be a prohibition of the kind that permitted such subletting with the consent of the immediate landlord and so would be outside the ambit of Article 26.
15. On a first reading of the lease, there is no plain provision either absolutely barring subletting of part only or permitting such subletting with consent. Although the lease provides that clause headings do not form part of the document and must not be taken into account, surprisingly, in light of the conclusion the Tribunal has reached below, the lease does not express an absolute bar on subletting of part where one might expect to find it – perhaps at clause 3.8.2 or 3.8.7.
16. The Tribunal agrees with Mr Denvir BL that clause 3.8.1 is a governing provision that prohibits parting with the possession of the premises or any part of them except pursuant to a transaction permitted by the provisions of the Lease. The following clauses contain no provision permitting subletting of part only and, consistent with that, contain provisions at 3.8.8.4 that any sublease must impose an absolute prohibition against all dealings with the Premises other than assignment, subletting or charging of the whole. This was a substantial business letting for a term of 150 years and the lease is a detailed professionally drafted commercial lease. When these clauses and the lease are considered as a whole it becomes clear that the meaning that the document would convey to a reasonable person, having all the background knowledge which would reasonably have been available to the parties in the situation which they were in at the time of the contract, is that there is an absolute bar on subletting of part only of the premises.
17. The Tribunal was referred to subsequent transactions but does not find them of assistance in interpreting what the parties meant at the time of the contract.
18. The Tribunal concludes that that the provisions in the Head Lease are an absolute bar on subletting of part only of the premises.

Parting with possession

19. The Tribunal must be careful to confine itself within the powers specially committed to it. From time to time, it is asked to deal with questions of whether issues are within its legal competence and, the parties agreed that, in this case, it should do so. In deciding where its boundaries lie, the Tribunal may properly investigate matters bearing on the question but must be circumspect about how far it goes in deciding matters that may be outside those boundaries. For completeness, but with reservations, the Tribunal now turns to the question of whether there was no impediment to sub-letting part only because that would not amount to the Applicants parting with their possession of the premises.
20. The Applicants propose to part with factual possession and DP Realty Limited, trading as Dominos, would be granted legal and factual possession of part of the premises. The proposal is not that DP Realty Limited would be allowed merely to use and/or occupy part of the premises but instead, part would be within their exclusive physical control and the Applicants would be physically excluded.
21. As the Tribunal understands Mr Good's BL alternative submission it is that a distinction may be drawn between legal and factual possession, the document should be interpreted as containing a bar on parting with legal possession of the Applicants' interest only and, because the proposed subletting of part would not result in the parting with legal possession of their interest, there was no impediment to the subletting.
22. The Tribunal does not agree. The suggested construction is entirely at odds with the plain meaning of clause 3.8.1 in regard to parting with possession of the Premises. Given the documentary, factual and commercial context, including the fact that covenants regulating alienation and parting with possession were incorporated in most modern commercial leases, the Tribunal concludes that the provision should be given its normal meaning i.e. to include a restriction on granting legal and factual possession of part of the premises to another.
23. The Tribunal concludes that there is an absolute bar to sub-letting part only because that would amount to the Tenant parting with the possession of part of the premises otherwise than pursuant to a transaction permitted by the provisions of the lease.
24. In light of these conclusions the Tribunal determines that it has no jurisdiction in these circumstances.

ORDERS ACCORDINGLY

14th March 2011

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

Appearances

Applicants: Patrick Good BL instructed by McKinty & Wright, Solicitors

Respondent: Kevin Denvir BL instructed by Doris & MacMahon, Solicitors