

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

BT/14/2007

BETWEEN

YUK CHEUN WONG (KNOWN AS KATIE WONG) – APPLICANT

AND

MRS HER JUING JAN – RESPONDENT

Premises: 15d Glen Road, Belfast

Lands Tribunal – Michael R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI

Background

1. Some years ago the Tribunal had ordered the grant of a new lease of premises at 15a Glen Road, Belfast (see BT/18/2003). That lease is coming to an end. Mrs Jan is the landlord. Mrs Wong, the tenant, occupies the premises as a Chinese takeaway.

Procedure

2. The Tenancy Application to the Lands Tribunal was made in February 2007. The Tribunal postponed its proceedings to allow related court proceedings to be completed.
3. Written and oral evidence was received from Mrs Jan and Mrs Wong. Oral evidence was received from William Albert Davidson, an architect and planning consultant. The Tribunal visited the premises. An undertaking in regard to use and occupation was received from Mrs Jan.
4. After the oral hearing, written submissions were received from counsel.
5. Mr A J S Maxwell BL appeared for Mrs Jan, instructed by Nixon & Co, solicitors. Mr M McEwen BL appeared for Mrs Wong, instructed by M D Loughrey, solicitors.

Positions

6. On 23rd January 2007 Mrs Jan served a Notice to Determine opposing the grant of a new tenancy under Article 12 of the 1996 Order. The grounds of opposition were:
 - that the tenant ought not to be granted a new tenancy in view of her persistent delay in paying rent, which has become due (Art. 12(1)(b));

- the tenant ought not to be granted a new tenancy in view of other substantial breaches. (Art. 12(1)(c));
- the landlord intends to carry out substantial works of construction (Art. 12(1)(f)(ii)); and
- the landlord intends that the holding will be occupied for a reasonable period for the purposes of business to be carried on by her (Art. 12(1)(g)(i)).

Opposition on grounds of substantial works of construction was abandoned in October 2008.

Discussion

Intention of Own Occupation for Business

7. In McDevitte v McKillop (1994) NIJB 91 the Court of Appeal endorsed the test of intention laid down in Cunliffe v Goodman [1950] 2 KB 237. 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 ...".

9. A positive undertaking to trade has been considered enforceable. However Mrs Jan gave a written undertaking that if successful in her opposition she would not use the premises for any purpose other than takeaway carried on by her for a period of 5 years and would not let the premises or dispose of them to any third party.
10. The Tribunal believes Mrs Jan's oral evidence, supplemented by her undertaking, that she really is committed to occupying the premises for her own business for some 5 years. It also regards that to be a reasonable period in these circumstances.
11. Mrs Jan's ability to conduct the business was questioned. Mr McEwen pointed out that she produced no evidence of arrangements to employ any supporting staff whereas Mrs Wong currently employs two full-time and one part-time persons. Mrs Jan is not young. Mrs Wong suggested that Mrs Jan did not have the necessary skills for the essential speed and uniformity of cooking. The Tribunal accepts that some details of Mrs Jan's plans were not made clear. But she has had a long involvement in restaurants and takeaways. She gave the Tribunal the impression that she is a determined person. She intends to occupy the premises as they stand. There is no major scheme to be implemented. The fact the Wong's paid a premium to acquire the business assets from Mrs Jan at the time they first took a lease also points to her having a successful business. Without deciding the point, the terms of the

original lease would suggest that the kitchen fixtures and fittings belonged to Mrs Jan. In any event, Mrs Jan's evidence was that she had the essential item of equipment - a cooker - available.

12. The Tribunal accepts that Mrs Jan has reached a genuine decision to occupy the premises for a reasonable period and has a reasonable prospect of being able to carry out the scheme proposed. That decides the matter but for completeness the Tribunal now turns to the other ground of opposition.

Persistent Delay in Paying Rent

13. In Sekhri v Millar (1) BT/97/1996 [1998] the Tribunal considered delay in paying rent. It concluded that the word "persistent" should be given its ordinary meaning and relevant considerations will include the extent of arrears, the duration of delay, any pattern of delay and whether a tenant persisted against resistance, complaints or proceedings by a landlord. However, persistent delay need mean no more than that one instalment was in arrears for a significant period of time, or that rent had been persistently paid late, or a combination of both.
14. Correctly, in the view of the Tribunal, it was accepted that there were persistent delays in payment of rent.
15. This ground of opposition has been established. But the Tribunal has a discretion as to whether or not to grant a new lease. That discretion is to be exercised on a broad rather than a narrow consideration of all relevant circumstances including what is likely to happen if a new tenancy is granted. Once persistent delay is demonstrated, the burden shifts to the Tenant to allay the fears of a recurrence. In practice there is a presumption that any misconduct which the Tribunal finds has taken place during the current lease will continue and the onus shifts to the Tenant to give reasons either to show that it will not or show that the misconduct is such that, on balance, the Tribunal should exercise its discretion to grant a renewal in any case.
16. Mrs Wong was persistently in arrears for most of the 4-year term. For most of that time those arrears exceeded a year's rent. Before the Notice to Determine was served, from July 2004 until late October 2005 rent payments ceased and there was a further missed quarterly payment in May 2006.
17. The conduct between the service of Notice to Determine and the hearing may be viewed as a probationary period during which time the tenant, having received a warning about her misconduct in the form of the Notice to Determine, may set about redeeming his reputation. There was no prompt effort to do so. After the Notice to Determine and Tenancy Application, in May 2007 and subsequently, there were further delays that persisted in some shape or form

until rectified as a result of High Court proceedings and a payment into court, in mid 2008. The amount of the arrears at that time was 17 months at the current rent. Since then there has been prompt payment of rent.

18. The new rent was not determined until some time after the commencement date of the lease. The Tribunal would not regard rent payments as having become due until they were fixed. There appears to have been some delays by Mrs Jan in presenting cheques – some then were not honoured. The Tribunal would make some allowance for time to deal with accumulated arrears as a result of delay in fixing the rent and late presentation of cheques.
19. The parties have not enjoyed a good business relationship and there were personal difficulties between Mrs Wong and her former partner. Making some allowance for slips and breakdowns in communications, against this background of persistent delay there were no explanations from Mrs Wong that would encourage the Tribunal as to her future conduct. There was no attempt to reassure the Tribunal by producing securities or offering an advance payment of a significant amount of rent. Punctual payment of rent very recently is not a powerful factor in Mrs Wong's favour. The Tribunal is not persuaded that Mrs Wong's attitude has changed and prompt payments would be made.
20. The failure to pay rent was compounded by a failure to pay insurance premiums.
21. The Tribunal concludes that Mrs Wong ought not to be granted a new tenancy in view of her persistent delay in paying rent, which has become due.

Other Substantial Breaches

22. A number of issues were raised in connection with the untidiness of the shared yard, grease build up, and shared drains blocked by fat. There were other minor doubtful issues about gutter cleaning and ceiling damage. In the view of the Tribunal these difficulties are not substantial and could easily be remedied by provisions in a new lease.

Conclusion

23. The Tribunal concludes that the landlord has succeeded in her opposing the grant of a new tenancy under two grounds within Article 12 of the 1996 Order:
 - that the tenant ought not to be granted a new tenancy in view of her persistent delay in paying rent, which has become due (Art. 12(1)(b)); and
 - the landlord intends that the holding will be occupied for a reasonable period for the purposes of business to be carried on by her (Art. 12(1)(g)(i)).

ORDERS ACCORDINGLY

24th February 2010

Michael R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI

LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances

Applicant: M McEwen BL instructed by M D Loughrey, solicitors.

Respondent: A J S Maxwell BL instructed by Nixon & Co, solicitors.