

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/4/2007

BETWEEN

DX NETWORK SERVICES LIMITED – APPLICANT/TENANT

AND

BELFAST INTERNATIONAL AIRPORT – RESPONDENT/LANDLORD

**Premises: Unit 3, New Freight Forwarders Buildings at
Belfast International Airport**

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

Belfast – 4th December 2007

Introduction & Background

- 1) In 1998 the holding - Unit 3, New Freight Forwarders Buildings - had been let (“the 1998 Lease”) by Belfast International Airport Limited (“Belfast Airport”) to Hays Commercial Services Limited (“Hays”). During that tenancy Hays improved the premises by constructing an office area (“Hays’ improvements”). DX Network Services Limited (“DX Services”) was formerly part of the same group of companies and it is successor to the business formerly carried on by Hays.
- 2) In 2006, Belfast Airport served a Notice to Determine on DX Services who then occupied the holding under a lease for term of 2 years from 1st July 2004 (“the current tenancy”). Belfast Airport said it was willing to grant a new tenancy. DX Services have made a Tenancy Application to the Lands Tribunal (‘the 2007 Tenancy Application’) under the Business Tenancies (NI) Order 1996 (“the 1996 Order”).
- 3) Terms for a new lease were largely settled. However, Article 18(2) of the 1996 Order provides for certain improvements to be disregarded in the determination of the rent payable under a new tenancy granted under that Order. At the request of the parties, the Tribunal agreed to

determine whether Hays' improvements are to be disregarded in determining a new rent. The question was agreed to be this:

"Should the office area constructed by Hays at the premises be rentalised or does the said office area constitute an improvement which should be disregarded when determining the rent to be paid by DX under a new [2007] tenancy?"

- 4) In summary, Mr Aiken BL suggested that, in the circumstances, an assignment from Hays to DX Services should be deemed to have taken place and it would be inequitable for Belfast Airport to charge it for Hays' improvements. Mr Park BL suggested that, as Hays was not DX Services' predecessor in title, Belfast Airport was entitled to charge for them.
- 5) The Tribunal heard oral argument and later invited and received further written submissions in regard to Pelosi v Newcastle [1981] CA 2 EGLR 36 and "Fortwilliam Golf Club", Cameron & Others v Gordon & Others [1970] BT/11/1996.
- 6) The issue may be of some importance not only to lease renewals but also to rent review clauses that reflect the statutory language.
- 7) It is agreed that if the improvements are included, the rent now would be £55,500 per annum whereas if they are disregarded, the rent would be £53,500 per annum.
- 8) The sequence of events may be summarised as follows:
 - The 1998 lease to Hays was for a term of 6 years from 1st July 1998. The use that Hays made of the building was in connection with its mail business rather than its other, recruitment business.
 - A Landlord's Notice to Determine that lease was served by Belfast Airport on Hays with a termination date of 30th June 2004 - the end of the contractual term.
 - Hays made a Tenancy Application to this Tribunal (Ref: BT/11/2004) on 11th February 2004 ('the 2004 Tenancy Application').
 - Around March 2004 Hays decided to de-merge its mail business from its recruitment business. The mail business would become DX Network Services Limited ("DX Services") which would begin as part of a group but then be floated off as a separate company. Belfast Airport was informed of these proposals.
 - By an agreement of 29th June 2004 the mail business assets of Hays were transferred to DX Services.
 - In July 2004 Hays proposed an "extension of the 1998 lease ... subject to an assignment to DX Services".
 - In November 2004, the de-merger took place.
 - By mid 2005, Belfast Airport was demanding and accepting rent from DX Services.

- In June 2006, the current lease to DX Services was executed for a term of 2 years from 1st July 2004. The rent disregarded Hays' improvements. The engrossed lease was furnished to the solicitors for DX Services (who remained the solicitors for Hays) on the undertaking that a withdrawal of the 2004 Tenancy Application by Hays 'would be arranged'.
- On 20th July 2006 Belfast Airport served a Notice to Determine the current lease on DX Services with a termination date of 21st January 2007.
- Hays made an application to this Tribunal for withdrawal of the 2004 Tenancy Application and that became effective on 25th September 2006.
- On the 16th January 2007 DX Services made the 2007 Tenancy Application.

Disregarding Improvements

- 9) Article 18(2) of the 1996 Order provides for certain improvements to be disregarded in the determination of the rent payable under a new tenancy granted under the 1996 Order:

"In the absence of agreement the rent shall be such as may be determined by the Lands Tribunal ..., there being disregarded-

...

(c) any effect on rent of any improvement-

(i) carried out by the tenant or a predecessor in title of his; or

(ii) where the tenant or a predecessor in title of his has remained in occupation of the holding during two or more tenancies, carried out by him or that predecessor in title during a tenancy other than the current tenancy; other than in pursuance of an obligation to the immediate landlord;

..."

- 10) It was the Town Tenants (Ireland) Act 1906 that led to the enactment in England of the Landlord and Tenant Act 1927 ('the 1927 Act') which was the forerunner of the Landlord and Tenant Act 1954 ('the 1954 Act') in England, and there is a degree of commonality in the treatment of tenant's improvements between the jurisdictions. However, it is important to note that both the legislative history and language differ. As there are such differences both over time and between the jurisdictions, care must be taken to establish the applicable provisions, before relying on any apparently relevant case.
- 11) In England Section 34 of the 1954 Act provided at (1)(c) for the disregard of
 "Any effect on rent of any improvement carried out by the tenant or a predecessor in title of his otherwise than in pursuance of an obligation to his immediate landlord,"
- 12) Mr Park BL referred to Re "Wonderland", Cleethorpes, East Coast Amusement Co Ltd v British Railways Board [1963] HL 2 All ER 775 in which the House of Lords concluded that improvements were to be disregarded only if they were carried out by the tenant or his predecessors in title during the current tenancy and not to improvements carried out during earlier tenancies.

13) In relation to the disregarding of improvements, the 1996 Order was a re-enactment of the provisions of the Business Tenancies Act (NI) 1964 ('the 1964 Act'). The 1964 Act was enacted after Re "Wonderland", Cleethorpes and, among other things, reversed that outcome. (See Article 18(2)(c)(ii).) In England, Section 34 of the 1954 Act was amended, in 1969, also reversing the outcome but adopting a different scheme:

" (1) ..., there being disregarded—

(c) any effect on rent of an improvement to which this paragraph applies,

(2) Paragraph (c) of the foregoing subsection applies to any improvement carried out by a person who at the time it was carried out was the tenant, but only if it was carried out otherwise than in pursuance of an obligation to his immediate landlord and either it was carried out during the current tenancy or the following conditions are satisfied, that is to say,—

(a) that it was completed not more than twenty-one years before the application for the new tenancy was made; and

(b) that the holding or any part of it affected by the improvement has at all times since the completion of the improvement been comprised in tenancies of the description specified in section 23(1) of this Act; and

(c) that at the termination of each of those tenancies the tenant did not quit."

Other provisions

14) Other provisions of the 1996 Order may be relevant:

- Article 5(2)(a) provides that where the tenancy ceases to be a tenancy to which the 1996 Order applies (for example where the tenant no longer occupies the holding) the landlord may terminate the tenancy by serving notice in the prescribed form;
- Article 11 includes provision for the tenant to terminate by withdrawing his Tenancy application; and
- Article 31 of the 1996 Order makes provision for groups of companies, their business, use and occupation but not in regard to improvements.

Tenant & Predecessor in Title

15) The central question is:

"Was Hays a predecessor in title of DX Services within the meaning of the 1996 Order?"

16) Article 2(2) of the 1996 Order defines terms including "predecessor in title":

"'predecessor in title' in relation to ... a tenant means any person through whom ... the tenant, ..., has derived title;"

17) The expression "predecessor in title" has been explored in a variety of contexts within business tenancies. Interpretation is not without its difficulties. The Tribunal was referred to a number of cases including some in England decided under the 1927 Act.

- 18) The 1927 Act provided for a disregard in rent or compensation for improvements and goodwill. The definitions in S.25 (1) include the expressions “tenant” and “predecessor in title”:
- “The expression ‘tenant’ means any person entitled in possession to the holding under any contract of tenancy, whether the interest of such tenant was acquired by original contract, assignment, operation of law or otherwise”
 - “The expression ‘predecessor in title’ in relation to a tenant ... means any person through whom the tenant ... has derived title, whether by will, intestacy, or by operation of law;”
- 19) Although the expression “tenant” is defined in the 1927 Act, it is not defined in the 1996 Order. But, having regard to the business purpose of the legislation, it is clearly an implication of the 1996 Order that the tenant, for purposes of renewal, must have the characteristic of being a person entitled in possession to the holding.
- 20) The expression “predecessor in title” is defined in the 1996 Order (see 16) above).
- 21) The 1927 Act required that to qualify for compensation the tenant must satisfy the five-years period for attachment of goodwill to the premises stipulated by the Act. In Williams v Portman [1951] 2 All ER 539 the tenant Williams had sublet to Freedman for a short period. Williams later negotiated a surrender of Freedman’s sub-lease, entered into possession and resumed his original business. The Court of Appeal held that Williams did not derive his title from Freedman. The Tribunal notes that Williams v Portman perhaps reflects a strict conveyancing view that was followed in Pasmore v Whitbread [1953] CA 2 QB 226 where the Court of Appeal held that the 1927 Act was concerned with the compensation for goodwill attached to the premises and the issue was title to the property, the legal interest which the tenant holds, and not the predecessor to the business.
- 22) Later, after 1969, the tenant’s right to possession was considered in addition to the title to the lease. In regard to the latter, a wide rather than a strict conveyancing interpretation was held to be appropriate in Pelosi v Newcastle [1981]. A landlord, Newcastle, had granted a lease of a coffee bar to a tenant, Cox. Cox sublet to L & T Pelosi who carried out improvements. L & T Pelosi assigned to A & P Pelosi. A & P Pelosi then acquired by assignment the reversionary interest of the immediate lessor – Cox. In his judgment, having regard, in particular, to the incorporation of a definition of “predecessor in title” in the 1954 Act, and to the purpose of the Act, Omrod LJ held that the definition was wide and not confined to its strict conveyancing meaning. Mr Park BL suggested that Omrod LJ was concerned to avoid the anomaly that A & P Pelosi would be found to have destroyed their right to compensation as successors in title to

L & T Pelosi because they had taken an assignment of Cox's interest. Omrod LJ held that the tenant under the Act was the person entitled in possession to the holding. A & P Pelosi could only establish their right to possession by reference to the sublease and that was an integral part of A & P Pelosi's title. Agreeing, Fox LJ said that "what one is looking for are the predecessors in title to the tenant's entitlement in possession to the holding under a contract of tenancy" and it would be altogether unreal to disregard the interest assigned by L & T Pelosi. Also agreeing, Bush J said that the question was "from whence do [A & P Pelosi] derive their title". A & P Pelosi derived their title as tenants in possession not merely from the assignment of the reversion of Cox but also from the original assignment of the sublease from L & T Pelosi. To prove their title to the lease the Pelosis would need to refer only to the assignment to them of the intermediate lessee's [Cox] reversion. To prove their right to possession they would need to refer also to the assignment to them of the first sub lessee's sublease [L & T Pelosi] to account for their being in possession of the holding. The improvements by L & T Pelosi had therefore been carried out by their "predecessors in title" and their claim to compensation under the 1927 Act was good.

- 23) Mr Park BL referred to Brett v Brett Essex Golf Club Ltd [1986] 1 EGLR 154, CA. This was a rent review case and the reference in the lease was held to be a reference to the unamended 1954 Act. As there had been a surrender of the lease under which the improvements had been carried out, and the then current tenancy was one of a substantially different holding, the improvements were not to be disregarded.
- 24) A number of cases have considered circumstances in which improvements were made prior to the grant of a lease. Mr Park BL referred to Henry Smith's Charity Trustees v Hemmings [1983] CA 1 EGLR 94 in which a tenant, Ludovici, took an assignment of a lease of residential premises. The lease expired. Ludovici then agreed with the Trustees that he would carry out improvements and he would be granted a new lease. The new lease was granted after the improvements were completed. Ludovici then assigned the new lease to Hemmings. The Trustees triggered a rent review. The Court of Appeal held that under the Rents Act 1977 the critical question was whether at the time the improvements were done Ludovici was 'a tenant under the regulated tenancy'. Although the term of the new lease was expressed to commence before the date when the improvements were completed, the date of execution was later and the Court held that the improvements were not carried out by an existing tenant and were not effected by the tenant.

- 25) Mr Park BL also referred to Panther Shop Investments Ltd v Keith Pople Ltd [1987] 1 EGLR 131 which was a rent review case. The reference in the lease was held to be references to the unamended 1954 Act. The Court distinguished Re Wonderland Cleethorpes on the facts, in particular, that the relevant improvements had been made by a tenant who had been allowed into possession in advance of the final grant of a lease to enable the tenant to carry out works in anticipation of its use of the premises after the grant of a lease. Improvements were disregarded.
- 26) In Fortwilliam Golf Club [1970], which was a case under the 1964 Act, the Tribunal concluded that certain improvements in 1903 should be disregarded because they anticipated the execution of a later demise in March 1904, and that demise commenced on 1st January 1903, probably because there was an earlier agreement to make a lease for a golf course. Mr Park BL suggested that the continuity of occupation in this way was quite different from improvements being carried out by one commercial tenant and subsequently there being a new tenancy in relation to another.

Conclusions

- 27) A number of matters are not controversial:
- It is clear that the expression “predecessor in title” refers to previous holders of the leasehold estate, not the business. (See Pasmore v Whitbread [1953])
 - It is not suggested that there is written evidence of an assignment of the 1998 lease or any lease from Hays to DX. The Tribunal concludes that there is no such assignment.
 - It is accepted that Hays carried out the improvements as a tenant in possession.
 - Hays is not a “predecessor in title” in its strict conveyancing sense.
 - In June 2004, upon the transfer of the mail business assets of Hays to DX Services, the latter became the occupier in fact of the holding. That was before the end of the contractual term of the 1998 lease and the termination date (30th June 2004) of the 2003 Notice to Determine.
 - From June 2004 until the de-merger in November 2004, under the provisions for groups of companies in Article 31, DX Services’ occupation was probably then equivalent to occupation by Hays.
 - The application to withdraw its 2004 Tenancy Application, by Hays, which became effective on 25th September 2006, brought its tenancy to an end in accordance with Article 11.
- 28) The question that arises is whether or not the expression “predecessor in title” in the 1996 Order is to be interpreted in its strict conveyancing sense. If it is, then Hays is almost certainly

not a predecessor in title of DX Services. If it is not, then the second question therefore is whether Hays qualifies as a predecessor in title of DX Services in a wider sense.

- 29) As in England, the legislation in this jurisdiction incorporates a definition of “predecessor in title”. If the strict conveyancing meaning had been intended, that would have been unnecessary. (See Pelosi v Newcastle [1981].) The Tribunal concludes that the answer to the first question is that the expression “predecessor in title” in the 1996 Order is not to be interpreted in its strict conveyancing sense.
- 30) The second question is more difficult.
- 31) In regard to the current lease, at the date of execution (June 2006) DX Services was in factual occupation but Hays’ tenancy had not been brought to an end. Therefore Belfast Airport did not have good title at that time to make the 2004 lease to DX Services.
- 32) In November 2004, once the de-merger took place, the Article 31 provisions for groups of companies no longer applied and clearly DX Services alone, and not Hays, became the factual occupier of the holding. So from then onwards Belfast Airport could have brought Hays’ tenancy to an end by service of a notice in accordance with Article 5(2)(a) of the 1996 Order. However it did not do so. It was only later, in September 2006, when the 2004 Tenancy Application was withdrawn by Hays, and its tenancy was thereby terminated, that Belfast Airport had good title to make a lease to DX Services.
- 33) Referring to Henry Smith’s Charity Trustees v Hemmings, Mr Park BL suggested that the only useful approach to be taken to the concept of “predecessor in title” is that stipulated by the legislation; this demands that it be established that title was derived through that other person. That was a case under the Rent Act 1977 and among other things that Act does not include a definition of the phrase. However the Tribunal agrees that the expression is not wide enough to include each and every person who at some time has held some interest in the premises.
- 34) In this case the strands of entitlement to the leasehold interest and factual possession are in a tangle. At some points in time the legal position is doubtful. However:
 - Hays made the improvements at a time when it had both legal title and factual possession;
 - Between the time of the improvements and the time of renewal of the current lease, no person other than Hays or DX Services was entitled to the leasehold interest;
 - The leasehold interest was not surrendered to Belfast Airport;
 - As Belfast Airport did not bring Hays’ tenancy to an end by service of a notice in accordance with Article 5, the point in time at which DX obtained both legal title and factual

possession was when Hays withdrew the 2004 Tenancy Application; until then the position was complicated but, without and until that withdrawal, Belfast Airport could not provide good title to grant the current lease;

- Between the time of the improvements and the time of renewal of the current lease, no person other than Hays or DX Services was in factual possession of the premises; and
- At no stage was possession given up to Belfast Airport.

- 35) In these exceptional circumstances the Tribunal concludes that, in ordinary language, it was only, in September 2006, and through Hays that both strands merged and DX Services obtained their title to the current lease and their right to possession of the holding.
- 36) The approach to statutory interpretation has become more purposive. The legislative intention is that the landlord is prevented from appropriating the value of the tenant's voluntary improvements. (See Dawson; *Business Tenancies in NI* SLS 1994). The landlord is not free to charge for improvements that were not part of those premises that were provided by him (of course, if after improvements are made, a landlord resumes possession they become part of his premises and he is free to charge for them). Belfast Airport did not provide premises that included the improvements.
- 37) Mr Park BL pointed out that Hays had made it quite clear that it was doing its utmost to distance itself from DX Services e.g. it would not provide any guarantee. In the view of the Tribunal, evidence of the business arrangements is of doubtful relevance and must be treated with caution as the focus must be on a predecessor to the title rather than a predecessor to the business. In this case the closeness or remoteness of Hays and DX Services after de-merger is irrelevant to the issues.
- 38) For completeness the Tribunal finally turns to issues of estoppel and waiver.
- 39) In the absence of any documentary evidence of assignment, the Tribunal does not accept the suggestion of Mr Aiken BL that the circumstances, including the relationship between Hays and DX Services and the request for a licence to assign, are sufficient for it to conclude that, either before or after the de-merger actually took place, there was an assignment of the leasehold interest from one to the other. That being so, there is no question of Belfast Airport having given consent, to any assignment, by estoppel. (See Deasy's Act at Sections 10 & 43 and Craigdarraigh Trading Company Limited v Doherty and Another [1989] NI 218.) Nor does it accept his suggestion that the provisions of Article 31 of the 1996 Order for groups of companies could create a 'deemed assignment'; those provisions are quite limited in their scope to the business, use and occupation.

- 40) The Tribunal further does not accept the suggestion of Mr Aiken BL that an estoppel or waiver arose as a result of the improvements being disregarded in the rent agreed for the current tenancy. There is no evidence that the issue of whether Hay's improvements were to be disregarded was then raised at all, or that DX Services subsequently altered its position to its own detriment in reliance on anything implied by those circumstances.
- 41) The Tribunal therefore agrees with Mr Park BL that the circumstances did not create an estoppel against Belfast Airport claiming that Hays was not the predecessor in title to DX Services or amount to a waiver of Belfast Airport's right to rely on the absence of an assignment of the leasehold interest in this renewal. But, for the reasons set out earlier, the Tribunal concludes that Hays was a predecessor in title of DX Services within the meaning of the 1996 Order.
- 42) The Tribunal therefore concludes that the answer to the question that it is asked to determine is this. The office area should not be rentalised and the said office area constitutes an improvement which should be disregarded when determining the rent to be paid by DX under a new [2007] tenancy.

25th November 2008

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

Appearances:

Applicant: Joseph Aiken BL instructed by C & H Jefferson, Solicitors.

Respondent: Jonathan Park BL instructed by Johns Elliot, Solicitors.