

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/57/2006

BETWEEN

CAPITA BUSINESS SERVICES LIMITED – APPLICANT

AND

BRITISH BROADCASTING CORPORATION – RESPONDENT

Premises: Blackstaff House, Great Victoria Street, Belfast

Lands Tribunal

The Honourable Mr Justice Coghlin

and

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

Introduction

1. The British Broadcasting Corporation ('BBC') contact/call centres at Glasgow and Belfast handle a vast number of telephone calls and emails each year, dealing with viewers and listeners about anything from simple factual enquiries to serious editorial points, from programme contributions to handling sensitive issues on a freephone action line.
2. In September 1998 after a procurement process the BBC entered into the first service provision agreement (or outsourcing agreement) with Capita Business Services Ltd ('Capita') whereby it would provide customer service contact centre services for the BBC. Accordingly Capita took over the BBC contact centre in Glasgow. Later, to increase capacity, Capita opened a contact centre in Belfast.
3. The Glasgow centre is on upper floor premises in Sauchiehall Street. The Glasgow premises appear to have been taken by the BBC on a short lease and subleased to Capita. The Belfast centre is on premises belonging to the BBC and within Blackstaff House, Belfast ('the Belfast premises'). The premises were occupied by Capita under a lease dated 9th June 1999.

4. In July 2003, after a procurement process, Capita entered into a new provision agreement ('the Service Agreement') for the continuing provision of contact centre services to the BBC. If the Glasgow and Belfast centres are unable to handle the demand, Capita can bring in additional overflow capacity at their other contact centre sites in the UK.
5. The agreement includes an undertaking by the BBC to grant a new lease of the Belfast premises. It also requires the BBC to use reasonable endeavours to offer Capita a new lease of the Glasgow premises on substantially similar terms and if not to reimburse Capita for its additional costs arising from its occupation of them or occupying and moving to alternative premises.
6. Agreements to surrender are valid only if approved by the Tribunal. In 2006 Capita applied for approval of agreements for surrender. These provide for immediate surrender if the Service Agreement is terminated; on the expiry of the Service Agreement; or on the expiry of the term of years of the lease. They also provide for surrender on one month's notice from the landlord if it is agreed to close operations at the premises.
7. At an oral Hearing in Belfast on 19th January 2007 Mr Good BL suggested that the requirement for approval is founded on two objectives:
 - To ensure that a tenant is fully informed of the implications of the step about to be taken; and
 - To prevent abuse by a landlord of its potentially stronger bargaining position to the detriment of a tenant;and the mischief that the Order seeks to prevent does not arise.
8. The Tribunal indicated that it had strong reservations and invited the parties to submit further material, which they did in due course. It also visited the Belfast premises.

The 1996 Order

9. Article 24 of the 1996 Order provides:
 - "Without prejudice to Article 23(7) or 25, or paragraph 6 of Schedule 2, so much of any agreement relating to a tenancy to which this Order applies (whether contained in the instrument creating the tenancy or not) as—
 - (a) purports directly or indirectly by any means whatsoever to preclude any person from making an application or request under this Order; or
 - (b) provides for the termination or surrender of the tenancy in the event of the tenant's making such an application or request; or
 - (c) provides for the imposition of any penalty, restriction or disability on any person in the event of his making such an application or request; or
 - (d) purports to exclude or reduce compensation under Article 23,shall be void. "
10. However Article 25 of the 1996 Order provides:

“Notwithstanding Article 24, an agreement to surrender a tenancy to which this Order applies is valid if (and only if)—

- (a) the agreement is entered into at a time when the tenant is in possession of the holding; and
- (b) the agreement is approved by the Lands Tribunal.”

11. Subject to compliance with Article 25(a), Article 25(b) gives an unfettered discretion to the Tribunal. Article 25(a) is satisfied in this case because Capita already is and has been the tenant in possession of the premises under a lease dated 9th June 1999.
12. The Law Reform Advisory Committee for Northern Ireland Report No 1 on Business Tenancies (LRAC No 2 1994) sets out the background to the 1996 Order. That background included concerns about agreements to surrender. The Committee compared agreements to surrender with the prohibition on contracting out and adopted the same reasoning that led it to recommend strongly that the prohibition remained. That is in complete contrast to the position in England where contracting out is routinely approved and not surprisingly therefore the case law suggests a non-interventionist approach (see Receiver for the Metropolitan Police District –v- Palacegate Properties Limited [2001] Ch 131 and Hagee (London) –v- AB Erikson and Larson (a firm) and Others [1975] 3 All ER 234 at 236). The committee accepted however, that in certain circumstances a valid agreement to surrender is essential but concluded that considerable caution must be exercised to prevent abuse. The recommendations were implemented in the 1996 Order. The positions in Scotland and in the Republic of Ireland also appear to be different.
13. The Tribunal concludes that the policy backgrounds are quite different. It therefore does adopt an interventionist approach and looks at the particular circumstances of each case to determine whether an exception should be made to the general prohibition on contracting out.

The Service Agreement, Agreements to Surrender and Draft Lease

The Service Agreement and Agreements to Surrender

14. Capita is providing the service exclusively to the BBC and to no other person. The service is to be paid for by the BBC only and the sole source of revenue to Capita in respect of the provision of the services is payments made by the BBC under the Agreement.
15. Under Clause 6(1) of the agreement Capita is required to install and commission new IT systems at the Glasgow and Belfast premises.
16. The Service Agreement may end for one of the following reasons:
 - 1) In accordance with the provisions of Clauses 31 and 32 i.e:
 - a) exercise by the BBC of its Option to Break without cause during the term;
 - b) a Default by Capita which results in termination by the BBC;

- c) a Default by the BBC which results in termination by Capita; or
 - d) force majeure; or
- 2) Expiry of the agreement by the effluxion of time.

17. The exercise by the BBC of its Option to Break without cause would result in compensatory payments to Capita including “breakage costs”, compensation for funding costs and for future loss of profits.

18. Clause 33.1 then provides:

“33.1 In the event that this [Service] Agreement is terminated pursuant to Clauses 31 or 32 or expires then:
. . . [Capita] shall surrender the Premises Leases to the BBC and vacate the premises demised by them . . .”

19. The Service Agreement therefore includes agreements to surrender. The draft lease contains procedural provisions relating to these agreements and also further agreements to surrender at the end of the lease and in the event of an agreement to close operations at the Belfast premises (see paras 25 & 26 below).

The Draft Lease and Agreement to Surrender

20. The Belfast premises are first and second floor offices forming part of Blackstaff House together with shared use of the entrance halls, passages, lifts, toilets, Snack Bar and Smoking [sic] Room. The BBC reserves shared use of passages through the premises.

21. The draft lease is for a term of 5 years from 1st January 2004 at a nominal yearly rent of £1.00.

22. Clause 3(xxii) of the draft lease contains an absolute bar against any user other than for the provision of the services pursuant to the Agreement.

23. Clause 3(xxv) contains an absolute bar on assignment (the ‘reasonableness’ qualification within Article 26(1)(b) of the 1996 Order is not fulfilled and Article 26 would not be engaged) so no one other than Capita can be bound by the agreement.

24. Proviso 5 of the proposed lease is in the following form:

“(ix) Agreement to Surrender

(a) In the event:

(1) that the Service Agreement is terminated or otherwise determined pursuant to the provisions thereof; or

(2) of the expiry of the Service Agreement; or

(3) of the expiry of the term of years hereby created;

the Tenant shall immediately surrender this Lease to the Landlord and vacate the demised premises and if required by the Landlord execute and deliver any Deed of

Surrender or other documents reasonably required by the Landlord to confirm and give effect to the said surrender Provided however that such surrender shall be without prejudice to either party's rights in relation to any antecedent claim or breach of covenant.

(b) In the event it is agreed pursuant to the provisions of the Service Agreement to close operation at the demised premises the Landlord may on giving not less than one month's notice to the Tenant require the Tenant to surrender this Lease to the Landlord and on the expiry of the notice the Tenant shall immediately vacate the demised premises and if required by the Landlord execute and deliver any Deed of Surrender or other documents reasonably required by the Landlord to confirm and give effect to the said surrender Provided however that such surrender shall be without prejudice to either parties' rights in relation to any antecedent claim or breach of covenant."

25. Part (a) adds an agreement to surrender on expiry of the contractual term of the draft lease and Part (b) is in effect a landlord's only option to break if it is agreed to close the operation.

The circumstances

26. The Tribunal can anticipate that an arrangement whereby a client leases part of its accommodation to its provider of outsourced services may, in some circumstances, justify treatment as an exception to the general prohibition on contracting out.

27. Mr Michael Stock, Head of Business and Partnerships at the BBC and Mr Paul Johnston Services Director, BBC Information at Capita, gave evidence about how the BBC and Capita worked in partnership and the practical and operational advantages in Capita providing the call centre service from BBC premises. These may be summarised as:

- 1) costs savings;
- 2) integration including
 - (a) Capita staff into the BBC culture; and
 - (b) Information & Communications Technology accessibility and security.

1) Costs Savings

28. Due to an internal reorganisation these premises were vacant in 1998 and locating Capita there saved costs.

2) Integration

29. Capita's services include handling of audience complaints, enquiries and comments and managing free phone action lines (including automated solutions). In addition it provides analyses of audience responses - the daily reaction to programmes and individual reports concentrate on specific programmes and issues.

30. The BBC Charter places an obligation on the BBC to

“ensure that any comments, proposals and complaints made by viewers and listeners of the Home Services are given due consideration by and are properly handled by the Corporation”.

And so the service provided by Capita is central. The Agreement also provides for the introduction of new technology that will allow ‘Glasgow and Belfast centres to evolve into fully integrated multi-channel contact centres’. The BBC considers that it benefits as well from a more connected relationship with its audiences, and more immediate feedback.

31. Developments in technology and business models mean that the processing of telephone calls, e-mails and correspondence can be based on computers that store and manage information electronically. That information and the information required to respond can be accessed instantaneously by persons even thousands of miles away. For these and other reasons Contact Centre services have become highly portable and suitable for outsourcing to skilled and specialist organisations. The location can range from off-site - including anywhere in the world, a neighbouring country, the same country or nearby - to on-site. The choice of location or locations will depend on the individual circumstances. At one extreme the service provided will require to be so integrated with the client that shared occupation on-site, perhaps under a formal licence rather than a lease, is the only option. At the other extreme there may be no need for occupation on-site and the degree of separation may be such that it makes no difference whether or not the service is provided from a remote location.

32. The Belfast Centre and the BBC interface with one another and access one another’s data not at regional level but at national level. A BBC Customer Service Operations team in London gathers and provides information to Capita in Glasgow and Belfast. There are priority arrangements for dealing with Scottish and Welsh contacts but calls from anywhere in the UK may go to either centre. The Belfast centre is not a direct link between the BBC in Belfast and its listeners and viewers in Northern Ireland - a call from Belfast may go to Glasgow and vice-versa. The hub of BBC broadcasting in Belfast is at Ormeau Avenue, not Blackstaff House. The Glasgow centre at Sauchiehall Street is some distance from BBC Scotland at Queen Margaret Drive.

(a) Integration of Capita staff into the BBC culture

33. All Capita staff receive induction training but evidence was given that by on-site location, they could develop a greater understanding of how the BBC operates and how its programmes are made - through the opportunity to become involved in BBC internal events, take part in shadowing programmes, sit in on recordings and attend BBC training events. In the view of the Tribunal this would not seem to depend on but would be assisted by on-site location. The

Tribunal also appreciates that informal contact between the staffs in the shared areas and facilities can make a contribution to mutual understanding and shared values.

34. The service is stated to be intended to be based on much closer physical working between the BBC team and the Capita teams, allowing them to better lead by example on how to handle comments and complaints and for a complainant to receive a much quicker detailed response. The Tribunal doubts whether the Centre's location within Blackstaff House, Belfast facilitates significantly closer physical working than, for example location in other nearby Belfast premises with appropriate telecoms links; but it accepts that would be less convenient.

(b) Information & Communications Technology Accessibility and security

35. The Hardware and Software at the Glasgow and Belfast Centres is provided by Capita. Both are connected to the BBC Voice Virtual Private Network (VPN) and "Reith" - the BBC Wide Area Network (Wan). Each centre has a Local Area Network ('LAN') connecting its Digital Access Signalling Systems, Servers, PCs, telephone handsets etc. Networking switches/routers link both LAN backbones to Reith. At Belfast, Capita has the advantage of access to Reith via a very high capacity link (1Gb) between Blackstaff House and Broadcasting House, Belfast. This link belongs to and is shared only with the BBC. Most of the servers and systems supporting all the Contact Centre services are located at the Belfast Centre.

36. The vulnerability of computer systems and information depends to a large degree on the persons having access to it and the Tribunal accepts that locating Capita staff and systems within a BBC building accessed only through other premises under BBC control provides additional security.

37. At the time of the agreement (2003) the BBC and Capita had been working together for some years and by locating the Belfast Centre in Blackstaff House, Capita was able to use the existing network infrastructure. The Tribunal accepts that relocating to alternative premises would have delayed the take up of the service and required additional resources.

Summary and Conclusions

38. The 1996 Order prohibits contracting out but accepts that in certain circumstances a valid agreement to surrender is essential and allows for such agreements if approved by the Tribunal. But considerable caution must be exercised to prevent abuse and the Tribunal therefore looks at the particular circumstances of this case to determine whether the degree of necessity is such that an exception should be made to the general prohibition on contracting out.

39. Article 25(a) is satisfied in this case because Capita already is and has been the tenant in possession of the premises under a lease dated 9th June 1999.
40. The parties are fully informed and have received advice throughout the negotiations and leading to the conclusion of the Agreements. The parties are both significant commercial entities and they presently enjoy an equality of bargaining power.
41. Capita could perform the service contract without being located on BBC premises. But the provision of the premises by the BBC arises primarily out of the nature of the service contract and is ancillary to the performance of that contract - the premises are to be used to provide the service exclusively to the BBC and to no other person and the sole source of revenue to Capita in respect of the provision of the services at the premises is payments made by the BBC. The contact centre services are a central and integral part of the business of the BBC and the performance must be prompt, accurate and reflect the culture of the BBC. Most of the Capita computer hardware and software supporting all the Contact Centre services is located at the Belfast Centre, taking advantage of a high capacity BBC link between Blackstaff House and Broadcasting House, Belfast. As a result of the earlier 1998 agreement and lease, which may have been based more on convenience, the BBC and Capita had been working together for some years and Capita is able to use the existing network infrastructure at the premises. There are security advantages in locating the Centre premises on a BBC campus. The terms of the draft lease are driven by the Service Provision Agreement. It is important to the BBC that persons operating the contact centre services integrate into the 'BBC culture' and, as the premises are on a BBC campus, informal contact between the staffs is facilitated.
42. Having ascertained what services Capita is required to perform and having regard to the nature of those services, the Tribunal concludes that there was not a critical but a strong requirement for Capita to occupy the premises at Blackstaff House to perform its obligations under the Service Agreement. The occupation of the premises is in turn so dependent on Capita's provision of the services that the need to provide for bringing the service agreement to an end, justifies a corresponding provision in the lease agreement and an exception to the general prohibition. The Service Agreement and the Draft Lease may be considered together as a composite scheme. The Tribunal therefore approves the agreements in the Service Agreement at Clause 33.1 and Proviso 5(ix)(a)(1) and (2) and (b) in the Draft Lease.
43. Proviso 5(ix)(a)(3) of the Draft Lease requires a surrender at the expiry of the term of the lease. That is not approved. But the Tribunal accepts that the lease may otherwise be brought to an end contemporaneously with expiry of the term by surrender under the Service Agreement.

ORDERS ACCORDINGLY

6th May 2008

**The Honourable Mr Justice Coghlin and
Michael R Curry FRICS IRRV MCI.Arb Hon.Dip.Rating Hon.FIAVI
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances

Patrick Good BL instructed by C & J Black.