

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

BT/88/1991

BETWEEN

TERSAIM LAL SHARMA - APPLICANT

AND

JOHN McHUGH - RESPONDENT

Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS

Strabane - 1st October 1991

This application, dated 15th August 1991, for a new tenancy of a shop at No 9 Castle Place, Strabane, County Tyrone, followed a Landlord's Notice to Determine Business Tenancy (dated 25th April 1991) under Section 4 of the Business Tenancies Act (Northern Ireland) 1964 ("the 1964 Act"). That Landlord's Notice opposed a grant of a new tenancy on the following grounds:-

"1. That on the termination of the current tenancy the Landlord intends -

- (a) To demolish or rebuild the premises comprised in the holding or a substantial part of the premises; or
- (b) To carry out substantial works of construction on the holding or part thereof; and that the Landlord could not reasonably do so without obtaining possession of the holding.

2. That on the termination of the current tenancy the Landlord intends that the holding will be occupied for a reasonable period for the purposes, or partly for the purposes of a business to be carried on by him or by a company in which he has a controlling interest, or as his residence; but the landlord cannot rely on this ground if his interest was purchased or created less than 5 years before the termination of the current tenancy, and at all times since the purchase or creation of the Landlord's interest the premises have been let to a tenant occupying them for the purposes of his business."

At this hearing the Respondent abandoned his objection No 1 above.

Mrs Nuala Quinn of Counsel called the Respondent/Landlord Mr John McHugh to give evidence.

The following facts were proved or admitted:-

1. Nos 5, 7 and 9 Castle Place, Strabane are held under two leases

(a) No 9 Castle Place (subject to a right of way from the street via a gateway) held under lease dated 28th April 1883 ("the 1883 Lease") between George Sigerson of the one part and Mary Browne of the other part. The term was for 99 years from 1st May 1883 subject to the payment of the yearly rent of £6.00. By divers mesne assignments and acts in the law the premises became vested in Edward Leo McDevitt and by Assignment dated 28th February 1944 they were transferred to Thomas McHugh, the father of the Respondent in this case.

The lease came to an end by effluxion of time on 1st May 1982. The rent reserved has not been paid nor demanded for over 20 years and the present fee simple owner is not known.

(b) Nos 5 and 7 Castle Place held under lease dated 11th June 1903 ("the 1903 Lease") between John G Lecky, Thomas S Ash and William A S Graves to James J McIlwaine.

The term was for 100 years from 1st November 1902 subject to the payment of the yearly rent of £10.00. By divers mesne assignments and acts in the law the premises became vested in Sarah Richmond and by Assignment dated 28th November 1957 they were transferred to Thomas McHugh, the father of the Respondent.

2. The holding, which forms the subject of this application and is presently known as No 9 Castle Place, Strabane, is constituted of all the premises in the 1883 Lease (and the right of way is incorporated in the shop) together with part of the premises in the 1903 Lease.

3. Mr Thomas McHugh died on 10th November 1983 and his Will contained bequests as follows:-

"1. To my son John my shop at Castle Place, Strabane and my home at Cloughfin, County Donegal.

2. To my daughters Mary Browne and Teresa McHugh the sum of Twenty thousand pounds each.

All the rest residue and remainder of my estate I leave devise and bequeath to my said son John ...".

Because such monies as formed part of the estate were taken up with taxation and other expenses etc disputes arose as whether the bequests to the two daughters took priority and whether the meaning of the bequest to the Respondent was confined solely to the retail shop/s on the premises. An action in the Chancery Division was stayed on terms which as far as the premises (in which the holding is situated) was concerned was to be vested in the Applicant in this case but subject to a contract to charge all lands transferred and vested in the Applicant of the sum of £30,000 for payment to his two sisters equally between them. This settlement was signed 2nd February 1990 (some 6¼ years after the death of Mr Thomas McHugh). The Deed of Assent was dated and signed on 11th April 1991.

4. The holding was the subject of a lease (from Thomas McHugh to Tersaim Lal Sharma) dated 29th October 1980. The term was for five years from the 6th October 1980 subject to a yearly rent of £4,420 payable quarterly. A rent review to take place at the end of two year periods was never carried out but the rent was subsequently increased to £4,940 per annum and that is the rent presently being paid. There was an option given to the tenant to renew the lease for a further five years but such option was not exercised.
5. The Respondent's father carried on the business of selling and repairing bicycles of all kinds - at first trading as Central Cycle Stores and then under his own name Thomas McHugh. Sometime in 1960 he let the holding as a shoe shop and as a hairdressing salon. In 1974, however the Respondent and his father re-opened as a shop selling and repairing bicycles. In 1980 the Respondent left to live outside the jurisdiction and Mr Thomas McHugh ceased trading and let the shop to Mr Sharma.
6. The Respondent, as the result of borrowing money on mortgage of a house in expectation of his inheritance following his father's death, found himself in debt as a result of the time taken to resolve the family differences over the bequests in his father's Will. While those are not yet fully settled he is in debt to the extent of some £15,000 to £16,000 plus what is still due to his sisters. He is in receipt of £80 per week rent from Mr Diver who occupies No 5 Castle Place, Strabane but the rent which Mr Sharma pays goes direct to the Enforcement of Judgements Office.

The Respondent has not applied to the Department of Health and Social Services for help - he told the Tribunal he did not wish so to do.

Mrs Nuala Quinn of Counsel (for the Respondent) submitted:-

1. The Lands Tribunal should take into account that the Respondent's only option to obtain a reasonable standard of living is to re-open No 9 Castle Place as a cycle shop. He had been in the business at that shop for some years with his father and knows it completely.
2. Problems arose out of the drafting of his father's will and with the title to the properties and this left him in debt.
3. The Respondent refuses to rely on assistance from DHSS and he wishes and is willing to work at his own business.
4. The Respondent has the will to carry out his intention. The cycle business is not a large capitalised business and because of the nature of that business the premises do not need to be refurbished and little (if any) fitments are required to be installed.
5. The Applicant could have applied to exercise his option for a further five years but did not so do.
6. On the question of title:-

The Respondent submits that he is the owner of the fee simple - he recollects his father telling him that he had bought out the fee simple but no deed has yet come to light nor has the person who would have owned the fee simple been found. The Respondent submits that in any event he is the owner by adverse possession. The rent reserved has not been paid or demanded for over 20 years.

Refers to Section 14 of the 1964 Act. In particular Section 14(3) the tenant must serve his application for a new tenancy on any person having a reversionary estate which would be affected by the grant of a reversionary tenancy. Thus the Lands Tribunal if it does not uphold the objection of the Respondent cannot grant a new tenancy until the reversioner has an opportunity to appear in front of the Lands Tribunal.

7. The Applicant is challenging the right of the Respondent to oppose an application, on the ground that he intends to occupy for the purposes of a business carried on by him, because his estate was purchased or created at the date of the Assent on 16th April

1991 and that date is within five years of the termination of the current tenancy (5th November 1991).

The Respondent submits that is incorrect and the date his estate was created was from his father's death on 10th November 1983. Thus more than five years has elapsed.

The tenant has always paid his rent to him since that date - he is not taken by surprise.

Mr John Duffy LLB (of McCanny and Keohane, Solicitors) for the Applicant submitted:-

1. The Tribunal must be satisfied that the Respondent's wish, to occupy the holding himself for the purposes of his business, has moved out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision as per the words of Asquith LJ in Cunliffe v Goodman [1950] 2 KB 237; [1950] 1 All ER 720.
2. All the Respondent has done is to approach a cycle wholesaler and to obtain a letter from him dated 17th September 1991 which reads "In reply to your letter regarding the re-opening of your cycle business. We would be happy to offer you three months extended credit commencing 1st October 1991."

The wholesaler was not in Court to give evidence.

3. Anyone contemplating setting up business would
 - (a) explore the market demand;
 - (b) find out the initial cost of setting up that business;
 - (c) arrange for finance eg by contacting his bank. Yet, there was no letter from his bank put in evidence;
 - (d) consult on accountant;
 - (e) would estimate (at least) the cost of the initial stocking of the shop.

Submits that the Respondent's actions indicate that he has fallen far short of the "valley of decision".

4. The Lands Tribunal should take into account the nature of the Tenant and of the tenancy. It should bear strongly in the Tribunal's consideration that there is not one complaint about the Tenant and the tenancy.
5. Even if the Tribunal finds that the Respondent has "crossed the bar" then submits:-
 - (a) Mr Thomas McHugh's Will spoke from death. The devise did not bear fruit until the Settlement was finalised. There was a dispute which formed the action in Chancery. It was only after the terms of that Settlement were agreed that the sisters agreed to let the Respondent have the property. At the earliest he had an interest only from the date of Assent on 6th February 1990 and the registration thereof on 16th April 1991.
 - (b) If that is correct then the Lands Tribunal has no jurisdiction because of the five year rule in Section 10(3) of the 1964 Act.

DECISION

In this case the only objection to a new tenancy being granted to the Applicant is that the Respondent intends occupying the holding for his own cycle business.

It is accepted authority that the Respondent's intention must be established at the date of this hearing (Betty's Cafes v Phillips Furnishing Stores [1959] AC 20; [1958] 1 All ER 607). Thus the Respondent in his landlord's Notice to Determine Business Tenancy under Section 4 of the 1964 Act stated his intention in the objection at that date viz 25th April 1991 and on the date of this hearing on 1st October 1991 he had to show that he had satisfied the Lands Tribunal that (in the words of Asquith LJ in Cunliffe v Goodman [1950] 2 KB 237; [1950] 1 All ER 720) the project had moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision.

The Respondent's intention has not been proved to the satisfaction of the Lands Tribunal to be a real, fixed and settled intention. All he has been able to show to indicate the steps he has taken since 25th April 1991 is a letter dated 17th September 1991 from S Osborne and Company Limited as follows:-

"In reply to your letter regarding the re-opening of your cycle business. We would be happy to offer you three months extended credit commencing 1st October 1991."

No additional evidence was given regarding this letter - it was not clear to the Tribunal that unequivocally it enabled the Respondent to completely stock a vacant shop using the extended credit, nor, because the signatory to that letter was not in Court, could it be discovered that he knew the extent of the Respondent's other financial difficulties.

The Respondent told the Tribunal that he had been in business with his father between 1974 and 1980 and he retained the tools required since then.

The Tribunal would have expected other steps to have been taken - over five months have expired since the Landlord's Objection was served; especially in view of his present financial difficulties with the Northern Bank and other smaller creditors and that he has not yet carried out the terms of the settlement of 2nd February 1990 which stayed the action in Chancery in that the sums due to his sisters as beneficiaries under his father's Will have not yet been paid.

The least the Tribunal would have expected are consultations with an accountant, his own Bank, and LEDU. He had taken no advice as to how the market for the sale and repair of cycles was forecast to be in the immediate future (especially in the present problems of all retail businesses) and, bearing in mind that about 11 years has passed since he gave up the cycle business which he operated with his father, he could not show that his tools were sufficiently up to date as that the more modern cycles with many gears could be maintained.

Looking overall at all these matters the Lands Tribunal is not satisfied that the Respondent has established his ground of objection to a new tenancy. Therefore, in accordance with Section 12 of the 1964 Act, the Lands Tribunal must grant a new tenancy to the Applicant. The parties must have some time to agree the terms of the tenancy and the rent payable but if agreement is not possible in a reasonable time the Tribunal will expect proofs of evidence to be submitted soonest so that the plenary hearing may proceed in good time.

The alternative submission that the Respondent's interest only commenced from the date of Assent in 6th February 1990 was neither fully supported nor fully resisted by the parties submitting authorities for their respective positions. But as the matter was said to touch on the Lands Tribunal jurisdiction, the Tribunal takes the view (on the limited legal arguments submitted) that the Respondent had an equitable estate at the time that probate was granted; but because of the limited legal arguments and the Tribunal's decision on the facts, it is not necessary for the Tribunal to decide that matter at all.

The Applicant is granted a new tenancy by the Tribunal, the terms of which will be for the parties to agree. Failing that agreement the disputed matters should be submitted to the Tribunal to decide in further hearing of this Application.

Having heard the parties the Tribunal reserves the question of costs.

ORDERS ACCORDINGLY

1st November 1991

**MR A L JACOBSON FRICS
LANDS TRIBUNAL FOR NORTHERN IRELAND**

Appearances:-

Mr John Duffy LLB (of Messrs McCanny and Keohane, Solicitors) for the Applicant.

Mrs Nuala Quinn of Counsel (instructed by Messrs R H O'Connor and Company, Solicitors) for the Respondent.