BT/43/2015

IN THE LANDS TRIBUNAL FOR NORTHERN IRELAND

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IN THE MATTER OF THE BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

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BETWEEN:

CAR PARK SERVICES LIMITED

Applicant

-and-

BYWATER CAPITAL (WINETAVERN) LIMITED

Respondent

____

Lands Tribunal – The Honourable Mr Justice Horner and Henry Spence MRICS Dip Rating IRRV (Hons)

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HORNER J

A. BACKGROUND

[1] Car Park Services Limited ("the applicant") occupies premises comprising a car park located at Winetavern Street/Gresham Street, Belfast ("the reference property") and which covers an area of some 0.9 acres. By an agreement in writing dated 1 December 1997 ("the agreement") the applicant was granted the right to use the reference property for the purpose of parking motor vehicles and for no other purpose. This agreement, made between Eamon McCann as owner of the land and the applicant, commenced on 1st December 1997 and was to continue four weekly until revoked by either party giving four weeks' notice.

[2] The applicant continued to occupy and operate its car parking business from the reference property until sometime in 2008 at which time it became aware that Mr McCann had acquired several derelict properties adjacent to the reference property. Shortly thereafter there was an agreement between Mr McCann and the applicant that the applicant could demolish the derelict buildings and occupy the additional areas for its car parking business. This agreement was undocumented. The planning application to permit the applicant to continue with the car parking business on the enlarged site was made by Mr McCann and not the applicant.

[3] In 2009 the applicant carried out the works required to merge the additional areas into its car parking operation. These works created a car park which was some 0.3 acres larger than the reference property ("the new car park"). The applicant has occupied the new car park for its car parking business from 2009 to the present and continues to do so.

[4] In or around 13 March 2013 Mr Gavin Clarke of Osborne King was appointed fixed charge receiver ("the receiver") of Mr McCann's interest in the new car park. Subsequently, on 12 February 2016, Bywater Capital (Winetavern) Limited ("the respondent") became the successor in title to Mr McCann and since that date has held the new car park subject to the agreement.

[5] On 26 March 2015 the applicant had made a request to the receiver for a further tenancy of the new car park, pursuant to Article 7 of the Business Tenancies (Northern Ireland) Order 1996 ("the Order"). This request was for a tenancy of the new car park commencing on 1st October 2015 for a term of 5 years.

[6] On 26th May 2015 the receiver served a notice in response to the request, advising the applicant that he would oppose a tenancy application on the following grounds:

> "A (i) The tenant is not a tenant of a tenancy to which the Business Tenancies (Northern Ireland) Order applies.
>
> (ii) The document described in the Tenant's Request for a New Tenancy as 'the current lease' is not a lease and grants no estate in the property therein described, rather it is a licence."

[7] The receiver's notice also made the following proposals:

> "B Without prejudice to the grounds expressed at A, in the event that a court of competent jurisdiction determines that the current lease be construed as a lease then the landlord would be willing to grant a new lease on the following terms:
>
> (i) The new lease will comprise only the property in the current lease.
>
> (ii) The rent payable under the new lease shall be calculated in the same way and on the same basis as that in the current lease.

> (iii) The proposed date of commencement of each duration of the new tenancy: 5 years from 1st October 2015.
>
> (iv) The other terms of the tenancy shall be the same as those in the current lease."

[8] Subsequently, on 17 June 2015 the applicant referred the matter to the Lands Tribunal under Article 10 of the Order.

[9] There followed a number of mentions/reviews before the Member of the Lands Tribunal. Mr McCann's interest in the reference property was acquired by the respondent on or about 12 February 2016. On the eve of the mention/review of 24 February 2016 before the Member, an argument was raised for the first time by the solicitors who had just been appointed for the receiver that even if a lease was created by the agreement, the tenant was not entitled to request a new tenancy under Article 7 of the Order.

[10] The parties agreed that the following questions be determined by the Tribunal as preliminary issues:

(i) Did the agreement create a lease or a licence? ("Issue 1")

(ii) If it did create a lease, was the tenant entitled to request a new tenancy under Article 7 of the Order? ("Issue 2")

(iii) If the applicant was not legally entitled to request a new tenancy under Article 7, is the respondent nevertheless now estopped from disputing or has it waived its right to dispute, its entitlement so to do? ("Issue 3")

B. THE AGREEMENT

[11] The terms of the agreement entered into between the applicant and Mr McCann are as follows:

> "THIS LICENCE made the 1st day of December 1997 between EAMON McCANN of 15 Wellington Park, Belfast (hereinafter called "the Licensor") of the one part and CAR PARK SERVICES LIMITED having its registered office at 16 Donegall Square South, Belfast (hereinafter called "the Licensee") of the other part.
>
> WHEREBY IT IS AGREED AND DECLARED as follows:-

(1) Subject as hereinafter provided the Licensor will permit the Licensee, its servants and agents, the right to use the land (hereinafter called "the car parking site") described in the Schedule hereto for the purposes of parking motor vehicles and for no other purposes whatsoever.

(2) This Licence shall be exclusive to the Licensee commencing on the 1st day of December 1997 and continuing four weekly until revoked by the Licensor or determined by the Licensee by the giving of four weeks' written notice.

(3) [This relates as to how the Licence fee is to be calculated and is partly determined by the car park revenue.]

(4) The Licensor shall not be liable to the Licensee its servants or persons authorised by the Licensee to enter upon the car parking site for the purpose of parking motor vehicles, or otherwise, in respect of any personal injury, loss, damage or inconvenience howsoever caused to such persons or to any goods and chattels or motor vehicles brought by any such person onto the car parking site.

(5) The Licensee shall pay all rates and taxes (if any) payable in respect of the car parking site.

(6) The Licensee shall erect at its own expense whatever additional gates, paling fences or barriers that it considers necessary for using the land for car parking purposes and shall keep the surface of the car parking site and existing fences and entrance gates on the site in good order and condition to the reasonable satisfaction of Licensor.

(7) The Licensee shall keep the car parking site free of any rubbish and litter and shall make proper arrangements for the removal thereof.

(8) The Licensee shall be solely responsible for the effecting of any necessary insurance.

(9) The Licensee shall arrange and obtain all necessary statutory approvals including Planning

> Permission if necessary and renew these as and when necessary.
>
> (10) The Licensee shall not erect on the car parking site or any part therefore any building or structure other than those necessary in the operation of the car park and shall remove same upon the termination of the Licence.
>
> (11) The Licensee shall indemnify and keep indemnified the Licensor from and against all actions, proceedings, costs, claims and demands by third parties in respect of any damage or liability caused by or arising on the site in respect of damage to property or personal injury or any other claim arising out of the Licence hereby granted.
>
> (12) It is hereby further agreed between the parties hereto that this Licence creates no tenancy or lease whatever between the parties and that possession of the car parking site is retained by the Licensor subject however to the rights created by this Licence and that such rights are not assignable by the Licensee.
>
> SCHEDULE REFERRED TO
>
> All that plot of ground situate at Winetavern Street/Gresham Street, Belfast and shown for general identification purposes only on the map or ground plan attached hereto and therein surrounded by a red line."

[12] There was some involved discussion about the effect of the increase in area of the car park in 2008. It seems that this must necessarily involve a surrender by the applicant, if the agreement was in fact a lease, and a re-grant on the same terms as before by Mr McCann to the applicant: see Woodfall on Landlord and Tenant, Volume 1 at 17.026 and Jenkin R Lewis and Son Ltd v Kerman [1971] Ch 477 and Section 7 of Deasy's Act. Mr Hanna QC did take the point that the 2008/9 "lease" was not identified in the application for a new tenancy. We are mindful of what Barry J said in Barclay's Bank Limited v Ascott [1961] 1 All ER 782, namely:

> "…. the question which the court really has to consider is whether the notice given by the landlord has given such information to the tenant as will enable the tenant to deal, in a proper way, with the situation (whatever it maybe) referred to in the notice.

> It is clear, I think, from the authorities which have been cited to me that this notice should be construed liberally, and provided that it does give the real substance of the information required, then the mere omission of certain details .... will not in fact invalidate the notice."

This guiding principle has been adopted by the Lands Tribunal for Northern Ireland e.g. see Joyland Amusements (NI) Limited v AS and D Enterprises Limited BT/102/1989.

For the reasons given no prejudice has been suffered by the respondent and in those circumstances we have no hesitation in agreeing such amendment as may be necessary under General Rule 12 to permit the applicant to take this point.

C. ISSUE 1

[13] The parties cannot agree whether the applicant has been granted a lease or a licence by Mr McCann. The applicant says that although the agreement is described as a licence it is in reality a lease. The respondent says that it is clearly stated to be a licence and the provisions are consistent with this description. This briefest of summaries does not do justice to the careful, well-thought out and cogent arguments advanced with great skill by Mr Edwin Johnson QC for the applicant and Mr Nicholas Hanna QC for the respondent. We should at this stage acknowledge the great assistance the Lands Tribunal has had from both legal teams in the resolution of all three issues.

[14] The determination of whether an agreement to occupy land constitutes a lease or a licence is one that has assumed considerable importance when statutes began to provide greater protection for tenants as opposed to licensees. This happened with residential properties under the Rent Acts and with businesses under the Landlord and Tenant Act 1954 in England and Wales. It also happened in Northern Ireland with the Business Tenancies Act (NI) 1964. It is surprising that such a fundamental issue, namely whether an agreement is a lease or a licence, still troubles the courts and tribunals. As one commentator, Peter Williams, said in exasperation in the Landlord and Tenant Review (2014), "why was not such a basic issue settled some time by in the 17th century".

Well the issue has not been settled. It continues to trouble the legal community in Northern Ireland in general, and the business community in particular, given that a business tenancy is subject to the regime of the Business Tenancies (NI) Order 1996 ("the Order") whereas premises occupied under a licence enjoy no such protection.

[15] The parties were agreed that the correct way to construe an agreement such as the present one is that set out by Lord Hoffmann in Investors Compensation Scheme v West Bromwich Building Society [1998] 1 WLR 896 and discussed in Rainy Sky SA

v Kookmin Bank [2011] UKSC 50 by the Supreme Court. Lord Clarke said at paragraph [14]:

> "I agree with Lord Neuberger (also at para 17) that those cases show that the ultimate aim of interpreting a provision in a contract, especially a commercial contract, is to determine what the parties meant by the language used, which involves ascertaining what a reasonable person would have understood the parties to have meant. As Lord Hoffmann made clear in the first of the principles he summarised in the Investors Compensation Scheme case (1998) 1 WLR 896, 912H, the relevant reasonable person is one who has the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

[16] In Street v Mountford [1985] AC 809 the House of Lords considered the issue which lies at the heart of the present dispute. This concerned a residential property as opposed to a commercial one, although there is no real dispute that the principles this Tribunal must apply are the same. In that case it was conceded by the landlord that the agreement "granted exclusive possession to Mrs Mountford" and the landlord sought to argue that "an occupier granted exclusive possession for a term of rent may nevertheless be a licensee if, in the words Slade LJ in the Court of Appeal that:

> "There is manifest the clear intention of both parties that the rights granted are to be merely those of a personal right of occupation and not those of a tenant."

[17] It was important for Mrs Mountford to establish that there was a tenancy because she then would have the protection of the Rent Acts which would not be available to her if she occupied the premises as a Licensee. In this case it is just as important for the applicant to establish that it has a lease so that it can enjoy the protection of the Order. The courts and tribunals are and should always be vigilant to ensure that parties do not escape the intended legal consequences of a statute by a "pretence".

[18] In giving the judgment of the court Lord Templeman said at 819E-F:

> "Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the

> consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacturer of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

The position in the Republic of Ireland appears to be the same: see Irish Shell and BP Limited v Costello Limited [1981] IRLR 66 at 70.

[19] Where there is grant of exclusive possession to an occupier for a term and at a rent, then there is in law a tenancy except in certain rare exceptions which are not relevant to the present dispute between these parties. The relationship of landlord and tenant can only exist if the tenant is given exclusive possession of the property. This concept should not be confused with exclusive occupation. Wylie on Irish Landlord and Tenant Law at 2.36 refers to the right of the occupier to call the place his own as being important determining whether it is exclusive possession. The land occupied under a licence remains under the "control of the licensor". As Wylie makes clear the concept of "possession" in this context, as in other contexts, "tends to be an elusive one".

[20] Arden LJ said in NCP v The Trinity Development Company (Banbury) Limited [2001] EWCA Civ. 168 at paragraph [12]:

> "… exclusive possession means the ability to exclude all persons, including the landlord, from possession save in so far as the landlord is exercising a right of re-entry conferred by the agreement."

[21] Sometimes it can be relatively easy to draw the line and determine that there has been exclusive possession: see ESSO Petrolem Co Limited v Fume Grange Limited and Others [1994] 2 EGLR 90. In other cases it can be more difficult to know where the line should be drawn e.g. National Car Parks Ltd v The Trinity Development Co (Banbury) Ltd [2001] EWCA Civ. 1686.

[22] Both parties adduced evidence before the Tribunal through witness statements and oral testimony. The Tribunal found this evidence to be of limited value in construing the agreement.

[23] The Tribunal makes the following findings:

(i) The applicant and Mr McCann were not "asymmetrical". The applicant, whose Directors include Mr McHugh, an accountant who gave evidence and Mr O'Kane, a builder/surveyor, was experienced in running car parks. Mr McCann is a well-known music promoter and property developer in Northern Ireland.

(ii) Both Mr McHugh and Mr McCann purported to give evidence as to the legal advice they were given or not given. On their versions of events they were poorly served. We have not heard evidence from their solicitors. In any event what is important is that each side had the opportunity to take legal advice and both had solicitors, who are well regarded, acting on their behalf. If the advice that they received was defective, or if they chose to obtain no advice, and we make no finding on either of these issues, that is a matter between them and their solicitors.

(iii) Mr McHugh was somewhat unforthcoming about his knowledge of the legal consequences of the agreement being a licence and not a lease. We are satisfied given the nature of the applicant's business and from having listened to him give his testimony that he knew in 1997 and (again in 2009) that if the agreement was a licence the Order would not apply. On the face of the correspondence, his fellow Director, Mr O'Kane, appears to have proceeded on the basis that this was a licence: see letter of 27 November 1997 from Mr O'Kane enquiring whether under the licence there was a right to erect advertising hoardings.

(iv) Mr McCann knew that there was a difference between a licence and a lease. However, he considered that after 18 months the licence became a lease and that there was protection under the Order. This is either a result of him misunderstanding the advice given by his solicitor or his solicitor giving incompetent advice. There was also evidence that Mr McCann did not use the car park to park his own motor vehicle when he was in the vicinity unless he paid for a ticket. He considered that "he could not be using it for my convenience". (He had a vested interest in the turnover of the car park as this was linked to the rent that the applicant was required to pay although Mr McCann's fee would have made no difference.)

[24] In any event we do not find the subjective understanding of the parties to be of any real assistance. Nor do we consider that Mr McCann's use of the car park provides any real clue as to the construction of the agreement given that he had little need to use it and he either received incorrect legal advice or misunderstood that legal advice. What Mr McCann thought he could or could not do is of little weight,

if any, in determining the precise legal nature of the document he entered into with the applicant. As Mustill LJ said in Hadjiloucas v Crean [1988] 1 WLR 1006 at 1024G:

> "Any layman asking to consider whether an agreement gave exclusive possession to an occupier would be likely to think that one of the most useful pointers would be the way in which the parties conducted themselves whilst the agreement was in force but before any dispute had arisen. In this he would be mistaken, so far as the general law of contract is concerned; and I can see nothing in the reported cases to suggest there are any special rules of construction which apply only to agreements said to fall within the Rent Acts."

[25] Clearly the agreement is referred to throughout as a licence and Mr McCann is described as a licensor and the applicant as the licensee. Clauses 1 and 2 give the applicant the right to use the car park for parking motor vehicles "and for no other purposes whatsoever". It is a personal right given to the applicant only. We consider that this clause favours the agreement being a licence given that what is being granted is an exclusive personal right to park motor vehicles only on the reference property or the new car park.

[26] Clause 4 seeks to ensure that Mr McCann will not be liable to the Licensee in respect of personal injuries, loss or damage suffered by the applicant or its servants or persons using its car park. If the applicant had exclusive possession, then the needs for such a clause would be reduced. However, we can understand why out of an abundance of caution a landlord might wish to include such a clause in an agreement. The clause is therefore neutral and no assistance in construing the agreement.

Clause 5, Clause 6, Clause 7 and Clause 8 are not helpful in reaching any conclusion as to the nature of the agreement. Clause 9 relates to applications for planning permission. This was not followed. But as we have said, we do not consider how the agreement operated on the ground to be of any real assistance in the construction of the agreement.

Clause 10 relating to the erection of buildings is neutral. The same applies to Clause 11 and the right to an indemnity which does not assist us either way in our deliberations.

[27] Clause 12 is in very straightforward terms. The parties are expressly agreeing that there is no tenancy or lease between the parties and that possession of the car parking site is retained by Mr McCann subject only to those personal rights created by the licence and further that such rights are not assignable by the applicant to

anyone else. Clause 12 could not be clearer. The objective intention of both parties captured in this clause is that the applicant will have a licence, that he will not have exclusive possession and that the relationship will not be that of landlord and tenant. The applicant and its Directors should have been in no doubt when they signed this agreement that what they were committing to was a licence, not a lease and that while the applicant had exclusive personal rights of occupation for the purpose of carrying on a car park, the applicant did not enjoy exclusive possession of the car park and thus did not have the protection of the Order.

[28] In National Car Park Limited v The Trinity Development Co (Banbury) Limited Arden LJ said at paragraph [29] in respect of a declaration that the licence "is not intended by either party hereto to confer upon the Licensee any right or interest in the nature of a tenancy and gives no proprietary interest to the Licensee in the Licence Premises", as follows:

> "While this declaration is not, of course, determinative, as I have explained, the court it seems to me, must proceed on the basis that where two commercial parties have entered into an agreement of this nature, calling it a licence, they have received appropriate advice, they are aware of the importance of the term and they were intending to enter into such an agreement with an appreciation of its significance. I also bear in mind there has been no suggestion that any of the terms of this agreement constitute a sham, in the sense they were never intended to be reacted upon as a result of some other agreement between the parties."

Buxton LJ said at paragraph [41]:

> "[41] Such intention to grant exclusive possession has indeed to be demonstrated by the agreement. That is to say, one looks at the agreement as a whole and, looking at this agreement, it seems to me, as I understand it seems to my Lady, that Clause 8, in the terms it is set out, must be at least potentially relevant to the intent that is to be collected from the agreement as a whole. The parties say in Clause 8 (and it is assumed that they were parties acting with the benefit of skilled legal advice which fully understood the implications of the nature of a tenancy as set out in Street v Mountford):

> **"This licence is not intended by either party hereto to confer on the Licensee any right or interest in the nature of a tenancy."**

> The use of the phrase **in the nature of a tenancy** must in my judgment indicate that the parties had in mind the prime requirement for the existence of a tenancy delineated in Street v Mountford; that is to say exclusive possession of the premises."

These comments apply to the present case.

[29] We also note that there is no covenant of quiet enjoyment in the agreement. We appreciate that such a covenant is implied by law: see Section 41 of Deasy's Act. However, neither of us has ever seen a business lease where such a covenant has been omitted. The reason for this is that the covenant implied by Section 41 of Deasy's Act is so wide that any solicitor for a landlord would take care to circumscribe its operation. Thus, the landlord will almost always give a narrower covenant of quiet enjoyment to the tenant. A landlord is permitted to do this eg see Leonard v Taylor [1872] IR 7CL 207 and the discussion at 14.07 of Wylie's Landlord and Tenant. We therefore find that the absence of an express covenant of quiet enjoyment is evidence that the agreement was not intended to be a lease.

[30] Further, almost invariably a commercial lease will reserve to the landlord an express right of entry on the premises demised. Of course, no such reservation is necessary if the agreement is a licence. The omission of such a term in the present agreement provides further support for our conclusion that it is a licence and not a lease eg see Essex Plan Ltd v Broadminster [1988] 56P and CR353.

[31] Finally, in another case involving whether an agreement constituted a lease or a licence, Clear Channel UK Limited v Manchester City Council [2005] EWCA Civ. 1304 Parker LJ said at paras [28] and [29]:

> "[28] I venture to make one additional comment, however. I find it surprising and, (if I may say so), unedifying that a substantial and reputable commercial organisation like Clear Channel, having (no doubt with full legal assistance) negotiated a contract with the intention expressed in the contract (see Clause 14.1, quoted above) that the contract should not create a tenancy, should then invite the court to conclude that it did.
>
> [29] In making that comment I intend no criticism whatever of Mr McGhee who sought valiantly to make bricks without straw. Nor, of course, do I

> intend to cast any doubt whatever on the principles established in Street v Mountford. On the other hand the fact remains that this was a contract negotiated between two substantial parties of equal bargaining power and with the benefit of legal advice where the contract so negotiated contains not merely a label but a clause which sets out in unequivocal terms the parties' intention as to its legal effect, I would in any event have taken some persuading that its true effect was directly contrary to that expressed intention. In the event, however, as the judge so clearly demonstrated the case admits of only one result."

[32] In quoting Jonathan Parker LJ, we likewise exclude Mr Johnson QC from any criticism. He has argued a difficult point fairly and as effectively as the facts permit. Accordingly in respect of Issue 1 we conclude that the agreement created a licence, not a lease.

D. ISSUE 2

[33] The relevant statutory provisions are:

(i) Article 2(2) of the Order which states:

> "**Term certain** in relation to a tenancy means any definite period of certain duration whether or not the tenancy is renewable for further such periods."

(ii) Article 4(1) states:

> "This Order does not apply to -
>
> (c) A tenancy granted for a term certain not exceeding 9 months, except where the tenant has been in occupation for a period which, together with any period during which any predecessor in the carrying on of the business carried on by the tenant was in occupation, exceeds 18 months."

(iii) Article 7(1) states:

> "A tenant may, subject to and in accordance with this Article, make a request for new tenants where the current tenancy is —
>
> (b) a tenancy granted for a term certain not exceeding 9 months, where the circumstances are as mentioned in the exception in Article 4(1)(c)."

[34] Briefly summarised the respective cases are as follow.

[35] Mr Johnson QC for the applicant says that the common law position, the definition and outworking of including a periodic tenancy as a term certain all support the applicant's case that the applicant is entitled to bring an application for a new tenancy under Article 7(1).

[36] Mr Hanna QC for the respondent says that a periodic tenancy is not a term certain. It must not be confused with a renewable lease. A periodic tenancy cannot come within the definition because it is only until a notice is served that the tenancy has a "definite period of duration". He calls in aid the Report of the Law Reform Advisory Committee for Northern Ireland on Business Tenancies and the position in England under the Landlord and Tenant Act 1954.

[37] It is important to note that the Irish Courts have taken a more relaxed attitude to the requirement at common law that a tenancy can only be for a term of fixed duration. Apart from common leases involving uncertainty of duration, like leases for lives renewable forever and leases for lives and/for years, the courts have been prepared to recognise other leases of uncertain duration: see 2.23 of Wylie's Irish Landlord and Tenant Law.

[38] The definition in the Order requires a definite period of certain duration. It does not matter if the tenancy is renewable for further such periods. Accordingly, a tenancy that terminates in the happening of an event, such as the death of a tenant, will not be of a certain duration. However, whereas here the tenancy is for an initial four week period and then continues on a four weekly basis thereafter, until revoked by the licensor. Thus it is of a certain duration. See Re Land and Premises at Lis, Hants [1971] Ch 986, Scholl Manufacturing Co Ltd v Clifton [1967] Ch 41 at 51 and Newham London Borough Council v Thomas-Van Staden [2008] EWCA Civ 1414.

[39] It is also fairly clear that a term certain "also captures the periodic tenancy at common law":

(i) Woodfall at 6.033 (Vol 1) states:

> "Despite some early dicta to the contrary, it is now settled that a tenancy from year to year is

> a lease for a year certain, with a growing interest during every year thereafter, springing out of the original contract, and parcel of it. There is not in contemplation of law a recommencing or re-letting at the beginning of each year. Thus it is said that a tenancy from year to year gives only one time of continuance. That time, however, may be confined to one year, or extended to several years, according to the circumstances of the case. In the first place, the lease is for one year certain, and after the commencement of every year, or perhaps after the expiration of that part of the year in which a notice for determining the tenancy may be given, it is a lease for the second year, and in consequence of the original agreement of the parties every year of the tenancy constitutes part of the lease, and eventually becomes part and parcel of the term; so that a lease, which in the first instance is only for one year certain, may in the event be a term for 100 years or more."

(ii) Wylie on Irish Landlord and Tenant Law at 4.11 is of a like mind.

> "A tenancy from year to year, although initially for a term of one year, will, therefore, continue thereafter from year to year indefinitely, until ended by either party, or their respective successors, giving notice of determination. Where it does so continue, it has been reiterated, despite initial doubts on the subject, that the successive years following the initial one year term are to be regarded as continuation of that term, rather than a series of successive, independent terms. Thus if the tenant from year to year is continued for a period of 50 years, the tenant's interest is regarded in retrospect as a term of 50 years, although prospectively it remains a periodic tenancy. This point may be of crucial significance where, e.g., the tenant claims to have acquired an easement by prescription, i.e., long user."

(iii) In Hammersmith and Fulham London Borough Council v Monk [1992] 1 AC 478 the nature of a periodic tenancy was explored by the House of Lords, and in particular by Lord Bridge. He said at 483D:

> "Hence, in any ordinary agreement for an initial term which is to continue for successive terms unless determined by notice, the obvious inference is that the agreement is intended to continue beyond the initial term only if and so long as all the parties to the agreement are willing that it should do so. In a common law situation, where parties are free to contract as they wish and are bound only so far as they have agreed to be bound, this leads to the only sensible result."

He went on to say at 490B-C after quoting from Bacon's Abridgment, 7th Ed Volume IV, page 839:

> "Thus the fact that the law regards a tenancy from year to year which has continued for a number of years, considered retrospectively, as a single term in no way affects the principle that continuation beyond the end of each year depends on the will of the parties that it should continue or that, considered prospectively, the tenancy continues no further than the parties have already impliedly agreed upon by their omission to serve a notice to quit."

[40] We do not consider that there is much to be gained from considering the Landlord and Tenant Act 1954 as Section 26(1) of that Act is in different terms to Article 7(1) of the Order. Furthermore the context in which "term certain" is raised in Section 43(3) is different to the context of Article 7. Under Section 5(1) of the Business Tenancies Act (NI) 1964 periodic tenants were necessarily excluded because the term certain had to exceed one year, which obviously cannot apply to weekly, monthly and yearly tenants. We also agree with Mr Johnson QC that it is impossible to excavate from the Law Reform Advisory Committee's Report the explanation for the change in the law encapsulated by Section 5(1) and now contained in Article 7(1).

[41] The construction contended for by the respondent accords with the statutory intention of the Order. The periodic tenancy qualifies for protection under the Order, but such a tenant is unable to request a new tenancy until he has completed 18 months of business occupation. Accordingly, if we are wrong in our conclusion

that this is a licence, we conclude that the applicant was entitled to request a new tenancy under Article 7 of the Order.

[42] For the sake of completeness we now consider what the position is if we are wrong in our conclusion that this is a licence, but correct in our conclusion that the applicant was entitled to request a new tenancy under Article 7 of the Order.

E. ISSUE 3

[43] It is fair that this last issue was approached in a fairly general way by both the applicant and the respondent. The applicant did not attempt to say if he was relying on waiver and/or election and/or equitable forbearance and/or estoppel whether by representation or convention. Instead both sides adopted a fairly broad brush approach preferring to rely on particular authorities to support their respective positions.

[44] The applicant relies heavily on Bristol Cars Limited v RKH Hotels Limited (In Liquidation) [1979] 38 P&CR 411. In that case the tenants served an invalid Section 26 notice. The landlord did not serve a counter-notice but indicated that it was willing to grant a new tenancy. There were then lengthy negotiations for a new lease and the tenant applied for a new tenancy. The landlord then applied for an interim rent but subsequently objected to the validity of the Section 26 notice. The Court of Appeal in England held that the landlord had had a choice. This was either to challenge the validity of the notice or to treat it as valid and apply for an interim rent. However by issuing the application, the landlord had elected to waive any defect in the notice. Templeman LJ also held that the landlord was also estopped because during the course of the negotiations it had been clear to the tenant that, even though the new lease could not be agreed, the landlord would not oppose the grant of a new lease.

[45] However, in this case it is important to observe that:

(i) The defect related to the failure of the notice served by the tenant to give a date for the commencement of the new tenancy not less than six months after the making of the request and not earlier than the date on which the current tenancy was due to expire by a fluxion of time. The requirement to do so was a procedural one and not a substantive one.

(ii) The landlord by his actions had made it clear that it was going to negotiate a new tenancy. Knowing that there was a defect in the notice the landlord waived the defect by applying for an interim rent.

[46] That case can be distinguished from the present one under consideration for a number of reasons. These include:

(i) The complaint relates not to a procedural defect or irregularity but goes to the jurisdiction of this Tribunal in respect of a particular tenancy.

(ii) In Bristol Cars the tenant had been led to believe that there was a new tenancy to be negotiated. In this case the respondent had always made clear that any negotiation was subject to the applicant establishing that there was a lease.

(iii) The landlord had not taken any step such as demanding an interim rent that could be said to waive any defect.

[47] It seems to the Tribunal that it was not for the respondent to determine whether the Tribunal had jurisdiction. This remains a matter exclusively for the Tribunal: see Daejan Properties Limited v Mahoney [1995] 2 EGLR 75. This was not a procedural defect that could be waived by a party but one which went to the Tribunal's jurisdiction. This must be a matter for the Tribunal to determine in accordance with the rule of law not for the parties.

[48] Further, if there was a representation by the respondent that it would treat the applicant as having the right to make an application under Article 7, which the Tribunal does not accept on the facts, there is no evidence the applicant acted upon such a representation to his detriment. No such case has been made out. The point was raised, albeit late in the day, but the applicant has been afforded every opportunity to deal with it. There is no way in which it could be said that the applicant has suffered any detriment. Any additional costs which may have been incurred by this issue being raised late in the day, and there is no evidence that any further costs were incurred, can be dealt with by the Tribunal making an appropriate order in respect of such costs. The point is that there has been no evidence of any unfairness demonstrated by the applicant.

[49] The respondent relies on Anthony Wroe (T/a Telepower) v Exmos Cover Limited [2000] EWCA Civ 31. The facts of that matter can be briefly stated. The applicant was granted an agreement dated 23 September 1994 described as being "a licence for the use of Business Premises". The licence period of 12 months was renewed at its end. Upon requesting delivery up of possession the applicant contended that the occupation was that of a tenant not a licensee. The respondent maintained that it had no power to offer a tenancy as it was not allowed to do so under the terms of its lease. Monies were tendered as rent by the applicant but rejected by the respondent. A Section 25 notice was served on the applicant. It purported to terminate the applicant's tenancy and that any application for a grant of a new tenancy would be opposed under the ground mentioned in paragraph (g) of Section 30(1) of the 1954 Act. Thereafter until August 1998 the matter proceeded on the basis that the room occupied by the applicant was held on a tenancy to which the 1954 Act applied. The opposition to a new tenancy was confined to the grounds stated in the notice given under Section 25 of the 1954 Act. The court ordered a

preliminary issue as to whether or not the respondent could make good its opposition to a new tenancy on ground (g) of Section 30(1) of the 1954 Act. The respondent did not object. During the course of the hearing the judge took the point that the applicant did not have a tenancy and was merely a licensee. An argument was raised that there was an estoppel which prevented the respondent from denying the existence of a tenancy. On the appeal the Court of Appeal stated that:

> "The question in the present case is whether one party can deny that an agreement which, properly construed and understood, does not create a tenancy must be treated, as between the parties to it, as if it does have that effect."

It quoted an article from Mr R E Megarry to which the Master of the Rolls referred which stated that:

> "… the relevant distinction is between the representation that **the Act shall apply** (which is objectionable as an attempt to confer on the court a jurisdiction which goes beyond the intention of the legislature) and a representation that **I will treat you as having the same rights as if the Act applied**."

The Court of Appeal concluded:

> "On a true appreciation of the position, this is not a case in which it can be said that the respondent company has elected between two inconsistent remedies; nor that it is sought to approbate and reprobate. The most that can be said is that the respondent made a procedural mistake. He should have raised the issue 'licence or tenancy' in its answer to the appellant's application for a new tenancy; and it should not have invited the court to determine the Section 30(1)(g) point as a preliminary issue in advance of the question whether or not there was a current tendency to which Part II of the Act could apply. The judge, in my view, would have been correct to hold that the respondent was not precluded by that mistake from raising the issue '**licence or tenancy'**. *A fortiori*, the judge was entitled to invite consideration of that question in the circumstances that it went to the root of her jurisdiction."

[50] It will be noted in that case that the applicant did not take any steps on reliance upon the representation which would make it unfair or unjust to allow the

respondent to contend that there had never been a tenancy and there was no evidence that the applicant had acted to its detriment in reliance on any representation made to him. This is the position in the present application under consideration.

F. CONCLUSION

[51] Accordingly, the Tribunal concludes:

(i) This is a licence, not a lease.

(ii) If the Tribunal is wrong in that conclusion and it is a lease, then it is a tenancy to which Article 7(1) applies and the applicant is entitled to make a request for a new tenancy.

(iii) If the Tribunal is wrong in its conclusions on Issue 1 and Issue 2, then the respondent is not precluded from taking the point that this Tribunal has no jurisdiction to hear such an application.

16th September 2016