[1988–90 Gib LR 294]

TIPTREE HOLDINGS LIMITED v. IRISH TOWN HOLDINGS LIMITED

COURT OF APPEAL (Spry, P., Fieldsend and Huggins, JJ.A.): September 21st, 1990

Landlord and Tenant—renewal of tenancy—business premises—duration of tenancy—landlord and tenant obviously "agreed" on duration of tenancy for purposes of Landlord and Tenant Ordinance, s.52 if tenant seeks 6-year tenancy with option to renew and no dispute raised by landlord—comment that 12-year tenancy also acceptable not application for 12-year tenancy—purpose of s.52 to ensure very short tenancies not granted unless expressly wanted, rather than ensure granting of long tenancies as matter of course

Landlord and Tenant—renewal of tenancy—duration of tenancy—onus on party wishing to depart from terms of previous lease to show reason for doing so—shop tenant's acquiring long lease of accommodation to rear after inclusion within shop irrelevant in determining duration of renewed tenancy—landlord's consent given when tenant had short lease of accommodation to rear—tenant's intention to spend money improving shop also irrelevant since subject to change

The tenant applied to the Supreme Court for a new tenancy of business premises.

The landlord had leased the premises—a shop and offices on Main Street—to the tenant for a term of 6 years from June 1st, 1977, with an option to renew for a further 6 years, which the tenant exercised (although owing to disagreement as to the rent payable, the new lease was not executed until 1986). The new lease did not contain an option to renew. In 1977, the tenant also took, from a third party, a 6-year lease of accommodation immediately behind the premises; this lease, too, had an option—which the tenant exercised—to renew for a further 6 years. With the necessary consent, the tenant carried out building work to amalgamate the premises. In about 1987, the tenant acquired a 990-year lease of the additional accommodation from the third party. The tenant applied by originating summons for a new 6-year tenancy not on the terms of the existing lease, but on those of the "original" 1977 lease, which contained the option to renew. On the hearing of the originating summons, a tenancy for 6 years without any option to renew was granted. The tenant appealed.

The tenant submitted that the option to renew should have been granted,

as (a) the legislature had shown, by amendments to the Landlord and Tenant Ordinance made in 1986 (such as the 5-year minimum term for leases granted by the court where the parties were undecided as to the duration of the lease imposed in s.52), that it intended longer tenancies to be granted, and the judge had been wrong to reject this contention; (b) the Supreme Court (Alcantara, A.J.) had failed to take account of the tenant's interest in the property to the rear of the premises that would be of little value if there were no access at the front; (c) the Supreme Court had failed to take account of the fact that the tenant intended to refurbish the shop at an estimated cost of £80,000; (d) the landlord had adduced no evidence relating to its special interest in the refusal of the grant of an option to renew; and (e) the Supreme Court had made its decision on the basis that the tenant was applying for a 12-year lease, which had never been the case.

The landlord submitted in reply that (a) no policy decision regarding options to renew tenancies could be read into the legislature's concern that very short tenancies should not be granted unless in accordance with the parties' wishes; (b) the tenant's interest in maintaining its access to premises at the rear of the shop that it had acquired from a third party, outside the landlord's control, militated no more strongly in favour of the grant of the option than did the landlord's general interest in retaining control of its property against it; (c) the money had not yet been spent on the refurbishment, and so the tenant's intention to refurbish the premises could not be considered a relevant factor; and (d) the landlord was under no obligation to adduce any evidence relating to any special interest of either party in the grant or refusal of the option to renew, as the burden was on the tenant to show that it would be just and reasonable to depart from the terms of the current tenancy, which contained no such option.

Held, dismissing the appeal:

(1) The tenant had failed to discharge the burden resting on it of showing that the terms of the present lease (which did not contain an option to renew) should be departed from. While the Supreme Court may not fully have appreciated the force of the tenant's argument relating to the premises to the rear of the shop, the tenant had created this difficulty for itself by acquiring those premises from a third party. When the landlord consented to the works to incorporate the accommodation at the back of the premises, the tenant had no interest in that accommodation beyond the 6-year lease (para. 11; paras. 13–14).

(2) As the landlord was claiming no special interest (beyond its natural interest in retaining control of its property) in limiting the tenancy to 6 years without any option to renew, there was no obligation on it to advance any evidence. Parties in proceedings such as these needed to adduce evidence only when they were trying to claim that there were factors entitling them to more favourable treatment than would be given to any other landlords/tenants of similar premises (para. 10; paras. 13–14).

(3) It was not—and had never been—in dispute that the new tenancy should be for 6 years, rather than 12; the tenant's comments in the lower court that he would be prepared to accept a 12-year lease were a reference to the fact that a 12-year lease (which was less valuable to a tenant than a 6-year lease with an option to renew) would also be acceptable to the tenant; they were not an application for a 12-year lease. When a tenant asked for a 6-year tenancy and the landlord did not dispute that a 6-year tenancy should be granted, it was obvious that the parties were "agreed" on the term of the new tenancy for the purposes of the Landlord and Tenant Ordinance, s.52. The purpose of s.52 was not to ensure that longer tenancies were granted as a matter of course; it was merely to ensure that very short tenancies were not granted unless this was what the parties themselves had agreed upon (para. 4; para. 7; paras. 13–14; para. 16).

(4) The tenant's mere intention to spend money on premises could not be a relevant factor for the purposes of determining the duration of a lease, as, however sincerely held, it was subject to change depending on the circumstances at the time (para. 9; para. 13; para. 15).

Cases cited:

(1) *88 High Rd.*, *Kilburn*, *In re*, [1959] 1 W.L.R. 279; [1959] 1 All E.R. 527, distinguished.

(2) *Cardshops Ltd.* v. *Davies*, [1971] 1 W.L.R. 591; [1971] 2 All E.R. 72; (1971), 22 P. & C.R. 499; 115 Sol. Jo. 265; [1971] R.V.R. 151, applied.

(3) *O'May* v. *City of London Real Property Co. Ltd.*, [1983] 2 A.C. 726; [1982] 2 W.L.R. 407; [1982] 1 All E.R. 660; (1982), 43 P. & C.R. 351; 126 Sol. Jo. 157; 261 E.G. 1185, applied.

Legislation construed:

Landlord and Tenant Ordinance (1984 Edition), s.52: The relevant terms of this section are set out at para. 5.

s.54(1): "The terms of a tenancy granted by order of the court under this Part (other than terms as to its duration and as to the rent payable) shall be such as may be agreed between the landlord and the tenant, or as, in default of such agreement, may be determined by the court; and in determining those terms the court shall have regard to the terms of the current tenancy and to all relevant circumstances."

P.J. Isola for the appellant;
J.J. Neish for the respondent.

1 **HUGGINS, J.A.:** The plaintiff tenant sought a new tenancy of business premises under Part IV of the Landlord and Tenant Ordinance. The defendant landlord did not oppose the grant of a new tenancy, but there was a dispute as to the terms upon which it should be granted, and the present appeal is confined to that dispute.

2 The plaintiff originally became the landlord's tenant by virtue of a lease dated November 24th, 1977. That lease was for a term of 6 years from June 1st, 1977 with an option for the tenant to renew for a further 6 years. That option was exercised but, owing to disagreement as to the rent to be paid during the new term, the new lease was not executed until February 25th, 1986. In accordance with the express terms of the 1977 lease, the new lease contained no option to renew.

3 The premises consisted of a shop with offices, with an entrance from Main Street. In 1977, the tenant also took from a third party a lease (for 6 years, with an option to renew for 6 years) of accommodation immediately behind the premises, and, with necessary consent, structural alterations were made to unite the premises and the accommodation behind them into one shop. The tenant incurred considerable expense in making the alterations and in refurbishing the shop and, not surprisingly, wishes to have the use of the enlarged shop for as long as possible. About 3 years ago, the tenant acquired a 990-year lease of the accommodation at the back. Whether consideration was given—and, if so, what—the court was not told.

4 The originating summons applied for a new tenancy for 6 years, but on terms not of the "current" lease of 1986 but of the original lease of 1977. The tenant was therefore hoping that, if it exercised the option which would thereby be included, it would be able to enjoy the use of the entire shop for another 12 years from the expiration of the "current" lease. As Mr. Neish rightly points out, it was nevertheless misleading in the course of argument to suggest that the tenant was seeking a new lease for 12 years. It was not in dispute that the new tenancy should be for 6 years; the dispute was merely as to the proposed option for a further renewal. That is an important matter to keep in mind, because Mr. Isola has relied upon *In re 88 High Rd., Kilburn* (1), where the tenant sought a term of 14 years and the landlord wanted the shorter term of 7 years. Wynn-Parry, J. said ([1959] 1 All E.R. at 528):

> "My inclination is to grant the tenants the longer term of years, provided that I do not prejudice the landlords. Counsel for the tenants asked that a further term should be put in, giving the tenants the right to break the lease at seven years if the result of the review of the rent, in their opinion, resulted in too high a figure. On the whole, having considered that, I think that they are asking for the best of both worlds, and I propose to grant to the tenants the equivalent of a fourteen-year term, but to direct that there shall be included in the lease a provision as regards the review of the rent at the end of the first half of the term."

5 The fundamental distinctions between that case and the present are that the court was there concerned to decide upon the duration of the

tenancy to be granted and that the originating summons had asked for 14 years. It is a basic rule of our system of law that the court does not give a plaintiff more than he has asked for. Here, the tenant has asked for a 6-year tenancy (albeit with an option for yet a further tenancy) and it would have been wrong to give it longer. Moreover, s.52 of the Ordinance provides that—

> "where on an application under this Part the court makes an order for the grant of a new tenancy, the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant, or, in default of such an agreement shall be such a tenancy as may be determined by the court to be reasonable in all the circumstances, being, if it is a tenancy for a term of years certain, a tenancy for a term of not less than 5 years and not more than 14 years, and shall begin on the coming to an end of the current tenancy."

6 Although at first sight the words "the new tenancy shall be such tenancy as may be agreed between the landlord and the tenant" might appear to refer to all the terms of the tenancy, a glance at s.54 makes clear that s.52 is concerned solely with the duration of the tenancy. Where a tenant asks for a 6-year tenancy and the landlord does not dispute that a 6-year tenancy should be granted, it is obvious that the duration of the tenancy has been "agreed" between them. In such a case the new tenancy "shall be" such as has been agreed.

7 Alcantara, A.J. heard the evidence adduced by both parties and granted a new tenancy for 6 years at a rent of £1,450 per month with no option for renewal. The tenant complains that in so deciding the judge erred in two respects. First, counsel contends that the judge wrongly rejected the contention that by amendments made to the Landlord and Tenant Ordinance in 1986 the legislature showed that it intended the courts to grant longer tenancies than theretofore under Part IV. This, Mr. Isola submits, appears from the provision in s.52 that, where the court makes an order for the grant of a new tenancy and the parties have not agreed as to the length of the term, the duration decided upon by the court should be not less than 5 years. Counsel also referred to s.56 and to the Fifth Schedule, which, he said, showed an intention to give greater security to tenants, and, in a case like the present, required the court to give the security of a longer term. I cannot accept these arguments. In my view the judge was entirely right to conclude that all that the legislature was seeking to do in relation to the duration of new tenancies was "to ensure that very short tenancies should not be granted."

8 The second complaint is that the judge wrongly said that the tenant had no particular interest in obtaining the inclusion of an option to renew. What the judge actually said was:

> "In support of a 12-year lease Mr. Isola has put forward the fact that

> three years ago the plaintiff bought from the other landlord the premises at the back with the King's Street address. I do not give much importance to this as I have no evidence whether this purchase has been a burden or a bargain. However I do take it into account."

I have already said that there never was an application for a 12-year lease. What Mr. Isola submits now is that the judge seems to have missed the point that the tenant was making in relation to the back part of the shop, namely that that part would be of little value to the tenant once it had to surrender the front part and its access to Main Street. There was evidence to support this point. Mr. Garcia said in the record, at 17: "If the wall went up again [I] would not be able to use the back as a shop," and, at 19: "I am not saying [that the] opening of [the] wall enhances [the] property. It makes [the] shop bigger. It enhances [the] value of [the] overall business."

9 Furthermore, the judge appears to have misheard the evidence as to the estimate of the cost of refurbishment of the shop which is now proposed, a figure which he recorded, at 17, as "£18,000." This may have been through no fault of his, but the correct figure of "£80,000" appears from the letter of January 29th, 1990 (in the record, at 64) which was before him. However, this money has not yet been spent and will not necessarily be spent, so I do not see how it is a relevant factor.

10 In this connection, Mr. Isola has made much of the fact that the landlord adduced no evidence relating to any special interest of the parties in the granting or refusing of the option. I think that Mr. Neish is right when he replies that there was no obligation on the landlord to adduce such evidence: the burden was on the tenant to show that it would be just and reasonable to depart from the terms of the current tenancy: see *O'May* v. *City of London Real Property Co. Ltd.* (3) and *Cardshops Ltd.* v. *Davies* (2). The landlord has not alleged that it has any special interest in limiting the tenancy to 6 years with no option for an extension. That is not to say that it does not have the interest that any landlord has in retaining the maximum possible control over his property. No evidence was required to establish the existence of that general interest: it is something of which the court may properly take judicial notice. If the option were granted, the landlord might be deprived for another 6 years of its common law right to obtain possession of its property.

11 Whilst I am persuaded that the learned judge may not fully have appreciated the significance of the argument that the tenant was seeking to advance in relation to the back of the shop as a separate unit, the force of that argument is necessarily limited because the tenant itself had created this factor by acquiring the back of the shop from a third party; the landlord was not party to the acquisition and could not have prevented it. It must be remembered that when the landlord consented to the removal of the back wall of the premises so as to incorporate the accommodation at

the back into the shop, the tenant had no interest in that accommodation extending beyond its interest in the premises themselves. Even assuming that the judge was in error, therefore, I am of the opinion that the tenant has failed to discharge the burden which rested on it of showing that it would be just and reasonable to reintroduce the option that had been in the 1977 lease but which by agreement was not in the "current" lease of 1986.

12 For these reasons I would dismiss the appeal.

13 **FIELDSEND, J.A** concurred with **HUGGINS, J.A.**

14 **SPRY, P.:** I agree with the judgment delivered by Huggins, J.A. In particular, I agree that there is no need for a party in proceedings such as these to give evidence, unless he claims that there are factors which entitle him to ask for more favourable treatment than would be given to any other landlord or tenant (as the case may be) of similar premises.

15 Secondly, I agree that a mere intention to spend money on the premises cannot be a relevant factor. However sincere the intention, circumstances may change and the tenant may find himself unwilling or unable to spend the money when the time comes.

16 I think I should add for the record that I do not understand the tenant ever to have asked for a 12-year lease. What Mr. Isola said in this court, according to my notes, was that he asked for a term of 6 years, with an option for a further 6 years, which would, in effect, give him a term of 12 years, and he said that if the court thought fit to grant him a 12-year term, he would be content. I understand from the record that this was also his attitude in the lower court. His remarks seem to have been misunderstood: he was, of course, saying that he would be prepared to accept something less, rather than more, valuable than that for which he was asking. A lease for 6 years with an option for a further 6 years is more attractive to a tenant and less attractive to a landlord than a lease for 12 years.

17 As Fieldsend, J.A. also agrees, it is ordered that the appeal be dismissed.

Appeal dismissed.