

**THE HIGH COURT
CIRCUIT COURT APPEAL**

RECORD NO. 2007 No. 177 CA

BETWEEN

LIKE IT LOVE IT PRODUCTS LIMITED

PLAINTIFF/APPELLANT

AND

DUN LAOGHAIRE/RATHDOWN COUNTY COUNCIL

DEFENDANT/RESPONDENT

Judgment of Mr. Justice Roderick Murphy dated the 5th day of February, 2008.**1. Pleadings**

By Landlord and Tenant Civil Bill dated 22nd May, 2007 the appellant gave notice of an application for a new tenancy of the premises known as Blackrock Town Hall (excluding the library and rates office), relying on evidence relating to the premises being a tenement held on a weekly tenancy from 26th January, 1998, varied by subsequent agreement in writing. The application was refused by the Circuit Court and comes by way of appeal to this Court of the whole of the judgment of that court, of 2nd July, 1997.

The respondent claimed that the tenancy had terminated on 31st August, 2006 by means of a notice in writing dated 23rd June, 2006. The appellant claimed that that notice was not a valid notice to quit.

In the event that the notice in writing was a valid notice to quit and that the tenancy determined on 31st August, the appellant claimed a new tenancy pursuant to Part II of the Landlord and Tenant (Amendment) Act, 1980. As, in the whole of the five years preceding that date, the premises was bona fide used by the appellant as tenant for the time being wholly for the purposes of carrying on a business. On 30th August, 2006 the appellant, complying with the provisions of s. 21 of the Act, duly served on the respondent a notice of intention to claim the relief sought, and claimed a new tenancy and compensation for improvements and/or compensation for disturbance. The parties failed to agree on the terms of a new tenancy.

By defence and counterclaim delivered 18th June, 2007 the respondent denied the plaintiff's entitlement. The agreement of 26th January, 1998, extended by letter of 22nd July, 1998 was for a temporary convenience letting of the premises for the purposes of s. 75(4) of the Local Government (Planning and Development) Act, 1963. Accordingly, the said agreement is excluded from the provisions of the Landlord and Tenant (Amendment) Act, 1980.

Moreover, in the alternative the respondent requires vacant possession thereof for the purpose of carrying out a scheme of development which includes the said premises and in respect of which planning permission exists. Accordingly, the appellant is not entitled to a new tenancy.

Furthermore, the creation of a new tenancy would not be consistent with good estate management. A notice to quit is not required in respect of the temporary agreement letting. The appellant is estopped and precluded from saying that a notice in writing dated 23rd June, 2006 is not a valid notice of termination. The appellant was at all material times fully aware of the nature of the temporary convenience letting as entitlement to occupy the premises. It was denied it made improvements or was entitled to a new tenancy or to compensation for improvements or compensation for disturbance.

By way of counterclaim the respondent sought a declaration that the appellant was not entitled to a new tenancy in the premises or to compensation for improvements or compensation for disturbance under the provisions of the 1980 Act.

The temporary convenience was the letting of the premises for such period until the respondent Council required possession of the premises for the purposes of its statutory powers, functions and duties and that the grounds thereof were stated in the agreement of 26th January, 1998. The Vocational Education Committee of the Council had obtained permission on 18th December, 2003 for the refurbishment, alterations and extension of the premises.

2. Issue to be determined

The plaintiff/appellant, having appealed the order of the Circuit Court, submitted that the question as to whether the letting under which the premises was held as a temporary convenience letting was a matter to be determined under s. 5(1)(a)(iv) of the 1980 Act which states:

“(iv) Such contract or tenancy is not a letting which is made and expressed to be made for the temporary convenience of the lessor or lessee and, (if made after the passing of the Act of 1931) stating the nature of the temporary convenience ...”

Such temporary convenience must be stated in the agreement and must actually be made for a temporary convenience: *Eamonn Andrews Productions Limited v. Gaiety Theatre Enterprises* (Circuit Appeal – 26th July, 1972) and see Wiley: *Irish Landlord and Tenant Law* (second edition) p. 3.40.

The plaintiff says that the temporary convenience was not identified.

3. Evidence on behalf of respondent

Mr. Andrew Coffey, the principal of the plaintiff company (also known as Andy Ruane), gave evidence of his contact with Mr. O'Hare of the defendant Council with regard to the company's use of the room above the library in autumn, 1997. The company wished to use the premises for the purpose of making programmes for TnaG, in early January, 1998. He gave evidence of spending IR£25,000 for repairs and looking for permanence. He agreed that the letting was a temporary convenience letting and was initially for five and a half months and that s. 75(4) of the 1963 Planning and Development Act applied. In cross-examination he agreed that the premises was 5,000 sq. ft. and the rent reserved was £100 per month. While repairs and refurbishment was done, there were not any improvements. He said he signed the agreement on 26th January, 1998 with legal advice. A letter from his solicitor of 19th December, 1997 referred to a caretaker's agreement.

He agreed that the wording of the letting agreement did not provide for permanence.

4. Evidence on behalf of the respondent

4.1 Mr. Eamonn O'Hare was then the Acting County Manager of the defendant until May, 2006. He was involved in the letting agreement of 26th September, 1998 which is a lease agreement and simply he was involved in the letting negotiations from 26th September, 1998.

There had been no funding for the development of the premises from 1994/1995. In 1997/1998 there was some discussion regarding a joint venture for the library refurbishment. There was nothing more specific. Now there was planning permission in place for the Vocational Education Committee of the County Council to extend into the building.

Under cross-examination Mr. O'Hare said that the plaintiff required the building for six months. He told them that they had plans for the building and, accordingly, agreed for a temporary convenience letting for six months. Normally the County Council gave eleven months convenience letting. The County Council wished to preserve the building and possibly to move the library upstairs and to upgrade it.

He was advised that the then open market rent would be £60,000 per annum on the basis of evaluation of £12 per sq. ft. (This equates to a monthly rent of £5,000)

4.2 Mr. Eugene Conlon said that the current plans of the County Council were to develop the library and the premises as a senior college. Planning permission had been granted to the VEC. The Council, as freeholder, would give a lease to the VEC who would develop the entire civic building.

5. Submissions of the plaintiff/appellant

Mr. Hugh O'Neill S.C., on behalf of the plaintiff/appellant submitted that the entitlement to a new tenancy under Part II of the 1980 Act was dependent on the premises being a "tenement" as defined in s. 5(1) of the Act as stated above.

He said that the evidence adduced established that no temporary convenience was ever identified other than a possible assertion by Mr. O'Hare to the effect that the Council required the property to be put into repair/made watertight. That general desire was not capable of rendering any letting made for that purpose a valid temporary convenience letting. It was not the reason stated for the letting in the agreement of 26th January, 1998. The Council did not identify the temporary convenience as being "until the Council in its absolute discretion requires clear possession (of the premises) for the purpose of its statutory powers, functions and duties". The temporary convenience was never requested by the plaintiff.

He referred to *O'Driscoll v. Riordan* [1985] 16 L.R. Ir. 235 where Palles C.B. quoted with approval the following passage from the judgment of Fitzgibbon L.J. in *McCutcheon v. Wilson* 12 L.R. Ir. 151:

"Every letting is in a sense for the convenience or to meet a necessity of one or other or both of the parties; but the temporary convenience or necessity contemplated here must, I think, be something special, peculiar to the party or parties or to the holding, collateral to, or possible even irrespective of the quantity or quality of the tenant's interest, not expected to continue to exist at another time or in other hands, and must be shown to form the motive of the letting at the time." (at 244)

Even if the agreement did create a temporary convenience letting sufficient of s. 5(1), that temporary convenience was expressed to be for the period 19th January, 1998 until 30th June, 1998. By definition, the temporary convenience terminated at the end of the fixed term.

He referred to *Murphy v. O'Connell* [1949] I.R. Jur. Rep. 1, where Murnaghan J. said:

"It is not the law that a letting which was for temporary convenience at the beginning remains always a letting for temporary convenience. I think that, in this case, where there was a fresh letting made each month by reason of the tenancy being a monthly tenancy, it cannot be said that this letting remained a letting for the temporary convenience of the defendant all the time or that after the period of eighteen months a tenancy which ensued was a tenancy for temporary convenience." (at 2,3)

The VEC had obtained planning permission. Counsel agreed that a *prima facie* entitlement to a new tenancy was defeated where it appears that the landlord required vacant possession for the purpose of carrying out a scheme of development of property, which includes the tenement and has planning permission for the scheme. However, the VEC is a separate body from the Council. Section 7(3) of the Vocational Education Act, 1930 provides that every Vocational Education Committee shall be a body corporate by its said style or name, and shall have perpetual succession and an official seal (which shall be judicially noticed), with power to acquire and hold land for the purpose of its powers and duties. (Section 7(3) of the Vocational Education Act, 1930). The personal involvement of the landlord is important because the following subsection provides that the landlord may be ordered to pay to the tenant such sum as it considers proper by way of punitive damage if the scheme of arrangement has not been carried out within a reasonable time.

Moreover, it was submitted that no evidence was led by the respondent to suggest that the creation of a new tenancy would not be consistent with good estate management. He referred to *Hamilton v. Sun Alliance*, a decision of 5th July, 1971, where Murnaghan J. was not prepared to say that the grant of a new tenancy for a term of 21 years was inconsistent with good management of the estate as the respondents have not as yet become the owners of the estate. (at p. 4).

6. Submissions of the respondent Council

Mr. Connolly S.C. said that the appeal involved a determination of a net point of law as whether or not the premises in question constituted a tenement within the meaning of s. 5 of the 1980 Act.

Counsel submitted that Mr. Ruane/Coffey in his evidence to the court stated that he had read and signed the agreement of 26th January, 1998 on behalf of the plaintiff which clearly, on its face, provided for a temporary convenience letting. The plaintiff had independent legal advice. The plaintiff remained in possession on foot of an agreement made by letter dated 22nd July, 1998 which expressly extended "your temporary convenience letting of Blackrock Town Hall".

The nature of the temporary convenience letting in the agreement of 26th January, 1998 was stated to be for the purposes of s. 75(4) of the 1963 Act until the Council in its absolute discretion "requires clear possession thereof for the purpose of its statutory powers, functions or duties". In *Igote Limited v. Badsey Limited* [2001] 4 I.R. 511 at 561, Murphy J., delivering the judgment of the Supreme Court, referred to *Kramer v. Ireland* [1997] 3 I.R. 43 at 55:

"In this case, as in any case, where the parties are in disagreement as to what a particular provision of a contract

means, the task of the court is to decide what the intention of the parties was, having regard to the language used in the contract itself and the surrounding circumstances.”

Igote held, at 516, that the intention of the parties to an agreement may be ascertained only from the document concluded by them:

“In my view the judge erred in asserting the intentions of the parties from the evidence heard by him as well as the alterations aforesaid and documents prepared in the course of the negotiations. The intention of the parties may be gleaned only from the document ultimately concluded by them, albeit constrained in the light of the surrounding circumstances but not ascertaining their intentions in such circumstances. Such a process would be justified only where one or other of the parties claimed rectification of the document executed by him: this is not the present case.”

It was submitted that the plaintiff must have known at all material times, including at the time of the letter of 22nd July, 1998, to which no objection was ever raised, that the plaintiff was let into possession of the premises on a temporary convenience letting until such time as the Council required possession for the purpose of its statutory powers, functions or duties. The plaintiff is estopped from contending that the said letting of the premises is other than a temporary convenience letting. The provisions of s. 5 of the 1980 Act disapply the provisions of the Act compared to how *Costello J. in Phillips v. The Medical Council* [1991] 2 I.R. 115 referred to the statement in *Pickard v. Sears* as follows:

“Where one by his words or conduct wilfully causes another to believe in the existence of certain state of things and induces him to act in that belief, or to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at that time.”

Moreover, the plaintiff cannot seek to assert that the tenancy under consideration is other than the tenancy referred to in the written agreement of 26th January, 1998. This is the tenancy referred to in the plaintiff’s original (and second and most recent) notice claiming a new tenancy and also in the Landlord and Tenant Civil Bill before the court which is the subject of the appeal.

Section 75(4) of the 1963 Act gives wide powers to planning authorities to dispose of lands in order to secure the best use of that land, including the granting of a lease where the authority considers that they will not require the use of the land for the period of the lease. That provision extends the provisions of the 1980 Act. It follows that the letting agreement was therefore not a tenancy within the meaning of the 1980 Act.

7. Decision of the Court

7.1 The issue in this appeal involves a determination of a net point of law as to whether the premises in question constitutes a tenement within the meaning of s. 5 of the Landlord and Tenant (Amendment) Act, 1980. Section 5(1) of the 1980 Act provides, insofar as it is material:-

“In this Act ‘tenement’ means –

(a) premises complying with the

- (i) they consist either of land covered wholly or partly by buildings or of a defined portion of a building;
- (ii) ...
- (iii) they are held by the occupier thereof under a lease or other contract of tenancy express or implied or arising by statute;
- (iv) such contract of tenancy is not a letting which is made and expressed to be made for the temporary convenience of the lessor or lessee and, (if made after the passing of the Act of 1931) stating the nature of the temporary convenience; and
- (v) ...”

7.2 The agreement of 26th January, 1998 seems to the court to be unambiguous. It recites:

“AND WHEREAS the tenant has requested the Council to allow him into possession of the said premises on a temporary convenience letting for the purpose of section 75(4) of the Local Government (Planning and Development) Act, 1963 and the Council in its absolute discretion requires clear possession thereof for the purpose of its statutory powers, functions, or duties which the Council has consented to do ...”

The operative part is also without ambiguity:

“NOW THIS AGREEMENT WITNESSES that for the temporary convenience of the tenant and the Council and for the purposes of section 75(4) of the Local Government (Planning and Development) Act, 1963 THE COUNCIL LETS AND THE TENANT TAKES ALL AND SINGULAR ...”

Section 5(1) excludes a contract of tenancy which is made and expressed to be made for the temporary convenience of the lessor or the lessee. The temporary convenience of the Council is expressly established by the agreement and is identified in the phrase “for the purpose of its statutory powers, functions or duties”.

Moreover, the letter of 22nd July, 1998 is expressed to extend the tenant’s temporary convenience letting. The short letter states:

“The Council is prepared to extend your Temporary Convenience Letting of Blackrock Town Hall on a month to month basis with it being renewed each month.”

7.3 It seems to me that the unambiguous intention of the parties may be gleaned from the agreement (including that letter) ultimately concluded by them as is clear from the judgments of *Kramer v. Ireland* [1997] 3 I.R. 43 at 55, and *Igote Limited v. Bardsley Limited* [2001] 4 I.R. 511 referred to in the defendant’s counsel’s submissions above.

The statement in *Pickard v. Sears*, approved by Costello J. in *Phillips v. The Medical Council* [1991] 2 I.R. 115 applies.

Pickard v. Sears stated:

"Where one by his words or conduct causes another to believe in the existence of a certain state of things, and induces him to act in that belief, or to alter his own position, the former is precluded from averring against the latter a different state of things as existing at that time."

The conduct of the plaintiff/appellant, the agreement and its renewal and the level of rent prevent the tenant from denying the temporary convenience of the agreement.

Moreover, in his evidence, Mr. Coffey, the principal of the appellant company, said that he had read and signed the agreement, had independent legal advice in doing so and, in this appeal, relies thereon.

7.4 In relation to land acquired by a planning authority under that Act, s. 75(4) of the Local Government (Planning and Development) Act, 1963 gives power to the authority, *inter alia*, to grant a lease of land where the authority considers that they will not require the use of the land for the period of the lease.

Section 75(4)(b) provides that neither the Landlord and Tenants Acts, 1931 to 1958 nor the Rent Restrictions Act, 1960 shall apply in relation to a lease granted as aforesaid for the purpose of the section.

That paragraph extends to the provisions of the 1980 Act pursuant to s. 20(1) of the Interpretation Act, 1937 which provides:

"Whenever any statute or portion of a statute is repealed and re-enacted, with or without modification, by an Act of the Oireachtas, references in any other statute or in any other statutory instrument to the statute or portion of the statutes so repealed and re-enacted shall, unless the contrary intention appears, be construed as references to the portion of such Act of the Oireachtas containing such re-enactment."

Accordingly, the provisions of paragraph (b) of s. 75(4) extend to the 1980 Act. It appears to follow that the letting agreement granted on 26th January, 1998 and extended by letter dated 22nd July, 1998 is therefore excluded from the provisions of the 1980 Act.

Murphy v. O'Connell, which does not concern a local authority, is, accordingly, not relevant.

7.5 Even if the letting agreement were not so excluded, the premises are not a tenement within the meaning of s. 5 of the Landlord and Tenant (Amendment) Act, 1980.

In the circumstances the court affirms the decision of the Circuit Court dated 2nd July, 2007.