LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

LANDS TRIBUNAL RULES (NORTHERN IRELAND) 1976

BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

IN THE MATTER OF AN APPLICATION FOR DISCOVERY

BT/85/2020
(AND 14 OTHER REFERENCES)

BETWEEN

HUTCHISON 3G UK LIMITED AND EE LIMITED – APPLICANTS/TENANTS

AND

AP WIRELESS II (UK) LIMITED – RESPONDENT/LANDLORD

Re: 15th Hole, Carrickfergus Golf Club, 35 North Road, Carrickfergus (and 14 other locations)

Lands Tribunal – Henry Spence MRICS Dip Rating IRRV (Hons)

Background

1. Hutchison 3G UK Limited and EE Limited ("the applicants") occupy a telecommunications mast on the 15th Hole, Carrickfergus Golf Club, 35 North Road, Carrickfergus (and 14 other "green field" sites ("the reference properties").

2. The applicants occupy the reference properties by way of leases which have now expired, and the applicants have lodged tenancy applications with the Lands Tribunal, in accordance with Article 7 of the Business Tenancies (Northern Ireland) Order 1996 ("the BT Order").

3. The landlord, AP Wireless II (UK) Limited ("the respondent") has not objected to new leases being granted but to date the parties have been unable to agree the appropriate rents for the reference properties.

4. The respondent has now lodged a discovery application seeking additional information prior to the hearing of the substantive issues in the references.

5. The applicants have declined to provide the additional information requested and this is the issue to be decided by the Tribunal.

Procedural Matters

6. The applicants were represented by Mr Adrian Colmer KC, assisted by Mr Douglas Stevenson BL and instructed by DWF solicitors. Mr Richard Coghlin KC, assisted by Mr Keith Gibson BL and instructed by Eversheds Sutherland solicitors, represented the respondent.

7. The Tribunal is grateful to counsel for their helpful submissions.

The Law

8. Rule 9(4) and (5) of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") provide:

> "9(4) Subject to paragraph (5) any party to proceedings shall if so requested by the registrar, furnish to him any document which the Tribunal may require and which it is in that party's power to furnish, and shall, if so directed by the registrar, afford to all other parties to the proceedings an opportunity to inspect any such document and to take a copy thereof.
>
> (5) Nothing in this rule shall be deemed to require the delivery of a document or information or particulars which would be privileged in the proceedings or contrary to the public interest to disclose."

Authorities

9. The Tribunal was referred to the following authorities:

- Muller and Another v Linsley and Another [1994] EWCA Civ 39
- Cornerstone Telecommunications Infrastructure Ltd v London & Quadrant Housing Trust [2020] UKUT 282
- Vodafone Ltd v Hanover Capital Ltd [2020] Lexis Citation 293
- Berkley Square Holdings Ltd and others v Lancer Property Asset Management Ltd and others [2021] EWCA Civ 551
- EE Ltd and Hutchison 3G Ltd v Morriss and others [2022] All ER (D) 34

10. And to the following texts:

- Without Prejudice Rule: Exceptions by Practical Law Dispute Resolution
- Without Prejudice Privilege: An Overview by Practical Law Dispute Resolution

The Respondents' Discovery Submissions

11. Mr Coghlin KC:

Background

(i) The principles for determining the correct and proper rent before the Lands Tribunal in Northern Ireland focus almost entirely on comparables. In the normal course of events, the parties would look to the transactions in the market and extract the relevant information. The parties would look to open market lettings, rent reviews, expert determinations.

(ii) The respondent also refers to the Royal Institution of Chartered Surveyors (RICS) guidance which states that comparable evidence should be:

a) Comprehensive.

b) Very similar or if possible identical to the property being valued.

c) Representative of the market at the date of valuation.

d) The result of an arms length transaction in the market; verifiable; consistent with local market practice and the result of underlying demand.

(iii) It goes without saying that the parties would go to the information contained in those transactions executed as between a notional willing landlord and a willing tenant and review the same, identifying their usefulness in relation to location, type and age. There would be diversity of both the identity of landlord and tenant.

(iv) What we have here, however, perhaps uniquely in the history of the Lands Tribunal, is a rather peculiar set of circumstances whereby:

a) the tenant in the market is, to outward appearances one entity;

b) the landlords are entirely disparate individuals, who in the main, are relatively unsophisticated; and

c) comparable information comes solely from the tenant, in table summary format without supporting documentation.

(v) Quite obviously, where a single party controls the market and provides most if not all the comparable evidence there must be an intense scrutiny of the information provided to ensure that it is correct. This much was communicated to the Tribunal in the first "Derrycraw" discovery decision dated 13th May 2021, wherein it was submitted that due to the nature of the telecoms market the Tribunal relies almost entirely on the evidence of comparables supplied by the operator, which places a much greater onus on the operator as regards discovery – as per Cornerstone Telecommunications Infrastructure Ltd v London & Quadrant Housing Trust [2020] UKUT 0282.

(vi) The Tribunal in the first Derrycraw decision, at para 17, reiterated that each party should have available as much relevant information as possible. It is the relevance of that information which the respondent now contends for and the applicants resist.

The Comparables

(vii) The respondents' application for discovery is set against the aforementioned privileged and unusual position which the tenant applicants hold in these references. Quite obviously, if the applicants can target specific individuals which they consider are unlikely to have the resources, energy and financial backing to dispute tenancy applications before the Lands Tribunal, an advantage can be gained. If it is in fact the case that the applicants have deliberately targeted a certain section or type of landlord in order to artificially attempt to set the rents, that is a matter that should be instantly and immediately deprecated by the Lands Tribunal.

(viii) A rather obvious way of trying to set the comparables at a lower level would be to seek to agree rents with ill-resourced landlords and then use those poorly negotiated rents as comparables when approaching the more well-resourced ones. This leads to an impression of "setting the market". Examples of entities falling into the former category would include Government Departments, large corporate entities and other telecom operators.

(ix) Set against that background the Tribunal is invited to review the comparables 1 to 79 provided by the applicants.

(x) The table is very helpfully ranked in order of term and commencement date, starting on 3rd February 2020. One can clearly see a pattern of leaving the well-resourced parties to the end.

(xi) The verification of comparable evidence is also a matter touched on by the RICS. There the learned authors comment on the importance of comparable evidence being examined carefully for accuracy and to ensure that all the relevant details behind the transactions are fully taken into account. It is doubtful that the applicants would take issue with that as a statement of general principle.

The Application

(xii) The approach to the assessment of rent which the Upper Tribunal in England and Wales adopted was initially contained in Vodafone Ltd v Hanover Capital Ltd Lexis Citation 293. Thereafter the leading judgment is that of EE Ltd & Hutchison 3G Ltd v Morriss & Others [2022] All ER(D) 34 which focused more on a "normal" approach to assessing comparables (known colloquially as "Pippingford").

(xiii) By way of background, in 2004, a renewal tenancy was granted on a site within the Pippingford Park Estate by a lease for a term of 10 years to the then telecoms provider Orange. In 2012, following the merger with T-Mobile, the lease was assigned to the current application in the present reference. Since the expiry of the lease on 1st August 2014, the claimants had been holding over under the tenancy continued by the (English) Landlord and Tenant Act 1954 ("the 1954 Act"). Therefore, the claimants applied under the 1954 Act for a new tenancy of the site. The defendants did not oppose the grant of a new lease for a term of 10 years but the parties were unable to agree on all of the terms, with particular focus on the rent payable.

(xiv) The Court made clear that there would be a move away from the approach in Hanover Capital and the emphasis was now on open market transactions, as it would be in a "normal" valuation case before the Tribunal. The Court set out a number of general points at paras 66 to 70:

> "Preliminaries
>
> 66. Before coming to the evidence there are a number of general points which can usefully be made.
>
> 67. First, it is common ground that it is necessary, when making use of transactional evidence, to consider whether agreed rents include an incentive payment to induce willingness in an otherwise unwilling site provider (discussed in Hanover Capital at paragraphs 56 to 63).

68. Secondly, in this sector it is almost invariably the case that agreed rents will have been arrived at 'off market' in circumstances where the operator has selected a site in which it is interested and has approached the owner with a proposal to let it. It will usually be the case that the site owner had no previous interest in, or intention of, letting the site and did not offer it for letting on the open market. It will therefore be necessary to consider whether any adjustment is required to rents agreed in the real world to take account of the assumption that the hypothetical letting is one which takes place in the open market in which the property is offered to all who might be interested in it (discussed in Hanover Capital at paragraphs 64 to 71).

69. Thirdly, much of the transactional evidence is of the renewal of leases of existing sites, but a renewal is a poor comparator for a new letting of a bare site between parties negotiating at arm's length in the open market and such evidence must be therefore viewed with circumspection. When parties negotiate for the renewal of a lease of an existing site they are already in a relationship of landlord and tenant, and the site is already equipped. In most cases, while the negotiation continues, the site provider will be entitled to receive a rent under the parties' previous agreement which will have been set during the currency of the old Code (uninfluenced by the no-network assumption). That passing rent will almost certainly be considerably higher than the rent the parties eventually agree for their new letting in the shadow of the new Code. None of these features of a renewal negotiation is mirrored in the section 34 valuation hypothesis, and it would be very difficult to make a reliable assessment of the influence they are likely to have on the outcome of the negotiation. Because the parties are moving from one statutory environment to another, telecommunications lease renewals, to a much greater extent than lease renewals of other types of property, are poor comparables for section 34 valuations. Weight ought not to be put on them if sufficient evidence of lettings of new sites is available. The same point was made by the Court in Hanover Capital at paragraph 77.

70. Fourthly, when employing evidence of lettings of new sites for the purpose of a section 34 valuation, it is essential to be aware of all of the features of the comparable transaction which may have influenced the rent agreed. That is a basic principle of valuation by the comparative method, but it is one which the claimants dogmatically resisted earlier in these proceedings. It has been an article of faith for the claimants that capital sums paid by them to site providers as part of the terms of lettings of new sites, or on the renewal of leases of existing sites, must be treated as 'inducements' and left entirely out of consideration. They insist that only the sum identified by the parties in a new letting as consideration assessed in accordance with the provisions of the Code can be used as a guide to rental value and that all other payments, no matter how substantial, must be treated as the price of purchasing the willingness of otherwise unwilling site providers."

(xv) The attitude of the claimants in the matter (those claimants being the exact same legal entities as in this instance) led to the following:

"71. Adherence to this dogma led the claimants to withhold full details of their own transaction from the defendants (and possibly even from their own expert witness) – despite being aware of the practice of making capital payments Mr Sladdin did not include them in the comparable material he initially identified as relevant and could not recall when he had been given access to the full details of those transactions; the information about capital payments which he did include in his report were later agreed by him to be wrong, significantly under-stating the sums paid). It took an order of the Court before details of capital sums paid by the claimants on new lettings were disclosed. When disclosed, those payments cast many of the transactions on which Mr Sladdin had originally relied in a rather different light. New lettings which he had understood involved site payments of £250 a year had been accompanied by a capital payment of £15,000 on completion. Whether or not the claimants are right about those payments being inducements which ought in principle to be ignored (a matter to which I will return) it is indefensible for them to keep the details of such transactions

from the experts and from the Court. What the payments represent is a question of fact for the Court, and what account is to be taken of them is a question of valuation judgment for the experts; neither question falls to be pre-determined by one of the parties."

(xvi) The discovery sought is the ancillary documentation in respect of 21 sites, being numbers 1-21 of the large table annexed to these submissions. Those are all of the early transactions which the Tribunal will want to scrutinise to make sure that they are "arm's length" transactions and not, as the respondent is suggesting, transactions which were designed to skew the market in the applicants' favour. The respondent therefore seeks discovery of the ancillary documentation to include, without prejudice to the generality of the foregoing:

a) Details of Early Completion Incentive Payments (ECIPs).

b) Details of contribution of fees.

c) Details of any other payments or incentives or like character.

d) Correspondence passing between the parties prior to settlement including any without prejudice correspondence.

e) As a catchall, if not caught within the above, a copy of any heads of terms and a summary of the factual matrix of the renewal including details of all payments made as part of the transaction or other incentives which have a monetary value or would confer a quantifiable benefit.

(xvii) Of course, it is acknowledged there is a slightly different approach in the attitude of the Lands Tribunal to discovery applications as opposed to the general attitude of the High Court, wherein the test under Rule 9(4) of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Lands Tribunal Rules") is that the emphasis is on documents which the Tribunal may require as opposed to the test in the High Court which is the disclosure of documents which may be relevant to either party in advancing or resisting its own case or the case of the other.

(xviii) In practice, however, it will be rare that a document would be relevant to one party's case but irrelevant to the Tribunal. What the Lands Tribunal Rules effectively permit is for a much wider discretion before the Tribunal, reflecting (notionally) a more inquisitorial rather than adversarial approach. Set against that background, in the respondent's respectful submission, it is axiomatic that the Tribunal, in fixing the rent, will want to ensure that the comparables upon which its judgment is formed are bona fide. This should indeed be the goal of all the parties to the litigation. It has been a feature of much judicial comment by the Upper Tribunal in Cornerstone Telecommunications Infrastructure Ltd v London & Quadrant Housing Trust [2020] UKUT 0282 at paragraph 109 (replicated and approved by this Tribunal at paragraph 14 of the first Derrycraw decision – page 14 of the Trial Bundle – and more recently by the Upper Tribunal in the Morriss/Pippingford case.

(xix) There are a number of what the respondent contends are decisive factors including:

a) The attempt initially by the applicants to have their own solicitor verify matters.

b) When pressed, the applicants did in fact file an affidavit from someone within Mobile Broadband Network Limited (on behalf of the applicants) – Mr Philip John Sturgeon, who acknowledged that mistakes had been made including misrepresenting the fees paid to a solicitor (the fee stated to be paid was some £1,250 but the actual sum paid was £1,500 exclusive of VAT and, presumably, once VAT is included, the correct figure is actually £1,800). Pausing here, the issue over whether or not VAT is accounted for or not is unclear. The entry in Mr Sturgeon's affidavit at paragraph 7(ii) at page 93 would tend to suggest that VAT has not been included. If VAT has been excluded on each of the fees, then the incentive payments are considerably under represented by a factor of 20%.

c) It is acknowledged by Ms Hobson on behalf of the applicants that the best way to find an explanation for Rent Review Agreements is to understand

how the parties reached an agreement at the reviewed rental levels. This is an entirely proper statement by Ms Hobson but, in truth, does little more than state the obvious.

The Applicants' Response

(xx) As set out in the previous submissions, the relevance of the information sought is not being disputed. The point appears to be, as per paragraph 2.9 of the applicants' submissions that "that those details have been provided". Subject obviously to clarification, what the applicants seem to be arguing is that the documentation is relevant, the documentation is in their possession, custody and power but the documentation does not have to be revealed because someone within their organisation has identified the information from the documentation and that has been provided. Presumably the documentation has been collated in order that Mr Sturgeon could fact check the veracity of the statements made. If that is indeed the case, then it is not a difficult task to provide it.

(xxi) In the normal course of events, as between the parties, to use an example, the lease is one of the central documents and is almost inevitably disclosed as part of the exchange of evidence between the parties. What the applicants seem to be suggesting is that it would now be sufficient for one party in possession of the lease simply to summarise its contents and provide that in a note or memorandum such that would satisfy their discovery obligations. The analogy at paragraph 2.11 to the effect that when it comes to attempts to find comparables, all that is ever usually disclosed are details of the market letting is of course correct, but it totally misses the point. The information which is normally disclosed is disclosed by third parties in the market and there may well be a confidential sensitivity in disclosing the precise terms of a lease but normally the expert valuers, when speaking to their colleagues, will ask if there are any unusual or particular circumstances to the agreement which might skew the comparable. Sometimes that information is released and sometimes it is not and the valuers are often hampered by the fact that they cannot get disclosure of the underlying documents. That fact does not, however, detract from their relevance.

(xxii) In the respondent's respectful submissions, the above deals with discovery of items (a) to (c) and (e). In relation to item (d), in respect of the without prejudice correspondence, without prejudice documentation has been disclosed where the reasonableness of a transaction has been challenged.

(xxiii) In Muller and another v Linsley and another [1994] EWCA Civ 39, the Court of Appeal ordered without prejudice correspondence between the parties A and B to be produced to a third party, who had not been involved in the relevant WP exchanges. There the claimant was a company director and shareholder who had been dismissed. He was then involved in a shareholder dispute, which was settled. A firm of solicitors had advised him on the shareholder dispute. After the settlement, the claimant sued the solicitors, alleging that their negligence had triggered his dismissal. In the action against the solicitors, the claimant pleaded, amongst other matters, that in settling the shareholder dispute, he had acted reasonably to mitigate his loss. The solicitors sought disclosure of the communications leading up to the settlement on the primary basis that they were relevant in a way that did not infringe the WP rule. The claimant claimed WP privilege.

(xxiv) The Court held that the communications should be produced. The claimant had put the reasonableness of his own attempt to mitigate his loss in issue and, accordingly, could not both assert the reasonableness of the settlement and claim privilege for the documents by which it was achieved.

(xxv) Whilst the principles in Muller had been criticised (see Berkley Square Holdings Ltd and others v Lancer Property Asset Management Ltd and others [2021] EWCA Civ 551, which involved a two party case where the waiver of privilege was not allowed) nevertheless it still remains the position that the Court has the power as a matter of principle to order disclosure of without prejudice material where the reasonableness of a settlement (in this case obviously over rent) is called into question.

Conclusion

(xxvi) As set out above the test is whether or not the Tribunal may require a document. That notion of what may be required should, in the respondent's respectful submission, take into account the documents which the parties themselves acknowledge as being relevant (including for the avoidance of doubt the expert instructed by the respondent). Here both the applicants and respondent acknowledge that they have such documentation in their custody, possession or power.

(xxvii) In circumstances where the parties consider the documentation relevant and have it in their custody, possession or power, it is respectfully submitted that the Lands Tribunal ought to require the applicants to disclose the information. The applicants' refusal to disclose same on the basis that they themselves have provided a summary of the documents cannot possibly be considered as an answer.

The Applicant's Submissions

12. Mr Colmer KC:

Introduction

(i) This submission falls into two parts:

a) The substantive submission: The first part of this submission addresses the merits (or lack thereof) of this, the latest phase, in the respondent's campaign of disproportionate and delaying requests for irrelevant and unnecessary information.

b) The response to the respondent's allegations: The second part of this submission addresses the arguments and the aspersions which have been deployed and cast by the respondent in an attempt to support this latest perambulation around the irrelevant and the unnecessary.

Part 1: The substantive submission

(ii) Contents of the substantive submission:

The substantive submission is in five sections

a) Statement of the documents which are the subject of the application.

b) Statement of the legal basis for an order for disclosure: the statutory rules.

c) Statement of the legal basis for an order for disclosure: the case law.

d) Does the Tribunal require the subject documents?

e) Conclusion on substantive submission.

(iii) Statement of the documents which are the subject of the application

These are recorded at paragraph (xvii) of the respondent's submission.

(iv) Statement of the legal basis for an order for disclosure: the statutory rules

a) In the Lands Tribunal the legal basis for an order for disclosure of a document is comprised in Rule 9 of the Rules.

b) That rule is drafted in clear and straightforward terms:

> "9(4) Subject to paragraph (5) any party to proceedings shall, if so requested by the registrar, furnish to him any document which the Tribunal may require and which it is in that party's power to furnish, and shall, if so directed by the registrar, afford to all other parties to the proceedings an opportunity to inspect any such document and to take a copy thereof."

c) This statutory rule establishes the only legal jurisdiction by reference to which disclosure of a document may be ordered by the Tribunal.

d) On the other hand, the contents of paragraph (xvii) of the respondent's submission serve only to cloud and confuse the clarity in Rule 9. The respondent's allusion to the discovery rules applicable in the High Court, and its claim that there is only a "slight difference in approach in the

attitude" to discovery, as between the Tribunal and the High Court, are both simply wrong in law and should be ignored. Likewise, the proposition that there is a mere difference in "emphasis" as to discovery, between Tribunal and High Court, is without any legal basis at all.

e) Contrary to what the respondent argues, there is only one statutory rule in play, and that rule is Rule 9. Furthermore, that rule is a model of clarity and simplicity. At the heart of Rule 9 lies the following question: does the Tribunal require the document? Accordingly, any attempted cross-references to statutory rules and principles in other courts and jurisdictions is misguided, unnecessary and unhelpful.

f) In all the decisions, which the Tribunal has made in this litigation, it has consistently applied Rule 9, without any of the glosses or distractions urged upon it by the respondent.

(v) Statement of the legal basis for order for disclosure: the case law

a) As noted above, on foot of the respondent's persistence, the Tribunal has had repeated occasions on which to consider, and to record, how Rule 9 is to be applied.

b) In its first decision on disclosure in the Derrycraw case, in May 2021, the Tribunal held at paragraph 17:

> "The Tribunal requires as much relevant information as possible in order to arrive at its decision. That said, however, it has no desire to consider 'realms' of indiscriminate and irrelevant information, nor does it wish either party to bear the cost of providing such information."

c) In its second decision on disclosure in the Derrycraw case, in January 2022, at paragraph (20), the Tribunal considered whether information sought "… would be useful …" in the exercise of valuing the parcel of land.

d) In its third decision the Derrycraw case, in February 2022, at paragraph (25) the Tribunal reiterated that it "… has no desire to consider reams of irrelevant information …".

e) In its fourth decision in the Derrycraw case, in December 2022, at paragraph (51), the Tribunal confirmed, and accepted, the agreement between the parties that the Tribunal is an "inquisitorial Tribunal" and that "it [has] the statutory authority under Rule 9(4) of the Rules to request any document which 'the Tribunal may require'".

f) In passing, the Tribunal may note that, at paragraph (xviii) of its submissions, the respondent is now reneging on its earlier unqualified acceptance of the inquisitional nature of the Tribunal. In that paragraph the respondent seeks to downgrade the nature of the Tribunal to something which is merely "notionally" inquisitorial.

g) The respondent's change of stance on this is as notable as it is wrong. Up to this point, there has been complete consensus between the parties and the Tribunal as to its inquisitorial status role. The late-in-the-day retreat on the part of the respondent is only explicable as a tactical shift on its part in order to bolster its attempt to introduce inapplicable principles into the disclosure process. Such an approach will only lead to the Tribunal misapplying Rule 9 and, it should, it is submitted, be resisted.

(vi) Does the Tribunal require the subject documents?

a) First and foremost, this question has to be answered in the context of the task which the Tribunal is undertaking in these proceedings. To repeat which has been often been said throughout this and related litigation, the Tribunal's task is to value a small, greenfield site.

b) The question thus is: does the Tribunal need any of the subject documents in order to value this small, greenfield site?

c) Whether one applies the actual wording of Rule 9, which speaks in terms of the Tribunal "requiring" the information sought, or whether one applies a test of "usefulness", it is respectfully submitted that, objectively speaking, there are no factors whatsoever which weigh in favour of ordering disclosure of the subject documents.

d) Before proceeding any further, it is important to note the following with respect to the subject documents:

   i. As to "details of early completion incentives (ECIPs)", the respondent has been provided with a statement of all ECIPs that have been paid.

   ii. "Details of contributions to fees", the respondent has been provided with a statement of all contributions to fees that have been paid.

   iii. "Details of any other payments or incentives of like character", no payments have been paid other than ECIPs.

   iv. "The correspondence passing between the parties prior to settlement including any without prejudice correspondence", these documents have not been provided.

   v. "As a catch all, if not caught within the above, a copy of any heads of terms and a summary of the factual matrix of the renewal including details of all payments made as part of the transaction or of other incentives which have a monetary value or would confer a quantifiable benefit"; the respondent has been provided with the statements described above, in respect of ECIPs, contributions to fees and annual site payments.

e) Even though the respondent has received all that information, nonetheless, by this application, the respondent now wants underlying

documents in respect of categories (i), (ii), (iii) and (v); and it also wants to see the without prejudice negotiation correspondence in category (iv).

f) It is against that background, and in that context, that the Tribunal has to consider the following question: in order to value this small, greenfield site, does the Tribunal require the underlying documents in respect of categories (i), (ii), (iii) and (v) and does it require the without prejudice negotiation correspondence in category (iv)?

g) Having thus framed the question, it is submitted that there are no factors whatsoever that point to a conclusion that the Tribunal requires either the underlying documents or the without prejudice negotiation correspondence. The following points may be made.

<u>The respondent's ongoing failure to give a reason why the Tribunal may require the documents and correspondence</u>

h) In its initial submissions in support of this application, filed on 15 August 2024, and in its most recent submissions, the respondent does not anywhere set out why the Tribunal may require either the underlying documents in the without prejudice negotiation correspondence.

i) Nowhere in those submissions does the respondent even suggest why the underlying documents or the without prejudice negotiation correspondence would be useful to the Tribunal. There is no explanation of what this will add to the Tribunal's knowledge.

j) The respondent has had ample time to frame an argument as to why, in order to value this small, greenfield site, the Tribunal "may require" the documents and correspondence, or as to why the Tribunal would find the documents and correspondence useful for that task.

k) The fact that the respondent has had that time but has failed to come up with such an argument speaks volumes. The respondent's own failure

shows that there is no basis upon which the Tribunal could properly exercise its Rule 9 power.

l) In its submissions the respondent engages in some unsubstantiated and un-evidenced theorising about the status and capacity of the landlords in the comparables and about the market generally. These aspects are addressed in part 2 of these submissions. But, suffice it to say here, these wide-ranging conjectures on the part of the respondent, or its expert, fall far short of constituting a reason why the Tribunal may require the underlying documents or the correspondence.

<u>The respondent's earlier acceptance that neither the underlying documents nor the correspondence are required by the Tribunal</u>

m) The respondent's ongoing failure and inability to frame any argument at all (never mind a plausible one) as to why the Tribunal may require the underlying documents or the correspondence in order to value this small, greenfield site is, however, entirely consistent with its stance in earlier, related proceedings.

n) Those earlier, related proceedings are the <u>Derrycraw</u> case. In its August 2024 submissions and in its recent submissions, the respondent is strikingly silent about the <u>Derrycraw</u> case. Although the respondent now chooses to ignore the <u>Derrycraw</u> case, that position is entirely at odds with the respondent's earlier stance on the significance of that case.

o) At paragraph (41) of the Tribunal's fourth disclosure decision, in December 2022, the respondent was recorded as having made the following submission:

> "The Tribunal was informed that there were 16 cases between the applicants and the respondent and 15 had been stayed pending a decision on the subject (i.e. the Derrycraw) reference. This therefore was not a 'one-off' case as presented by the applicants."

p) That is to say, the respondent, up to the time of that submission, and for a considerable period of time ever since, elevated the Derrycraw case to one which had an influential, if not in fact determining, effect on all other cases involving small, greenfield sites of which the respondent is a landlord.

q) The point is this: the respondent litigated, negotiated and ultimately, on the day of the hearing, on the steps of the Tribunal, settled the level of rent payable in the Derrycraw case without any of the subject documents which it now seeks.

   i. To be clear, the Derrycraw case was listed for hearing without any of the subject documents it now seeks.

   ii. To be clear, the Derrycraw case was settled without any of the documents it now seeks.

r) The conclusion which inevitably flows from the facts of (i) the intended hearing (ii) the settlement, is that when the respondent was taking its commercial decision to either prosecute or settle the Derrycraw case, advised by legal and expert opinion, the respondent considered and was advised and guided, that it could both argue for, and come to a settlement view about, the proper level of rent without any of the subject documents it now seeks.

s) It is important to note that, in the Derrycraw case, the respondent actually made some attempt to procure some of the subject documents. That attempt was rejected by the Tribunal. That rejection was not appealed. The respondent cannot now attack that decision. But, more significantly, the respondent's prosecution to hearing and settlement, without any of the subject documents which it now seeks, is determinative of the question of requirement in this case.

t) If the respondent had no reason to see the subject documents before running or settling the Derrycraw case, it cannot plausibly say it needs

them now. And much less can the respondent plausibly say that the Tribunal requires the subject document.

The lack of coherent expert support for production of the subject documents

u) It may be that this late-in-the-day, after-the-event, pursuit of the subject documents is driven by the respondent's expert. In that regard, it is noted that he has produced a letter dated 28th August 2024 which, it seems, is intended to provide a justification for the request for the subject documents. The letter does nothing of the kind but rather, instead, it engages in theorising and conjecture. This is addressed further in part 2 of these submissions.

v) If this drive for access to the subject documents is indeed directed by the respondent's expert, then, respectfully, the Tribunal should consider this carefully given the approach to date.

w) Three instances call for consideration:

i. The Ballyrainey case: the respondent's expert's approach in the Ballyrainey case is well known to the Tribunal. The Tribunal is referred to its fourth decision in the Derrycraw case and, in particular, paragraphs 52 and 53 thereof. They are set out here for convenience:

"52. The Tribunal finds the following facts to be relevant:

i. The Ballyrainey site was a greenfield site almost identical to the subject Derrycaw site.

ii. The experts in Ballyrainey and Derrycaw were the same, Ms Hobson on behalf of the tenants and Mr Crothers on behalf of the landlord.

iii. The landlord in the Ballyrainey site was not the respondent but the Tribunal finds this to be of no significance in assessing a rental for each site, under the 1996 Order.

iv. Mr Crothers is an experienced chartered surveyor and he would have been aware that his duty of care to the landlord in the Ballyrainey site was the same as his duty of care to the respondent in the subject site.

v. Mr Crothers agreed the appropriate rental for the Ballyrainey site based solely on comparable evidence supplied by Ms Hobson. This comprised comparable evidence of rental agreements negotiated by her and some letting evidence from her investigations of the wider telecoms market.

vi. Despite having the same duty of care to the landlord in the Ballyrainey site, Mr Crothers did not require a cross-check of evidence from WIP sites to satisfy himself that the rental agreement in the Ballyrainey site was correct. He was content to reach agreement without the WIP information.

vii. Mr Crothers did not mention in his expert report, the meeting of experts, his expert declaration and his statement of truth, that he required WIP evidence as a cross-check, despite having the same duty of care.

viii. In his statement of truth he noted that the expert opinion which he expressed in the Ballyrainey agreement represented 'my true and complete professional opinion'. There was no mention of the need for WIP evidence as a cross-check.

ix. In his experts declaration he stated that his report contained 'all the facts which I regard as being relevant to the opinions I have expressed and that attention ha been drawn to any matter which would affect the validity of these opinions'. Again no mention of WIP evidence being required.

53. Based on the above facts, the Tribunal can only conclude that Mr Crothers was professionally satisfied that a rental for the Ballyrainey

site could be assessed based solely on comparable evidence supplied by Ms Hobson. He had the same duty of care to his clients in Ballyrainey and Derrycaw but he did not find it necessary to carry out a cross-check using WIP evidence in reaching agreement on the Ballyrainey site."

In the Ballyrainey case, the Respondent's expert was content to settle the rental in it without access to WIP information.

But the relevant point for the instant application is that, in the Ballyrainey case, the Respondent's expert was equally content to settle the rental in it without access to the Subject Documents which he now seeks.

It is submitted that the respondent's experts' insistence, in this case, on having access to the subject documents, is as unnecessary as it was in the Ballyrainey case.

The Respondent's expert did not consider that he, or the Tribunal, required the Subject Documents in the Ballyrainey case. That being so, he cannot plausibly say that he, or the Tribunal, require the Subject Documents in the instant case.

The Derrycraw case:- … The Respondent's expert was instrumental in the prosecution, negotiation and settlement of the Derrycraw case.

The Respondent's expert did not consider that he, or the Tribunal, required the Subject Documents in the Derrycraw case. That being so, he cannot plausibly say that he, or the Tribunal, now require the Subject Documents in the instant case.

The Sump Hill case: In this case, the Respondent's expert took a point, and pursued if for some months, at time-cost and financial-cost to all parties and the Tribunal, as to whether the small, greenfield site should be valued as such, or as (he contended) a finished site.

On, effectively, the eve of the hearing, the Respondent's expert abandoned this point and, subsequently, the issue of rental was resolved – again without any of the Subject Documents which he now, seemingly, seeks."

x) For these reasons, any expert "foundation" for the request for the subject documents is demonstrably and wholly lacking.

Conclusion on substantive submission

(vii) For the reasons set out above, it is, respectfully submitted that there is no reason why the Tribunal might require the subject documents in order to value this small, greenfield site. The parties, and the Tribunal, have been ready, willing and able to conduct that valuation exercise, without the subject documents, on a range of occasions, in individual cases. There is no reason why this case should be treated differently.

Part 2: The response to the respondent's allegations

Contents of the response to the respondent's allegations

(viii) This response to the respondent's allegations is divided up into five sections:

a) The suggestion of targeting of ill-resourced landlords.

b) The mistake in one statement of an aspect of one solicitor's fee.

c) The role of the applicants' solicitor.

d) Without prejudice correspondence.

e) The range of evidence.

The suggestion of targeting ill-resourced landlords

(ix) This suggestion is no more than baseless conjecture on the part of the respondent. The respondent does not even advance it as an allegation or a

proposition. The respondent's submission makes it plain that this is more speculation and conjecture on the respondent's part.

(x) The fact that the respondent does not consider that it can advance this as a positive assertion speaks volumes. In any event, any analysis of the comparables tables shows this is a point without any merit. For one thing, the very first entry in the table concerns a significant commercial, corporate entity represented by one of Northern Ireland's largest and leading law firms. The same table discloses the many landlords who were of a corporate or commercial nature and who were represented by solicitors and agents. The aspersion implicitly cast on the capacity of those professionals to represent their clients rebounds to the utter discredit of the respondent.

(xi) There is of course, one point that entirely destroys the respondent's suggestion that the applicants have targeted ill-resourced landlords. The Tribunal is aware that the applicants have issued some 16 cases against the respondent. The respondent is anything but an ill-resourced landlord. It is a multi-million-pound multi-national entity. In fact it describes itself on its own website as the leading mobile phone mast site lease investment firm in the world. The Tribunal is also aware that the leading case in this jurisdiction was the Derrycraw case – between the applicants and the respondent. Seen with those facts in mind, the respondent's vague points about targeting and market-setting are frankly absurd.

The mistake in one statement of an aspect of one solicitor's fee

(xii) The fact that there was one mistake in one fee out of 70 comparables is indicative of nothing other than a measure of desperation on the part of the respondent in its effort to undermine the settlement it entered into in Derrycraw.

The role of the applicants' solicitor

(xiii) The applicants' solicitor properly and professionally provided a witness statement in this matter. That was the correct and efficient way to address the application. It has since been supplemented by one from Mr Sturgeon.

Without prejudice correspondence

(xiv) The respondent's pursuit of without prejudice correspondence in a valuation case is uniquely unprecedented. What matters is what was agreed. The prior negotiating stances of the parties to the ultimate agreement are irrelevant. They are not remotely useful to anyone, whether in the case to which they relate or in any other case; and nor are they of any use to the parties or the Tribunal.

The range of evidence

(xv) There is a theme in the respondent's submission that because of an alleged gap in the evidence for valuation, the subject documents are required. The foundational proposition is incorrect and, in any event, the conclusion does not follow. As noted previously, there is a growing range of evidence as to value – not least emerging from the hard-fought and apparently fully-informed Derrycraw agreement. In any event, the subject documents add nothing to the valuation case. The applicants' expert has explained why rent review evidence is of no relevance.

Conclusion

(xvi) For these reasons the Tribunal is invited to dismiss this application.

The Tribunal

13. The Tribunal has fully considered the detailed and substantial submissions of the parties in relation to the subject discovery application.

14. With regard to the Lands Tribunal, the law on discovery is as stated in Rule 9(4) of the 1976 Rules. This Rule is clear and unambiguous and simply provides for the discovery of any document which the Tribunal "… may require …".

15. The Tribunal finds the following facts to be of relevance:

(i) The exercise for the Tribunal is to assess the rental value for lease renewal of some 15 small greenfield sites at various locations throughout Northern Ireland.

(ii) The Tribunal has before it details of market lease renewal agreements on some 79 similar small, greenfield sites.

(iii) 96% of the landlord in the 79 comparables were represented by a solicitor and some 41% were represented by a solicitor and an agent. These comprise a variety of landlords including large commercial and corporate entities, including the respondent. Based on these facts the Tribunal does not find any evidence for the respondent's suggestion that the applicant may have been involved in targeting "ill-informed" landlords leading to "market fixing".

16. Does the Tribunal require any of the documents as requested by the respondent to assess the rental on these remaining 15 small, greenfield sites? With 79 comparables available the Tribunal is more than confident that it can value the subject 15 sites without the need for any additional documentation. In addition, 3 similar sites have already been agreed without the need for this additional documentation.

Conclusion

17. The Tribunal therefore dismisses the respondent's discovery application.

29th April 2025

Henry Spence MRICS Dip.Rating IRRV (Hons)
Lands Tribunal for Northern Ireland