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/201/2024

BETWEEN

CASTLESTONE LIMITED – APPLICANT/LANDLORD

AND

VODAFONE LIMITED – RESPONDENT/TENANT

Re: 30 Donegall Place, Belfast

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

Background

1. On the 6th November 2024 the Lands Tribunal received a Tenancy Application from Castlestone Limited ("the applicant") and which was accompanied by a Notice to Determine the existing tenancy on 30 Donegall Place, Belfast ("the reference property") which was held by Vodafone Limited ("the respondent"). The Notice to Determine stated that:

    (i) The existing tenancy was to be terminated on the 30th November 2024.

    (ii) On grounds contained in Article 12(1)(f) of the Business Tenancies (Northern Ireland) Order 1996 ("the Order") i.e. "redevelopment" grounds.

2. The issue, therefore, to be decided by the Tribunal was the bona fides of the applicant's intentions with regard to redevelopment of the reference property.

3. The Tribunal issued various directions relating to the substantive issues in the reference but on the 16th January 2025 the applicant submitted an "Interlocutory Application for Notice of Particulars and Request for Discovery".

4. This was discussed at a mention of the reference on the 28th January 2025 but the Tribunal dismissed the Interlocutory Application and set a date for hearing the substantive issues in the case i.e. the proofs relating to the applicant's intentions with regard to redevelopment. The hearing was scheduled for the 24th and 25th March 2025.

5. Subsequently, the hearing was not required as the tenancy was surrendered on the 25th February 2025. The only issues which remain to be decided by the Tribunal are those of costs and statutory compensation, if any.

6. The applicant, however, is now seeking the information it had previously requested in its Interlocutory Application, dated 16th January 2025.

Procedural Matters

7. The applicant was represented by Mr Wayne T Atchison KC instructed by Davidson McDonnell solicitors. The respondent was represented by Mr Keith Gibson BL instructed by Cleaver Fulton Rankin solicitors. The Tribunal is grateful to counsel for their detailed and helpful submissions.

The Applicant's Submissions

8. On behalf of the applicant Mr Atchison KC submitted:

    (i) The applicant seeks provision of information and/or discovery of certain matters from the respondent.

Background

(ii) The applicant's case is simple and has been consistent from the outset. At all material times, the applicant has maintained that, despite its representations to the contrary, the respondent did not legitimately intend or want a new tenancy and was in fact seeking to abusively utilise the 1996 Order to delay and frustrate the applicant from recovering possession of the premises to "drag out the process" and confer sufficient time for the respondent's new premises to be made ready as it is understood that the respondent's contractor met with some form of delay in having the new premises ready for the respondent to take occupation.

(iii) The applicant refers the Tribunal to its Statement of Case dated 20th November 2024. As appears therefrom, the applicant has consistently identified the following issues:

a) Paragraphs 6 to 13 – having served a Notice to Determine on 23rd April 2024 (with a termination dated of 30th November 2024), at all material times during the succeeding 8 months the respondent raised no objection and in fact acted in a matter consistent with respecting that notice e.g. when it notified the applicant's solicitors in August 2024 that it was issuing a Deed of Surrender relating to the underlease (to its related entity, Call Me Connections Limited). The respondent never intimated that it wanted a new tenancy and, by its words and conduct, appeared to want the lease to terminate.

b) Paragraph 15 – the respondent's solicitor contacted the applicant's solicitor on 23rd October 2024 to explain that whereas the respondent had contracted for a new space (believed to be in the Corn Market area), they had met with a delay in completing the fit out of their new premises which would take 3 months such that the respondent wished to occupy the reference property until January or February 2025.

c) The applicant filed the Form EA and made the application that the tenant was not entitled to a new tenancy pursuant to Article 10 on 6th November 2024.

d) Paragraph 19 – the respondent's solicitor wrote over on 6th November 2024 stating:

> "we are instructed to write to you to confirm that it is our client's intention to make a Tenancy Application to the Lands Tribunal …"

e) That application was first reviewed before the Tribunal on 13th November 2024. On that occasion, as expressly appears from paragraph 22 of the applicant's Statement of Case, the respondent's counsel stated that the respondent wanted a new tenancy at the reference property. Paragraph 22 documents that and warrants reproduction and consideration in full:

> "22. Counsel for the respondent at the mention on 13th November 2024 stated to the Lands Tribunal that the respondent wants to see the landlord's proof and statement of case <u>because the respondent wants a new tenancy at the premises</u>. This representation to the Lands Tribunal was surprising on the basis that the applicant understands that the respondent is imminently relocating to a new store at Corn Market and closing its store at the premises. It is the applicant's position that the Lands Tribunal should urgently seek an affidavit from the respondent in respect of inter alia its Deed of Surrender in respect of the sub-lease referred to above, its commitment to a lease of new premises at Corn Market and specifically addressing whether it truly intends to continue its tenancy and occupy the premises for a legitimate business to be carried on by it. It is the applicant's understanding that a large commercial organisation such as the respondent operating a large retail store portfolio across the UK and Ireland plans well ahead for the closure of old stores and

the opening of new stores such it is anticipated that discovery of the material suite of documents will show the true intentions and chronology of conduct on the part of the respondent. It would take very little time for the respondent to make this simple and straightforward but critically important evidential information and documentation available to the Lands Tribunal."

f) The applicant immediately put the legitimacy of the representation and truth of the respondent's intentions in issue, as appears from paragraph 22 of the Statement of Case. The Tribunal will register that when the respondent filed its replying Statement of Case on 19th December 2024, it conspicuously failed and omitted to respond to that issue whatsoever. The object of the respondent's Statement of Case was to specify any issues with which it took issue and to articulate its case. "The respondent has had the benefit of the Statement of Case of the applicant" [at para 2]. The respondent did not take any issue and did not dispute the applicant's position in relation to both the correspondence from Cleaver Fulton Rankin dated 6th November 2024 and the respondent's counsel's submission that the respondent wanted a new tenancy.

g) Paragraphs 18, 23 to 31 – wherein the applicant communicated to the Tribunal the significant impact and implications of the respondent's obstruction and impeding recovering of vacant possession upon the expiration of the lease (on 30th November 2024) both in terms of frustrating the applicant itself, its contractors and professionals, and the proposed new business tenant, disrupting the applicant's programme of works and occasioning considerable loss, expense and damage.

h) Lest there be no doubt, from the very outset, the applicant expressly made the point at paragraph 35 of the applicant's Statement of Case that:

"The respondent is abusively seeking to utilise the 1996 Order to delay the applicant recovering possession because (through no fault of the applicant) it has encountered delays in having its new store at Corn Market ready for occupation but has no legitimate intention of taking a new tenancy at the premises and has no regard for the adverse impact its action will have on the applicant, the applicant's contractors including the builder and contract administrator (an their employees), the new proposed business tenant ITX UK Limited and reputation of carrying out business in Northern Ireland."

i) In its replying Statement of Case, the respondent conspicuously failed and omitted to respond to that issue whatsoever.

j) Indeed, paragraph 36 of the applicant's Statement of Case concluded that:

"the respondent's representation to the Lands Tribunal on 13th November 2024 that the respondent wishes to have a new tenancy at the premises should be interrogated urgently and rigorously by the Lands Tribunal."

k) Again, in its replying Statement of Case, the respondent conspicuously failed and omitted to respond to that issue whatsoever.

(iv) The Tribunal can see that the applicant has always been both transparent and consistent about the nature of the case being made i.e. that the respondent was acting in an abusive manner and that, contrary to its representations, it did not legitimately intend to take a new tenancy.

(v) Therefore, cumulatively, the Tribunal can see that the respondent expressly represented that it wanted a new tenancy:

a) The respondent represented in correspondence from Cleaver Fulton Rankin dated 6th November 2024.

b) In its counsel's submission to the Tribunal at the review conducted on 13th November 2024.

(vi) The Tribunal will recall at the review conducted on 20th December 2024, following exchange of the respective Statements of Case, the applicant specifically referred the Tribunal to the "elephant in the room that needs to be addressed is the tenant's intention" and referred to the fact that the respondent's Statement of Case was "deliberately silent on that". At that review the applicant specifically sought a direction in conformance with paragraph 22 of its Statement of Case i.e. obligating the respondent to file an affidavit "in respect of inter alia its Deed of Surrender in respect of the sub-lease referred to at 8 above, its commitment to a lease of new premises at Corn Market and specifically addressing where it truly intends to continue its tenancy and occupy the premises for a legitimate business to be carried on by it". In doing so, the applicant expressly referred the Tribunal to the fact that it is against the provisions of the Business Tenancies regime to wilfully conceal facts. The Tribunal will recall that whereas the respondent was vehemently resistant to the provision of such an affidavit, it did not take any issue with the applicant's concerns about legitimate intentions or wilful concealment.

(vii) Owing to the frustration on the part of the applicant, arising from the respondent's repeated insistence that it wanted a new tenancy, in order to demonstrate that the respondent did not legitimately want a new tenancy, the applicant issued the interlocutory application on 16th January 2024.

(viii) Once again that interlocutory application was transparent and consistent about the applicant's case. Most notably, the Tribunal is referred to:

a) The application, at paragraph (b) referred to the fact that on 23rd October 2024:

> "… the respondent's solicitor advised the applicant's solicitor that the respondent had contracted for new premises (believed to be in the Corn Market area) but unfortunately that they had met with a delay in respect of their new lease in

relation to the fit out of their new premises and that the process was going to take 3 months and that the respondent may require to occupy the premises until January/February 2025. After taking instruction, later that day, when the respondent's solicitor was notified that the applicant was already committed to contractors, the respondent's solicitors volunteered that the respondent may seek to make a tenancy application in order to drag out the process and effectively allow them the extension of time required."

b) At paragraph (d), the applicant made clear that it believed that the respondent was abusing the Lands Tribunal regime and did not legitimately desire a new tenancy:

> "That the applicant believes that (for the reasons expanded upon in the applicant's Statement of Case) the respondent is abusively seeking to exploit the Lands Tribunal Business Tenancies mechanism to delay, frustrate and obstruct the applicant from realising possession i.e. to "drag out the process" when in actual fact the respondent does not have any legitimate desire to enter into a new tenancy at the premises, and has in fact contractually committed to taking new premises."

c) At paragraph (e), the applicant expressly identified that it believed that the Tribunal was being mislead by the respondent concealing material facts:

> "That in all the circumstances the respondent's conduct is prejudicing and adversely impacting the applicant, misleading the Tribunal by concealing material facts, the applicant's new proposed business tenant and the applicant's contractors (of which there are many) who have been retained to conduct the works which are of a substantial nature and cannot be done without obtaining possession of the premises."

d) At paragraph (f) the applicant emphasised that from the very outset, the Tribunal was being misled:

> That whereas the respondent's counsel informed the Tribunal at the review conducted on 13th November 2024 that the respondent "wants a new tenancy at the premises", the applicant's evidence suggests that is not the case, and that the respondent has no true intention of entering into a new tenancy of the premises.

e) At paragraph (g), the applicant was unequivocal in relation to its concerns and complaint:

> There are critical issues engaged as to whether the Lands Tribunal is in fact being misled by the wilful concealment of material facts by the respondent.

(ix) The respondent has not filed any response or objection in answer to the Interlocutory Application, despite having been in receipt of same since 16th January 2025. Critically, following receipt of the Interlocutory Application, and articulation of the concerns communicated therein, no issue was recorded by the respondent at the subsequent reviews i.e. as to the gravity of the concerns being communicated by the applicant. Rather, at all material times the respondent has simply sought to avoid answering the applicant's concerns.

(x) Indeed, when the case was reviewed on 28th January 2025, the applicant expressly submitted to the Tribunal that this was a unique case with compelling facts and went through the aforementioned issues articulated in the applicant's Statement of Case. In doing so, the Tribunal will recall that the applicant expressly referred to the BTO providing for legitimate requests for tenancies and that the mechanism should not be exploited by a tenant who has met with problems at its new premises. In doing so, express reference was made (once again) on behalf of the applicant to the provisions in respect of misrepresentation and penalties for wilful concealment. Indeed, reference was made to potentially promoting a

preliminary point on that basis. Following receipt of submissions by the respondent (about the adequacy of the applicant's proofs), the applicant expressly referred the Tribunal to the respondent's omission to address the Tribunal on the existence of their new lease and it was expressly submitted that the Tribunal was being subjected to concealment of material facts by the respondent. At that stage the Tribunal resolved that it was minded to move straight to a hearing in respect of the substantive case i.e. as to whether or not to determine the tenancy and the case was fixed for hearing on 24th and 25th March 2025.

(xi) The foregoing equips the Tribunal with a concept of the background which preceded the recent events, culminating in the tenancy being determined, which unequivocally betray and evidence that all material times the applicant's concerns were in fact well founded.

Disclosure of respondent's new tenancy at alternative premises

(xii) On 7th February 2025, as appears from the photographs taken by the applicant's solicitor, Mr David McDonnell, the respondent displayed a sign in its shop window which stated "Sorry we're closing: Our last day will be 16th February 2025".

(xiii) Thereafter, on 14th February 2025, the respondent's solicitor wrote to the applicant stating:

> "As you are aware our client has secured alternative premises … Our client intends to take no further steps in respect of your application save to apply for its costs …. our client seeks to determine the tenancy with effect from 25th February 2025 …"

(xiv) Leaving aside the acceptance and concession that their client had secured alternative premises in the matter which the applicant had already communicated (which must properly be construed from the formulation "as you are aware"), this Tribunal will register from the foregoing that the applicant's concerns which it registered from the very outset have been proven and made good. It is now beyond peradventure that when the case was reviewed on 28th January 2025, and indeed all of the preceding

reviews, that the respondent was already committed to its new premises and never had any legitimate intention to renew a lease at the subject premises.

(xv) In such circumstances, there can be no question about the need for this Tribunal to scrutinise whether the respondent made misrepresentations and/or concealed material facts. Those issues are paramount and shall inform the disposal of the application and the question of costs.

Material Legal Provisions

(xvi) The Tribunal will be conversant with the fact that the 1996 Order includes provision for compensation for misrepresentation or by the concealment of material facts (Article 27) and includes provision for penalties for the wilful concealment of material facts (Article 28). It is respectfully submitted that is for good reason: to ensure that the Tribunal is not misled or induced by misrepresentations or the concealment of material facts.

(xvii) For the reasons aforesaid, until the respondent most recently conducted an unceremonious *volte face*, one can see that at all material times the respondent was wilfully concealing material facts and misrepresenting its true position and intentions i.e. that it did not in fact want or intend to take a new lease.

(xviii) The Tribunal is also respectfully referred to the following provisions of the 1996 Order:

(i) The duty of parties to business premises to give information to each other and ability to serve Notices requiring provision of information pursuant to Article 29.

(xix) The Tribunal is also respectfully referred to the following provisions of the Lands Tribunal Rules (Northern Ireland) 1976:

(i) Rule 9(4) which relates to disclosure of documentary evidence and is cast in wide terms (emphasis applied):

9 Disclosure of documentary evidence

(1) Every party to a reference shall, if so requested by the registrar, furnish to him a list of the maps, plans, documents of title or otherwise, computations, and written, printed, or published material which it is intended to tender in evidence at the hearing, together with a copy of such list for each of the other parties to the proceedings.

(2) Subject to paragraph (5) the registrar may call for one or more of any item shown on such list may require information or further or particulars regarding any such item.

(3) The registrar shall send to each party to the proceedings a copy of, the list required by this rule and may at his discretion also send a copy of the item or of any information or further and better particulars delivered to him.

(4) Subject to paragraph (5) any party to proceedings shall, if so required 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 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.

(ii) Rule 12 Interlocutory Applications:

(1) Except where these rules otherwise provide, any application for an order or directions of an interlocutory nature in connection with any proceedings shall be made to the registrar.

(2) The application shall be made in writing and shall state the title of the proceedings and the grounds upon which the application is made.

(3) If the application is made with the consent of another party the terms of such consent shall be set forth in writing and signed by or on behalf of all consenting parties.

(4) Where any party has not consented to the making of an application a copy of the application shall be served on him and the application shall state that such service has been affected.

(5) Any party who objects to the application may, within 7 days after written notice of objection to the registrar and to the applicant, and before making any order on the application the registrar shall consider any objections which he may have received and, if so required by any party shall give all parties an opportunity of appearing before him.

(6) When dealing with any application under this rule, the registrar shall have regard, inter alia, to the convenience of the parties and the desirability of limiting so far as practicable the costs of the proceedings, and shall communicate the decision in writing to each party thereto.

(7) The registrar may, and shall if so required by the applicant or by any party objecting to an application under this rule, refer the application to the President for decision.

(8) Any party aggrieved by a decision of the registrar on an application under this rule may appeal to the President by giving notice in writing to the registrar and to every other party within 7 days after receiving notice of the decision or within such further time as may be allowed by the registrar, but an appeal from a decision of the registrar shall not act as a stay of proceedings unless so ordered by the President.

(9) The powers and duties of the President under this rule may be exercised and discharged by any member or members of the Tribunal authorised by the President in that behalf.

(10) The powers of the registrar under this rule shall include the power to direct by which party or parties to the proceedings the costs of or incidental to or consequent upon an interlocutory application are to be borne, and to direct that all or some, part of such costs are to be costs in the cause.

(11) Upon the hearing the Tribunal may revoke or vary an interlocutory order as to costs made under this rule.

(xx) It follows that the Tribunal is properly equipped with the power to require the disclosure of documentary evidence and also to make an Order or Directions of an interlocutory nature.

(xxi) It is respectfully submitted that by any measure, the interests of justice and fairness dictate that both this Tribunal and the applicant are properly entitled to see the information and documentation requested in the applicant's Interlocutory Application. There can be no doubt as to existence or relevance. Moreover, the information and documentation requested is capable of easy provision.

(xxii) It is perhaps telling that the respondent seeks to protest so much about providing the information and documentation requested. The applicant respectfully submits that the Tribunal should be concerned to ensure that the applicant is not permitted to conceal such relevant material, which would only serve to aggravate and exacerbate the conduct to date.

(xxiii) It is readily apparent that there are live issues between the parties including in respect of costs. The question of costs and the residual issues shall be informed by those matters requested in the applicant's Interlocutory Application and requires provision of the information and documentation requested. Both this Tribunal and the applicant are legitimately entitled to see those documents and information which, it should be emphasised, are capable of easy provision.

Submission

(xxiv) For the reasons aforesaid the applicant says that in all the circumstances it would be fair, just and apposite for this Tribunal to Order provision of the particulars and discovery sought, and the applicant hereby respectfully seeks such an Interlocutory Order in the terms of the Request referred to in the Interlocutory Application.

(xxv) For the reasons aforesaid the applicant says that in all the circumstances it is a legacy of the respondent's own conduct, which the Tribunal should be concerned to scrutinise, such that the request is legitimate and proportionate.

(xxvi) As appears from the application, the applicant submits that the provision of the discovery should be directed and ordered to be made on oath (verified by sworn affidavit) by an Officer or Director of the respondent.

The Respondent's Submissions

9. On behalf of the respondent Mr Gibson BL submitted:

(i) These submissions are divided up into the following headings, namely:

a) Jurisdiction of the Tribunal

b) Background – burden of proof and planning permission

c) The factual background

d) The application for a Notice for Further and Better Particulars

e) The application for discovery

(ii) Dealing with each seriatim:

a) Jurisdiction of the Tribunal

(iii) As has often been stated by the Tribunal, the Tribunal is a creature of statute, obliged to work within the rules – see paragraph 40 of Hutchison 3G UK Ltd & EE Ltd -v- AP Wireless II (UK) Ltd, Part 2 BT/80/2020, where the Tribunal reiterated that it is obliged to work within the rules as set out

in the Lands Tribunal Rules (NI) 1976. The Tribunal therefore has no inherent jurisdiction to create procedure or interlocutory applications such as is afforded to the High Court. Any relief which a party to a dispute seeks must come within the confines of the prescribed rules.

(iv) In context therefore, the relief sought by the applicant, in respect of the 'Notice for Further Particulars' in the respondent's respectful submission, goes out with the powers of the Tribunal. Furthermore, as set out in these submissions, the 'Notice for Further Particulars' is in a form unknown to the Tribunal and asks questions which are irrelevant and/or do not arise out of either party's Statement of Case. Therefore, even if the Tribunal could find a power to order replies to particulars the response would either be (1) not relevant, (2) not arising out of the pleadings or (3) a matter of evidence.

b) Background

(v) In the applicant's submission there is a focus on the 'simplicity' of the applicant's case and on principles of fairness and justice. What this submission appears to do is seek to impart some equitable principles into the operation of the Lands Tribunal. The principles of equity have no bearing whatsoever in the exercise by the Tribunal of its statutory function, those principles being reserved to the Courts of Chancery.

(vi) It is difficult, if not impossible, to see what the principles of equity have to do with a NFBP or a discovery request.

(vii) Furthermore, the applicant has made the following allegations in respect of the respondent, namely:

- That the respondent is guilty of delay.
- That the respondent is guilty of frustrating the applicant from recovering possession.
- That the respondent is dragging out the process.
- That the respondent is guilty of failing and omitting to respond to issues.

- That the respondent is acting abusively.
- That the respondent is guilty of fraud.
- That the respondent was guilty of misrepresentation.
- That the respondent was guilty of wilful concealment.
- That the respondent was guilty of a lack of bona fides.
- That the respondent was guilty of wilful concealment (as per the applicant's counsel)
- That the respondent's solicitor's letter of 6th November 2024, in which the respondent sought to make clear that discussions between the parties were on a without prejudice basis, was a cynical and illegitimate allegation.
- That the respondent is abusively seeking to misuse the Business Tenancies Order.

(viii) The above insults and slurs are not, in the respondent's respectful submission, appropriate in a commercial setting and display, to borrow a sporting mantra, an attempt to play the man not the ball.

(ix) As has been reiterated by the Tribunal itself in the numerous reviews which have taken place, the burden of proof rests solely with the landlord on seeking to establish that the tenant is not entitled to a new tenancy on the basis of Article 12(1)(f) that on the expiration of the current tenancy the landlord intends:

i. to demolish a building or structure which comprises or forms a substantial part of the holding and to undertake a substantial development of the holding; or

ii. to carry out substantial works of construction on the holding or part of it;

and the landlord could not reasonably do so without obtaining possession of the holding.

(x) It appears beyond peradventure that the applicant could not possibly hope to satisfy that burden of proof at any hearing in the near future and certainly not for when the full hearing of this matter was scheduled on 24th and 25th March. Whenever the respondent's Statement of Case was served on or about 20th November 2024, it failed to contain the basic proofs which the Tribunal would expect to see at a hearing including, but not limited to, any evidence of a board meeting, any ability to discharge the financial burden on it nor any attempt to address the required statutory proof prescribed by Article 13 of the Business Tenancies (NI) Order 1996 pertaining to planning permission.

(xi) This led to a review before the Tribunal on 20th December 2024 which it was put forward by the respondent that even on a cursory view the landlord's Statement of Case fell far below what was required. In order to deflect there was an attempt by the applicant's counsel to require the respondent to file an affidavit setting out the respondent's intention (not the applicant) and any contractual arrangements that the respondent had with a third party. Unsurprisingly the affidavit contention was rejected summarily by the Tribunal and the Tribunal reiterated expressly at that review of 20th December 2024 that it was up to the landlord to come to proof.

(xii) The applicant was permitted until 16th January 2025 to amend its hand with any amended Statement of Case. Recognising the difficulty which it faced, the landlord went ahead and served a further Statement of Case, not within time, but on 23rd January 2025. Belatedly it now included:

a) A report on the issues of statutory permissions (these again fell far below what was required with an incorrect presumption that the works did not require planning permission).

b) A purported resolution but as set out below it did not give authority for either the application to the Lands Tribunal or for the works – it purported to give authority to enter into a surrender and lease.

c) Evidence of finance.

(xiii) On 4th February 2025 the respondent wrote to the applicant specifically on the issue of planning permission, pointing out that for the works envisaged planning permission was required. To date, there has been no response to that correspondence. The absence of a reply is telling. If the respondent's position on the issue of planning was misconceived and demonstrated a misunderstanding of the relevant planning legislation, then the applicant would have responded setting out that, for whatever reason, planning permission was not required. There has been no such correspondence.

(xiv) The importance of planning permission and how carefully it is scrutinised was reiterated by the Tribunal in Andress House Ltd -v- Car Park Services Ltd BT/21/2016. At paragraph 13 of Andress House, the Tribunal considered that there were six issues in that particular instance which were required in order to establish the applicant's intention at the date of hearing, namely:

- Planning permission
- Building Control approval
- Hotel franchise
- Finance for the project
- Board approval
- Building contractor

(xv) Applying those requirements mutatis mutandis to the current instance, the applicant would need to have shown at the date of hearing:

- Planning permission
- Building Control approval
- Finance for the project
- Board approval
- Building contractor

(xvi) As of the date of lodging its Statement of Case on 20th November 2024, the applicant had (i) no evidence of planning permission, (ii) no evidence of Building Control approval, (iii) no evidence of finance for the project nor (iv) any evidence of Board approval.

(xvii) It was only upon the respondent's submissions on the inadequacy of the applicant's Statement of Case that the applicant amended its hand in respect of (iii) finance but, as of the date of the Order of the Tribunal of 25th February 2025, which determined the tenancy, the applicant still had not produced planning permission, Building Control approval or Board approval.

(xviii) Given those inadequacies, the applicant's attempts to ride roughshod over the protection afforded by without prejudice negotiations is perhaps not surprising.

c) The Factual Background

(xix) What is clear, reading down the applicant's Statements of Case and the applicant's submissions, is that the applicant made an assumption that the respondent was going to vacate but never actually clarified the matter. This is a point which is made in detail in the respondent's submissions at paras 4-13, which are replicated below:

> "4. The Respondent has been in occupation of these premises for just over 21 years. The respondent, initially trading from the premises on 25th August 2003. This was the respondent's city centre store and the flagship store for Belfast. It was fitted out at the time of the commencement of the lease, further refitted in or about 2013 and then once again in 2018.
>
> 5. As set out above the respondent has invested considerably in the store, which has remained a constant fixture in the City Centre of Belfast notwithstanding the identity of the landlord changing frequently during its tenure. The respondent has at all material times adhered to each and every covenant within its lease and there are no complaints

by the applicant or its predecessors in title of any breach of the original or renewal leases.

6. The applicant appears on the papers provided to date (and the respondent notes in passing that the applicant has provided little or no discovery), to have brought into being the business plan in respect of these premises, in or around 2022/2023 (subject obviously to confirmation from the applicant).

7. There was no communication of said plans to the respondent throughout 2022 and 2023 however on 5th February 2024 the applicant communicated through its agent Mr Pierce that it would require vacant possession on redevelopment grounds.

8. The applicant had at that juncture, the opportunity to set out in detail its case for redevelopment and to provide the necessary proofs which the respondent and the Lands Tribunal would naturally seek. They failed to do so but nevertheless on 24th April 2024 served notice of the Intention to Terminate the respondent's tenancy. There was some communication from the applicant's agent Mr Pierce in the days following the notice when he offered alternative accommodation, but this was not responded to or accepted. Thereafter and over the next 6 months, the only communication of note between the parties was the surrender of the under-lease from Call Me Connections to the respondent. The applicant landlord chose (as per paragraph 12 of its Statement of Case) to interpret this Deed of Surrender of the under-lease as being an explicit expression that the respondent was desirous of the head lease coming to an end.

9. There is no individual or individuals ascribed to within the applicant company who allegedly held onto this belief. Certainly, there is nothing in the applicant's Statement of Case which suggests that any encouragement was given by the respondent to the applicant to view the surrender of the under-lease in the way now ascribed by the applicant. Indeed, the surrender of the under-lease could have been viewed in a number of different ways including that the respondent

wished to let to another under-lessee or to trade the premises out itself (which the respondent has done in other locations).

10. The fact that the applicant chose unilaterally to view this action in the way it did and without seeking to obtain any clarification is a matter entirely for it, but it does not, as the applicant suggests, indicate any mala fides on behalf of the respondent. Such a suggestion is as unhelpful as it is misplaced. The notion that the applicant further relied, to any extent, on this communication of 12th August 2024 as evidence of the respondent's intention is further undermined by the correspondence included in the applicant's Statement of Case at Tab H. There, the contractor, DGW Building Services Ltd, has written a letter in which he recites that he was approached by Mr David Lamont of the applicant company in or around June 2024 with work due to commence on the last week of July 2024.

11. The applicant therefore had already committed to carrying out and commencing the building works in circumstances where it had no indication whatsoever of the respondent's intention. Indeed, there is nothing which objectively can be ascribed as supporting the applicant's contention, if it is seriously being made, that they were in some way induced by the respondent to commence their works. The applicant, for reasons which again are unexplained in the applicant's Statement of Case, chose to commence actual building works without obtaining vacant possession.

12. The fact that the applicant chose unilaterally to start work with the knowledge that vacant possession was to be an issue is further evidenced by the Agreement of 8th February 2024 which specifically puts vacant occupation of the subject premises 'at risk'. To commence constructions works was therefore a commercial decision made by the applicant set against a background of a tenant who had been in occupation for a period of 21 years and who had previously renewed a lease in 2019.

13. Why exactly the applicant thought it appropriate to enter into the agreement of 8th February 2024 in circumstances where vacant possession was not agreed, when only a limited approach had been made to the respondent and when it was uncertain if an agreement for surrender would be accepted by the Lands Tribunal is unclear. Again, for reasons which are unexplained, the applicant has deliberately chosen not to deal with this aspect of its case in its Statement of Case."

(xx) It goes without saying that it is entirely the applicant's failing and not that of the respondent to obtain the necessary legal confirmations on vacation. What the applicant seeks to do in the Statements of Case and submissions is to elevate its failure to properly obtain the necessary clarification as demonstrating mala fides on behalf of the respondent and, in effect, seeking to shift the onus onto the respondent to establish why it did not leave on 30th November 2024. The failure by the applicant to obtain the necessary clarity is not explained and there is no obligation on the respondent to the contrary.

(xxi) What the applicant fails to explain is the fact that it did absolutely nothing between the 23rd April 2024 and the 10th October 2024 when the applicant's solicitor requested an update (paragraph 13 of the applicant's Statement of Case). This is notwithstanding that, in or about June 2024, the applicant had approached DGW Building Services Ltd in order to carry out works to the subject premise which was envisaged would start on the 1st December 2024, being obviously one day after the expiration of the lease.

(xxii) In context where the applicant had served a Notice to Determine, the misplaced assumption that the respondent would vacate is entirely of the applicants own making. In circumstances where they had no commitment of any sort from the respondent that they were going to vacate, arranging a construction start date of the 1st December 2024 which assumed vacant possession was foolhardy at best.

(xxiii) The realisation that the applicant had failed to properly secure possession led to a meeting between the parties themselves on the 24th October 2024 when the position was laid bard. It is the respondent's contention that the discussion was without prejudice but that was not accepted by the applicant and, doubtless realising the precarious position which they now found themselves in, they thereafter, right up until the applicant's current submissions, attempted to reveal and refer to the contents of without prejudice discussions and correspondence. In reality, however, those misplaced attempts by the applicant come to nought because not even they can suggest that there was some agreement to vacate.

(xxiv) The respondent's position was confirmed in a letter of the 6th November 2024 in which the respondent stated:

> "We refer to the above.
>
> We are instructed that our respective clients recently hosted a without prejudice telephone discussion.
>
> Without waiving the without prejudice privilege of the matters discussed, we are instructed to write to you to confirm that it is our client's intention to make a tenancy application to the Lands Tribunal. That application will follow in due course."

(xxv) In an attempt to steal an advantage, the applicant took the decision on the same day and, presumably in direct response to the aforementioned correspondence, to launch its tenancy application. In circumstances where this decision was made by the applicant meant that they had to come up to proofs.

(xxvi) What the landlord failed to do was to enquire of the respondent what term may have been required after the termination date or to negotiate on that point. The respondent in its tenancy application could have asked for a term of any length (including an extremely short one) or asked for a term with a very short break clause. Notably there are no provisions in the Order for minimum periods of duration, as opposed to maximum periods where there is a restriction of Article 17(1)(b) of 15 years. Rather

obviously, therefore, until the respondent moved to new premises, it had an extant requirement to lease and occupy the subject premises.

(xxvii) Thereafter, the tenancy determined by consent with effect from 9 am on the 25th February 20255. The applicant's tenancy application has therefore been heard and determined and, in the respondent's respectful submission, the Tribunal is functus officio in respect of determination of the issues arising of the applicant's Tribunal application. The only other matter to determine is costs and statutory compensation.

d) The application for a Notice for Further and Better Particulars

(xxviii) The application for Notice for Further and Better Particulars was lodged by the applicant on the 16th January 2025 along with an introduction, at a time prior to determination of the lease on the 25th February 2025. The reason given for that interlocutory application at paragraph (d) of the 16th January 2025 was that:

> "… the respondent is abusively seeking to exploit the Lands Tribunal Business Tenancies mechanism to delay, frustrate and obstruct the applicant from realising possession, i.e. to 'drag out the process' when in actual fact the respondent does not have any legitimate desire to enter into a new tenancy at the premises, and is in fact contractually committed to taking new premises."

(xxix) There then follows the notice, which is, in both form and content, a document unknown to the Tribunal and not provided for within the Tribunal rules. There is no clarity in the applicant's submissions as to whether or not this is meant to be a Notice for Further and Better Particulars or a Notice for Discovery or a Notice for Interrogatories or some other hybrid form of request.

(xxx) Assuming it intends to come within the rubric of a Notice for Particulars, there is provision for a Notice for Further Particulars in Article 29 of the 1996 Order. Article 29 prescribes that a Notice for Particulars may be served before a Notice to Determine or a request for a new tenancy (Article 29(4)). Notably, the Notice is prescriptive, i.e. the Notice **must** be

served before the service of a Notice to Determine or a request for a new tenancy.

(xxxi) There is no provision whatsoever for a service of a Notice for Further and Better Particulars (the applicant refers to further and better particulars which imply that they arise out of a previous matter, being 'better' particulars). There is only provision in the Rules for as aforementioned further particulars – the respondent submits that this is an important distinction reflecting as it does the difference between a matter pre and post proceedings.

(xxxii) It is important to note that the Notice for Further and Better Particulars is a creation entirely within the rules of the Court of Judicature. The requirement to order particulars is a specific provision of the Rules of the Court of Judicature pursuant to Order 18 Rule 12. As aforesaid, there is no similar provision in either the Business Tenancies Order or the Lands Tribunal Rules. The Tribunal has therefore no power to make such an interlocutory Order.

(xxxiii) As set out above at para 3, this Tribunal has itself identified that it can only make Orders as are provided for within the rules. There is no scope for a statutory Tribunal to act outside its own rules – see, Khan -v- Haywood & Middleton Primary Care Trust [2007] 1 ICR 24 where Brooke LJ, in the context of the rules pertaining to another creature of the statute, namely the Employment Tribunal explained:

> "The Employment Tribunal is a creature of statute and its procedure is specifically governed by the 2004 Regulations. It is much used by litigants in person. Its procedures are governed by what is meant to be an informal but clearly understood code. Thus, whilst at first blush, and particularly given the tight time-limits for instituting proceedings, it might withdrawn a claim should be allowed to revive it, **I am satisfied that, for such a procedure to exist, it would need to be set out expressly in the rules. I therefore regard the absence of any such express provision in the rules as important**."

- My emphasis

(xxxiv) As in this particular instance, there is express provision for a set of particulars in the rules, but limited to a distinct set of circumstances, which do not apply here. There is no power to do what the applicant seeks but, even if there was such a power, even if the Tribunal could somehow interpret the Rules to provide for it, the notice as presently drafted it would not serve any useful purpose. Further illustrating the hopelessness of the applicant's point there is no yardstick by which the Tribunal might assess when, where and in what circumstances replies to a NFBP might be ordered.

(xxxv) Quite obviously, if one is to draw an analogy with the separate procedure provided for in the rules of the Court of Judicature, a Notice for Further and Better Particulars arise out of pleadings and arise out of particulars which one party requires from the other. In the course of a Writ Action, this naturally accrues in respect of the pleadings, whether that be a Statement of Claim, a Defence, Defence and Counterclaim or Reply to Defence. Here, particularly number 1 which the applicant seeks relates to a communication on the 12th August 2024 relating to a Deed of Surrender. This does not arise out of either the applicant's Statement of Case or respondent's Statement of Case.

(xxxvi) It therefore hangs without being tied to anything and so, even if a Notice was ordered, this request would not be relevant, not arising out of the Statements of Case filed.

(xxxvii) In respect of paragraph 2, this is a question arising out of communications made by counsel during the course of a case management review. There is no procedure which exists in the High Court, County Court or in any other known Tribunal to ask questions out of representations made at a case management review.

(xxxviii) Paragraph 3 is an echo of the applicant's pervading misunderstanding of the law, that somehow the tenant's intention is relevant to a landlord's Notice to Determine.

(xxxix) As has been repeatedly stated by the Tribunal, it is not, the burden of proof is solely on the applicant. The tenant is perfectly entitled to sit back and judge the standard of landlord's proofs – see, for example, Car Park Services Ltd v Conway Estates Ltd, BT/66/2021.

(xl) There the tenant made a tenancy application, it was responded to by the landlord setting out his proofs for an objection under Article 12(1)(f) and, after filing of the said proofs in the form of a Statement of Case, and thereafter a mention before the Tribunal, the tenant withdrew its tenancy application. The landlord sought costs on the basis that a tenant who withdrew the application should be liable for costs and the conclusion of the Tribunal was that a tenant should not be expected to give up its tenancy until it has been fully appraised of the landlord's intentions and supplied with detailed proofs on which those intentions rely. The application for costs was refused.

(xli) Paragraph 4 relates to discovery. The legal principles involved are well settled following a decision of Party E -v- Party C, BT/109/2016 wherein the Tribunal reviewed the relevant statutory provisions in comparison with the Rules of the Court of Judicature (NI) 1980. Rule 9(4) of the Lands Tribunal Rules (NI) 1976 prescribes that any part to the proceedings shall, if so requested by the Registrar, furnish to him [the Registrar] any document which the Tribunal may require and which it is in the party's power to furnish, and shall, if so directed by the Registrar, forward to all other parties to the proceedings an opportunity to inspect any such document and take a copy thereof.

(xlii) One of the first questions to be asked is why the Tribunal might have required to see any of the documents sought at paragraph 4(a) to (d) at the time the Notice was issued, namely the 16th January 2025 (i.e. pre-termination of the tenancy, which is aforementioned occurred on the 25tth February 2025). Again, as has been repeated ad nauseam, the burden of proof is on the applicant and the tenant's intention was of no relevance to whether or not the application could satisfy the burden of proof. These documents were therefore entirely irrelevant and whether

or not the respondent had 1, 2, 3, 4, 5, 6 or 7 other tenancies of premises in the Belfast area is utterly irrelevant to determining the landlord's intention.

(xliii) Even pre-termination the documents would not have been required but now post termination any relevance, which is denied in any event evaporates altogether.

e) Conclusion

(xliv) The landlord issued a tenancy application relying on ground 12(1)(f). The applicant mistakenly believed that the respondent would vacate on the 30th November 2024 despite there being no agreement to that effect. The applicant landlord laboured under a misunderstanding/misapprehension and had made an assumption which was entirely incorrect.

(xlv) On the basis of its mistaken assumption, it proceeded to put into place a chain of events for building works which only made sense if the tenant vacated on or about the 30th November 2024. When it became apparent that the tenant was not going to vacate, the landlord launched its tenancy application in circumstances where it was unable to satisfy the statutory proofs. In all the circumstances, the applicant landlord's attempt to shift the burden of proof from the landlord to the tenant is to be roundly deprecated by the Tribunal.

(xlvi) In any event, the parties have agreed to determine the tenancy and so, in respect of a tenancy application itself, the Court is functus officio. All that is left is issue of costs, and compensation, and in respect of costs (and reserving the right for further submissions) the respondent tenant submits it is entitled to its costs by virtue of the fact that the landlord could not satisfy the necessary proofs by the proposed hearing date.

(xlvii) In the meantime, however, and notwithstanding the fact that the tenancy has been determined, the landlord seeks a Notice for Further and Better Particulars in respect of matters which do not form part of the Statements

of Cases. As set out above, there is no procedure whereby the Lands Tribunal can make such an Order.

(xlviii) In respect of the discovery application, the respondent respectfully submits that the Lands Tribunal could not possibly consider that the specific test for discovery under the Lands Tribunal Rules has been satisfied, for the Tribunal does not require the documents sought in determining the landlord's intention.

(xlix) Furthermore, and in any event, this application is, to all intents and purposes, an abuse of process. The application in its current form was refused by the Tribunal at a review on the 28th January 2025 when, rather than accede to the application, the Court fixed the matter for hearing on the 24th and 25th March 2025. There is no suggestion that the application was being "paused" or adjourned generally. In such circumstances, the attempt by the applicant to resurrect the application should be deprecated.

The Tribunal

10. On the 6th November 2024 the Tribunal received a tenancy application from the applicant and which was accompanied by a Notice to Determine the existing tenancy on the reference property which was held by the respondent. The Notice to Determine stated that:

    (i) The existing tenancy was to be terminated on the 30th November 2024.

    (ii) On grounds contained in Article 12(1)(f) of the Order i.e. "redevelopment" grounds.

11. The issue therefore to be decided by the Tribunal was the bona fides of the applicant's intentions. The applicant brought the reference to the Tribunal and the burden of proof rested solely with the applicant to prove its intentions with regard to redevelopment of the reference property. The Tribunal agrees, therefore, with Mr

Gibson BL, the respondent tenant did not have to take any action until the applicant's intentions had been conclusively proven. See Car Park Services Ltd v Conway Estates Limited BT/66/2021 in which the Tribunal stated that a tenant should not be expected to give up its tenancy until the landlord had conclusively proved its intentions.

12. The Tribunal directed, therefore, that the applicant should submit a Statement of Case including proof of its intentions. This was served on the 20th November 2024 but the respondent considered that this fell far short of the proofs that were required. The Tribunal subsequently gave the applicant until the 16th January 2025 to submit any additional proofs.

13. Before the additional proofs were received, on the 16h January 2025, the applicant submitted an "Interlocutory Application for Notice of Particulars and Request for Discovery".

14. This was discussed at a mention of the reference on the 28th January 2025 but the Tribunal declined the Interlocutory Application rather, it set a date for hearing the substantive issues in the case, the proof of the applicant's intentions, on the 24th and 25th March 2025.

15. The hearing was not required, however, as the tenancy was surrendered on the 25th February 2025. The only issues which remain to be decided by the Tribunal are those of costs and statutory compensation, if any.

16. The applicant is now seeking the information it had previously requested in its Interlocutory Application dated 16th January 2025.

17. Article 29 of the Business Tenancies Order allows for the service of a "notice for particulars" but this notice must be served before the service of a Notice to Determine. Article 29, therefore, does not apply in the subject reference.

18. Rule 12 of the Lands Tribunal Rules allows for applications of an interlocutory nature and Rule 9(4) is clear and unambiguous as to discovery. It is simply any document which the Tribunal "may require".

19. At the date of the applicant's Interlocutory Application for Notice of Particulars and Request for Discovery, 16th January 2025, did the Tribunal require any of those documents requested by the applicant in order to adjudicate on the issue before it, the validity of the applicant's intentions? The answer is that it did not require any of the particulars, documents or information requested by the applicant. Rather it required conclusive proof of the applicant's intentions. The documents requested were irrelevant in relation to the substantive issues in the reference.

Conclusion

20. On the basis as outlined above the Tribunal refuses the applicant's Interlocutory Application for Notice of Particulars and Request for Discovery, dated 16th January 2025.

16th May 2025

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