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

BT/109/2016

BETWEEN

PARTY E – APPLICANT

AND

PARTY C – RESPONDENT

Re: Shopping Centre Unit

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

Background

1. Party E ("the applicant") is the tenant of a Shopping Centre Unit ("the reference property") and it is currently involved in a lease renewal dispute with the landlord, Party C ("the respondent"), under the terms of the Business Tenancies (Northern Ireland) Order 1996. The dispute is currently listed for hearing at the Lands Tribunal.

2. In the interim the applicant is seeking a direction from the Tribunal that the respondent discloses details of an arbitration award involving the respondent and a third party. This arbitration award fixed the rent for another unit in the Shopping Centre ("the arbitration unit") in 2011 and the tenant of the arbitration unit had consented to the award being disclosed.

3. The respondent objects to disclosing the details of the arbitration award.

Procedural Matters

4. The applicant was represented by Mr Douglas Stevenson BL, instructed by DWF (Northern Ireland) LLP, Solicitors. Mr Adrian Colmer BL, instructed by Hewitt & Gilpin, Solicitors, appeared on behalf of the respondent. The Tribunal is grateful to the legal representatives for their helpful submissions.

The Law

5. The relevant statute is contained in Rule 9 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Lands Tribunal rules"):

> "(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 the 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

6. The Tribunal was referred to the following authorities:

- Dolling-Baker v Merrett [1990] 1 WLR 1205 (CA)
- Ali Shipping Corporation v Shipyard Trogir [1998] CLC
- Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184

7. Reference was also made to Order 24 Rule (3) of the Rules of the Court of Judicature (Northern Ireland):

> "ORDER 24 – DISCOVERY AND INSPECTION OF DOCUMENTS
>
> (1) ….
>
> (2) ….
>
> Order for Discovery
>
> (3) Subject to the provisions of this rule and of rules 4 and 8, the Court may order any party to a cause or matter (whether begun by writ, originating summons or otherwise) to make and serve on any other party a list of the documents which are or have been in his possession, custody or power relating to any matter in question in the case or matter, and may at the same time or subsequently also order him to make and file an affidavit verifying such a list and to serve a copy thereof on the other party."

Discussion

8. In its submission to the Tribunal the respondent had objected to disclosing details of the arbitration award on four grounds:

   (i) relevance;

   (ii) necessity;

   (iii) the respondents right to privacy and confidentiality; and

   (iv) jurisdiction.

Relevance

9. Mr Stevenson BL asked the Tribunal to note that the parties were in dispute about the amount of rent to be paid on the reference property and an end allowance to be applied the rent. In that regard he considered the arbitration award to be relevant. He submitted that it was within the respondent's power to provide and there was no basis for withholding the details of the award.

10. Mr Colmer BL submitted that the award of an arbitrator in an arbitration was made on the basis of whatever evidence was provided to the arbitrator. Given its particular nature, he considered that the findings in an arbitration award had no probative value in a separate assessment of rent, such as the subject reference, which was undertaken at a different time and on different evidence. If the arbitration award had no probative value it was not therefore relevant in the current proceedings.

11. The Tribunal generally agrees with Mr Colmer BL and doubts the usefulness of a 2011 arbitration award in relation to the subject reference, which is a 2016 lease renewal. In any case the Tribunal would not be bound by any of the findings in the arbitration award.

Necessity

12. Mr Stevenson BL did not consider "necessity" to be a relevant consideration in the subject reference. He referred the Tribunal to the test under the Supreme Court Practice 1999 Volume I – "**The White Book**":

"24/2/11 'RELATING TO ANY MATTER IN QUESTION BETWEEN THEM'

(R.2(1) - These words refer not to the subject matter of an action, but to the questions in the action. So in an action for possession of land, where the plaintiffs title is in question, they refer to the title, not the land. They are not limited to documents which would be admissible in evidence (Compagnie Financière du Pacifique v Peruvian Guano Co (1882) 11 QBD as per Brett LJ at pp62, 63. O'Rourke v Darbishire [1920] AC 581 at 630) nor to those which could prove or disprove any matter in question: any document which it is reasonable to suppose contains information which may enable the party (applying for discovery) either to advance his own case or to damage that of his adversary, if it is a document that may fairly lead him to a train of inquiry which may have either of those two consequences must be disclosed …".

13. Mr Stevenson BL submitted that, in the subject reference, it was "reasonable to suppose" that the arbitration award contained information which may enable the applicant "to advance his own case" or to "damage that" of the respondent and on that basis the details of the arbitration award "must be disclosed".

14. Mr Colmer BL considered that it was absolutely crucial for the applicant to establish "necessity" in relation to the discovery of any document. In this regard he referred the Tribunal to the approach of the Court of Judicature in Northern Ireland as detailed in Order 24 Rule 9:

"9. On the hearing of an application for an order under rule 3, 7 or 8 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter of or saving costs."

15. He also referred the Tribunal to Ali Shipping Corporation in which the question of necessity, as a key hurdle in the realm of arbitration, was emphasised by the English Court of Appeal per Potter LJ:

> "… I observe by way of preliminary that, to date, the confidentiality rule has been founded fairly and squarely on the ground that the privacy of arbitration proceedings necessarily involves an obligation not to make use of material generated in the course of the arbitration outside the four walls of the arbitration, even when required for use in other proceedings (subject to the exceptions already discussed).
>
> In considering the question of relief, the Court has not hitherto undertaken any detailed examination of the objecting party's motives for seeking to uphold such privacy. No doubt the court ordinarily acts on the working assumption that, in agreeing to arbitration, each party considers that his interests will be best served by privacy and that both parties recognise and undertake mutual obligations of confidentiality, subject only to such exceptions as the court may recognise.
>
> Because the doctrine rests upon the assumption that the parties have a legitimate interest in privacy which the court will protect, an exception based on the subsequent need to protect the inconsistent interest of one party alone is properly formulated in terms of **reasonable necessity** (Mr Colmer BL's emphasis) rather than mere convenience or advantage.
>
> Further, where exceptional circumstances are asserted, it will usually be appropriate for the court to limit its task to establishing whether such circumstances have been made out, and not to explore the motives of the objecting party or whether the court considers that his interests will in fact be prejudiced by disclosure. In the ordinary way, prejudice will be presumed and, unless excepting circumstances are established, confidentiality will be upheld."

16. Mr Colmer BL submitted that there was nothing from the applicant to say that disclosure of the arbitration award was necessary – the applicant merely stated that its expert "would like to see" details of the award.

17. Mr Colmer BL also asked the Tribunal to note that Ali Shipping Corporation was a case involving two parties to an arbitration and it was not a case of a third party looking access to an arbitration agreement, such as in the subject reference. He submitted that the application had failed to put forward any single authority whereby a third party "stranger" was granted access to an arbitration award.

18. The Tribunal agrees with Mr Colmer BL, the applicant had failed to provide any authority whereby a third party has been granted disclosure of an arbitration award, for use in private proceedings. The Tribunal is bound by law to protect the privacy interests of the respondent, unless the applicant could demonstrate that it was reasonably necessary for it to have details of the arbitration award, rather than "mere convenience". This was established by the English Court of Appeal in Ali Shipping Corporation. In the subject reference the applicant has not demonstrated any "reasonable necessity" to persuade the Tribunal to order disclosure of the arbitration award under Rule 9(4).

The Respondents Right to Privacy and Confidentiality

19. Mr Stevenson BL submitted that many Court cases were private but that did not mean that documents did not have to be disclosed. He gave the example of a personal injury claim whereby the claimant's medical records would have to be disclosed, even though they were confidential.

20. He referred the Tribunal to Emmott in which the Court considered at some length the principles behind the concept of confidentiality in arbitration proceedings. Mr Stevenson BL submitted that in the Emmott case and other authorities the following principles were established:

(i) the confidentiality of the arbitration proceedings arises between the parties to the arbitration that it shall remain confidential.

(ii) the agreement means the parties are not entitled to publish details of the case to third parties and that the documents disclosed or generated in the arbitration can only be used for the purposes of the arbitration.

(iii) that confidentiality extends to any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or award.

(iv) that duty of confidentiality was subject to exceptions.

(v) one of these exceptions was where discovery was ordered by a Court or, it was submitted, other competent Tribunal with powers to order disclosure of documents. In Dolling-Baker Parker LJ stated:

> "It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains."

That was not to say that the Court or Tribunal should shut its ears to the question of confidentiality. The court or Tribunal can take the issue of confidentiality into consideration in deciding whether to order disclosure of a document. But, the fact that a document was confidential did not provide a blanket reason to resist discovery.

(vi) One other exception was where the other party to the arbitration consents to it being used. In this case, the disclosure of the document cannot constitute

a breach of the implied agreement of confidentiality, as the other party has agreed to it being used.

21. Given that in the subject reference the tenant of the arbitration unit had consented to the arbitration award being disclosed, Mr Stevenson BL submitted that the issue of confidentiality did not arise.

22. Mr Stevenson BL further submitted that even if consent had not been given to the arbitration award being disclosed, the applicant would still be inviting the Tribunal to make an order for its production, given the relevance of the award to the present proceedings and the fact that the award contained historical information whose disclosure could not in any way compromise the position of the parties to the arbitration.

23. Mr Colmer BL submitted that the Tribunal was being asked to completely disregard arbitration confidentiality and to accept this would drive a "coach and horses" through the privilege and confidentiality of arbitration proceedings.

24. He considered that the applicant's submissions as to confidentiality rested on one point – the tenant of the arbitration unit was content for the arbitration award to be disclosed and thus it discharged the respondent from its duty of confidentiality. He submitted that this proposition missed two key points:

(i) the respondent enjoyed a right whereby it was entitled to have the arbitration award kept private; and

(ii) quite apart from its own right of privacy, the tenant of the arbitration unit owed a duty of confidentiality to the respondent with regard to the arbitration award.

25. Mr Colmer BL referred the Tribunal to comments of Collins LJ in Emmott:

> "[60] The uncontroversial starting point is that in English law arbitration is a private process ….
>
> [62] Parties who arbitrate in England expect that the hearing will be in private, and that is an important advantage for commercial people as compared with litigation in court: see Hassneh Insurance Co of Israel v Mew [1993] 2 Lloyd's Rep 243, at 246-7; Economic Department of City of Moscow v Bankers Trust Co [2004] EWCA Civ 314, [2005] QB 207, at [2] and [30], Mance LJ emphasised that privacy and confidentiality were implicit in parties' choice to arbitrate in England, and valued by them. See also Esso Australia Resource Ltd v Plowman (Minister for Energy and Minerals) (1995) 128 ALR 391, at 398, per Mason CJ.
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> [63] The privacy of arbitration is underlined by CPR 62.10(3)(b), which provides that subject to the power of the court to order that an arbitration claim (i.e. a court claim concerning arbitration) may be heard in public or in private … The starting point is that the parties' wish for confidentiality and privacy outweighs the public interest in a public hearing: Economic Department of City of Moscow v Bankers Trust Co."

26. As to the duty of confidentiality which the tenant of the arbitration unit and the arbitrator owed to the respondent, Mr Colmer BL referred the Tribunal to these further extracts from Emmott:

> "[79] … confidentiality in the sense of an implied agreement that documents disclosed or generated in arbitration can only be used for the purposes of the arbitration.

And

> "[81] … what has emerged from the recent authorities in England is that there is … an implied obligation (arising out of the nature of arbitration itself) on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award and not to disclose in any other way what evidence has been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the court: Dolling-Baker v Merrett at 1213-1214; Hassneh Insurance Co of Israel v Mew at 246; London and Leeds Estates Ltd v Paribas Ltd (No 2) Ltd at 106; Ali Shipping Corporation v Shipyard Trogir at 326 (where the defendants had conceded the existence of the implied term: see at 328). The obligation is not limited to documents which contain material which is confidential, such as trade secrets. The obligation arises, not as a matter of business efficacy, but is implied as a matter of law: Ali Shipping Corporation v Shipyard Trogir."

And

> "[84] The implied agreement is really a rule of substantive law masquerading as an implied term …".

27. Mr Colmer BL asked the Tribunal to note that the applicant's citation from the judgement in Dolling-Baker was incomplete in that the aspect of the citation quoted appeared to emphasise relevance as a factor – but the rest of the citation showed that the court would be anxious to preserve confidentiality and privacy. The entirety of the citation reads:

"It must be perfectly apparent that, for example, the fact that a document is used in an arbitration does not confer on it any confidentiality or privilege which can be availed of in subsequent proceedings. If it is a relevant document, its relevance remains. But that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself. When a question arises as to production of documents or indeed discovery by list or affidavit, the court must, it appears to me, have regard to the existence of the implied obligation, whatever its precise limits may be. If it is satisfied that despite the implied obligation, disclosure and inspection is necessary for the fair disposal of the action, that consideration must prevail. But in reaching a conclusion, the court should consider, amongst other things, whether there are other and possibly less costly ways of obtaining the information which is sought which do not involve any breach of the implied undertaking."

28. Mr Colmer BL also pointed out that Dolling-Baker was concerned with documents generated in the arbitration, other than the award and he submitted that it was not authority for the proposition, as put forward by the applicant, that an arbitration award may be disclosed to a "stranger" to the arbitration just because it is or was suspected to be relevant to later legislation. The Tribunal agrees.

29. The Tribunal also agrees with Mr Colmer BL, the respondent had a right to privacy and the tenant of the arbitration unit owed a duty of confidentiality to the respondent as a matter of law. Accordingly the Tribunal finds that the tenants consent to disclosure is irrelevant and is not determinative of the subject reference.

Jurisdiction

30. Mr Stevenson BL submitted that Rule 9(4) of the Lands Tribunal Rules gave the Tribunal similar powers to those contained in Order 24 Rule (3) of the Rules of the

Court of Judicature, with regard to the discovery of documents. He considered Rule (3) to be wide ranging and whereby a party to proceedings was obliged to provide anything within its power to provide.

31. Mr Colmer BL considered that there was a key difference between Rule 9(4) and Order 24 Rule (3) in that Rule 9(4) referred to "any document which the Tribunal may require" whilst Order 24 Rule (3) was a more general power, focusing on a party drawing up a list of documents. He also referred the Tribunal to rule 9(5) of the Lands Tribunal Rules and he submitted that it would be "contrary to the public interest" and in breach of Rule 9(5) for the Tribunal to use private arbitration agreements as a means of settling third party disputes.

32. It is clear that Rule 9(4) gives the Tribunal the statutory authority to order the disclosure of any document which it "may require". The question is, however, should the Tribunal exercise this power in the subject reference? Having considered the submissions the Tribunal finds that:

    (i) the applicant has failed to convince the Tribunal as to the relevance of the 2011 arbitration award in relation to the 2016 lease renewal proceedings before the Tribunal.

    (ii) the applicant has failed to establish that disclosure of the arbitration award was "reasonably necessary" in the 2016 lease renewal proceedings.

    (iii) as a matter of law the respondent had a right to privacy and the tenant of the arbitration unit owed a duty of confidentiality to the respondent. As such the tenant's consent to disclosure of the arbitration award was irrelevant.

The Tribunal therefore declines to exercise its authority under Rule 9(4) to request disclosure of the arbitration award.

Conclusion

33. The Tribunal dismisses the application.

ORDERS ACCORDINGLY

12th January 2018 **Henry M Spence MRICS Dip.Rating IRRV (Hons)**
Lands Tribunal for Northern Ireland

Appearances:

Applicant: **Mr Douglas Stevenson BL, instructed by DWF (Northern Ireland) LLP, Solicitors.**

Respondent: **Mr Adrian Colmer BL, instructed by Hewitt & Gilpin, Solicitors.**