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 STAY OF PROCEEDINGS

BT/145/2020

BETWEEN

HUTCHISON 3G UK LIMITED AND EE LIMITED – APPLICANTS

AND

ROLAND GRAHAM – RESPONDENT

Re: Lands at Bellevue, Belfast Road, Enniskillen

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

Background

1. On 6th November 2020 Hutchison 3G UK Limited and EE Limited ("the applicants") made an application to the Lands Tribunal, under the terms of the Business Tenancies (Northern Ireland) Order 1996 ("the Order"), to renew their tenancy of lands at Bellevue, Belfast Road, Enniskillen ("the reference property"). Mr Roland Graham ("the respondent") is willing to grant a new tenancy but the parties have been unable to agree terms for the new tenancy.

2. Since November 2020 the application has been subject to several mentions before the Tribunal, culminating in the Tribunal issuing directions for the submission of expert evidence, leading to a substantive hearing on Thursday 28th September 2021. Due to unforeseen circumstances the hearing did not proceed.

3. To date the parties have:

   (i) exchanged books of facts.

(ii) participated in a number of reviews before the Tribunal.

(iii) held substantive discussions in relation to possible draft terms, including detailed discussions by the experts as to head of terms.

(iv) held two unsuccessful joint consultations with a view to resolving the issues between the parties.

4. Subsequently, on 21st October 2021, the respondent made an application to stay the subject proceedings, pending the outcome of Hutchison 3G UK Limited and AP Wireless II (UK) Limited [BT/80/2020] ("the Derrycraw Case"), which the respondent considered involved very similar issues. This was despite the Tribunal having rejected the respondent's previous application for a stay on 18th December 2020.

5. The applicants are opposed to a stay of the proceedings and the Tribunal has invited submissions from both parties.

Procedural Matters

6. The Tribunal received written submissions from Mr Keith Gibson BL on behalf of the respondent and from Mr Adrian Colmer QC on behalf of the applicants. In the current circumstances the parties have agreed to deal with the application by way of written submissions only and the Tribunal is grateful to counsel for their helpful submissions.

The Legislation

7. The respondent has made an application for a stay of the proceedings under Rule 14 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules"):

"Proceedings to be consolidated or heard together"

14.-(1) Except where otherwise provided by these, any party to proceedings before the Tribunal may apply under Rule 12 to the registrar for an interlocutory order that such

proceedings be consolidated or heard together with other proceedings (whether or not between the same or some of the same or other parties) upon the ground that –

a) the dispute or question for determination in the several proceedings is the same, or

b) there is a dispute or question for determination which is common to each such proceedings.

(2) Upon such application the registrar may -

a) order that the proceedings be consolidated or heard together, or

b) order that an issue of fact or of law or of mixed fact and law be determined in one or other of the proceedings with the remaining proceedings stayed, or

c) with the consent in writing of all the parties thereto, order that the determination in one of the proceedings of the dispute or question or issue shall be binding upon all such parties in their respective proceedings subject to the right of any such consenting party to require the Tribunal to state a case for the decision of the Court of Appeal.

(3) In any such proceedings referred to in paragraph (1) the President or the Tribunal may, without any application in that behalf, make an order that the proceedings shall be consolidated or heard together with other proceedings and any such order may be made with respect to same only of the issues or matters involved."

8. Rule 18 of the Rules provides:

"Procedure at hearing

18. Subject to the provisions of these rules and to any direction given by the President, the procedure at hearing shall be such as the Tribunal may direct."

Authorities

9. The respondent referred the Tribunal to the case of Mr Swallow [2010] UKFTT 481 (TC) in the First Tier Tax Tribunal.

The Respondent's Submissions

10. The respondent is contending for a stay of the current proceedings before the Tribunal. Mr Gibson BL referred the Tribunal to Rule 18 of the rules whereby the procedure at any hearing shall be such as the Tribunal may direct and generally, in respect of time, the Tribunal has the power to extend time, as per Rule 13, or, in the alternative, the power to order a stay of the proceedings under Rule 14. It was not disputed that the Rules gave the Tribunal the statutory authority to order a stay of the proceedings.

11. Mr Gibson BL submitted that the respondent faced dealing with three significant issues which were not agreed:

    (i) terms of the lease; the applicant having set out an entirely different new lease which it wished to have incorporated.

    (ii) the length of the new tenancy; the applicant was contending for a one year lease in circumstances where there had never been a one year lease.

    (iii) the rent; the applicant has proposed a new rent of £350 whereas the current rent is £4,000 per annum.

12. Mr Gibson BL asked the Tribunal to note that the amendments to the lease were so significant that the parties had engaged their experts to produce a Scott Schedule in relation to the amended terms and a meeting of experts took place on 28th May 2021. Contrary to the submissions of the applicants, Mr Gibson BL submitted that six months had not been wasted as, during that time, the parties were ventilating the issue of the basis of valuation which was one item on the Scott Schedule.

13. The Tribunal was referred to a discovery application regarding a similar application at Derrycraw ("the Derrycraw case"). Mr Gibson BL considered that the issues of discovery which afflicted that case were repeated in the subject reference and the costs involved in bringing the subject reference to finality could be significant. He therefore put forward the following grounds for a stay:

    (i) The absence of equality of arms.

    (ii) The issues of discovery in the Derrycraw case which have yet to be ventilated both in writing and ultimately before the Tribunal, as it appeared the applicant in that case wished to reopen the issue of discovery.

    (iii) The decision by the applicant to put forward entirely new lease terms and this had already occasioned extra time and expense.

    (iv) The similar issues which were being faced by the Tribunal in the Derrycraw case.

14. Mr Gibson BL considered the overriding test to be whether the stay was just and convenient, as outlined in Mr Swallow [2010] UKFTT (TC), and which he considered gave a wide discretion to the Tribunal.

15. The Tribunal had the power to order that any rent be backdated to the date of the application itself and on that basis Mr Gibson BL did not consider that there was any prejudice to the applicants by the Tribunal granting a stay of the proceedings. He also asked the Tribunal to note that the respondent was not seeking an indefinite stay but rather for a period of six months, to allow the Derrycraw case to progress, with the applicants thereafter having liberty to apply to have the stay lifted.

16. In conclusion Mr Gibson BL submitted that if precedents were to be set in these types of cases then it was only prudent that they be set by parties properly and equally advised and this principle was one which echoed in the hierarchy of comparables before the Tribunal, with those comparables negotiated between professionally advised parties being of greater weight

than one side professionally and one not. He submitted that there was no justification for the Tribunal not applying similar principles in the subject reference.

17. The respondent wished the correspondence to date, in relation to this preliminary issue, to be regarded as an application under Rule 12, "interlocutory applications".

The Applicants' Submissions

18. Mr Colmer QC referred the Tribunal to an earlier and unsuccessful application by the respondent to stay the subject proceedings on the basis that the Derrycraw case was a "test" case.

19. The Tribunal was invited to consider the correspondence in full but Mr Colmer QC considered it clear that the basis for the respondent's first application was framed by reference to two matters:

    (i) The respondent's suggestion that "… there are undoubtedly going to be common issues raised in the instant matter and the related Derrycraw matter in relation to the operation of the Business Tenancies (Northern Ireland) Order 1996 and some of the points that may be engaged in relation to the Electronic Communications Code" ("the Derrycraw point").

    (ii) In the interests of saving the Tribunal time and the parties "time and costs … and avoiding parties commit further significant time and resource" ("the costs point").

20. Mr Colmer QC asked the Tribunal to note that the respondent's application for a stay at a review on 18th December 2020 was rejected by the Tribunal and this decision was not challenged by the respondents.

21. Mr Colmer QC provided which he considered to be a chronology of events following the Tribunal's decision to deny the respondents a stay of proceedings in December 2020:

(i) In the first instance the respondent complied with the directions of the Tribunal and served his expert's book of facts on 19th March 2021.

(ii) The respondent, however, again suggested a stay in his solicitor's letter of 1st April 2021. The solicitors for the applicants replied on 9th April advising that a stay was not necessary and an application for a stay was not pursued by the respondent at that time.

(iii) On 14th April 2021 the respondent adopted a new reason for delaying the proceedings: "our expert has raised an important additional question which he considers should be addressed by the Tribunal ahead of inter alia the consideration of the questions of rent and term etc.". The point identified by the respondent's expert was a suggestion that a clause which empowered the applicants to undertake certain works in fact imposed an obligation to undertake those works, and that this somehow affected the valuation. By letter dated 15th April 2021 the solicitors for the applicants responded, noting the respondent's ongoing delaying tactics and rejecting the suggestion that there was any merit in the point raised by the respondent's expert or that it required a preliminary hearing.

(iv) At reviews on 29th April 2021 and thereafter, the Tribunal set a detailed timetable and in the course of that exercise the solicitors for the parties, the experts and counsel all met and exchanged views and papers, over the course of a number of months. Reviews were undertaken by the Tribunal with respect to the respondent's expert's point on 24th May 2021, 7th June 2021 and 23rd June 2021. Ultimately a full hearing on the proposed preliminary point was fixed for 28th September 2021.

(v) Then, a matter of days before the hearing, the respondent conceded the preliminary point and it was not pursued and confirmed this position to the Tribunal on 27th September 2021. At the respondent's behest some five months were spent, and significant time and costs were wasted.

22. From the respondent's solicitors letter of 21st October 2021, Mr Colmer QC considered his renewed request for a stay to be based on (i) the Derrycraw point and (ii) the costs point which were the same reasons advanced and rejected in December 2020.

23. Mr Colmer QC considered this approach, that was making repeated interlocutory applications on the same grounds, to be inappropriate and he referred the Tribunal to a decision of the Court of Appeal in England Woodhouse v Consignia PLC; Steliou v Compton [2002] EWCA Civ 275 at [55]:

> "There is a public interest in discouraging a party who makes an unsuccessful interlocutory application for the same relief, based on material which was not, but could have been, deployed in support of the first application, in some contexts, this partly because, as Chadwick LJ said in Securum Finance Limited v Ashton [2001] CH 291, there is a need for the court to allot its limited resources to other cases. But at least as important is the general head, in the interests of justice, to protect the respondent to successive applications in such circumstances from oppression. The rationale for the rule in Henderson v Henderson (1843) 3 Hare 100, that in the absence of special circumstances, parties should bring their whole case before the court so that all aspects of it may be decided (subject to appeal) once and for all is a rule of public policy based on the desirability, in the general interests as well as that of the parties themselves, that litigation should not drag on forever, and that a defendant should not be oppressed by successive suits when one would do: see per Sir Thomas Bingham MR in Barrow v Banside Members Ageny Ltd [1996] 1 WLR 257, 260 A-D.

24. Mr Colmer QC submitted that Courts and Tribunals should be alert to the tactic or strategy of a litigant who seeks to re-litigate and re-run points which have already been decided against him. Mr Colmer QC considered such conduct to be an abuse of process and was not allowed but in Woodhouse he conceded that the court recognised that there may be instances where the Court or Tribunal entertained a repeat application based on a new point.

25. Mr Colmer QC asked the Tribunal to note in the subject reference, the respondent's new and repeated application was not even attempting to introduce new reasons and instead he was just advancing the same points as he advanced in December 2020 – namely the Derrycraw point and the costs point.

26. As to the Derrycraw point, Mr Colmer QC submitted that the respondent's contention seemed to be that Derrycraw was the "first" case and all others should await it. However, when read in full, Mr Colmer QC submitted that the Tribunal's comments in the Derrycraw case with regard to it being the "first" case were about the approach to disclosure and were not about any test status being given to the Derrycraw case more generally.

27. Indeed Mr Colmer QC submitted that the Tribunal had repeatedly rejected the proposition that the Derrycraw case was a test case and as the Tribunal was aware, a number of cases, including cases where the landlord was represented by the solicitors in the subject reference, have progressed to full hearing and resolution.

28. Post the filing of the written submissions Mr Matthew Howse of the solicitors representing the respondent asked the Tribunal to note that only one matter where his firm acted for a landlord had progressed to a resolution and that was not after a full hearing. The Tribunal agrees with Mr Howse. The Tribunal is aware that, however, it was generally accepted by all parties involved in similar telecommunications cases that Derrycraw was not a test case and all cases would be decided on their own facts.

29. As to the costs point, Mr Colmer QC submitted that this same resource issue had been advanced and rejected by the Tribunal in December 2020 and if the respondent's litigation resources were under pressure it was clear that that turn of events had been caused by the respondent's own actions in pursuing and then abandoning his preliminary point. He asked the Tribunal to note that some five months, five mentions and the time and services of two experts and numerous lawyers had been consumed in a pointless exercise.

30. Mr Colmer QC recorded that one would have sympathy with a party whose means may be limited, albeit that no proof had been adduced in that point, but if resources had been wasted on a pointless exercise, at that party's behest, that did not entitle that party to a stay of the proceedings.

31. The Tribunal was referred to Article 6 of the European Convention on Human Rights and Mr Colmer QC submitted that this Article entitled the applicants to protection under the convention as to a determination of its rights withing a reasonable time. He referred the Tribunal to Tinnelly & Son Ltd v United Kingdom [1998] 27 EHRR 249 and In the matter of an application by Hugh Jordan [2019] UKSC 9 and in that case the Supreme Court warned that:

> "… since a stay of proceedings prevents a claim from being pursued so long as it remains in place, it engages another aspect of Article 6 of the Convention, namely the guarantee of an effective right of access to a Court …. It (i.e. the stay) must therefore pursue a legitimate aim, and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."

32. Mr Colmer QC submitted, therefore, that it would be wholly disproportionate to impose a stay on the entirety of the applicants' proceedings against the respondent and by acceding to the respondent's application for reasons already considered and rejected the Tribunal would be denying the applicants' right of access to the Tribunal for no good reason. This, he considered, would be shutting the applicants out and preventing them from pursuing their rights, when it was clear that there was a range of steps in the proceedings that could now reasonably be pursued.

33. As proof, Mr Colmer QC referred the Tribunal to the respondent's own suggestion, at the end of his solicitor's letter of 21st October 2021, that, in any event, his expert required discovery and this recognition that there were interlocutory steps that could properly be progressed in the subject reference, such as exchange of discovery, rather betrayed the respondent's application for stay.

34. Mr Colmer QC then asked the Tribunal to note that in the Derrycraw case the respondent had abandoned its pursuit of some categories of discovery. The respondent's solicitor, Mr Howse, pointed out that in the Derrycraw case the respondent decided to no longer pursue a specific subset of a category of discovery, on a without prejudice basis and in an effort to try and narrow the issues. The Tribunal accepts Mr Howse's explanation and draws no conclusions from the respondent's abandonment of some categories of discovery in the Derrycraw case.

35. It was accepted by Mr Colmer QC that the respondent was entitled to make discovery requests in the subject reference at the appropriate time and he considered the appropriate time to be after service of the expert reports.

36. In conclusion Mr Colmer QC submitted that the arguments about the general terms of the lease could and should be progressed and to stay the entirety of the proceedings when there was a clear body of work to be undertaken would be disproportionate and wholly contrary to the Supreme Courts guidance on stays. Mr Colmer QC therefore requested the Tribunal to dismiss the respondent's renewed and repeated request for a stay.

Conclusions

37. With regard to the respondent's request for a stay of the proceedings the Tribunal finds the following factors to be relevant:

    (i) The subject reference has been before the Tribunal since November 2020 and the Tribunal agrees with Mr Colmer QC's submissions that the applicants had a legal right to have their reference to the Tribunal adjudicated on within a reasonable period of time.

    (ii) The Tribunal also notes that in December 2020 a similar request for a stay of the proceeding on similar grounds had been considered and rejected by the Tribunal.

    (iii) There have been and still are numerous other similar references to the Tribunal and none of the proceedings in these references have been stayed.

(iv) In all similar references the Tribunal has consistently stated that the Derrycraw case was not a test and each case of a similar nature would be decided upon the facts in that case, although the Tribunal does accept that issues in the Derrycraw case may or may not be relevant to other similar cases.

(v) With regard to the costs point, the Tribunal notes that significant time, effort and costs over a period of five months had been wasted on a preliminary point pursued and ultimately abandoned by the respondent.

(vi) In relation to "equality of arms" the respondent has employed a competent expert and if, in order to complete his expert report, he requires discovery of additional information from the applicants, as in the Derrycraw case, he is at liberty to request this from the applicants.

38. On the basis of the above the Tribunal dismisses the respondent's request for a stay of the proceedings and will now convene an urgent review of the reference in order to issue further directions leading to a full hearing.

16th December 2021

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