

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

IN THE MATTER OF AN APPLICATION FOR COSTS

BT/16/2019

BETWEEN

JD SPORTS FASHION PLC – APPLICANT

AND

CENTRAL CRAIGAVON LIMITED – RESPONDENT

PART 2 - COSTS

Re: Units 43 & 44 Rushmere Shopping Centre, Central Way, Craigavon

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

Background

1. JD Sports Fashion PLC (“the applicant”) is the tenant of Units 43 & 44 Rushmere Shopping Centre, Craigavon (“the reference property”) and on 20th February 2019 the applicant made a tenancy application to the Lands Tribunal in accordance with the terms of the Business Tenancies (Northern Ireland) Order 1996.
2. The parties could not agree on the correct rent for the reference property and they subsequently appointed experts to act on their behalf in assessing the rent. In November 2019 the experts submitted a “Statement of Agreed Facts”. In this statement they agreed that the correct valuation date for the purposes of assessing the rent was 18th August 2018, the date of termination of the existing lease.
3. Subsequently, following the outbreak of the “Covid” pandemic, the applicant contended that the retail property market had suffered a serious depreciation. The applicant considered,

therefore, that the tenancy ought to reflect the property market at the time it was to be granted and it was unreasonable to expect the tenant to pay a 2018 pre “Covid” rent for the grant of a new lease in 2020.

4. The parties then asked the Tribunal to decide a preliminary issue as to the correct valuation date to be used in assessing the “new” rent.
5. By a decision dated 5th February 2021 the Tribunal directed that the correct valuation date should be the date specified by Central Craigavon Limited (“the respondent”) in its Notice to Determine, the 18th August 2018. In addition, when negotiating the terms of the “new” lease, the Tribunal encouraged the parties to consider including in the terms a rent review in or around August 2020 (during “Covid”) and a rent review in or around August 2022 (post “Covid”).
6. The respondent now seeks its costs in the preliminary reference.

Procedural Matters

7. It was agreed that the issue of costs should be decided by way of written representations. The Tribunal received a submission from Mr Douglas Stevenson BL on behalf of the applicant and from Mr Adrian Colmer QC on behalf of the respondent. The Tribunal is grateful to counsel for their helpful submissions.

Position of the Parties

8. Mr Colmer QC submitted that the respondent was the successful party and as such it should be awarded its costs.

9. On behalf of the applicant Mr Douglas Stevenson BL submitted that the Tribunal should reserve the costs of the preliminary hearing and consider the costs of the entire proceedings at the final conclusion of the reference.

The Law

10. Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 (“the Rules”) provides:

“(1) Except in so far as section 5(1), (2) or (3) of the Acquisition of Land (Assessment of Compensation) Act 1919 applies and subject to paragraph (3) the costs of an incidental to any proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President.

(2) If the Tribunal orders that the costs of a party to the proceedings shall be paid by another party thereto, the Tribunal may settle the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed by the registrar on a scale specified by the Tribunal, being a scale of costs for the time being prescribed by rules of court or by county court rules.”

11. In Oxfam v Earl & Ors [1995] BT/3/1995 the Tribunal clarified how it should exercise its discretion (at page 8):

“The Tribunal must exercise that discretion judicially and the starting point on the question of costs is the general presumption that, unless there were special circumstances, costs follow the event, i.e. that in the ordinary way the successful party should receive its costs.”

The Respondent’s Submissions

12. On behalf of the respondent Mr Colmer QC submitted:

- (i) The preliminary hearing was required because the respondent took a point as to the correct date to be fixed for the assessment of the rent in respect of the reference property.

- (ii) Unexpectedly, and at a late stage in the proceedings, after the experts had submitted their Statement of Agreed Facts and their Expert Reports, the applicant resiled from the agreed position that the valuation date was 18th August 2018.
- (iii) The applicant purported to justify its stance by reference to English legislation and English case law.
- (iv) The applicant's expert agreed in his witness statement that to use a valuation date other than that which had been previously agreed by the experts was not in conformity with the practice in this jurisdiction.
- (v) There was therefore no legal or evidential basis for the applicant's contention but it still required the matter to proceed to hearing, in which its arguments were rejected.
- (vi) Given the foregoing, the Tribunal was invited to award the respondent its costs in the reference.

The Applicant's Submissions

13. In response Mr Stevenson BL submitted:

- (i) The respondent's submission stated that the applicant attempted to justify its stance by reference to English case law. That was not correct. At hearing, the applicant placed reliance on "Reynolds & Clarke" only to demonstrate that there was no practical problem with fixing a termination date in the future. It did not contend that the wording of the 1996 Order and the 1954 Act were the same.
- (ii) The respondent stated that there was no legal basis for the applicant's claim that the termination date of the current tenancy did not have to be the date on the landlord's notice to determine. Again this was not correct. The Tribunal held (and the respondent's submissions accepted) that the Tribunal had a discretion to exercise as to what the date could be. It was perfectly open to the Tribunal to fix the termination date, and thus the commencement date of the new tenancy, at a date other than the date of the notice to determine. There was, therefore, a legal

basis for the applicant's claim. The question became how the Tribunal would exercise that discretion.

- (iii) The respondent also contended that the applicant had no evidential basis for its claim the commencement date should be in or around 2020. It is accepted that the Tribunal came to that conclusion. It was also held that there was no evidence provided by the respondent about the 2018 valuations. Without wanting to revisit the decision, the applicant's submission simply was that if the Tribunal was going to order the grant of a new tenancy at hearing, in say, 2021, then the rent should reflect the value at the date of the grant of the new tenancy.
- (iv) In light of the previous position between the experts, the Tribunal exercised its discretion to hold that the commencement date for the new tenancy should be the date set out in the landlord's notice to determine. The Tribunal also encouraged the parties to consider rent review clauses in 2020 and 2022 to reflect the effect of the "Covid" pandemic.
- (v) In so far as the respondent seeking costs is concerned, the proceedings remain live. The applicant and respondent still have to agree the terms of any new tenancy, and may well be back before the Tribunal to have those terms determined. It may be, for example, that issues may arise about the Tribunal's suggestion that rent review clauses are inserted to reflect the "Covid" pandemic. Given that the proceedings are still live, and the outworking of the Tribunal's decision is yet to be agreed or determined, the applicant submits that the appropriate course for the Tribunal to adopt would be to reserve the costs of the preliminary hearing and then to consider the costs of the entire proceedings in the round at the final conclusion.

Conclusion

14. The subject reference was a discrete preliminary issue brought by the applicant to ask the Tribunal to determine the correct valuation date to be used to assess the rent under the "new" tenancy. The other substantive issues in the case may or may not come before the

Tribunal at some future date but the Tribunal sees no reason to defer its costs decision in this preliminary issue.

15. The respondent in the preliminary issue reference had “won” and unless there were special circumstances costs should follow the event. As the successful party it should be awarded its costs.

16. In Oxfam v Earl the Tribunal also directed, under the heading of “Special Awards”.

“The next question for a Tribunal is whether there were special circumstances which would warrant a departure from that general rule. But these must be circumstances connected with the proceedings, for example, to reflect an unsuccessful outcome on a major issue.”

17. The Tribunal can see no “special circumstances” in the subject reference whereby the respondent should not be awarded its costs. The Tribunal, therefore, awards the respondent its costs in the preliminary reference, such costs to be taxed in default of agreement.

8th April 2021

Henry Spence MRICS Dip.Rating IRRV (Hons)

Lands Tribunal for Northern Ireland