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/20/2013

BETWEEN

MARKS & SPENCER PLC – APPLICANT

AND

FIRST CHAPTER COMPANY LIMITED – RESPONDENT

Re: Unit 1, 248-266 Newtownards Road, Belfast

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

BACKGROUND

1. Under Article 7 of the Business Tenancies (Northern Ireland) Order 1996 ("the Order") Marks & Spencer PLC ("the applicant") had requested a new tenancy of Unit 1, 248-266 Newtownards Road, Belfast ("the reference property"). The tenant's request, which was issued on 29th October 2012, proposed that the annual rent for the reference property should be £62,500 per annum. By notice dated 3rd November 2012 the landlord, First Chapter Company Limited ("the respondent"), indicated that it did not oppose the applicant's request for a new tenancy but did not accept the proposed rent of £62,500 per annum. The sole issue between the parties was therefore the amount of annual rent to be paid for the reference property, the parties having agreed all other terms of the new lease.

2. Following protracted negotiations the parties could not agree the annual rent to be paid and on 7th February 2013 the applicant initiated the current proceeding in the Lands Tribunal by submitting a formal application for a new tenancy. Subsequently, by letter dated 1st October 2013, the Tribunal directed the parties to submit their written evidence; report on facts by 12th November 2013 and their expert reports by 10th December 2013.

3. On 24th October 2013 the applicant forwarded a "without prejudice save as to costs" letter to the respondent offering to settle the proceedings on terms that the rent payable from 24th August 2013 in the new lease should be £78,000 per annum and that each party should bear their own costs ("the Calderbank offer"). This offer was to remain open for acceptance until 5.00 pm on Friday 8th November 2013. After that date the offer was to continue to remain open but on terms that the respondent should pay all the applicant's costs from the date of the offer. This Calderbank offer was not taken up by the respondent and the respondent did not make any counter offer to settle.

4. As detailed in their expert reports, the applicant's expert considered that the rent should be £63,500 per annum and the respondent's expert concluded that the rent should be £89,600 per annum. The hearing subsequently commenced before the Lands Tribunal on 2nd October 2014 but it did not finish on that date. It was adjourned, part-heard, to enable the respondent to seek further information from the applicant in relation to its tenancy of premises at 513-517 Lisburn Road, Belfast.

5. Further information was provided in due course and both experts submitted addendum reports to their evidence. The hearing was relisted for 10th September 2015. On 8th September 2015, however, the parties reached agreement that the rent payable should be £78,000 per annum but they could not agree on the allocation of costs. This is now the issue to be decided by the Tribunal.

PROCEDURAL MATTERS

6. The parties had agreed that the reference should be dealt with by way of written submissions. Mr Hanna QC wrote on behalf of the applicant and Mr A J S Maxwell BL on behalf of the respondent.

POSITION OF THE PARTIES

7. Mr Hanna QC submitted that, having regard to the Calderbank offer and its rejection, the respondent should be ordered to pay the applicant's costs incurred after 8th November 2013 or, in the alternative 90% thereof. If, however, the Tribunal considered it inappropriate to make such an order he considered that the "fall-back" position should be that each party should bear its own costs. In no circumstances did he consider that there was any justification for the applicant being ordered to pay any part of the respondent's costs.

8. Mr Maxwell BL submitted that the respondent was induced to continue to contest the tenant's application after the Calderbank offer, due to the failure of the applicant to provide information relating to the applicant's tenancy of 511-513 Lisburn Road in a timely manner. The respondent's expert considered this evidence to be the most relevant comparable evidence in relation to the reference property. Further, when the information was provided, Mr Maxwell BL submitted that it was inaccurate and misleading thereby inducing the respondent to continue to contest the application. On that basis he considered that the respondent should have its costs, at least from the date of the Calderbank offer and the respondent had so offered by letter of 4th September 2015.

STATUTE

9. Rule 33 of the Lands Tribunal Rules gives the Tribunal a discretion on costs:

> "33.-(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 and incidental to any proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President."

AUTHORITIES

10. Both parties had referred the Tribunal to its previous decision in Oxfam v Earl & Others (BT/3/1995) and to the following extracts in particular:

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"The costs of and incidental to any proceedings shall be in the discretion of the Tribunal …"

And

"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."

DISCUSSION

11. Mr Hanna QC submitted that the starting point in deciding the allocation of costs was to consider how costs should be awarded disregarding the Calderbank offer. That done, he suggested that it was then necessary to consider whether the Calderbank offer, and in the subject reference its rejection, should lead the Tribunal to make a special award of costs. The Tribunal agrees to some extent but it not only has to consider the Calderbank offer but also if there were any other special circumstances which would lead the Tribunal to depart from the assumption that costs should follow the event.

12. Mr Hanna QC submitted that, as in Oxfam v Earl, where the only dispute was about the amount of rent, the subject reference fell into the category of a "no fault nor principle dispute". He referred the Tribunal to page 15 of the Oxfam decision:-

> "This was not the type of case in which there was a single black or white issue, such as liability, to be decided one way or the other. Instead, this was to do with the duration, rent and other terms of a lease renewal. At the Hearing the principal issue was the rent. It was an example of 'no fault nor principle' litigation. There was a range of possible rents and the decision would be at some point on a scale. There might or might not be an obvious clear winner. If not, in such circumstances, which often arise in arbitration although perhaps unusual in the Courts, the Tribunal generally would not take a strict mathematical approach to choosing a winner but instead, unless there were good reasons not to do so, order each side to pay its own costs. That technically is a special award but not one that should surprise those experienced in property rental valuation disputes. There is no good reason why a party offering to settle at, or close to a 'no winner' halfway house should necessarily be expected to pay the other party's costs nor that it should be presumed to follow from such an offer."

In the instant case, given the agreement on rent at £78,000 per annum, he considered that there was no obvious clear "winner" or "loser" and the figure was so close to the mid-point that, to use the wording of the Tribunal in Oxfam: "the match was close to a draw". Accordingly, setting aside the Calderbank offer (and any other special circumstances), he suggested the preliminary view of the Tribunal should be that each side should bear its own costs. That was the preliminary view in the Oxfam case.

13. Mr Maxwell BL pointed out to the Tribunal that the rent now fixed, £78,000 per annum, was an increase of approximately one quarter on the applicant's original rental proposal and, in the circumstances, he submitted that it was indisputable that the respondent was the successful party and in the absence of any other factors would be entitled to its costs.

14. The Tribunal agrees with Mr Hanna QC, this was a "no fault nor principle" dispute with no obvious "winner" and, as in Oxfam v Earl, the preliminary view of the Tribunal is that in the normal course of events each side should bear its own costs.

THE CALDERBANK OFFER

15. If an offer to settle has been made and rejected, the Tribunal may make a special award as to costs incurred after that date. If a party has made a Calderbank offer and the amount agreed is not more than the amount offered, the Tribunal will be disposed to award costs to the offeror, unless it considers it was reasonable for the offeree not to accept the offer.

16. Mr Hanna QC asked the Tribunal to note that, in the subject reference, the respondent ultimately accepted the rental figure which had been offered in the Calderbank offer and as a result, substantial additional costs were incurred which would have been avoided if the offer had been accepted at the outset. On that basis he submitted that, in accordance with established principle, the respondent should be ordered to pay the applicant's costs incurred after 8th November 2013.

17. He further submitted that it was not reasonable for the respondent to refuse to accept the Calderbank offer which was made at an early stage, before the exchange of expert reports. He referred the Tribunal to a similar situation which arose in the Oxfam case, in which the Tribunal said:

> "The fact that the Calderbank Letter offer was made before the exchange of expert evidence took place does not reduce the reliance to be placed on it. On the contrary it is highly desirable that compromises take place as early as possible and, if possible, before the expense of preparing expert reports is incurred. The Respondent certainly has the right to test the evidence but it is a well established

principle that if a party fails in its challenge to the evidence, it must bear the consequences in costs."

He submitted that was precisely what happened in the subject reference, the respondent's expert had sought to "test the evidence" but, having done so, effectively conceded that it did not assist him in his attempt to argue for a higher figure.

18. Mr Maxwell BL referred the Tribunal to the following extract from Oxfam which he considered relevant to the subject reference:

> "If a Calderbank Offer is not accepted and the Tribunal awards no more than the sum offered, the initial presumption will be that the Offeree should pay the Offeror's costs. But, if a Calderbank Offer is brought to its attention, the Tribunal will also consider whether it was reasonable for the Offeree not to accept, bearing in mind all the terms of the offer, the information then available to the Offeree, the conduct of the parties in putting their 'cards face up on the table' and the then likely costs of going on. The refusal of the offer may not necessarily be the critical factor."

He advised the Tribunal that the respondent's expert was aware that a transaction had taken place involving the applicant and premises at 511-513 Lisburn Road which he considered the most relevant comparable to the subject premises. He referred the Tribunal to the following exchanges of information re the comparable at 511-513 Lisburn Road:

(i) The respondent's expert had initially requested information concerning this transaction by telephone from the applicant's expert. He renewed his request for information by emails on 12th October 2013, 14th October 2013, 30th October 2013, 4th November 2013 and 5th November 2013 (these emails were submitted to the Tribunal).

(ii) In response the applicant's expert in an email dated 14th October 2013 stated "I have been advised by M&S that they have agreed to purchase the building.

To date no transaction has been completed and the terms are confidential". Mr Maxwell BL asked the Tribunal to note subsequent disclosure showed these instructions from the applicant, communicated by their expert, were incomplete. He submitted that not only was the applicant under contract to purchase the property, but, formal agreement between the applicant and the various relevant parties in relation to the sub-sale to the present landlord, lease back and development of the Lisburn Road site were signed on 9th August 2013.

(iii) Despite repeated requests, particulars of the Lisburn Road transaction were not forthcoming and it was only after the respondent sought an Order of the Tribunal for disclosure that a substantive response was received by two letters of 4th and 20th February 2014 (these letters were submitted to the Tribunal). The letter of 4th February stated: "In response to your request for information relating to the agreed terms for our clients' proposed letting of premises on the Lisburn Road, we confirm that the primary commercial terms of the proposed letting are as follows …". Some additional information was provided in the letter of the 20th. Mr Maxwell BL advised the Tribunal that the respondent accepted the applicant's description, "primary commercial terms", as being determinative and that these were the terms sufficient to allow the respondent to assess the value of the letting. He submitted that this information appeared to support the respondent's view of the value of the reference property, by comparison with the Lisburn Road premises, at £15 per sq ft, the Lisburn Road lease being a lease for 15 years with a 10 year break and an overall rate of £15 per sq ft and with comparable amenities. He further submitted that there was no justification for the delay in production of this information by the applicant.

19. On the strength of the information provided by the applicant in February 2014, the respondent elected not to accept the Calderbank offer. Was it reasonable for the respondent to refuse the applicant's Calderbank offer?

20. As in Oxfam, in deciding whether it was reasonable for the respondent not to accept, the Tribunal has to consider, among other things, the "information then available to the offeree" and "the conduct of the parties in putting their cards face up on the table".

"The information then available to the offeree"

21. It is clear from the submitted documentation that the respondent's expert had requested information relating to the premises at 511-513 Lisburn Road prior to the submission of the applicant's Calderbank offer of 24th October. It is also evident from his email of 14th October to the applicant's expert that he considered this evidence to be of some significance. He noted in his email "… This comparable will have significant similarities to the subject – being a modern unit with on-site parking fronting a main arterial route into Belfast. I think it will be of considerable assistance to the Tribunal. Further, the terms agreed constitute useful evidence, regardless of whether the transaction has completed as yet." It is therefore clear to the Tribunal that, at the time of the Calderbank offer, significant information, which was in the possession of the applicant, was not available to respondent's expert.

"The conduct of the parties in putting their cards face up on the table"

22. Mr Maxwell BL had already pointed out to the Tribunal that, at the date of the Calderbank offer, not only was the applicant under contract to purchase the Lisburn Road, property but formal agreements had been signed some weeks prior on 9th August 2013. This was not disputed by the applicant in its written submissions to the Tribunal. The information requested by the respondent's expert in his exchanges of early October 2013 should have therefore been readily available to the applicant.

23. The Tribunal considers that it was reasonable for the respondent to reject the Calderbank offer as, at the time of the offer, he did not have information relating to what he considered to be significant comparative information. The Tribunal also

considers that the applicant failed to "put its cards face up on the table" by not providing the information requested on a timely basis.

24. Having considered the Calderbank offer the Tribunal therefore reverts to its preliminary conclusion that each side should bear its own costs. Were there any other special circumstances, however, which need to be considered prior to the Tribunal's final determination on costs?

ANY OTHER SPECIAL CIRCUMSTANCES

25. Mr Maxwell BL had asked the Tribunal to note that the applicant's expert, in his evidence to the Tribunal at hearing on 2nd October 2014, indicated that the Lisburn Road transaction could not be relied on because there could be more to the transaction than set out in the respondent's expert report. The hearing was subsequently adjourned to allow for further information to be provided by the applicant and for supplemental reports to be submitted. The applicant's supplemental report provided new information which indicated that a payment of £617,500, which he described as an inducement, and fit out costs of £300,000, which he alleged were incurred by or on behalf of the landlord, must be taken into account when assessing the effective rent per sq ft of the letting. This led the applicant's expert to the conclusion that the correct rental per sq ft for the Lisburn Road comparable was £3.73. This significant information, however, had not been included in the applicant's statement of the "primary commercial terms" detailed in his email of the 4th February 2014, which had led the respondent to the conclusion that £15 per sq ft was the correct rental figure.

26. Mr Maxwell BL advised the Tribunal that in light of the new evidence and additional analysis provided by the applicant, the respondent then agreed the annual rental of £78,000 which had been previously put forward in the applicant's Calderbank offer. He considered this position analogous to a defendant amending his defence to include

an additional ground. Mr Maxwell BL submitted that the respondent's decision not to accept the Calderbank offer was influenced by the material misdescription of the Lisburn Road transaction by the applicant omitting additional costs to the landlord of £917,500 which were expressly provided for within the terms of the sale and agreement for lease subsequently disclosed. He further considered that there was extreme reticence and delay on the part of the applicant in providing particulars of the Lisburn Road transaction and when the particulars were provided they were so fundamentally lacking as to give a false impression of the transaction. In the circumstances he submitted that the respondent should have its costs against the applicant.

27. Mr Hanna QC submitted that the respondent's expert had sought "to test the evidence" but, having done so, effectively conceded that it did not assist him in his attempt to argue for a higher rental figure. He asked the Tribunal to note that the respondent never made a Calderbank offer – the applicant did, offering to meet the respondent more or less halfway, and at a figure that was ultimately accepted, though only after substantial and avoidable costs had been incurred. The Tribunal does not agree.

28. At an early stage in the proceedings and before the issue of the applicant's Calderbank offer, the respondent's expert had made it clear that he considered the comparable evidence relating to the property at 511-153 Lisburn Road to be of considerable significance in relation to the subject reference. He had repeatedly requested details of the transaction which transpired had reached final agreement on 9th August 2013, some two months prior to the respondent's initial requests in early October.

29. Following the Tribunal's intervention the "primary commercial details" of the transaction were made available by the applicant. This information led the respondent's expert to the conclusion that the Calderbank offer should be declined and the respondent should pursue its case for a rental of £89,600 per annum.

Subsequently, at hearing on 2nd October 2014, the applicant's expert advised the Tribunal that the transaction at Lisburn Road could not be relied upon because there was more to the transaction than as set out in the respondent's expert report. The hearing was adjourned and subsequent information provided by the applicant indicated that a significant landlord's contribution of £917,500 had not been included in the "primary commercial details" provided to the respondent on 4th February 2014. The applicant's expert submitted that taking into account this new information revised the rental figure in the transaction to £3.73 per sq ft, as opposed to the £15 per sq ft which the respondent had relied on.

30. The Tribunal agrees with Mr Maxwell BL, the information provided by the applicant on 4th February 2014 was misleading and if full and accurate information, which was in the possession of the applicant, would have been provided at that date, the Tribunal is satisfied that the dispute as to rent would have settled much sooner, as was the outcome when full and correct information was eventually made available.

CONCLUSION

31. The Tribunal finds that these are special circumstances in which to depart from its preliminary view that each side should bear its own costs and the Tribunal awards the respondent its costs from 4th February 2014.

ORDERS ACCORDINGLY

15th October 2015

Mr Henry Spence MRICS Dip.Rating IRRV (Hons)

Lands Tribunal for Northern Ireland