

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/63/2022

BETWEEN

FISHER LAW – APPLICANT

AND

DAPOK LIMITED – RESPONDENT

Re: Unit 21 The Courtyard, Galgorm Castle, Ballymena

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

Background

1. Fisher Law (“the applicant”) is the tenant of premises at Unit 21 The Courtyard, Galgorm Castle, Ballymena (“the reference property”) by way of a lease which commenced on 1st February 2016 for a term of six years. The lease has now expired and the applicant has lodged a tenancy application with the Lands Tribunal, requesting a new tenancy.
2. The landlord, Dapok Limited (“the respondent”), has, on 22nd January 2022, submitted a Landlord’s Notice to Determine, advising that it is willing to grant the applicant a new tenancy. To date, however, the parties have been unable to agree the terms of the new tenancy.
3. The parties had brief exchanges re the new terms of the lease and on 31st January 2022, the applicant emailed the respondent’s solicitor requesting his client’s “open market value evidence”. This evidence, however, has not as yet been disclosed to the applicant. At a subsequent mention of the reference, on 19th August 2022, the respondent’s solicitor advised

the tribunal that there was “no point in further negotiations” and that he would share “a table of evidence” which contained “cast iron and multiple” comparable evidence.

4. To date the “table of evidence” has not been forthcoming. The applicant has now made a reference to the Lands Tribunal under Rule 9(4) of the Lands Tribunal Rules (Northern Ireland) 1976 (“the Rules”) requesting discovery of the evidence. This is the issue to be decided by the Tribunal.

Procedural Matters

5. The applicant was represented by Mr Shaun Fisher, solicitor. Mr Thomas Thibodeau BL, instructed by McMahon McKay, solicitors represented the respondent. The parties have agreed that the issue should be decided by way of written submissions which they have provided. The Tribunal is grateful to the legal representatives for their helpful submissions.

The Law

6. Rules 9 and 10 of the Rules are relevant in this reference:

“Disclosure of documentary evidence

9.-(1)

(2) ...

(3) ...

(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 what 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 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.:

And

“Disclosure and exchange of the evidence of expert witnesses

10.-(1) ...

(2) Except where these rules otherwise provide, a party who intends to call an expert witness shall, within 28 days after being so requested by the registrar, send to the registrar with sufficient copies for service upon each of the other parties to the proceedings:

(a) a summary of the expert evidence to be given on behalf of such party at the hearing including all computations necessary to his case;

(b) a copy of each map, plan, document, or material disclosed in any list furnished pursuant to rule 9; and

(c) where the expert evidence involves a comparison of value with property not the subject of the proceedings, all relevant particulars of the situation, plan, area, and circumstances of that other property.

(3)

(4) The registrar after receiving all the evidence required to be supplied by the parties under paragraph (2) shall send a copy of the evidence thus supplied to each other party who has supplied evidence under paragraph (2).”

The Applicant’s Submissions

7. Mr Fisher asked the Tribunal to note that on the 9th September 2022 the Tribunal directed “that you (the respondent) should share with the tenant the table of evidence referred to at the last mention, or provide a reason to the Tribunal as to why this may not be possible.”

8. Mr Fisher considered this to be in response to his email of 31st August 2022 to the respondent which stated “if your table is as persuasive as you asserted at the mention, its contents may

be sufficient to resolve the reference completely rather than the parties being put to the time, effort and expense of meeting the Tribunal's timetable.".

9. The Tribunal was then referred by Mr Fisher to the respondent's response to the Tribunal's direction which suggested that the applicant was seeking the respondent's expert evidence. Mr Fisher advised that this was not the case, the applicant was seeking documented rents payable for the other thirty units in the Galgorm Castle complex, as the applicant could not source that information other than through the respondent. He considered it to be "required" under rule 9(4) of the Rules.

10. Mr Fisher referred the Tribunal to the Overriding Objective which appeared at Order 1 rule 1A of the Rules of the Court of Judicature (Northern Ireland) 1980, Order 58 rule 1 of the County Court Rules (Northern Ireland) 1981 and rule 2 of the Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (NI) 2020 which he considered should have application to the Lands Tribunal:

"Dealing with a case fairly and justly includes, so far as practicable:

 - a. ensuring that parties are on an equal footing;
 - b. saving expense;
 - c. dealing with the case in ways that are proportionate to –
 - i. the amount of money involved;
 - ii. the importance of the case;
 - iii. the complexity of the issues;
 - iv. the financial position of each party;
 - d. ensuring that it is dealt with expeditiously and fairly;
 - e. allotting to it an appropriate share of the Court's/Tribunal's resources, while taking into account the need to allot resources to other cases."

11. Applying each and every one of these elements, Mr Fisher submitted that the respondent was obliged to produce the information requested and the respondent's refusal to negotiate, engage directly, share information and intent to escalate costs flew in the face of the Overriding Objective.
12. In conclusion Mr Fisher submitted that denying the applicant access to the information was prejudicial and disclosure did not prejudice the respondent in any way. Litigation, he considered, should be concluded with a "cards face up" approach.

The Respondent's Submissions

13. Mr Thibodeau BL referred the Tribunal to its directions which were issued on 24th August 2022.
 - A report on facts to be lodged by 30th September 2022
 - Expert reports are to be exchanged and lodged by 28th October 2022
 - Experts to meet by 11th November 2022 and provide a note of their meeting.
14. This was followed by a further direction of the Tribunal on 9th September 2022 that the respondent's solicitor share evidence of a table previously referred to at a mention on 19th August 2022 or provide a reason to the Tribunal as to why this may not be possible. The applicant relies on rule 9(4) in grounding that request.
15. Mr Thibodeau BL submitted that it was misleading for the applicant to suggest that at the mention of 19th August, the respondent's solicitor advised that he would share his client's table of evidence that day with the Tribunal and the applicant. Rather, in the context of the Tribunal's offer of a 14 day adjournment of the matter to facilitate further negotiations between the parties, the respondent's solicitor advised that such postponement was

unnecessary as further negotiations would be of no assistance due to the strength of the respondent's evidence which could be made immediately available.

16. In response the Tribunal issued directions for production of the evidence, Mr Thibodeau BL respectfully submitted that such evidence should be produced by way of exchange, in accordance with those directions. He asserted that the appropriate mechanism for sharing evidence was by mutual exchange and the evidence requested forms part of the respondent's expert evidence which was governed by rule 10 of the Rules.

17. Mr Thibodeau BL further submitted:

- (i) The table requested by the applicant, without having seen it, forms part of the respondent's expert evidence and it was the respondent's submission that it was not merely documentary evidence which fell under the ambit of rule 9.
- (ii) Expert evidence was governed by rule 10.
- (iii) Rule 10(4) was clear that the registrar shall, in accordance with rule 10(2), once received, send a copy of the evidence "to each other party who has supplied evidence under paragraph (2)". The clear intention of rule 10(2) was for mutual exchange of evidence.
- (iv) The applicant has not provided, nor indicated an intention to provide any such evidence to the registrar which would then trigger mutual exchange, despite requests made by the respondent and its expert, the earliest request for details of the applicant's expert having been made by the respondent on 31st January 2022.
- (v) Further, as the applicant has disputed the validity of service of the respondent's Notice to Determine, it would appear that its case is that the request for a new tenancy was the initiating document. It was, therefore, that on its own case, the onus was on the applicant to prove that its valuation of £8,000 per annum, as the open market rent, was correct. The applicant has yet to provide any evidence, expert or otherwise, in support of its valuation and if it does not engage an expert, then it was difficult to understand how its figure could be relied upon and further

how in all the circumstances the respondent should be required to unilaterally share its evidence.

- (vi) The respondent has more than 30 business units within its complex and unilaterally sharing such expert evidence would be prejudicial to the respondent. Such a scenario would provide the applicant with evidence from which he may attempt a downward only negotiation of the respondent's valuation of the open market rent, without the applicant having ever procured any evidence of its own.
- (vii) The respondent refutes the assertion made by the applicant at the mention of 20th September 2022, that if it were to be provided with the table of evidence and it contained clear evidence of market rent, it would accept this and settle its new rent accordingly, thus saving on time and costs. The respondent believes that on the contrary, the applicant intends to escalate costs by making use of the table to commence a downward only negotiation on rent without incurring any costs to itself by providing expert evidence for its own requested rent of £8,000 per annum.
- (viii) The applicant's downward approach to the negotiations is illustrated by its rejection of the respondent's Notice, its very serious allegation made at the mention of 19th August 2022 that the respondent obtained its rental agreements with neighbouring tenants by duress, its objection to the appointment of the respondent's expert and its unwillingness to accept the measurement of the reference property or the respondent's valuation method.
- (ix) The applicant was, therefore, requesting sight of evidence which he had already rejected.
- (x) The purpose of rule 10 was to ensure that the parties were on "equal footing" to which the applicant refers and that where one party has followed the requisite procedures and obtained expert evidence it should not be prejudiced by the other party having sight and making use of such evidence without producing its own.
- (xi) With regards to costs, the respondent refuted any allegation that it was intent to escalate costs. Rather it was acting in accordance with the procedures and obligations set out in the Business Tenancies (Northern Ireland) Order 1996 and the Rules.

18. In conclusion Mr Thibodeau BL submitted that the direction made by the Tribunal on 24th August 2022 and the timetable therein was the appropriate way forward and the respondent requests the Tribunal to make such further directions as may be required to meet that timetable.

The Tribunal

19. On 9th September 2022 the Tribunal directed that the respondent should provide the applicant with the comparable evidence referred to at the mention of 19th August 2022 or provide a reason as to why this may not be possible.

20. The respondent is not refusing to provide the information, rather it is contesting the appropriate forum and timing of the production of the information.

21. In the normal course of events there would be informal and without prejudice negotiations between the parties and their experts, at which juncture comparable evidence from each party would be provided and discussed.

22. In the subject reference there has been little or no engagement, discussion or negotiation. The Tribunal also understands that, to date, the applicant has not appointed an expert to act on its behalf.

23. If the informal and without prejudice discussions between parties are unproductive the Tribunal would then, in the normal course of events, issue directions to go down the formal route of report on facts and expert reports.

24. The Tribunal would firstly ask for mutual exchange of report on facts. These should contain all of the factual evidence on which each party intends to rely, including market evidence of

comparables. The reason for this mutual exchange of evidence is that each expert has all of the facts, including the other experts facts, prior to drafting their independent expert reports for the benefit of the Tribunal.

25. The applicant contends that if the respondent's evidence of comparables in the Galgorm Castle complex is produced now, prior to the mutual exchange of facts, it would cut down on costs as the engagement of experts may not be necessary.
26. The respondent submits that the correct procedure for the exchange of factual evidence is by way of mutual exchange, as confirmed by rules 9 and 10 of the Rules. The respondent contends that to do otherwise would be prejudicial.
27. As there has been little engagement between the parties in the subject reference, there has, therefore, been no informal mutual exchange of comparable evidence or without prejudice discussions between the parties.
28. The Tribunal, therefore, has no alternative but to go down the formal route for the production of evidence and issues the following directions:
 - (i) Mutual exchange of Report on Facts by 15th November 2022
 - (ii) Mutual exchange of Expert Reports by 13th December 2022
 - (iii) Experts to meet and produce a minute of their meeting by 20th December 2022.
29. The Tribunal will organise a mention shortly thereafter to fix a date for hearing.

Costs

30. The Tribunal will deal with the issue of costs when the reference has been finally disposed of. If, however, the Tribunal finds that either party has unnecessarily prolonged the proceedings

by its actions or failure to act, this will be taken into consideration in the Tribunal's decision on the award of costs.

26th October 2022

Henry Spence MRICS Dip.Rating IRRV (Hons)

Lands Tribunal for Northern Ireland