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 ORDER FOR DISCOVERY

BT/80/2020

BETWEEN

HUTCHISON 3G UK LIMITED AND EE LIMITED – APPLICANTS

AND

AP WIRELESS II (UK) LIMITED – RESPONDENT

PART 2

Re: Lands to the north of 25 Corgary Road, Jerrettspass, Newry

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

Background

1. Hutchison 3G UK Limited and EE Limited ("the applicants") occupy a telecommunications site known as lands to the north of 25 Corgary Road, Jerrettspass, Newry ("the reference property").

2. The applicants occupied the reference property by way of a lease which has now expired and they have lodged a tenancy application with the Lands Tribunal, in accordance with Article 7 of the Business Tenancies (Northern Ireland) Order 1996 ("the BT Order").

3. The landlord, AP Wireless II (UK) Limited ("the respondent"), has not objected to a new lease being granted but to date the parties have been unable to agree terms.

4. Both parties had previously lodged discovery applications with the Lands Tribunal and by a decision dated 13th May 2021, the Tribunal adjudicated on the various discovery requests. In this further preliminary hearing the parties seek direction on:

   (i) the scope of Category (iii) of the original discovery request.

   (ii) the jurisdiction of the Tribunal to join third parties to the proceedings, at the request of the applicants.

Procedural Matters

5. The applicants were represented by Mr Adrian Colmer QC. Mr Keith Gibson BL represented the respondent. The Tribunal is grateful to counsel for their helpful submissions.

6. In addition, the Tribunal also received submissions from:

   (i) On behalf of the applicants:

   - DWF (Northern Ireland) LLP, solicitors
   - Mr Philip John Sturgeon, Regional Property Surveyor MBNI
   - Ms Joanne Hobson, expert witness

   (ii) On behalf of the respondent:

   - Eversheds Sutherland, solicitors
   - Mr James Thacker, Vice President Legal, in the respondent company
   - Mr Kenneth Crothers, expert witness

7. The Tribunal is grateful to all for their contributions.

The Scope of Category (iii)

8. The Tribunal refers to the following extracts from its decision of 13th May 2021:

"17. The Tribunal requires as much relevant information as possible in order to arrive at its decision. That said, however, it has no desire to consider "realms" of indiscriminate and irrelevant information, nor does it wish either party to bear the cost of providing such information. It is conscious, however, that due to the nature of the reference, almost entirely all of the evidence to date has been put forward by the applicants and the respondent has little means of cross-checking this information. As this is the first reference of its type in this jurisdiction the Tribunal is keen that each party should have available as much relevant information as possible."

And

"19.(iii) Discovery Sought: 'All and any documentation evidencing comparables which demonstrate the difference between (1) what landlords receive in situations where they pay for the cost of erecting their own mast as opposed to (2) when applicants erect the mast themselves.' ['Category (iii)']

Respondent's Position: This is really nothing more than part of the detailed evidence of the comparables already furnished. See para 102 of Cornerstone v London & Quadrant Housing.

Applicants' Position: Not relevant, for the second scenario is not covered by either the Business Tenancies Order or the code.

The Tribunal: 'Permitted Use' in the existing lease agreement provides: 'to install, operate, maintain, repair, renew, replace, upgrade and add to the telecommunications on the site'. Erring on the side of caution the Tribunal considers that this information may be relevant and directs the applicant to provide same."

9. In an email dated 2nd June 2021, the applicants' solicitors had previously updated the Tribunal on its compliance with the Discovery Order and noted: "Given the volume of documentation being produced, the Applicants may require some additional time in order to comply with the second and third request of the Respondent. The work undertaken to date in respect of the third request has revealed that it may concern 500 sites.".

10. In his second witness statement, dated 22nd October 2021, Mr Sturgeon referred to the Category (iii) sites as WIP sites and confirmed that there were 97 such sites in this jurisdiction. He did not, however, consider that the WIP sites were relevant to the proceedings, despite the Order of the Tribunal.

11. The Tribunal had received various submissions from the solicitors and other parties re the scope of Category (iii) discovery. The Tribunal, however, wished to seek the views of the experts, who were both experienced surveyors and, as experts, were under a duty to act independently for the benefit of the Tribunal.

12. The surveyors held a joint meeting on 27th September 2021 and the following extract relates to the WIP sites:

> "(d) WIP sites
>
> Mr Crothers understands that the respondent contends that the Order requires production of details of all transactions in relation to WIP sites.
>
> We understand that the applicant is challenging this position.
>
> Mr Crothers agrees with the respondent's request and considers this material to be relevant and of assistance. He considers particulars of the sub-letting or licensing income capable of being generated from WIP sites to be necessary in order to enable the parties and their advisors, and hence the Tribunal, to make an informed judgement of the rental value of a telecoms site. That may involve a form of residual valuation, in addition to or

absent comprehensive and reliable open market evidence of lettings of comparable greenfield sites.

Ms Hobson does not agree to those transactions being relevant to the valuation.

Mr Crothers noted and takes issue with the assertion by Messrs DWF Solicitors (in their letter of 16th September 2021) that the respondent has 'instructed' him to draw comparison between greenfield sites and WIP sites. It is he who requested this information and he has neither sought nor received any 'instruction' as to his valuation approach or methodology."

13. Mr Crothers considered that the hypothetical willing landlord would be faced with a choice:

    (i) he may let the bare site at a rent that would reflect the fact that the tenant must construct the facility; or

    (ii) he may construct the facility and let the finished facility to the tenant.

In any event he considered that the landowner would do whatever produced the best return on his investment but he could only form that conclusion when he had all the facts. In the subject reference, he submitted that these facts included the amount of "rent" obtainable from a WIP site.

14. He suggested a third option, that was for the landowner to lease the bare site to an infrastructure provider and there was a market for such a provider to take sites, develop and licence space to operators such as the applicants. He submitted that the rent obtainable for WIPs would inform the infrastructure providers rental bid and was certainly relevant in the subject proceedings. He considered it essential that the experts and Tribunal had access to the details of WIP transactions.

15. Ms Hobson's opinion was that a residual valuation, as proposed by Mr Crothers, was neither appropriate nor necessary and she considered the residual method of valuation to be a method of last resort.

16. Mr Crothers did not agree and he referred the Tribunal to the RICS Guidance Note on the Valuation of Development Property which defined "development property" as

> "an interest where redevelopment is required to achieve the highest and best use, or where improvements are either being contemplated or are in progress at the valuation date".

And further advises

> "Best practice avoids reliance on a single approach or method of assessing the value of development property. Normally, any valuation undertaken by the market comparison approach should be cross-checked by reference to the residual method. Where a residual method is used, it is similarly important to cross-check the outcome with comparable market bids and transactions where they exist, including the subject property."

17. Mr Crothers confirmed that he intended to follow the RICS Guidance in the subject reference and to utilise both comparable and residual evidence.

18. Ms Hobson had preferred the comparable method of rental assessment to the exclusion of any other method but Mr Crothers asked the Tribunal to note that of the 46 comparable transactions to be made available only two were open market lettings, which comprised less than 1% of the applicants' Northern Ireland greenfield sites. This, he considered, emphasised the need to explore and apply a second method of valuation.

Conclusion

19. In its original "discovery" decision of 13th May the Tribunal had ordered discovery of the transaction details relating to WIP sites. As stated in that decision, this is the first case of its kind to come before the Tribunal and the Tribunal is keen to have as much relevant information available as possible.

20. Mr Crothers is an experienced chartered surveyor and the Tribunal, erring on the side of caution, agrees that it would be useful to cross-check the comparable evidence by considering another method of valuation, particularly in light of the lack of open market lettings and as recommended by the RICS Guidance.

21. The Tribunal, therefore, directs the applicants to produce details of the original Category (iii) transactions, as previously requested, within four weeks of the date of this decision. This may, however, be stayed depending on the joining or otherwise of other parties to the proceedings and the receipt of further submissions if required.

The Jurisdiction to Join Third Parties

22. This matter arises as the applicants have requested that Cornerstone Telecommunication Infrastructure Limited ("Cornerstone") and On Tower UK Limited, On Tower UK One Limited, On Tower UK Two Limited and On Tower UK Four Limited ("On Tower") be joined to the subject proceedings, specifically to be heard on the issue of the confidentiality of the WIP data held by the applicants.

23. The Tribunal was referred to Rules 3, E5, 6 and 18 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules"):

> "3.-(1) The General Rules in this part shall, unless otherwise provided, apply to all proceedings before the Tribunal.

(2) In their application to each of the jurisdiction to which Parts III to VIII relate, the General Rules shall have effect as respectively modified Part and as if proceedings in the exercise of that jurisdiction were instituted by a notice of reference."

And

"E5(ii) The registrar may direct any party to the proceedings to serve notice of any application, or to serve any document upon any person whom the registrar considers may be affected by the proceedings and may join any such person as a party to the proceedings and give him notice in writing that he has been so joined notwithstanding that he has not applied to be so joined.

(2) Any person joined by the registrar as a party under paragraph (1) may apply to the registrar within 14 days after the date of the notice given to him by the registrar thereunder, to have his name removed from the proceedings on the ground that he has no interest, or no sufficient interest, in the proceedings to justify his appearance as a party therein."

And

"6.-(1) The registrar may at any stage of the proceedings give notice of the entry of the reference to any person whose interest appears to be affected by the reference and such person on receipt of such notice may apply to the registrar to be joined as a party to the reference stating –

a) his interest in the matter and the grounds on which he intends to rely;

b) whether he intends to appear separately or jointly with some other person;

c) whether he intends to call an expert witness;

d) an address for the service of documents upon him;

and the registrar may then join such person as a party, and shall give notice thereof to all other parties in the proceedings.

(2) An application under this rule shall be made to the registrar within 14 days from the date of service of a notice of the entry of reference by the registrar under this rule."

And

"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."

24. The parties have made various submissions about the jurisdiction of the Tribunal to join Cornerstone and On Tower to the proceedings but the Tribunal will focus on the consideration and application of the Rules by which it is statutory bound.

The Applicants' Submission

25. The applicants referred the Tribunal to Rules 18 and E5. In relation to Rue 18 Mr Colmer QC considered that there was no justification for confining the operation of Rule 18 in any way and the question of who may attend a hearing went to the heart of "the procedure at hearing".

26. In addition, Mr Colmer QC submitted that Rule E5 plainly applied in the instant matter, as it was known that On Tower and Cornerstone had expressed an interest in the subject proceedings, and it appeared that they considered they may be affected by the judgement of the Tribunal. Both On Tower and Cornerstone had corresponded with the Tribunal and the Office of the Lord Chief Justice.

27. Mr Colmer QC considered that the respondent had ignored the test for service or joinder set out in Rule E5, that is whether a party "may be affected by the proceedings".

28. The duties on the Tribunal, as to the proper consideration of the exercise of its powers, was considered by Mr Colmer QC to be clear. In this respect he referred the Tribunal to the judgement of McCloskey J in Re Edmunds' Application [2020] NI 679:

> "(38) … a public authority invested with a discretionary power, is obliged in every case to take into account all material facts and factors, to disregard the immaterial, to direct itself correctly in law, to act without bias, to adopt a procedurally fair decision making process, to avoid fettering its discretion. These are the familiar and well established touchstones …"

And

> "(40) [A public authority will be found to have] impermissibly fettered the discretion conferred upon it by statute by failing to consider the application made to on its merit."

29. The Tribunal was then referred to the discretionary powers of the registrar contained in Rule E5. Mr Colmer QC submitted that in deciding whether to exercise these discretionary powers, the registrar must take into account all material facts and factors and if the registrar does not consider the application on its merits he will have impermissibly fettered his discretion.

30. Far from being any bar on the registrar in exercising his powers under Rule E5, Mr Comer QC submitted he was under a legal imperative to consider exercising that power and that imperative applied in the subject reference, given that Cornerstone and On Tower had written to the Tribunal and the OLCJ on the basis that they may be affected by the subject proceedings.

31. Mr Colmer QC asked the Tribunal to note that, in the High Court, a non-party was permitted to come into Court to object to the production of documents, including on grounds of confidentiality. He referred to the judgement of Morgan J in Reid v Newtownabbey Borough Council [2007] NIQB 106 at [17] concerning a common law, non-statutory application of the principle which, before the Lands Tribunal he submitted, found statutory form in Rules 6 and E5.

32. He also referred the Tribunal to the English Civil Procedure Rules, Rules 31.19 and at paragraph (3).

> "(3) A person who wishes to claim that he has a right or a duty to withhold inspection of a document, or part of a document must state in writing (a) that he has such a right or duty; and (b) the grounds on which he claims that right or duty."

And at paragraph 6

> "(6) For the purposes of deciding an application under … paragraph (3) (claim to withhold inspection) the Court may (a) require the person seeking to withhold disclosure or inspection of a document to produce that document to the Court; and (b) invite any person, whether or not a party, to make representations."

33. In conclusion Mr Colmer QC submitted:

(i) The Tribunal, in the person of the registrar, had a power which should be exercised to serve and join On Tower and Cornerstone.

(ii) The suggestion by the respondent that this step amounted to a back door appeal ignored the original judgement of the Tribunal which was careful to preserve the applicants' opportunity to advance the question of confidentiality and commercial sensitivity.

(iii) The Tribunal's exercise of its Rule E5 power was an important part of the process of considering the question of confidentiality and commercial sensitivity. The respondent had advanced no reason why the Tribunal should fail to exercise the power which had been granted to it.

The Respondent's Submission

34. Mr Gibson BL asked the Tribunal to note that the applicants could not point to a single authority which supported their contention that, after a decision, a third party should have the right to make representations as to how that decision affects them.

35. He did not consider the authority quoted by the applicant, Reid v Newtownabbey Borough Council, to be an authority for the submission as claimed as it pertained to issues regarding Khama Subpoenas, whose jurisprudence evolved from common law arising out of the inherent jurisdiction of the High Court, not any prescribed rules.

36. He referred the Tribunal to an extract, as set out by Morgan J in Reid v Newtownabbey Borough Council supra cit:

> "[10] By virtue of E5 31 and 32 of the Administration of Justice Act 1970 the Court can order discovery from a non-party of documents either before commencement of an action or during its continuance where a claim in respect of personal injuries to a person or in respect of a persons death is being made. In England and Wales further statutory provisions and Rules Extend the power so that it is available in all actions where the disclosure sought is likely to support the case of the applicant or adversely affect the case of one of the other parties to the proceedings and disclosure is necessary to dispose fairly of the claim or to save costs. In this jurisdiction a party in the position of the plaintiff must rely on the mechanism devised by the Court in Khama v Lovell White Durant [1994] 4 All ER 269. In that case the Vice-Chancellor held that he Court has a wide measure of control over the manner in which a trial is to be conducted and he approved the practice of calling for the production of documents specified in a subpoena on a day prior to the date of the intended trial so as to promote earlier disclosure of evidential material in order that the parties may know the strength and weakness of each others cases as soon as possible."

37. Mr Gibson BL submitted that a party had a right to set aside a subpoena under the inherent jurisdiction of the High Court, as detailed in Ram Property Developments v Aeropeople Ltd 2011 NICh 3 and it had nothing whatsoever to do with the discretion of the Tribunal which was confined to operate solely within the rules provided for.

38. Mr Gibson BL asked the Tribunal to note that the application by the applicants appeared, and there had been no clarification, to seek to join On Tower and Cornerstone solely for the purpose of the subject discovery application and not for the purpose of their business tenancies application before the Tribunal generally. In the limited role in which they sought to make that application, the respondent contended that there existed no jurisdiction to do so as the decision re discovery had been made, it was over and there had been no appeal.

39. If the application was to join them to the proceedings for the purposes of hearing the applicants' whole application before the Tribunal, then Mr Gibson BL submitted that case has not been made out by either On Tower or Cornerstone.

Discussion of the Rules

40. The Tribunal agrees with Mr Gibson BL, the Lands Tribunal is confined to work within its rules:

    (i) Rule 3 stipulates that the general rules shall, unless otherwise provided, "apply to all proceedings before the Tribunal".

    (ii) Rule E5 gives the registrar the authority to join a person "affected by the proceedings".

        - Mr Colmer QC submitted that Rule E5 applied in the subject proceedings as On Tower and Cornerstone had previously expressed an interest in the proceedings having written to the Tribunal and OLCJ, as they considered that they may be affected by the proceedings.

        - Mr Gibson BL submitted that this Rule referred to parties affected by the proceedings which was a tenancy application and it was not intended for an interlocutory application.

        - The rule gives the registrar the authority to join any party "affected by the proceedings". The Tribunal does not consider that this is limited to the tenancy application. The Tribunal is, however, unsure as to how On Tower and Cornerstone might be affected by the proceedings.

(iii) Rule 6 gives the registrar the statutory authority at "any stage of the proceedings" to give notice to any person "whose interest appears to be affected by the reference".

- Mr Colmer QC considers On Tower and Cornerstone to be parties "whose interests appear to be affected by the reference" and he asked the Tribunal to note that this rule was drafted in the widest possible terms.

- Mr Gibson BL submitted that this rule only applied to persons whose interests were affected by the reference, defined in Rules 3 and 4 as being the notice of reference in Form I, that was the tenancy application.

- The Tribunal, to date, is unsure as to how the interests of "On Tower and Cornerstone" may be affected by the reference.

(iv) Rule 18 gives the Tribunal the authority to run the proceedings at hearing as it sees fit.

- Mr Colmer QC submitted that under Rule 18 there could be no principled objection to the Tribunal deploying Rule 18 to answer the question "who should appear?".

- Mr Gibson BL submitted that the rule did not provide the Tribunal with some sort of carte blanche to create a jurisdiction where non-existed and furthermore, given that there were already express provisions for joinder at Rules 6 and E5, there was no room for interpreting another rule to provide for an existing power.

- The Tribunal does not agree with Mr Gibson BL's narrow interpretation of Rule 18 but notes that the rule only provides for "procedure at hearing". The subject application is concerned with whether On Tower and Cornerstone should be joined to the proceedings.

Conclusion

41. As previously stated, the Tribunal is unclear, at this stage, as to how On Tower and Cornerstone might be affected by the proceedings and the judgement of the Tribunal. Almost all of the submissions in this matter to date have come through the applicants, not On Tower or Cornerstone. Evoking its statutory authority under Rule 6 the Tribunal will direct the registrar to formally give notice of the entry of the reference to On Tower and Cornerstone and invite them to apply to be joined as parties, stating clearly:

    a) their interest in the proceedings.

    b) how they might be affected by the proceedings and the judgement of the Tribunal.

    The application to join must be made to the registrar within 14 days from the date of service of the notice by the registrar. Upon receipt the Tribunal will adjudicate on whether the Rules permit the parties to be joined.

12th January 2022

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