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/80/2020

BETWEEN

HUTCHISON 3G UK LIMITED AND EE LIMITED – APPLICANTS

AND

AP WIRELESS II (UK) LIMITED – RESPONDENT

PART 4

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 and operate a telecommunications mast on a "greenfield" site known as lands to the north of 25 Corgary Road, Jerrettspass, Newry ("the reference property").

2. AP Wireless II (UK) Limited ("the respondent") is the landlord of the reference property. The existing lease has expired and the applicants are now seeking a new lease under the provisions of the Business Tenancies (Northern Ireland) Order 1996 ("the 1996 Order").

3. The parties have been unable to agree the terms of the new tenancy and the subject reference relates to a fourth application for discovery, the Tribunal having issued previous decisions on May 2021, January 2022 and February 2022.

4. The relevant extracts from the May 2021 Part 1 decision are:

> "16. The Tribunal also acknowledges that this was the first case of its type before the Tribunal in this jurisdiction …."

AND

> "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…."

AND

> "19. (ii) Discovery Sought: Any policies or guidelines relating to the level of rent that the Applicants pay third party mast providers.
>
> ….
>
> The Tribunal: The Tribunal considers that this information may be relevant as it provides an indication of what rents/payments are made to third party providers. The Tribunal directs the applicant to provide this information. If there is an issue with regard to 'confidentiality' the Tribunal will consider submissions on this issue.
>
> (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.

….

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."

AND

"21. The provision of all of the information, as directed by the Tribunal, should be provided within four weeks of the date of this decision…."

5. In the Part 2 January 2022 decision the parties sought 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."

6. The relevant extracts are:

"10. In his second witness statement, dated 23rd October 2021, Mr Sturgeon referred to the Category (iii) sites as WIP sites and confirmed that there were 97 such sites in this jurisdiction…."

AND

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

…..

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 ….

Mr Crothers … 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."

AND

"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."

AND

"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.

…."

7. The Part 3 February 2022 decision of the Tribunal was in relation to "the scope" of the production of information relating to "greenfield sites". This related to the production of transactions prior to 2017 and the Tribunal decided that these should be produced.

8. Subsequent to the previous decisions in the subject reference, the Tribunal has now received detailed submissions from the applicants, the respondent, On Tower and Cornerstone about issues of confidentiality in relation to the discovery (ii) and (iii) requests, that is the WIP sites.

9. Following, however, agreement of the rental for an almost identical greenfield site at Ballyrainey, Comber ("the Ballyrainey site"), between the experts in the subject reference, Ms Hobson and Mr Crothers, the applicants, On Tower and Cornerstone have requested the Tribunal to revisit the relevance of the information relating to the WIP sites, as requested by the respondent. This is the issue to be decided by the Tribunal.

Procedural Matters

10. The applicants were represented by Mr Adrian Colmer KC, instructed by DWF Solicitors. The respondent was represented by Mr Richard Coghlin KC, instructed by Eversheds Sutherland Solicitors. On Tower was represented by Mr Peter Hopkins BL, instructed by Pinsent Masons Solicitors. Cornerstone was represented by Mr David Dunlop KC, instructed by Cleaver Fulton Ranking Solicitors. The Tribunal is grateful to counsel for their detailed and helpful submissions.

11. The Tribunal also received witness statements from Ms Joanne Hobson, on behalf of the applicants and from Mr Kenneth Crothers, on behalf of the respondent.

Position of the Parties

12. The applicants' position was that the Tribunal had a firm legal basis for revisiting its decision on relevance and there was a clear factual basis for doing so. Given the approach of the respondent's expert in the Ballyrainey site, it was clear that the WIP documents, previously sought by him were not necessary for fairly disposing of the subject proceedings.

13. The respondent's position was that the issues had not changed and, as the Tribunal had already adjudicated on the discovery issue, there was no legal basis to revisit it. With regard to the Ballyrainey site, the only issue was that Mr Crothers did not qualify his expert's declaration in his expert report. This, however, was not a material change of circumstances and was not a basis for re-opening the relevance issue.

14. Cornerstone's position was that the Tribunal had three grounds for reconsidering the issue of relevance and they requested the Tribunal to do so:

    (i) Rule 9(4) of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules").

    (ii) The decision in May 2021 was an interlocutory exercise which was not fixed or closed and was not a final decision.

    (iii) The Tribunal was entitled to re-open where there was a material change of circumstances.

15. On Tower's position was similar to Cornerstone's.

The Legislation

16. Rule 9(4) of the Rules provides:

> "9(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 which 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."

Authorities

17. Kea Investments Ltd v Watson & Others [2020] EWHC 472 (Ch). The Tribunal was referred to the following extract:

> "The Chanel Principle
>
> 48. That does not mean that a party is free to fight over again interlocutory battles it has fought and lost. But the relevant principles are not those applicable to the issue of estoppel; they are those laid down by the Court of Appeal in Chanel Ltd v F W Woolworth & Co Ltd [1981] 1 WLR 485 ('Chanel'). I will refer to this as 'the Chanel principle'.
>
> 49. For a statement of the principle, Ms Jones referred to another decision of mine Holyoake v Candy, this time in relation to security for costs, at [2016] EWHC 3065 (Ch). Although it is a lengthy passage, it is simplest to cite from this judgment as follows:
>
> > 'Abuse of process the law
> >
> > 12. Mr Stewart QC, who appeared for the Claimants, submitted that in the circumstances it was an abuse of process for the Defendants, having voluntarily withdrawn the first application, to bring a second application on effectively the same grounds. He relied on the principle known as the rule in Henderson v Henderson (1843) 3 Hare 100, as interpreted by Lord Bingham in Johnson v Gore Wood [2002] 2 AC 1 at 31, where he referred to a:
> >
> > > 'broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing on the question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.'

13. In Chanel Ltd v F W Woolworth & Co Ltd [1981] 1 WLR 485 ('Chanel'), the plaintiffs, in an action for trade mark infringement and passing-off, obtained ex parte interlocutory injunctions; on the inter partes hearing the defendants felt constrained to give undertakings and by consent the motion was stood over to trial (without being opened or the evidence read) on the defendants giving undertakings 'until judgment or further order'. The defendants then carried out some research which led them to think they had an argument after all and applied to discharge the undertakings. Foster J refused the application, and the Court of Appeal refused leave to appeal. Buckley LJ held (at 492D) that an order (or undertaking) expressed to be until further order gave a right to the party bound to apply to have the order (or undertaking) discharged if good grounds for doing so are shown. He then said he would assume (without deciding) that the evidence the defendants had uncovered would have enabled them to resist the motion, and continued (at 492H):

> 'The defendants are seeking a rehearing on evidence which, or much of which, so far as one can tell, they could have adduced on the earlier occasion if they had sought an adjournment, which they would probably have obtained. Even in interlocutory matters a party cannot fight over again a battle which has already been fought **unless there has been some significant change of circumstances, or the party has become aware of facts which he could not reasonably have known, or found out, in time for the first encounter**.' [Tribunal emphasis]

The Issue

18. The issue, therefore, for the Tribunal was did the circumstances in the Ballyrainey site agreement amount to a "significant change in circumstances" or "has a party become aware of facts which he could not reasonably have know or found out, in time for the first encounter".

The Ballyrainey Site Agreement

19. The Ballyrainey site negotiations and agreement were carried out by the same experts as in the subject reference, Ms Hobson and Mr Crothers. The sites are almost identical greenfield sites, both 144 sq mtrs in area and which have identical lease terms relating to conditions and uses.

20. Mr Coghlin KC made the point that the landlords were different but the Tribunal considers that this should have no bearing on the experts assessment of a rental value under the terms of the 1996 Order.

21. For his assessment of the appropriate rental value in the Ballyrainey site Mr Crothers relied upon lease renewal evidence from other similar sites, which had been negotiated by Ms Hobson and some new letting evidence from Ms Hobson's investigations of the wider telecoms market. Mr Crothers' expert report did not mention the necessity or desirability of having comparable evidence from WIP sites, which he had requested in the subject reference.

22. In addition, the agents met on 4th May to discuss the rental valuation. Ms Hobson has advised the Tribunal in her witness statement that there was no discussion at the meeting of the need to consider comparable evidence from WIP sites, in order to assess a rental value for the Ballyrainey site. This was confirmed by the agreed minutes of the meeting which were submitted to the Tribunal.

23. Ms Hobson also referred the Tribunal to Mr Crothers' expert report in which he declared and confirmed that his expert report included all of the facts which he regarded as being relevant and he went on to state "that attention has been drawn to any matter which would affect the validity of those opinions".

24. In respect of his valuation methodology in his expert report for the Ballyrainey site, Mr Crothers had taken an average of 24 comparables, ranging from 3 months before the

valuation date and 9 months after, to arrive at an average rental value. He provided an alternative valuation by averaging comparables 3 months before the valuation date.

The Applicants' Submissions

25. Mr Colmer KC referred the Tribunal to the following matters which he considered were not in contention:

    (i) The Lands Tribunal was an inquisitorial Tribunal and had the statutory power under rule 9(4) to determine its own proceedings.

    (ii) The test was what did the lands Tribunal require with regard to information, not what each party required.

    (iii) The Lands Tribunal had an ongoing entitlement to consider what it required at any point in the proceedings but must exercise that discretion judicially.

    (iv) The Lands Tribunal can revisit an interlocutary decision.

26. Mr Colmer KC asked the Tribunal to note:

    (i) The reason why the subject reference had arisen was because, Mr Crothers, in the subject proceedings, contended that documents relating to WIP sites were required for him to complete his valuation.

    (ii) However, in striking contrast to the stance adopted by Mr Crothers in the instant proceedings, Mr Crothers, in the Ballyrainey proceedings, did not seek any information at all about WIP sites.

    (iii) Rather, in Ballyrainey, Mr Crothers relied solely on the applicants' comparable evidence of renewal rental agreements on other similar greenfield sites. Commenting on those comparable transactions Mr Crothers noted in his expert report:

        "9.1 The rental evidence in the 12 months period straddling the renewal date show an average rent of £1,988 per annum.

9.2 Analysed by quarter, the transactions in the 3 months period immediately preceding the renewal date show an average rent of £2,233 per annum.

9.3 In my view the latter is the most cogent evidence of value at the date of the renewal and is most likely to have informed the parties at that date.

9.4 On that basis I assess the rental at £2,200 per annum."

27. He then referred the Tribunal to Mr Crothers' "statement of truth" and "declaration" detailed in his expert report for the Ballyrainey site.

"Statement of Truth

10.1 I confirm that insofar as the facts stated in my report are within my own knowledge I have made clear which they are and I believe them to be true and that the opinions I have expressed represent my true and complete professional opinion". [Mr Colmer KC emphasis]

AND

"Declaration

11.1 I confirm that my report includes all facts which I regard as being relevant to the opinions I have expressed, and that attention has been drawn to any matter which would affect the validity of those opinions." [Mr Colmer KC emphasis]

28. The Ballyrainey proceedings, Mr Colmer KC submitted, were reported upon, discussed and the site valued by Mr Crothers on the basis of the applicants' greenfield evidence alone and moreover, the Ballyrainey proceedings have since been negotiated and settled on the basis of the greenfield comparable evidence alone. He submitted, patently, as per Mr Crothers declaration, he stands over that settlement as one based on all relevant and necessary considerations.

29. In these circumstances, Mr Colmer KC concluded that Mr Crothers did not consider information about WIP sites to be necessary for the proper valuation of the Ballyrainey site and if that was the case why was such information necessary for the valuation of the reference property at Derrycaw?

30. With regard to "relevance", Mr Colmer KC noted much of the respondent's submissions focussed on the Tribunal already having taken a decision on the issue of relevance and the fact that "the ship had sailed".

31. The Tribunal had decided:

> "The Tribunal considers that this information may be relevant as it provides an indication of what rents/payments are made to third party providers. The Tribunal directs the applicant to provide this information. If there is an issue with regard to 'confidentiality' the Tribunal will consider submissions on this issue."

32. At the most recent mention of the subject reference the Tribunal emphasised that, having decided the issue of relevance, it did not intend to revisit it. Mr Colmer KC advised the Tribunal that the applicants respected the Tribunal's decision on that and indeed, as matters stood at that time, there was no material before the Tribunal that would give rise to a reconsideration.

33. However, as the respondent correctly recognised in its submissions, Mr Colmer KC submitted that there will be instances in which (to quote the respondent):

> "Some new intervening circumstance or fact has arisen which would cause the Tribunal to alter a previously held position."

34. Given the question which now arises from Mr Crothers strikingly different approaches in the Ballyrainey proceedings and the Derrycaw proceedings, Mr Colmer KC submitted that this case is one of those identified by the respondent, where the Tribunal can properly revisit the

question of relevance and this was not going back on a previous decision, rather it was revisiting the decision "in light of a new intervening circumstance or fact … which would cause the Tribunal to alter a previously held position."

35. Mr Colmer KC submitted that this was in accordance with rule 9(4) which allowed the Tribunal to decide what information was "necessary" at any particular point in time.

Cornerstone's Submission

36. Mr Dunlop KC encouraged the Tribunal to re-open the question of relevance and he submitted that it could do so on the basis of the following grounds:

    (i) Rule 9(4).

    (ii) The decision in May 2021 was an interlocutory exercise which was not fixed or closed and was not a final decision.

    (iii) The Tribunal was entitled to re-open where there was a significant change in circumstances.

37. Mr Dunlop KC then provided the Tribunal with a full explanation and description of the "framework agreement" which Cornerstone had with other operators and he submitted that, as a matter of law, the Tribunal ought not to make an order on relevance without Cornerstone being heard on the issue.

On Tower Submissions

38. On behalf of On Tower Mr Hopkins BL briefed the Tribunal on the "MSSA", which was similar to the Cornerstone "framework agreement" and which regulated On Tower's operations with other telecoms providers. He advised the Tribunal that the MSSA was far removed from a rental value and he mirrored Mr Dunlop KC's submissions that the Tribunal should not make an order on relevance without hearing submissions from On Tower.

The Respondent's Submissions

39. Mr Coghlin KC asked the Tribunal to note it was accepted in the Part 1 decision that:

    (i) this was a "novel" case with similar issues never having previously come before the Tribunal.

    (ii) it was a rental assessment under the terms of the 1996 Order.

    (iii) the only comparables available had been supplied by the applicant.

    He submitted that the issues in the subject Part 4 reference had not changed.

40. He referred the Tribunal to paragraph 14 of the Part 1 decision and noted that the "co-operation" from the applicant had not been forthcoming:

    "14. … In the subject reference the Tribunal would have liked to have seen a spirit of co-operation and willingness to share information.".

41. The Tribunal was informed that there were 16 cases between the applicants and the respondent and 15 had been stayed pending a decision on the subject reference. This therefore was not a "one-off" case as presented by the applicants.

42. He further submitted that there was a potential for some 5,000 references and there was substantial public interest in the outcome of the subject reference. There was, therefore, he submitted, the need to cross-check the comparables supplied solely by the applicants. In the Part 1 decision the Tribunal ordered that the relevant documents should be provided and nothing had changed.

43. Mr Coghlin KC then referred the Tribunal to its Part 2 decision of November 2021 which had been required because the order of the Tribunal in the Part 1 decision had not been complied with.

44. He referred the Tribunal to paragraph 17 of its Part 2 decision:

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

The issues of novel case, public interest, need for cross-check and comparables coming solely from the one side were also relevant in the Part 2 decision. Again nothing has changed in relation to the subject Part 4 reference.

45. Mr Coghlin KC asked the Tribunal to note that the RICS guidance recommended the need for a cross-check and indeed, Ms Hobson did not say in her evidence that the information requested was not relevant, rather she merely asserted that the residual method of valuation was not reliable.

46. In the Part 2 decision the Tribunal directed that the information requested by Mr Crothers should be supplied within four weeks. There had, therefore, been two judgements about relevance and in the public interest Mr Coghlin KC requested that the information should be supplied.

47. With regard to the Ballyrainey site agreement Mr Coghlin KC submitted:

(i) It was accepted that Mr Crothers did not qualify his expert's declaration re wanting WIP agreements to cross-check.

(ii) If that was the inference it was not a material change of circumstances.

(iii) "Cogency" depended on truth and there was an interest in having all relevant information.

(iv) The residual valuation was required as a cross-check, in the public interest.

48. Mr Coghlin KC asked the Tribunal to note that Mr Crothers' opinion had not changed and he still required the WIP information as a cross-check in the subject reference. He submitted, therefore, that the only inference in the Ballyrainey agreement was that Mr Crothers could have been more careful in the wording of his experts' declaration.

49. Mr Coghlin KC accepted that the Lands Tribunal had the power to re-open an interlocutory decision if there was a material change of circumstances but he did not consider the circumstances in the Ballyrainey site agreement to be a material change.

50. If, however, the Tribunal decided to re-open the issue of relevance he submitted it could only do so judicially giving reasons. He considered that the issue of confidentiality could be dealt with by way of a confidentiality ring and this did not require the re-opening of relevance, which had already been dealt with.

The Tribunal

51. It was not contested that:

(i) The Lands Tribunal was an inquisitorial Tribunal.

(ii) It had the statutory authority under Rule 9(4) of the Rules to request any document which "the Tribunal may require".

(iii) The Tribunal had the authority to re-open the issue of relevance in the subject reference but it had to do so judicially and only if there was "some significant change of circumstances, or the party has become aware of the facts which he could not reasonably have known, or found out, in time for the first encounter." (the Chanel principle).

52. The Tribunal finds the following facts to be relevant:

(i) The Ballyrainey site was a greenfield site almost identical to the subject Derrycaw site.

(ii) The experts in Ballyrainey and Derrycaw were the same, Ms Hobson on behalf of the tenants and Mr Crothers on behalf of the landlord.

(iii) The landlord in the Ballyrainey site was not the respondent but the Tribunal finds this to be of no significance in assessing a rental for each site, under the 1996 Order.

(iv) Mr Crothers is an experienced chartered surveyor and he would have been aware that his duty of care to the landlord in the Ballyrainey site was the same as his duty of care to the respondent in the subject site.

(v) Mr Crothers agreed the appropriate rental for the Ballyrainey site based solely on comparable evidence supplied by Ms Hobson. This comprised comparable evidence of rental agreements negotiated by her and some letting evidence from her investigations of the wider telecoms market.

(vi) Despite having the same duty of care to the landlord in the Ballyrainey site, Mr Crothers did not require a cross-check of evidence from WIP sites to satisfy himself that the rental agreement in the Ballyrainey site was correct. He was content to reach agreement without the WIP information.

(vii) Mr Crothers did not mention in his expert report, the meeting of experts, his expert declaration and his statement of truth, that he required WIP evidence as a cross-check, despite having the same duty of care.

(viii) In his statement of truth he noted that the expert opinion which he expressed in the Ballyrainey agreement represented “my true and complete professional opinion”. There was no mention of the need for WIP evidence as a cross-check.

(ix) In his experts declaration he stated that his report contained “all the facts which I regard as being relevant to the opinions I have expressed and that attention has

been drawn to any matter which would affect the validity of these opinions". Again no mention of WIP evidence being required.

53. Based on the above facts, the Tribunal can only conclude that Mr Crothers was professionally satisfied that a rental for the Ballyrainey site could be assessed based solely on comparable evidence supplied by Ms Hobson. He had the same duty of care to his clients in Ballyrainey and Derrycaw but he did not find it necessary to carry out a cross-check using WIP evidence in reaching agreement on the Ballyrainey site.

54. In the Part 1 and 2 decisions the Tribunal "erred on the side of caution" in granting Mr Crothers request for the WIP information. The Tribunal finds, however, that the basis on which agreement was reached in the Ballyrainey site was a "significant change in circumstances" and it was also information that the applicants would not have been aware of at the time of the Part 1 and 2 hearings.

55. Re-visiting the issue of relevance based on these facts, the Tribunal finds, as per rule 9(4) of the Rules, it no longer requires the WIP evidence to assess a rental for the reference property, under the terms of the 1996 Order.

15th December 2022

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