

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

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 “green field” 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 commenced on 18th June 2007 for a term of 10 years, 5 months and 9 days. The lease has now expired and the applicants have lodged a tenancy application with the Lands Tribunal, in compliance with Article 7 of the Business Tenancies (Northern Ireland) Order 1996 (“the BT Order”). The applicants are now seeking a new tenancy with a term of one year and a rent of £200.
3. 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 the terms.

4. During the negotiations and submission of evidence, both parties have lodged discovery applications with the Tribunal. This is the preliminary issue to be decided.

Procedural Matters

5. The applicants were represented by Mr Adrian Colmer QC, instructed by DWF Solicitors. Mr Keith Gibson BL, instructed by Eversheds-Sutherland Solicitors, made representations on behalf of the respondent. The Tribunal is grateful to the parties for their legal submissions.
6. Following exchange of the experts' "Books of Facts" the Tribunal received various witness statements/discovery applications from (i) Michelle Cully solicitor on behalf of the applicants and (ii) Peter Thacker, Vice President Legal of the respondent company.

The Law

7. Rule 9 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules") provides:

"(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 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.

(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."

Authorities

8. The Tribunal was referred to the following authorities:

- (i) Party E v Party C BT/109/2016
- (ii) Cornerstone Telecommunications Infrastructure Ltd v London & Quadrant Housing Trust [2020] UKUT 0282
- (iii) Vodafone Ltd v Hanover Capital Ltd [2020] EW Misc 18
- (iv) Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd & Anr [2020] EWCA Civ 90

9. The Tribunal was also referred to the following texts:

- (i) Law Commission's Report of February 2013 [No 336]
- (ii) Sch 1 and Sch 2 Digital Economy Act 2017

Discussion

The Respondent's General Submissions

10. On behalf of the respondent Mr Gibson BL made the following general submissions in relation to discovery:

- (i) This was the first reference to the Tribunal of any case relating to the new Schedule 3A Electronic Communications Code ("the code") to the Communications Act 2003 which came into force with the Digital Economy Act 2017, on 28th December 2017.
- (ii) The issue of whether or not the Tribunal had the jurisdiction to impose a Code Agreement, pursuant to paragraph 20 of the code, in circumstances where there was an existing Business Tenancy has been the subject of much litigation in England and Wales. The decision of the Court of Appeal in Cornerstone Telecommunications Infrastructure Ltd v Ashloch Ltd & Anr [2021] EWCA Civ 90 was that it did not. For

the purpose of the subject reference both parties were content, for the present, to accept the Lands Tribunal jurisdiction. This accorded with the Executive Summary of the Law Commission Report of February 2013.

- (iii) It was not disputed that the BT Order applied to the tenancy of the reference property and the Tribunal will have to assess the rent in accordance with Article 18 of the BT Order.
- (iv) Pursuant to Article 24(3) of the code there is “no-network assumption” and what this means is that no allowance is to be made for the fact that there is presently situated on site a telecommunications mast or network or apparatus. This is obviously not the situation under Article 18 of the BT Order.
- (v) Due to the nature of the Telecoms market the Tribunal will rely almost entirely on the evidence of comparables supplied by the operator. In the subject reference, the applicant, and this places a much greater onus on the applicant re discovery. This was reiterated by the Upper Tribunal in Cornerstone Telecommunications Infrastructure Limited v London & Quadrant Housing Trust [2020] UKUT 0282 at para 102:

“It means that evidence of the headline figure payable under a negotiated agreement is unlikely, without access to a detailed breakdown from at least one side, to provide much useful evidence for the Tribunal. The loss and damage anticipated in any particular case will depend on the characteristics of the particular site. Unless the Tribunal has access to the parties’ own analysis of the sum agreed between them it may be difficult to analyse comparable transactions.”

- (vi) At paragraph 109 of the same judgement the Upper Tribunal made the following clear:

“The Tribunal does not order disclosure as a matter of course, and leans against indiscriminate disclosure. But parties should not lose sight of the Tribunal’s power to direct disclosure where it is necessary to do so, as it was in this case. It is part of the duty of solicitors to consider and agree what directions for the exchange of information and disclosure of documents should be sought from the

Tribunal at the case management hearing. Expert witnesses should also consider between themselves before they prepare their reports what information they reasonably require to enable them to provide their evidence. Where that information is held by one of the parties the experts should request it, and it should be provided. If it is not provided an application should be made to the Tribunal, but compulsion ought not to be necessary. The Tribunal stated in *Cornerstone Telecommunications Infrastructure Limited v University of the Arts London* [2020] UKUT 0248 at [67]:

‘Disputes would be avoided if material can be shared, as a matter of courtesy and helpfulness even where there is no obligation to do so.’

It is disappointing that the reluctance to share information continues, creating unnecessary mistrust between the parties, and delays which frustrate the work of the Tribunal.”

- (vii) The legal principles involved in discovery in the Tribunal in Northern Ireland are outlined in Party E v Party C BT/109/2016. The relevance of comparables to the exercise which the Tribunal must carry out pursuant to Article 18 should be noted and the Tribunal has the statutory power to decide whether comparables are relevant and necessary.

11. In conclusion Mr Gibson BL submitted that from the Tribunal’s perspective and indeed from the perspective of the valuers, the emphasis must be on providing such discovery which allows a proper detailed forensic examination of the comparables and of the factors likely to influence the Tribunal in a consideration of Article 18 and the new code. The discovery sought by the respondent goes no further than what is required to allow that process to be completed.

The Applicants’ General Submissions

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

- (i) The respondent's approach was to entirely ignore the specific issues which are before the Tribunal in the subject reference. Instead the respondent's approach was to engage in high-level, hypothetical, irrelevant and unhelpful debate about the generality of the operation of the telecommunications industry.
- (ii) The issues before the Tribunal were the terms of the renewal of the tenancy on the reference property and specifically the terms with regard to (a) rent, and (b) duration of the lease.
- (iii) Properly approached the issues of (a) rent and (b) duration of the term will be informed by evidence as to comparable sites. The respondent does not seem to recognise that, as a matter of principle, the identification and analysis of comparable sites is the way to approach the consideration of the reference property, although at paragraph 12 of his skeleton argument the respondent concedes "... the role of comparables ... is of vital importance ...".
- (iv) Having accepted that principle the respondent fails to employ it in its requests for specific documents. The respondent's incorrect approach is revealed when one contrasts the characteristics of the reference property with the characteristics of the type of site in respect of which the respondent seeks information.
- (v) The characteristics of the site are not in dispute. They are concisely and uncontroversially described in Ms Cully's first witness statement of 9th February 2021, at paragraph 5.

"The Site is a greenfield telecommunications site where the Applicants lease a parcel of bare land, as opposed to, for example, occupying space on a roof-top site or where the operator installs equipment on an existing mast. The Site is occupied solely by the Applicants."

- (vi) That is to say, the characteristics of the specific premises which are the subject of the application before the Tribunal are:
 - Business Tenancies Order renewal;
 - a greenfield site;
 - a parcel of bare land;

- not a site on which a third party owned mast has been erected; and
- not a site shared with any other party.

13. In these circumstances Mr Colmer QC requested the Tribunal to grant the applicants' application for discovery and to dismiss the respondent's.

The Tribunal

14. The Tribunal concurs with the observations and findings of the Upper Tribunal, England and Wales at paragraph 109 of its decision in Cornerstone Telecommunications Infrastructure Ltd v London & Quadrant Housing Trust. In the subject reference the Tribunal would have liked to have seen a spirit of co-operation and willingness to share information.

15. It was not disputed that the task was to assess the correct renewal terms, including rent and duration of lease, in accordance with Article 18 of the BT Order.

16. The Tribunal also acknowledges that this was the first case of its type before the Tribunal in this jurisdiction and it was all the more reason to adopt a position of "willingness to share" rather than confrontation.

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.

18. On that basis the Tribunal will now consider each party's request for discovery.

The Respondent's Request

19. The respondent had served a Schedule of Discovery requesting eight different items of information:

(i) Discovery Sought: "Details of all and any Shares in occupation of each site."

Respondent's Position: In line with the Hanover decision the sharing of sites is clearly relevant because it affects demand for that particular site. In order to understand the comparable, it is necessary to know whether or not they are shared.

Applicants' Position: The subject site is occupied by the applicants as joint tenants and not as a sharer. There is no need to produce any information in respect of other sites. Only one site is shared in any case.

The Tribunal: Clause 8.1 of the existing lease allows for sharing of the subject site and the Tribunal agrees with the respondent the ability to share a site may be a factor which would have an impact on its rental value. The Tribunal acknowledges that the reference property is not shared but the lease permits the applicant to share should it so desire. The Tribunal directs the applicant to provide the information requested.

(ii) Discovery Sought: "Any policies or guidelines relating to the level of rent that the Applicants pay third party mast providers."

Respondent's Position: Pursuant to Hanover, the approach on valuation is effectively to rely on the Business Tenancies approach which is a rental value on the open market by a willing lessor whilst at the

same time keeping an eye on the direction of the new code. The relevant provisions are paras 24 and 25 of the code. Here the respondent seeks rent comparables in respect of rents or payments made to third party mast providers.

Applicants' Position: Not relevant and in any event confidential.

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."

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.

(iv) Discovery Sought: "All and any documentation involving plans to upgrade the site."

Respondent's Position: The issue of upgrades is one which is relevant in the context of the code and the Court is referred to Cornerstone v London & Quadrant at paras 60 to 90. If the applicant wants something more than is provided by para 17 of the code, that will affect valuation.

Applicants' Position: The applicants have no plans to upgrade the subject site.

The Tribunal: The respondent accepts that the applicants currently have no plans to upgrade the site but they reserve the right to cross-examine on this issue at hearing.

(v) Discovery Sought: "Schedule of all renewals completed in Northern Ireland since 28th December 2017."

Respondent's Position: What has been submitted provides none of the detail as prescribed by the Court in Cornerstone v London & Quadrant. Proper details should be provided.

Applicants' Position: Renewals that fall outside "greenfield" sites are not comparable. There is some further comparable evidence which will appear in the expert's supplemental report on facts.

The Tribunal: The Tribunal will await the additional comparable evidence which will be provided in the expert's supplemental report on facts. If this remains an issue after provision of the supplemental report the Tribunal will reconsider.

(vi) Discovery Sought: "Documents supporting the comparables schedule."

Respondent's Position: As per "(v)".

Applicants' Position: Redacted copies are available.

The Tribunal: The redacted copies should be provided to the respondents as a matter of urgency. If this then remains an issue the Tribunal will reconsider.

(vii) Discovery Sought: "Copies of any new Code Agreements since 28th December 2017."

Respondent's Position: Copies of new code agreements, which do not take into account the Business Tenancies legislation, are relevant for they are clearly comparable in the truest sense of the word.

Applicants' Position: Not relevant.

The Tribunal: The Tribunal notes that pursuant to Article 24(3) of the Code there is a "no-network" assumption when considering the rent to be paid. This is not the same under the BT Order. The Tribunal considers, however, that the new code agreements may provide evidence as to the rental value of the greenfield site and directs the applicants to provide this information. The Tribunal notes that the applicants' expert has included details of two new code agreements in her expert evidence.

(viii) Discovery Sought: "List of all the sites which the applicants currently own or are in occupation of (in NI)."

Respondent's Position: This is necessary to confirm, in the absence of open market lettings, all of the comparables disclosed to date are exhaustive.

Applicants' Position: This is too onerous an exercise and not relevant.

The Tribunal: The Tribunal agrees with the applicants, this is too onerous and in any case the owner occupied sites are irrelevant.

The Applicants' Request

20. The outstanding discovery requests made by the applicants are (the Tribunal will use the applicants' numbering):

(2) Discovery Sought: "Copies of all relevant correspondence relating to respondent's acquisition of the site to include the heads of terms."

Applicants' Position: To understand what, if any, representations were made by the respondent to Mrs Smith during the acquisition process and what the respondent's expectations may have been at the time of acquisition in respect of the prospective telecommunications rental for the site and how the code might affect valuation.

Respondent's Position: The respondent has provided a copy of the intervening lease. The respondent denies relevance in assessing the market rental value (on the hypothetical basis) for any renewal of the site in accordance with the BT Order.

The Tribunal: The Tribunal agrees with the respondent and fails to see what relevance the respondent's "expectations" at the time of acquisition are to the assessment of the renewal rent for the new lease. Request for discovery denied.

(7) Discovery Sought: "Details of all comparable evidence that the respondent and/or the respondent's expert will use/rely upon in these proceedings ('the respondent's comparable transactions')."

Applicants' Position: The applicants' expert requires same to understand the basis of the valuation proposed by the respondent's expert valuer and whether she may need to rely on such evidence for her own valuation.

Respondent's Position: The respondent is severely disadvantaged in not being able to access publically available information regarding comparable evidence. The respondent does not have any direct comparable evidence at the date of the second witness statement.

The Tribunal: The Tribunal accepts that the respondent has little or no comparable evidence. As further information is provided by the applicant, as directed by the Tribunal, the respondent's expert will include any additional information on which he intends to rely in his report on facts and expert report.

(8) Discovery Sought: "Copy leases for the respondent's comparable transactions along with any side letters and/or any supporting documents including details of any permissions, rent payments, and compensation paid and/or fees paid to the site providers or their advisers."

Applicants' Position: The applicants' expert requires same to verify information that has been used by the respondent's expert valuer and whether she may need to rely on such information for her own valuation.

Respondent's Position: The respondent does not have any comparable evidence to disclose at the date of the second witness statement.

The Tribunal: The Tribunal accepts that the respondent does not have any comparable evidence. If, however, such evidence comes to light this should be provided to the applicant.

(9) Discovery Sought: "Copies of all documents relating to any greenfield lease renewal transactions between the respondent and a code

operator since the introduction of the code in December 2017 ('other greenfield lease renewal transactions')."

Applicants' Position: The applicants' expert in her letter states that she requires these documents in order that she may have complete knowledge of all transactions to be considered for her valuation.

Respondent's Position: The respondent has had no greenfield lease renewals in Northern Ireland involving the respondent since 2017.

The Tribunal: The Tribunal accepts the respondent's position.

(10) Discovery Sought: "Copies of lease agreements relating to the other greenfield lease renewal transactions along with any side letters and/or any supporting documents including details of any permissions, rent payments and compensation paid and/or fees paid to the site advisers or their advisers."

Applicants' Position: The applicants' expert requires same in order that she may verify the information that has been provided to her and whether she needs to rely on such information for her own valuation.

Respondent's Position: The respondent advises that it does not have any such information.

The Tribunal: The Tribunal accepts that the respondent does not have any such information but should additional information come to light it should be provided to the applicants.

Conclusion

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. Shortly thereafter, the Tribunal will convene a mention and issue directions for a hearing on the substantive issues relating to lease renewal terms.

13th May 2021

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