

**LANDS TRIBUNAL FOR NORTHERN IRELAND**  
**LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964**

**IN THE MATTER OF AN APPLICATION**

**BT/63/1990**

**BETWEEN**

**READY MIXED CONCRETE (ULSTER) LIMITED - APPLICANT**

**AND**

**DANIEL McCAFFREY - RESPONDENT**

**Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS**

**Omagh - 27<sup>th</sup> September 1991**

This was an application for a new tenancy of premises at No 33 Kelvin Road, Omagh, Co Tyrone. The lease was brought to an end on 28<sup>th</sup> February 1991 by a "Landlord's Notice to Determine Business Tenancy" under Section 4 of the Business Tenancies Act (Northern Ireland) 1964 ("the 1964 Act") dated 5<sup>th</sup> March 1990. The Respondent's objections to a new tenancy were not upheld and by an Order dated 21<sup>st</sup> December 1990 the Lands Tribunal dismissed the Respondent's objection to a new tenancy. The questions of the rent to be paid in the new tenancy and the duration thereof were left to negotiations between the parties. Those negotiations proved to be of no avail and this hearing heard an expert valuer from each side. There were two matters in dispute, the first having some effect on the second. They were:-

1. **Duration of the new tenancy**

Mr Daniel Alfred McLernon MIAVI (Estate Agent and Valuer) (for the Respondent) gave his opinion that the duration should be 10 years with a rent review at the end of five years. Mr John Vance Arthur BSc FRICS FRVA (for the Applicant) gave his opinion that the duration should be 14 years with a rent review at the end of seven years.

2. **The rent to be paid**

Mr McLernon's opinion was £9,100 per annum (equal to £175 per week).

Mr Arthur's opinion was £1,600 per annum.

No other disagreements were reported to the Lands Tribunal at the hearing, but it became fairly obvious to the Tribunal that neither party had directed thoughts towards what type of review clause there should be in the new lease and who should arbitrate if agreement failed at the review stage.

The original lease dated 6<sup>th</sup> March 1970 between Patrick A O'Neill and Ready Mixed Concrete (Ulster) Limited was for 21 years from 1<sup>st</sup> March 1970 and contained no rent review clause. Inter alia it contained the following covenant by the lessee (the Applicant) which has some effect on the rent to be paid:-

**Paragraph 2(c)** "To contribute one half of the cost of keeping in repair the access roads coloured yellow and coloured yellow and hatched in black." (The latter right-of-way was at the western boundary of the leased land but the former right-of-way transversed the leased land). In the lease there was excepted and reserved "unto the Lessor and his successors in title:-

- (1) a right of way for all purposes over the Access Roadway coloured yellow on the said plan."

Mr McLernon based his opinion of the rental value, of a "Commercial Yard" containing 0.48 acres with frontage of 55 feet to the Kevlin Road, on the following comparables:-

### **Rental Comparables**

1. A commercial yard and shed at James Street, Omagh let (James Eakin to Ken Shortt Tyres) for 10 years from 1<sup>st</sup> January 1988 @ **£9,600 per annum**.

The use is for a retail tyre depot containing approximately 0.75 acres in total area and the shed (included in the total area) contains approximately 10,000 square feet and is not in good order.

There is no rent review.

2. A commercial yard and open corrugated iron shed at Holmview Avenue, Omagh let (David A Kane to Wesley Creighton/O'Rourke's Coal) for 5 years from 1<sup>st</sup> May 1987 @ **£9,600 per annum**.

The use is for a coal yard containing approximately 0.464 acres in total area and the shed contains approximately 2,550 square feet is steel framed and has a concrete floor. The front of the shed is partly closed in with brick (the landlord assisting the tenant with the cost thereof).

There is a narrow limited access where Holmview Avenue joins the main Campsie Road.

3. An open car park at Mountjoy Road, Omagh let (Diocese of Derry to Department of the Environment for Northern Ireland) for 5 years from 1<sup>st</sup> March 1987 @ **£2,500 per annum**.

The use is limited to the Department's servants and agents for carparking. The premises contain 0.58 acres and the Lessor retains the right to use the premises at week-ends for carparking by people who use the adjacent Football Ground. The Lessee has surfaced the entire area with tarmac and has installed security gates.

### **Sales Comparables**

1. A building plot at No 18 James Street, Omagh sold (Noraut Limited to BOAZ Properties) in 1990 at £215,000. Area of land 1.8 acres with planning permission for a supermarket and carparking.

(Note:- Mr Arthur also quotes this comparable with slightly different detail.)

A structurally damaged dwelling and corrugated iron stores have been discounted.

Mr McLernon devalues this as follows:-

£215,000 for 1.8 acres	=	£119,444 per acre
½ acre	=	£ 59,722
		say £ 60,000
Divide by 7YP	=	£ 8,571 per annum
		say £ 8,500 per annum

2. A building plot at Dromore Road, Omagh sold (Property Equipment and Construction Holdings to Conlon) in July 1990 for £25,000. Area of land 0.30 acres served by an estate road off Dromore Road with a planning permission for a warehouse.

Purchaser uses the site for retail sales of second-hand cars.

Mr McLernon devalues as follows:-

0.3 acres sold @ £25,000

0.5 acres worth £41,666

Divide by 7YP = £ 5,952 per annum

say £ 6,000 per annum

Mr Arthur based his opinion of a yard, restricted to the sole use for the production, sale and distribution of ready-mixed concrete, on the following comparables:-

### **Sales Comparables**

1. A site at Meeting House Hill, off James Street, Omagh sold in January 1991 for £215,000 (Cullyburn to BOAZ Properties Limited).

(Note:- Mr McLernon quotes this comparison as No 1 in his sales comparables.)

Equivalent to £119,444 per acre.

2. A site in an Industrial Estate at Dromore Road sold (Property Equipment and Construction Holdings Limited to Conlin) at £25,000 for an area of 0.305 acres.

(Note:- Mr McLernon quotes this comparison as No 2 in his sales comparables.)

Equivalent to £82,000 per acre.

### **Rented Comparables**

Mr Arthur found no suitable rental comparables in Omagh Town. He put forward sites occupied by the Applicant for production of ready mixed concrete but situated in different towns viz:-

1. Adjacent to the Old Mill Industrial Park, Antrim a site of 0.4 acres let for 21 years from 1970 with rent reviews at seven-yearly intervals. The last review was agreed in February 1985 @ £1,200 per annum and is equivalent to £3,000 per acre per annum. (A new 21 years lease has been offered at a rent of £1,750 per annum which is

equivalent to £4,375 per acre per annum. An option to purchase the freehold has been offered to the Applicant @ £14,000 which is equivalent to £35,000 per acre.) Those offered terms reflect 8 YP of the suggested rent.

2. A site in Newtownards let for 21 years from 1961 @ £200 per annum. In 1982 a further 15 years was agreed with 5-yearly rent reviews. The December 1987 review was overlooked and a rent of £1,750 per annum was agreed in November 1990, but backdated to 1987. The area of the site is 0.33 acres and the rent of £1,750 per annum is equivalent to £5,300 per acre.

Mr Arthur also referred to two sites purchased by the Applicant for production of ready mix concrete viz:-

3. Site at Seagoe Industrial Estate at Craigavon extending to 0.56 acres. The site was rented @ £450 per annum to the Applicant when he purchased in May 1990 for £12,000. That is equivalent to £21,428 per acre.
4. Site at Carnbane Industrial Estate at Newry, extending to 0.588 acres, purchased in August 1988 @ £9,000. That is equivalent to £15,036 per acre.

Mr Arthur considered that based on the two Omagh sales comparables the capital value of the subject site would be at a rate of £30,000 per acre. He took the investment as requiring an 11% return and by dividing by 9YP arrived at an equivalent rental value of £3,333 per acre per annum. Because the subject site contains 0.48 acres he arrived at a rental value of **£1,600 per annum**.

Further he considered that the equivalent rent for the Antrim site in December 1984 was £3,000 per acre per annum which supported a rent of **£1,500 per annum** making all the necessary adjustments for the earlier date for the rent review for the Antrim site and that the Antrim site was in a superior location. He informed the Tribunal that the output of the Antrim site was 6.67% above the Omagh site in 1989 and for 1990 the corresponding figure was 69.23%. Also the average selling price in the Antrim site is 12.58% over that in the Omagh site. For the Newtownards site the output in 1989 was 86.67% over the Omagh site and for 1990 the corresponding figure was 92.31%. The average selling price at Newtownards is 25.96% over that in the Omagh site. He considered that these figures confirm that the sites at Antrim and Newtownards were more valuable to the Applicant than the Omagh site.

Mr William McCrory of Counsel, for the Respondent, submitted:-

1. The conditions and covenants in the lease, including the user covenant are unaltered apart from the term of years and rent to be paid.
2. The Respondent relies on all the comparables referred to by Mr McLernon although the most important is the rent for the coal yard at Holmview Avenue, Omagh.
3. Little assistance should be derived from the Applicant's comparables of depots/sites occupied by Ready Mixed Concrete (Ulster) Limited in towns other than Omagh.
4. The arithmetical exercise carried out for the site at Dromore Road, Omagh touched on the pulse of the matter for the subject site for making ready mix concrete is more attractive than the site at Dromore Road.
5. Mr McLernon based on his experience testified that the term should be for 10 years with 5-yearly reviews. That was suggested as a compromise although in recent years some leases contained 3-yearly reviews.

Mr Mark Orr of Counsel, for the Applicant, submitted:-

1. The Lands Tribunal must assess the rent of a site subject to the right of way reserved in the lease and subject to the covenant restricting use of the site. Refers to Hill and Redman's Landlord and Tenant at page 351B.
2. The Applicant submits that the Lands Tribunal should grant a term for 14 years with a rent review at the end of 7 years, notwithstanding that in the old lease there was no rent review.

In the Respondent's proof of evidence, only one comparable letting contained a rent review.

3. There is no direct comparable to be found in Omagh town. Therefore, assistance must be obtained from other yards let for production of ready mix concrete and their throughput wherever situated.

## **DECISION**

The statutory basis for the Lands Tribunal to determine the rent (in the absence of agreement between the parties) is contained in Section 15(2)(a), (b) and (c) of the 1964 Act as follows:-

"In the absence of agreement the rent shall be such as may be determined by the Lands Tribunal to be that at which, having regard to the terms of the tenancy (other than those relating to rent), the holding might reasonably be expected to let in the open market by a willing lessor, there being disregarded:-

- (a) Any effect on rent of the fact that the tenant has or his predecessors in title have been in occupation of the holding;
- (b) any goodwill attached to the holding by reason of the carrying on thereat of the business of the tenant (whether by him or by a predecessor of his in that business);
- (c) any effect on rent of any improvement -
  - (i) carried out by the tenant or a predecessor in title of his; or
  - (ii) where the tenant or a predecessor in title of his has remained in occupation of the holding during two or more tenancies, carried out by him or that predecessor in title during a tenancy other than the current tenancy;

other than in pursuance of an obligation to the immediate landlord;".

That statutory hypothesis is rarely (if ever) found in the real market and shows the difficulties faced by the respective expert valuers. Both ignored the buildings and plant erected on the site - the Tribunal accepts that is correct for the buildings and plant were erected by the Applicant and/or his immediate predecessor in title.

However the Tribunal cannot accept the later approaches of the experts. The first matter to be decided in any calculation of rental value in a lease is the term of years and the frequency of rent reviews (if any). In his proof of evidence Mr McLernon did not mention either the term or rent reviews although verbally he put forward a 10 year term with a rent review at the end of five years. On the other hand Mr Arthur in his proof considered that it

was reasonable to "assess the revised rental on the basis of a 14 year Lease with a rent review at the end of seven years". In view of the fact that the old lease was for 21 years with no rent review, the Tribunal prefers Mr Arthur's submission. The term is fixed at 14 years with a rent review at the end of the seventh year.

Neither party considered and submitted what should be the wording of such a rent review. Bearing in mind the amount of litigation there is as to the meaning of such rent reviews, the Tribunal does not attempt to draw up such wording but leaves it to the parties to agree in the first instance, but the Tribunal suggests that the reviewed rent should be in the same statutory hypothesis as contained in Section 5 of the 1964 Act.

Having decided on the term of years and one rent review, the quantum of rent can be decided. The Tribunal notes that the wording of Section 5(2) of the 1964 Act does not require a reasonable rent to be determined but what "the holding might reasonably be expected to be let in the open market by a willing lessor" (subject, of course, to the matters to be disregarded).

In order to calculate that rent both experts found relatively few "comparables" and each took sales evidence and derived a rent therefrom. However, some of what were termed "comparables" gave little assistance to the Tribunal for the rent and sales figures were agreed on vastly different bases from the statutory hypothesis and the Tribunal found that the large adjustments necessary were impossible to make with any accuracy. That is no doubt why the experts differed to the extent of £9,100 per annum on the one hand and £1,600 per annum on the other.

**Taking the rented comparables first:-**

Mr McLernon's No 1 at James Street Omagh.

This was a retail tyre depot but had previously been used by Omagh Car Auctions. There is a building of approximately 10,000 square feet on the total site area of approximately 0.75 acres. Mr Arthur devalued the rent of £9,600 per annum as follows:-

Building	10,000 square feet @ £0.75 per square foot	=	£7,500
Yard	0.49 acres	say	<u>£2,100</u>
Total Rent			<u>£9,600</u> per annum

Mr McLernon, on the other hand, made no analysis.



This evidence is for a completely different type of property - a retail property with a building in a better retail situation.

The Tribunal dismisses this as being a transaction which requires so many nebulous adjustments that it is not a comparable.

Mr McLernon's No 2 at Holmview Avenue, Omagh.

This was relied on by Mr McLernon as his primary comparable. Mr Arthur on the other hand considered that this was far out of line with Mr McLernon's other two comparables. When he investigated he found a building of 2,550 square feet which was steel framed with a concrete floor and was clad with corrugated iron - total area of site 0.464 acres. The tenant had since closed in part of the front of that building with a brick wall (partly at his own expense and partly at the lessor's expense). It was used for a coal depot and had been an established coal business prior to this letting - the lessor wishing to cease trading himself.

Mr Arthur's opinion was that the rent of £9,600 per annum reflected that goodwill of the established coal business which was attached to the premises.

Neither expert attempted a devaluation of that rent nor was the Tribunal told of whether there was a covenant or condition restricting the use of the premises to coal yard.

In all those circumstances the Tribunal considers this transaction of doubtful use.

Mr McLernon's No 3 at Mountjoy Road, Omagh.

This was the only letting put forward as a comparable which contained a covenant limiting the user of the site. It is in a better location but its access is not as good as the subject site. The lease also reserves a right of way through the car park to a football ground and the right to use the car park on Saturdays and Sundays for people wishing to go to a football match on the adjacent sports fields.

The rent reserved (£2,500 per annum) was for an open, unsurfaced area of 0.58 acres and the lessee (the Department of the Environment for Northern Ireland) was required to surface the car park and to install security gates. No figures of cost of works were reported to the Tribunal nor was any 'guesstimate' made by either expert. The Tribunal finds this the

best of all the comparables even though it requires adjustments in order to arrive at the rental of the subject in accordance with the hypothesis of Section 5 of the 1964 Act.

Mr Arthur's comparables at Antrim and Newtownards.

Both of these sites had been leased by the Applicant and were used for the same purpose as the subject site. Once again there is insufficient data on which to properly analyse these transactions for:-

- (a) there is no data to indicate the difference (if any) of rental levels for commercial sites between Omagh and Antrim and Omagh and Newtownards, and
- (b) there are no facts as to what basis the review of rent took place in the Antrim premises at December 1984/February 1985. Nor is it indicated how the new lease rental offered (£1,750 per annum) has been arrived at or whether there is a likelihood of that rent being accepted or even whether the option to purchase at £14,000 is likely to be exercised and
- (c) there are no facts as to what basis the rent reviews of the Newtownards premises were carried out.

All in all these two transactions do not form a satisfactory basis for determining the rent of the subject premises.

**Secondly, the sales comparables:-**

Mr McLernon's No 1 and Mr Arthur's No 1

This is the one transaction although some of the details are reported differently. The sale price is agreed at £215,000 although Mr McLernon dates it as 1990 and Mr Arthur January 1991. It is situated off James Street, Omagh.

This was a sale of land of an area of 1.8 acres on which was a structurally damaged dwelling and some old corrugated iron stores. Both experts ignored the buildings and treated the site as a cleared site for it had been sold with planning permission for building a supermarket with the necessary carparking. The Tribunal rejects this as a comparable - it is a completely different kind of site situated near to the shopping centre of Omagh and would attract bids (either capital or rental) from an entirely different section of the market.

Mr McLernon's No 2 and Mr Arthur's No 2

This site of 0.30 acres is situated in a comparatively small site for warehouses at Dromore Road, Omagh. Permission was granted for a 5 warehouses/light industries development adjacent to and behind an existing filling station. Unit 2 forms the subject of this sale at £25,000 and although there is planning permission for one warehouse the purchaser is using the site for the retail sale of second hand cars.

Once again, the Tribunal rejects this as a comparable because it would attract bids (either capital or rental) from an entirely different section of the market than that bidding for the subject site.

Having looked at the facts of all the comparables submitted by both expert valuers and having rejected for one reason or another all the comparables save one, the Tribunal is now faced with the problem of using that transaction to arrive at the rent a willing lessor would reasonably expect for the Kevlin Road site subject to the rights of way, the burden of half the cost of maintaining the right of way and the restrictive user covenant. That truly reflects the problems the expert valuers found, and although the Tribunal has disagreed with them, the ways each tried to overcome the problems posed.

The Tribunal starts with the rent to be paid for the car park at Mountjoy Road, Omagh by the Department of the Environment for Northern Ireland who no doubt utilised the expertise of Chartered Surveyors in the Valuation and Lands Office either to directly advise on or to negotiate the rent reserved in the lease for five years from 1<sup>st</sup> March 1987.

That rent was for 0.58 acres @	£2,500 per annum
Add:- for surfacing the site a rent of	£ <u>1,000</u> per annum
	£3,500 per annum

The new tenancy will run from the expiration of three months from the date of this decision (in accordance with Section 9 of the 1964 Act) whereas in the above transaction the tenancy ran from 1<sup>st</sup> March 1987.

Updating allowance	£ <u>1,200</u> per annum
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Equivalent 1991 Rent for 0.58 acres = £4,700 per annum

The subject site is 0.48 acres and the pro-rata rent is, therefore:-

£3,890 per annum

but say £3,900 per annum

The Tribunal determines that the new tenancy shall be for a term of 14 years (with a rent review at the end of seven years), subject to a rent of £3,900 per annum. All the other terms of the new tenancy shall be the same as in the current tenancy.

Having reserved the matter of costs of the first day of hearing, the Tribunal awards costs of that day to the Applicant such costs if not agreed to be taxed by the Registrar on the County Court scale; the Tribunal makes no order as to costs of this second day of hearing.

#### **ORDERS ACCORDINGLY**

**11<sup>th</sup> October 1991**

**Mr A L Jacobson FRICS  
Lands Tribunal for Northern Ireland**

#### **Appearances:-**

**Mr Mark Orr of Counsel (instructed by Messrs Robert Kelly and Son, Solicitors) for the Applicant.**

**Mr William McCrory of Counsel (instructed by Messrs R H O'Connor and Company, Solicitors) for the Respondent.**