

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 3

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”) have occupied lands to the north of 25 Corgary Road, Jerrettspass, Newry (“the reference property”) by way of a lease which has now expired and they have lodged a tenancy application with the Lands Tribunal.
2. The landlord, AP Wireless II (UK) Limited (“the respondent”), is willing to grant a new lease but to date the parties have been unable to agree terms.
3. Both parties had previously lodged discovery applications and by a decision dated 13th May 2021, the Tribunal adjudicated on the discovery requests. This is the second application in relation to the Tribunal’s original discovery decision and this application is in relation to the “scope” of the production of information relating to “greenfield sites”.

Position of the Parties

4. The applicants have already produced details in respect of 48 greenfield site lease renewals completed since the introduction of the Electronic Communications Code (“the Code”) on 28th December 2017. A further two post December 2017 transactions are due to be disclosed. The valuation date for the subject reference is July 2020 and the applicants’ position is that there was no justification in analysing transactions which were aged and irrelevant.

5. The respondent’s expert, Mr Crothers, has advised the Tribunal that, in order to compile his expert report, it was necessary to access evidence prior to 28th December 2017, not least to ascertain how the letting market had changed after the introduction of the Code, if at all.

Procedural Matters

6. The Tribunal received a written submission from Mr Adrian Colmer QC on behalf of the applicants and from Mr Keith Gibson BL on behalf of the respondent. The Tribunal is grateful to counsel for their helpful submissions.

The Statute

7. Rule 9(4) of the Lands Tribunal Rules (Northern Ireland) 1976 (“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

8. The Tribunal was referred to the following authorities:

- GREA Real Property Investments v Williams [1979] 1 EGLR 121
- Marklands Limited v Virgin Retail [2004] 2 EGLR 43 CHD
- Party E v Party C BT/109/2016

Texts

9. And to the following texts:

- (i) Reynolds and Clarke 5th Edition at paragraphs 11-31
- (ii) RICS Guidance Note: “Comparable evidence in real estate valuation”; 1st Edition October 2019

The Respondent’s Submissions

10. Mr Gibson BL asked the Tribunal to note that the need for transaction details of greenfield sites prior to the 28th December 2017 was discussed at a meeting of experts on 27th September 2021 and it was recorded:

“Mr Crothers considers that discovery should include any transactions that took effect before the implementation of the Code. He contends that there is not some ‘cliff edge’ on 28th December 2017 that renders prior transactions of no relevance or assistance and that a cut off date of 28th December 2017 is an artifice.

Ms Hobson does not agree that transactions that took effect before the implementation of the Code are relevant to the valuation.”

11. Mr Crothers further clarified his position in correspondence of 4th November 2021 in which he asserted that participants in the market for greenfield sites were alert to the emerging legislation for some considerable time prior to the 28th December 2017 as the Digital Communications Bill had its first reading in the House of Commons on 5th July 2016.

12. Mr Gibson BL also noted that, in the subject reference, both parties have agreed that the comparable method is a proper method of valuation and he referred the Tribunal to a quote from Lewison J in Marklands Limited v Virgin Retail [2004] 2EGLR 43 CHD:

“9. Valuation essentially proceeds by analogy. The valuer looks for an analogue which he has to value, and which has been the subject matter of a real transaction. He then works on the premise that if the subject matter of his valuation were to be the subject of a similar transaction, it would command the same value as the analogue. Since the analogue will never be identical to the subject matter of the valuation, the valuer will have to make adjustments to the value revealed by the analogue in order to reflect the differences between the analogue and the subject matter of his own valuation. In the case of a property valuation the analogues are usually called ‘comparables’. In the case of a property valuation typical adjustments will reflect differences between the comparables in location, terms of letting and so on.”

13. With regard to determining which comparables were good comparables Mr Gibson BL referred the Tribunal to an extract from GREA Real Property Investments v Williams [1979] 1 EGLR 1211:

“It is a fundamental aspect of valuation that it proceeds by analogy. The valuer isolates those characteristics of the object to be valued which in his view affect value and then seeks another object of known or ascertainable value possessing some or all of those characteristics with which he may compare the object he is valuing. Where no directly comparable exists the valuer must make allowances of one kind or another, interpolating or extrapolating from his given data. The less closely analogous the object chosen for comparison is the greater the allowances which have to be made and the greater the opportunities for error.”

14. It was the respondent’s case that it wished to see particulars of transactions on greenfield sites pre and post 28th December 2017, not least to see how the letting market had changed, if at all. He suggested that this was the sort of information the Tribunal itself would want to see in order to understand how the impact of the Digital Economy Act 2017 changed passing rent.

15. In conclusion Mr Gibson BL submitted:

- (i) In order to complete his report, the respondent's expert had indicated that it was necessary to access evidence of transactions prior to 28th December 2017. The rationale for doing so was clear insofar as the date itself, whilst obviously relevant, was somewhat arbitrary in the context of the market lettings process generally.
- (ii) The applicants' claim that anything prior to 28th December 2017 was not relevant simply because the 28th December 2017 existed, being a date not created by the market but by statute, was nonsensical.

The Applicants' Submissions

16. Mr Colmer QC also referred to the authorities of Marklands Ltd v Virgin Retail and GREa Real Property Investments v Williams. From the judicial comments contained therein he concluded that in a valuation exercise, the closer the analogy, the more useful the evidence will be in conducting the valuation process and conversely, the weaker the analogy, the less useful and indeed the more dangerous.

17. He then referred the Tribunal to paragraph 17 of the Tribunal's "discovery" decision of 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."

18. The professional guidance in this area was also reflected in the RICS Guidance Note "Comparable evidence in real estate valuation", 1st Edition, October 2019. Mr Colmer QC referred the Tribunal to an extract from the core section of the guidance note "General

principles of comparable evidence” in which the following appeared and in particular to bullet point 3 which advises that the comparables should be “recent”:

“Ideally, comparable evidence should be:

- comprehensive – there should be several comparables rather than a single transaction or event
- very similar or, if possible, identical to the item being valued
- recent, i.e. representative of the market on the date of valuation
- the result of an arm’s-length transaction in the market
- verifiable
- consistent with local market practice and
- the result of underlying demand, i.e. comparable transactions have taken place with enough potential bidders to create an active market.”

19. Mr Colmer QC then contrasted the applicants’ approach to disclosure of the greenfield sites with the respondents:

(i) The applicants’ approach:

- the applicants had already disclosed transaction details on 48 greenfields sites.
- the applicants’ approach had been founded on the principles set out by the Tribunal in its decisions on the subject reference supported by the English practice statement and the RICS guidance.
- the applicants’ focus had been on the 48 sites which comprised recent transactions sharing all of the attributes of the reference property:
 - a) a greenfield site
 - b) a Business Tenancies Order renewal

c) a renewal taking place in the context of the Code

d) a renewal after the introduction of the Code

(ii) The respondent's approach:

- the respondent has insisted on the applicants delivering up details of a further 167 transactions no matter at what date they were negotiated and no matter how far they may be removed from the characteristics of the reference property.
- the respondent ignores the Tribunal's own statement of its practical and proportionate approach and simply asserts that the applicants should deliver up all of the 167 transactions entered into at any time prior to the Code.
- this approach urges upon the Tribunal an "indiscriminate" production of "realms" of information.

20. With regard to the relevance of the Code, Mr Colmer QC submitted that the respondent's focus on a mere date rather than the significance of the dated demonstrated a failure to appreciate the practical exercise in which the Tribunal was engaged.

21. Mr Colmer QC considered that the Tribunal's task was to assess a rental value for the reference property at July 2020 but the respondent encourages the Tribunal to ignore that date and wade through 167 transactions which occurred prior to the introduction of the Code in December 2017. He referred to the warning words of Forbes J in GREA Real Property Investments:

"The less closely analogous the object chosen for comparison is the greater the allowances which have to be made and the greater the opportunity for error."

22. In its submission the respondent simply says it wishes to see particulars of transactions and Mr Colmer referred the Tribunal to its decision in Party E v Party C in which case the applicant

stated in relation to disputed documents that it would “like to see them”. The Tribunal notes that under rule 9(4) of the Rules the party requesting disclosure had to make out a case based on “reasonable necessity”. Mr Colmer QC also referred to paragraph (32) of the May 2021 decision where the Tribunal stated:

“It is clear rule 9(4) gives the Tribunal the statutory authority to order the disclosure of any documents which it ‘may require’.”

23. Mr Colmer QC asked the Tribunal to note that the discovery process before it was not driven by the wishes or desires of the parties or their experts but rather it was driven by what the Tribunal may require in accordance with Rule 9(4). He submitted therefore that there was no justification for undertaking the exercise proposed by the respondent which was concerned with analysing transactions that were aged and irrelevant, which he submitted would lead to error.

24. The Tribunal was then made aware by Mr Colmer QC that, in any case, the respondent was a party to some 28 local greenfield site transactions prior to the introduction of the Code and they were free to analyse those transactions.

Conclusion

25. The Tribunal is well aware of the criteria for selecting the best comparables in the subject reference and notes:
 - (i) The date of valuation in July 2020 and transactions of similar greenfield sites closest to that date will be the most relevant.
 - (ii) As stated in its decision of May 2021, this is one of the first references of its kind to come before the Tribunal in Northern Ireland and it is desirable to have as much relevant information as possible.
 - (iii) That said, the Tribunal has no desire to consider reams of irrelevant information.

26. Much, however, has been made of the effect of the introduction of the Code on 28th December 2017 on the telecoms market but to date no party has produced market evidence to detail what that effect is. The Tribunal, therefore, invoking its statutory authority under Rule 9(4), considers it is essential to know the impact on the letting market of the introduction of the Code.

27. On that basis the Tribunal orders the applicants to provide transaction details of all greenfield sites agreed after 1st January 2017. The Tribunal will hold a meeting with the parties to agree a timetable for the production of this information if one cannot be agreed between the parties.

23rd February 2022

Henry Spence MRICS Dip.Rating IRRV (Hons)

Lands Tribunal for Northern Ireland