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 COSTS

BT/2 & 3/2024

BETWEEN

NORTHERN IRELAND POLICING BOARD – APPLICANT

AND

GORTALOWRY DEVELOPMENTS LIMITED – RESPONDENT

Re: Lesley Buildings, 42-46 Fountain Street, Belfast

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

Background

1. NI Policing Board ("the applicant") is the tenant of fourth floor office premises and ground floor storage premises at Lesley Buildings, 42-46 Fountain Street, Belfast ("the reference property").

2. The applicant holds the reference property under two leases:

   (i) A lease dated 17th September 2001 between the Prudential Assurance Company Limited and the applicant in respect of the fourth floor premises ("the fourth floor lease").

   (ii) A lease dated 15th September 2020 between Gortalowry Developments Limited ("the respondent") and the applicant in respect of the ground floor storage premises ("the storage lease").

3. The term of the fourth floor lease expires on 30th July 2026 and the term of the storage lease expires on 31st August 2026.

4. It was not disputed that in early 2021 the parties entered into negotiations for variations to the leases. One of the points being negotiated was the grant to the applicant of a new break option for both leases, with the break date being 31st July 2024.

5. The negotiations between the parties failed to achieve an agreed outcome and on 19th December 2023, the Crown Solicitor's Office, on behalf of the applicant made an application to the Lands Tribunal citing:

> "My application is for an order by the Tribunal that:
>
> The Crown Solicitor's Office (CSO) were contacted by Solicitors for the Landlord, A&L Goodbody on February 2021 advising that our respective clients had agreed to vary the existing lease in terms of (a) tenant break notice – to be moved to 31 July 2024 (b) tenant to be granted 6 car parking spaces as opposed to the current 2 and (c) a new rent agreed of £102,315 (exclusive of VAT).
>
> Negotiations between the parties progressed and the Deed of Variation, from the CSO perspective, was agreed in November 2021. Since that date the CSO has been chasing A&L to issue engrossments of the Deed for execution. Given that we are now 2 years without engrossments being issued or having received any detailed explanation from the Landlord or their Solicitors for the delay, the CSO was instructed by the Tenant to issue a Notice to Determine on the Landlord and this was served on 8 August 2023. The Tenant intends to vacate the premises on 24 July 2024.
>
> The facts on which I rely are: Lease dated 31/7/2021, Deed of Variation and email correspondence."

6. The respondent disputed the Tribunal's authority to deal with the issues raised in the applicant's reference. It also disputed the validity of the applicant's Notice to Determine.

7. The Tribunal directed that the hearing of the applicant's reference would be held on 24th June 2024. Subsequently, however, on the morning of the hearing, the applicant accepted the respondent's position that the Tribunal had no authority to adjudicate on the reference and it agreed to an order of dismissal.

8. The respondent now seeks it costs in the reference and the allocation of costs is the issue to be decided by the Tribunal.

Procedural Matters

9. It was agreed that the issue of costs would be decided by way of written submissions. The Tribunal received submissions from:

   (i) A&L Goodbody Solicitors on behalf of the respondent.

   (ii) Mark Hayward BL, instructed by the Crown Solicitor's Office, on behalf of the applicant.

10. The Tribunal is grateful to both parties for their helpful submissions.

The Statute

11. The statutory authority of the Lands Tribunal to award costs are contained Rule 33 of the Lands Tribunal Rules (Northern Ireland) 1976 ("the Rules"), together with section 8(7) of the Lands Tribunal and Compensation Act (Northern Ireland) 1964 ("the 1964 Act"), section 8(7) provides as follows:

> "8(7) Subject to sections 9 and 10 and any other transfer provisions, the Lands Tribunal may order that the costs, or any part of the costs, of any proceedings before it incurred by any parties shall be paid by any other party and may tax or settle the amount of any costs to be paid under any such order or direct in what manner they are to be taxed or settled."

12. Rule 33 of the Rules provides as follows:

> "33.-(1) Except in so far as [Article 5 of the Land Compensation (Northern Ireland) Order 1982] applies and subject to paragraph (3) the costs of and incidental to any

proceedings shall be in the discretion of the Tribunal, or the President in matters within his jurisdiction as President.

(2) If the Tribunal orders that the costs of a party to the proceedings shall be paid by another party thereto, the Tribunal may settle the amount of the costs by fixing a lump sum or may direct that the costs shall be taxed by the registrar on a scale specified by the Tribunal, being a scale of costs for the time being prescribed by rules of court or by county court rules."

Authorities

13. The Tribunal was referred to the following authorities:

- Ritter v Godfrey [1920] 2KB 47 (CA)
- Donald Campbell & Co Ltd v Pollak [1927] AC 732
- Re Kavanagh's Application [1997] NI 368 (CA) at page 382 A-B
- Groupama Insurance Co Ltd v Overseas Partners Re Ltd [2003] EWCA Civ 1846 [2004] CP rep 18

14. The Tribunal refers to the following extract from its previous decision concerning the withdrawal of an application Sai K Cheung & Christine Cheung v Fernheath Developments Limited BT/55/2007:

> "6. The starting point is the presumption, which follows from the application to withdraw, that the tenants have lost…"

In the subject reference, therefore, the starting point is that the applicant has lost.

15. In Oxfam v Earl & Ors [1995] BT/3/1995 the Tribunal clarified how it should exercise its discretion under Rule 33(1) of the Rules:

> "The Tribunal must exercise that discretion judicially and the starting point on the question of costs is the general presumption that, unless there were special circumstances, costs follow the event, i.e. that in the ordinary way the successful party should receive its costs."

And

> "Unless there are good reasons for a special award, such as extravagant or unsatisfactory conduct of the proceedings (including the role of the expert witnesses) or failure on an important issue, costs will follow the event so the 'loser pays all'."

Discussion

16. The applicant had withdrawn its reference to the Tribunal so it was the "loser" and should pay all the costs in the normal way. Were there, however, any "special circumstances" relating to the subject reference which would warrant a departure from that general rule?

17. In his submission to the Tribunal Mr Hayward BL had identified three sets of circumstances relating to the reference which he considered would warrant a departure from the general rule:

    (i) The condition of the property which had a problem with leaks over two years resulting in the reference property being defective.

    (ii) The respondent's failure to engage and agree Deeds of Variation.

    (iii) The respondent's refusal to submit to arbitration or suggest an alternative dispute resolution ("ADR") mechanism.

18. On those issues Mr Stevenson BL responded:

(i) The alleged condition of the premises

19. The alleged condition of the premises was of no relevance whatsoever to the question of the costs of bringing completely misconceived proceedings.

20. The respondent's submissions were asking the Tribunal to make a determination on the condition of the premises over the course of the term of the applicant's lease. This is a determination which could only be decided after hearing evidence from both sides. It was certainly not a determination that the Tribunal could make on the basis of the emails and letters appended to the applicant's submissions.

21. Given if the Tribunal were to say it was going to make a determination on the select, one sided and limited evidence provided by the applicant, all the emails say is that there were some leaks in the premises in 2017 and 2022. They certainly do not demonstrate that the premises were "defective" or that the applicant "could not continue in occupation of them". The respondent obviously denies that the premises were defective or in that the applicant could not continue in occupation.

22. The Tribunal agrees with Mr Stevenson BL, issues concerning the alleged condition of the reference property never came before the Tribunal and it is, therefore, impossible for the Tribunal to find that there were "exceptional circumstances" relating to defects that would warrant a departure from the general rule.

(ii) The respondent's failure to respond to requests to agree Deeds of Variation

23. The respondent's refusal to confirm that the Deeds of Variation were agreed cannot be used as a reason for issuing proceedings based on the Deeds of Variation being agreed. That makes no sense. The applicant was aware that they had not been agreed. The applicant accepts and admits that, yet they issued proceedings on the basis they had been agreed. They must bear the cost consequences of issuing proceedings which they knew were based on a false premise.

24. The applicant's conduct during the negotiations (which did not result in any agreement) about a variation to the leases were hardly a picture of industry. The parties had been in negotiations about the proposed variations and in particular about car parking spaces. The last correspondence on this issue was sent by the respondent on 4th November 2021. The

applicant did not contact the respondent's solicitor again until 23rd February 2023, more than 15 months later. The allegation of delay can therefore be laid equally at the door of the applicant.

25. When the applicant served notice on 8th August 2023 terminating the leases in reliance on the (non-existent) Deeds of Variation, the respondent replied on 22nd August 2023 pointing out they had no right to do so as the Deeds of Variation had not been agreed or executed. The applicant was therefore under no illusions that the Deeds of Variation had not been agreed, and that the respondent would dispute any allegation they had been.

26. When, on 14th November 2023, the applicant said it was going to issue Lands Tribunal proceedings, the respondent's solicitors queried on the very same date, what type of proceedings it was going to issue. The applicant therefore knew before it issued proceedings that the respondent was going to contest these completely misconceived proceedings.

27. After proceedings were issued, it was pointed out to the applicant that the proceedings were misconceived, both in the respondent's submission of 3rd May 2024 and in its skeleton argument of 17th June 2024. The applicant however, continued to proceed.

28. The proceedings were not abandoned until the morning of the hearing, when counsel and solicitors were in attendance. That is, the applicant left it to the very last minute to abandon proceedings which it knew were advanced on a false premise (namely Deeds were in existence which they knew had not been agreed, never mind executed), and which the Tribunal had no jurisdiction to hear, and when they had been repeatedly advised the proceeding were misconceived.

29. That set of circumstances were clearly not "exceptional circumstances".

30. The Tribunal fully agrees with Mr Stevenson BL, these were not "exceptional circumstances". It was a matter of fact and agreed by both parties that the Deeds of Variation had never been

signed by the respondent. The Tribunal also agrees with Mr Stevenson BL, the applicant's proceedings were based on a false premise and the Tribunal, therefore, had no jurisdiction to adjudicate. The proceedings were abandoned on the morning of the hearing.

(iii) The respondent's refusal to submit to ADR

31. The applicant wrote on 17th June 2024 to suggest that the respondent agree to the Lands Tribunal sitting as an arbitrator. That request was also misconceived. The Tribunal can sit as an arbitrator "in a case concerning the value or use or development of any land". The point in issue in this case, whether a binding Deed of Variation had been entered into, was not a case "concerning the value or use or development of any land". The Lands Tribunal therefore could not sit as an arbitrator and hear the dispute in this case, such as it was. The respondent can hardly be criticised for that.

32. As to the suggestion that some other arbitrator determine the "dispute", the respondent is like every other potential defendant in Chancery type proceedings, under no obligation whatsoever to engage in arbitration. Arbitration is every bit as expensive as Court litigation and it does not represent a less costly way of resolving a dispute. The respondent's quite understandable refusal to submit to arbitration is certainly not an "exceptional circumstance" and particularly when the issue was only raised one week before the hearing date. The Tribunal agrees, the respondent's refusal to submit to arbitration was not an "exceptional circumstance".

33. In summary Mr Stevenson BL submitted there were no "exceptional circumstances" in this case. The applicant has needlessly caused the respondent to incur significant legal costs, and has continued to do so with its lengthy submissions on costs. He submitted, therefore, that the applicant must bear all of the costs, including the costs of these submissions.

Conclusion

34. The simple fact is that the applicant made a reference to the Tribunal, based on an incorrect premise that the Deeds of Variation had been agreed and were legally binding. The applicant was aware that this was incorrect. The Tribunal, therefore, did not have any jurisdiction to hear the reference. The Tribunal agrees with Mr Stevenson BL, there were no "exceptional circumstances" in the subject reference which would warrant a departure from the general rule that the "loser" pays the costs of the reference.

35. The Tribunal awards the respondent all of its costs in the reference, such costs to be taxed by the Tribunal in default of agreement.

8th October 2024

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