

LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

IN THE MATTER OF AN APPLICATION

BT/15/2018

BETWEEN

JOHN MINNIS ESTATE AGENTS LIMITED – APPLICANT

AND

STEPHEN JAMES AND PATRICIA JAMES – RESPONDENTS

Re: Unit 7 Library Court, Ballyhackamore, 402 Upper Newtownards Road, Belfast

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

Background

1. The subject reference concerns the lease renewal of commercial premises at Unit 7 Library Court, Ballyhackamore, 402 Upper Newtownards Road, Belfast (“the reference property”) which is currently occupied by John Minnis Estate Agents Limited (“the applicant”). The landlords of the reference property are Stephen James and Patricia James (“the respondents”).
2. On 1st February 2018 the respondents issued the applicant with a Notice to Determine under Article 6 of the Business Tenancies (Northern Ireland) Order 1996 (“the Order”) proposing terms for a new lease. The applicant responded on 3rd August 2018 by serving a Tenancy Application under Article 7 of the Order. The validity of the notices were not disputed.
3. The location of the reference property is on the Upper Newtownards Road in Ballyhackamore, which is a suburb some three miles east of Belfast City Centre. Library Court is an “L shaped”, two storey commercial development, comprising eight commercial units on the ground floor with Belfast Education and Library Board occupying the first floor. Units 1 to 4 front Eastleigh Drive with units 5 to 8 fronting the Upper Newtownards Road. A dedicated car park is located

to the rear with provision for some 22 vehicles. Parking is limited to two hours. There is no car parking to the front of the premises.

- The reference property comprises a ground floor commercial unit with retail space to the front and WC, kitchen, store to the rear. It is rectangular in shape, considered to be in good repair and pedestrian access is off the Upper Newtownards Road. Nett internal areas have been agreed:

Retail	924 ft ²
Ancillary	<u>37 ft²</u>
Total	961 ft²

- The applicant holds the reference property by way of a lease dated 1st November 2012 for a term of five years and granted by the then landlord SPENG NO1 LLP. The initial rent in 2012 was £17,000 per annum and it was let as a “shell” unit. The reference property was subsequently sold to the respondents.
- The parties have been unable to agree the rental value of the reference property, based on a new lease commencing on 6th August 2018 (“the valuation date”) for a 10 year term, with an unconditional tenant break clause after year five. The issue, therefore, to be decided by the Tribunal is the correct rental value based on the agreed terms of the lease.

Procedural Matters

- The applicant was represented by Mr Robert McCausland BL. The respondent was represented by Mr Keith Gibson BL, instructed by Ferguson & Co Solicitors. Ms Joanne Hobson MRICS of RHM Commercial Estate Agents gave expert evidence on behalf of the applicant and Mr Ruairi Scullin MRICS of Lisney Estate Agents provided expert evidence on behalf of the respondents. Ms Hobson and Mr Scullin are experienced Chartered Surveyors and the Tribunal is grateful to them for the professional manner in which they presented their written and oral evidence.

Position of the Parties

8. The applicant considered that the correct rental value should be £18,800 per annum. The respondents sought a rental value of £27,250 per annum.

Statute

9. Article 18 of the Order stipulates how the rent should be assessed:

“Rent Under New Tenancy

18.-(1) The rent payable under a new tenancy granted in pursuance of an order of the Lands Tribunal shall be such as may be agreed between the landlord and the tenant.

(2) 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 be 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;

(d) ...

(3) ...

(4) ...

(5) ...”.

Authorities

10. The Tribunal was referred to the following authorities:

- Skelton v McEvoy BT/72/2001
- Skelton v McEvoy BT/72/2001 (Costs)
- Co-operative Group Limited v Cedareast Investments Limited BT/67/2012
- Britel Fund Trustees Limited v B&Q Plc (unreported) 11th March 2016

And to the following text:

- Hill and Redman’s Law of Landlord and Tenant para 1923

Joint Meeting of Experts

11. Prior to hearing the experts had submitted an agreed “Report on Facts” which mainly contained details of some 15 comparable properties. At the direction of the Tribunal, on 29th October 2018, the experts held a meeting and provided a joint minute, which listed the areas of agreement/disagreement between them.

Areas of Agreement

12. The experts were agreed on the following issues:

- (a) The lease term would be for 10 years with an unconditional tenant break clause at the end of year five.
- (b) The floor areas of the reference property were as submitted to the Tribunal in the Report on Facts.
- (c) The chronology of events were as set out in the respondent’s Expert Report.

- (d) The reference property was to valued on an overall basis (rent per square foot).
- (e) The analysis of comparables 1, 3, 4, 5, 6 and 7 were as contained in the Report on Facts.
- (f) Comparables 9, 12 and 14 had on street car parking to the front of the building (310-322 Upper Newtownards Road).
- (g) The relevance of comparables 1, 2, 4, 7, 8 and 11.
- (h) Solicitors were instructed on Monday 29th October on terms set out in both Expert Reports in relation to comparable 1, 277 Upper Newtownards Road.

Disagreement

13. The areas of disagreement were:

- (i) What, if any, weight should be attached to the comparables provided by both expert witnesses.
- (ii) The correct analysis of comparables 2, 8, 9, 10, 11, 12, 13, 14 and 15.
- (iii) The correct analysis of rent free periods (whether over the term certain or to the first rent review)
- (iv) Analysis of ancillary accommodation on the ground and first floors.
- (v) Relevance of comparables 3 and 5 situated within a retail block adjacent to a M&S foodhall and a dedicated car park.
- (vi) Relevance of comparables 13 and 15 within the same building as the subject.
- (vii) Relevance of comparables 6 and 10.
- (viii) Relevance of lease renewal negotiations on Unit 6 Library Court.
- (ix) The rent per square foot to be applied to the ground floor sales area and ancillary area of the subject.

Discussion

14. Having heard the representations of both parties the Tribunal has identified the following issues which are relevant to the outcome of the subject reference and which require further consideration:

- (i) Rental levels within Ballyhackamore village.
- (ii) Analysis of ancillary and first floor areas.
- (iii) Analysis of rent free discount.
- (iv) The weight to be attached to comparable 1.
- (v) The weight to be attached to the experts "best" comparables.
- (vi) The weight to be attached to the rental negotiations on Unit 6 Library Court.

(i) Rental levels within Ballyhackamore village

15. Ms Hobson submitted a map showing the retail area within Ballyhackamore village which ran from Nos 195 to 404 Upper Newtownards Road. She identified two points on the map, points A and B. The reference property was located at point B, while point A was at the other end of the village. She noted that west of point A was "a church, a Tesco supermarket, a Gospel Hall, a filling station, a Kwik Fit garage and a small retail development anchored by an M&S foodhall." In her opinion point A was the "business end" of Ballyhackamore as it contained more facilities which in turn generated more footfall. She considered, therefore, that rental levels at point A would be 10% higher than at point B, the location of the reference property.

16. Mr Scullin's opinion was that there was no market evidence whatsoever to suggest a variation of rental levels between points A and B within Ballyhackamore village. He did not consider the reference property to be in a less favourable location than the comparables located at point A.

17. When questioned by Mr Gibson BL, Ms Hobson agreed that this was her personal opinion and she conceded that there was no market rental evidence to support an alleged difference in rental levels between points A and B. The Tribunal agrees with Mr Scullin, there was no

market evidence before the Tribunal to support Ms Hobson's contention. The Tribunal therefore finds that there should be no variation of rental levels due to location within Ballyhackamore village.

(ii) Analysis of ancillary and first floor areas

18. The experts were unable to agree the basis of analysis for ancillary and first floor accommodation on the comparable properties. This had an impact on the rental prices per square foot for the retail areas as assessed by both experts. Ms Hobson considered that ancillary ground floor space should be valued at half of the ground floor retail and first floor accommodation should be taken at a third of the ground floor retail. Mr Scullin had analysed all ancillary accommodation at a basic £5 per square foot and first floor space at £3.50 or £7.50 per square foot, depending on usage. Neither expert had submitted any market evidence to support their analysis.
19. In order to facilitate any proper comparison between the experts' comparables and the reference property, both experts must use the same basis of analysis.
20. In advance of a General Rates Revaluation the Land and Property Services (LPS) collect and analyse a substantial amount of rental information. From this analysis they produce valuation schemes which are then published on their website. A significant amount of the rental evidence collected by LPS relates to small shops such as the reference property. Following analysis of this rental information for the 2015 General Revaluation, LPS issued valuation schemes advising that ancillary accommodation within small shops, behind the first structural wall, should be taken at 25% of the Zone A retail pricing and first floor accommodation at 10% of the Zone A retail. This was applied throughout Northern Ireland. The Tribunal recognises that the comparable properties in the subject reference had not been analysed on a zoned bases but in order to facilitate consistent analysis the Tribunal directed the experts to re-analyse the comparable properties on the basis that ancillary accommodation should be taken at 25% of the retail pricing and the first floor accommodation at 10%.

(iii) Rent free discount

21. Prior to hearing the parties had agreed that the new lease would be for a term of 10 years with a break option 5 years after commencement of the lease.
22. The Tribunal was referred to the case of Britel Fund Trustees Limited v B&Q Plc (unreported) delivered on 11th March 2016. This judgement was the judgement of His Honour Judge John Mitchell in the County Court sitting in Central London and which concerned premises at Unit 10, Tottenham Retail Park, Tottenham.
23. Based on that judgement the parties were agreed that a discount should be applied to the rent for the reference property to reflect a three month fitting out “rental holiday”. This was permitted under Article 18 of the Order whereby the Tribunal had to “determine a rent at which, having regard to the terms of the tenancy other than those relating to rent, the premises might reasonably be expected to let in the open market by a willing seller”.
24. Given that the parties had agreed a tenant break clause at the end of year five Ms Hobson considered that a 5% discount was warranted to reflect a three month rent free period over the 60 month term certain. Mr Scullin considered that the rent free period should be applied over the entire term, 120 months, giving a discount of 2½%.
25. Mr Gibson BL asked the Tribunal to note that, in Britel, the valuation date for the purposes of the lease was not included within the judgement, although he suspected that it was in or around 2013/14, for the case was heard in November 2015 and there was reference to arbitration in respect of the rent in 2011. He considered that context to be important as paragraph 1 of the decision recorded that the lease was for a term of 10 years with mutual rolling break clauses which permitted both the landlord and tenant to terminate the lease at any time after 30th June 2018. Taking into account the fact that it was a 10 year lease Mr Gibson BL assumed that the lease commencement date was in or around 2013 for a period of 10 years with a five year break clause. As such he considered the circumstances to be

analogous to the subject reference and the relevant term to which the discount should be applied was over 10 years and not five years, as outlined in paragraph 21 of the decision.

26. In paragraph 21 of the decision in BriteI the court stated:

“... as H H J Bailey said in HMC Music care must be taken to ensure that when considering comparables, like are compared with like. If the rent in this case is determined by reference to an unadjusted comparable of a ten year lease with a rent free holiday, no discount would be applied to the rent so determined.”

27. As the basis of analysis of rent free periods was disputed between the experts the Tribunal prefers to reflect the rent free period in the overall price per square foot for the reference property.

(iv) The weight to be attached to comparable 1

28. Comparable 1 related to premises at 277 Upper Newtownards Road which was located directly across the road from the reference property. The property was recorded in the report on facts and expert reports as “offer only” with little weight attached to it but immediately prior to hearing it was confirmed that “the transaction has now progressed to being documented through solicitors”. This was not disputed.

29. Although there was much discussion about the validity of this comparable at hearing the respondent conceded, in his closing submission, that transactions concerning comparable properties may be taken into account even though the transaction took place after the valuation date. It was a matter of the weight to be attached to them.

30. Ms Hobson considered this comparable to be very significant as it was a good comparable in terms of location, situated directly opposite the reference property. It was also a ground floor retail until within a parade.

31. Mr Scullin submitted that there were several factors which detracted from the usefulness of comparable 1:

- (a) It was some 38% larger than the reference property, being 1,327 sq ft.
- (b) It was in a poorer condition than the reference property reinforced by the fact that there was to be a change of use to a hot food bar.
- (c) It was a letting agreed after the valuation date. Mr Gibson BL did not contend that the comparable should be excluded, but he referred the Tribunal to the following extract from Skelton v McAvoy BT/72/2001 which referred to rents agreed after the valuation date:

“... such rents cannot be of assistance because they could not be in the minds of a hypothetical landlord and tenant of the subject premises at the relevant date ... Although the Tribunal accepts that the post relevant date transaction may be taken into account, it has reservations as to the weight to be attached to it in this case.”

32. The Tribunal notes:

- (a) This comparable is situated directly opposite the reference property.
- (b) It is 38% larger than the reference property which would suggest a higher price per sq ft for the reference property.
- (c) The condition of this property is inferior to the reference property.

33. The Tribunal also notes the extract from Skelton but in the context of this reference, comparable 1 would have been “in the minds of the hypothetical landlord and tenant” as both parties were certainly aware of it and they had included it in their report on facts and expert reports on an “offer only” basis. The Tribunal therefore attaches weight to this comparable.

34. To reflect rent free periods both experts had analysed this rental evidence at some £21.50 per sq ft for the retail area.

(v) Consideration of the experts' best comparables

35. Prior to the proceedings the Tribunal asked the experts to consider their best comparables. Ms Hobson considered comparables 1, 9, 10, 12 and 14 to be the most significant.

36. Mr Scullin divided his most relevant comparables into three blocks:

- Block A containing comparables 9, 12 and 14
- Block B containing comparables 3 and 5
- Block C containing comparables 13 and 15

37. The experts were both agreed, therefore, that comparables 9, 12 and 14 were relevant. Reflecting rent free periods the experts had come up with broadly similar pricings per sq foot for the retail areas:

	Ms Hobson	Mr Scullin
Comparable 9	£32.60	£32.74
Comparable 12	£18.69	£18.38
Comparable 14	£25.00	£26.49

38. The experts were unable to provide any reasons as to why there was such a variation in rents between these 3 similar units in the same locality. The Tribunal notes however that Unit 9 was located on a prominent corner site which would suggest a higher rental figure.

39. Ms Hobson also considered comparable 10 to be relevant and her analysis gave a figure of £17.80 per sq ft. Mr Scullin pointed out that this was a triangular shaped building. He analysed the transaction at £17.45 per sq ft, well below other rental levels in the locality which, in his opinion, reflected the style, irregular shape and configuration of the building.
40. Mr Scullin considered comparables 3 and 5 to be relevant. The experts were agreed on the analysis of these comparables, at £23.97 and £28.80 per sq ft respectively. Ms Hobson, however, considered these units to be in a superior location as they were in a commercial development containing a M&S foodhall and had bespoke car parking.
41. Comparables 13 and 15 were also considered by Mr Scullin to be relevant. He analysed these at £25.51 and £26.16 per sq ft respectively. Ms Hobson analysis gave figures of £24.10 and £25.50 per sq ft. These were units within Library Court, the location of the reference property. Ms Hobson attached little weight to comparable 13 as the tenant was unrepresented in the rental negotiations but the Tribunal considers it to be a reasonable comparable. She attached no weight to comparable 15 as the transaction date was almost 3 years prior to the valuation date and it was half the size of the reference property. For these reasons the Tribunal also attaches little weight to comparable 15.
42. The Tribunal summarises the experts “best” comparables:

Comparable	Price per sq ft	Comments
1	£21.50	38% larger and in poor condition
9	£32.60	Superior corner site
12	£18.69	Seems like an “outlier” and no explanation for the low rent. Ignored
14	£25.00	Reasonable comparable

10	£17.80	Irregular shaped building and poor internal configuration. Ignored
3	£23.97	Slightly better location
5	£28.80	Slightly better location
13	£25.51/£24.10	Reasonable comparable
15	£26.16/£25.50	Transaction almost 3 years prior to valuation date and half the size of the reference property. Ignored

43. The Tribunal faces a difficult task in assessing the correct rental value for the reference property as, even within the experts' best comparables, prices range from £17.80 per sq ft to £32.60 per sq ft. The Tribunal doing the best it can with the evidence available, considers the following comparables to be the most relevant:

Comparable	Price per sq ft	Comments
14	£25.00	
3	£23.97	
5	£28.80	
13	£25.51/£24.10	
1	£24.71	Actual rental £21.50 but adding 15% to reflect inferior repair and larger property

Based on these comparables the Tribunal finds that the rental value of the reference property should be based on a figure of £25 per sq ft, to reflect a 3 month rent free holiday, giving a rental assessment of:

Retail	924 sq ft @ £25	£23,100
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Ancillary	37 sq ft @ £6.25	<u>£231</u>
		£23,331
	Say	£23,300

(vi) The weight to be attached to the rental negotiations on Unit 6 Library Court

44. Mr Scullin considered this to be a relevant comparable as it constituted an open market letting, negotiated at arms length between the landlord and the tenant. The letting was agreed at a rental of £27,000 per annum, however, the terms of agreement were rescinded by the tenant when he employed an agent to act on his behalf. The Tribunal attaches no weight to these negotiations as there was never any formal agreement and the tenant was free to rescind the previously agreed terms when properly advised by an agent.

Conclusion

45. Based on the evidence submitted, the Tribunal assesses the correct rental value of the reference property at £23,300 per annum, to commence on the valuation date.

ORDERS ACCORDINGLY

1st February 2019

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

Appearances:

Applicant – Mr Robert McCausland BL.

Respondent – Mr Keith Gibson BL instructed by Ferguson & Co, Solicitors.