

[2023 Gib LR 730]

**AUTOSPORT (GIBRALTAR) LIMITED v.
SUNDERSONS LIMITED**

SUPREME COURT (Yeats, J.): October 27th, 2023

2023/GSC/042

Landlord and Tenant—rent—renewal of business tenancy—open market rent to be determined by court pursuant to Landlord and Tenant Act, s.53 if parties unable to agree—court ordinarily relies on evidence of rents of comparable properties—properties need not be identical to be comparable, provided same essential features

The parties sought the determination of the rent payable under a tenancy.

The claimant was the long-term tenant of business premises which were used as a car showroom and workshop. The defendant was the landlord of the premises, having purchased the freehold title in January 2021. The defendant had given the claimant six months' notice to terminate the tenancy but the claimant was not willing to do so. The claimant had issued a claim form seeking the grant of a new tenancy. The defendant initially contested the grant of a new tenancy but as it failed to comply with an unless order, its defence was struck out and the matter proceeded to a hearing to determine the terms of the new tenancy to be granted to the claimant.

The parties agreed that the new tenancy should be for a period of six years, with a rent review in the third year. They also agreed that the tenancy should reflect the terms of an unexecuted deed of lease of 2010, which the claimant had negotiated with the then landlords, and that the new rent should be the open market rent, as provided for by s.53 of the Landlord and Tenant Act. However, the parties' valuations of the open market rent were very different. The claimant proposed £17,664 per annum, which was calculated by increasing the current/passing rent of £12,000 by the percentage increases in the Gibraltar Index of Retail Prices since 2009 (when the current rent was set), whereas the defendant proposed a new rent of £170,000 per annum, based on comparable properties.

The expert for the claimant considered that any valuation had to take account of the current uncertain economic conditions in Gibraltar. He agreed that using comparables would ordinarily be the right method but said that there were no suitable comparables. He did not consider that any of the comparables used by the expert for the defendant met the criteria in terms of size, location and characteristics. The expert for the defendant also referred to the uncertain economic situation in Gibraltar. He identified six

comparable properties, two of which were located in the same building as the premises. His evidence was that there was an acute shortage of warehousing and that the premises was very well located.

Held, judgment as follows:

Gibraltar courts ordinarily relied on evidence of the rents of comparable properties in order to assess the open market rent of a particular property. The court did not doubt that traders were concerned about the long-term economic outlook but there was no actual evidence before the court from an economist which would lead the court to conclude that the situation was so dire that the court should depart from the prevailing method of assessment of market rent. The court had to look at the situation as it was now and apply the comparables methodology as far as possible. The court considered that two of the properties identified by the defendant's expert as comparable properties, namely those in the same building as the premises, were comparable. They were in the same locality and of the same character, namely ground floor commercial properties looking out onto the public highway. Properties did not need to be identical to be comparable as long as their essential features were the same. The court accepted the evidence that there were no new listings offering warehouse space for rent and that this indicated that there was a demand for this type of property. The amount of the passing rent could be relevant to the assessment to be carried out. In the present case there was no evidence as to the circumstances in which the £12,000 passing rent was set (and not increased over the years). The property next door to the premises was the appropriate starting point for determining the open market rent. That rent had been set in 2017 at £21.72 per sq. ft. The court would discount that rate to take account of the fact that the premises were larger and, to a lesser extent, would also apply a discount to take account of the low passing rent. Taking all of that into account, the open market rent of the premises was £15 per sq. ft. The premises were measured by a professional company (and the basement was measured by the defendant's expert). The court accepted their measurements and the proposal that the rent for the basement should be 50% of the rate for the main part of the premises. The open market rent for the premises was therefore £121,755 per annum. The claimant should be granted a new tenancy over the premises for a period of six years. The rent payable should be £121,755 per annum with a rent review in the third year. The remaining terms should be as per the unexecuted deed of lease of 2010 (paras. 6–7; paras. 59–74).

Cases cited:

- (1) *Cohen & Massias Ltd. v. Tisa Property Ltd.*, January 27th, 2011, unreported, referred to.
- (2) *Flanders Community Centre Ltd. v. London Borough of Newham*, [2016] EWHC 1089 (Ch), considered.
- (3) *International Franchises Ltd. v. Bari Properties*, 2013–14 Gib LR 118, considered.

- (4) *Khubchand & Co. Ltd. v. Key City Properties*, 1979 Gib LR 15, considered.
- (5) *Knight v. Lawrence*, [1991] BCC 411, referred to.
- (6) *Lovely & Orchard Servs. Ltd. v. Daejan Invs. (Grove Hall) Ltd.*, [1978] 1 EGLR 44, referred to.
- (7) *Tiptree Holdings Ltd. v. Irish Town Holdings*, February 14th, 1990, unreported, considered.
- (8) *Trans-World Invs. Ltd. v. Dadarwalla*, [2007] EWCA Civ 480, considered.

Legislation construed:

Landlord and Tenant Act, s.53: The relevant terms of this section are set out at para. 6.

C. Gomez (instructed by Charles Gomez & Co.) for the claimant;
G. Stagnetto, K.C. with *E. Dudley* (instructed by TSN) for the defendant.

1 **YEATS, J.:** Autosport (Gibraltar) Ltd. (“Autosport”) is the long-term tenant of the business premises at 1C–1D Rosia Road (“the premises”). The premises are used as a car showroom and workshop. Sundersons Ltd. (“Sundersons”) is the landlord of the premises. It purchased the freehold title to the premises on January 26th, 2021.

2 On June 23rd, 2021, Sundersons gave Autosport six months’ notice to terminate the tenancy pursuant to s.44 of the Landlord and Tenant Act (“the Act”). On June 29th, 2021, Autosport’s solicitors confirmed that it was not willing to give up possession.

3 Autosport issued a claim form on October 13th, 2021 seeking the grant of a new tenancy pursuant to Part IV of the Act. In the particulars of claim, Autosport claimed a new tenancy with effect from January 1st, 2022 for the term of six years at market rent. Sundersons initially contested the grant of a new tenancy. However, as a result of its failure to comply with an unless order dated July 15th, 2022, Sundersons’ defence was struck out and the matter proceeded to a hearing simply to determine the terms of the new tenancy to be granted to Autosport.

4 The parties are agreed that the new tenancy should be for a period of six years with a rent review in the third year. They also agree that the tenancy should reflect the terms of an unexecuted deed of lease of 2010 which Autosport negotiated with the then landlords, and that the new rent should be the open market rent—as provided for by s.53 of the Act. The parties are however poles apart on their respective valuations of the open market rent. Autosport proposes a new rent of £17,664 *per annum*, which is calculated by increasing the current/passing rent of £12,000 by the percentage increases in the Gibraltar Index of Retail Prices since 2009 (when

the current rent was set). Sundersons says that the open market rent for the premises, based on comparable properties, is £170,000 *per annum*.

5 Evidence at the hearing of September 21st, 2023 was limited to an expert on each side. Autosport called Mr. Brian Francis FRICS of Brian Francis & Assocs. and Sundersons relied on Mr. Paul Gibson MRICS of Gibson Gale Ltd. Both are registered valuers based in Gibraltar.

The statutory framework and applicable principles

6 Section 53 of the Act provides that when parties are unable to agree the rent for a new tenancy the court shall determine it. This section states:

“53.(1) The rent payable under a tenancy granted by order of the court under this Part shall be such as may be agreed between the landlord and the tenant or as, in default of such agreement, may be determined by the court 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 carried out by the tenant or a predecessor in title of his otherwise than in pursuance of an obligation to his immediate landlord . . .”

7 Gibraltar courts ordinarily rely on evidence of comparable properties’ rents in order to assess what the open market rent of a particular property should be. Although they are not recent decisions, *Khubchand & Co. Ltd. v. Key City Properties Ltd.* (4) and *Tiptree Holdings Ltd. v. Irish Town Hldgs. Ltd.* (7) offer some assistance as to how this exercise is undertaken.

8 In the first of these cases, Spry, C.J. was dealing with an argument by the landlord that using comparable properties’ rents was not an appropriate method because those rents would have been set in the past and not at the relevant moment in time. It was argued that the method would inhibit or depress rents in times when rents, in general, were rising. The learned Chief Justice disagreed and said the following (1979 Gib LR at 17):

“I think the proper course is for the court to assess the general factors, the special factors, the actual rents, taking into account the dates when they were agreed or assessed, of comparable properties and the opinions of the professional witnesses and then arrive at its own conclusion.”

9 In *Tiptree Holdings*, Alcantara, J. said the following at p.8 of his judgment:

“I now turn to the rental. The starting point is *Khubchand & Co Ltd v. Key City Properties Ltd* [1979] Gib LR 15 approved by the Court of Appeal in *International Properties (Gib) Ltd v. Marquez & Co Ltd* (Civil Appeal, 3 of 1986). In *Lombard Ltd v. Beaumont Investments Ltd* (1986 V 65), dated 15th of February 1988, I extracted some excerpts from the Court of Appeal decision, which bear repetition:

‘The duty of the court is to discover the market rates.

It must rely to a great extent on the actual rents for comparable properties agreed or assessed in the recent past.

That brings me to the use of the word comparable. In relation to rentals, a comparable is, I think, a property in the same or similar locality, reasonably similar in size and character with similar amenities.’

I am not only bound by the definition of the Court of Appeal, but I agree entirely with it. Nonetheless, I am going to be audacious enough to give my own definition, which is different in form but not in substance. A comparable is a property which, although different in form and layout is capable of bearing comparison because the essential features are similar. There is no need for a property to be identical to be a true comparable.”

10 More recently, in *International Franchises Ltd. v. Bari Properties* (3), Dudley, C.J. also faced an argument regarding the use of a different method of assessment. He said (2013–14 Gib LR 118, at para. 26):

“In determining the market rent of premises, this court must make its assessment applying the prevailing method by which rents are calculated in Gibraltar, and not by arbitrarily importing a method used in another jurisdiction and which has not been adopted by the market here. To do otherwise would be much the same as valuing gold by the metre rather than the gram.”

The reference to methods used in other jurisdictions was a reference to a “zoning” method used in the United Kingdom which the claimant’s expert was proposing. The learned Chief Justice then went on to confirm (*ibid.*, at para. 27) that the “prevailing method of valuation” in Gibraltar was the use of comparable properties.

Deed of lease of 2010

11 In 2010, the previous landlords and Autosport agreed that Autosport would be granted an 18-year lease to the premises as from September 1st, 2009. The rent was agreed at £12,000 per annum.

12 The deed of lease also included the following terms. Autosport had to keep the premises and the landlords' fixtures under repair. The lease could not be assigned or sub-let without the landlords' consent. The landlords would insure the premises against fire risk. On the rent being reviewed, the new rent was to be the greater of the passing rent or the open market rental value. (The deed of lease contains provisions as to how the open market value was to be determined at a rent review.)

13 The deed of lease was executed by Autosport but, for reasons which have not been explained, it was not executed by the landlords.

Evidence of Brian Francis FRICS

14 Mr. Francis has been a chartered surveyor since 1974. He has been the principal of Brian Francis & Assocs. since 1986. In that same year, he was appointed a Fellow of the Royal Institution of Chartered Surveyors. His firm manages a large portfolio of properties.

15 Mr. Francis prepared a report in January 2023 in order to provide an opinion on the market rent of the premises on behalf of Autosport. Mr. Francis applied the RICS Valuation Global Standards 2022 Edition which defines market rent as being the following:

“The estimated amount for which an interest in real property should be leased on the valuation date between a willing Lessor and a willing Lessee on appropriate lease terms in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably prudently and without compulsion.”

16 He describes the premises at paras. 6.1 and 6.2 of the report as follows:

6.1 The premises are located on the ground floor of Trafalgar House, a predominantly residential building, located to the north of the recently demolished Queen's Cinema, and the former Queen's Hotel, both sites of which the Gibraltar Government is in the process of considering comprehensive redevelopment proposals . . .

6.2 The premises consist of a very large showroom cum workshops with a registered area of 6448 sq ft (599 m²) . . . Its location on the east side of a very busy roundabout poses difficulty in gaining easy vehicular access to the premises. On the other hand, there is a steady flow of pedestrian footfall from the south district to the southern entrance of Main Street. Although the front showroom was found

generally in good condition, the southern area of the premises was found and still is in a very dilapidated condition.”

17 Importantly, Mr. Francis considers in his report that any valuation has to take into account the current economic conditions in Gibraltar. At paras. 8.4 and 8.5 he makes the following observations:

“8.4 The political and economic implications are too complex to analyse in this report, but it is an undeniable fact that the local traders are extremely concerned about the longer terms of the pandemic, the ongoing EU Brexit treaty negotiations and the Ukraine conflict. No one can predict the final outcome of these negative local and global conditions . . .

8.5 All of this uncertainty and economic instability raises the important question whether a Valuer should under such unpredictable circumstances rely on historic market evidence which was achieved under very different market conditions prevailing at the time. Hence, although in the following section, we have commented on some market transactions referred to in [Paul Gibson’s] report which have been extracted from the Register of Tenancies of Business Premises, we have to raise a fundamental question, whether these historic transactions are of any value in determining the current market rent under the present depressed market conditions. Furthermore, under the definition of market rent one has to consider the fact that the premises are to be valued with vacant possession, in which case a Valuer should also consider whether there would be any demand at all for such large premises given the current dire economic climate.”

18 He then goes on to conclude that market value should be set by increasing the passing rent by the General Index of Retail Prices increases since the rent was set in 2009. He says the following at paras. 9.8 and 9.10 of the report:

“9.8 I have also reached the conclusion that the best and fairest way of achieving the desired objective of meeting the criteria defined under the lease for determining the open market rental value is to adjust the initial market rent agreed under the same criteria by reference to the General Index of Retail Prices.

9.10 The open market rental value in January 2009 was agreed at £12,000 per annum when market conditions were far more stable and according to the published official statistics, the increase in the General Index of Retail Prices between January 2009 and July 2022 was 42.7%, which would represent an upwards adjustment of the passing rent to the current equivalent rent of £17,124 per annum . . .”

(The increase in the General Index of Retail Prices up to the date of the hearing results in a rent of £17,664 per annum.)

19 At the hearing, Mr. Francis agreed that using comparables would ordinarily be the right method but said that there are no comparables to use in this particular instance. He had looked at the Register of Tenancies of Business Premises and also made enquiries with other agents. There are no recent transactions of large or small properties which are comparable. Mr. Francis said that there were only two properties which were similar to the premises in terms of size, location and use. The Bassadone Motors showroom and garage on Devils Tower Road and the Capurro showroom and garage on Line Wall Road. Those two properties are however owner-occupied.

20 Mr. Francis confirmed that he had considered the comparables identified by Mr. Gibson, but that he did not think that any of them met the criteria of size, location and characteristics. In terms of timing, none of the rents had been set after the end of the Covid-19 pandemic.

21 When asked by Mr. Gomez whether he had come to the conclusion that the £17,664 proposed rent was a fair and objective rent, Mr. Francis said that it was difficult to say. He explained that he could have tried to use comparables and give a discount for the economic uncertainties and the premises' particular location, but that there is no mechanism for such a discount. Mr. Francis confirmed that if any evidence of possible comparables is identified, he is happy to review his conclusion. Mr. Francis did refer to a recent valuation of the premises by Land Property Services Ltd. for rating purposes and said that £4 per sq. ft. had been assessed by them. Rating, he said, follows the "tone of the market."

22 In cross-examination, Mr. Francis acknowledged that the RICS guidelines refer to market rent, and that increasing current rent by the Index of Retail Prices is not referred to in the guidelines. When challenged by Mr. Stagnetto that he was using an unconventional methodology which resulted in by far the lowest rent of any comparable property, his response was that he knew of no other method in the circumstances. Mr. Francis could not however recall having previously argued that there are no comparable properties in a valuation hearing of this type.

23 Mr. Francis agreed that properties with different user restrictions could be compared, but that comparing the premises to other vehicle showrooms would be best. He agreed that the details in Mr. Gibson's comparables list were correct. On the specifics, Mr. Francis said the following. The rent at the Soho shop at Trafalgar house was set in 2009 and does not appear to have been reviewed. The Trafalgar Bar is smaller in size. Smaller properties normally attract a higher rate of rent. The rent there was also set six years ago. The Eroski supermarket at North Mole Road has been sold post Brexit and Mr. Francis questioned whether the high rent had contributed to the previous business not being successful. The New Harbours and Lathbury warehouses were not comparable because of their

sizes. They were also purpose-built, had good accessibility and parking, and were not therefore directly comparable. Access to the premises is not ideal. It is on a busy roundabout with no adjoining parking, although there are public car parks nearby.

24 In relation to the size of the premises, Mr. Francis had relied on the registered area which was of 6,448 sq. ft. However, he had no reason to doubt the larger measurements being put forward by Sundersons. He also agreed that any rent payable for a basement area should be set at 50%.

25 The unexecuted deed of lease of 2010 does not require Autosport to provide a surety. Mr. Francis agreed that this would be beneficial to the tenant.

26 Mr. Francis agreed that the Index of Retail Prices rates are not set by reference to property rental prices. He also confirmed that housing *residential* prices had risen by up to 30% since 2020, although they appear to have stagnated following the interest rates rises of 2023. When it was suggested by Mr. Stagnetto that using the Index of Retail Prices for that market would clearly have resulted in an anomaly, Mr. Francis simply responded that he would have had comparables to use.

27 As to market conditions generally, Mr. Francis said that there was evidence of empty office space and there had been a contraction in demand for warehousing and retail properties. Mr. Francis referred to a retail property in Main Street that had negotiated a “reverse premium” and a lowering of rent in order to continue in occupation.

28 Mr. Stagnetto referred to the Chamber of Commerce annual report for 2022 and put to Mr. Francis that the “doom and gloom” was being overstated. Mr. Francis disagreed. Mr. Francis opined that the effect of Brexit, the Covid-19 pandemic and the war in Ukraine was cumulative. He added that the uncertainty regarding the treaty being negotiated between the United Kingdom and the European Union on Gibraltar was also important. Mr. Francis was of the view that should there be no agreement, this would have an adverse effect on Gibraltar’s overall economy.

Evidence of Paul Gibson MRICS

29 Mr. Gibson has been a Member of the Royal Institution of Chartered Surveyors since 1983. He has worked in Gibraltar as a valuer since 2005 and also has an interest in an estate agency. He was instructed by Sundersons and produced a report on January 26th, 2023.

30 Mr. Gibson also applied the RICS Valuation Global Standards (said in his report to be the 2017 edition although it was confirmed in evidence that there are no material differences with the 2022 edition).

31 In his report, Mr. Gibson draws attention to Gibraltar's economic situation. At p.4 he says:

“There remains some uncertainty in the Gibraltar [*sic*] as a result of the exit from the EU with border negotiations still being negotiated, in addition there has been added uncertainty resulting from the war in Ukraine with resultant inflation and rises in interest rates.”

32 Mr. Gibson's description of the property and location is similar to that set out by Mr. Francis. However, Mr. Gibson considers that the premises are “very well located.”

33 In relation to the size of the premises, Mr. Gibson says the following:

“The registered area on the Gibraltar commercial property register is stated as 6448 sq ft, but the property has been professionally measured by surveying.gi and the actual net internal area is 723.20m² on the ground floor (7785 sq ft). In addition, there is an irregular shaped basement area with a narrow, steep stone stair access with restricted headroom used for parts which we have attempted to measure, area circa 61.6 m² (663 sq ft).”

34 At p.6, he comments further on market conditions and says:

“The residential market has been very active over the course of the last few years, but has slowed in the last six months as interest rates have increased. The retail market has slowly recovered with trade close to pre-Covid levels and rents starting to rise. In respect of warehouse space there is an acute shortage in Gibraltar particularly as the Devils Tower Road area which was historically a more industrial area is changing more to a residential area with warehouse space reducing.”

35 He then continues with a “Valuation Comment” at p.7:

“This is an unusual property which comprises a very large showroom unit with a 17m frontage onto one of the busiest roundabouts in Gibraltar. The property has no external loading facility but there is access for vehicles directly into the unit from the road for loading and unloading with plenty customer parking close by either by the Magazine building at the rear of Ragged Staff gate or on the old Parade ground. Whilst a small part of the property is partially in disrepair my valuation has been undertaken on the assumption that the tenant is holding over under full repairing terms and this area should be in repair.”

36 Mr. Gibson identifies six comparable properties. The following is a summary of the information he provides on these comparables:

(i) *8 Trafalgar Road*. These are the premises of Soho Ltd., a furniture retail business in the same building as the premises. The property's area is 4,941 sq. ft. Rent is £72,000 p.a. or £14.57 per sq. ft. Mr. Gibson asserts that the property has an inferior frontage and no vehicular access. The lease is a 15-year lease as from August 1st, 2009 and there is an outstanding rent review.

(ii) *Unit A & B Rosia Road*. This is the Trafalgar Bar which is next door to the Autosport premises. The property's area is 1,851 sq. ft. Rent is £40,200 p.a. or £21.72 per sq. ft. The lease was entered into in November 2017.

(iii) *22 North Mole Road*. This is an Eroski Supermarket. It is let under a 10-year lease as from December 1st, 2016 with a review after five years. The property's area is 5,851 sq. ft. Rent is £136,000 p.a. or £23.24 per sq. ft. Mr. Gibson says that the lease was "recently" assigned at a premium of £500,000 which he comments indicates that it is a low rent. (At the hearing, he clarified that the assignment had taken place some two years ago.)

(iv) *39 Harbours Deck*. This is a warehouse unit with an area of 941 sq. ft. plus a mezzanine of 485 sq. ft. A 3-year lease was entered into in January 2021. The rent is £30,000 p.a. or £25.36 per sq. ft.

(v) *Units 12 & 13 Lathbury Barracks*. This is a 671 sq. ft. unit let for a term of five years as from January 27th, 2020. The rent is £18,000 p.a. or £26.82 per sq. ft.

(vi) *25 Harbours Yard*. This is a 3,777 sq. ft. unit let as from December 2019. The rent is £80,000 p.a. or £21.45 per sq. ft.

37 Mr. Gibson then concludes his report with the following:

"If [the premises] came onto the market demand would be high from other showroom users, supermarkets and bulk type retailers. Such prominent large units are rare in Gibraltar and this unit is on one of the busiest roundabouts in Gibraltar. In my opinion, the open market rental for this unit should be set at £21 per sq ft on the ground floor and say basement at 50% of this level. We have assumed that the property is in full repair for the purpose of this valuation, which equates to an open market value of £170,000 per annum exclusive."

38 At the hearing, Mr. Gibson confirmed that he had never assessed rent by reference to increases in the Index of Retail Prices. In relation to this case, he had found six comparable properties and considered that they were sufficient, particularly because two of these are located in the same building as the premises.

39 His evidence was that there is an acute shortage of warehousing. Although this has always been the case in Gibraltar, the problem has been exacerbated by the residential property boom in Devil's Tower Road.

40 On Covid, his opinion was that businesses were recovering save perhaps for Main Street retail shops. In any event the pandemic had not affected warehousing and supermarkets. In case of a hard Brexit for Gibraltar, this could potentially mean a greater demand for space, not less. In answer to questions by Mr. Gomez, Mr. Gibson agreed that the combination of Brexit, Covid and the war on Ukraine was cumulative. He also agreed that a potential tenant would look at this economic situation and would have to take a view on whether to enter into an obligation for the payment of rent. However, his view was that there was still a strong demand for these types of properties. When it was put him that in 2019 a tenant would have been in a different position to today, he responded that Covid had gone; interest rates had peaked; and that the war in Ukraine was at a stalemate. Most people will therefore see economic recovery. Mr. Gibson did however agree that there was less consumer spending power now than there had been a few years ago.

41 He also agreed with Mr. Francis' evidence that there was a lot of empty office space because some businesses had moved away after Brexit and there has been an increase in home working. However, that did not apply to warehousing.

42 Mr. Gibson confirmed that the Acmoda premises in Trafalgar house had not been re-let. It had been on the market for a few months although Mr. Gibson's opinion was that that property was less attractive than the premises because it had a smaller frontage and more difficult access.

43 At New Harbours, the landlord was actually seeking higher rents as the market for warehousing was reasonably strong because there was nothing available. Although he had no evidence of actual demand, he explained that there were no listings of available properties—which suggests that they are all occupied.

44 Mr. Gibson explained that the way that tenants are guarding against any economic uncertainty is by entering into shorter leases and having break clauses.

Submissions by the parties

45 Autosport's case is that there are no suitable comparable properties and that therefore the established methodology for assessing open market rent cannot be applied. In the circumstances, it was submitted by Mr. Gomez that the court should have regard to the passing rent. Since the passing rent was set in 2009, it is accepted by Autosport that this has to be adjusted and therefore it is proposed that it be increased by the percentage increase in the Gibraltar Index of Retail Prices since 2009.

46 The submission that there are no suitable comparable properties is in three parts. The first is that there are no directly comparable properties. The

two properties that would be directly comparable are the Bassadone Motors garage in Devil's Tower Road and the Capurro garage in Line Wall Road, but those are both owner-occupied. The second is that in relation to other comparable properties, the rents for those were set before the present downturn in the economy. There has been a downturn in business as a result of the Covid-19 pandemic and the uncertainty this created. This uncertainty remains because the treaty on the future relationship between the EU and the UK for Gibraltar has not been settled. In addition, there is a wider economic crisis which the war in Ukraine is partly responsible for. The third is that the comparables identified by Mr. Gibson are not actually suitable for comparison because of the size and other characteristics of those properties.

47 Mr. Gomez pointed out how Mr. Gibson was himself agreeing that there was uncertainty in the economic panorama. Any hypothetical willing tenant would look at what the economic outlook is before deciding to enter into a commitment for rent. Therefore, the proposal by Mr. Francis of adjusting the passing rent made perfect sense. Mr. Gomez submitted that the court should not hesitate in moving away from the established practice of using comparables.

48 In support of Autosport's case that the court should simply set the new rent based on the passing rent for the premises, Mr. Gomez relied on *Trans-World Invs. Ltd. v. Dadarwalla* (8). There, the English Court of Appeal dealt with an appeal by a landlord where it was said that the first instance judge had ignored the passing rent when setting a new rent under the English equivalent to s.53 of the Act. In upholding the landlord's appeal, Mummery, L.J. said the following ([2007] EWCA Civ 480, at paras. 27–30):

“27. In my judgment, the judge was clearly wrong on two points.

28. First, as is clear from paragraph 9 of his judgment, he left the passing rent of the Property out of account, as invited to do by counsel for the Tenant, on the basis that there was no evidence of the circumstances in which the passing rent had been negotiated in the past.

29. Secondly, and for a similar reason, he wrongly left out of account the rent of a comparable adjoining property, No 106, describing it as a ‘rogue figure’ of little or not [*sic*] relevance. He said that there was no evidence as to the circumstances in which the rent was determined.

30. In my judgment, the judge was wrong to disregard the passing rent and the rent of No 106 on the basis stated by him. The rents under the current lease and of the adjoining property at No 106 are relevant valuation evidence of market rent of the Property without the need for the court to require the party relying on those rents to produce positive

evidence of the circumstances in which they were determined. Rather it is for the party who challenges the relevance of the passing rent and/or the rent of the adjoining property to adduce evidence of circumstances relied on to show that the rents are *not* relevant factors in the valuation exercise of determining the open market rent.” [Emphasis in original.]

49 *Flanders Community Centre Ltd. v. London Borough of Newham* (2)¹ concerned an appeal to the High Court from a decision of the County Court setting the rent of a new tenancy. The landlord appealed against the decision of the trial judge to set the new rent in the amount of the passing rent. In the course of his judgment, Norris, J. noted that s.35 of the UK Landlord and Tenant Act 1954 (which has its equivalent in our s.54 of the Act) requires the court to take account of the terms of the current tenancy when setting the terms of the new tenancy—other than in relation to the tenancy’s duration or rent payable. The learned judge said the following ([2016] EWHC 1089 (Ch), at para. 27):

“By contrast with section 35, there is no automatic default as regards rent to the terms of the current tenancy, section 35 requiring the court ‘to have regard to the terms of the current tenancy and to all relevant circumstances.’ It is however agreed that passing rent is in fact a relevant matter to take into account, though of itself because it may have been set historically, it is not necessarily a good guide to the current rent.”

The appellant landlord argued that where a judge finds that expert evidence is unsatisfactory (in the sense that there is no reliable evidence capable of analysis as to current market rent) then the judge should himself conduct the analysis. Norris, J. said the following:

“41. The basis for that submission is the decision in *Rombus Materials v Lamb Properties* (unreported) 18 February 1999. The appeal judge had there commented that the trial judge had said that he could not pluck figures out of the air and decide what is reasonable himself but that in fact, having so directed himself, that was exactly what he did. The appeal judge said:

‘In my view the proper approach would have been to look at the comparables and look at the calculations from them at a rent of £8.59 psm amounting to £20,000. From that £20,000 figure, the learned judge would have been entitled to discount down on the basis of any weaknesses he saw in the comparables. I consider the fair figure for the discount would have been one of about 10%. Lest it be thought that the exercise I have engaged upon is

¹ The claimant’s authorities bundle only included the case digest. I have however accessed a full transcript of the judgment of Mr. Justice Norris.

another example of plucking figures from the air, I would point out that the necessity for this court to embark on the exercise comes about because the learned judge misdirected himself in failing to pay any regard to the comparables. In that situation, the choice for this court is either to do the exercise itself if it can properly do so or to order a new trial. The reasons of saving of time and cost which cause me to favour the former course are obvious.'

42. He then continued to say that he was able to do so because he was in as good a position to assess the merits of the expert evidence and to make findings as was the learned judge.

43. It was said that Judge Faber should have conducted the same exercise in the instant case. I accept that she might have done so. The question is whether she was wrong in law to give weight to the passing rent rather than to undertake that exercise. There were no reliable comparables to start with. The points of difference were not pleaded, and the significance of the points of difference was not valued. As she pointed out, 'I cannot guess as to how much more of a discount there should be.' The point is that nobody had given her any help on that issue. She took what she thought was the most reliable evidence."

50 The previous landlords of the premises were the trustees of the estate of Lewis Francis (dec'd). Mr. Gomez described the trustees during the relevant period as well-known legal or property professionals. Why, he asked, did the trustees, not seek to increase the rent for the premises from 2009 to 2021? The court, it was said, could draw an inference from that. Mr. Gomez submitted that as trustees they would have been under an obligation to ensure that the rent being paid for the premises was the proper open market rent. He referred to *Knight v. Lawrence* (5) where a receiver was found to be in breach of his duty when he had failed to serve notices setting rent reviews into motion.

51 On behalf of Sundersons, Mr. Stagnetto submitted that there is no basis in law for the methodology being proposed by Mr. Francis. Mr. Francis himself had confirmed that he had not used the Index of Retail Prices to set open market rent in any other case. Mr. Stagnetto submitted that the approach was likely to produce a result which did not reflect the true open market rent for the premises. Mr. Francis' proposed rent amounted to £2.73 per sq. ft. That would be significantly lower than the rents paid in any of the comparable properties identified by Mr. Gibson. The rents for those ranged from £14.57 to £26.83 per sq. ft. Passing rent may have been relevant had it not been so low.

52 Mr. Stagnetto submitted that bulk retail outlets, warehouses and supermarkets are comparables because the premises lend themselves to that type of use. Location is not as critical for such businesses.

53 On market conditions, it was argued that Gibraltar is not in dire economic circumstances. The Covid-19 pandemic is over and we cannot be certain as to the impact that Brexit will have on the economy. Rent has to be assessed as at today's circumstances. In the same way that the court will not provide for a potential upturn, it should not provide for a possible downturn. In any case, Mr. Stagnetto referred to the Chamber of Commerce Annual Report of 2022 which said the following in relation to warehousing space:

“One sector of the property market, which is often overlooked in Gibraltar, is that of warehousing, storage, and light industrial space. The scarce availability and high cost of such space is a serious impediment to growth for small and medium businesses that require storage or workshop facilities here rather than across the frontier.

The shortage has resulted in sales and rental prices reaching over and beyond the budgets of many local companies. In turn this delays investment and results in missed opportunities for local businesses to develop. There appear to be no plans from the government to earmark any new areas for further developments which would alleviate the pressure is on this market segment. Indeed, the opposite seems true as the north district, traditionally a light industrial area, is rapidly turning into the new residential zone for high-rise housing.”

54 Mr. Stagnetto referred to *Cohen & Massias Ltd. v. Tisa Property Ltd.* (1) (unreported judgment of Butler, J.). There, the learned judge held that rents were to be determined as at the date of the hearing (at para. 7(vi)). This was relied on as support for the proposition that the court should not speculate as to future economic conditions or uncertainties.

55 In any event, the fact that rent is to be determined as at the date of the hearing is common ground. Mr. Gomez himself referred to *Lovely & Orchard Services Ltd. v. Daejan Invs. (Grove Hall) Ltd.* (6) where HHJ John Finlay, Q.C. (sitting as a deputy High Court Judge) said the following ([1978] 1 EGLR at 48):

“Accordingly, in my judgment, the proper date for the purposes of the termination under section 34 [which is section 53 of the Act] is the date of the hearing but having regard to matters which can reasonably be expected to happen between that date, and the date when the term is to be expected to commence, if the order made at the hearing takes effect in the usual course, in so far as these events subsequent to the date of the hearing, have a bearing, upon determination of the question: At what rent the premises might reasonably be expected to be let in the open market by a willing lessor for a term commencing at that date of commencement.”

56 As to the comparables identified by Mr. Gibson, Mr. Stagnetto made the point that some of the rents had been set post the Brexit referendum and indeed, in relation to the Harbours Deck property, after Brexit and Covid. He also submitted that the court should have particular regard to the two comparable properties within the same building. Those had more restrictive accesses and smaller frontages, yet have significantly higher rents. Mr. Stagnetto also submitted that the Eroski Supermarket on North Mole Road was a very relevant comparable.

Analysis

57 However cold the approach may be, the court does not concern itself with whether Autosport would be able to afford any significant increase in rent. The court's task is to determine what the open market rent is.

58 Before assessing what rent should be payable, the court has to determine what the other terms of the lease will be. Here, there is little difficulty because the parties agree that the new tenancy should be for a period of six years with a rent review after three years. Furthermore, the tenancy should reflect the terms of the unexecuted deed of lease of 2010.

59 I do not doubt Mr. Francis' evidence that traders are concerned about the long-term economic outlook. Mr. Gibson rightly acknowledged that there were uncertainties as to the future. It is clear that the Covid-19 pandemic had a terrible impact on some businesses. It is also clear that in terms of economic prospects for our community, a successful outcome to the EU/UK Treaty negotiations on Gibraltar is generally preferred to a "no deal" scenario. However, whilst the court can take some judicial notice of the general consensus, there is no actual evidence before the court by an economist which would lead me to conclude that the situation is so dire that the court should depart from the prevailing method of assessment of market rent. I agree with Mr. Stagnetto that I have to look at the situation as it is now and apply the comparables methodology as far as possible.

60 The premises are in a busy location. There is significant footfall from persons travelling to and from the town centre. The front of the premises looks onto a busy roundabout. There are available car parking areas nearby, although none adjacent to the property itself.

61 So, are there comparables that the court can have regard to? I accept Mr. Francis' evidence that the best comparables would have been the Bassadone and Capurro garages but that these have to be discarded because they are owner-occupied. However, I do not agree with Mr. Francis that all of the six comparables identified by Mr. Gibson are of no use. They bear consideration.

62 Two of Mr. Gibson's comparables are in the same building as the premises. The Soho premises, which is a furniture retailer, and the

Trafalgar Bar. Both properties are smaller than the premises. The former pays rent at £14.57 per sq. ft. and the latter at £21.72 per sq. ft. The rents appear to have been set in 2009 and 2017 respectively. The Trafalgar Bar lease has similar repairing obligations on the tenant. I have not had sight of the Soho lease. It seems to me that these properties are comparable. They are in the same locality and are of a similar character—ground floor commercial premises looking out onto the public highway. As Alcantara, J. said in *Tiptree Holdings* (7), they do not need to be identical to be comparable as long as their essential features are the same.

63 The Eroski supermarket has a rent of £23.24 per sq. ft. It was set in 2016. It does not have any adjoining parking. The area is 5,581 sq. ft. It is closer in size to the premises than any of the other comparables.

64 The warehouse units at Harbours Deck, Lathbury Barracks and Harbours Yard are perhaps less relevant. They are purpose built warehouses and in my view not therefore directly comparable. The rents being paid on those (ranging from £21.45 to £26.83 per sq. ft.) do nevertheless give a good indication as to the ranges being paid on commercial properties outside of town.

65 I accept Mr. Gibson's evidence that there are no new listings offering warehouse space for rent. He considered that this is because there are no vacant properties. I agree with him that this would indicate that there is a demand for that type of property. This is also evident from the Chamber of Commerce Report of 2022 relied on by Mr. Stagnetto and which I have referred to at para. 53 above. Indeed, one can see that Devil's Tower Road is changing in character and that high-rise residential buildings are replacing light industrial buildings.

66 The amount of the passing rent can be relevant to the assessment that has to be carried out. As Mummery, L.J. said in *Trans-world Invs.* (8), it is for the party who challenges the relevance of the passing rent (or the rent of an adjoining property) to adduce evidence as to why the circumstances which led to the setting of those rents is such that they should not be taken into account. Here there is no evidence as to the circumstances in which the £12,000 passing rent was set (and not increased over the years). Similarly, there is no evidence of the circumstances in which the rent was set in the Soho premises or the Trafalgar Bar—save for the argument that those rents were set prior to the change in economic outlook.

67 I also note the observation of Norris, J. in *Flanders Community Centre* (2) that although passing rent is a relevant factor it may not necessarily be a good guide if it was not set in the recent past. That is true here as the passing rent was set in 2009.

68 How do I reconcile the relevance of the passing rent (when no evidence has been adduced by the landlord as to the circumstances in which the

passing rent was negotiated) as against the fact that the adjoining comparable properties pay significantly higher rents? The annual rent proposed by Autosport is £17,664. This works out at £2.73 per sq. ft. (based on an area of 6,448 sq. ft.). This is so far below that of any of the comparables that it cannot represent the open market rent for the premises. It cannot even be taken as a starting point.

69 It seems to me that the Trafalgar Bar's rent has to be the appropriate starting point. It is next door to the premises and I regard it as a good comparable. The rent was set in 2017 at £21.72 per sq. ft. It is a smaller property and account has to be had for that. The Soho shop pays at £14.57 per sq. ft. although that rent was set in 2009. The Eroski supermarket also pays rent at £23.24 per sq. ft. This supports the conclusion that £21.72 per sq. ft. is an appropriate starting point. I will discount this rate to take account of the fact that the premises are larger and, to a lesser extent, will also apply a discount to take account of the low passing rent. In my judgment, taking all of this into account, the open market rent of the premises is £15 per sq. ft.

70 But what is the actual surface area of the premises? Sundersons caused the area of the premises to be measured. This was done by a company called Surveyors.gi. In the experts' agreed statement of facts, the following is stated at para. 3:

"The area noted in the Register of Business Premises is 6448 sq ft. (599 sq m) and the measured area as supplied by a professional surveying company employed by the Landlords, surveying.gi came to 7785 sq ft. (723.20 sq m). In addition there is a small basement area accessed via a staircase which was measured by the Landlord's valuer of 663 sq ft. (61.6 sq m) as per the attached plan in Appendix 1. The surveyors did not agree on the relevant areas to be valued as the tenant's surveyor referred to the area on the Register as being the relevant area not the measured area."

71 The surveyors did not give evidence and no report from them has been produced. Mr. Gibson simply asserted that the surveying company had measured the premises and had found the area to be 7,785 sq. ft. In addition he had measured the basement at 663 sq. ft. Autosport did not challenge this. Indeed, in evidence, Mr. Francis said he had no reason to doubt those measurements. (I presume that Autosport did not challenge these new measurements because they simply wanted the new rent to be assessed by reference to the passing rent and therefore the actual measurements were irrelevant.) As I shall be setting the market rent by reference to a rate per square foot, the exact area of the premises is obviously important. The evidence is that the area was measured by a professional company (and that Mr. Gibson measured the basement). I shall accept their measurements. I shall also follow the proposal that the basement area should be paying rent

SUPREME CT. AUTOSPORT LTD. V. SUNDERSONS LTD. (Yeats, J.)

at 50% of the rate for the main part of the premises. The relevant area is therefore 7,785 sq. ft. plus 50% of 663 sq. ft. This is a total of 8,117 sq. ft.

72 I therefore conclude that the open market rent for the premises is £121,755 per annum. (That is £15 per sq. ft. x 8,117 sq. ft.)

73 Prior to the hearing, the parties had not agreed on when the new tenancy was to commence. The normal course is for the new tenancy to take effect by no later than three months from the date of the hearing. I will have to hear the parties on this if there is no agreement.

Conclusion

74 Autosport shall be granted a new tenancy over the premises for a period of six years. The rent payable shall be £121,755 per annum with a rent review in the third year. The remaining terms shall be as per the unexecuted deed of lease of 2010 negotiated between Autosport and the then landlords.

Judgment accordingly.
