LANDS TRIBUNAL FOR NORTHERN IRELAND
LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964
BUSINESS TENANCIES ACT (NORTHERN IRELAND) 1964
IN THE MATTER OF AN APPLICATION
BT/3/1995
BETWEEN
OXFAM - APPLICANT
AND
N P R EARL
P R KENNEDY
F A ALEXANDER
K H MacKENZIE - RESPONDENTS

RE: 11 THE DIAMOND, COLERAINE

Lands Tribunal - Mr Michael R Curry FRICS FSVA IRRV ACI.Arb

Coleraine - 26th October 1995
Belfast - 4th September 1996

Oxfam was the tenant of a shop at No 11 The Diamond, Coleraine, a secondary retail location within the town. The Landlords had served a Notice to Determine under the Business Tenancies Act (NI) 1964 ("the BTA") but did not oppose the grant of a new tenancy. At the hearing the Tribunal was informed that the parties had agreed the extent of the premises to be comprised in, and terms for, a new lease. The new lease would commence on 1st May 1995 for a term of nine years with three yearly rent reviews.

The only issue remaining for the Tribunal was the rent. The value of the storage accommodation was agreed so the main issues related to the retail accommodation only. As no clear pattern emerged from the experts' analyses of all the comparables, that narrowed to a question of which comparable or comparables should be preferred and what adjustments, if any, should be made to reflect differences with the subject, bearing in mind that some of these would be reflected in the zoning method adopted by both valuers.

Appearances

Patrick Good instructed by Harrison Leitch & Logan, appeared on behalf of the applicant and called Gareth Mark Johnston ARICS, a qualified Chartered Surveyor with three years experience of the commercial market in Northern Ireland, to give expert evidence.

Rex Anderson of Anderson & Co appeared on behalf of the Respondent and called George Edward Andrew Tees, a Chartered Surveyor with many years experience and local knowledge as an expert witness.

Matters not in dispute

The areas of the subject and the principal comparables at No 9 and No 6 The Diamond were agreed and, adopting the approach of both experts, may be summarised as follows:

Shop No.	Retail Area	Storage Area
11 (Subject)	432.25	727.00
9	312.00	147.00
6	217.00	125.00

(Note: All areas are given in square feet and the retail areas are given In Terms of Zone A ("ITZA") ie the equivalent area if the shop comprised retail space in Zone A only.)

The parties agreed that areas defined as stores, in the expert evidence, should be considered to be restricted to that use, because of the alterations which would be required to adapt them to retail use.

As it was apparent that the valuers were relying, to differing extents, on hearsay evidence, the parties agreed that the Tribunal admit the hearsay evidence but use its discretion as to what weight should be attributed to it.

A Secondary Comparable - A Bank

Mr Johnston referred to a rent review of a bank at No 22, in August 1994, which he analysed at £16.70 psf Zone A, but he did not consider that of any great assistance because of differences in the use, the lease, the much larger scale of the property and the office content on the upper floors. He attached little or no weight to this comparison, which he supplied for background information only and really relied on No 9, the adjoining shop.

Mr Tees did not think No 22 was relevant because, in his view, a modern bank was of no help as a comparison for rather ancient shopping units such as the subject.

The Subject and the Principal Comparables

Rental evidence in the area was scarce and the experts agreed that rental evidence from outside the immediate locality would be of little assistance. At the Hearing the principal comparisons, on which the experts relied, were No 9, on which Mr Johnston relied and No 6, on which Mr Tees relied.

No 9, "Barnardos"

No 9, the adjoining shop, was part of the same building. It was held on terms that were not, in any relevant or material way, different from the subject. It had the same landlord and a rent of £7,000 pa was agreed as at 1st January 1995. That represented £21.25 psf Zone A. Compared with the subject, this was about 1-0" smaller in frontage (just over 12-0") and the retail space was much more narrow to the rear. The subject unit had considerably more non-retail space.

Mr Johnston accepted that there were some differences between the subject and No 9 but, in his view, rarely would one get such helpful evidence. The only weakness was that it was a rent review rather than an open market letting. Although the subject was different to the adjoining shop because the adjoining shop narrows and the subject was wider, all shops had some differences and he could not see any differences which would allow him, as a valuer, to adjust to Mr Tees' £28 psf Zone A for the subject from £21.25 psf Zone A, the agreed figure for No 9.

Although included in his written evidence, Mr Tees said he did not rely on No 9 because he considered it to be a poor retail unit. After 25 feet of depth the shop narrowed to 9-8" which was very narrow indeed for a retail shop. Comparing the Zone A rates, Mr Tees attributed the difference between No 9 and his opinion of rent for the subject to the narrowness of rear portion of the shop.

No 6 The Home Bakery Shop

Mr Tees relied primarily on No 6 which was let, in 1985, with a restriction on use to sale of home bakery products but otherwise on similar terms to the subject, to the current tenant, for a term of 3 years with an option for a further 3 at £7,250 pa. That represented £36.68

psf Zone A, more than twice the Zone A price obtained for the subject some eight months later. He did not know why.

The rent had been increased to £8,320 in 1988. Mr Tees did not know whether there was any rent review between then and 1994 but he understood the rent was agreed in 1994 again at £8,320. Mr Tees had no idea as to whether the occupier at No 6 had the advantage of professional advice. He considered the rent was probably high in 1988 but reasonable in 1994.

Mr Tees would not accept No 9 was a better comparison than No 6 nor that the rent of No 6 was a rogue rent or remarkably high, just high. He thought it started high but saw no reason why it did not represent the market now.

In Mr Johnston's view the original rent was very high but the absence of any increase in over six years suggested the market was flat.

So far as the restrictive user was concerned both experts agreed that it would have the effect of reducing the rent, so £8,320 would be less than a full open market rent. Mr Tees thought that it was not sufficient to disqualify the unit as a comparison. The suggestion that the rental without the restriction would be higher did nothing for its weight, to Mr Johnston, as a comparable.

Car Parking

No evidence was given of any car parking at No 6.

At the hearing it emerged that the Applicant had a mistaken view that the subject did not enjoy any car parking facilities. Following production of the map attached to the counterpart lease, Mr Johnston accepted that the premises included space for parking three cars as opposed to the neighbouring shop, No 9 which had parking for only one car and that would support an additional rent of £500 pa for the subject. That figure was not contradicted by Mr Tees.

An Application for a new lease of the Home Bakery Shop

In Mr Johnston's view the contractual period of the lease of No 6 had expired and the tenant was overholding as a tenant protected by the BTA. The effect of that was that there was only a six monthly lease. In his view a tenant would be prepared to pay a higher rent for a six monthly lease than a lease for six or nine years.

The Respondent produced, at the Hearing, a copy of a document which appeared to be a Tenant's application under the BTA. Mr Johnston was unable to provide any explanation as to why, if holding on a six monthly tenancy was more attractive than a longer lease, the tenant would have applied for a new lease and proposed in the document a new, higher rent of £10,400 pa with effect from the 1st September 1995, which would appear to be a Zone A of £46.20. He had never seen a tenant make a proposal for an increased rent in such an application and, at £46.20 Zone A, that would appear to be so far above the market that it would be useless as a comparison. In all the circumstances Mr Johnston would attach very little weight, if any, to this comparable.

Mr Tees agreed that tenants tended to put in applications, under the BTA, at the old rent and could not understand why an application for the home bakery shop had been put in at a higher figure than the old rent. To Mr Tees, £46.20 psf Zone A appeared high but home bakeries were very popular in Coleraine.

The Experts' Opinions

Bearing in mind the comparisons, and the car parking, Mr Johnston considered £11,500 pa would be appropriate. He adopted the same Zone A pricing as the shop next door, No 11, and added £500 pa to reflect the additional parking. Looking at the rent contended for by Mr Tees that represented about a 40% increase and in Mr Johnston's view that was not sustainable.

Mr Tees concluded that the appropriate Zone A pricing was £28.75 psf Zone A reflecting the car parking. He relied on No 6 as his main comparison and discounted its Zone A, which he analysed at £36.26, by 30% because of quantity, a figure based on experience. Mr Johnston accepted that a shop with a smaller retail sales area was generally going to attract a higher Zone A rent when devalued.

The Tribunals Conclusions

Which comparable provides the best starting point?

The experts agreed that the rent review of the Bank at No 22 is of little help.

The tenancy of the Home Bakery shop at No 6 had a strange rental history. The shop was agreed for letting in 1985 at a rent far above, about twice, the level at which the subject was let a short time later: there was some increase, then the rent stabilised, then the rent was

agreed, in circumstances in which the tenant appeared to be overholding under the Act, in 1994 at no increase but still far above the level of the revised rent for the subject in 1992. The Tribunal does not accept that a tenant overholding after the expiration of the contractual term of the lease would find that situation to be to its advantage and would pay an increased rent.

The high rent was further exaggerated when one took into account the restrictive user clause, which would suggest an even higher still unrestricted open market rent. Both valuers agreed that the user restriction should have reduced the rent but neither have made any enquiry or come to any conclusion as to what that adjustment might be.

The application for a new lease specified a new rent in excess of the old rent and that was something neither expert had rarely, if ever, come across before.

The Tribunal accepts that if the rent was a rogue then it had been a rogue with a very long life because for some years the tenant could have got out at any time and did not. But, although this was his primary comparison and he obviously was aware of this unusual if not unique application and strange historical pattern, in spite of his long experience and local knowledge, Mr Tees had not followed the trail to arrive at any expert explanation or analysis which would assist the Tribunal in understanding the reasons why.

The Tribunal concludes that, without such investigation and explanation, it would be unsafe to rely on No 6 as a comparison and it provides little assistance.

Even if the Tribunal were to rely primarily on No 6, Mr Tees made an allowance for quantity of some 30%. He based that opinion on experience but, if the tribunal is to rely on such evidence, it must be given the opportunity to consider the factual foundation and expert analysis on which the opinion is based, so that it can be properly tested. The Tribunal had no evidence drawn from Mr Tees' undoubtedly long experience and local knowledge, which it could use to test, by way of example or otherwise, whether an allowance of 30% or any other figure was appropriate.

The better comparison was No 9. It and the subject were two similar shops, side by side, in the same building, there was common access at the rear, the lease terms were similar and there was a settled rent review of No 9 on 1st January 1995, close to the relevant date. But the Tribunal does not accept that the Zone A pricing, as analysed, can be adopted without adjustment.

Although he had included an analysis of No 9 in his Precis of evidence, Mr Tees effectively rejected it. But the only reason put forward by him for its rejection was the narrowness of the rear portion of the retail area.

Although zoning in the ordinary way might be expected to deal with the small difference in frontage of the two shops, after the first 25 feet of depth of the comparison it became exceptionally narrow. Mr Johnston made no adjustment for this. Mr Tees suggested, although he had included it in his evidence, that that meant it ought to be rejected as a comparable. The Tribunal accepts that this is not sufficient to disqualify it as a comparable. Given that differences in the front portion would be accommodated satisfactorily by use of the zoning method, the Tribunal does not accept that differences in the rear cannot be accommodated by an adjustment to the pricing and a small adjustment at that.

The parties are in agreement as to the pricing to be adopted for the storage accommodation.

Taking a broad view the Tribunal adopts a Zone A of £23.00 psf for the retail area to reflect the differences between subject and No 9 and adds the undisputed £500 pa to reflect the additional car parking facilities giving a rent of £12,250 pa.

COSTS:

The Tribunal, having decided the substantive issue of rent, then on the 4th September 1996 heard the parties on the issue of costs. The Tenant ("the Offeror") had made an offer to the Landlord ("the Offeree") to settle, in the form generally known as a Calderbank letter which was dated 29th August 1996.

The General Principles

"Costs follow the event"

Rule 33 gives the Tribunal a discretion in the matter of cost:

> *"Costs*
>
> **33**
>
> (1) Except in so far as section 5(1), (2) or (3) of the Acquisition of Land (Assessment of Compensation) Act 1919 applies and subject to [taxation] 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."

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.

Special awards

The next question for a Tribunal is whether there were special circumstances which would warrant a departure from that general rule. But these must be circumstances connected with the proceedings, for example, to reflect an unsuccessful outcome on a major issue.

Offers to settle

A party may create special circumstances by making an offer to settle and thereby take steps to protect its position with regard to costs.

The Headnote in Padmanor Investments Ltd v Soundcraft Electronics Ltd [1995] 4 All ER 683 puts it this way:

> "Where an offer of settlement had been made, ... the court's determination of liability for the costs of the Offeror turned principally on a comparison of what was offered and what was achieved, and thereafter on whether the Offeree ought reasonably to have accepted the offer."

It is important that parties should have mechanisms by which they can both genuinely attempt to compromise and, if possible, protect themselves against the costs of continuing litigation if, by carrying on with the litigation their offer is not bettered or if their offer is unreasonably rejected. Equally important, satellite litigation on costs is undesirable and parties should be clear as to the consequences of accepting or rejecting offers to settle. The objectives are simple, but the achievement difficult. A Tribunal is of course not obliged to surrender its discretion and base its decision on costs wholly on the basis of an offer to settle.

Methods

The methods of proposing to compromise are dependent, to an extent, on the forum for dispute resolution:

Payments into Court,

Sealed Offers,

"Calderbank Letter" or "Cutts v Head" offers (for convenience the Tribunal refers to these as Calderbank offers)

Payments into Court

In appropriate circumstances, a party may make a payment into Court, a procedure governed by Rules of Court. But this procedure is not available within the Lands Tribunal Rules and, in any event, is generally impractical where an annual sum (rent) is at stake.

Sealed Offers

Rule 31 of the Lands Tribunal Rules 1976 make provisions for Sealed Offers:

> "*Sealed Offers*
>
> **31.**
>
> (1) An unconditional offer of any sum or of readiness to accept any sum as compensation shall not be disclosed to the Tribunal until it has decided upon the amount of compensation to be awarded to the party to or by whom the offer was made, but a copy of the offer enclosed in a sealed cover and marked plainly "unconditional offer" may be sent to the registrar or delivered to the Tribunal at the hearing by the party who made the offer and shall be opened by the Tribunal after it has decided upon the amount of the compensation.
>
> (2) Where the only issue in proceedings is or becomes the determination by the Tribunal of a price, valuation (other than a valuation for rating purposes), rent, royalty or sum of money, or the apportionment of a price, such valuation, rent, royalty or sum of money, a party to the proceedings may make an unconditional offer of readiness to agree to a specified amount and may send or deliver a copy of his sealed offer and marked in the same manner as in paragraph (1), and which shall be opened by the Tribunal after it has made its determination.
>
> (3) Subject to any statutory provision an unconditional offer made in accordance with paragraph (1) or (2) shall be taken into account by the Tribunal on the issue of costs."

So there is provision in the Rules for Sealed Offers but, except in compensation cases, **only if an amount of money or rent is the sole issue** and, unlike England and Wales, Valuations for Rating are excluded.

The Rules are explicit so far as the procedure for making an offer is concerned but so far as the effect is concerned, the Rules state only that it "shall be taken into account ... on the issue of costs" and allow other legislation, for example the Land Compensation (NI) Order

1982, to make more specific provisions as to the effect of a sealed offer. In passing, the Tribunal notes that the 1982 Order deals only with costs incurred after the offer was made. The Business Tenancies Act 1964 makes no such provisions.

The Tribunal stresses that even though a Sealed Offer may carry great weight, "shall be taken into account" does not mean that all other factors shall be ignored.

Calderbank offers

In a matrimonial decision, in which neither of these procedures was available, Calderbank v Calderbank [1975] 3 All ER 335 a suggestion of a letter of offer "without prejudice save as to costs", which if accepted would resolve the dispute and if not accepted might affect the award on costs, was put forward. That approach was approved as applicable in a wider context in Cutts v Head [1984] 1 All ER 597 but subject to the caution that it may not carry all the consequences of a Payment in. To a large extent, the initial concept of Calderbank letters was based on the sealed offer procedure in the Lands Tribunal but the procedure gives greater flexibility than a sealed offer and has gained widespread acceptance.

Sealed Offer or Calderbank Offer

So the choice for a party wishing to make an offer to settle in the Lands Tribunal is between a Sealed offer and a Calderbank offer. Should the Tribunal admit a Calderbank Letter when it already has a Sealed Offer procedure in its Rules?

The Tribunal considers that it should. There are material differences between the two. A Sealed Offer has the advantage of being straightforward but, in consequence, the disadvantage of being inflexible, based on Rules (the Lands Tribunal Rules) and available only in particular circumstances, whereas a Calderbank Letter offer is based on contract and, properly used, is capable of great flexibility.

Assessing Success

The Tribunal begins by considering what guidance may be obtained from the decided cases. In the Courts the approach as to how a Calderbank letter is assessed differs from that of a Sealed Offer.

In the case of a Sealed Offer the approach of the Courts is, first, to consider what conclusion it would have come to on costs disregarding the Offer and then to question, using objective hindsight, whether, by going on, the recipient achieved more than by settling on the terms of the letter. In recent times the courts have begun, perhaps in exceptional circumstances, to apply a further test. That is whether the Sealed Offer ought reasonably to have been accepted. Some take the view that a simple straightforward approach should

be adopted and that the then likely award of costs of going on be disregarded for purposes of considering whether or not more was achieved by going on. Others say the likely award of costs should be taken into account.

In the case of a Calderbank letter the approach is primarily to consider whether the proposals in the letter ought reasonably to have been accepted.

In McDonnell v McDonnell [1977] 1 ALL ER Ormrod LJ said

> "It would be wrong, in my judgment, to equate an offer of compromise in proceedings such as these precisely to a payment into court. I see no advantage in the court surrendering its discretion in these matters as it has to all intents and purposes done where a payment into court has been made. A Calderbank offer should influence but not govern the exercise of the discretion. The question to my mind is whether, on the basis of the facts known to the wife and her advisers and without the advantage of hindsight, she ought reasonably to have accepted the proposals in the [Calderbank] letter, bearing always in mind the difficulty of making accurate forecasts in cases such as this. On the other hand, parties who are exposed to the full impact of the costs need some protection against those who can continue to litigate with impunity under a civil aid certificate."

In The Maria [1993] 3 All ER 851 the Court of Appeal held, in regard to a sealed offer, that an arbitrator was required to act judicially in exercising his discretion as to costs, but he had to apply the same principles as applied in the High Court, in particular the principle that costs normally followed the event. If a sealed offer was made, being the arbitral equivalent of a payment into court, a respondent was normally entitled to payment of costs, broadly from the date of the offer, if the award in respect of the claim (and interest, if appropriate) was less than the offer.

The majority of the Court of Appeal also held that an arbitrator in considering a Sealed Offer was not entitled to take into account whether an award of costs would be made in favour of the claimant as that would require the claimant to assess not only the likelihood of achieving an award on his claim and interest exceeding the offer, but also, if there was a risk of an order that the claimant pay the respondent's costs, the chance of obtaining an award greater than the offer and the respondent's costs. Such a result would hinder settlement and introduce complications inconsistent with the principle that costs should follow the event.

Sir Thomas Bingham MR, as he then was, dissented. He said that the arbitrators posed to themselves what is accepted as being the right question: "has the claimant achieved more by rejecting the offer and going on with the arbitration than he would have achieved if he had accepted the offer?". But the complaint was that in taking account of costs the arbitrators took account of an extraneous matter and so acted unjudicially.

> "When the court or an arbitrator has to exercise a discretion on costs where there has been a payment in or a sealed offer, a comparison has to be made between what was paid in or offered and what was recovered. This is, I think, an objective, hindsighted exercise: the plaintiff or claimant has either recovered more or he has recovered less, and that, (in the absence of special circumstances) is usually determinative. The question is not, at any rate in the ordinary way, whether it was reasonable to refuse the offer. The claimant's case may, for instance, depend on the evidence of a witness whom he has every reason to believe honest and reliable, and he may for that reason reject the offer; but if the claim substantially collapses because the witness proves to be neither honest nor reliable, the reasonableness of the claimant's belief will not save him from the usual consequences in costs."

He continued:

> "It appears that in relation to Calderbank offers and offers of an analogous kind, the approach may be different and may take account of the reasonableness of the Offeree's refusal (see McDonnell v McDonnell [1977] 1 All ER 766 at 770, Cutts v Head [1984] 1 All ER 597 at 602 and Chrulew v Borm-Reid & Co (affirmed) [1992] 1 All ER 953). No reliance has however been placed on this difference of approach in the present case."

and later:

> "Plainly the owners were on that basis substantially worse off as a result of going on, and for that reason the arbitrators ordered them to pay the costs after the lapse of an appropriate time for them to assess the offer. I do not find the arbitrators' decision in any way a surprising one for commercial men to reach. I would have difficulty in ruling that it was a decision which the law forbade them to reach."

The Tribunal agrees with these views. They are based on sound commercial common sense. Against a growing recognition that parties be appraised of the likely cost of continuing with proceedings, the Tribunal is of the opinion that, in appropriate circumstances, the recipient of a Calderbank letter may be expected to take future costs into account, and, in particular, should be expected to do so where such costs are likely to

be disproportionate to the matters in dispute. Further, consideration of a Sealed Offer, may as well, in exceptional circumstances, require the likely costs of going on to be taken into account, albeit with objective hindsight.

'No fault nor principle' disputes

Although in general the Tribunal should be guided by Court practice, there is a special class of Reference that often comes to the Tribunal and which is less common in the Courts and that may be termed 'no fault nor principle' litigation. Unlike much other litigation, there is no presumption, flowing from the offer of a figure for the new rent in this type of Reference in which the only real issue was the amount of rent, that an Offeror is in some sense admitting he was at fault or in breach of contract or has infringed some right or was wrong on a point of legal or valuation principle. The circumstances are closer to those of party to typical 'no fault nor principle' arbitrations, such as many rent reviews, than a Court Action.

Although a presumption of admission of being at fault or wrong may commonly flow from a Payment in or Sealed Offer in the Courts, the Tribunal does not consider that to be the case in a 'no fault nor principle' Reference in the Tribunal.

In the Courts it may be appropriate that it is taken that, as such an offer includes an implied admission of 'fault or wrong', it follows that the Offeree is entitled to payment of his costs up to the date for acceptance, but the Tribunal makes clear that it will not assume that to be appropriate in 'no fault nor principle' cases. If an Offeror intends that such costs are to be paid or if there is any doubt as to whether it is a 'no fault nor principle' reference, then a Calderbank Offer (which, of course, is expressly without prejudice save as to costs) should be preferred. Otherwise the Tribunal will deal with such costs, up to the date for acceptance, as a matter for its discretion in the usual way.

The Offer in the instant case

By letter dated 29th August 1995 and marked "without prejudice save as to costs", the surveyor for the Offeror wrote to the surveyor for the Offeree in the following terms:

> "In respect of the lease renewal due effective from 1 May 1995 on behalf of Oxfam, I can confirm that they are willing to pay an increased rent of £12,500 per annum from 1 May 1995 with each party paying its own costs to date."

The Tribunal notes that it was pitched at the then halfway point and in that regard had the appearance of a genuine offer to compromise. He continued:

"This offer is in the form equivalent to a sealed offer "without prejudice, save as to costs" in accordance with the principle enunciated by the Court of Appeal in the Calderbank 1975."

And if the offer were not accepted at the time:

"The purpose of this offer is to save the cost and expense of the Lands Tribunal proceedings which are likely be substantial. Accordingly, this offer remains open unconditionally until the hearing date."

And expressly further reserving the right to refer to the letter on the issue of costs:

"In the event of your failure to accept the above offer, this unconditional offer may be used for purposes of determining liability for cost at Lands Tribunal Proceedings".

Receipt of the letter was acknowledged by the surveyor for the Offeree.

The Issues

How should the Tribunal properly exercise its discretion on costs?

Was the "Calderbank" offer admissible and, in particular:

Was this a suitable case for a Calderbank letter?

Should there have been a "sealed offer" instead?

Must a Calderbank letter offer to pay the other party's costs up to the date of offer?

What was the appropriate test to be applied to the Calderbank letter and, in particular:

Was the Offeree better off, or no worse off by going on?

What was the effect, if any, of the offer preceding the exchange of expert evidence?

Agreed Figures

Some figures were agreed. The Offeree's costs up to 29th August were agreed to be £923.75. The Offeror's costs after 29th August were agreed to be £1,492.25.

A Sealed Offer?

For the avoidance of doubt, the Tribunal makes it clear that it does not accept the letter in question to represent a Sealed Offer because it was not in the form required by its Rules.

Further, in this Reference, it might be argued that, at the time of the letter, it could not be said that the only issue was rent, as the surveyor wrote:

> "I would propose that all other terms in the existing lease remain the same"

and so, perhaps on a somewhat strict view, the Sealed Offer procedure was not available until those other terms were agreed.

An Offer capable of acceptance?

Before a Calderbank letter is taken into account, in the question of costs, in whatever way is appropriate for that purpose, consideration must be given to the contractual role of the offer and, in particular, whether it was capable of acceptance.

No issue was taken in regard to a reasonable time for acceptance. The Tribunal finds that there was an offer capable of acceptance at the time the offer was made and concludes the offer was admissible to that extent.

The Tribunal does not however consider that it was capable of acceptance thereafter, without clarification because, although the offer purported to remain open until the Hearing, it is not clear whether the "costs to date" provision would relate to the date of offer or date of acceptance (at any time up to the date of hearing).

It is of vital importance that, if satellite litigation on costs is to be avoided, offers to settle are carefully framed and crystal clear in their terms. There are precedents available and it is desirable that they should be adopted as a whole or the greatest care taken if they are to be modified.

A Successful Party

This was not the type of case in which there was a single black or white issue, such as liability, to be decided one way or the other. Instead, this was to do with the duration, rent and other terms of a lease renewal. At the Hearing the principal issue was rent. It was an example of 'no fault nor principle' litigation. There was a range of possible rents and the decision would be at some point on a scale. There might or might not be an obvious clear winner. If not, in such circumstances, which often arise in arbitration although perhaps unusual in the Courts, the Tribunal generally would not take a strict mathematical approach

to choosing a winner but instead, unless there were good reasons not to do so, order each side to pay its own costs. That technically is a special award but not one that should surprise those experienced in property rental valuation disputes. There is no good reason why a party offering to settle at, or close to a 'no winner' halfway house should necessarily be expected to pay the other party's costs nor that it should be presumed to follow from such an offer.

Even if were assumed that a Sealed Offer included a presumption that the Offeror would pay the Offeree's costs to date for acceptance, and the Tribunal does not accept it does, the express words of this offer remove any doubt.

The Tribunal is not aware of the initial negotiating position of the Landlord but from the time of exchange of expert evidence he supported a rent of £14,250. The Tenant supported £10,750, which was the rent under the old lease and the rent set out in his "proposals for a New Tenancy" in his Application to the Tribunal. The gap was relatively large. The halfway point would have been £12,500. The Tribunal finally determined the rent to be £12,250. The divergence from the halfway point was very small in the context of the difference between the parties, the match was close to a draw. So, although the Tenant came out marginally ahead, there was no obviously successful party, no clear winner.

Subsequent special reasons

The state of knowledge of the Tenant's expert changed, in that in the course of the Hearing it emerged that, although all matters other than rent were thought to be agreed, there was a difference between the parties as to the extent of the car parking facilities within the demise. The Landlord produced the current lease and map and the Tenant had to concede that the Landlord's view was correct and the facilities were more extensive and valuable than he had assumed.

Even though there was a discrepancy and, if he had taken proper steps to inform himself, the Tenant's expert might have adopted a figure closer to the final determination, the Landlord was not at a disadvantage, his view was correct, and the Tenant had little excuse for his mistaken view. He had only to look at the premises, lease and map.

The Tribunal finds these would not be grounds for departure from a preliminary view that each side meet its own costs.

The Timing of the Offer

The fact that the Calderbank Letter offer was made before the exchange of expert evidence took place does not reduce the reliance to be placed on it. On the contrary it is highly desirable that compromises take place as early as possible and, if possible, before the expense of preparing expert reports is incurred. The Respondent certainly has the right to test the evidence but it is a well established principle that if a party fails in its challenge to the evidence, it must bear the consequences in costs.

The outcome in the instant Reference

Firstly considering whether the offer had been beaten, it had not. The Offeror offered to pay a new rent of £12,500 pa. The offeree held out for £14,500. The Tribunal determined £12,250. The offeree had fallen not only well short of his figure but also short of the offer. The offer was not taken up so additional costs were incurred that could have been avoided. On this test the Offeror should be paid his costs from the date of offer. While perhaps technically that should be a later date to allow time for consideration and acceptance, the parties took the date of offer as the material date.

The Tribunal does not accept either that it should take costs to date into account but not costs of going on, or assume that, in the absence of the offer, the Tribunal would have awarded the offeree his costs. In any event, even if contrary to the views of the Tribunal, the offeree could reasonably have assumed that by going on he would have been paid his costs, the Tribunal considers that, generally speaking, the difference in rent should be looked at over the whole term of the lease, not just to the date of first rent review, and, by accepting the offer, the offeree would have been better off.

The Tribunal was referred to Singh v Parksfield plc reported in Halsbury's monthly review April 1996 96/961 but that case must be distinguished in that a Payment In procedure was available but not used and the Calderbank which was used instead was fatally flawed in that it was silent as to responsibility for costs.

It was submitted that to accept, as valid, a Calderbank which does not pay the costs of the party up to the date of Offer would be to create a new procedure. The Tribunal does not agree. One main attraction of the Calderbank procedure is its flexibility and further, in Singh v Parksfield plc, the Court of Appeal held that there was no presumption that a Calderbank included the offeree's costs: the offer must include all the details.

Costs of going on

Once the offer was on the table, the gap between the parties was £2,000 pa. With hindsight, one party's costs of going on was known to be about £1,500. It is likely that would

have been a reasonable estimate at the time of the offer. That does not appear to be a disproportionate amount in that context but, in any event, the offer was not beaten.

Conclusions

General views

It may be helpful if the Tribunal summarises its general views on liability for costs and, in particular, Offers to Settle.

Offers to Settle are encouraged, encouraged at an early stage and parties should be clear as to the consequences, but the Tribunal must, in exercising its discretion, take into account the particular circumstances of the case before it. It cannot fetter its discretion before hearing the parties, except insofar as it is already bound to do so by statute or the decided cases. The following is to be taken as no more than broad guidelines.

After having determined all issues other than costs, the Tribunal will hear the parties on costs. In coming to a decision it will begin by considering whether or not there was a loser. At this stage, if there was an issue of fault or principle, it does not matter whether a loser was wholly unsuccessful or achieved a near miss, he was still the loser. But, if there was no issue of fault nor principle, and the outcome was a draw, or close to one, the Tribunal will not generally consider either party to have lost. Unless there are good reasons for a special award, such as extravagant or unsatisfactory conduct of the proceedings (including the role of expert witnesses) or failure on an important issue, costs will follow the event so 'the loser pays all'.

In regard to costs incurred after the date for acceptance of an Offer to Settle, which was rejected, failure to achieve more than the offer may give rise to a special award on costs. The Tribunal will examine any offer brought to its attention, firstly to determine whether, or to what extent, it is valid and therefore admissible in the question of costs. Offers may deal with some or all of the issues in dispute (but must deal completely with the issue) and may either offer a sum or readiness to accept a sum, which may be a rent. There are two options - Calderbank Offers and Sealed Offers. They are not the same.

Calderbank Offers are more flexible than Sealed Offers. A Calderbank Offer (precedents are available in the text books) must be considered in the context of the law of contract. It must deal expressly with all matters on offer and, for example, if it is silent on costs the Tribunal will assume there is no offer to pay any of the offeree's costs or requirement to pay any of the Offeror's costs, taxed or otherwise, either before or after the offer, and will assess the offer on that basis.

A Sealed Offer may be used if, but only if, the issue for determination is a single sum or rent. It must be considered in the context of statutory requirements (eg in compensation for compulsory purchase) and the Lands Tribunal rules (see rule 31). Comparison with 'Payments In' offers little guidance because that procedure has effectively removed the discretion of the Court.

If a Calderbank Offer is not accepted and the Tribunal awards no more than the sum offered, the initial presumption will be that the Offeree should pay the Offeror's costs. But, if a Calderbank Offer is brought to its attention, the Tribunal will also consider whether it was reasonable for the Offeree not to accept, bearing in mind all the terms of the offer, the information then available to the Offeree, the conduct of the parties in putting their 'cards face up on the table' and the then likely costs of going on. The refusal of the offer may not necessarily be the critical factor.

In regard to a Sealed Offer, the Tribunal generally will consider "a miss is as good as a mile" and will require compelling reasons to depart from a preliminary conclusion that if an Offeree fails to do better, the Offeror should be paid his costs and vice versa. But, subject to any statutory requirements, if an Offeree falls just short of the offer or just beats it (a near miss), the Tribunal may, in exceptional circumstances, take other factors into account including a comparison of the likely costs of going on, with the net amount which would have been at stake at the time of the offer (the difference between the figure on offer and the figure contended for by the offeree).

The instant case

There was no winner on the issue of rent and it was a 'no fault nor principle' Reference. A special award on costs is appropriate.

No Sealed Offer was made but a Calderbank offer was made. Costs before and after the Calderbank date must be considered separately.

The Tribunal first deals with the costs before the Offer. As there was no fault nor principle at the heart of the dispute and no winner, the Tribunal determines that each pay their own costs up to the time of the offer.

The Tribunal now turns to costs after the Offer. As there was no fault nor principle at issue and no winner the preliminary view is that each pay their own costs but does the Calderbank offer displace that? The Tribunal accepts that the Calderbank was valid and capable of acceptance at the time of offer (but not later). There was no obligation to include particular provisions as to costs so long as the offer was clear and it was. There was no

counter proposal to narrow the gap. The offeree failed to beat the offer. The costs of going on were significant but not disproportionate to the amount at stake. The Tribunal concludes that the Offeree should pay the Offeror its costs incurred after the offer and so orders.

ORDERS ACCORDINGLY

17th October 1996

MR M R CURRY FRICS FSVA IRRV ACI.Arb
LANDS TRIBUNAL FOR NORTHERN IRELAND

Appearances:

Patrick Good of Counsel instructed by Harrison Leitch & Logan, Solicitors, for the Claimant.

Rex Anderson of Messrs Anderson & Co, Solicitors, for the Respondent.