LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

BT/80/1986

BETWEEN

JOHN GIBSON McLEAN - APPLICANT

AND

THE SCOTTISH PROVIDENT INSTITUTION - RESPONDENT

Lands Tribunal for Northern Ireland - The President, Judge R T Rowland QC and Mr A L Jacobson FRICS

Belfast - 20th January 1989

This application under section 8(1) of the Business Tenancies Act (Northern Ireland) 1964 concerned the renewal of a lease of rooms occupied by a Dental Surgeon on the fourth floor of an old six storey office block of offices situated in a prominent position in the centre of Belfast (on the corner of Donegall Square West and Wellington Place).

In his application the tenant requested a term of 5 years on the same terms as the current lease and proposed a rent of £2,000 per annum. The landlord made no objection to a new lease and at the time of the service of the Landlord's Notice (under the 1964 Act) proposed a rent of £2,000 per annum but required the terms of the lease to be radically altered to what was colloquially called "institutional terms" (a phrase which will be defined more clearly at a later stage in this decision). The tenant resisted this change as being substantially more onerous while the landlord wishes to impose it unilaterally and that is the main issue between the parties.

Mr Michael Lavery QC for the Applicant/Tenant called Gordon Hugh Mawhinney FRICS FRVA to give evidence.

Mr Mawhinney testified that the new lease offered by the landlord is substantially more onerous than that under which the tenant holds the premises. His evidence was that changes in the user clause, the clause permitting sub-letting, the clause requiring a guarantor or security, the clause regarding building insurance and the clauses regarding provision of services and fixing the service charge all militated (more or less) against the

tenant and transferred to the tenant major areas of responsibility and the high risk associated with the ownership and occupation of an old building which in the past has suffered serious defects. However he accepted that most of those clauses should be capable of amendment in negotiation so as to be acceptable to the tenant. At this stage the parties agreed that the major dispute between the parties related to the terms of the lease concerning service charge and that this hearing be restricted to that issue.

Mr Mawhinney further testified that accompanying the Landlord's Notice to Determine under Section 4 of the 1964 Act was a letter dated 28th January 1986 a paragraph of which encapsulated the change brought about by the proposed lease, viz:-

> "Previous letters to you have made you responsible for internal repairs to the offices, and to pay a service charge which includes only cleaners and caretakers wages, cleaning materials, electricity consumed in lighting the common parts and the annual insurance premium. Some 2 years ago, however, our clients decided that all future lettings were to be on a full repairing and insuring basis with the tenants responsible for their proportionate part of all expenditure, including management expenses."

Mr Mawhinney referred to parts of the proposed Buildings Manual annexed to the proposed lease and mentioned in paragraph 2.10 of that lease the following words:-

> "To perform and observe the covenants on the part of the Tenant and conditions contained in the Buildings Manual".

He considered the most important parts were:-

Clause 1.25:- "<u>To Protect Pipes Etc</u>:

To keep all equipment wiring and piping including cisterns and other water apparatus and appliances in or serving the demised premises properly protected from frost and other hazards and to indemnify the Landlord against all damage occasioned by reason of the overflowing blocking or severing of same as a result of any act or omission on the part of the Tenant or any servant employed by the Tenant or other person whomsoever in or about the demised premised and not to permit the waste of water."

Mr Mawhinney considered that the tenant would be placed in the extraordinary position of being responsible for all equipment wiring and piping situated anywhere in the office block and which served his offices and not merely those items inside the offices occupied.

Clause 5.0 "Definition (of service charge).

The expression "Service Charge" shall mean a proportionate part of the expenses and outgoings incurred by the Landlord in the management of the Building and the provision of services therein and the other heads of expenditure as the same are set out in Part 2 of this Schedule".

Part 2

Clause 1.06 "Cleaning lighting maintaining repairing renewing and improving the common areas of the Building and all apparatus in the Building including the lifts, and the carpets and furnishings and floral decoration therein".

Clause 1.07 "Inspecting Testing cleaning maintaining repairing renewing replacing and improving the supply media plant and apparatus".

Clause 2.06 "Making representations whether in public or private with regard to any matter or thing which in the Landlords opinion which shall be final will prejudice the Building and if necessary instituting proceedings".

Clause 2.07 "Provision maintenance repair renewal and improvement of the building plant and equipment required to provide the Services".

And one more definition:-

Clause 3.10 "common areas of the Building" shall mean the porches vestibules entrance halls passages corridors stairs landings lift shafts toilets storerooms plant and boiler rooms roof, roof timbers floor and ceiling joists walls foundations exterior and structure generally and all other parts of the Building excluding those exclusively demised to Tenants".

Mr Mawhinney accepted that although the building has already suffered serious structural problems relating to piling (greenheart piles) the remedial work had been properly carried out. Nevertheless, he submitted, there is no guarantee that something similar will not occur or that some large outlay will be required in the future. The result of the combination of the clauses above would be that whereas the tenant has presently covenanted to be responsible for internal repairs to the offices occupied the new lease in addition will make him responsible for a share of the repairing and insuring and improving the entire building. Thus the landlord is shifting his burden onto the tenant and in addition the tenant must

accept a proportion of the risk that a substantial amount would be required for repair of a building which was constructed some 90 years ago.

He submitted that these clauses were all embracing in relation to the maintenance repairing renewing and improving the building and in an old building such as this are wholly unacceptable to a tenant, particularly a tenant with a short lease.

Mr Mawhinney accepted that the current rental value is £2475 on terms the same as the existing lease.

Mr Neil Faris, Solicitor for the Respondent/Landlord called Mr Michael Robert Curry FRICS FRVA to give evidence.

Mr Curry having described the building testified that the total cost of remedial work in the piling of the building, carrying out repairs to the pediment roof and main roof and general refurbishing of the building was about £1,750,000 and because the building was listed as being of special architectural interest that cost was assisted by a contribution by way of Government grants amounting to £296,250.

He traced the gradual development of service charges generally from pre 1940 when it was limited to a contribution to landlord's cost of day-to-day expenses of maintaining common parts and cleaning and lighting the same to the early 1960's when it was common to provide the landlord with a net income by making the tenants responsible for all the running costs by providing for the recovery of the actual costs incurred. In the leases of the Scottish Provident Building there was no service charge provision in a lease of June 1957. By December 1961 the standard lease included provision for "such charges for cleaning the said premises as may from time to time be determined by the Landlords or their Agent to be paid by the Tenant". By August 1973 there was a "catch-all" provision viz:- "such charges for such services which the landlord may from time to time provide, as may from time to time be determined by the Landlords or their Agent". The current standard lease to John G McLean (the Applicant) dated 14th February 1984 contained the following:-

> "The Tenant shall also pay to the Landlords on the said quarter day such charges for such services which the Landlords may from time to time provide as may from time to time be determined by the Landlords or their agent. The Tenant shall in addition as and by way of further rent during the tenancy pay forthwith on demand a proportionate part (to be assessed by the Landlords) of the amount paid from time to time by the

Landlords for the purpose of insuring the Building to the full reinstatement value thereof from and against loss or damage by fire, storm, tempest, lighting, explosion impact and aircraft and, articles dropped therefrom and such other risks normally insured against as the Landlords' shall from time to time determine and including Architects' and Surveyors' fees and loss of three years rent and of insuring the lifts and other electrical and mechanical installations servicing the Building."

In the 1984 lease (and each of the earlier leases) the tenant was responsible for interior repair and maintenance of the rooms occupied by him.

Mr Curry testified that the landlords' present proposals for terms for service charge were a natural progression although, he agreed, they significantly alter the previous approaches by quite closely identifying the services to be paid for by the tenant.

He submitted that it was accepted modern commercial practice for landlords to grant "institutional leases" ie the landlord covenants to provide the services detailed in the lease and the onus of meeting the costs of servicing, maintaining and repairing the building is met by the tenants. The landlord thus recovers his rent net of all outgoings on the property.

Mr Curry submitted a schedule of all the lettings in the building which showed 14 renewals of tenancies on "institutional terms"; 18 new tenancies on "institutional terms" and 8 renewals of tenancies awaiting the result of this Application. Additionally 3 rooms are vacant and a further 4 rooms are to be vacated shortly. The landlords thus were committed to providing the services and it would be unfair to those tenants who have taken leases of rooms on institutional terms to allow the present Applicant/Tenant to occupy his premises under a special agreement.

Mr Curry estimate that the current rental value on "institutional terms" is £2,475 per annum.

The parties agreed that proofs of evidence submitted by William George Samways of Young & Mackenzie, (Architects) and Mr T J A McAuley (former Senior Partner in McAuley & Browne, Civil and Consulting Engineers) should be received and accepted as factually agreed.

Mr Michael Lavery QC, for the Applicant/Tenant submitted:-

1. The present case is on all fours with O'May v City of London Real Property Co Ltd [1982] 1 All ER 660 in which the judge in the first instance had held for the landlord. The Appeal Court allowed the tenant's appeal and the House of Lords dismissed the landlord's appeal.

2. One or two provisions in the O'May Case are stronger in the tenant's application in the instant case.

   In the O'May case it was agreed that a sum of 50p per square foot would be a reasonable valuation of the extra risk the tenant would carry if the cost of the landlord's responsibility for maintenance repairs and services in respect of the building and any structural damage were transferred to the tenant by the terms in the new lease. It was held not reasonable to impose that obligation onto the tenant.

3. The Scottish Provident building has undergone considerable renovation due to various defects and disrepair. It could be that a large liability of unforeseen defects might arise because it is an old building built in two stages between 1896 and 1904.

4. In the O'May Case recent new lettings had been made on a "clear lease" or "institutional" basis but the House of Lords held that it was not fair to impose such a burden on existing tenants when renewing their leases.

Mr Neil Faris, Solicitor, for the Respondent/Landlord submitted:-

1. The Respondent does not challenge the principles of the decision in the O'May Case but the factual situation is different (see Lord Hailsham's judgement at p663f).

2. There the terms of the existing lease were a detailed lease similar to the proposed lease for the Applicant. It contained a full service charge.

   In the instant case the existing lease is an old-fashioned lease as Mr Mawhinney admitted.

   In the O'May case the principles had been recently established and the landlord had accepted certain obligations in the lease. Therefore it was difficult for the landlord to expect a radical change.

3. Secondly, the O'May landlord was seeking to introduce a new lease and to get his tenants to agree to it. O'May was the first case in that building and that left the landlord all his options in the event that his attempt failed.

   Compare that with the Scottish Provident Building where there is a clear majority of tenants who took a lease on new terms on lease renewal or which were new lettings. The Applicant/Landlord is in a difficult position if the Lands Tribunal finds in favour of the tenant ie some tenants will be paying a proportion of the Landlord's full costs and some will not. Therefore the facts are much more in favour of the landlord than in the O'May case.

4. Thirdly in the O'May case there was a scarcity of alternative available offices and the weakness in O'May's bargaining ability had to be taken into account. In his evidence before the Lands Tribunal Mr Mawhinney agreed that the tenant would have no difficulty in finding alternative accommodation to which to move.

5. Lastly, there is evidence before the Lands Tribunal of a substantial amount of money spent in putting the building to rights.

   There is an area of risk of expenditure with any building and the question is who takes the risk? The burden of proof lies with the party who seeks change - the Respondent says there is a risk but not a serious burden.

Mr Lavery QC in reply:-

1. Mr Faris accepts the onus of proof.

2. The 1964 Act provides protection to the business tenant - a security of tenure. The availability of alternative offices elsewhere should be ignored.

3. Mr Faris say the terms of O'May's lease can be found in Lord Hailsham's decision at p663 f but these terms are of the new lease.

4. What the landlord was attempting to do in the O'May case was to obtain a "clear lease". The landlord in this case is attempting to do the same. To do so he is attempting to put full responsibility of all repairs to the building onto the tenant.

   Both landlords wished to increase the value of the investment.

5. Fourteen tenants have accepted the new terms. Therefore the landlord in this case is in a much better position than was O'May ie a much better position if wishing to sell.

   Because the landlord has got concessions from other tenants who consider the rent reasonable and the risk light it should not be used as a stick to beat other tenants.

6. The landlord in this case is better off than the landlord in the O'May case and suffers less hardship. The rent reduction by way of compensation (50p per square foot - less than 5%) was so small that the risk must have been very small of any large outlay in the near future. No-one can warrant that the Scottish Provident building will not require a large outlay sometime. The tenant should not be forced to assumed that risk.

7. The tenant in this case cannot estimate with any degree of accuracy his service charges for the year to come. It is not fair to burden him with this unquantified risk for a five year lease.

DECISION

It is common ground that service charges are not rent, but rather one of the other terms of the new tenancy and thus are dealt with under Section 16 of the 1965 Act viz:-

> "The terms of a tenancy granted by order of the Lands Tribunal under this Part (other than terms as to the duration thereof and as to the rent payable thereunder) shall be such as may be agreed between the landlord and the tenant, or as, in the absence of agreement, may be those terms the Lands Tribunal shall have regard to the terms of the current tenancy and to all the relevant circumstances".

The wording of that Section does not differ in any significant respect from Section 35 of the Landlord and Tenant Act 1954 and so the House of Lords interpretation of Section 35 in O'May v City of London Real Property [1982] 1 All ER 660 is most pertinent. In the O'May case Lord Hailsham LC at p665b said:-

> "From these sections I deduce three general propositions: (1) it is clear from S.34 that in contrast to the enactments relating to residential property, Parliament did not intend, apart from certain limitations, to protect the tenant from the operation of market forces in the determination of rent; (2) in contrast to the determination of rent, it is the court

and not the market forces which with one vital qualification, has an almost complete discretion as to the other terms of the tenancy (which, of course, in turn must exercise a decisive influence on the market rent to be ascertained under S.34); and (3) in deciding the terms of the new tenancy, as to which its discretion is otherwise not expressly fettered, the court must start by 'having regard to' the terms of the current tenancy which ex hypothesi must either have been originally the subject of agreement between the parties or themselves the result of a previous determination by the court in earlier proceedings for renewal".

And later @ p665 e:-

"But I do believe that the court must begin by considering the terms of the current tenancy, that the burden of persuading the court to impose a change in those terms against the will of either part must rest on the part proposing the change and that the change must in the circumstances of the case, be fair and reasonable and should take into account, amongst other things, the comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity, and the general purpose of the Act which is to protect the business interests of the tenant so far as they are affected by the approaching termination of the current lease, in particular as regards his security of tenure."

The terms of the current tenancy as far as service charges are concerned are to be found in the second part of Clause 2 of the Memorandum of Agreement dated 14th February 1984:-

"The Tenant shall also pay to the Landlords on the said quarter days such charges for such services which the Landlords may from time to time be determined by the Landlords or their agent. The Tenant shall in addition as and by way of further rent during the tenancy pay forthwith on demand a proportionate part (to be assessed by the Landlords) of the amount paid from time to time by the Landlords for the purpose of insuring the Building to the full reinstatement value thereof from and against loss or damage by fire, storm, tempest, explosion impact and aircraft and articles dropped therefrom and such other risks normally insured against as the Landlords, shall, from time to time determine and including Architects' and Surveyors' fees and loss of three years rent and of insuring the lifts and other electrical and mechanical installations servicing the Building".

Additionally, the Tenant was made liable to keep the interior of the premises occupied (together with certain Landlord's fixtures etc) in good and tenantable repair and condition.

So far as the restricted issue before the Lands Tribunal is concerned, those are the terms of the current tenancy which must be considered.

The change in the terms of the landlord wishes to impose is much more onerous and includes the

> "cleaning lighting maintaining repairing renewing and improving the common areas of the Building and all apparatus in the Building including the lifts and the carpets and furnishings and floral decoration therein." (the Lands Tribunal underlining).
>
> The common areas of the building embrace, inter alia, all parts of the building (both exterior and interior) excluding those exclusively demised to all tenants. That is onerous enough but the building is some 90 years old and although sometime in 1979 approximately £1,750,000 was spent in underpinning and repiling in part (some greenheart timber piles had rotted) and on refurbishing the building it still remains an old building. The risk of an item requiring a large expenditure occurring some time in the future is not insubstantial. The building lacks central heating or air conditioning. Whether or not it would be practical to install either or both was not the subject of any evidence before the Lands Tribunal but the Tribunal notes that the Tenant would bear his share of improving the "common areas".

The landlord seeks to discharge his burden of persuading the Tribunal to impose that change by saying first of all that the landlord wishes to have "clear leases" or "institutional leases" for business reasons manifested in the contemporary property market. Secondly by saying that because of the large expenditure of money there is a risk that further large expenditure can occur in the future but that it not a serious burden.

The first of those matters is a perfectly legitimate aim for the landlord to pursue but it is equally legitimate for the tenant to resist. But as far as the second matter is concerned it does not go far enough. What the landlord is attempting to transfer to the tenant is a proportion of all the outgoings on the building including the year to year repairs to the structure, the exterior and the risk of a further single large expenditure whether that risk is a serious burden or not.

Further, the landlord refers to 14 renewals of tenancies and 18 new tenancies on the new terms, and gave evidence that there was no scarcity of alternative accommodation. In the Tribunal's opinion that disregards the general purpose of the 1964 Act which protects the business tenant as regards his security of tenure. That 18 new tenancies have been granted in recent years was not explained to the Tribunal but it may be due to tenants expanding their businesses or refusing the terms offered for renewal of tenancy or for some other reason. It is sufficient to say that does not diminish the tenant's protection given by the 1964 Act. As Lord Wilberforce stated in the O'May Case @ p671 e:-

> "There is no obligation, under s.35 of the Act, to make the new terms conform with market practice if to do so would be unfair to the tenant. And there is no inherent necessity why the terms on which existing leases are to be renewed should be dictated by those of fresh bargains which tenants may feel themselves obliged to accept."

Additionally, the expert valuers evidence indicated (at least as far as the landlord was concerned) that no compensation (as far as yearly rent was concerned) was being offered to the tenant as a quid pro quo for accepting the extra burden of maintaining, repairing, renewing and improving the common areas of the building. Mr Curry (for the landlord) estimated the current rental value of £2475 per annum on the new "institutional terms" and Mr Mawhinney (for the tenant) agreed that the current rental value was £2475 per annum but on the terms in the current lease.

The present application raises in the most direct way the same dilemma that faced the Courts in O'May's Case namely that where a landlord has legitimate and compelling reasons for seeking to shift the burdens of the tenancy agreement from himself to the tenant and where the latter has also legitimate and compelling reasons for resisting the shift, the question is how is the issue between them to be resolved? Both the Court of Appeal and the House of Lords have answered that question by setting forth the principles to be applied in such cases. The basic principle is that since under Section 16 of the Business Tenancies Act 1964 the Lands Tribunal is required to "have regard to" the terms of the current lease, the burden of persuading the Tribunal to change those terms rests on the party proposing to change and, although the Tribunal has wide discretionary powers to change the terms and impose new terms, the party proposing the change has first to show that the change is fair and reasonable in all the circumstances having regard, inter alia, to the comparatively weak negotiating position of a sitting tenant requiring renewal of his

tenancy. And it appears that such a change cannot be justified merely be agreeing to reduce the rent to an acceptable figure in return for shifting the burden. It was on this point that the judge of first instance was reversed in both the Court of Appeal and the House of Lords. Lord Hailsham said of it at page 669e:

> "Granted that a reduction in the rent of 50p from £10.50 per foot to £10 per foot is, in the limited sense described, an adequate estimate of the compensation which a landlord will offer if the risk is to be transferred. But the argument is again two edged. It may equally be argued that an additional 50p is the adequate estimate of the rent rightly payable to the landlord if the risk is to be kept where it is under the current lease. But neither of the two statements assists to answer the question where, in the new lease, the risk of fluctuations is to lie."

The "risk of fluctuations" is indeed the key to the solution of the problem. It was, in the end, the basis of the House of Lords decision and constitute the "ratio decidendi" of the case. Lord Wilberforce dealt succinctly with the point in the following passage from his speech at page 671G:

> "There can be no doubt that this detriment (ie that suffered by the tenants) is real and serious. Considering only an obligation to bear a proportion of the cost maintaining and repairing the exterior and common parts of the building, to impose this on the tenants is something which they may most reasonably resist. They risk incurring a liability which is unpredictable and which may, in the event of a structural defect, be very great. They have no power of precautionary inspection or survey, since they only have access to part of the building. They have no means of verifying that work for which they are charged was necessary at the time, or was truly repair and not improvement, the cost of which ought not to be put on the tenants, nor of controlling what work has been done. As tenants, carrying on a Solicitors business, they have no staff capable of performing these tasks, whereas the landlord, as a large property Company with an interest in over 200 buildings in the City of London, has ..... The character of the two parties' interest in the land, the landlords' an indefinite one by freehold, the tenants' a limited one over a comparatively short period, even though capable of renewal if the tenants so wish, is such as to call for the assumption of long term risks by the former; his benefit too is long term and will not, according to the evidence, emerge till the 1990's. Transference of these rights to the leaseholders, accompanied, as is inevitable, by separation of control, creates

> a risk disproportionate to their interest ..... The tenants are being asked to bear all the risks of property management, a business which they have not chosen, being management by others in the interest of those others. The present distribution of burdens is that freely and contractually agreed on so recently as in 1972. To recast it involves a serious departure from the terms of the current lease. In my opinion, a court which has to have regard to the terms of the current lease ought not to sanction such a departure; and such other circumstances as should fairly be taken into account, the landlord's wishes and the increasing acceptance by others, in different situations, of clear leases are insufficient to give grounds for so doing."

In the opinion of the Tribunal those words apply to the present case. In making the necessary comparison between the advantage desired by the landlord and the detriment to be suffered by the tenant it is the latter who suffers far more than the landlord and the evidence in the case, together with the considerations set out by Lord Wilberforce, make this case virtually indistinguishable from O'May's Case. The Tribunal accordingly holds that it is not reasonable, in all circumstances, to impose the unpredictable and fluctuating burden on the tenant against his will in return for a fixed figure valid throughout the new tenancy and calculated as at the beginning of the tenancy. The Tribunal does not accept that the proposed change in the terms of the lease is fair and reasonable and accordingly the service charge term must be on the basis of the current lease. Before parting with the case it should be stated that Mr Faris, though accepting as he was bound to, the principle decided in O'May's Case sought to distinguish it on its facts by pointing out inter alia, (a) that the current lease is a very old-fashioned lease whilst the O'May lease was comparatively recent and (b) that whilst alternative accommodation was in short supply in O'May there was no such problem in the instant case. Neither of these, however, in the opinion of the Tribunal, is sufficient to displace the crucial considerations which resulted in a decision in the tenant's favour.

Certain other terms in the new lease are still the subject of negotiation between the parties and hope is expressed that agreement can be reached. In default of such agreement either party is at liberty to apply to the Lands Tribunal.

ORDERS ACCORDINGLY

The President, Judge R T Rowland QC
and Mr A L Jacobson FRICS
LANDS TRIBUNAL FOR NORTHERN IRELAND

9th March 1989

Appearances:-

Mr Michael Lavery QC and Mr Alva Brangam (instructed by Messrs Basil Glass & Co, Solicitors) for the Applicant/Tenant.

Mr Neil C Faris, Solicitor (of Cleaver Fulton & Rankin, Solicitors) for the Respondent/ Landlord.