LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

BT/31/1993

BETWEEN

JOHN COSGROVE - APPLICANT

AND

FREDERICK ROY CATHCART AND MAUREEN CATHCART - RESPONDENTS

Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS

Enniskillen - 4th May 1993 and 17th June 1993

This was an application by the Applicant/Tenant of Unit 10, Derrychara, Enniskillen, Co Fermanagh for a new tenancy of business premises in accordance with Section 8 of the Business Tenancies Act (Northern Ireland) 1964 ("the 1964 Act").

It arose in this way:- the Respondents/Landlords on 27th November 1992 served a Landlord's Notice to Determine Business Tenancy, under Section 4 of the 1964 Act, on the Tenant. That Notice opposed an application for a new tenancy to the Lands Tribunal on the following grounds:-

"(A) the Tenant ought not to be granted a new Tenancy in view of his persistent delay in paying rent which has become due.

(B) that the Tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding.

(C) that on the termination of the current tenancy the landlord intends -

(i) to demolish or rebuild the premises comprised in the holding or a substantial part of those premises; or

(ii) to carry out substantial works of construction on the holding or part thereof;

and that the landlord could not reasonably do so without obtaining possession of the holding.

(D) that on the termination of the current tenancy the landlord intends that the holding will be occupied for a reasonable period for the purposes, or partly for the purposes, of a business to be carried on by him or by a company in which he had a controlling interest, or as his residence; but the landlord cannot rely on this ground if his interest was purchased or created less than 5 years before the termination of the current tenancy, and at all times since the purchase or creation of the landlord's interest the premises have been let to a tenant occupying them for the purpose of his business."

That Section 4 Notice terminated the tenancy on 30th May 1993.

On 29th January 1993 the Applicant's Solicitors wrote saying that the Applicant was "not willing to give up possession of the premises".

On 5th March 1993 this Application was made to the Lands Tribunal.

Mr Mark Horner of Counsel for the Respondent called Mr Frederick Roy Cathcart (one of the Respondent/Landlords), Mr David Ernest Morrison (of the Building Control Department of Fermanagh District Council) and Mr Brian Robert Cooke (partner in Brian Cooke Design Partnership - and having a Higher National Certificate in Building Technology) to give evidence.

Mr Cathcart testified as to the Tenant's delay in paying the rent reserved by the lease. His figures were unchallenged apart from one payment. No rent book was given to the Applicant nor did Mr Cathcart produce any book of account showing rent received but his figures were taken from the Bank Statement showing money lodged. He further testified as to difficulties with the clause in the lease regarding insurance of the leased buildings and other breaches of conditions in the lease.

His main evidence concerned the requirements of the Building Control Department regarding works which had been carried out some time in 1987 which had not received authorisation and which did not conform with the Building Regulations.

Lastly, Mr Cathcart testified as to what steps he had decided to take in order to carry out the requirements of Building Control, including his ability to pay for those works and his arrangements with Contractors to give an estimate of cost and to carry out those works.

Mr Morrison testified as to the events and discussions that had taken place with Building Control representatives between 4th January 1988 through to 4th April 1990 and to the present requirements of Building Control.

Mr Cooke testified that he had drawn up the plans of the premises which had been handed in to the Tribunal and had calculated the price of the works based on those plans. He considered that the entire premises of approximately 3,200 square feet of necessity would be required by the contractor in order that approximately 1,000 square feet of the first floor "loft" could be removed with safety and that the premises then remaining could be properly fireproofed and electric cables etc could be reinstated.

Mr Jonathon Lowry of Counsel for the Applicant called Mr John Cosgrove (the Applicant trading as The Print Factory) and Mr Eamonn Martin McCusker BSc (employed as a quantity surveyor by Mr Terry McGovern, a building contractor) to give evidence.

Mr McCusker testified that he has not yet completed the two year's training and experience required by the Royal Institution of Chartered Surveyors to enable him to apply for Associateship. He had been instructed verbally to produce an estimate for demolishing those parts of the holding shown to him by the Applicant at the premises. He had seen an estimate of £4872 for the cost of the works provided by Messrs McConnell & Dundas for the Landlord. His figures were as follows:-

"Taking Down Timber Stud Walling and Integral Floors	
Using Portable Scaffolding Tower and Removing from Site	£225.00
[ie 2 men for 16 hours plus hire of a lorry @ £5 per hour]	
Disconnection of Electrical Units and Making Safe on	
Completion	£45.00
[disconnection back to Mains Meter]	
Total	£270.00
VAT	£47.25
Estimate including VAT	£317.35

In cross-examination he agreed that the working area thus lost was substantial area-wise ie in relation to the total area. He also agreed that a dust screen would be required - which would cost about £250 - in order to segregate the demolition working area from the Tenant's machinery plus a cost of about £70 to fully cover all machinery. In so doing, he was of the opinion that for a cost of about £700 plus the work could be done at the week-end without the Tenant having to give up possession.

The Tribunal notes that he was not given instructions in writing nor had he been given the list of work to price necessarily required by Fermanagh District Council Building Control.

Mr Cosgrove, the Tenant, testified as to his rent payments. He accepted that his rent payments were generally late but the reason he gave was that he paid Mr Cathcart, the Landlord, when he called for his rent. When Mr Cathcart stopped calling he paid no rent between that paid for quarter beginning 1st December 1989 and that paid in October 1990. He could give no reason why the disputed payment of £1,500 made on 11th January 1991 was in cash - the cash cheque written by him on 10th January, paid to him by the Bank on 11th January and subsequently on the same day to Mr Cathcart. He did not pay by cheque the full amount to Mr Cathcart because he did not wish so to do. The Tribunal indicated that if he had paid £1,500 he would not have settled a Summons in the High Court for forfeiture on 9th October 1992 at the agreed amounts for that would have left his rent account in credit rather than being exactly up to date. Mr Cosgrove could not explain. He further testified that the rent for the quarter commencing 1st June 1993 had been sent to his own solicitor.

Secondly Mr Cosgrove accepted that he had not painted the premises in the six years he had been in occupation although the lease required painting each three years. He had insured the property for £50,000 when first in occupation although he had not increased that amount each subsequent year. He presented the Insurers' documents for the current year which indicated the amount had been raised to £50,800.

He had recently obtained finance to enable him to purchase a site on which he had obtained planning permission for a new factory sometime in early 1991 but Bank now required further collateral before approving a loan to cover the erection of a new building.

He told the Tribunal that he had not read "the small print" of the Lease - that was in reference to the Tenant's obligations therein. He, at first, could not recollect asking the

Landlord for time to pay until May 1991 following a County Court Civil Bill (for ejectment) to be heard on 31st January 1991 but he agreed that he had received a Recorded Delivery letter dated 25th July 1991 from Mr Cathcart's Solicitors, inter alia, which stated: "[Mr Cathcart] instructs us that he has been promised by yourself that the premises would be vacated by you in the Spring of this year and this has not happened. Our client had agreed a rent with another tenant of £10,000 per annum from the 1st May 1991. Your continued occupation of the premises has jeopardised the new tenancy and our client therefore requires you to vacate the premises immediately".

The Tribunal finds the following facts proved or admitted:-

1. The Lease dated 18th April 1988 granted a term of three years from the 1st April 1987 subject to an annual rent of £5,000 payable half yearly in advance.
   Inter alia that Indenture included the following clauses:-

   "2(g) From time to time to well and sufficiently repair and cleanse and so repaired and cleansed to keep the said buildings and all other erections which may at any time during the said term be erected or built and all additions which may be made to the demised premises and the doors and windows thereof and the fittings and Landlords fixtures in good and tenantable repair (reasonable wear and tear excepted) and every three years to paint all woodwork internal and external with two coats of paint of a colour to be approved by the Lessor.

   (h) To forthwith insure and thenceforth keep insured to the full value hereof all buildings erections and fixtures of an insurable nature erected or standing upon or affixed to the demised premises against loss or damage by fire in a solvent and responsible Fire Insurance Office in the joint names of the Lessor and Lessee and to pay all premiums necessary for that purpose and whenever required so to do to produce to the Lessor or his Agent or Agents the Policy or Policies of such Insurance and out of its own private monies if necessary to rebuild repair or otherwise reinstate in a good and substantial manner under the direction and to the satisfaction of the Surveyor for the time being of the Lessor any premises destroyed or damaged and that if the Lessee shall fail to insure or keep insured the said premises or to produce the receipt for any premium upon request the Lessor may do all things necessary to effect or

maintain such insurance and all money expended by him for that purpose shall be repaid by the Lessee in demand.

2. The Applicant originally occupied Unit 11 (adjacent to the present holding Unit 10) but he agreed with the Respondent to move to Unit 10 because the Respondent required Unit 11. As a result the first floor "loft" area of approximately 1,000 square feet was built to suit the requirements of the Applicant and it was agreed to hold the rent reserved at £5,000 per annum to acknowledge the disruption suffered by the Applicant by his voluntary removal.

3. The rent in fact was due and paid quarterly in advance although the Lease required half-yearly payments in advance.

4. The addition of the first floor "loft" comprised an office and what is termed an art room with stairs up. The area is approximately 1,000 square feet.

That addition did not require planning permission but there was no submission of plans to Building Control. On 4th January 1988 (ie some nine months after commencement of the term of the lease) following a visit by an officer of Building Control a letter was issued requesting that plans etc be deposited with Fermanagh District Council. Brian Cooke Design by letter of 6th January 1988 made an application etc for Building Control permission.

On 11th January at a site meeting with Building Control Mr Cathcart and Mr Cooke agreed to submit details of remedial work to make good all contraventions.

On 7th March 1988 the unapproved development was reported to the meeting of Fermanagh Council and this was followed by a letter of 22nd March 1988 from Mr Cooke stating that he was proceeding with the application. On 25th August 1988 Building Control received the calculations made by the engineer thus completing Mr Cathcart's application.

On 18th October 1988 Building Control requested further information. This was followed by a letter dated 27th January 1989 from Mr Cooke suggesting that the first floor area should be closed down.

On 8th February 1989 Building Control had another site meeting with Mr Cathcart and Mr Cooke. On this occasion the tenant, Mr Cosgrove, was present. The following options were discussed:- either improve the addition to the standards required or close down the first floor and remove the stairs up to that first floor.

On 20th February 1989 Building Control received a letter from Mr Cooke stating that the lease of the building is due to expire on 30th March 1990 and requested that the matter be deferred until 31st March 1990. Building Control replied by letter of 22nd March 1989 that if Mr Cathcart is willing to discontinue the use of the first floor and remove the stairs giving access thereto the District Council would be willing to defer action in the meantime. However the letter stated that if the first floor continued to be used then remedial work was to be carried out within 28 days.

At a further site meeting on 8th May 1989 it was recommended that a notice be served under 18(1) of the Building Regulations for contraventions regarding structure, fire resistance and stairs. Following a visit to site on 15th June 1989 checking that the contraventions still existed a Notice was served on Mr Cathcart on 31st July 1989. Mr Ferguson, Solicitor, on behalf of Mr Cathcart discussed the matter of forthcoming Court action with Building Control on 13th September 1989. Yet another site meeting took place on 13th November 1989 at which Mr Cathcart took a decision to remove both the stairs and the first floor but Mr Cosgrove objected.

Mr Cathcart (by telephone) told Building Control on 1st December 1989 that his tenant Mr Cosgrove had refused to let him carry out remedial work. On 29th December 1989 the District Council issued a letter to Mr Cosgrove detailing the contraventions (with A R Card).

On 15th January 1990 Building Control received a telephone call from Mr C McAleer (the publisher of a free newspaper entitled the Fermanagh Advertiser) on behalf of Mr Cosgrove. That call was in response to the letter (above) of 29th December 1989 to Mr Cosgrove and concerned firstly alternative accommodation but in addition requested that if the stairs were removed would that not abate most of the contraventions.

There were sundry calls and letters up to 4th April 1990 when a discussion with Mr Cathcart discussed the then current situation.

5. That Notice (dated 31st July 1989) from Fermanagh District Council to Mr Cathcart delineated the contraventions of the Building Regulations (Northern Ireland) 1977 (as amended) as follows:-

"D8 - Structural stability of first floor is inadequate.

E5 (i) - First floor construction requires half hour fire protection.
(ii) - Beams supporting floor require one hour fire protection.

E15 - Fireboard ceilings and chipboard walls do not provide Class I Spread of Flame Finish.

H3 (i) - Width of stairs is less than 800mm.
(ii) - Goings of steps in stairs are less than 250mm minimum.
(iii)- Bottom step of stairs exceeds the going of other steps.
(iv) - Riser of steps in stairs inconsistent.
(v) - Handrail to stairs is not terminated by scroll or other suitable means.

6. In the front page of the Fermanagh Advertiser dated February 1991 was a large advertisement showing "an artist's impression of the new Print Factory on the IDB Industrial Estate at Killyvilly, Tempo Road, Enniskillen due for completion early 1991".

7. Rental payments by Mr Cosgrove for the holding commenced with the quarter commencing 1st December 1987. Mr Cathcart collected the rent by personal visits and although those visits were generally a few days after the first day of the due month all payments were made as required until the payment due on 1st March 1990.

From then onwards difficulties occurred when Mr Cathcart discontinued his practise of visiting. Thus:-

		Arrears
Payment due 1st March 1990	not paid	£1,250
Payment due 1st June 1990	not paid	£2,500
Payment due 1st September 1990	not paid	£3,750
On 26th October 1990	£3,500 paid	£ 250
Payment due 1st December 1990	not paid	£1,500
On 10th January 1991	*£1,000 paid*	£ 500
Payment due 1st March 1991	not paid	£1,750

On 25th April 1991	£1,500 paid	£ 250
Payment due 1st June 1991	not paid	£1,500
On 2nd July 1991	£1,500 paid	NIL
Payment due 1st September 1991	not paid	£1,250
Payment due 1st December 1991	not paid	£2,500
Payment due 1st March 1992	not paid	£3,750
Payment due 1st June 1992	not paid	£5,000
Payment due 1st September 1992	not paid	£6,250

On occasions a Civil Bill for forfeiture or ejectment had been issued on behalf of Mr Cathcart.

(a) In the County Court a Civil Bill for ejectment was issued on 31st January 1991. There was an agreed withdrawal following payment of arrears and a promise by Mr Cosgrove to vacate in the spring of 1991.

(b) A further Civil Bill in the County Court was withdrawn when it was realised that the Net Annual Value of the premises was £875 and therefore should be heard in the High Court.

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(c) Proceedings had been issued in the High Court on 3rd June 1992 and a summons issued on 3rd September 1992. Before the hearing was to take place a payment of £5,000 was made on 9th October 1992 leaving £1,250 still in arrears. Proceedings and summons were withdrawn before hearing on agreement to pay remainder of arrears of £1,250 plus interest on arrears of £584.07.

On 27th October 1992 a cheque for £1,250 was sent to Mr Cathcart's Solicitors and on 10th November 1992 a cheque for £584.07 was sent to the Solicitors. Thus at that latter date arrears were NIL.

		Arrears
Payment due 1st December 1992	not paid	£1,250
On 4th February 1993	£1,250 paid	NIL
Payment due 1st March 1993	not paid	£1,250
On 20th April 1993	£1,250 paid	NIL

Note:- Payment marked by asterisks ie on 10th January 1991 is disputed. Mr Cosgrove says £1,500 cash was paid. A cash cheque for £1,500 was drawn by him from his own bank branch. That cheque was dated 10th January 1991 and the teller's stamp shows the cash was paid on 11th January 1991. Mr Cosgrove produced a receipt on F R Cathcart Ltd headed paper and signed by F Roy Cathcart. It reads "John Cosgrove paid £1,500.00 on 11th January 1991" but it is so written that the figure 5 may have been superimposed over a figure 0 - but that is **not** clear. The Tribunal does not decide one way or another between the parties nor does the Tribunal have to so decide. The figures shown as facts in this paragraph show that it is most likely on the balance of probabilities that the payment was £1,000 for otherwise there would be a payment of £500 in advance when the payment of £1,500 was made on 2nd July 1991 and at the withdrawal of the High Court proceedings only £5,750 NOT £6,250 would have been the arrears.

8. Property insurance was taken out by Mr Cosgrove for a sum of £50,000 but that was adjusted this year to £50,800.

   Mr Cathcart requested Lowndes (NI) Ltd (Insurance Brokers) to advise on proper amount. Their advice dated 11th March 1992 was to insure for £100,000 replacement cost. Mr Cathcart then instructed the Brokers on 4th June to obtain cover with the Commercial Union for £50,000.

   Mr Cathcart took no action to demand from Mr Cosgrove the premium paid for that cover amounting to £287.50 (ie in accordance with Lease).

9. Mr Cosgrove has not ever carried out the interior and exterior painting required by the Lease. That requirement was to paint each three years ie twice in the six years Mr Cosgrove has been in occupation.

Mr Jonathon Lowry of Counsel for the Applicant/Tenant submitted:-

There are two issues in this Case (a) the substantial works issue and (b) the rent payments issue.

1. The substantial works issue

(i) Mr Cathcart says he intends to demolish but it is submitted that it is not substantial. Mr McCusker in evidence estimated it would cost about £720 to reduce the building (internally) to a shell. Compared with the Capital Value of the building at £100,000 that could not be substantial. Even the cost estimate put forward by Mr Cathcart at £4,800 plus should not be considered substantial.

(ii) Mr Cathcart's intention to act only crystallised after he had issued the statutory Landlord's Notice to Determine Business Tenancy on 27th November 1992. The work required was not costed at that time - the estimate put in evidence by him was only received on the day before the first day of this Hearing. It was a question for the Tribunal as to whether his intention was genuine or not.

2. The rent payments issue

(i) It is accepted that the rent was often in arrears. The High Court Case was in respect of that but was struck out by the payment of the rent arrears and the interest thereon.

(ii) The Lands Tribunal is given a discretion by the wording of Section 10(1)(a), (b) and (c) of the 1964 Act and that discretion quite properly should be exercised in favour of Mr Cosgrove for Mr Cathcart had agreed prior to the hearing in the High Court that the proceedings be struck out. In respect of those arrears of rent it would be unjust to take those arrears into account in this Case.

(iii) Regardless of the Lands Tribunal discretion the Landlord has waived his right to rely on the arrears for the periods up to 1st June 1992.

Refers to Discussion Paper No 3 of the Law Reform Advisory Committee for Northern Ireland entitled "A Review of the Law relating to Business Tenancies in Northern Ireland". At page 9 of that Paper at para 3.2.4 it says:- "A business tenant in Northern Ireland who carries on business in breach of such a prohibition is vulnerable to removal by forfeiture or ejectment, these powers being specifically reserved to the landlord by section 6 [of the 1964 Act]. The landlord may also choose to oppose renewal on one or more of the first three grounds in section 10(1), paragraphs (a)-(c). In proceedings for forfeiture or

ejectment, the tenant may rely on waiver of the breach of the landlord. This is also true under section 10(1)(a)-(c), which are discretionary grounds of opposition".

(iv) One action amounting to waiver is acceptance of rent after action for forfeiture. See Woodfall on Landlord and Tenant Volume 1 @ p852 considering acts that amount to waiver - @ para 1.1907:-

"Demand for rent accruing due after the forfeiture, if the demand be absolute and unqualified. Acceptance of rent accruing due after the forfeiture".

Submits that was what Mr Cathcart did in this Case for he waived the rent arrears when they were paid up by Mr Cosgrove at the agreement at the High Court proceedings. He also accepted rent covering the period up to 1st September 1992 even though tardy.

(v) There was some confusion in Mr Cosgrove's mind and the letter of 27th October 1992 to Mr Cathcart's Solicitors shows that he thought he had paid rent up to the end of December and thought his rent was in order up to the end of January. He seeks clarification in that letter of the rental payment position. Further payments were made in February and April but that was in respect of quarters commencing 1st December 1992 and 1st March 1993.

Mr Mark Horner of Counsel for the Respondent/Landlord submitted:-

1A As far as the Landlord's objection to the grant of a new tenancy on the grounds of Section 10(1)(f)(i) ie "to demolish or rebuild the premises comprised in the holding or a substantial part thereof;" the evidence of Mr Morrison of Building Control and Mr Cooke should be accepted. Mr Morrison is an officer of Fermanagh District Council and proved his evidence. The Lands Tribunal is invited to accept the estimate of the required cost of the works as more realistic than that of Mr McCusker. Mr McCusker accepted that the floor area to be demolished was a substantial part of the premises as a whole and further he accepted that Mr Cathcart intended to so demolish.

B Mr Cooke's evidence should be accepted in preference to Mr McCusker's regarding possession of the premises to carry out the works. Mr Cooke took into account the requirements of Building Control and both he and Mr Morrison considered the work

would take a fortnight while Mr McCusker thought that the work he had priced could be done at the weekend.

C Submits that Mr Cathcart's intention to demolish a substantial part of the holding has moved out of the "zone of contemplation" into the "valley of decision". Submits that at this hearing there is no doubt of the Landlord's intention for:-

(a) Building Control have allowed much time in order to get building matters corrected but formal notice requires to be attended to by Mr Cathcart.

(b) Mr Cathcart has proved that finance is immediately available.

(c) Mr Cathcart has obtained a proper estimate of cost.

(d) Mr Cathcart's regular builder is able and ready to carry out the works.

2A As far as the Landlord's objection regarding the persistent delay in paying rent which has become due (Section 10(1)(b) of the 1964 Act); the lack of regular painting (Section 10(1)(a)) and the insufficient insurance of the building (Section 10(1)(c)) it is admitted that there were serious rent arrears; that no painting was carried out at three yearly intervals and that insurance in the sum of £50,000 was carried out by Mr Cosgrove whereas Mr Cathcart was advised and required insurance in the sum of £100,000.

B There was no forfeiture and therefore there could be no waiver by the Landlord when he accepted rent at a later date. The agreement in the High Court followed the payment of accrued rent in order to obtain relief from forfeiture/ejectment. That agreement included the payment by the Tenant of the Landlords costs - which are still outstanding.

The Landlord was doing everything in his power to get his rent due by going to Court.

C Refers to Vol 27 Halsbury's Laws of England (Fourth Edition) at para 500:-

"To establish this ground, the landlord must show that the tenant ought not to be granted a new tenancy in view of his persistent delay in paying rent which has become due. It is sufficient that there is a history of late payment, although it need not be prolonged; nor need there be substantial arrears of rent (Hopcutt v Carver (1969) 209

Estates Gazette 1069 CA and Horowitz v Ferrand [1956] CLY 4843, where it was said that a landlord was not expected to be subjected to the "work and irritation of dunning the tenant for the rent".

D Submits that although the Lands Tribunal is given a discretion in Section 10(1)(a), (b) and (c) this is not a suitable case where the Lands Tribunal should exercise that discretion in favour of the Tenant.

DECISION

The parts of Section 10 of the 1964 Act which are relevant to this matter are as follows:-

"(1) The grounds on which a landlord may oppose an application made under Section 8 to the Lands Tribunal for a new tenancy are such of the following grounds as may be stated in the landlord's notice to determine under section 4, that is to say:-

(a) where under the current tenancy the tenant has any obligations as respects the repair and maintenance of the holding, that the tenant ought not to be granted a new tenancy in view of the state of repair of the holding, being a state resulting from the tenant's failure to comply with those obligations;

(b) that the tenant ought not be granted a new tenancy in view of his persistent delay in paying rent which has become due;

(c) that the tenant ought not to be granted a new tenancy in view of other substantial breaches by him of his obligations under the current tenancy, or for any other reason connected with the tenant's use or management of the holding;

(f) that on the termination of the current tenancy the landlord intends -

(i) to demolish or rebuild the premises comprised in the holding or a substantial part of those premises; or

(ii) to carry out substantial works of construction on the holding or part thereof;

and that the landlord could not reasonably do so without obtaining possession of the holding."

The Landlord did not proceed with his objection under Section 10(1)(g) of the 1964 Act. In order to succeed in his objection under Section 10(1)(f)(i) to a new tenancy being granted he must show that (a) his intention must have "moved out of the zone of contemplation - out of the sphere of the tentative, the provisional and the exploratory - into the valley of decision". (See Asquith LJ in Cunliff v Goodman [1950] 2KB 237, [1950] 1 All ER 720.) The relevant time at which the Landlord's intention must be shown to exist is at the hearing of the application for a new tenancy (See Viscount Simonds in Betty's Cafes v Phillips Stores [1958] 1 All ER 607). He also must show in this Case that the proposed demolition of part of the premises is of a substantial part thereof.

Mr Lowry invited the Tribunal to accept Mr McCusker's estimate of cost of works and to compare that as insubstantial with the capital value of the entire holding at £100,000. For two reasons the Tribunal must reject that comparison ie Mr McCusker estimated for works shown to him by the Tenant on the premises. He was not present at the first day's hearing and had not heard the evidence of the officer from Building Control. His estimate was increased from £317.35 (including VAT) by a further £320 (including VAT?) for a proper dust screen and for covering the expensive printing machinery in situ, but that increase was his "guesstimate" when giving verbal evidence. That coupled with his limited experience leads the Tribunal to give only little weight to his opinions. Secondly the comparison with capital value of the entire holding is misleading for that capital value might be considerably increased or decreased by a comparatively small expenditure on works.

That leaves the Tribunal with Mr Cooke's evidence that the demolition of some 1,000 square feet of working area should be compared with a total working area of some 3,200 square feet. On that basis the Tribunal is satisfied that the demolition is of a "substantial part of those premises".

Coming now to the question of the Landlord's intention at the date of hearing the facts show:-

1. The Landlord was required to correct in one way or another the unapproved and unsatisfactory development of this first floor.

2. He had endeavoured over a period of time to come to an arrangement with Building Control. When the Tenant was brought into the discussions with the Building Control officer at a site meeting he refused to allow certain works to be done. (In this matter

the Tribunal prefers the evidence of Mr Morrison of Building Control and the Landlord to that of Mr Cosgrove, the Tenant. Mr Cosgrove was an unsatisfactory witness in a number of matters.)

3. The Landlord then issued a Section 4 Notice to Determine Business Tenancy on 27th November 1992.

4. He had until the date of this hearing to show that his intention, delineated by his objection to the grant of a new tenancy, had become a proper and real decision.

At this hearing he showed in evidence:-

(a) that he is ready to carry out the demolition in order to comply with the requirements of Building Control rather than be found guilty of an offence under the Building Regulations (Northern Ireland) Order 1979;

(b) that he has obtained a proper evidence of the cost following a proper survey of the premises;

(c) that he has finance immediately available;

(d) and that a builder, used by the Landlord from time to time on various properties, is able and ready to carry out the required works.

The Tribunal is satisfied that the Landlord's intention has moved into the valley of decision.

As far as whether the Landlord could not reasonably carry out the works without obtaining possession the Tribunal once again has to decide between the evidence of Mr McCusker and Mr Cooke. Mr McCusker considered that the work could be done in one weekend and provided a dust screen from floor to roof was erected and the printing machines, computers etc were properly covered, the demolition could be carried out from underneath with little working space. Mr Cooke, on the other hand was of the opinion that the contractor could not do all the works without having the whole premises empty. Mr Morrison agreed with Mr Cooke that the works could not be done in less than a fortnight. In his evidence Mr Cosgrove underlined that his machinery was intricate, expensive printing machinery, computer machinery etc. The Tribunal accepts Mr Cooke's evidence in its entirety but especially as to the contractor's working space as more realistic than Mr McCusker's evidence. The Tribunal has no doubt that in the light of the machinery in situ and the

chance that dust damage could ensue, the contractor would require the removal of that machinery for that reason alone apart from the working space required for safety reasons.

The Tribunal is satisfied that the Landlord could not reasonably have the works carried out without obtaining legal possession of the holding.

As far as the Landlord's objections under Section 10(1)(a), (b) and (c) of the 1964 Act the facts are clear, and apart from the one payment of rent where the evidence differed it was accepted by Mr Lowry that the rent was often in arrears but he submitted that the Tribunal could not consider the arrears before the agreed settlement of the High Court Case for by his acceptance the Landlord had waived his right to use them in this Case. He also invited the Tribunal to use the discretion given in Section 10(1)(a), (b) and (c) in favour of the Tenant.

Had the only objections been under Section 10(1)(a) and 10(1)(c) of the 1964 Act viz:- the Tenant had not carried out the three-yearly painting of the premises nor had he insured the premises for an amount reasonably representing the cost of rebuilding the premises, the Tribunal would not have found a great difficulty in exercising that discretion in favour of the Tenant. The Landlord had adopted a laissez faire attitude to the Tenant's non-compliance with the obligations under his lease and although they may have been mentioned in discussions he took no further action.

As far as the consistent late payment or non-payment of rent (even the payment due on 1st June 1993 had not been received by the Landlord by the second day of the hearing on 17th June although Mr Cosgrove in evidence said he had given a cheque to his solicitor) that is well-proven and admitted. The Tribunal does not accept that the result of the agreement in the High Court to pay and accept arrears of rent including interest thereon amounted to a waiver by the Landlord. Indeed that was one of the inconveniences and expense suffered by the Landlord in recovering the rent owed to him. Nor can the Lands Tribunal use its statutory discretion in favour of the Tenant in such a case of continuous tardy and non-payment of rent when due. The conduct of the Tenant as a whole in regard to his obligations under the tenancy eg the consistent history of rent payments, the previous litigation for non-payment, the lack of carrying out the three-yearly painting and the under-insuring of the premises all point to the Tribunal not exercising discretion in favour of the Tenant (see Eichner v Midland Bank Executor and Trustee Co Ltd [1970] 2 All ER 597 CA). Nor did the Tenant make any proposals for a remedy.

Thus under both the Landlord's main objections to the granting of a new tenancy the Tribunal is satisfied that he has established his grounds of objection. In accordance with Section 11 of the 1964 Order the Lands Tribunal "shall not make an order .... for the grant of a new tenancy".

The Tribunal orders that the tenancy is terminated on 30th September 1993.

The Applicant will pay to the Respondent his costs of this application, if not agreed to be taxed by the Registrar of the Lands Tribunal on the County Court Scale.

ORDERS ACCORDINGLY

Mr A L Jacobson

24th June 1993 **Lands Tribunal for Northern Ireland**

<u>Appearances</u>:-

Mr Jonathon Lowry of Counsel (instructed by Messrs T R Gibson & Co, Solicitors) for the Applicant.

Mr Mark Horner of Counsel (instructed by Messrs L'Estrange & Brett, Solicitors) for the Respondent.