LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

IN THE MATTER OF AN APPLICATION

BT/76/1993

BETWEEN

PATRICK JOSEPH COREY - APPLICANT

AND

ALOYSIUS DONNELLY AND JAMES BRENNAN - RESPONDENTS

Lands Tribunal for Northern Ireland - Mr A L Jacobson FRICS

Cookstown - 2nd November 1993

This was an application for a new tenancy for business premises at No 32 Burn Road, Cookstown. Those premises had been built around the turn of the century and had been used as a Hall for the Ancient Order of Hibernians ("the AOH"). It had lain vacant for about a year and on 21st May 1988 the Applicant entered into occupation for a term of 5 years at a rent of £1,000 per annum.

On 5th April 1993 the Respondents (who were the Trustees of the Hall) issued a Landlord's Notice to Determine Business Tenancy under Section 4 of the Business Tenancies Act (Northern Ireland) 1964 ("the 1964 Act"). This brought the existing tenancy to a close on 16th October 1993.

The Applicant on 28th May 1993 informed the Respondents that he was unwilling to give up possession of the premises and on 28th July 1993 he made this Application under Section 8 of the 1964 Act to the Lands Tribunal.

The Section 4 notice by the Respondents objected to a new tenancy on the following grounds:-

"1. You have failed to pay the rent of the said premises.

2. You have failed to pay the ground rent of the said premises.

3. You have failed to insure the premises or furnish prove (sic) of such insurance.

4. You have failed to carry out repairs to the premises or to spend the sum of £4,500.00 on the premises.

5. You have failed to be responsible for the payment of Employers and public liability insurance in respect of the premises.

6. You have failed to keep the premises in proper repair, all of these being provisions which you were required to do under the terms of your Tenancy Agreement dated 27th May 1988."

Mr Dermot Fee of Counsel (for the Respondents) called Mr Aloysius Donnelly to give evidence.

Mr Donnelly testified he was one of the original Trustees of the hall who entered into the agreement with Mr Corey for the lease of the premises in 1988. That agreement contained a user clause to use the premises for the retail sale of musical instruments. It required a yearly rental payment in advance of £1,000 per annum. In the Schedule to the Agreement various stated repairs costing £4,500 were required and such expenditure would be credited against the rental payments due when receipts for such work done were produced from time to time. He testified that no such receipts ever had been produced.

He further testified that the Agreement also required the premises to be insured for not less than £10,000 and a public liability insurance was to be taken out. No documentation of such insurances had ever been shown to the Trustees. However in cross-examination he agreed that he had not asked for such documentation until a solicitor's letter was sent in May 1993. That letter also asked for payment of rent but no request for rent was made previously to that date.

Mr Joseph McAvoy of Counsel (for the Appellant) called Mr Kevin Teague BSc CEng MIEI and Mr Patrick Joseph Corey and Mr Patrick O'Neill Quantity Surveyor/Estimator to give evidence.

Mr Teague submitted a report dated 2nd February 1993 which was produced following an inspection of the premises on that date. He testified that the building was of rubble masonry walls with a slated roof. The west wall was off vertical and the mortar at the lower level was partially disintegrating due to dampness. He considered that the building could have been in that condition for the past 10 years and it could last for perhaps another 10

years. He could not recommend that a new roof should be installed for if three tie bars across the roof trusses were removed there was a likelihood of that west wall collapsing. That wall could be buttressed or shored and a new roof installed with the wall properly tied, but that would be costly and would not prove a permanent repair.

Mr O'Neill a Quantity Surveyor/Estimator testified that he had 24 years experience and had been instructed to estimate the cost of the repairs done and told to him by Mr Corey at prices current at the period between May/June 1988 and October 1988. The total cost was estimated a £8,731 excluding VAT.

In answer to a question from the Lands Tribunal he testified that his pricing was based on the work being carried out by contractors. VAT would have added 15% on perhaps 60% of the total cost.

He further testified that he had seen no actual receipts for the repairs actually done.

Mr Corey testified to the facts preceding his signing of the Agreement. In this respect some of those facts were diametrically opposed to the evidence of Mr Donnelly. He explained that the sum of £4,500 to be spent on repairs was a figure mentioned by a Mr Neeson who was the treasurer of the branch of the AOH but who was now deceased. Neither Mr Neeson nor he took any professional advice on that amount. He testified that he had spent about £9,000 on repairs making the premises fit for his retail business of selling musical instruments, but he had no receipts from any person carrying out the respective works; there were no specifications or plans drawn up by those persons; there was no documentation whatsoever. He further testified that he had borrowed £10,000 from the Bank - £5,000 for additional stock for the repaired premises and £5,000 for the repairs - but he had spent £9,000 on the repairs. All persons carrying out those repairs were paid in cash.

In cross-examination he told the Tribunal that he had not taken out policies of insurance for the building and for public liability - he asked for a quote from the insurance company and the £400 asked for he could not afford. When asked about individual persons carrying out repairs he "could not recollect" the sum paid for various works. He had taken notes of all payments but these notes were mislaid.

DECISION

The evidence given in this case left much to be desired. The Trustee of the AOH Mr Donnelly gave his evidence straightforwardly but his recollection was not always sharp as to what discussions took place in or around 1988.

Mr Teague's evidence was clear and concise but he had not seen the premises in 1988. However his report was most helpful to the Tribunal.

The Tribunal, while accepting all the pricing in Mr O'Neill's report which was well presented, must reject his final figure for the whole essence of his report was based on the repairs Mr Corey told him had been carried out (and which he could measure). His pricing was based on what recognised contractors would have charged at the operative time. Mr Corey did not carry out any repairs on that basis for, if he had so done, he would have receipted accounts which he could have submitted to the Respondents at that time and to the Lands Tribunal at this hearing. His evidence was that at all times he paid cash and got no receipts.

Coming now to Mr Corey - he was a most unsatisfactory witness and where his evidence was in direct opposition to Mr Donnelly's evidence the Tribunal prefers the latter person's evidence.

The facts found by the Tribunal are as follows:-

1. The Tenancy Agreement was entered into freely by Mr Corey. A handwritten memorandum made (prior to the Tenancy Agreement) by the then Treasurer of the AOH Division 23 while negotiations were going on between Mr Corey and the Treasurer resulted in the formal Tenancy Agreement produced by the Respondent's solicitors which was signed by both parties and duly witnessed.

2. The formal Tenancy Agreement followed that written memorandum except in three aspects:

    (a) The Tenancy Agreement made the Lessee "responsible for all Employers and Public Liability Insurance cover and shall produce the Policy of such Insurance to the Trustees if so requested".

(b) The Schedule of repairs to the Tenancy Agreement to be carried out by the Lessee was to "be carried out within a period of 4 years from the date hereof" whereas the written memorandum did not include that quoted phrase.

(c) That repair covenant also read that the "Lessee shall carry out repairs to the said property as is detailed in the Schedule hereto the Lessee being credited in lieu of rent by production of receipts in respect of the said repairs".

That phrase was not included in the written memorandum.

3. That Schedule reads:

"Details of repairs and improvement to be carried out by Lessee. Strip existing roof and remove all debris to dump. Refelt and roof with corregated (sic) iron and paint after one year. Replace Fashia (sic) board and spouting. Plaster all inside walls and repair all inside defects making property fully secure. Paint interior and exterior of premises. Fit gate at side and supply Trustees with key."

4. The Applicant was trading at No18 Burn Road a little distance from the subject premises where his overheads (including rent and rates) were proving more than his business could bear.

5. The Applicant employed a surveyor/estimator to produce a figure of the cost of repairs carried out by the Applicant during the period between May 1988 (at the date of the Tenancy Agreement) and October 1988 (when the Applicant commenced trading in the premises).

The estimator's figure was £8,731 excluding VAT. He suggested that VAT would have been paid at a rate of 15% on approximately 60% of £8,731.

That estimated figure was based on the prices paid to bona fide contractors.

6. The Applicant instructed the estimator what repairs and alterations he had done in that period and the estimator measured what was possible and then priced his bill.

7. The Applicant produced no paid accounts to the Tribunal. He paid cash, obtained no receipts, and did not remember the names of most of the people who carried out the

work. He told the Tribunal he had kept notes of the amounts but these notes were mislaid!

8. The Applicant did not ever take out fire insurance nor public liability insurance.

9. The Applicant has made no payment of rent.

These facts show that Applicant, although having agreed to the terms of the Tenancy Agreement, wilfully ignored these matters he had covenanted to do. On the facts in front of the Tribunal, although he repaired the inside of the premises and installed new windows it is impossible for the Tribunal to come to any conclusion as to the amount the Applicant actually spent on repairs. He paid cash to all those people who carried out the various jobs and received no paid receipts. Yet he knew that the Trustees required those receipts so that the expenditure could be set off against the £1,000 per annum rent due.

So also with the required insurance - he knew that he was required to produce evidence that such insurance had been carried out. On at least two occasions he was requested for such proof but continued to put off the evil day. As far as the roof was concerned no effort was made to put the work required in train. It very well may have exceeded the sum of £4,500 agreed by both parties to be spent on repairs, but when any estimate had been obtained that was the time further negotiations with his landlord might have produced a satisfactory answer.

The Applicant's whole approach (and his demeanour in giving evidence) was that regardless of the conditions in the Tenancy Agreement he did not consider he should do anything but what was absolutely necessary to allow his business to continue at the lowest possible overhead cost.

The Tribunal has no hesitation in upholding the Landlord's objections to a new tenancy. The tenancy will come to an end on 31st January 1994.

The Applicant will pay the reasonable costs of the Respondents, if not agreed to be taxed by the Registrar of the Tribunal on the County Court Scale.

ORDERS ACCORDINGLY

Mr A L Jacobson

3rd December 1993 **Lands Tribunal for Northern Ireland**

Appearances

Mr Joseph McAvoy of Counsel (instructed by Plunkett Quinn & Co, Solicitors) for the Applicant.

Mr Dermot Fee of Counsel (instructed by P A Duffy & Co, Solicitors) for the Respondents.