LANDS TRIBUNAL FOR NORTHERN IRELAND

LANDS TRIBUNAL AND COMPENSATION ACT (NORTHERN IRELAND) 1964

BUSINESS TENANCIES (NORTHERN IRELAND) ORDER 1996

BT/90/2002

BETWEEN

FUJITSU TELECOMMUNICATIONS EUROPE LIMITED – APPLICANT/TENANT

AND

BRUNSWICK (9 LANYON PLACE) LIMITED – RESPONDENT/LANDLORD

Premises: 9 Lanyon Place, Belfast

Lands Tribunal – Michael R Curry FRICS IRRV MCI.Arb Hon.FIAVI

Belfast – 20th December 2002

PART I

Introduction

1. This Decision concerns an urgent application made to the Tribunal on 6th December 2002. Article 26 of the Business Tenancies (Northern Ireland) Order 1996 ("the 1996 Order") gives the Lands Tribunal a power to deal with disputes arising from the unreasonable withholding of consent to alienation and to award damages.

2. The Applicant, Fujitsu Telecommunications Europe Limited ("FTEL"), is the tenant of Brunswick (9 Lanyon Place) Limited ("Brunswick"), under a Lease dated 21st January 2000 ("the headlease") of the third, fourth and fifth floors of premises known as 9 Lanyon Place, Belfast. FTEL claims that Brunswick has unreasonably withheld its consent to the subletting ("the proposed sub-lease") of one quarter of the third floor to the Global Email Company Limited ("GEM").

3. The parties agreed that the question of whether the consent had been unreasonably withheld should be dealt with as a preliminary point. As delay might be fatal to the proposed sub-letting, the application was heard on Friday 20th December 2002. It was suggested that, in the interests of speed, an immediate decision might be given,

with reasons reserved. In the course of the Hearing it became apparent to the Tribunal that if a decision with reasons could be given promptly, that might be more helpful.

4. On Monday 23rd December 2002 a reasoned decision, subject to editorial and slip corrections, was sent by email to the parties. This final version is intended to correct such errors and omissions (some important) but avoid departure from the original text apart from necessary changes in the interest of clarity and completeness. The final conclusions remain the same.

5. GEM already occupies the other three quarters of the floor under a sub-lease dated 8th May 2002 ("the sub-lease"). The headlease was granted by Dunloe Ewart (9 Lanyon Place) Limited and, reflecting a change on 28th June 2002 in the shareholders and Directors of the group holding company, in August 2002 Dunloe Ewart (9 Lanyon Place) Limited changed its name to Brunswick (9 Lanyon Place) Limited.

6. The proposed term for the sub-lease is 3 years and 3 months from the 1st November 2002 to 28th February 2006. The term of the headlease is 20 years from 1st March 2001.

7. Mark Orr QC with Keith Robinson BL instructed by Tughans, Solicitors appeared for the Applicant. Mr Mark Andrew Fountain, Director of Quality and Facilities Management for FTEL gave oral evidence.

8. Stephen Shaw QC instructed by C & H Jefferson, Solicitors appeared for the Respondent. Mr Peter James Edward McMorran, an experienced Chartered Surveyor and employee of Brunswick managing agents for the building - DTZ McCombe Pierce - prepared a report and gave oral evidence. Mr Acheson Elliott an employee of the group holding company of which Brunswick was a member also gave oral evidence.

The Applicable Law

9. The Application by FTEL is brought under Article 26(5) of the 1996 Order and is based on the proposition that Brunswick has unreasonably withheld its consent to the proposed underletting.

10. The relevant principles are set out in 2 guideline cases:

International Drilling Fluids Limited v Louisville Investments (Uxbridge) Limited [1986] 1 All ER 321 CA and

Mount Eden Land Limited v Straudley Investments Limited 74 P&CR 306 CA

These are summarised in *Woodfall's Law of Landlord and Tenant Vol 1* at para 11.138.

11. The principles were applied in this jurisdiction in Lebreh Limited & another v Laganside Corporation [2001] NIJB 378. In Lebreh, at p 383 Weatherup J also noted:

> "While the principles may be the same their application may differ depending upon the nature of the agreement between the parties and the nature of the term being considered. As Lord Steyn stated in R v Secretary of State for the Home Department ex parte Daly [2001] 3 All ER 433 at 477, 'In law context is everything'".

12. Some care must be taken on one point; in this jurisdiction the burden of proof lies on the applicant to demonstrate that the respondent has acted unreasonably whereas the Landlord and Tenant Act 1988 reversed that position in England and Wales.

13. Weatherup J referred to *Halsbury's Laws of England* 4th Ed. Reissue Vol. 27(1) para 401 which sets out guidance also particularly relevant to some aspects of this application:

> "What is or is not 'reasonable' is a question of fact to be decided in light of the circumstances existing at the date the landlord has asked for his consent, which may have been wholly unforeseen at the date of grant of the lease. The landlord will not be held to have acted unreasonably if he acted as a reasonable person might have done in the circumstances; but where the lease imposes a heavy burden on the tenant, as, for example, where the rent is high, the grounds for refusing consent should be substantial.

[see Sheppard v Hong Kong and Shanghai Banking Corporation (1872) 20 WR 459.]

It will generally be unreasonable for the landlord to refuse consent on grounds unconnected with the personality of the proposed [sub-lessee] …"

And later:

"Whilst a landlord need usually consider only his own relative interests, there may be instances where there is such a disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent that it is unreasonable for the landlord to refuse consent." [International Drilling]

14. In Mount Eden the landlord was only prepared to give its consent to an assignment subject to a condition that the sub-tenant's deposit be held jointly by itself and the respondent. The appellant contended that, inter alia, the condition was reasonable in that it would ensure that the appellant had early warning of any default by the sub-tenant, thus enabling them to police the respondent's obligations under the lease. The Court of Appeal dismissed the appeal holding that the condition was an illegitimate attempt on the appellant's part to improve its position under the lease. The lease gave no right to the appellant to seek early warning of a sub-tenants default. Phillips LJ also held (per curiam) that it will normally be reasonable for a landlord to refuse consent or impose a condition if it is necessary to prevent his contractual rights under the lease from being prejudiced by the proposed assignment or sub-lease. It will not be reasonable for a landlord to seek to impose a condition which is designed to increase or enhance the rights he enjoys under the headlease.

15. In *Landlord and Tenant Law* 2nd Ed. by Wylie at 22.03 the author discusses collateral advantage in this jurisdiction:

"If the proposed sub-tenant is respectable and financially sound so as to compare well with the tenant, it probably is not a valid ground for refusing consent that, if the head-tenancy is forfeited or terminates early for some other reason, the landlord is likely to be saddled with the sub-tenant as direct tenant. The risk of the landlord suffering financial losses must therefore, be extremely remote. Unlike in the case of an assignment, the essential feature of a sub-

letting is that the landlord continues to enjoy the benefit of the head-tenancy and the covenants in it ….".

16. Also *Wylie* at 21.11:

> "In particular, the courts will not permit a landlord to use the opportunity of a request for consent to an assignment to secure a collateral advantage or benefit over and above what the existing lease provides. This includes seeking *additional* security or a better surety …" (Mount Eden)

The Grounds

17. On or about 2nd October 2002 FTEL sought consent and on or about 18th November 2002 Brunswick indicated to FTEL that it was not prepared to consent "taking account of the audited accounts provided in respect of the proposed sub-lessee the sub rent proposed and the terms and conditions of the proposed sublease". These reasons were set out in a letter dated 18th November 2002 from Mr McMorran.

18. In this application FTEL says Brunswick is withholding consent unreasonably for, among other things, the following reasons:

    (i) On 8th May 2002 FTEL granted a sub-lease of the other three-quarters of the 3rd floor to GEM until 28th February 2006. The proposed underletting of the remaining quarter is to the same sub-tenant and is also until the same termination date.

    (ii) The sub-lease of 8th May 2002 was approved by Brunswick who had executed a Licence to Underlet with FTEL and GEM on 3rd April 2002.

    (iii) The sub-lease of 8th May 2002 as approved by Brunswick has a clause giving GEM a right of "first refusal" on the remaining quarter which GEM now wishes to take.

19. The right of "first refusal" could only be triggered by an offer from a stranger and Mr Orr explained that FTEL were not relying on a right of first refusal as such but argued that the granting of such a right was a material part of the context.

The Headlease

20. The term of the headlease is 20 years commenced on 1st March 2001 and the relevant provisions are:

3.10.2 Not to assign mortgage charge or underlet the whole of the Premises without the consent both of the Superior Landlord and the Landlord but such consent in the case of the Landlord is not to be unreasonably withheld to an assignment or underletting of the whole of the Premises to a good and suitable assignee or underlessee demonstrably capable of paying the rents reserved by this Lease and performing and observing all of the covenants on the Tenant's part and conditions contained in this Lease.

3.10.4 Not to underlet any part of the Premises unless such part is a Permitted Part, the consent of the Landlord is obtained (such consent not to be unreasonably withheld or delayed) the consent of the Superior Landlord is also obtained and the other provisions of this clause 3.10 which apply to under-lettings are observed.

3.10.7 *On the grant of any underlease*:

3.10.7.3 to reserve a rent which is the greater of the market rent as at the time of the grant of the underlease (assessed in accordance with the principles in Schedule 2) or the rent reserved by this Lease or the greater of the proportionate part of the market rent of the Premises as at the time of the grant of underlease (as so assessed) and the proportionate part of the rent reserved by this Lease where only part of the Premises is being underlet such market rent or such proportionate part of such market rent or such proportionate part of rent reserved by this Lease as at such time to be approved by the Landlord

3.10.7.4 to include such covenants of the underlessee as are not inconsistent with or impair the due performance and observance of the covenants of the Tenant in this Lease.

21. Mr Orr pointed out that the headlease generally was an unexceptional commercial lease but noted there was no "effect of waiver" clause (see e.g. the precedents in *Drafting & Negotiating Commercial Leases* 4th Ed by Murray Ross).

The Context

22. The extent of the 3 floors held by FTEL amounts to some 77,500 sq ft and the current rent is marginally in excess of £1M a year.

23. In or about June 2002 there had been very significant changes in the shareholders of the landlord group of companies and the Tribunal accepts that new owners may change company policies and see things differently. But so far as these issues are concerned, they must of course continue to act within the range of what is reasonable.

24. Mr Fountain explained that FTEL is part of the Fujitsu Group which has a turnover of the order of £50 Billion and some 110,000 employees. The headquarters of FTEL is in Birmingham and the turnover of FTEL is of the order of £130M per annum and the number of employees is of the order of 750. He said that the first half results for FTEL were as good as any other division of the group and as good as anyone else in the telecoms sector. FTEL also had about 100 employees in Antrim and other employees elsewhere in east Belfast and at the airport. Mr Fountain said that FTEL had never defaulted on rent and there had been no complaint from the landlord. FTEL had 18½ years left of their headlease and they had every intention of honouring the headlease, but as they had empty space they would wish to let that to mitigate their costs.

25. Although the landmark building had signage suggesting that it was some form of headquarters for Fujitsu the reality was that only one FTEL employee was in the building and there were some other parts of their take occupied by GEM and tenants at will. That was not the original plan; FTEL originally intended to expand to occupy the whole of the three floors over a period of time. They had not expanded as expected because of a change of climate in the sector. The original plan would have seen some 400 employees eventually and perhaps 200 by now. Mr Fountain accepted that the telecoms sector had been volatile in the recent past and significant players had come and gone.

26. GEM is a relatively new business which Mr Fountain described as a email posting service ie it looks after email traffic for other people. There was no significant business or trading relationship between FTEL and GEM. Mr Fountain said that if he

had been asked to look at the trading accounts for GEM he would have passed the request to someone more specialised in considering financial accounts. He accepted that they did not look promising but said that the overall business context must be considered.

27. The sub-lease from FTEL to GEM was based on a rent that rose in steps over the term of the sub-lease and Brunswick had no objection to a stepped or ramped rent for the proposed sub-lease. The reason for the ramped rent in the sub-lease to GEM was, Mr Fountain said, to facilitate the development of GEM as a relatively new business.

28. The Tribunal was referred to in an announcement in the *Belfast Telegraph* on 18th December 2002 of the award of a contract with *Tourism Ireland* said to be worth over 3M Euros over the next 3 years to handle all of Tourism Ireland international consumer telephone and email queries and this would result in an expansion of GEM's employees from 450 people to 485 people initially.

29. Mr Shaw suggested that the general perception was that the bubble had burst in this sector. Mr Fountain said no and suggested that Mr Shaw was thinking of the dot com era. Mr Fountain was happy that GEM had good growth plans and was hoping that they would take the extra quarter floor and more later. He considered GEM to be good tenants, there had been only trivial issues in regard to air conditioning and night working.

Service Charge & Rent

30. Two of the landlord's objections may be dealt with quite shortly and, if the Tribunal may say so, possibly addressed by the parties equally shortly.

Service Charge

31. The proposed sub-lease includes a cap on the rate of increase of service charge and the Tribunal accepts that such a limitation is inconsistent with the corresponding covenant of the headlease. As it is not suggested that the requirement at 3.10.7.4 of the headlease is itself unreasonable, on one view the failure to comply is fatal and means that Brunswick is under no obligation to consider whether or not it is reasonable to withhold consent or consider any other matter. Mr Fountain had not

been aware until immediately before the hearing that they were being challenged about the cap on service charge growth. However, on the assumption that the Tribunal has a jurisdiction, it concludes that this inconsistent cap on the rate of increase of service charge is a valid reason for refusal of consent.

Rent

32. The aggregate rent to be paid under the proposed sub-letting for the term of 3 years and 3 months is equivalent to an average rent of about £10.13 per sq ft per annum. Mr McMorran pointed out that the current rent payable under the headlease is equivalent to £13.39 per sq ft per annum.

33. By clause 10 of the sub-lease provision was made for GEM to have first option should a bona fide offer be received from a stranger in respect of any part of the remaining quarter of the 3rd floor. The arrangement was that GEM could enter into an agreement and "the terms of this lease [sub-lease] shall be varied to reflect the additional space and the rental due under the terms of this [sub-lease] will be adjusted on a pro rata basis to take account of the additional area involved ….".

34. The rent under the sub-lease is less than the rent under the headlease. Mr Fountain explained that the proposed new sub-lease was intended to provide for exactly equivalent rents and steps.

35. Mr Orr pointed out that that £13.39 per sq ft per annum would be exceeded in about 14 months time but Mr Shaw submitted and the Tribunal accepts that Brunswick were entitled to consider whether the average of the ramped rent per square foot fell short of the rent under the headlease. Mr Shaw accepted that if the average rent under the sub-lease exceeded that figure that would be sufficient.

36. Mr McMorran did not give evidence as an expert witness and the Tribunal has reservations about his approach. Unless the lease provides otherwise, comparison of the rents under the headlease and the proposed sub-lease must be on the basis of comparison of like with like. Mr McMorran reduced the aggregate rent to be paid under the proposed term of the sub-lease to an annual equivalent. His approach to the headlease was quite different. He went straight to the headline rent and did not take into account the heavily discounted actual rents which were payable for the first

2 years of the headlease. It seems to the Tribunal that the equivalent rent per sq ft per annum of the aggregate rent to be paid under the headlease during the period up to first rent review is substantially less than the figure on which Mr McMorran based his comparison.

37. However, on a preliminary view of the arithmetic, the Tribunal accepts that although the proposed rent may be within perhaps 10% of the headlease rent, it is still below it.

38. The Tribunal therefore accepts that the Tenant has not shown that the proposed rent is equal to or greater than the rent reserved by the headlease but it is inclined to think that it does not fall as far short of that rent as Mr McMorran's arithmetic (which relies on the headline rent only) suggests. The Tribunal however accepts the shortfall on rent to be a valid reason for refusal of approval and refusal of consent.

39. The Tribunal was referred to *Wylie* and Deasy's Act (The Landlord and Tenant Law Amendment Act (Ireland) 1860) which is not repealed. Mr Orr suggested that the rental concession granted in the sub-lease was signified in writing and amounted to a general waiver of that covenant. The rent in the proposed sub-lease equated with that in the sub-lease and FTEL could not therefore object.

40. The Tribunal does not agree with Mr Shaw's attempt to distinguish between the company as owned prior to June 2002 and after June 2002 but accepts that the waiver of strict terms in the sub-lease was not a general waiver and does not generally govern relationships between the parties in relation to the rent under another sub-lease and for a different holding.

Other Grounds

41. Doing the best it can with the evidence, including that of Mr McMorran and Mr Elliot, the Tribunal finds that Brunswick's other grounds for withholding consent to the proposed sub-lease were as follows.

Default by GEM

42. The audited accounts provided on or about 16th October 2002, relating to GEM, indicated losses of £2.2M and £3.28M respectively for the years ended 31st

December 2000 and 31st December 2001. During the same period the net asset value of the company reduced from £5.16M to £1.882M. No interim trading figures for 2002 were provided.

43. In Mr McMorran's view if the sub-lease were to proceed and for any reason, Brunswick inherited GEM as a direct covenant, no status information provided demonstrated the capability of GEM to pay the rent reserved.

44. However the Tribunal notes that:
    a. the total rent to be paid under the proposed sub-lease is £200,000 or thereabouts over the next 3 years and 3 months; and
    b. neither Mr McMorran nor Mr Elliot were aware of the accounts being passed to a suitably qualified financial expert for review with regard to GEM's relative strength in comparison with FTEL or otherwise.

45. Further, Brunswick's relationship is with FTEL not GEM.

Default by FTEL

46. Brunswick were also concerned about FTEL for reasons which the Tribunal finds mildly surprising.

47. Clause 5.4 of the Licence to underlet dated 3rd April 2002 (i.e. relating to the sub-lease) contained the following provision (for convenience- 'tenant default'):

> "The Tenants [FTEL] must pay to the Landlord forthwith upon the grant of this licence the sum of £25,000 together with Value Added Tax thereon (if applicable) in respect of an amount of the cost to the Landlord [Brunswick] of insuring against non payment of the rent due under the Lease by reason of the insolvency of the Tenant [FTEL]".

48. The evidence indicated that a Mr Alain McKinney, then an Associate Director of Insignia Richard Ellis Gunne, had been seeking to obtain the relevant insurance for tenant default. Although the clause makes no provision for FTEL to obtain cover and Mr Fountain said that Mr McKinney had no instructions to act from them in the matter and Mr Elliot had been in Email correspondence with Mr McKinney, Mr Elliot said he thought the responsibility lay with FTEL. Mr Fountain was quite clear that placing the

insurance was the responsibility of Brunswick and they were making a contribution towards the cost and not necessarily paying the full amount. In regard to the proposed sub-letting FTEL therefore offered a pro rata contribution of £8,000.

49. The Tribunal accepts that FTEL would necessarily be involved in providing information in regard to tenant default insurance and that in order to ensure that Brunswick had the benefit of the policy, it would best be placed by Brunswick. In the event, although the correspondence indicated that a Mr Stephen Flannigan was drawing up a policy for approval, no cover was ever put in place.

50. Mr Elliott concluded that no policy had been put in place because the insurers found FTEL a high risk. That was based on advice that he had received from Mr McKinney verbally.

51. Mr Elliott confirmed that he based his assessment of the strength of FTEL on the refusal in the insurance market. He accepted that FTEL had been a perfect tenant with regard to rent of more than a £1M a year paid promptly on the dot. So Brunswick concluded on the basis of a conversation with Mr McKinney, who they thought was acting for FTEL and was obtaining insurance cover that was not their responsibility to obtain, that FTEL were a high risk.

52. On balance, the Tribunal finds that Brunswick were unreasonable in relying on the difficulty in obtaining tenant default insurance cover as a basis for concluding that FTEL were a high risk in regard to default on one quarter of one floor of the premises in Lanyon Place.

The Tenant Default Condition

53. Mr Elliott explained that Brunswick's concern with regard to the proposed sub-lease was that in the event of a default by FTEL, they would inherit GEM as a direct tenant. In turn, they were concerned about the risk of a default by GEM, having seen their audited accounts.

54. Having regard to the perceived risk, the position of the landlord was then set out in Mr McMorran's letter of 18th November:

"Should however FTEL be able to provide at their cost and for the benefit of my clients Tenants Default Insurance in respect of FTEL at the pro rata rent currently available by FTEL for the proposed accommodation and for the term of the sub-lease … then my clients may be willing to reconsider this matter.

Given your assurances regarding the covenant strength of FTEL I presume this insurance cover will be available."

55. In response Napier & Son, Solicitors for FTEL wrote:

"… our client is prepared to pay your client £8,000 to obtain its consent to this sub-letting. This sum is calculated on a pro rata basis with the £25,000 previously paid in respect of GEM's original Lease. This sum will be paid strictly on the understanding that our client is not agreeing to make future payments in respect of any other sub-letting to whether in relation to GEM or any other company."

56. Mr McMorran replied:

"…. I regret to advise that such a payment does not address my client's concerns expressed in my letter of 18 November 2002.

Given that the assurances expressed by your client representative regarding the covenant strength of FTEL, my clients find it surprising that Tenant Default Insurance is not available, however, if your client is able to provide alternative assurances, ie, a Parent Company guarantee, then my client may be willing to reconsider this matter."

57. In passing, the Tribunal indicates that it would be minded to regard a parent company guarantee condition as disproportionate in the circumstances.

58. A letter was put before the Tribunal from a Mr Paul Dudley, Joint Managing Director of TL Clowes (Warwick) Ltd who were Insurance Brokers employed by FTEL. Although this evidence was late in production and is hearsay and that must detract from the weight to be attached to it, they had investigated insurance protection for insolvency and tenant default guarantee. On 19th December 2002 they reported to FTEL that the cover is very complex and difficult to purchase and in the current climate is very unusual that this cover is considered let alone purchased. They found one underwriter in the Lloyds market who would consider the risk and he gave a

rough indication of premium of around £125,000 per annum based on a sum insurance of £1M. The underwriters view was that no client currently would consider this to be good value and the brokers agreed with him.

59. When questioned, Mr McMorran said he had never seen such an insurance requirement included in a lease, had never come across a premium being sought apart from the sub-letting in this building and that was the first time he had ever seen such a proposal and he had no evidence to otherwise question the status of FTEL.

60. Mr McMorran suggested that the landlord was open to alternative proposals with regard to reassurance about the strength of FTEL. However in the view of the Tribunal the relevant position is as set out in the letter of 18th December 2002 from the solicitors for Brunswick to the solicitors for FTEL

> "Our client considered the matter and taking account of the audited accounts provided in respect of the proposed sub-lessee, the sub-rent proposed and the terms and conditions of the proposed sub-lease, our client was unwilling to grant approval to the proposed sub-lease. Our client previously indicated that should your client be able to provide at their cost and for the benefit of our client tenant default insurance in respect of Fujitsu …. then our client might have been willing to reconsider the matter."

61. For the following reasons, the Tribunal concludes that the condition requiring tenant default insurance in respect of FTEL is unreasonable.

a. The Tribunal accepts that

   i. So long as the decision of Brunswick is within the margin of reasonableness, the application must fail (Woodfall at 11.141 and Shanly v Ward (1913) 29 TLR 714);

   ii. A reasonable landlord will be concerned at the ability of the incomer to meet obligations under the headlease as they fall due and it is a question of fact whether the information supplied to the landlord demonstrates the ability of the incomer to pay rent and perform obligations: Brunswick is entitled to consider the ability of GEM to pay the rent;

iii. The fact that Brunswick had permitted tenancies at will and consented in principle to a sub-letting to COMPAQ demonstrates that Brunswick has not applied a prejudiced view;

iv. Allied Dunbar at para 36 illustrates the principle that it is reasonable to take into account what might happen where the landlord may inherit the sub-tenant; and

v. It is not up to Brunswick to go on a quest to determine the relevant facts; the landlord was entitled to invite the applicant to make its case. But Brunswick having made a condition, FTEL were entitled to challenge its reasonableness.

b. The application concerns a short under-lease and there is no evidence of FTEL wishing to give up its interest. The proposal is for a sub-lease for 4 years out of a 20 year headlease.

c. There were substantial funds in GEM. FTEL were proposing to offset a further tranche of their rental obligations to Brunswick. The Tribunal finds that there was no adequately considered conclusion reached by Brunswick that:

   i. the personality of GEM had become objectionable or undesirable
      1. in absolute terms;
      2. in comparison with FTEL; or
      3. as a result of GEM's proposed modest expansion;

   ii. there was evidence of a probability or increased probability that the landlord would find itself in direct relationship with GEM as a consequence of the proposed sub-lease or otherwise.

d. The rent under the headlease is high.

e. The condition is disproportionate.

f. As the condition relates to FTEL and not GEM, it is too remote from the personality of GEM.

g. There appears to be an attempted collateral purpose of improving Brunswick's position under the headlease.

h. Although FTEL is in a volatile sector where household names have come and gone and it is apparent FTEL's activities at Lanyon Place have not gone the way they expected, and they were trying to cut their losses by sub-letting etc., that does not of itself raise a question about the strength of their covenant.

i. Brunswick were unreasonable in relying on the difficulty in obtaining insurance cover as a basis for concluding that FTEL were a high risk in regard to default on one quarter of one floor of the premises in Lanyon Place.

j. The Tribunal strongly disagrees with Mr Shaw's submission that the conduct of Brunswick and its agents demonstrated careful and good estate management.

k. With regard to allegations of inaccuracy in the Applicant's case, the Tribunal accepts that the landlord company had remained the same legal entity, it was beyond argument that the company was bound by acts in its past, the factual matrix included the fact that this was a proposed additional letting of one of the remaining quarter of a floor, three-quarters of which already had been granted to GEM and the suggestion that GEM was an undesirable tenant conflicted with the fact that it was already an accepted tenant (although circumstances may change).

l. So far as the provision of information was concerned the Tribunal accepts that landlord's agents had received exactly what they asked for, there was no other correspondence requesting anything else.

62. On the preliminary point, the Tribunal therefore concludes that the condition requiring tenant default insurance in respect of FTEL is unreasonable. However the inconsistent cap on the rate of increase of service charge is a valid reason for refusal of consent and the shortfall on rent is a valid reason for refusal of approval and refusal of consent.

ORDERS ACCORDINGLY

23rd December 2002
(Corrected 6th January 2003)

Mr M R Curry FRICS IRRV MCI.Arb Hon.FIAVI
LANDS TRIBUNAL FOR NORTHERN IRELAND

<u>Appearances</u>:

Applicant: Mark Orr QC and Keith Robinson BL instructed by Tughans.
Respondent: Stephen Shaw QC instructed by C & H Jefferson.