ST CATHERINE'S PARISH 1980 No. 8496P

THE HIGH COURT

BETWEEN:

THE TRUSTEES OF ST. CATHERINE'S PARISH, DUBLIN

Plaintiff

and

MIRIAM ALKIN AND FREDA ALKIN

Defendants

Judgment of Miss Justice Carroll delivered the 4th day of March 1982.

The Plaintiff's claim is for damages for breach of covenant to repair under an indenture of lease dated the 10th December 1880 made between the Plaintiff of the one part and John Cogan of the other part whereby the premises known as 114 and 115 Thomas Street in the City of Dublin were demised to John Cogan for the term of 100 years from the 1st January 1881 subject to the yearly rent of £180 sterling. The Plaintiff is a body corporate incorporated by private Act of Parliament (17 & 18 Vict. Cap. 23).

The Defendants are the last assignees of the lessee's interest under the said lease which has now expired. In 1972 they acquired a package which included Nos. 113, 114 and 115 and a site to the rere of No. 117. An application to acquire the fee simple in Nos. 114 and 115 was refused by the County Registrar on 22nd February 1980.

The lessee under the lease covenanted with the lessors that he, his heirs, executors, administrators and assigns "shall and will from time to time and at "all times hereafter during the continuance of the term hereby granted at his or "their own expense well and sufficiently uphold, support, maintain and keep the

"premises hereby demised and all houses, buildings, walls and drains and "improvements whatsoever now made, erected or built or which shall hereafter be "made, erected or built on the said hereby demised premises or any part thereof "in good sufficient tenantable order repair and condition and rebuild the same if "injured or destroyed by fire lightening tempest or other accident and at the "determination of this demise shall and will yield up the peaceable and quiet "possession thereof unto the said trustees their successors and assigns in such "good order repair and condition as aforesaid and will permit the said trustees "their successors and assigns and their surveyors, agents or workmen at all "reasonable times during the said term to enter into the said premises to view "the condition thereof and of all defects and want of repair there found to give "or leave notice in writing at the said premises for the said John Cogan, his "executors administrators or assigns to repair the same within three calendar "months next after such notice within which said time he the said John Cogan his "executors, administrators or assigns will repair and make good all serious "defects and want of repair mentioned in such notice."

By letter dated the 27th February 1980 the Plaintiff called on the Defendants to put the said premises into repair.

By letter dated the 23rd April 1980 the Plaintiff sent to the Defendants dilapidation notices specifying the defects and wants of repair in the said premises and called on the Defendants to carry out the works specified in the

notices within three months from the date thereof in accordance with the terms of the lease.

The Defendants did not carry out the repairs and the lease expired on the 31st December 1980.

Section 65 of the Landlord and Tenant (Amendment) Act 1980 provides as follows:-

"1. Where a lease (whether made before or after the commencement of this Act) of a tenement contains a covenant (whether express or implied and whether general or specific) on the part of the lessee to put or to keep the tenement in repair during the currency of the lease or to leave or put the tenement in repair at the expiration of the lease and there has been a breach of the covenant, the subsequent provisions of this section shall have effect.

(2) The damages recoverable in any court for the breach shall not in any case exceed the amount (if any) by which the value of the reversion (whether mediate or immediate) in the tenement is diminished owing to the breach.

(3) Save where the want of repair is shown to be due, wholly or substantially, to wilful damage or wilful waste committed by the lessee no damages shall be recoverable in any court for the breach if it is shown -

(a) that, having regard to the age and condition of the tenement, its repair in accordance with the covenant is physically impossible or,

(b) that, having regard to the age, condition, character and situation of the tenement, its repair in accordance with the covenant would involve expenditure which is excessive in proportion to the value of the tenement, or

(c) that having regard to the character and situation of the tenement, the tenement could not when so repaired be profitably used or could not be profitably used unless it was re-built, re-constructed, or structurally altered to a substantial extent."

This Section is identical for all practical purposes to Section 55 of the Landlord and Tenant Act 1931.

It is necessary to make the following determinations in this matter:-

1. Are all the items of want of repair specified in the dilapidation notices occasioned by breach of covenant by the lessee?

2. What is the cost of repairing the damage occasioned by the breaches of covenant?

3. What is the amount by which the value of the reversion is diminished owing to the breaches?

4. Do any of the sub-clauses in Section 65(3) apply?

5. If so, was the want of repair or any of it caused by the wilful damage or wilful waste committed by the lessee?

Question 1: Are all the items of want of repair specified in the

dilapidation notices occasioned by breach of covenant by the lessee?

Both houses are in a very bad state of repair and number 114 is worse than number 115. Since they acquired the premises in 1972 the Defendants spent a small amount in running repairs but not enough to comply with the covenant. By virtue of section 12, Deasey's Act (Landlord and Tenant Law Amendment Act (Ireland) 1860) the Defendants are liable as successors in title of the original lessee for breaches of the covenant to repair by their predecessors in the title as well as by themselves. The premises had been completely re-built by the lessors in or around 1880 under a building contract dated the 3rd of November 1879. It seems that the buildings formerly on that site had been destroyed by fire.

One of the causes of damage to number 114 was due to the demolition of number 113 about sixteen years ago and the consequent exposure of the flank wall of number 114 which was formerly protected by number 113.

At the rear, each house was stepped back from its neighbour so that the back wall of number 113 joined the side wall of number 114 about four feet in from the back wall of that house.

I consider that damage caused by the exposure of this wall is not due to a breach of covenant to repair by the lessee. Therefore I do not think that the item in the Schedule of Dilapidations relating to number 114 which provides for lining the wall, fixing sarking felt and trimming around the existing flying shores is the lessee's responsibility. Similarly where it is provided in the Schedule of Dilapidations for the removal of all loose,

dead or decayed plaster from the inside of that side wall, this is not the lessee's responsibility either, because the primary cause of the damage must be the exposure of the outside wall.

There was a conflict of evidence in relation to whether there was a crack or a fracture in the flank wall of number 114 at the former junction of the back wall of number 113 (a fracture being defined as a crack that went through the entire fabric of the wall).

I inspected the premises myself. I confirmed, as was the evidence, that there was a crack on the outside of the flank wall which corresponds with the crack on the inside of the flank wall. Therefore on the balance of probabilities I hold this is a fracuture not a crack. Accordingly since this is a structural defect any work connected with repairing this is not the responsibility of the lessee.

There was a further conflict of evidence in relation to the front wall of the two houses, namely whether the wall was distorted on the vertical and horizontal plane and whether the parapet was leaning in. To my untrained eye the front wall was undulating at the top storeys and the parapet was leaning in but both conditions could be described as slight. Therefore I hold that the front wall of both houses is slightly distorted and the parapet is leaning in slightly.

However in the case of <u>Gilligan .v. Silke</u> (1963 I.R. 1) Kingsmill-Moore J.

(at page 22) gives as a typical incidence of permissive waste,

> "failure to take steps to prevent an incipient bulge in the wall from affecting the stability of the whole wall through neglect to supply bars."

Therefore by analogy I consider that the lessee should be held responsible for a condition of the front wall.

There was also conflict of evidence whether the front wall was originally bonded into the flank wall of number 114 and the party wall of 114/115. It is in my opinion immaterial which was the case. The necessity to repair the front wall which includes stitching the front wall to the flank wall and party wall is necessary because of the neglect of the front wall and does not depend on whether the wall was bonded originally or not.

In relation to the garden at the rear, the Schedule of Dilapidations specifies the restoration of demolished buildings in the garden. I find that the evidence in relation to these buildings is very tenuous and I do not consider that this want of repair has been proved to my satisfaction.

Similarly in relation to a dividing wall between numbers 114 and 115, the evidence does not establish to my satisfaction that it existed at the time of the lease or since then. No such wall is shown on the lease map.

It is clear however that the side wall of the garden at the rear of number 114 which gives on to a lane has been demolished. There may have been

a gate in this as indicated in the original map annexed to the lease. If so, this was not adverted to at the trial. In any event the boundary was destroyed.

Apart from the exceptions mentioned above I find that the want of repair described in the two Schedules of Dilapidations was due to the failure by the lessee to observe the covenant to repair.

<u>Question 2</u>: <u>What is the cost of repairing the damage occasioned by the breach of covenant?</u>

There is a conflict of evidence relating to the works necessary to repair the damage and this affects the cost. The Plaintiff claims that if the works specified in the Dilapidation Schedules is carried out, then both premises would be sound. The Defendants claim that what the Plaintiff requires is not sufficient and a much more elaborate and expensive job must be done.

It seems to me that were it not for the provisions of Section 62(2) and (3), these claims would be reversed.

The conflict arises in relation to the works necessary to repair (1) the front wall of both premises, (2) the flank wall of number 114 and (3) the roof.

Even though damage to the flank wall by exposure is not the Defendants' responsibility, nevertheless it is necessary in my opinion to consider what repairs are necessary to put the entire premises into repair in order that

damage to the reversion can be calculated. Then whatever adjustment is necessary to apportion the cost of repairing the damage occasioned by a breach of covenant and the cost of repairing damage not due to the lessee's default can be made.

Mr. Cowan, who prepared the Dilapidation Schedules for the Plaintiff, required, in relation to the front wall, all decayed or damaged bricks to be cut out and renewed, and to rake out and re-point the whole front elevation and the copings on top of the front wall. In relation to the flank wall, he required it to be lined, the copings to be made good and the short length of side wall which extended beyond number 113 to be re-pointed. Mr. Cowan is an Architect employed by Mr. Griffith's firm and the Schedules are in fact signed by Mr. Griffith.

Mr. West, a Structural Engineer who gave evidence for the Defendant, recommended that the front wall be demolished to third floor level and also the flank wall of number 114 to third floor level past the fracture at the rear and that this should be rebuilt. This involves shoring up the roof for which considerable scaffolding would be required. He also recommended removing four bonding timbers in the flank wall which are below third floor level and stitching the vertical fracture of the flank wall below third floor level

In relation to the front wall, Mr. West said it is not dangerous but has

defects which he would recommend should be put right. He said he could not say it would not become dangerous; that he must give the best advice which was to rebuild; and that he would not be happy if a client did anything other than what he recommended. In relation to the flank wall Mr. West said the bonding timbers were suspect and it is good practice to remove them and build up with bricks or concrete lintels.

Mr. Griffith, for the Plaintiff, agreed that there were slight or insignificant distortions in the front wall but he said any bulge was insignificant and he would not advise a client to rebuild but to repair.

Mr. O'Neill, Architect for the Defendant, said in his opinion that the entire front wall was not in a fit condition to be repaired in the upper parts or re-pointed and that the flank wall was decayed beyond repair and should be demolished.

To my mind, the question is whether to insist on Mr. West's solution as being the only solution possible to bring the building to a reasonable standard of repair or rely on Mr. Griffith's opinion that repair is all that is necessary or at most demolition to third floor ceiling level. This is a classic case of experts differing.

I am satisfied that Mr. Griffith is an experienced, competent architect and I accept his advice as his honest, professional advice. I am also satisfied that Mr. West is an experienced competent engineer and his advice i

his honest, professional advice. I accept that Mr. West's advice is better because it is a more extensive and expensive job, but I am not convinced that it is the only solution or that Mr. Griffith's advice is wrong. I am not satisfied that Mr. Griffith's advice, if followed, is inadequate to put the building into a reasonable state of repair.

In relation to the roof Mr. Cowan specifies that all loose, cracked or broken slates be removed and replaced using new slates, the slates to be fixed with lead or copper tacks.

Mr. O'Neill said he came to the conclusion that the iron nails holding the slates in position were decayed by rust and he said that it was necessary to strip and re-slate the entire roof.

Again I take the view that the solution proposed by Mr. Cowan and endorsed by Mr. Griffith is a professional opinion which I accept as a honest professional opinion. The evidence of Mr. O'Neill whose opinion I also accept as his honest professional opinion does not prove that opinion is wrong to me. The more expensive job proposed by the Defendants would be better but it is not in my opinion the only solution possible in order to put the roof into a reasonable state of repair.

In the original Bill of Quantities prepared by Mr. Horne (with September 1980 prices) the total works including VAT. cost £63,946.12 (or £62,083.61 excluding VAT.). This was reduced by agreement with Mr. Drum to £59,028.96 (excluding VAT.).

This latter figure is made up as follows:-

Building No. 114	£17,473.21
" No. 115	£16,162.81
Garden at rear No. 114	£11,742.75
" " " No. 115	£13,650.19
Total	£59,028.96

For comparison purposes it is necessary to break down Mr. Horne's original total costs into buildings on the one hand and gardens at rear and demolished buildings on the other hand. According to my calculations the original estimate is divided, (excluding 15% for plant, insurance etc. and excluding VAT.) as follows:-

Buildings No. 114	£16,449.75
Garden at rear	£10,180.00
Buildings No. 115	£15,236.00
Garden at rear	£12,120.00

The items in Mr. Horne's original Bill which I propose excluding as not being the lessee's responsibility are as follows:-

Re 114

Building

External work, (item four)	£1,228.50

Internally, staircase, (item three)	£ 60.00
Decoration, staircase and hall (portion of,)	£ 200.00
Total	**£1,488.50**

Garden

Garden Wall (12 feet)	£1,300.00
Demolished Building	£2,800.00
Total	**£4,100.00**

Re 115

Building

No reduction

Garden

Garden Wall (61 feet)	£6,500.00
Garden Wall (21 feet)	£2,275.00
Demolished building	£2,000.00
Total	**£10,775.00**

I have therefore excluded:-

£1,488.50 of £16,449.75 i.e. 9.04 per cent

£4,100.00 of £10,180.00 i.e. 40.27 per cent

£10,775.00 of £12,120.00 i.e. 88.90 per cent

The reductions agreed with Mr. Drum have to be brought up to July 1981 by an increase of 21.97 per cent and V.A.T. at 3 per cent. This increases

the cost of the repairs to the building, number 114, to £21,951.43 and to number 115 to £20,305.18.

The cost of repairing the building, number 114, has to be reduced by 9.04 per cent (i.e. £1984.40) leaving the cost of repairing the damage occasioned by the breach and omitting the cost of repairing the damage for which the lessee is not responsible at £19,967.03.

The cost of repairing the damage to the building, number 115, at July 1981 prices is £20,305.18.

The cost of repairs in the garden of 114, (July 1981 prices) is £14,752.29 less 40.27 per cent (£5,940.74) equals £8,811.55.

The cost of repairs in the garden of number 115 (July 1981 prices) is £17,148.60 less 88.90 per cent (£15,245.10) equals £1,903.50.

Therefore the costs of repairing the damage caused by breach of covenant are:-

Buildings Nos., 114 and 115,	£40,272.21
Garden Nos., 114 and 115	£10,715.05

<u>Question 3</u>: <u>What is the amount by which the value of the reversion is diminished owing to the breach of covenant?</u>

In order to do this on the evidence available I have to determine the value of the premises in their general unrepaired state and their value if

all the repairs were carried out and make a proportionate deduction in respect of the repairs which are not the responsibility of the tenant.

Mr. Byrne, the Valuer who gave evidence on behalf of the Plaintiff, said that in his opinion the annual rents which could be obtained from number 114 were as follows:-

	Unrepaired	Repaired
Basement	unlettable	£ 750.00
Shop	£4,200.00	£4,200.00
First Floor	£ 600.00	£2,340.00
Second Floor	£ 400.00	£1,500.00
Third Floor	£ 200.00	£1,300.00

Mr. Farrell who gave evidence as a Valuer for the Defendants, said that in his opinion the annual rents obtainable from number 114 are as follows:-

	Unrepaired	Repaired
Basement	£ 560.00	£ 560.00
Shop	£4,200.00	£4,200.00
First Floor	£1,090.00 (storage)	£1,635.00
Second Floor	£ 650.00 (residential)	£ 950.00
Third Floor	£ 520.00 (residential)	£ 850.00

In relation to number 115 Mr. Byrne said that the following rents could in his opinion be obtained:-

	Unrepaired	Repaired
Basement	£ 150.00	£1,000.00
Shop	£4,500.00	£4,500.00
First Floor	£1,560.00	£2,340.00
Second Floor	£ 750.00	£1,500.00
Third Floor	£1,000.00	£1,500.00

In Mr. Farrell's opinion the rents obtainable from number 115 would be:-

	Unrepaired	Repaired
Basement	£ 560.00	£ 560.00
Shop	£4,500.00	£4,500.00
First Floor	£1,158.00	£1,737.00
Second Floor	£ 650.00 (residential)	£ 950.00
Third Floor	£ 520.00 (residential)	£ 850.00

In arriving at a capital value for number 114 Mr. Byrne chose a multiple of 8.3, whether repaired or in its unrepaired condition less acquisition costs of 8 per cent. In respect of number 115 he chose a multiple of 6.75 in its unrepaired condition and 7 per cent if it were repaired, in both cases

less acquisition costs of 8 per cent.

Mr. Farrell chose for both premises a multiple of 7 in respect of the unrepaired condition and 8 in repaired condition.

Mr. Byrne gave as his opinion that in Thomas Street there was not a vast difference between workroom, residential or office rents. Mr. Farrell, on the other hand gave as his opinion that there was a difference, e.g. in respect of number 114 (second floor) he gave a rent of £945.00 for office/storage use and £650.00 for residential use.

I have arrived at a valuation of the premises on the following basis:-

1. I am satisfied that the basement in No. 114 is unlettable at present.
2. The rent for the flat on the third floor of number 115 which was formerly rent-controlled and is still occupied by the tenant, I have valued as a fair market rent. I cannot assume that anything less than a fair market rent to the landlord is now permitted following the Supreme Court decision in Madigan .v. Attorney General (29th June 1981)
3. I have taken the average between the rents which can be obtained in Mr. Byrne's opinion and the rents which can be obtained in Mr. Farrell's opinion. Mr. Byrne made no difference between residential and office/storage rents and I have accepted that as his opinion. Mr. Farrell did give a difference for a residential rent and I took

those figures as his opinion. In my view the rents can only be valued on the use which can now be made of the premises and not on potential use which might be made if Planning Permission were obtained for a change of user.

4. I have decided that the multiple to be applied is 7 before repair and 7.5 after repair.

Accordingly I find that the following rents could be obtained in respect of number 114:-

	Unrepaired	Repaired
Basement	unlettable	£ 655.00
Shop	£4,200.00	£4,200.00
First Floor	£ 845.00	£1,988.00
Second Floor	£ 525.00	£1,225.00
Third Floor	£ 360.00	£1,075.00
Total	£5,930.00	£9,143.00

In respect of number 115 the following rents could in my opinion be obtained:-

	Unrepaired	Repaired
Basement	£ 355.00	£ 780.00
Shop	£4,500.00	£4,500.00

	Unrepaired	Repaired
First Floor	£1,360.00	£2,040.00
Second Floor	£ 700.00	£1,225.00
Third Floor	£ 760.00	£1,175.00
Total	£7,675.00	£9,720.00

Applying a multiple of 7 before repair and 7.5 after repair I find that the value of number 114 in its unrepaired state is £41,510.00 and in its repaired state £68,572.00.

The value of number 115 in its unrepaired state is £53,725.00 and in its repaired state is £72,900.00.

The difference in market value of number 114 in its repaired and unrepaired state is £27,062.00 and in respect of number 115, £19,175.00.

The amount by which the value of the reversion is damaged by the breach of covenant of the lessee is calculated as follows:-

In the case of the buildings number 114, the damage to the reversion must be attributed as to 90.96 per cent to want of repair by the lessee and 9.04 per cent to want of repair by the lessor.

Where the damage to the reversion is £27,062.00 the amount attributable to the lessor is £2,446.40 and to the lessee £24,615.60.

In the case of the damage to the reversion of the buildings of number 115 the full amount of £19,175.00 was caused by the lessee.

There is no evidence that there has been any damage to the reversion of the garden area at the rear which is now totally cut off by the back wall of the yards of the two buildings. All the evidence was directed to the letting of the house without reference to any garden at the rear.

The limit therefore which can be recovered by a Plaintiff because of Section 65(2) is £24,615.60 plus £19,175.00 equals £43,790.60.

Question 4: Do any of sub-clauses (a), (b) or (c) contained in section 65(3) apply?

Sub-clause (a) provides:

"That having regard to the age and condition of the tenement, its repair in accordance with the covenant is physically impossible."

It is common case this does not apply. The buildings are repairable.

Sub-clause (b) provides:

"That having regard to the age, condition, character and situation of the tenement its repair in accordance with the covenant would involve expenditure which is excessive in proportion to the value of the tenement."

The value of No. 114 now is £41,510.00 and repaired it is £68,572.00. The value of No. 115 now is £53,725.00 and if repaired is £72,900.00.

If the two properties are taken together the diminution in the value of the reversion is £46,237.00 of which £43,790.60 is attributable to breach of covenant and the cost of fully repairing both is £42,256.61 of which £40,272.21 is attributable to repairs under the covenant.

The age of the building is only 100 years which is not excessive. The situation of the premises is in Thomas Street which is a busy secondary shopping area. Its character is in keeping with the rest of the street. Its condition is such that it can be repaired for less than the diminution in the value of the tenement.

I do not consider it necessary to take No. 114 as one entity and No. 115 as another entity as regards application under this sub-paragraph. It is true that more money has to be expended on No. 115 in proportion to its value. Even if it had to be considered separately, I do not consider the expenditure as excessive. The repairs which have to be carried out have to be carried out to the two buildings as one entity. Therefore even though they are let separately the building must be considered as one from the point of view of repairing.

By carrying out the repairs the Plaintiff will have property which is increased in value by more than the cost of the repairs therefore sub-clause (b) cannot apply.

Sub-clause (c) provides:

"That having regard to the character and situation of the tenement
"the tenement could not when so repaired be profitably used or could
"not be profitably used unless it was rebuilt, reconstructed or
"structurally altered to a substantial extent."

The character and situation are as stated in connection with sub-paragraph (b). When repaired the lessor can let the premises and get an adequate return on the property. No structural alterations are required. It will be necessary to rebuild a small derelict portion at the rear of No. 114. Some reconstruction is necessary for the W.C.'s in the yard and the thrust-out W.C.'s. But this cannot, in my opinion, be described as being rebuilt or reconstructed to a substantial extent in the context of the whole works. Therefore sub-clause (c) does not apply.

It does not therefore become necessary to decide the extent to which the want of repair is due to wilful damage or wilful waste committed by the lessee.

I therefore give judgment for the Plaintiff in the sum of £40,272.2$.

Approved
Nella Cassell.