THE HIGH COURT

No. 3271/82

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

BETWEEN/

TONY BYRNE

Plaintiff

-and-

MARTINA INVESTMENTS LIMITED

Defendant

Judgment of Mr. Justice O'Hanlon delivered the 30th day of January, 1984.

This is a claim for damages by the tenant of the basement premises at No. 51 Grafton Street in the City of Dublin, against his landlord. In the Civil Bill the Plaintiff claims that the Defendant was guilty of breach of contract, nuisance, trespass and negligence, as a result of which the Plaintiff has been hindered in the quiet enjoyment of the demised premises, and

has suffered pecuniary loss and damage under a number of different headings.

The Plaintiff is a hairdresser by occupation, and took the letting of the basement at No. 51 Grafton Street with the intention of using it as a hairdressing saloon. His principal complaints against the Defendant are that the premises have, at all times since the letting was made in 1971, been subject to flooding from overhead, and from a small yard at the back, and that unpleasant odours have permeated the premises at regular intervals to the great distress of the staff and clientele of the hairdressing business.

The letting agreement is dated the 15th April, 1971, and was made for a term of ten years from the date of the Agreement. The term expired in 1981, and an application for a new lease under the provisions of the Landlord and Tenant (Amendment) Act, 1980, is also before the Court.

By virtue of Clause 3 of the Lease the Lessee covenanted as follows:-

"The Lessee shall keep and maintain the said demised premises and all additions and fixtures made thereto

"in good tenantable order, repair and condition, including all the doors and windows thereof, glazing and painting, woodwork, plastering, decoration, heating, lights, fittings and apparatus and shall not make any structural alteration or addition to the said premises without the previous written consent of the Lessors, such consent not to be unreasonably withheld by the Lessors in respect to reasonable alterations which do not depreciate the value of the premises or conflict with the interests of the Lessors or the other tenants in the buildings and so deliver up the same at the determination by any means of the tenancy hereby created, in clean and tenantable order and condition, with all locks and keys and fastenings complete AND the Lessee shall keep in repair any sanitary convenience of which he/they shall have use PROVIDED ALWAYS however, that nothing in these presents shall impose any liability on the Lessee to rebuild or carry out any structural

"repairs or alterations to the demised premises or any part thereof that shall not be occasioned or caused by the act or negligence of the Lessee."

The Lease does not contain any express covenant on the part of the Lessors to be responsible for external or structural repairs or for quiet enjoyment by the Lessee, but a covenant for quiet enjoyment would arise, in any event, by implication of law. Furthermore, as was held by Davitt P., in Victor Weston (Eire) Limited v Kevin Kenny, (1954) IR 191, an owner of premises who has let portions of his premises to tenants and who retains control of the remaining portions is bound to take reasonable care to prevent any part of the premises over which he retains control from becoming a source of danger or causing damage to his tenants, the adjoining occupiers.

I now turn to consider the factual situation in the present case as it emerged in the course of the evidence.

First, in relation to the complaint of flooding, this was said by the Plaintiff and his supporting witnesses to emanate from a number of different sources. There is a very small,

enclosed yard to the rere of the premises, on to which two other properties as well as No. 51 Grafton Street, abut.

When the letting was made to the Plaintiff in 1971, there was a door leading from the rere of the demised premises into this yard, and at the outset, that door, although not perfect, appears to have been in reasonably sound condition. There is a gully in the yard very close to that rere entrance into the demised premises, and it took a number of downpipes from No. 51 and also from adjoining premises.

By letter of the 3rd May, 1971, the Plaintiff informed the Defendant's predecessors in title, University Estates Limited, who had made the letting to him, that he intended to carry out improvements to the basement premises of 51 Grafton Street, but he did not specify the nature of the works he intended to execute. As part of the work to make the basement suitable for his hairdressing business, he then proceeded to erect concrete block supporting walls in the small yard already mentioned, and to instal a watertank thereon, with pipes leading from the interior of his premises to this tank. I am of opinion that he was not entitled to carry out

work of this nature without first putting his landlord on clear notice of his intention to do so and obtaining the requisite permission beforehand, but no objection has been taken to the structure in the period which has since intervened.

The Plaintiff partitioned off his premises with a solid partition which effectively cut off all access thereafter from his premises to the yard at the rere, save by dismantling the partition whenever it became necessary to go out into the yard.

In the course of time, water began to percolate from the yard under this partition and into the demised premises from time to time, when there was heavy rainfall and flooding occurred in the yard outside. The back door is now off its hinges, and no longer usable by reason of the condition to which it has been reduced.

I accept that flooding has taken place from time to time from the yard area, which has been a source of nuisance for the tenant who was trying to carry on his business in the basement premises, and I make the following findings of fact regarding the flooding from this source.

I am satisfied on the evidence that this flooding was caused by the gully becoming choked up and being left unattended over long periods. I have a strong impression that the trouble may have started coincidentally with the erection of the water-tank by the tenant in the yard outside, as there was evidence indicating that rubble had been left around the gully area and that no other building works had taken place in the yard during the relevant period.

Secondly, it emerged that some of the downpipes were broken or in a defective condition, and were discharging water over the surface of the yard, but some, and perhaps the major part, of this trouble was caused by downpipes serving premises other than No. 51, for which the landlord of No. 51 should not be held responsible.

Thirdly, I am of opinion that the erection of the partition in the basement of No. 51, which effectively cut off all access from the basement to the yard, save by the troublesome method of taking down the partition to achieve such access, meant in practice that the yard was left for very long periods without inspection to see what condition it was in. The tenant, in

his own interest and for his own protection, should have kept the yard under constant inspection, and should have kept the gully clear at all times, or at least should have kept the landlord informed if the yard or gully required remedial work to be carried out from time to time. I think no flooding from the yard need have occurred if the tenant had taken these elementary precautions to safeguard his own premises and that he must bear a much greater share of the blame than the landlord for the trouble which came from this part of the premises.

The next complaint of water damage related to water flowing down from overhead, which came with such volume and such persistence that it eventually caused part of the ceiling at the rere of the demised premises to collapse. With regard to this complaint I am left in a quandary since it was not possible to establish by evidence where this water came from, but there was a strong suggestion that it derived from sanitary fittings in the premises occupied by other tenants in the parts of the building immediately above the basement.

If this is the correct explanation, it would not impose legal liability on the landlord for damage thereby caused,

unless it could also be shown that the landlord had retained in its own possession and control the parts of the premises from which the leaking or overflow had occurred - as was the situation in the case already cited of Victor Weston (Eire) Ltd. v Kenny. I am unable to hold that it has been established as a matter of probability that the water which percolated into the demised premises from overhead in the rere of the premises derived from any source which the landlord was obliged by law to maintain or for which he can be held responsible.

Finally, it appears that water has leaked into the premises from time to time at the front of the premises, immediately under a pavement light. The expert witnesses were in agreement that such pavement lights are very difficult to keep in good repair, and that they are frequently a source of penetration of rain-water, and I am satisfied that water did enter the premises from this area from time to time and had a detrimental effect on the user of the premises for business purposes. As the landlord at all times accepted responsibility for this part of the premises and retained it in its control, it would be liable in damages for negligence if there was failure to take

reasonable care to prevent it becoming a source of damage to the tenant.

The other cause of complaint related to noxious smells which were said to have pervaded the premises at irregular intervals from the commencement of the tenancy and to be continuing down to the present time. The evidence on this topic - first as to whether nuisance of this type existed at all or not, and if so, where it emanated from - was of a very conflicting nature. Some of the Plaintiff's witnesses tended to say that unpleasant smells occurred every day; some that it occurred very irregularly, with intervals of some weeks elapsing at times between the mainfestations complained of. One Corporation Inspector, called as a witness by the Plaintiff, said that he had visited the premises several times and on one occasion detected sewage odours which lasted only for about one minute. They were not present in the front or rere parts of the premises, but only in a small area between the two parts. Another Corporation Inspector of sewers and main drains, inspected the entire premises from the top floor down to the basement and found nothing wrong. His assistant gave

evidence to the same effect. Representatives of the Defendant Company asked to be told immediately when the unpleasant smell could be experienced, but although going to the premises in response to telephone calls failed to detect the presence of the offending smells. The Manager of the Defendant Company, whose office is in very close proximity to the top of Grafton Street, claimed to have called to the demised premises over forty times in the space of less than a year, in response to telephone calls or on her own initiative, and never to have detected any evidence of the unpleasant odour referred to by the occupants.

It seems clear, from some of the evidence, that there may have been an all-pervading, and at times unpleasant, smell of damp associated with the premises and that some witnesses were referring to this while others were referring to a much more noxious smell such as would be caused by problems with the sewerage system.

I am prepared to accept, although with some reservations, that a highly unpleasant smell has been experienced in the demised premises from time to time, generally of very short

duration, but before this undoubted form of nuisance can give rise to an action for damages against the landlord, it must be established as a matter of probability that it was caused by some neglect or default on the part of the landlord in relation to part of the premises retained in its own control.

Experts of all kinds were called on both sides to deal with the probable cause of the offensive smell, but it did not appear to me that any of them could do more than speculate on possible sources of trouble. At the end of the day I find myself unable to make a finding that, as a matter of probability, the sewer pipe serving the premises is defective, or cracked, as was suggested as a possible source of trouble by the Plaintiff's witnesses. Expert witnesses with impressive qualifications were called by the Defendant to say that there was no evidence whatever to suggest the presence of any such defect, and that if it did exist it would almost certainly give rise to continuous and pervasive smells such as have not been experienced in the premises in question.

I think it is significant that the tenant, who was carrying on his business as hairdresser for the full length of

the term in the demised premises, and who now, on the expiration of the term claims to have been seriously prejudiced in his business activities by these two forms of nuisance which he attributes to the neglect and default of the landlord, never brought proceedings to remedy the situation at any time, until named as a Defendant in proceedings brought by the landlord. He than counterclaimed on two occasions in respect of the matters which are still the subject of his claim in the present proceedings, but settled on each occasion without pressing ahead with his claim for damages.

I think there has been some dilatoriness on the part of the landlord over the years in keeping up the exterior of the premises, and in coming to grips with the incursions of water at the front and rere of the premises, and I propose to deal with the claim by affirming an award of damages in favour of the Plaintiff, but reducing the amount of the award from the figure measured by the learned Circuit Court Judge to a sum of £2,000.

R.J. O'Hanlon.

30th January, 1984.

NOTE:

Counsel for the Plaintiff - Peter Shanley, SC (with him Hugh O'Neill, BL) instructed by Brendan D. McArdle & Co., Solicitors.

Counsel for the Defendant - Aongus O Brolchain, BL (instructed by Wm. Fry & Sons, Solicitors).