

Tenant's obligation to pay reinstatement costs

The Court of Appeal has recently found that a tenant was not liable for all reinstatement costs undertaken by, and claimed from, the landlord.

In *The Gama Foundation v Fletcher Steel Limited*¹ the Court of Appeal considered whether a landlord has the right to demand full repayment of all repair costs incurred after a failure by the tenant to reinstate the premises following the expiry of the lease.

The Court affirmed the presumption that a landlord can claim damages even where it will not incur the cost of performing the tenant's repair obligations but found the landlord is required to prove that the costs claimed were for a reasonable and proper amount.

Background

At the expiry of a 10-year lease, the tenant, Fletcher Steel Ltd, was in breach of several repair and maintenance covenants. The landlord, The Gama Foundation (**Gama**), claimed in an arbitration for \$1.75m in repair costs following expiry of the lease to reinstate the premises.

Fletcher Steel Ltd accepted liability for \$900,000 of those costs but denied liability for the balance. An arbitrator found that Fletcher Steel was liable for an additional \$320,000 but not the full amount.

Gama appealed the arbitrator's decision to the High Court. The High Court declined leave to appeal, but the Court of Appeal granted special leave to hear the appeal.

Court of Appeal decision

Gama argued the arbitrator incorrectly applied the relevant legal test in *Joyner v Weeks*.² The rule in *Joyner* has two propositions:

1. the fact a landlord has not and will not incur the cost of performing the lessee's repair obligation does not preclude a claim for damages; and
2. the measure of damages is the usual contractual measure, namely the landlord must prove it is a reasonable and proper amount for putting the premises into the state of repair they ought to have been left in.

Gama argued that the steps it had taken to repair the premises were in mitigation of damages caused by the tenant and were therefore recoverable, and that Fletcher Steel Ltd should have to prove the costs incurred by it were unreasonable.

The Court found the steps taken by Gama may have mitigated consequential loss (such as lost rent), but the arbitrator was correct to find that the amount recoverable was the costs of repair work Fletcher Steel Ltd had been obligated to carry out but had not. The Court found it is on the landlord to prove its damages. The Court rejected a position where a landlord could claim costs in "mitigation" where it would result in an entitlement to costs exceeding provable damages.

The Court of Appeal dismissed the appeal.

Comment

It is important that, coming up to the end of a lease, both a landlord and tenant are clear on reinstatement obligations. A tenant should be aware of significant costs that can be awarded against them should they fail to reinstate or repair the premises. As a landlord it is important to be aware of the costs that may or may not be claimable at the expiry of the lease and when undertaking repair works.

Want to know more?

If this article raises any questions or concerns, please get in touch with our Litigation and Property Team.

¹ *The Gama Foundation v Fletcher Steel Ltd*, [2023] NZCA 243.

² *Joyner v Weeks* [1981] 2 QB 31.