IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA625/2021
[2023] NZCA 243

BETWEEN	THE GAMA FOUNDATION Appellant
AND	FLETCHER STEEL LIMITED Respondent

Hearing:	23 February 2023
Court:	Clifford, Wylie and Whata JJ
Counsel:	T Mijatov and R A Hearn for Appellant W R Potter for Respondent
Judgment:	15 June 2023 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Clifford J)

Introduction

[1] This is an appeal by The Gama Foundation (Gama), pursuant to special leave granted by this Court after leave was declined by the High Court, against a decision of the High Court declining Gama leave to appeal an arbitral award (the Award) relating to a lease dispute to that Court.

[2] The outcome Gama seeks from this Court is, accordingly, a grant of leave to appeal the Award to the High Court.

Background

[3] In the 1970s Gama leased warehouse premises in Christchurch to the respondent, Fletcher Steel Ltd (Fletcher Steel). The buildings on the premises were designed and sited to meet Fletcher Steel's needs. The lease at issue here ran for 10 years, expiring on 31 August 2016. During its term the Canterbury sequence of earthquakes damaged the premises. As relevant here, the lease contained a number of repair and maintenance covenants. Fletcher Steel accepted it was, at the expiry of the lease, in breach of many of these covenants. Various issues arose.

[4] In the year or so before the expiry of the lease Gama, Fletcher Steel and their respective experts discussed the required repairs. Agreement was reached on only a limited range of issues. Little of even that work had been carried out before the lease expired and Fletcher Steel vacated the premises. As best as we can tell, Fletcher Steel chose not to carry out repair works itself so as to avoid the disruption to its use of the premises doing so would have inevitably involved.

[5] Following the expiry of the lease, from September 2016 to June 2017 Gama undertook extensive repair work, incurring costs of some $1.75 million (plus GST) in doing so, which it claimed from Fletcher Steel. Fletcher Steel accepted liability for some $900,000 (plus GST) of that amount. It denied liability for the balance, saying that the work undertaken by Gama went beyond and/or cost more than that which it was required to pay for. That dispute was arbitrated.

[6] Before the arbitrator, Gama succeeded in part and was awarded a further sum of some $320,000 (plus GST), which Fletcher Steel paid.

[7] Gama now says the arbitrator was wrong not to award it the full amount it claimed due to the erroneous way he understood and applied the relevant legal principles, in particular those found in the case of *Joyner v Weeks*.[1]

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1 *Joyner v Weeks* [1891] 2 QB 31 (CA).

[8] On that basis Gama sought leave from the High Court in terms of cl 5(1)(c) of sch 2 of the Arbitration Act 1996 to appeal various aspects of the Award to the High Court. The High Court declined that application (the High Court leave decision).[2] The High Court subsequently declined Gama's application for leave to appeal the High Court leave decision to this Court.[3] Finally, this Court granted Gama special leave to appeal the High Court leave decision to this Court.[4] In doing so, it formulated the legal questions by reference to which that appeal was to be determined in the following way:[5]

(a) Did the arbitrator err in finding that the rule in *Joyner v Weeks* precludes recovery of costs reasonably incurred in mitigation?

(b) If yes, which party bears the onus of proving the reasonableness of the costs incurred in mitigation?

(c) In all the circumstances, did the arbitrator err, when considering the reasonable and proper amount required to put the premises into the state of repair in which they ought to have been left, in failing to have regard to the prevailing circumstances at the time the lessor undertook the repair work?

[9] In argument, and as we explain below, it became apparent that distillation of the legal questions involved was not one which necessarily conformed to the arbitrator's legal errors as conceptualised by Gama. Thankfully, little now turns on that.

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2 *The Gama Foundation v Fletcher Steel Ltd* [2021] NZHC 633, (2021) 22 NZCPR 161.
3 *The Gama Foundation v Fletcher Steel Ltd* [2021] NZHC 2514.
4 *The Gama Foundation v Fletcher Steel Ltd* [2022] NZCA 314. This Court's decision in *Saltburn Holdings Ltd v Penrose Leasehold Ltd* [2019] NZCA 127 provides a helpful explanation of the procedural implications of sch 2 of the Arbitration Act 1996.
5 At [8].

Analysis

Overview

[10] In this judgment we first set out the principles governing grants of leave by the High Court pursuant to cl 5 of sch 2 of the Arbitration Act. We then summarise our understanding of the rule in *Joyner v Weeks*, including as considered by this Court in *Māori Trustee v Rogross Farms Ltd*.[6] Having done so we set out how that rule arose and was addressed in the Award. Finally, we summarise the basis upon which the High Court declined leave to appeal the Award.

[11] Against that background, and applying the relevant principles in light of the parties' submissions, we assess and dismiss Gama's appeal.

Schedule 2, clause 5: leave to appeal arbitral awards

[12] Clause 34 of sch 1 of the Arbitration Act limits recourse to the courts against arbitral awards to timely applications to have an award set aside on specified grounds. Notwithstanding, cl 5(1) of sch 2 provides for appeals on any question of law arising out of an award in three circumstances:

(a) if the parties have so agreed before the making of the award;

(b) with consent given after the making of the award; and

(c) with the leave of the High Court.

[13] Clause 5(2) then stipulates the High Court is not to grant such leave "unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more of the parties".

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6 *Māori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410 (CA).

[14] We adopt with gratitude the following summary of the relevant principles articulated by Osborne J in the High Court leave decision:[7]

> [9] … As explained by the Court of Appeal in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* (*Doug Hood*), the pre-condition in cl 5(2) is designed to ensure disputes will not be referred to the High Court if, as between the immediate parties, the matter is largely academic.[8]
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> [10] The Court further explained, once the cl 5(2) precondition is met, there remains a discretion whether leave to appeal should be granted which is to be exercised by the court in a disciplined way.[9]
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> [11] The Court set out and discussed eight (non-exhaustive) considerations which should be taken into account in the circumstances of a particular case, explaining that they are guidelines, rather than governing criteria.[10] The head-note to the report accurately summarises the considerations identified by the Court:[11]
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> (1) Where the question was a one-off point and of little precedent value the Court would not grant leave unless there were very strong indications of an error. Where the question was of precedent value the lower standard of a strongly arguable case that an error existed would be sufficient. Where conflicting decisions existed on the point in question this would weigh in favour of granting leave. This first consideration was the most important.
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> (2) If the question of law under consideration was the very reason for the arbitration this would weigh against exercising the discretion. Conversely where the question of law emerged incidentally during the arbitral process leave would be more readily granted.
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> (3) Where the arbitrators were legally qualified it would be more difficult to obtain leave to appeal the arbitral decision on a question of law.
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> (4) Where the dispute was of great significance to the parties this would weigh in favour of exercising the discretion.
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> (5) Where a very substantial amount of money was involved it might be somewhat easier for the parties to obtain leave.

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7 *The Gama Foundation v Fletcher Steel Ltd,* above n 2.

8 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) [*Doug Hood*] at [11].

9 At [54].

10 At [54].

11 At 318–319.

(6) Where the likely amount of delay consequent on granting leave was disproportionate to the significance of the dispute, or if the issue was urgent, the discretion was less likely to be exercised.

(7) If the parties had agreed that the arbitral award was final this, while not determinative, would weigh against the exercise of the discretion.

(8) If the dispute was of an international nature and the parties had expressly opted in to cl 5 (the appeal provisions of the Arbitration Act 1996, Second Schedule) this would weigh in favour of exercising the discretion (see para [54]).

[15] We proceed accordingly.

The Rule in Joyner v Weeks

[16] *Joyner v Weeks* involved a claim by a lessor against a lessee for the lessee's failure to put the leased premises in repair at the expiry of the lease. As matters had transpired, two years prior to that expiry the lessor had re-leased the premises upon that expiry. It did so on terms that required it to substantially alter the property. Accordingly, it had not and would not ever incur the cost of the lessee's required repairs and, arguably therefore, had suffered no loss as a result of the lessee's breach.

[17] The claim was referred for trial to an official referee. The referee awarded the lessor nominal damages (one farthing) only, accepting the lessee's contention no loss had been caused. The lessor moved to set aside the referee's judgment and for judgment in its favour or for a new trial.

[18] The Divisional Court found, contrary to the referee's finding, the fact that the lessee's repair obligations, and their associated costs, had not and would not be met by the lessor did not preclude the lessor's claim for actual damages.

[19] The question became one of quantum. The Court was not persuaded the cost of repairs was the appropriate measure of damages. Rather in its view the better measure was the diminution in value of the demised premises occasioned by the failure to repair, but not exceeding the cost of doing the repairs. On that basis it set aside the referee's judgment and ordered a new trial on the quantum issue.

[20] The defendant lessee appealed, and the plaintiff lessor cross-applied for judgment to be entered in its favour for £70, its claim for damages before the referee.

[21] The Court of Appeal first disagreed with the Divisional Court's approach to the measure of damages. Lord Esher MR described the correct approach, which he considered a rule of law, as follows:[12]

> The rule is that, when there is a lease with a covenant to leave the premises in repair at the end of the term, and such covenant is broken, the lessee must pay what the lessor proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left. It is not necessary in this case to say that that is an absolute rule applicable under all circumstances; but I confess that I am strongly inclined to think that it is so. It is a highly convenient rule. It avoids all the subtle refinements with which we have been indulged to-day, and the extensive and costly inquiries which they would involve.

[22] His Lordship went on to consider the contention the circumstance that the lessor had not and would not incur the cost of repairs disentitled it to damages so calculated, saying:[13]

> The rule that the measure of damages in such cases is the cost of repair, is, I think, at all events, the ordinary rule, which must apply, unless there be something which affects the condition of the property in such a manner as to affect the relation between the lessor and the lessee in respect to it. The question is whether there is any such circumstance in the present case.

[23] Lord Esher was satisfied that was not the case. The circumstance the lessor sought to rely on arose as a result of a contract between the lessor and a third person, to which the lessee was not a party and with which he had nothing to do. At the point of the determination of the lease between the lessor and the lessee the premises were out of repair. The contract between the lessor and the third person could not be taken into account: it was something to which the lessee was a stranger.[14] The result was that there was nothing to prevent the application of the ordinary rule as to the measure of damages in such cases.

[24] Lord Fry agreed.[15]

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12 *Joyner v* Weeks, above n 1, at 43.
13 At 43–44.
14 At 44.
15 At 45.

[25] Where a lessee defaults on repair obligations at the expiry of a lease, *Joyner v Weeks* therefore stands for two essentially straightforward propositions:

(a) The fact the lessor has not and will not incur the cost of performing the lessee's repair obligations does not preclude the lessor from claiming damages.

(b) The measure of those damages is the usual contractual measure, namely what the lessor claiming for breach of contract proves to be a reasonable and proper amount for putting the premises into the state of repair in which they ought to have been left by the lessee.

[26] The rule in *Joyner v Weeks* has been long subject to criticism on the basis its application resulted in windfall gains by a lessor. For a period the status of the rule was uncertain. In the United Kingdom its significance was limited by legislative intervention.[16]

[27] In 1991 the New Zealand Law Commission recommended the abolition of the rule.[17] Nonetheless, in *Māori Trustee v Rogross Farms Ltd* this Court reaffirmed the application of the rule in New Zealand.[18] As in *Joyner v Weeks*, the lessee Rogross Farms delivered the leased land at the end of the term in breach of its repair covenant. The lessor, the Māori Trustee, claimed damages of $19,570, the cost of remedying the breach. Given the terms of the breached covenants, however, the lessor could not persuade the High Court the lessee's breach had caused any diminution in the value of the leased land.[19] On that basis Rogross Farms argued the Māori Trustee should be awarded nominal damages only. The High Court found that it was not bound by the Court of Appeal's judgment in *Joyner v Weeks*: rather, agreeing with the

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16 Section 18(1) of the Landlord and Tenant Act 1927 (UK) provides:

> Damages … shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) … is diminished owing to the breach …; and in particular no damage shall be recovered for [such] a breach …, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

17 Law Commission *Aspects of Damages: The Rules in Bain v Fothergill and Joyner v Weeks* (NZLC R19, 1991).

18 *Māori Trustee v Rogross Farms Ltd,* above n 6.

19 An outcome this Court described as "inherently unlikely" at 412.

Queen Bench decision below, it concluded the proper measure of loss was the diminution, if any, in the value of the lessor's reversion.[20] No diminution having been proved, the lessor was awarded $10 in nominal damages only.

[28] On appeal this Court followed the approach in *Joyner v* Weeks and awarded damages to the lessor equal to the claimed costs remedying the breach. The criticisms of the rule were examined and discussed by Tipping J. The Court considered the rationale for the rule was sound:[21]

> It should be said at the outset that the rule is not as inconsistent with general principles in relation to the assessment of damages for breach of contract as has on occasions been suggested. Damages in tort are designed to reflect what the plaintiff has lost by reason of the wrong. Damages in contract are designed to represent the monetary equivalent of the promised benefit which has not been provided. In other words, they are designed to put the injured party, as nearly as possible, and so far as money can do it, into the position he would have been in if the contract had been performed.
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> Thus, if a lessee fails to perform a covenant and the term has expired a sum of money must replace the performance of the covenant. That sum of money will ordinarily equate the cost to the lessor of having the covenant performed. It is when the lessor is unable or does not wish, for whatever reason, to have the covenant performed that the difficulties said to be inherent in the rule arise. It follows that there is justification for holding that the rule is not absolute. But on a prima facie basis the rule fits comfortably with the purpose of damages for breach of contract.

[29] Given the above, it was suggested there was a "strong case" for the retention of the rule on a prima facie basis "if only because people who have agreed to do something should, prima facie at least, be required to do it".[22] The position in New Zealand law is therefore as stated by Tipping J as follows:[23]

> The rule in *Joyner v Weeks* is not an absolute rule. It is, however, the prima facie rule which will be applied unless the lessee can show by sufficiently cogent evidence that in both the short and the long term the lessor will definitely suffer no loss or will suffer a loss which can definitely be assessed at less than the prima facie measure.

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20 *Māori Trustee v Rogross Farms Ltd* [1991] 3 NZLR 369 (HC).
21 *Māori Trustee v Rogross Farms Ltd,* above n 6, at 418–419.
22 At 420.
23 At 420.

[30] In *Northash Ltd v Zeff Farms Ltd*, when declining special leave to appeal to the High Court an arbitral award concerning damages payable for breach of a lessee's covenant to maintain a farm in good condition, the Court emphasised that approach.[24] The position in New Zealand was, therefore different to that in jurisdictions where *Joyner v Weeks* is regarded as an absolute rule, that is a rule of law.[25]

The rule in Joyner v Weeks *as raised before and applied by the arbitrator*

[31] During the arbitration the parties had differing views as to the meaning and effect for their dispute of the principles in *Joyner v Weeks*. That difference in view responded to Gama's characterisation of the steps it had actually taken to repair the premises as "mitigation" of the damage caused by Fletcher Steel's breach.

[32] On that basis Gama argued the normal rules applying in actions for damages for breach of a contract (including the rule that cost incurred as a result of action reasonably taken in the course of attempting to mitigate the damage suffered as a result of the other party's breach of contract is recoverable) applied, with only one modification. That was under the *Joyner v Weeks* principle a landlord is entitled to recover damages for breach of a tenant's obligations of repair and maintenance even in respect of repairs which the landlord does not carry out.

[33] Fletcher Steel's position was that the effect of *Joyner v Weeks* was far more wide-reaching. Whilst the decision did provide for damages for repair work not carried out, it placed a heavier burden on the landlord overall in that it held that the landlord must prove, in respect of each item of its claim, not only breach and expenditure (or, in the case of work not carried out, possible expenditure) but that the expenditure claimed was necessary and proper. As a consequence, Gama could not rely on the rule normally applying that cost incurred as a result of action reasonably taken in the course of attempting to mitigate the damage suffered as a result of the other party's breach of contract is recoverable.

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24 *Northash Ltd v Zeff Farms Ltd* [2022] NZCA 471, [2023] 2 NZLR 202 at [36].
25 At [43].

Analysis

[34] The arbitrator did not consider that *Joyner v Weeks* was limited in the way argued by Gama. In summary, the arbitrator:

(a) recognised as a general rule of contractual damages that costs incurred by a plaintiff acting reasonably to mitigate their damages are recoverable;

(b) found that general rule did not apply in circumstances covered by *Joyner v Weeks*; and, accordingly,

(c) found the onus was on Gama to establish the costs it claimed for repair works (whether carried out by it or not) were the properly assessed costs of the repair work which Fletcher Steel was liable to perform under the lease but which it had failed to do.

[35] Gama now says the arbitrator's first two conclusions were wrong. Accordingly, it should have been for Fletcher Steel to prove that the repair costs claimed by Gama were unreasonable, not for Gama to prove they represented the damages it was entitled to for the breach by Fletcher Steel of its covenant to repair.

[36] In the High Court Osborne J was satisfied those propositions were not arguable in the context of the Award. We agree. Although the application of the principles of mitigation of damages may in certain circumstances affect claims under the prima facie approach found in *Joyner v Weeks*, that is not the case here. Our reasons follow.

[37] A classic statement of the contractual principle of mitigation is found in *Burrows, Finn and Todd on the Law of Contract in New Zealand*:[26]

> The law does not allow a plaintiff to recover damages to compensate for loss which would not have been suffered if he or she had taken reasonable steps to mitigate the loss. Whether the plaintiff has failed to take a reasonable opportunity of mitigation is a question of fact dependent upon the particular

[26] Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th ed, LexisNexis, Wellington, 2022) at 881 (footnotes omitted).

> circumstances of each case. The burden of proving such failure rests upon the defendant.

[38] The damages payable by Fletcher Steel to Gama crystallised on the date of the expiry of the lease. The state of the leased premises at that date determined the repairs required, so that the quantum of damages for the breach of the repair covenant reflected the cost of those repairs at that time. Despite what Gama claims, the steps Gama took were not in mitigation of those damages. Those steps may have mitigated consequential losses: for example, if the premises were not lettable without the repairs being done, and the repairs were within Gama's power to do within a reasonable period of time, it would be open for Fletcher Steel to say that delays by Gama in carrying out the repair work reflected a failure to mitigate. Gama did, in fact, claim for consequential lost rent. The arbitrator concluded that — because the scale and configuration of the property was not suitable for commercial tenants in the Christchurch — Gama had not proved it would have been able to re-lease the property during the period in which the repairs took place. Given the above, the principles of mitigation as raised in the questions of law proposed by Gama, and their effect on onus, were not material to the dispute between Gama and Fletcher Steel.

[39] The arbitrator summarised the rule of mitigation normally applying as being that the cost incurred as a result of action reasonably taken attempting to mitigate damage was recoverable. Given that the obligation of mitigation is to *reduce* damages otherwise flowing from a breach, a separate focus on the recoverability of costs incurred in mitigation is perhaps a little counterintuitive. What can be said is that in the ordinary course the benefit of mitigation to which a defendant is entitled is net of the plaintiff's costs of achieving that mitigation. Further, and what Gama may have had in mind, is the principle reflected in the following comments of *Burrows, Finn and Todd on the Law of Contract in New Zealand*:[27]

> It is implicit in the principle of mitigation that if mitigating steps are in fact reasonably taken, and additional loss or damage results notwithstanding the reasonable decision to take those steps, then that extra loss is recoverable in addition to any other loss.

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[27] At 883 (footnote omitted).

[40] That approach would appear to reflect the general proposition that "[t]he burden which lies on the defendant of proving that the plaintiff has failed in his or her duty of mitigation is by no means a light one, for this is a case where a party already in breach of contract demands positive action from one who was often innocent of blame."[28]

[41] The 7th edition of *Dilapidations: The Modern Law and Practice* contains helpful commentary on the relevance of the principles of mitigation in cases affected by the *Joyner v Weeks* principles, remembering the different status of those principles under New Zealand law.[29]

[42] The starting point is the general principle of damages that where a defendant has the option of performing the contract in alternative ways, damages must be assessed on the assumption that he will perform it in the way most beneficial to himself and not in that most beneficial to the claimant (the so-called "minimum obligation" principle).[30] So, the authors explain, where there are a number of different ways of performing the covenant to repair, damages will, in the ordinary case, be assessed at common law by reference to the cost of the lesser, and cheaper, work. That principle only applies where the lesser work constitutes a performance of the covenant: if it does not, it is irrelevant for the purposes of assessing damages.[31] Further, the text suggests that where work which produces a lower specification building will in fact cost more than work which results in a better building (and so is not work which the tenant would realistically be likely to have done had it elected to comply with its obligations) the cheaper, albeit higher specification, work will be the relevant work for the purposes of the common law measure of damages.[32]

[43] The authors then go on to consider the application of those principles where the landlord carries out remedial works following lease expiry, as was the case here. They confirm the straightforward application of the principle in *Joyner v Weeks* means that where a landlord elects to limit the work and not completely remedy the relevant

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28 At 882.
29 Nicholas Dowding, Kirk Reynolds and Alison Oakes *Dilapidations: The Modern Law and Practice* (7th ed, Sweet & Maxwell, London, 2022).
30 At 822.
31 At 822–823.
32 At 824.

disrepair the landlord remains entitled to the reasonable cost of the remedial works for which the tenant was liable under the covenant.[33]

[44] The question of mitigation is discussed in that context:[34]

> Where … the works carried out by the landlord in fact remedy the disrepair, the principles of mitigation may result in his claim being limited to the cost actually incurred, even where the effect of (for example) the covenant against alterations is that the tenant could not itself lawfully have carried out that work.

[45] They refer to the example of that approach found in *Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd* where air handling units were in disrepair.[35] Even if those units could have been repaired, very extensive work would have been required. The landlord in fact replaced them at a lower cost. It was held that the lower cost was the amount recoverable. The Judge reasoned:[36]

> … [A]lthough the *prima facie* measure of damage is the cost of [the repair work], [the landlord] has mitigated its loss by adopting a less expensive solution. The cost of this alternative solution therefore represents the amount recoverable. It is irrelevant, as [counsel] appears to contend, that the solution actually adopted in order to mitigate the loss is not one that would have been open to [the tenant]. However, [the tenant] is entitled to take the benefit of the mitigation.

[46] *Sunlife* went on appeal,[37] but not on the issue of the Judge's assessment of damages at common law. The approach has, moreover, been the subject of forceful academic criticism which argues the general law of mitigation has no part to play in dilapidation cases.[38]

[47] That approach to mitigation has not, we acknowledge, been considered in New Zealand. There may, therefore, be a live issue as to its application in New Zealand in an appropriate case. But this is not that case.

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33 At 824.

34 At 824 (footnote omitted).

35 *Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd* [2013] EWHC 463 (TCC), (2013) 147 Con LR 105.

36 At [158].

37 *Tiger Aspect Holdings Ltd v Sunlife Europe Properties Ltd* [2013] EWCA Civ 1656.

38 Nic Taggart "Darkness on the edge of town? Or is the calculation of consequential losses in dilapidation claims harder than it looks? (Part 1)" (2016) 4 (3) Journal of Building Survey, Appraisal & Valuation 130 at 137–139.

[48] As the *Sunlife* decision explains:[39]

> … [I]f the cost actually incurred by the landlord … is greater than the cost of other work which would be sufficient …, then the landlord is limited to recovering the costs of the latter.
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> …
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> … [T]he appropriate test is not whether the landlord has acted reasonably in carrying out remedial works, but rather whether what the landlord has done by way of repair goes no further than was necessary to make good the tenant's breaches of covenant.

[49] The authors of *Dilapidations: The Modern Law and Practice* comment:[40]

> However, the fact that the works carried out by the landlord go further than the works for which the tenant was liable does not mean that the tenant escapes liability for anything. What it means is that the sum recoverable at common law is limited to the reasonable cost of the repair works which the tenant should have carried out.

[50] Those comments are a complete answer to the legal issue Gama seeks to raise here. Indeed it would be strange if that were not the case. Gama, unlike the lessor in *Sunlife*, was not facing a contest between its claim for damages and the lesser, mitigated, amount it had actually spent. Rather Gama claimed — on the basis of what it termed mitigation — a presumptive entitlement to reasonable costs exceeding provable damages.

[51] The approach the arbitrator actually took in the Award, albeit arrived at with reference to *Joyner v Weeks* by a slightly different route, is on all fours with the decision in *Joyner v Weeks*, this Court's decision in *Rogross Farms*, the comments in *Dilapidations* and the analysis in *Sunlife*. That is, the amounts the arbitrator awarded Gama were, on the evidence before him, the amounts he found to be the costs of the repair work Fletcher Steel had been obliged to carry out but had not. The onus Gama complained of simply reflects the onus on a plaintiff to prove its damages.

[52] In argument before us Gama suggested the occasion of the dispute which featured in the *Northash* decision evidenced a need for further clarification here of the

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39 *Sunlife Europe Properties Ltd v Tiger Aspect Holdings Ltd*, above n 35, at [43] and [45].

40 Dowding, Reynolds and Oakes, above n 29, at 825 (footnotes omitted).

Joyner v Weeks, prima facie, approach.[41] We disagree. As our analysis shows, Gama's assertion that the approach they suggested to mitigation, in circumstances such as these, was the usual approach, is misplaced.

[53] Further, many of the relevant factors identified in *Doug Hood* point against leave. The arbitrator deciding the Award was highly qualified: a King's Counsel and a former Master of the High Court. He has recently retired. If leave were granted by this Court, and if then the High Court found in favour of Gama, a new arbitrator would need to be appointed. The process would begin again. The lease ended in 2016. The Award was issued in 2020. The amount of money on the line is not very substantial in the context of a commercial lease such as this one. A decision to grant leave here would cut across the clear legislative policy underpinning the Arbitration Act. As this Court in *Doug Hood* made clear:[42]

> … [O]ur Parliament, like those in the United Kingdom and Australia, has chosen to favour finality, certainty and party autonomy … [Parliament] intended to encourage arbitration as a dispute *resolution* mechanism. By enacting a statute with the express purpose of redefining and clarifying the limits of judicial review of arbitral awards, Parliament has made clear its intention that parties should be made to accept the arbitral decision where they have chosen to submit their dispute to resolution in such manner. It plainly intended a strict limitation on the involvement of the Courts where this choice has been made.

[54] Gama may be unhappy with the outcome of its arbitration. However it is an arbitration Gama chose to undertake according to the contract it and Fletcher Steel agreed to. The benefits and risks of arbitration are well known.

Result

[55] The appeal is dismissed.

[56] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Corcoran French, Christchurch for Appellant
Meredith Connell, Auckland for Respondent

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41 *Northash Ltd v Zeff Farms Ltd,* above n 24.
42 *Doug Hood,* above n 8, at [52].