



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

[2023] NZDT 658

APPLICANT **C Ltd**

RESPONDENT **V Ltd**

SECOND **LV**
RESPONDENT

The Tribunal orders:

V Ltd and LV (jointly and severally) are to pay C Ltd \$6,342.86 by 13 December 2023.

Background

1. This is one of two claims brought by [C Ltd], the owner of commercial premises at [Address], against the former tenant of those premises, V Ltd.
2. C Ltd purchased the premises from the previous owners DX and EE.
3. DX established a retail business known as [Business], which he operated from the premises.
4. In September 2016 a Deed of Lease was entered into for [Shop], between DX and EE as landlord and DX and BU as tenant.
5. The lease was for a period of two years from 1 June 2016, with two rights of renewal of two years each. The lease did not provide for market rent reviews, but it did provide for CPI rent reviews on each renewal date.
6. V Ltd (Mr & Mrs V) purchased the [Business] as a going concern in 2019. The lease of [the shop] was assigned to them under a Deed of Assignment of Lease dated 9 August 2019. The lease was varied to:
 - a. add further three more rights of renewal of two years each; and
 - b. add LV and KV as Guarantors.
7. Sometime in early 2022 (the date is not known) the landlord contacted the tenant asking whether they intended to renew the lease in June 2022. Mr & Mrs V indicated that they did intend to renew. There was no mention of a CPI rent increase at that time.

8. Sometime later, the landlord advised the tenant that there would be a CPI rent increase, and that the new rate from 1 June 2022 would be \$90,000 per annum (excl. GST).
9. The tenant indicated that this rate was not sustainable for their business. There were some attempts at negotiation between the landlord and tenant.
10. On an unknown date (some time before the end of May 2022), the landlord's lawyer sent a draft Deed of Renewal of Lease and Rent Review to the tenant.
11. The tenant did not sign that document. They continued to pay rent at the old rate. They began to look for other premises.
12. In early October, the tenant gave notice to end the lease on 31 October 2022. They vacated the premises on that date.
13. The landlord's two claims were heard together in on 2 November 2023. Both parties attended the hearing. Ms O represented C Ltd.

Findings

14. This claim seeks:
 - a. Rent arrears, representing the shortfall between the 'old rent' and the 'new rent' for the period from 1 June 2022 to 31 October 2022 (C Ltd's invoices 626, 634, 654, 660, and 678).
 - b. A management fee for June and July 2022 (invoice 655)
 - c. Operational expenses for the period from 1 August to 31 October 2022 (invoice 703).
 - d. Legal costs – preparation of the Deed of Renewal of Lease and Rent review (invoice 730).
 - e. "Management time" and loss of rental income due to the need for repairs after the end of the lease (invoices 730 and 812).

Rent arrears

15. The question to determine here is whether the rent increase took effect on 1 June 2023. If it did, then V Ltd are in rent arrears because they continued to pay at the previous rate.
16. The relevant part of the Deed of Lease is clause 2.5 and 2.6.
17. Clause 2.5 states that the annual rent payable from each CPI rent review date is determined by a formula that is set out in detail in clause 2.5.
18. Clause 2.6 states:

The new rent determined pursuant to subclause 2.5 shall be payable from the relevant CPI rent review date once it is determined by the landlord giving notice under that subclause.
19. Ms O submitted that the Deed of Renewal of Lease and Rent Review document was notice to the tenant of the CPI increase.
20. That document states:
 2. Rent review

2.1 The annual rent payable under the Lease from 1 June 2022 is \$90,000 per annum plus GST payable in advance by equal calendar monthly payments of \$7,500.00 plus GST.

2.2 In light of the current economic climate and in good faith, the first rental payment outlined in clause 2.1 will not be charged until 1 November 2022. From 1 June 2022 to 31 October 2022 the rent to be charged will remain in accordance with the previous rent review that being \$6,909.97 per month plus GST.

21. Ms O submitted that the waiver in paragraph 2.2 was conditional upon the tenant agreeing to the renewal. Because the tenant did not renew the lease, the rent increase took effect on 1 June.
22. Mr & Mrs V submitted that they had no such understanding. They submitted that the landlord made the offer to delay the rent increase after they told him that they would struggle to pay the new rate.
23. My finding is that Mr & Mrs V were entitled to rely on the plain words of paragraph 2.2.
24. They were also entitled to assume that the formal notice of rent review, which was prepared by the landlord's lawyer, contained all of the relevant terms and conditions of the rent review. There is no reference in that document to the waiver being conditional on the tenant agreeing to the terms of the renewal.
25. Therefore, according to the terms of the landlord's notice, the rent increase did not take effect until 1 November 2022. The rate remained at the previous rate until the date that Mr & Mrs V vacated.
26. There are no rent arrears, and this part of the claim is dismissed.

Management fee

27. The landlord seeks a management fee of \$576.00 plus GST for the months of June and July 2022.
28. C Ltd had not charged V Ltd a management fee before this invoice.
29. The fee is claimed under clause 3.1 of the lease agreement, which states:

The Tenant shall pay the outgoings properly and reasonably incurred in respect of the property which are specified in the First Schedule

30. The First Schedule of the Deed of Lease lists thirteen types of outgoings, including "Management Expenses".
31. The standard Deed of Lease agreement is clearly intended to apply to a wide range of commercial premises. Not all the types of outgoings listed in the First Schedule will be relevant to any particular property. For example, the list includes "Body Corporate charges for an insurance premium under any insurance policy effected by the Body Corporate". This cost is only relevant to unit title properties.
32. Outgoings are an expense that the landlord incurs in respect of the premises. If the landlord does not incur that expense, it cannot be charged to the tenant¹.
33. In this instance, the expense sought by the landlord is not a third-party cost. The landlord has issued an essentially arbitrary invoice for time / inconvenience in dealing with the tenant.
34. My finding is that this is not an outgoing that can be charged to the tenant.

¹ *Memelink v Road Runner 2012 Ltd* [2021] NZDC 17246

35. This part of the claim is dismissed.

Operating expenses

36. Mr & Mrs V accepted this part of the claim.

Legal fees – preparation of Deed of Renewal of Lease and Rent Review

37. C Ltd seeks payment of the cost that it incurred for the preparation of the Deed of Renewal of Lease and Rent review, on the grounds that Mr & Mrs V initially indicated that they intended to renew the lease.

38. Mr & Mrs V submitted that when they indicated their intention to renew, they were not aware that the C Ltd was going to increase the rent. They would not have agreed to renew if they were aware of the increase, because the new rate meant that their business was no longer tenable.

39. I acknowledge Mr & Mrs V's argument. However, the lease agreement clearly provides for CPI rent reviews on the date of renewal.

40. The Deed of Lease has a specific provision relating to costs, including legal costs. Clause 6.1 states:

Each party will pay their own costs of the negotiation and preparation of this lease and any deed recording a rent review or renewal. The Tenant shall pay the Landlord's reasonable costs incurred in considering any request by the Tenant for the Landlord's consent to any matter contemplated by this lease, and the Landlord's legal costs (as between lawyer and client) of and incidental to the enforcement of the Landlord's rights and remedies

41. In this instance:

- a. The legal costs claimed relate to the preparation of a deed of renewal and rent review.
- b. The costs do not relate to considering a request by the tenant for the landlord's consent for any matter.
- c. The costs do not relate to enforcement of the landlord's rights and remedies.

42. Applying clause 6.1, my finding is that each party must pay their own costs. C Ltd instructed their lawyer to prepare the renewal and rent review document, and therefore this cost falls to C Ltd.

"Management time" and loss of rental income due to the need for repairs after the end of the lease

43. These costs are linked to the landlord's other claim, for repairs and reinstatement after the tenant vacated the premises.

44. My decision in respect of that claim is that some parts of the landlord's claims for repairs and reinstatement were proven, including waterblasting (partial), repairs to walls and painting (partial), and repairs to damage where signs were removed.

45. Ms O submitted that all the repairs were completed by March 2023, and the premises were re-let in June / July 2023.

46. I accept that the need for repairs delayed the opportunity to re-let the premises. Some of those repairs are directly linked to damage that the tenant is legally liable for. However, the majority of the repairs are not.

47. This part of the claim seeks:

- a. One months' loss of rent; and
- b. "Management time" for Mr Y and Ms O, including "getting quotes, meeting with tradesmen, liaising with [the landlord's lawyer]".

48. My findings are:

- a. The tenant has no liability for delay caused by repairs / alterations / work that is not in the category of damage for which the tenant has a legal liability under the terms of the lease. Per my decision on the landlord's claim for repairs / remediation, only a relatively small portion of the work done on the property after the end of the tenancy related to 'tenant damage'.

The extent of proven tenant damage does not justify a claim for one month of delay.

I will award half of that amount.

- b. The claim for 'management time' is dismissed. Time and inconvenience of this type is part of the cost of operating this type of business, for which the landlord is compensated by way of receiving rent.

Filing fee and photocopying costs

49. The claim seeks reimbursement of the filing fee, and photocopying costs.

50. The Disputes Tribunal has no power to award costs to any party, except in certain limited circumstances

51. The claim for the cost of the filing fee and photocopying is dismissed.

Outcome

52. The tenant is liable for outstanding operational expenses (\$1,769.32) and damages for loss of opportunity to rent (\$4,312.50).

53. The landlord sought penalty interest on the outstanding invoices.

54. The lease provides for penalty interest of 15% per annum on "rent or other moneys payable under this lease".

55. In this claim the only proven outstanding invoice is for operating expenses. The invoice is dated 22 October 2022. At the date of hearing the invoice had been outstanding for 359 days². At an interest rate of 15% the total interest owed is \$261.04.

56. The proven claim totals \$6,342.86. V Ltd is liable to C Ltd for that amount.

57. Both Mr & Mrs V are guarantors of V Ltd's obligations, per the Deed of Assignment of Lease dated August 2019.

² From the date of the C Ltd invoice to the hearing date, allowing 10 working days for payment per the terms of the lease.

58. C Ltd's claim names Mr V as a joint Respondent with V Ltd, but not Mrs V.

59. As guarantor, Mr V is jointly liable with V Ltd for the proven claim.

Referee: Nicholas Blake
Date: 21 November 2023



Information for Parties

Rehearings

You can apply for a rehearing if you believe that something prevented the proper decision from being made: for example, the relevant information was not available at the time.

If you wish to apply for a rehearing, you can apply online, download a form from the Disputes Tribunal website or obtain an application form from any Tribunal office. The application must be lodged within 20 working days of the decision having been made. If you are applying outside of the 20 working day timeframe, you must also fill out an Application for Rehearing Out of Time.

PLEASE NOTE: A rehearing will not be granted just because you disagree with the decision.

Grounds for Appeal

There are very limited grounds for appealing a decision of the Tribunal. Specifically, the Referee conducted the proceedings (or a Tribunal investigator carried out an enquiry) in a way that was unfair and prejudiced the result of the proceedings. This means you consider there was a breach of natural justice, as a result of procedural unfairness that affected the result of the proceedings.

PLEASE NOTE: Parties need to be aware they cannot appeal a Referee's finding of fact.

Where a Referee has made a decision on the issues raised as part of the Disputes Tribunal hearing there is no jurisdiction for the District Court to reach a finding different to that of the Referee.

A Notice of Appeal may be obtained from the Ministry of Justice, Disputes Tribunal website. The Notice must be filed at the District Court of which the Tribunal that made the decision is a division, within 20 working days of the decision having been made. There is a \$200 filing fee for an appeal.

You can only appeal outside of 20 working days if you have been granted an extension of time by a District Court Judge. To apply for an extension of time you must file an Interlocutory Application on Notice and a supporting affidavit, then serve it on the other parties. There is a fee for this application. District Court proceedings are more complex than Disputes Tribunal proceedings, and you may wish to seek legal advice.

The District Court may, on determination of the appeal, award such costs to either party as it sees fit.

Enforcement of Tribunal Decisions

If the Order or Agreed Settlement is not complied with, you can apply to the Collections Unit of the District Court to have the order enforced.

Application forms and information about the different civil enforcement options are available on the Ministry of Justice's civil debt page: <http://www.justice.govt.nz/fines/about-civil-debt/collect-civil-debt>

For Civil Enforcement enquiries, please phone 0800 233 222.

Help and Further Information

Further information and contact details are available on our website: <http://disputestribunal.govt.nz>.