



(Disputes Tribunal Act 1988)
ORDER OF DISPUTES TRIBUNAL

District Court

[2023] NZDT 440

APPLICANT **DM, ND and TM**

**FIRST
RESPONDENT** **NN**

**SECOND
RESPONDENT** **F Ltd**

The Tribunal orders:

NN and F Ltd are jointly and severally liable to pay \$13,464.22 to the D Family Trust on or before 13 October 2023.

Reasons

1. F Ltd ('F') leased commercial premises from the D Family Trust ('the Trust') under two separate Deeds of Lease and Deeds of Assignment (the latter dated 8 May 2018) for the upstairs and downstairs of the premises respectively. NN was the guarantor for both leases.
2. The leases were due to end on 31 January 2023 and, in August 2022, the Trust enquired about F Ltd's plans. F Ltd's business had struggled during the Covid years and, in spite of approximately \$12,000.00 rent relief granted by the Trust, was around \$15,000.00 in arrears under the combined leases by that time.
3. NN for F Ltd requested in mid-September 2022 that the Trust allow the lease to rollover to a month-to-month lease after 31 January 2023 to give them some time to sell their business. In late October the Trust replied it would agree to that on condition that all arrears were paid. F Ltd responded that they would not be able to clear the arrears, so no agreement was reached about the ongoing use of the premises except that it was clear there would be no lease renewal.
4. What actually occurred was that F Ltd stayed in the premises from the end of January to 31 May 2023, using only the downstairs area and surrendering the upstairs (although continuing to use the staff toilets which are in the upstairs area). The Trust did not attempt to re-lease the upstairs until after May 2023 because of the toilet access.

5. As of 31 May 2023 the rent arrears were \$14,729.22 – The Trust states they are not claiming 15% interest on the arrears although they would be entitled to do so under the lease. They do also claim reinstatement costs of \$1006.25 for fluorescent lighting tubes that were missing when F Ltd vacated the premises. The Trust's total claim is therefore \$15,735.47.
6. F Ltd counter-claims \$26,600.00 being \$17,000.00 spent on stock between September and December 2022 and increased business running costs of \$9600.00 between February and May 2023. It seeks to hold the Trust liable for those costs on the basis that the Trust encouraged them to stay in business by agreeing to negotiate over flexible terms for remaining in the premises beyond the expiry date of the lease, when they otherwise would not have done so.
7. While F Ltd does not dispute the quantum of rent arrears calculated, F Ltd seeks a set-off against them on the basis that Covid rent-relief should have been higher than was provided, and that there was significant leaking from the roof for the last three years of their occupancy, resulting they say in the upstairs area being basically unusable for two years.
8. The issues to be determined are:
 - What is a reasonable deduction from the (undisputed) rent arrears amount for Covid rent-relief and/or the loss of use of part of the premises for part of the lease term due to water ingress?
 - Is F Ltd/NN liable to pay the reinstatement cost of the fluorescent light tubes?
 - Is the Trust liable to pay the business losses claimed by F Ltd?
 - What is payable on the claim and counter-claim?

What is a reasonable deduction from the (undisputed) rent arrears amount for Covid rent-relief and/or the loss of use of part of the premises for part of the lease term due to water ingress?

9. The Trust had already provided Covid rent-relief to F Ltd so there is no basis to revisit that relief nor was there any evidence provided by F Ltd to support its claim for further deductions in that regard.
10. There was sufficient evidence provided regarding the water ingress to show that leaking, particularly in the upstairs area, had been an ongoing problem over the years. TM stated that the Trust had paid for many attempts at repair, spending around \$30,000.00 on repairs and around \$5000.00 on dehumidifiers over the term of F Ltd's occupancy. However it is evident that whatever was spent (and F Ltd disputes the Trust's figures in that regard) did not resolve the issue, and I accept that F Ltd's business was affected by the leaking.
11. However from the evidence provided it is not possible to discern to what extent F Ltd was affected and the extent of any stock losses have not been proven. Given the timeframes involved, if the leaking had been serious over some years, I would expect that earlier and more weighty action would have been taken by F Ltd in respect of their lease, that is, they could have had grounds to terminate the lease early if severe leaking was not being rectified.
12. The Trust claims that a lot of ceiling panels shown as damaged in the photos of the leaking were damaged by cabling that was installed by the tenant but that is not established, and in any event, it is not the function of ceiling panels to prevent water ingress. The Trust also wished for it to be taken into account that they have not claimed 15% interest on the arrears that they are entitled to under the lease and that they did not increase the rent at any rent review in understanding of the effect that Covid had on F Ltd's business. While I note that, the Trust still must meet its obligations to the tenant under the lease.
13. For the reasons above, I consider that a 20% reduction in rent for the upstairs area for the final six months (the time in which the leaking appears to have been worse/ongoing during rain) is appropriate to cover F Ltd's need to mitigate the effect of the leaking (to move stock, use

buckets etc to contain the water). That works out to a reduction of \$1265.00 (upstairs rent being \$11,000.00+GST per annum).

Is F Ltd/NN liable to pay the reinstatement cost of the fluorescent light tubes?

14. F Ltd/NN stated that they were unsure what light had a missing tube as 'they had always replaced tube lights if they stopped' and also argued that because they had taken over the lease under assignment from the original lessee and had not put the lights in themselves, they should not be liable for them. Whether or not F Ltd put the lights in, they are liable under the terms of the lease agreement to reinstate the premises.
15. The Trust has provided an invoice for 'new tube' and 'replace all broken tubes for [Suburb] job', and I accept TM's statement that the Trust only owns this one commercial property. I therefore find on the balance of probabilities that lights in the premises needed repair or replacement at the end of the lease and that the cost of \$1006.25 is therefore proven as payable by F Ltd/NN.

Is the Trust liable to pay the business losses claimed by F Ltd?

16. There was nothing in all the correspondence provided to show that the Trust gave any binding undertaking or made any misleading statement with respect to the conditions under which the lease could be extended, that would make them liable for F Ltd's business losses. On the contrary, the evidence shows that the Trust made it very clear in a timely manner, before the end of the lease term, that it would renew the lease on a month-to-month basis, only on condition that F Ltd paid all rent arrears by the end of January 2023.
17. F Ltd's claim for \$17,000.00 spent on stock between September and December 2022 and increased business running costs of \$9600.00 between February and May 2023 therefore cannot succeed. Its decision to continue in business past the end of its lease term was entirely its own.
18. In summary, F Ltd and NN are jointly liable to pay arrears of \$14,729.22 minus a rent reduction of \$1265.00 due to water ingress, being \$13,464.22. The balance of the counter-claim is dismissed.

Referee Perfect

Date: 15 September 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>.