



Case in Brief:

*Leave for second appeal declined
in lease dispute arbitration*



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In *The Gama Foundation v Fletcher Steel Limited* [2023] NZCA 243, the Court of Appeal reiterated the strict New Zealand tests set out in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 (CA) and *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2008] 2 NZLR 591 for appellate intervention into arbitral awards and the requirement to set aside an award on public policy grounds.

Background

The Gama Foundation (**Gama**) leased industrial premises in Christchurch to Fletcher Steel Limited (**Fletcher**) from 2006 to 2016. The premises were damaged in the Christchurch earthquakes of 2010 and 2011. Fletcher had an obligation to repair and maintain the premises and yield them up in good repair at the expiry of the term. Fletcher had refrained from doing this as it would interrupt its business, and Gama ultimately undertook the works and sought

Second appeal declined

→ The Court of Appeal has declined to hear an appeal about an arbitral award regarding a leased property damaged in the Christchurch earthquakes.



reimbursement from Fletcher plus interest.

The general rule at common law is that the measure of damages for breach of the covenant to repair by a tenant is the cost of putting the premises into the state of repair required by the covenant.¹ The parties could not agree on the amount of damages, and this went to arbitration before Tomas Kennedy-Grant KC.² On 5 February 2020 an award was released and Gama succeeded in part and was awarded a sum of \$320,000 (plus

GST) which Fletcher paid.

High Court decisions

Gama's application for leave to appeal the award was declined.³ This application was based on clause 5(2) of the second schedule of the Arbitration Act 1996 (the **Act**). The declination was primarily as explained by the Court of Appeal in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd (Doug Hood)*,⁴ for the pre-condition in clause 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.

An application to set aside the award under clause 34, Schedule 1 of the Act was also filed and disposed of. The award included paragraph 14, which determined that repudiation of Fletcher's obligations was not in issue. Gama maintained this was a misunderstanding and wished to set aside this element of the award and remit that part to the arbitrator for consideration and to calculate damages. On a

1 *Joyner v Weeks* [1891] 2 QB 31 (CA); *Māori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410 (CA).

2 At issue was whether the repairs could have been carried out on a cheaper or more restricted basis.

3 *The Gama Foundation v Fletcher Steel Ltd* [2021] NZHC 633, (2021) 22 NZCPR 161. [High Court judgment]

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

close study of the events at the arbitration, Justice Osborne ruled that counsel for Gama made the submission unequivocally in his opening that repudiation was not in issue. It was dealt with in the award. Gama denied making this submission. Gama submitted the arbitrator's disregard of Gama's *closing* submissions was a breach of the public policy of New Zealand⁵ and the rules of natural justice.⁶

Justice Osborne declined to set aside this part of the arbitral award.⁷

On the papers, the High Court further declined leave for a second appeal to the Court of Appeal.⁸ This application dealt with the High Court judgment for leave to appeal (not to set aside) and considered the test for leave under [clause 5\(5\)](#), Schedule 2 of the Act:⁹

- (a) The appeal must raise some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.
- (b) Upon a second appeal, the Court of Appeal is not engaged

in the general correction of error. Its primary function is then to clarify the law and to determine whether it has been properly construed and applied by the Court below.

- (c) Not every alleged error of law is of such importance either generally or to the parties, as to justify further pursuit of litigation which has already been twice considered and ruled upon by a Court.

Court of Appeal decisions

On application, the Court of Appeal then granted [special leave](#) to appeal the High Court judgment on the following simplified questions:¹⁰

- (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?

Following a hearing on 23 February 2023, the [Court of Appeal dismissed the second appeal](#) against the High Court judgment.¹¹ The Court found the arbitrator had not erred in his interpretation of the rule in *Joyner v Weeks* as it applied to the facts. Furthermore, the Court would not have exercised its residual discretion to grant leave based on a combination of the eight *Doug Hood* factors.¹²

Conclusion

The decision confirms the strict parameters of applications to first obtain leave to appeal an award under clause 5, Schedule 2 of the Act and secondly, to try and set aside an award (on public policy grounds) under clause 34, Schedule 1 of the Act. This supports the proposition that New Zealand is an arbitration-friendly jurisdiction and courts will be very circumspect before intervening.

5 [Article 34\(2\)\(b\)\(ii\) of schedule one of the Arbitration Act 1996](#).

6 [Gama Foundation v Fletcher Steel Ltd](#) [2021] NZHC 635 at [51],[52]; [Trustees of Rotaira Forest Trust v Attorney-General](#) [1999] 2 NZLR 452 and [Todd Petroleum Mining Co Ltd v Shell \(Petroleum Mining\) Co Ltd](#) HC Wellington Civ-2008-485-2816, 17 July 2009.

7 [Gama Foundation v Fletcher Steel Ltd](#) [2021] NZHC 635 at [68].

8 [Gama Foundation v Fletcher Steel Ltd](#) [2021] NZHC 2514. The application dealt with the rule in *Joyner v Weeks* and the interest clauses of the lease.

9 As noted in [Downer Construction \(New Zealand\) Ltd v Silverfield Developments Ltd](#) [2007] NZCA 355, [2008] 2 NZLR 591 which endorsed [Cooper v Symes](#) (2001) 15 PRNZ 166 (HC) at [12].

10 [Gama Foundation v Fletcher Steel Ltd](#) [2022] NZCA 314.

11 [Gama Foundation v Fletcher Steel Ltd](#) [2023] NZCA 243.

12 Precedent value, focal reason of award, was the arbitrator legally qualified, great significance to parties, substantial quantum, disproportionate delay, agreed finality of award and international nature of dispute.