IN THE COURT OF APPEAL OF NEW ZEALAND

CA645/2014
[2016] NZCA 65

BETWEEN	THE CORNWALL PARK TRUST BOARD INC Appellant
AND	YONG XIN CHEN Respondent

Hearing:	11 February 2016
Court:	Ellen France P, Randerson and Stevens JJ
Counsel:	M G Ring QC and J G H Hannan for Appellant R J Hollyman, J A Wickes and T F Cleary for Respondent
Judgment:	14 March 2016 at 9:30 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence on appeal is granted.

B The appeal is allowed.

C The respondent is liable to pay the upset rent from the date of expiry of the lease until she vacated the property.

D The cross-appeal is dismissed.

E The respondent must pay the appellant costs for a standard appeal on a band A basis with usual disbursements. We certify for two counsel.

F Costs in the High Court are to be fixed in that Court.

REASONS OF THE COURT

(Given by Randerson J)

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Introduction

[1] The appellant Board owns and administers Cornwall Park in Auckland. For many years it has leased adjoining land to provide income to maintain the park for the benefit of the public.

[2] The form of lease utilised by the Board is known as a Glasgow lease. Key features of the lease are:

(a) It is a ground lease only.

(b) The term is for 21 years.

(c) The ground rent is fixed at the commencement of the term and remains payable at the same rate throughout the 21 year term.

(d) The lease is perpetually renewable so long as the lessee complies with the terms of the lease and is willing to pay the new ground rent established at the expiry of the 21 year term. (The new rent is described in the lease at issue as the "upset rent".)

(e) If the lessee does not renew or the lease is not taken up by a purchaser at auction, any improvements on the land revert to the Board without compensation to the lessee.

[3] The lease at issue in this appeal relates to a property at 21 Maungakiekie Avenue. It commenced on 30 March 1988 and expired on 29 March 2009. The ground rent fixed in 1988 was $8,300 per annum. A single dwelling was erected on the property in the 1920s or 1930s.

[4] The respondent Mrs Chen purchased the leasehold interest in the land and the dwelling in November 2005 for $450,000. After the expiry of the lease, she remained in possession until November 2011. During that time, the upset rent for the next 21 year period was established by the processes under the lease to be $73,750 per annum. There is no challenge to the amount so established or to the underlying valuations.

[5] Mrs Chen did not give notice to renew the lease. An auction of the lease was then held but no bids were received. In accordance with the terms of the lease, the improvements have reverted to the Board without compensation to Mrs Chen. The Board has since carried out repairs to the property and has rented it to a third party at approximately two-thirds of the upset rent.

[6] The Board brought proceedings in the High Court against Mrs Chen to recover:

(a) Ground rent of $173,323.64 at the upset rent of $73,750 per annum during the period she was in possession of the property after the expiry of the lease; and

(b) Costs incurred by the Board in remedying alleged breaches by Mrs Chen of the repair covenants in the lease.

[7] In support of the claim for ground rent, the Board relies on cl 13(t) of the lease:

> (t) The Lessee shall whilst and so long after the expiration of the term hereby granted as they retain possession of the said land pending the granting of a new lease as aforesaid pay to the Lessors for the period during which [they] retain such possession a rental calculated upon the basis of the upset rent as valued and fixed in manner aforesaid.

[8] In the High Court, Ellis J rejected the Board's claim.[1] She accepted Mrs Chen's argument that, properly construed, Mrs Chen's liability to pay the upset rent under cl 13(t) was dependent upon the grant to her of a new lease.[2] As this had not occurred and, in the absence of a successful third party bidder at auction, she was not liable to pay the upset rent during the period she was in possession. The Board appeals against that finding.

[9] The second limb of Mrs Chen's argument in the High Court was that, even if the Court supported the Board's interpretation of cl 13(t), the Board was estopped by its conduct from claiming the upset rent. The Judge did not find it necessary to reach a firm conclusion on this point but said she would have found Mrs Chen had not changed her position in reliance on any representation of the Board.[3]

[10] Ellis J found in favour of the Board on its claim for repair costs.[4] In doing so, she rejected Mrs Chen's defence that she had not breached any terms of the lease; that the Board had waived any claim for repair costs or was estopped from recovering them; and that its claims were excessive.[5] In her cross-appeal, Mrs Chen

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1 *The Cornwall Park Trust Board Inc v Chen* [2014] NZHC 2465.
2 Above n 1, at [101].
3 Above n 1, at [119].
4 Above n 1, at [147].
5 Above n 1, at [142]-[147].

challenges these findings and also raises some new arguments not developed in the High Court. We will refer to these in more detail below.

[11] The broad issues are:

(a) Whether the Judge correctly interpreted cl 13(t) of the lease.

(b) If the Board's interpretation is correct, is the Board estopped from claiming the upset rent?

(c) Did the Judge correctly identify Mrs Chen's repair obligations under the lease and the quantum of damages?

(d) Was the Judge right to reject Mrs Chen's defence of waiver or estoppel?

[12] The parties agreed that some additional evidence should be adduced on appeal. We are satisfied that is appropriate and order accordingly.[6]

The terms of the lease

[13] Ellis J helpfully appended a copy of the full terms of the lease to her judgment. For present purposes, we need refer only to some of them. The right of renewal is provided for in cl 13(a):

> (a) On the expiration by effluxion of time of the term hereby granted and thereafter at the expiration of each succeeding term to be granted to the Lessee or to the purchaser at any auction under the provisions hereinafter contained the outgoing Lessee shall have the right to obtain in accordance with the provisions hereinafter contained a new lease of the land hereby leased at a rent to be determined upon the basis of the valuation to be made in accordance with the said provisions for the term of twenty-one years computed from the expiration of the expiring term and subject to the same covenants and provisions as this lease as may be applicable to such new lease.

[14] Clauses 13(b)–(g) set out a process for determining the gross value of the fee simple of the land and of all substantial improvements of a permanent character. For valuation purposes, the lessor and lessee nominate their arbitrators and an umpire.

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6 Affidavits of K G McKeown, M Llewellyn (2), C W L Arnott and D R Tilbrook.

[15] The upset rent for the new term is to be:

> … equal to five pounds per centum on the gross value of the land after deducting therefrom the value of the substantial improvements of a permanent character as fixed by the respective valuations as foresaid.
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> (cl 13(h))

[16] Once the decision of the arbitrators (or of the umpire if necessary) has been made, the lessee is required to give notice to the lessor stating whether they desire to renew the lease. The notice may be given after expiration of the term of the lease so long as the lessee remains in possession of the land (cl 13(i)).

[17] Clause 13(j) applies where the lessee gives notice to renew:

> (j) Any such notice by the Lessee of their desire to have a new lease shall be deemed to constitute a contract between the Lessors (sic) and the Lessee for the granting and acceptance of a new lease at the rent fixed and determined upon the basis aforesaid and for the term and subject to such of the covenants and provisions as are herein contained including the provisions herein contained for valuations and for the right to a new lease at such valuation of rent made and determined as aforesaid or the offer of a new lease for sale by auction and all clauses auxiliary or in relation thereto.

[18] Clause 13(k) provides for what is to happen if the lessee fails to give a timely notice to renew the lease or if notice is given that the lessee does not wish to renew the lease. In either case, the right to a lease for a further term of 21 years:

> … shall be offered by the Lessors by public auction at the upset rental of the said land as ascertained and determined upon the basis of the valuations of the arbitrators or the umpire as aforesaid subject to the payment by the purchaser other than the outgoing Lessee of the value of the said buildings and improvements as so determined by the said arbitrators or their umpire …

[19] The lessee or third parties may bid at auction for the right to a lease for a further 21 years at the upset rental as determined.[7] A third party purchaser must pay the value of the buildings and improvements as determined by the process under the lease (cl 13(k)). A process for making that payment and the execution of a new lease is set out in cls 13(l), (m) and (n).

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[7] The lessor is bound to accept the highest bid so long as it is not less than the amount of the upset rental (cl 13(v)).

[20] Clause 13(s) provides that in every case where a lease is sold by auction, the new term runs from the date of expiration of the existing term. This subclause also provides that a third party purchaser does not become liable to pay the upset rental until taking possession:

> (s) In every case in which the right to a new lease is sold by auction the new term shall run from the date of the expiration of the then expiring term but the rent of a purchaser other than the outgoing Lessee shall not begin to run until the purchaser obtains possession.

[21] Clause 13(t) then follows. For convenience we set it out again:

> (t) The Lessee shall whilst and so long after the expiration of the term hereby granted as they retain possession of the said land pending the granting of a new lease as aforesaid pay to the Lessors for the period during which [they] retain such possession a rental calculated upon the basis of the upset rent as valued and fixed in manner aforesaid.

[22] The final provision of relevance is cl 13(w) which applies where there is no successful bid at auction for the right to a lease:

> (w) If at any auction no person shall become the purchaser at a rental equal to or greater than the upset rent as ascertained and determined in manner aforesaid then at or (as the case may be) as from the expiration of the then expiring term the land hereby leased with all buildings and improvements thereon shall absolutely revert to the Lessors free from any payment or compensation whatever and from any obligation to grant a new lease.

The interpretation of clause 13(t)

The Judge's approach

[23] Ellis J began by noting there was no dispute as to the principles to be applied when interpreting cl 13(t), citing a passage from the judgment of McGrath J in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[8] The Judge then considered a number of contextual issues including differences between the lease at issue and lease terms set out in the Public Bodies Leases Act 1908 (the PBLA); the observation by the majority of the Supreme Court in *Mandic v The Cornwall Park Trust Board* that the possibility there may be no purchaser at the upset rent figure was a recognition that

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[8] *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444 at [61] (cited at [74] in the High Court judgment, above n 1).

the upset rent may not meet the market;[9] the fact that, in the Judge's view, the parties to the lease could reasonably be expected to be aware that Glasgow leases have historically been contentious and that ground rental increases have on occasions been perceived as "crippling" by lessees; that, although there had been a substantial body of litigation over Glasgow leases, the point at issue did not appear to have arisen on previous occasions; and that Mrs Chen was aware that the Board had previously been prepared to contemplate freeholding.[10]

[24] Addressing the specific terms of the lease, the Judge noted it contemplated the expiration of the term might occur prior to the completion of the rent review process.[11] She considered it important that if the lease expired prior to the completion of the evaluation and rent review process, the lessee had to remain in possession in order to be able to exercise the right of renewal or to receive the value of the improvements in the event that the lessee chose not to renew and the lease was successfully auctioned.[12] Ellis J also observed that because the rent under the lease was payable six months in advance, if the rent review process was not completed at the expiry of the existing term, the lessee in possession would necessarily be required to pay at the old rate for the following six months. In the event the existing lessee later chose to enter a new lease there would be a retrospective adjustment to the rental rate. None of these points were disputed before us.

[25] The Judge also considered it was noteworthy that the only clause dealing expressly with the consequences of an unsuccessful auction of the right to a new lease was cl 13(w).[13] She noted that if the failed auction took place after the expiration of the term, cl 13(w) meant that the improvements as well as the leasehold interest in the land reverted to the lessor from the expiry of the old lease.[14]

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9 *Mandic v The Cornwall Park Trust Board (Inc)* [2011] NZSC 135, [2012] 2 NZLR 194 at [79](a).
10 Above n 1, at [76]-[91].
11 Above n 1, at [92].
12 Above n 1, at [93].
13 Above n 1, at [96].
14 Above n 1, at [97].

[26] Addressing the literal meaning of the words in cl 13(t), the Judge said:

> [100] In terms of the literal meaning of the relevant words, my view is that the word "pending" (in "pending the grant of a new lease") would ordinarily be regarded as synonymous with "while awaiting" or "until". Devoid of wider context, there is therefore some force in [counsel for the Board's] submission that the phrase naturally seems to form part of the description of the circumstances in which the cl 13(t) obligation is activated, namely for so long as a lessee remains in possession, awaiting the grant of a new lease. On that interpretation, whether or not a new lease is actually ever granted is arguably immaterial; the only relevant state of affairs is that the lessee has remained in possession.
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> [101] But it seems to me that the clause nonetheless contemplates, and is arguably predicated upon, the grant of a new lease. As [counsel for Mrs Chen] said, the words in dispute are in fact otiose if a completely literal interpretation is adopted. The meaning for which [counsel for the Board] contends could equally be conveyed if the clause simply read (punctuation inserted):
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> > The Lessee shall, whilst and so long after the expiration of the term hereby granted as they retain possession of the said land, pay to the Lessors for the period during which they retain such possession, a rental calculated upon the basis of the upset rent, as valued and fixed in manner aforesaid.

[27] The Judge then went on to consider in some detail the provisions of the standard form leases contained in the schedules to the PBLA, expressing the view that it was "tolerably plain" cl 13 (t) was intended both:[15]

> (a) to incorporate cl 13 of the First Schedule of the [PBLA], which made it clear that, where an existing lessee exercises the option to renew after the expiration date (and has remained in possession), he was obliged to pay the upset rent from the expiration of the old term; and
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> (b) to make it similarly clear (in combination with the additional words inserted in cl 13(s)) that, where an existing lessee purchases the lease at auction after the expiration date (and has remained in possession), he was obliged to pay the upset rent from the expiration of the old term.

[28] Ellis J continued:

> [103] It seems to me that the ambiguity around the ambit of cl 13(t) arises because it is a single clause that seeks to address the position of a lessee who remains in possession under both the First Schedule (renewal) option and the Second Schedule (auction) option. Had it been a matter of simply addressing the latter (auction) option it would have been much clearer simply to combine cl 13(t) with cl 13(s) as follows:

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15 Above n 1, at [102].

> (s) In every case in which the right to a new lease is sold by auction:
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> (i) the new term shall run from the date of the expiration of the then expiring term but the rent of a purchaser other than the outgoing Lessee shall not begin to run until the purchaser obtains possession; and
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> (ii) the Lessee shall whilst and so long after the expiration of the term hereby granted as they retain possession of the said land pending the granting of a new lease as aforesaid pay to the Lessors for the period during which retain such possession a rental calculated upon the basis of the upset rent as valued and fixed in manner aforesaid.
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> [104] If, in the case of an auction, the clauses are read together in this way (and I observe that the above rephrasing involves no change to the actual words used nor to the ordering of the words in either clause), it seems to me that it is [counsel for Mrs Chen's] interpretation that is plainly to be preferred.
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> [105] Even as the clauses are presently constructed, cl 13(t) is, in my view, to be seen as operating retrospectively only. By that I mean it only applies (and only makes sense) once the triggering event has occurred, namely an existing lessee who has remained in possession after the expiration date either exercises his right to renew or purchases the lease at auction.

[29] The Judge considered her view as to the meaning of cl 13(t) was supported by considering the ramifications for the lessee if the Board's interpretation were correct.[16] She variously described the outcome for the lessee as "harsh", "unfair" and "punitive".[17] This was because the amount of the upset rent would logically reflect the value of both the length of the new lease term and the right to renew at the end of it, and the outgoing lessee would be required to pay rent at that level even though she did not receive those benefits.[18] Moreover, in the circumstances which had occurred, the outgoing lessee would also forfeit the improvements to the property which had been valued at $375,000.[19] The Judge raised the rhetorical question "how can the outgoing lessee logically be required to pay the equivalent of the upset rental for the land in circumstances where the lease [clause 13 (w)] has deemed that the land has reverted to the lessor?"[20] A final element of unfairness as the Judge saw it was that any delay in completing the rent review or auction process

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16 Above n 1, at [106].
17 Above n 1, at [107] and [111].
18 Above n 1, at [107].
19 Above n 1, at [109].
20 Above n 1, at [110].

would potentially be highly prejudicial to the existing lessee if she did not renew the lease or if it was acquired at auction by a third party.[21]

[30] Ellis J concluded her discussion of this topic in this way:

> [107] Applying cl 13(t) where a lessee has remained in possession after the expiration date and the lease has then been sold to someone else would undoubtedly be harsh from an outgoing lessee's perspective. In particular, given that the amount of the upset rent must logically reflect, at least in a general way, the (considerable) value of both the length of the new lease term and the right to renew at the end of it, any obligation imposed on an outgoing lessee to pay rent at that level, when he does not in fact receive those benefits, seems unfair.

[31] The Judge did not reach any firm conclusion about the rent Mrs Chen was obliged to pay, beyond the conclusion that it was not at the upset rental rate. She reserved the opportunity to the parties to make further submissions on this point.[22] We were informed that, in view of the appeal, no further submissions have been made to the High Court as to the rent Mrs Chen ought to pay.

Counsel's arguments

[32] Counsel on each side addressed four possible scenarios that might arise upon the expiration of the lease:

Scenario one	The lessee gives notice to renew the lease.
Scenario two	The lessee declines to renew (or does not give a timely notice to renew) with the consequence that an auction ensues at which the lessee is the successful bidder.
Scenario three	The same as Scenario two except a third party is the successful bidder at auction.
Scenario four	No notice to renew is given and the auction is unsuccessful.

[21] Above n 1, at [111].
[22] Above n 1, at [118].

[33] Counsel agree that the existing lessee is obliged to pay the upset rent from the expiration of the lease in both Scenarios one and two. They also agree that the existing lessee must pay the upset rent in Scenario three, up to the date the third party purchaser takes possession. Counsel differed only about the position under Scenario four.

[34] The essential difference between them is that Mr Ring submitted cl 13(t) applied under Scenario four to make the lessee liable to pay the upset rent from the date of expiry of the lease until the lessee vacates the property. That was so irrespective of whether a new lease is granted. In contrast, Mr Hollyman for Mrs Chen submitted the Judge was correct to find the upset rent would not become payable under Scenario four since cl 13(t) was dependent upon the grant of a new lease. That had not occurred. In consequence, Mr Hollyman submitted Mrs Chen would only be liable to pay the old rent from the expiration of the lease until she vacated the property. In oral submissions, Mr Hollyman appeared to accept that if Mrs Chen was not obliged to pay the upset rent, there might still be room for argument about the level of rent she is obliged to pay. We discuss this further below.

Our assessment

[35] There is no dispute between counsel as to the proper approach to the interpretation of leases. As with any contract, the task is an objective one. The aim is to ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.[23] As explained in the joint judgment of McGrath, Glazebrook and Arnold JJ in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*:[24]

> While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most

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23 *Vector Gas*, above n 8, at [19] per Tipping J and *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60].

24 Above n 23, at [63].

> obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.[25]
>
> (footnotes omitted)

[36] The nature of Glasgow leases and their economic substance were discussed by the Supreme Court in *Mandic* in these terms:[26]

> [25] Long-term ground leases (usually of 14 or 21 years) renewable in perpetuity with rent calculated either by an assessment of fair or market rent (or some similar concept) or, as in this case, as a percentage of a sum established pursuant to stipulated valuation exercises, are referred to as Glasgow leases. They were mainly put in place in the 19th and early 20th centuries. A Glasgow lease is, in economic substance, a bond which is revalorised every 14 or 21 years and secured against the demised land. The income generated, while usually a modest return on the value of the land, is very secure and can be expected to increase over time, at each renewal date, as land increases in value. For these reasons, Glasgow leases were seen as providing secure endowment income for charities (such as schools) and public bodies (such as harbour boards). They also facilitated development, enabling those who wished to develop land (and were willing to take the associated risks) to do so without incurring the capital costs of land acquisition.
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> [26] Glasgow leases proceed on the basis that:
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> (a) increases in the value of the land due to extrinsic factors are for the lessor's benefit; but
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> (b) the rent should not be fixed in relation to value due to improvements made by the lessee.
>
> (footnotes omitted)

[37] We commence our analysis by an examination of the terms of the lease as a whole. We agree with Mr Ring's submission that the lease was intended to be comprehensive. That is apparent from the detailed provisions dealing with a full range of topics as well as the different scenarios that could occur on the expiration of the term of the lease. Mr Hollyman's concession that the lessee would be required to pay the upset rent from the expiry of the last term in each of Scenarios one, two and three was properly made:[27]

> (a) Under **Scenario one**, the giving of notice to renew by the lessee is deemed to constitute a contract between lessor and lessee for the grant

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25 See also the views of the Chief Justice in *Mandic*, above n 9, at [15].

26 Above n 9.

27 In the case of Scenario three, up to the date the new purchaser enters possession.

and acceptance of a new lease at the rent fixed and determined by the process established under the lease and otherwise on the terms of the existing lease – cl 13(a).

(b) Under **Scenario two**, where the lessee is the successful bidder at auction, the lessee must pay the upset rent – cls 13(k) and (s).

(c) Under **Scenario three**, where a third party successfully bids at auction, the lessee is obliged to pay the upset rent up to the time the purchaser enters possession – cls 13(s) and (t).

[38] So in each of the first three scenarios the existing lessee must pay the upset rent with effect from the expiry of the old lease with a retrospective adjustment taking into account the rent paid at the old rate until the new lease is completed. The consequence of Mrs Chen's submission is that the parties made no provision for the rent to be paid under Scenario four. It follows that the liability of the lessee to pay rent after the expiry of the lease would be left to be determined at common law or by s 105 of the Property Law Act 1952. We agree with Mr Ring that the parties are unlikely to have intended such an outcome in a carefully drawn and comprehensive lease of this nature, capable of renewing in perpetuity.

[39] We turn next to the meaning of the words in cl 13(t) and, in particular, the phrase "pending the grant of a new lease as aforesaid". Mr Ring did not dispute the Judge's view that the term "pending" would ordinarily be regarded as synonymous with "while awaiting" or "until". But he submitted the Judge was wrong to conclude that cl 13(t) had no application unless and until a new lease was granted. Rather, Mr Ring submitted that, in its ordinary meaning "pending" refers to an event or process the outcome of which is awaited in the sense that it has not yet happened. This is not necessarily premised on the event actually occurring or the process reaching a positive conclusion.[28] Interpreting cl 13(t) in this way the phrase in

[28] Counsel cited: the Oxford English Dictionary (online, 3rd ed, 2005); the New Zealand Oxford Dictionary (2005) at 837; the meaning "awaiting decision or settlement, undecided" in Black's Law Dictionary (9th ed, West Thomson Reuters, 2009) at 1248; and the New International Webster's Comprehensive Dictionary of the English language (Deluxe Encyclopaedic Edition, Trident Press International, 1999) at 932, giving the example "the court adjourned pending the jury's verdict".

question simply refers to a process which might or might not result in the grant of a new lease.

[40] Mr Ring supported his submission by submitting that cls 13(s) and (t) were complementary. On this basis, cl 13(t) is intended to cover two possibilities: the lessee's responsibility to pay the upset rent under Scenario three (successful bid by a third party purchaser) and under Scenario four (no renewal and no successful bid at auction).

[41] Addressing the Judge's view that the words "pending the granting of a new lease as aforesaid" were, on the Board's argument, otiose, Mr Ring submitted the words still had meaning to describe the process in the way he suggested.

[42] A final point made by Mr Ring was that, in contrast to other provisions in the lease referring to the rent "determined", cl 13(t) referred to rent "calculated upon the basis of the upset rent". This distinction showed the parties had in mind the circumstances in Scenario four when no new lease was granted but the lessee would be required to pay rent at a rate *equivalent* to the amount of the upset rent.

[43] Supporting the Judge's interpretation, Mr Hollyman agreed that cl 13(t) was intended to work in conjunction with cl 13(s). But he submitted cl 13(t) was intended to make it clear that the outgoing lessee was responsible for the upset rent under Scenario three until such time as the incoming purchaser became responsible to pay the new rent under cl 13(s).

[44] We acknowledge that the interpretation adopted by the Judge is an available meaning but, in the end, we are persuaded the better interpretation is that contended for by the Board. First, we reiterate our view that it is unlikely the parties would have executed a lease which did not cover the circumstances provided by Scenario four, thereby leaving it to the common law to determine what rent should be paid in these circumstances. Second, we do not regard the phrase "pending the granting of a new lease as aforesaid" as necessarily otiose. We accept the Board's submission that these words were intended to signify that cl 13(t) would apply during the period when the processes surrounding the grant of a new lease were under consideration,

irrespective of whether a new lease was ultimately granted. In other words, cl 13(t) was intended to be an interim arrangement "if and so long as" the lessee remained in possession pending the processes contemplated by the lease.

[45] Third, if the obligation to pay the upset rent under cl 13(t) was intended to be conditional on the grant of a new lease then it could be expected the draftsperson would have made the obligation to pay the upset rent "subject to" the grant of a new lease or to utilise other language clearly signifying the conditional nature of the obligation.

[46] The Judge relied on cl 13(w) to support her interpretation, finding that this was the only clause dealing expressly with the consequences of an unsuccessful auction.[29] She reasoned that it would be unfair or punitive for Mrs Chen to be required to pay the upset rent when she would no longer have the benefit of the improvements by virtue of cl 13(w).

[47] We do not see any direct connection between cl 13(w) and the interpretation of cl 13 (t). In particular, cl 13 (w) says nothing about the lessee's obligation to pay rent in the circumstances which have occurred here. While we accept that the fact that the buildings and improvements revert to the Board under Scenario four may have been a factor the parties considered, we do not consider the loss of the value of the improvements under cl 13(w) should affect our conclusion as to the proper interpretation of cl 13(t). An amount payable in respect of rent for a ground lease is an altogether different issue from what happens to the buildings and improvements on the leased land.

[48] We accept Mr Ring's submission that, in general, issues of unfairness ought not to bear upon the proper interpretation of the lease. The question is simply what the parties intended the words in the contract to mean having regard to the principles we have set out at [35] above. To the extent the Judge took issues of fairness into account, we accept Mr Ring's submission that she erred.

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[29] Above n 1, at [110].

[49] Even if issues of fairness are somehow relevant, we do not consider there is any unfairness in requiring Mrs Chen to pay the upset rent in the circumstances which have occurred. First, there is no suggestion she did not understand the terms of the lease. Indeed, she expressly acknowledged she understood the terms of the lease at the time of purchase. Second, when the Board began the valuation process in early December 2008 by appointing its independent arbitrator, the Board wrote to Mrs Chen setting out the process and specifically warning her of a likely rent increase. Notwithstanding that, Mrs Chen continued in possession for some two and a half years paying only the existing ground rent and failing to indicate one way or the other whether she wished to renew the lease.

[50] Third, on Mrs Chen's own evidence she owned other properties. She had the option of giving notice to renew the lease or bidding at auction to acquire the property. Had she done so, she could have rented the property as the Board has since done and ultimately sold it when she saw fit. The evidence adduced on appeal shows that other lessees have taken this approach, although in some cases they have had to accept discounted offers.

[51] Fourth, we do not consider any weight should have been given to the fact that cl 13(w) provides that the land reverts to the lessor as from the date of expiration of the existing lease. The fee simple of the land always remains with the Board and Mrs Chen had the benefit of possession during the period after the lease expired.

[52] Fifth, we consider the Judge was wrong to assume that because the property did not sell at auction, the rent was necessarily too high for the market. We accept Mr Ring's submission that an unsuccessful auction means there was no buyer on the day willing to commit to paying both the upset rent plus the value of the improvements as determined. The substantial rent increase reflects the length of time and the movements in the value of money and land between the 21 year reviews.

[53] Sixth, the criticism that delay in the determination of the upset rent could work to the disadvantage of the lessee does not appear to us to be wellfounded. The Judge's observations in this respect appear to be based on the view that the lessee

should not have to pay the upset rent calculated at a level "higher than anyone else is willing to pay".[30] We have already addressed the flaw in this reasoning. In any event, as the Judge acknowledged, much of the delay was occasioned by Mrs Chen.[31] Delay was also occasioned by the Board because it did not really press the matter for nearly a year while the *Mandic* litigation proceeded in the High Court. This was understandable since the valuation approach adopted by the Board for all its leases was in dispute.

[54] Turning to the comparison made by the Judge between the provisions of the lease at issue and the standard provisions prescribed by the PBLA, it is common ground that this topic was not the subject of pleadings or submissions by either party and was not therefore addressed by way of evidence or submission. In these circumstances, we allowed further evidence to be adduced on appeal as indicated above. Mr Arnott deposes that the Board first used a form of Glasgow lease in virtually identical terms to the lease at issue in 1920, prior to the time the Board was approved as a leasing body under the PBLA in 1923. Mr Arnott also deposes that the standard form of lease used by the Board does not refer to the PBLA. This may be contrasted with leases adopted by other public bodies that expressly refer to the schedules of the PBLA and adopt the "fair annual rental" approach to setting ground rent under the processes specified in the schedules to the PBLA.

[55] We agree with the Judge that the lease at issue clearly draws in part upon the forms prescribed in the schedules to the PBLA. The First Schedule prescribes a form of lease which may be renewed by notice at the expiry of the term but does not provide for an auction. The Second Schedule form of lease simply provides for an auction of the right of renewal at the expiry of the lease. As the Judge observed, the lease at issue combines both elements.

[56] Unlike the Judge, we do not consider the terms of the PBLA leases provide material assistance in interpreting the lease at issue which is structured differently from the statutory leases. In his oral submissions Mr Hollyman did not press us to

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30 Above n 1, at [117].
31 Above n 1, at n 22.

place reliance on a comparison with the PBLA leases or how the subject lease might have been drafted differently.

[57] The final point made by Mr Ring relates to the commercial purpose of the lease. Counsel's submission was that the commercial purpose of the lease, as identified by the Supreme Court in *Mandic*, was to provide secure endowment income through the expectation the income would increase at each renewal date as the value of the land increased.[32] Mr Ring submitted that this purpose would not be achieved or would be undermined if, despite the expected increase in value, the lessor was not necessarily entitled to receive income for the period of possession at the commensurate increased rate after the lease's expiry. He submitted this would provide an incentive to the lessee to draw out the valuation and renewal processes for as long as possible.

[58] We do not attach much weight to this point beyond noting that the identified purpose of the lease forms part of the general context in which the lease is to be interpreted. In the end, the lease is to be interpreted in accordance with its terms.

[59] A final point relates to the amount Mrs Chen would be liable to pay for rent were the High Court judgment to be upheld. Although we did not hear argument on the point, it is by no means clear that the only conclusion is that Mrs Chen would be liable to pay only the existing rent during her period of occupation after the expiry of the lease. Plainly, the lease contemplates that she is entitled to remain in possession while the processes of valuation, renewal notice or auction under the lease are in train. It does not necessarily follow that the presumption of a monthly tenancy created by s 105 of the Property Law Act or the common law presumption that the rent continues at the existing rate, would apply.[33]

[60] It follows that if Mrs Chen's argument were to prevail it would likely be necessary for the Court to examine what the parties intended by way of rent under Scenario four. The Court might also have to consider whether a market rent should

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32 Above n 9, at [25]-[26].

33 Kim Lewson *Woodfall's Law of Landlord and Tenant* (looseleaf ed, Sweet & Maxwell) at [10.040], referring to *Dean and Chapter of the Cathedral and Metropolitan Church of Christ Canterbury v Whitbread* (1995) 72 P&CR 9 at 16.

be applied and, if so, to hear evidence about what that should be. It appears unlikely the parties would have intended such an uncertain state of affairs to exist under Scenario four.

Is the Board estopped from claiming the upset rent?

[61] Mr Hollyman submitted that even if the Board's interpretation of the lease is correct, the Board was estopped by its conduct from claiming the upset rent.[34] Reliance was placed on invoices and statements sent by the Board to Mrs Chen as well as correspondence in the period after the expiry of the lease. In particular, counsel relied on statements made by the Board in two letters dated 7 February 2011 and 1 April 2011.

[62] We can deal with this point relatively briefly. As already noted, the Judge did not find it necessary to reach any final conclusions on the estoppel issue in view of her finding that the upset rent was not payable as a matter of interpretation of the lease.[35] She was prepared to assume that unequivocal and misleading representations had been made but she expressed the conclusion in robust terms that Mrs Chen did not change her position to her detriment on reliance upon any such representations:

> [122] … But the difficulty Mrs Chen would face is that I would not have accepted that she would, in fact, have moved out earlier if she had been aware that she would be liable for back rent for the time she remained in possession after the expiration date. That is because, as I have explained above, if she gave up possession prior to the auction process, the operation of the other clauses in the lease would have been hugely to her disadvantage. Although, had she moved out, she would not (hypothetically) have been liable to pay the backdated upset rent, all the improvements (valued at more than the amount of the upset rent) would have reverted to the Board. I do not for one moment think that she would have countenanced taking a $375,000 hit by vacating prior to the auction.
>
> [123] In my view the actuating cause of her (hypothetical) loss would be the delays in the rent review and auction processes which, in my view, were largely occasioned by her. As well, those delays began prior to the making of any of the pleaded representations, when (in my opinion) she chose not to respond to the letters sent by the Board in December 2008 and March 2009.

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[34] Relying on the well-established elements of estoppel described in decisions of this Court such as *Burbery Mortgage Finance & Savings Ltd (in rec) v Hindsbank Holdings Ltd* [1989] 1 NZLR 356 at 361 and *Wilson Parking New Zealand Ltd v Fanshawe 136 Ltd* [2014] NZCA 407, [2014] 3 NZLR 567 at [44].

[35] Above n 1, at [119].

[63] Mr Hollyman submitted it was not until the Board wrote to Mrs Chen on 6 October 2011 that she learned the Board would be seeking back rent from March 2009. Until then, he submitted that by rendering invoices to Mrs Chen at the old rental rate and by advising her in the letter of 7 February 2011 that she was required to continue to pay the old ground rent until the new rent "has been determined and accepted by the lessee", the Board was estopped from claiming back rent at the upset rate. Mr Hollyman also submitted that the Board's letter to Mrs Chen of 1 April 2011 did not make it clear to her that she would have to pay back rent at the upset rate if the property was passed in at auction. However we note this letter stated that if Mrs Chen continued to remain in possession until the date she was required by the Board to vacate, she "must pay the ground rent of $73,750 per annum as provided for in the lease".

[64] Having reviewed the correspondence, we are not persuaded that any unequivocal assurance was ever given to Mrs Chen to the effect that under no circumstances would she be required to pay the rent at the upset rate during the period of possession post expiry of the lease. At best, the position was left unclear for the period during which the valuation and auction process was continuing. More importantly, we agree with the Judge that Mrs Chen was unable to demonstrate any detrimental reliance on any representation made by the Board.

[65] In addition to the reasons given by the Judge, we accept Mr Ring's submission that Mrs Chen remained in possession principally because she continued to hold out the hope that the Board would agree to freehold the property. Mrs Chen chose not to make any commitment to renew the lease but left the position open even after the parties became aware for the first time on 15 December 2010 what the upset rent would be. As late as August 2011 she and other family members met with the Board's representative to discuss whether the Board was prepared to freehold the property and whether it would reduce the ground rent it was seeking. The practicalities of the auction process if Mrs Chen decided not to renew the lease were also discussed. According to Mrs Chen she was told then that the Board would not consider freeholding the property and shortly afterwards that it would not accept anything less than $73,750 for the new ground rent.

[66] This was not the first occasion Mrs Chen had raised the issue of freeholding the property with the Board. It had been raised on her behalf by her valuer in November 2010 and again by her legal advisers in January 2011. Mrs Chen was not inexperienced in property matters and was in receipt of legal and valuation advice throughout.

[67] We are satisfied the Judge was right to find there was no evidential basis to support the defence of estoppel.

Did the Judge correctly identify Mrs Chen's repair obligations under the lease and the quantum of damages?

[68] In support of its claim for the cost of repairs to the property, the Board relied on two clauses in the lease:

> 5. THE Lessee will during the said term keep and maintain and at the end or sooner determination thereof yield and deliver up the said land and all buildings fences hedges gates drains and sewers now or hereafter erected constructed or being upon bounding or under the same in good clean and substantial order condition and repair.
>
> 7. THE Lessee will only once in every fifth year of the said term in a proper and workmanlike manner paint all the outside wood and iron work of such buildings as aforesaid with two coats of good and suitable oil and lead colours and will also once in every fifth year of the said term in like manner paint paper varnish and colour all such parts of the inside of the said buildings as are usually painted papered varnished or coloured respectively.

[69] Mrs Chen maintained that the property was in poor condition when she acquired it, and that in spite of this she had maintained and repaired it during the lease. She did not call any expert evidence in support of her contentions. For its part, the Board called evidence from its property manager Ms Llewellyn, Mr Marshall, a senior building surveyor at the firm of CoveKinloch Auckland Ltd and Mr Williams, the director of Omega Construction (Auckland) Ltd which carried out the repairs to the property.

The Judge's findings

[70] The Judge reviewed authorities dealing with the scope of repair covenants and whether or not Mrs Chen was required to put the property into a better state of

repair than it was in when Mrs Chen took possession in 2005.[36] She noted the Board had not called any evidence about the state of properties in the Cornwall Park area at the benchmark date of 1988.[37] Having reviewed the authorities and submissions the Judge said:

> [140] Ultimately, therefore, I think it is unhelpful to consider the issues here in hypothetical terms or by reference to other cases. It seems to me that the real and relatively straightforward question is whether the relevant work done by the Board in relation to 21 Maungakiekie Avenue and for which it now claims, falls within the wording of the two repair covenants in the lease. The question simply is whether, as at November 2011, it can be said that the property:
>
> (a) had been painted inside and outside within the previous five years; and
>
> (b) was in "good" order and repair, "clean" order and repair and "substantial" order and repair.
>
> [141] I consider that these quite uncomplicated words mean that the lease required Mrs Chen as lessee to "yield and deliver up" a house (including fences, gates etc):
>
> (a) in which anything that was broken or not working (such as doors and windows) had been fixed;
>
> (b) which did not leak;
>
> (c) in which water damage had been remediated and mould removed;
>
> (d) that were not dirty (inside and out);
>
> (e) that had no rot;
>
> (f) in which any fixtures that were at the end of their life expectancy (carpets, roof, hot water cylinder) had been replaced;
>
> (g) in which any electrical and plumbing work done met the applicable regulatory standards;
>
> (h) from which there were no missing fixtures (such as doors, the stove, and bathroom vanities);
>
> (i) which had been painted inside and out within the last five years; and
>
> (j) which did not contain additions or alterations made in breach of the lease (ie to which the Board had not consented);

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36 Above n 1, at [132].
37 Above n 1, at [136].

[71] The Judge went on to reject Mrs Chen's evidence that there had been significant further deterioration in the property between November 2011 when she vacated it and the time when it was inspected three months later or when the work was ultimately completed.[38] The Judge was satisfied the photographic evidence and the evidence of those who inspected the property at relevant times confirmed that the obligations she had identified with regard to repair had not been met.

[72] As to the state of repair of the property when Mrs Chen took possession, the Judge said:

> [145] I also reject as irrelevant Mrs Chen's evidence about what the property was like when she moved into it. While I am prepared to accept that it may already have been in some disrepair and that some unauthorised alterations may well have been done to it, such matters do not detract from her liability to "keep and maintain" and to "yield and deliver up" the property in the condition just mentioned. That is the responsibility she took on when she chose to purchase the lease.

[73] The Judge recorded that counsel had taken objection to certain specific repair items in the schedule Mr Williams had prepared. She expressed her views about this in these terms:

> [146] Although issue was also taken by [Mrs Chen's counsel] with a number of specific repair items in the schedule prepared by Mr Williams, I do not consider that it is appropriate for the court to engage with such a finicky approach. In my judgment the Board has taken care to be fair, and even conservative (favourable to Mrs Chen) in its assessment of what work does and does not fall within the covenants. In that respect I specifically record that:
>
> (a) when instructing Cove Kinloch to prepare a report on the remediation work required, the Board was careful to express those instructions by reference to the exact wording of the repair covenant in the lease;
>
> (b) Cove Kinloch's estimates were reviewed, and the work required to effect the repairs revaluated, by Mr Williams. In my assessment Mr Williams was assiduous in ensuring that the most cost-effective remediation options were pursued. This resulted in a considerable reduction in the overall cost incurred; and
>
> (c) as I have said, although the Board instructed Mr Williams to effect certain improvements to the property, no claim against Mrs Chen has been made for those.

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[38] Above n 1, at [142].

> [147] Accordingly, and based on the evidence before me, it is my clear view that the repair items for which claims are now made by the Board fairly reflect the nature and extent of Mrs Chen's breaches of the repair covenants.

[74] Ellis J then addressed submissions made on behalf of Mrs Chen as to the appropriate measure of damages.[39] She rejected a submission that the decisions in *Joyner v Weeks* and *Maori Trustee v Rogross Farms Ltd* did not apply because they concerned breaches of a covenant to repair "demised premises".[40] Counsel further submitted that damages should be assessed in accordance with the principles in *Hadley v Baxendale*.[41] On this basis, it was said damages should be measured by reference to the loss naturally arising from the relevant breach and which could be said to have been in the reasonable contemplation of the parties at the time the contract was entered into.

[75] The Judge rejected these submissions too. She noted that the rule in *Joyner v Weeks* had been subject to extensive criticism but considered this Court had expressly confronted those concerns in *Rogross*.[42] After further discussion of the reasoning in *Rogross*, the Judge concluded:

> [161] Put simply, then, the Board has suffered loss because it did not receive the bargain for which it contracted. And in this case there can be no debate that the Board did wish to have the repair covenant performed; that is evidenced by the fact that it has now undertaken the repair works itself. …

[76] The Judge found that because the repairs had been undertaken, the quantum of damages could be easily quantified. She concluded that the Board's claim for repair costs and the associated costs of the CoveKinloch report must succeed accordingly.[43] The amount awarded was $119,327.19.

Mrs Chen's submissions

[77] Mr Hollyman raised numerous points in support of Mrs Chen's cross appeal. In summary these were:

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39 Above n 1, at [148].

40 *Joyner v Weeks* [1891] 2 QB 31 (CA); *Maori Trustee v Rogross Farms Ltd* [1994] 3 NZLR 410 (CA) (at [149]-[150] in the High Court judgment, above n 1).

41 *Hadley v Baxendale* (1854) 156 ER 145.

42 Above n 1, at [151]-[152].

43 Above n 1, at [162].

(a) The scope of the repair covenants should be limited by the fair wear and tear exception provided for in ss 106(b) and 116D of the Property Law Act 1952 (the 1952 Act).

(b) The extent of the repair obligations must be assessed by reference to the condition of the property at the outset of the lease in 1988 and could not require Mrs Chen to give the Board something different from the state of the property at that time.

(c) The Board had failed to prove its case because there was no evidence of the condition of the property in 1988.

(d) The rule in *Joyner v Weeks* had no proper justification and this Court should review its decision in *Rogross*.[44]

(e) The proper measure of damages should be the diminution in value of the reversion.

(f) The Judge had wrongly allowed certain claims amounting to $58,023.12.

[78] We deal with each of these issues in turn.

The Property Law Act 1952 issues

[79] It appears that the arguments in the High Court did not address the impact of the 1952 Act to the extent argued before us and the Judge did not refer to this topic.[45] Section 106 provides:

> **106 Covenants implied in leases**
>
> In every lease of land there shall be implied the following covenants by the lessee :
>
> …

[44] Above n 40.

[45] It is common ground that the 1952 Act is the relevant legislation as the lease commenced prior to 1 January 2008 – see s 367(6) of the Property Law Act 2007.

> (b) That he will, at all times during the continuance of the said lease, keep, and at the termination thereof yield up, the demised premises in good and tenantable repair, having regard to their condition at the commencement of the said lease, accidents and damage from fire, flood, lightning, storm, tempest, earthquake, and fair wear and tear (all without neglect or default of the lessee) excepted:
>
> Provided that this covenant shall not be implied in any lease of a dwellinghouse.

[80] The Board submits that this covenant does not apply because, in terms of s 68 of the 1952 Act, it is negatived by cl 17 of the lease. Section 68 provides:

> **68 Implied covenants may be negatived**
>
> A covenant or power implied under this or any other Act shall have the same force and effect, and may be enforced in the same manner, as if it had been set out at length in the deed wherein it is implied:
>
> Provided that any such covenant or power may be negatived, varied, or extended in the deed, or by a memorandum in writing endorsed thereon and executed as a deed is required to be executed by the parties to the deed intended to be bound thereby.

[81] Clause 17 of the lease says:

> 17. PROVIDED LASTLY AND IT IS HEREBY EXPRESSLY AGREED AND DECLARED that all covenants and provisions contrary to or repugnant with the covenants and the provisions hereinbefore contained and which but for this declaration would or might be implied herein by virtue of the Land Transfer Act 1952 or the Property Law Act 1952 or otherwise are hereby negatived and shall not be implied herein.

[82] We accept the Board's submission that cl 5 of the lease is contrary to, or repugnant with, the implied covenant under s 106(b) of the 1952 Act because it contains no fair wear and tear exception. Instead it simply requires the lessee to keep and maintain the land and buildings in good clean and substantial order condition and repair. The implied covenant under s 106(b) is therefore negatived in terms of s 68 of the 1952 Act. Put simply, the implied covenant under s 106(b) cannot stand with the terms of cl 17 of the lease.

[83] Section 116D of the 1952 Act applies to leases of dwellinghouses. Certain covenants are implied in such leases. Mr Hollyman noted in his submissions that the tenant's obligation to keep the dwellinghouse and grounds in a clean condition was to be construed having regard to the condition of the dwellinghouse and grounds at

the commencement of the tenancy. Further, the implied covenant to make good any damage to the dwellinghouse was subject to an exception for damage caused by fair wear and tear.

[84] The Board submitted that the implied covenants in s 116D of the 1952 Act do not apply because the lease at issue is not a lease of a dwellinghouse. Relevantly, s 104A(1) of the 1952 provides the following definition:

> **104A Interpretation**
>
> (1) For the purposes of the succeeding sections of this Part of this Act, except sections 117 to 121,—
>
> **Lease**, in relation to any dwellinghouse, includes an underlease, an agreement for lease or underlease, a periodic tenancy, a tenancy arising by operation or implication of law (other than a tenancy at sufferance), and any other agreement or arrangement (whether oral or in writing) under which for valuable consideration in money or money's worth any person is given the right to occupy the dwellinghouse, whether or not the agreement or arrangement is expressed in the form of a licence or a grant of leave and licence for the use or occupation of the dwellinghouse; but does not include—
>
> > (a) A lease of any land on which a dwellinghouse is erected if the lessee is entitled (whether beneficially or as trustee), on or before the termination of the tenancy, to remove the dwellinghouse or to receive compensation in respect of it:
> >
> > …

[85] We are satisfied s 116D of the 1952 Act does not apply to the lease at issue for two reasons. First, it is not a lease of a dwellinghouse. In substance, it is a lease of land. The primary clause states that the Board leases "all the said lands to be held by the Lessee as tenant …". The lease recognises by cl 5 that the lessee may erect and occupy buildings on the property. If so, the repair covenant applies to both land and buildings. However, the lessee pays rent only for the land and retains ownership of any dwellinghouse or other building erected on the property unless any of the express provisions for forfeiture apply.

[86] Second, even if the lease is in relation to a dwellinghouse within the commencing words of the definition, the application of the Act is excluded by subs (a) of the definition. That is because the lessee is entitled to receive compensation in respect of the dwellinghouse on or before the termination of the

tenancy. That is so under Scenarios one and two where the lessee renews the lease or is the successful bidder at auction. And, under Scenario three, the lessee is entitled to be paid the value of the improvements where a third party purchases at auction.

[87] The only circumstances in which the lessee is not entitled to compensation for the improvements are those in Scenario four or where the lease is determined by forfeiture or otherwise than by effluxion of time in terms of cl 13(y). We do not consider these exceptions derogate from the lessee's entitlement to compensation for the value of the improvements. It is always within the power of the lessee to ensure that the entitlement to compensation remains by complying with the terms of the lease, exercising the right of renewal, purchasing at auction or receiving the value of the improvements by a third party purchaser.

[88] Our conclusion that Glasgow leases are not intended to be included in pt 8 of the Act is supported by the views of an academic writer, Mr John Bickley, and by the New Zealand Law Commission.[46]

[89] In summary, the covenants implied by the 1952 Act have no application to the lease at issue.

The scope of the repair obligations under the lease

[90] The law as to the scope of an obligation to repair is well settled and does not call for lengthy discussion. In brief summary:

(a) The construction of a repair covenant ultimately turns on the ordinary meaning of the particular covenant in the context of the lease as a whole.[47]

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[46] John Bickley "The Property Law Amendment Act 1975 and Leases of Dwellinghouses" (1976) 3 Otago LR 458; Law Commission *The Property Law Act 1952* (NZLC PP16, 1991) at [620].

[47] *Weatherhead v Deka New Zealand Ltd* [2000] 1 NZLR 23, (1999) NZ ConvC 193,093 (CA) at [20]-[21]; *Post Office v Aquarius Properties Ltd* [1985] 2 EGLR 105 at 107 and *Auckland Waterfront Development Agency Ltd v Mobil Oil NZ Ltd* [2015] NZCA 390 at [44] and [62].

(b) A covenant to "keep and maintain" premises in "good clean substantial order condition and repair" may oblige the lessee to put them in repair if they are not already in repair when the lease began.[48] But a covenant in such terms does not entitle the lessor to something different to what was demised.[49]

(c) "Repair" may in the circumstances require replacement of an item in whole or in part.[50]

(d) In assessing the standard of repair, regard is to be had to the age, character and locality of the premises.[51]

(e) In the end, the assessment of what is reasonable to comply with the repair covenant is a matter of fact and degree.[52]

The alleged failure of the Board to prove its case because there was no evidence of the condition of the property in 1988

[91] Repair covenants are to be construed with reference to the age, character and locality of the property.[53] This has been interpreted to mean the lessee must keep the premises in a condition suitable for a lessee of the class who would have been likely to occupy the land as at the time of demise, and deliver the land up in that condition.[54]

[92] If the premises are old, the lessee's obligation is not to bring them up to date but to keep them in reasonably good condition for premises of that age.[55] A general covenant to repair is to be construed by reference to the condition of the premises at

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48 *Weatherhead v Deka New Zealand Ltd (No 2)* [1999] 1 NZLR 453 (HC) at 462, affirmed in *Weatherhead* (CA), above n 47. See *Hinde McMorland and Sim Land Law in New Zealand* (looseleaf ed, LexisNexis) at [11.117].

49 *Lister v Lane and Nesham* [1893] 2 QB 212 at 216-217 (CA). See *Hinde*, above n 48, at [11.119].

50 *Lurcott v Wakely & Wheeler* [1911] 1 KB 905 at 924 (CA). See *Hinde*, above n 48, at [11.119].

51 *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 (CA) at 727–728, [1923] All ER Rep 198; *Proudfoot v Hart* (1890) 25 QBD 42, [1886-90] All ER Rep 782 (CA) at 786; *Russell v Robinson* [2011] 2 NZLR 424 (HC) at [24]. See *Hinde*, above n 48, at [11.118].

52 *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12 at 21; *Weatherhead*, above n 47, at [19]-[20].

53 See n 51 above.

54 *Proudfoot v Hart*, above n 51, at 786-787.

55 *Hinde*, above n 48, at [11.118].

the time when the covenant begins to operate.[56] However, in the absence of evidence to the contrary, the property will be assumed to have been in tenantable condition when the tenant took possession.[57]

[93] Ultimately, as made clear in *Woodfall*, the lessee's obligation is principally governed by the words of the repair covenant:[58]

> … while the condition of the premises at the time of the demise provides a useful indication of what standard of repair was contemplated by the parties, the covenantor's obligation depends primarily on the words of his covenant. Thus a covenant "to put premises into habitable repair" is not governed by the state in which the covenantor found them; the covenant binds him to put them into such a state that they may be occupied not only with safety, but with reasonable comfort, for the purposes for which they were taken.

[94] It is common ground that neither party produced any specific evidence as to the condition of the dwelling at the time of the commencement of the lease in 1988. However, the evidence called at trial showed the dwelling was built sometime in the 1920s or 1930s and that it was a substantial two storey wooden dwelling with an iron roof. The area of the land is 1,297 square metres. The property has a swimming pool and backs onto Cornwall Park. It is not in dispute that the property is located in an attractive and sought-after locality, which tends to raise the standard of repair the Board was entitled to expect.

[95] In the absence of any evidence to the contrary, the law presumes that the property was in good condition at the commencement of the lease. The evidence established that by the time Mrs Chen vacated the property it was in a very poor state of repair. Importantly, the iron roof was described by the Board's expert witnesses as being at the end of its working life and required replacement. The failure of the roof had led to substantial water damage to ceilings. Other aspects in which the premises had not been kept in good order and repair included rotting timbers, doors and window frames; the carpets and the hot water cylinder had reached the end of their expected life; electrical and plumbing work did not meet regulatory standards; some fixtures were missing altogether; additions had been made without the consent of the

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56 *Woodfall's*, above n 33, at [13.026] citing *Walker, ex P Wright v Hatton* [1842] 10 M&W 249 and *Brew Bros Ltd v Snax (Ross) Ltd* [1970] 1 QB 612.

57 *Brown v Trumper* [1858] 26 Beav 11 at 15. See *Woodfall's*, above n 33, at [13.026].

58 *Woodfall's*, above n 33, at [13.026].

Board (contrary to the terms of the lease); and the dwelling was generally dirty inside and out and required painting.

[96] We agree with the Judge's description as to the extent of Mrs Chen's repair obligations in the passage we have cited at [70] above. The obligations she identified were related specifically to the items the expert witnesses had identified as requiring repair. In some cases, replacement was necessary as they were no longer fit for purpose. We are satisfied all of the repair work undertaken was reasonably required to comply with the repair covenants having regard to the age, character and locality of the house.

The status of the rule in Joyner v Weeks and the proper measure of damages

[97] The status of the rule in *Joyner v Weeks* was considered in detail in this Court's decision in *Maori Trustee v Rogross Farms Ltd*.[59] In both cases an issue arose as to the proper measure of damages for breach of a covenant to repair. The English Court of Appeal in *Joyner v Weeks* decided that the measure of damages ought to be the cost of repairs to the premises, even though the lessor had been able to re-let the premises and there was no evidence of any loss of value in the reversion. It is not in dispute that the rule has attracted much criticism including by the New Zealand Law Commission in a 1991 report.[60] Amongst other things, it has been said that to adopt a rule of this nature is contrary to accepted principles for the assessment of damages for breach of contract.

[98] In *Rogross*, this Court considered the rule in *Joyner v Weeks* in considerable detail, including the criticisms that had been made of it. Tipping J, delivering the judgment of the Court, pointed out that the rule was no more than a prima facie rule. The Court considered the rule was not as inconsistent with principles for damages of breach of contract as had been suggested. Tipping J said:[61]

> 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

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59 Above n 40.

60 Law Commission *Aspects of damages: the Rules in Bain v Fothergill and Joyner v Weeks* (NZLC PP19, 1991).

61 Above n 40, at 418–419.

> can do it, into the position he would have been in if the contract had been performed.
>
> 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.

[99] The Court pointed out that it was nevertheless important to bear in mind that, in the end, the assessment of damages is a question of fact and should not be trammelled by rigid rules.[62] Despite that, the Court considered there was often good reason to have a prima facie rule which applies in the generality of cases but can be departed from or modified with good cause. The Court concluded: [63]

> In this instance a prima facie rule would, in our view, adopt the advantages but avoid the disadvantages identified by the Law Commission and others in the rule in *Joyner v Weeks*. With respect to Greig J and the Law Commission, we do not consider that it is in the overall interests of justice to abolish the rule in *Joyner v Weeks* altogether. There is a strong case for holding that it is not an absolute rule but there is also a strong case for retaining 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.
>
> We would therefore state the law as follows. 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.

[100] We are not persuaded that this Court should review its decision in *Rogross*. We agree that the assessment of damages should proceed on a principled basis and that a flexible approach should be adopted. However, the principles established in *Rogross* allow appropriate flexibility to ensure a just and principled outcome is achieved in a given case.

[101] There is a more immediate reason why we should not review *Rogross* in the context of this case. Mr Hollyman accepted there was no evidence before the

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62 Adopting observations made in *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462 at 466.

63 Above n 40, at 420.

High Court to demonstrate that the Board had not suffered any loss to the value of the reversion as a result of Mrs Chen's breach of the repair covenants. The Board had incurred the cost of putting the premises into a proper state of repair and had obviously sustained a loss in that respect. If Mrs Chen wished to contend that the Board did not suffer any loss on the reversion, the onus was on her to place evidence to that effect before the Court. She did not do so and cannot now be heard to say that damages should have been assessed on some alternative basis. We are satisfied Mrs Chen's obligation under the repair covenants arises independently of the consequences of reversion.

Did the Judge wrongly allow the Board to recover the cost of certain items?

[102] Mrs Chen seeks to challenge the quantum of the repair costs by reference to a number of items included in the cost of carrying out the work. These are challenged on the bases that: the work was neither necessary nor reasonable; it went beyond repair to create something new; and constituted an improvement or a component of betterment.

[103] We do not propose to deal with these matters on an item by item basis. As the Board points out, the condition of the premises was independently assessed by an expert Mr Marshall who explained the basis of his assessment in this way:

> "I assess an item to be out of repair if it failed [sic – [fell]] below a condition that a reasonably minded person would consider that item to be in for a property of that age, type and condition."

[104] We are satisfied this was a proper basis for assessment. With regard to items such as the roof which had to be completely replaced, Mr Marshall's evidence was that the roof showed significant deterioration. It was in poor condition with holes in the sheeting. His opinion was that patch repairs may have delayed its inevitable complete replacement but that it was approaching the end of its serviceable life. CoveKinloch therefore recommended replacing the roof. The builder, Mr Williams, was also of the opinion that the roof required replacement, noting that most sheet laps were in different stages of decay which meant they could not be readily repaired. Similarly in respect of the rewiring of the house, which was necessary to comply with regulatory requirements. The evidence was that much of the wiring

was original and more recent wiring did not comply with good electrical practice. The expert witnesses called by the Board addressed the practical difficulty of rewiring on a piecemeal basis. Mr Williams' uncontested opinion was that rewiring the whole house was cheaper than targeted repair work.

[105] Mrs Chen did not call any expert evidence. If she contended that some of the items were unreasonable or unnecessary or sought to challenge them on any other ground, she ought to have called evidence to support her claim. She did not do so.

[106] We are satisfied, as was the Judge, that the work was reasonably required to remedy Mrs Chen's breach of the repair covenants and that the quantum of the repair costs was fair and reasonable.[64]

Was the Judge right to reject Mrs Chen's defence of waiver or estoppel in relation to the Board's claim for repair costs?

[107] Mr Hollyman submitted that the doctrine of waiver by estoppel applied so as to preclude the Board from pursuing a claim for the repair costs. He relied on three matters to support this contention. First, the Board had asked Mrs Chen only to tidy up the grounds in the period leading up to the auction of the property. Second, the Board did not raise the issue of repairs when it wrote to Mrs Chen's solicitors in October 2011 demanding payment of the backdated rent and requiring Mrs Chen to deliver vacant possession. Third, the Board did not take any steps to raise the condition of the property with Mrs Chen until almost a year after she had vacated the property. In written submissions, Mrs Chen submitted that the Board had positively represented to Mrs Chen that the strict legal rights under the lease would not be relied upon, and had made it impossible for her to comply with her obligation to yield up the property in a state of repair.

[108] Mr Hollyman did not pursue these contentions in his oral submissions. We are satisfied the evidence falls well short of establishing that the Board waived its right to claim for the repair costs. At best for Mrs Chen, there was delay by the Board in pursuing its claim but there was no unequivocal representation by the Board that it would not pursue a claim for repairs, nor is there any evidence that

[64] The sum awarded was $119,327.19 plus interest.

Mrs Chen acted to her detriment in reliance upon such representation. As the Board points out, the reverse was the case. She removed items from the property such as a gas stove. When the Board made its claim, Mrs Chen was sent a copy of the CoveKinloch report but accepted she took no steps at that stage to dispute that any of the work was not required. Nor did she obtain her own report which she was at liberty to do.

[109] In all the circumstances, the defence of waiver by estoppel must fail.

Result

[110] For the reasons given:

(a) The application for leave to adduce further evidence on appeal is granted.

(b) The appeal is allowed.

(c) The respondent is liable to pay the upset rent from the date of expiry of the lease until she vacated the property.

(d) The cross-appeal is dismissed.

(e) The respondent must pay the appellant costs for a standard appeal on a band A basis with usual disbursements. We certify for two counsel.

(f) Costs in the High Court are to be fixed in that Court.

Solicitors:
DLA Piper, Auckland for Appellant
Loo & Koo, Auckland for Respondent