IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2007-404-007558

UNDER	the Arbitration Act 1996, and Part XVII of the High Court Rules
BETWEEN	JAMACS CORPORATION LIMITED Plaintiff
AND	NORFOLK TRUSTEE COMPANY LIMITED Defendant

Hearing: 21 May 2008

Appearances: J Long and L N Milne for the Plaintiff
D J Chisholm for the Defendant

Judgment: 17 October 2008

JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 17 October 2008 at 12.00 noon, pursuant to
r 540(4) of the High Court Rules

Registrar/Deputy Registrar
Date:

Counsel: D J Chisholm P O Box 2629 Shortland Street Auckland 1001 for the Defendant

Solicitors: Lee Salmon Long P O Box 2026 Shortland Street Auckland 1001 for the Plaintiff

[1] This is an appeal under the Arbitration Act 1996 and r 879 of the High Court Rules from an arbitral award by the Hon Barry J Paterson QC on two preliminary issues requiring the interpretation of the terms of two leases of commercial property in Auckland. The properties are intended for use from time to time as cinemas and theatres to stage live theatrical and other similar events. The leases are standard form leases prepared by the Auckland District Law Society (ADLS). The relevant terms in the leases are similar.

[2] The arbitrator found that the landlord, Norfolk, is not obliged to keep and maintain in good order and repair certain landlord's fixtures and fittings, being theatre seats, carpet, stage rigging, fire curtain, toilet pans, cisterns, basins and taps in the bathrooms. The tenant, Jamacs, now appeals against the award.

[3] There are two issues on appeal. First, whether the landlord is obliged to maintain the items. Within this issue are two sub-issues:

i) does the clause in the lease providing for the landlord's obligations (clause 13) create an express obligation on the landlord to keep its fixtures and fittings in good order and repair; or

ii) if there is no express obligation, whether such an obligation can be implied as a result of the deletion of certain obligations from the clause dealing with the tenant's obligations (clause 10).

Secondly, if the landlord has the obligations for which the tenant contends, and if the tenant is able to prove that, as a result of fair wear and tear arising from reasonable use, the items are beyond repair, is the landlord required to replace or renew the items?

[4] The parties both agree that under the terms of the lease, the tenant has no obligation to maintain the items. It follows that either Jamacs is correct and the

landlord must maintain the items, or, alternatively, there is a "black hole" in the lease and no one is responsible for the items' maintenance.

The arbitrator's award

[5] The arbitrator found that there was neither an express nor an implied obligation on Norfolk to maintain the items. He found, relying on *Avondale Hotel No. 1 Ltd v Portage Licensing Trust* (2006) 6 NZCPR 702, that the law does not require that there be an obligation on the landlord to maintain where the tenant is relieved of an obligation to maintain because of fair wear and tear.

[6] The arbitrator also found that the landlord's obligation to maintain the "building and building services" in clause 13 did not include the landlord's fixtures and fittings. This was because the leases drew a distinction between building and the landlord's fixtures/fittings, that is between the construction/fabric of the building and the landlord's accessories fixed to the building. The inference the arbitrator drew from this distinction was that the term "the premises" was confined to the construction and fabric of the building and did not extend to fixtures and fittings. The arbitrator found support for this conclusion in:

i) the phrasing of the operative clause which said that the tenant took on "lease the premises" together with the "right to use … the landlord's fixtures and fittings contained within the premises"; and

ii) the separate provisions for insurance of the building itself and of the building's accessories.

[7] The arbitrator acknowledged that were it not for these factors, Jamacs would have a strong argument that, on the principle that fixtures become part of the land, Norfolk's responsibility for the building rendered it responsible for fixtures and fittings.

[8] The arbitrator did not think it was an appropriate case in which to imply a term into the lease imposing maintenance obligations for the items on the landlord.

Appellate jurisdiction

[9] Schedule 2, clause 5 of the Arbitration Act provides:

> **5 Appeals on questions of law—**
>
> (1) Notwithstanding anything in articles 5 or 34 of the Schedule 1, any party may appeal to the High Court on any question of law arising out of an award—
>
> (a) If the parties have so agreed before the making of that award; or
>
> (b) With the consent of every other party given after the making of that award; or
>
> (c) With the leave of the High Court.
>
> ...

[10] Rule 879 provides:

> **879 Appeals**
>
> (1) In cases to which clause 5(1)(a) or (b) of the Schedule 2 applies, the plaintiff must commence the appeal by filing an originating application in the proper office of the Court, as determined in accordance with rule 107(1).
>
> (2) The originating application must be in form 108.
>
> (3) Rule 44 applies in relation to the originating application.
>
> (4) This rule has effect despite anything in rule 106 or Part 4.
>
> (5) The originating application must not name the arbitral tribunal as a defendant.

[11] Rule 889 provides:

> **889 Hearing of Appeal**
>
> (1) Every appeal is to be by way of rehearing.
>
> (2) In any appeal, the Court has all the powers and discretions of the arbitral tribunal—
>
> (a) to hold the hearing or any part of it in private; and

(b) to make orders prohibiting the publication of any report or description of the proceedings or any part of them.

[12] The appeal is by way of rehearing. An appeal of this nature does not involve starting afresh. The Court is required to make its own decision, having considered the material in front of the arbitrator as well as the arbitrator's decision. It applies the law as at the date of the hearing before it: *Pratt v Wanganui Education Board* [1977] 1 NZLR 476; *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA).

Is there an express obligation to maintain?

[13] Jamacs argues that, contrary to the arbitrator's findings, Norfolk's obligation to maintain the "building and building services" is an express obligation to maintain the landlord's fixtures and fittings (except of course where the tenant is responsible for them under clause 10). This is said to be because fixtures and fittings are traditionally part of the land and the grounds on which the arbitrator found that the leases treated the building as something different from the fixtures and fittings could not be supported. Jamacs contends that:

i) The arbitrator's conclusion is based on an incorrect separation of "building" or "premise" from the fixtures within the building and that to so limit the definition of building is illogical;

ii) The new ADLS standard lease expressly includes maintenance of the landlord's fixtures and fittings in the landlord's obligations and that rather than introduce a new requirement, this confirms what has always been understood;

iii) The arbitrator's conclusion was influenced in part by the fact that insurance provisions demarcated between the building and fixtures; however, Jamacs argues that this was reflective of conventional insurance practice and not of a limited definition of building in the lease.

[14] Jamacs' submissions are supported by *Regis Property Co Ltd v Dudley* [1959] AC 370 where the tenant was expressly not responsible for damage arising from fair wear and tear and the landlord was found to be responsible, despite the fact that there was no express covenant providing that the landlord was responsible for fair wear and tear; rather, the landlord was expressed to have more general obligations in respect of maintenance. Similarly, in this case the tenant is expressly not responsible for fair wear and tear. Hence, the landlord, in Jamacs' submission, is responsible under the lease for all maintenance for which the tenant is not responsible.

[15] Norfolk accepts the general principle that fixtures and fittings are part of the land. The question of whether there is an express obligation on Norfolk, therefore, depends on whether the arbitrator was correct in finding that the lease differentiates between fixtures/fittings and the premises. Norfolk argues that the building; the premises; the fixtures and fittings contained within the premises; and the property are all separate things under the leases.

[16] Norfolk also argues that the operative clauses in the leases grant Jamacs a lease over the premises but a lesser right of use over Norfolk's fixtures and fittings within the premises. Hence, the fixtures and fittings have not been demised to the tenant by way of lease. Norfolk argues that this distinction between the demised premises and the fixtures and fittings is reinforced by clause 9, which gives the landlord a discretionary right to insure the fixtures and fittings in addition to the mandatory obligation to insure the building. It follows from this that the landlord's fixtures and fittings fall outside the reference to "building" in clause 13.1 (which sets out the landlord's responsibilities) as they are not part of the demise.

[17] Norfolk says, therefore, that the arbitrator was correct to distinguish "building" from "fixtures". This is consistent with the way the terms are used in the lease. Norfolk also relies on clause 40, which provides that there is no warranty that the premises will remain suitable for adequate use by the tenant.

Relevant Clauses

[18] Clause 10.1 sets out the tenant's obligations:

> THE Tenant shall (subject to any maintenance covenant by the landlord) in a proper and workmanlike manner and to the reasonable requirements of the landlord:
>
> **Maintain the premises**
>
> Keep and maintain the interior of the premises including the Landlord's fixtures and fittings in the same clean order repair and condition as they were in at the commencement of this lease and will at the end or earlier determination of the term quietly yield up the same n the like clean order repair and condition. *In each case the Tenant shall not be liable for fair wear and tear arising from reasonable use or damage* by fire earthquake flood storm act of God inevitable accident or any risk against which the Landlord is insured unless the insurance moneys are rendered irrecoverable in consequence of any act or default of the Tenant or the Tenant's agents employees contractors or invitees. (emphasis added)
>
> ...

[19] Clause 13 sets out the landlord's obligations:

> **Landlord's Maintenance**
>
> 13.1 THE Landlord shall keep and maintain the building and all building services in good order and repair but the Landlord shall not be liable for any:
>
> (a) Repair or maintenance which the Tenant is responsible to undertake; or
>
> (b) Want of repair or defect in respect of building services so long as the Landlord is maintaining a service maintenance contract covering the work to be done; or
>
> (c) Repair or maintenance which is not reasonably necessary for the Tenant's use and enjoyment of premises.
>
> (d) Loss suffered by the Tenant arising from any want of repair or defect unless the Landlord shall have received notice in writing thereof from the Tenant and shall not within a reasonable time thereafter have taken appropriate steps to remedy the same.
>
> 13.2 THE Landlord shall keep and maintain service maintenance contracts for lifts, airconditioning and at the Landlord's option any other building services unless it is the obligation of the Tenant to maintain such contracts.

[20] The question of whether there is an express obligation on Norfolk depends on whether the arbitrator was correct in finding that the leases differentiate between fixtures/fittings and the premises.

Land law principles

[21] The authors of Hinde McMorland and Sim *Land Law in New Zealand* state at 11.006(b):

> As a lease creates an interest in land the physical subject-matter of the demise may be as extensive as the reversionary estate out of which it is carved, save that the grant must be for a lesser term. Thus a lease of freehold land may, unless a contrary intention is shown by the terms of the lease, extend cujus est solum ejus est usque ad coelum et ad inferos, include all the fixtures on the land, an be subject to the doctrine of accretion and erosion ...

It follows that whether or not the leases exclude an obligation on the landlord to maintain his fixtures and fittings is a matter of contractual interpretation.

Contractual interpretation

[22] Considering the operative clause in isolation, I think that Norfolk has a strong argument that the lease distinguishes between a lease of the actual premises and a mere right to use fixtures and fittings. The distinction is drawn in the operative clause which provides that the tenant takes on "lease the premises ... together with the right to use the Landlord's fixtures and fittings". Moreover, the landlord's fixtures and fittings are ranked alongside other items – common areas and car parks – that are subject to a right to use and, in the case of common areas, are expected to be subject only to a mere right to use. The fact that fixtures and fittings are ranked alongside common areas in this way lessens any argument Jamacs might proffer that separating fixtures and fittings from building is just a tautology rather than a deliberate indication of the parties' intention to treat the items separately.

[23] Jamacs contends, however, that, when one considers the contract as a whole, the distinction between a lease of the premises and a right to use the fixtures and fittings cannot be supported. Norfolk counters each of these arguments. I turn then

to consider if the distinction between a lease of the premises and the right to use the landlord's fixtures and fittings is supported by the other provisions in the leases.

Clause 9

[24] Clause 9 separates the building and the fixtures for insurance purposes. Jamacs argues that this separation is simply a reflection of conventional insurance practice and should not be elevated to proof of an intention by the parties to treat fixtures and fittings as separate from the building under the lease. Norfolk does not squarely counter this submission; rather, it asserts that the distinction made in clause 9 supports the distinction in the operative clause. I was not referred to any evidence of insurance industry practice. However, if it is industry practice to insure buildings separately to fixtures within those buildings, it would seem wrong to allow the fact the clause reflects industry practice to inform the definition of fixtures and building through the lease agreement as a whole.

Clause 14

[25] Clause 14 requires the tenant to give notice of defects in the premises. It does not refer to fixtures or fittings. Jamacs argues that if the arbitrator's interpretation is correct, the tenant is required to give notice only of defects in the building fabric but not of those in the landlord's fixtures. Norfolk acknowledges but does not counter this submission.

Clause 15

[26] Clause 15 allows the landlord rights to enter and inspect the condition of the premises. Jamacs argues that if fixtures were distinguished from the premises in the way contended for by Norfolk, the landlord would only be entitled to inspect the structure of the building, and not its fixtures and fittings, despite the fact that the tenant has an express obligation to maintain these. Norfolk counters that it is implicit that if the landlord has the power to view the premises, it can also view the fixtures and fittings contained within the premises. Norfolk seems to say that the power to view comes in part from the fact that the tenant has an obligation (under

clause 10) to maintain the fixtures and fittings. However, there is some force in Jamacs' argument. A lease gives a right to exclusive possession, therefore, it seems proper that the landlord's right to enter be restricted to the purposes for which the parties agreed that the landlord could enter, in this case to inspect the *premises*. If this is so, under the lease Norfolk cannot enter the premises in order to inspect the fixtures and fittings.

Clause 22.1

[27] Clause 22.1 requires the tenant to obtain the consent of the landlord before making alterations to the premises. It makes no mention of fixtures or fittings. Jamacs argues that it cannot have been intended that this clause did not apply equally to the landlord's fixtures and fittings. Norfolk points out, however, that the fact that the tenant can only make alterations to the premises with consent does not give the tenant a positive right to make alterations to the landlord's fixtures and fittings without consent.

Clause 45(b)

[28] Clause 45 is the interpretation clause. Sub-clause (b) defines "the property" and "the building" as "land and building(s) of the Landlord which comprise or contain the premises". Jamacs argues that this definition does not restrict the phrase "building" to the exterior of the premises. I think that this definition adds some force to Jamacs' argument. At common law, items that have been affixed to land or buildings are "fixtures" and are treated as being part of the land itself: see *Feickert v Perpetual Trustees Estate and Agency Co of New Zealand* (1989) 1 NZ ConvC 190,224. Where such fixtures are attached to a building, it is their nature as an integral or permanent part of the building that causes them to become part of the land. In light of this principle, it would seem that if the parties had wanted to exclude fixtures from the definition of building, they ought to have done so in s 45. Norfolk seems to acknowledge this in its submissions, but argues that the effect of the clause is outweighed by the operative and insurance clauses.

Clause 10.1

[29] Norfolk relies on clause 10.1 to argue that where there is an obligation on any party (in this case Jamacs) in relation to fixtures and fittings, fixtures and fittings are referred to separately and expressly. Had the parties intended clause 13 to impose an obligation on the landlord in respect of its fixtures and fittings, they would have said so expressly. Clauses 10 and 13 ought to some extent be read together, given that clause 13 excludes the landlord from responsibility for those things for which the tenant is responsible and clause 10 sets out the tenant's responsibilities.

[30] The reference to premises in clause 10.1, "keep and maintain the *interior of the premises, including the landlord's fixtures and fittings*", can be read as supporting either of the meanings of "premises" proffered by the parties. On the one hand, the phrase might suggest the fixtures and fittings are part of the interior part of the (leased) premises and therefore part of the premises themselves. Conversely, the reference to the "interior of the premises" could support Norfolk's argument by demarcating the leased premises from those items contained within, but not forming part of, the premises. On this view, Jamacs leases only the premises, but has an obligation to maintain those items that are in the interior of the premises, including fixtures and fittings.

Clause 13

[31] Jamacs argues that clause 13.1 has the effect that the landlord assumes responsibility for maintenance of the whole premises, save for the items specified in clause 13.1(a)-(d). Therefore, apart from the excepted items in clause 13.1 (a)-(d), the landlord is responsible for all other maintenance obligations. However, as Jamacs acknowledges, landlords are not generally liable for maintenance of fixtures unless there is an express clause to that effect: *Felton v Brightwell* [1967] 276. The parties' lease agreements in this case contain an express clause, clause 13, imposing certain maintenance obligations upon the landlord. However, the landlord's maintenance obligations relate to the "building and all building services", therefore, the scope of the landlord's obligations depends on the central question of the

definition of "building". Clause 13 does not itself advance the interpretation of "building".

Other contextual factors

[32] I agree with Norfolk and the arbitrator that the fact that the new ADLS lease includes "fixtures and fittings" in clause 13 is of limited use. Jamacs argues that it signifies a clarification of what has been the position all along. However, the inclusion of "fixtures and fittings" in clause 13 of the new lease could equally demonstrate that the word "building" in the old ADLS lease, and therefore the parties' lease, and in clause 13 does not include fixtures and fittings.

The leased or demised premises do not extend to the fixtures and fittings

[33] As the arbitrator noted, the case falls on a fine line. Overall, however, I conclude that the demised premises do not extend to the fixtures and fittings. The operative clause clearly demonstrates an objective intention that Jamacs have only a use right of fixtures and fittings and that, as such, the fixtures and fittings are differentiated from the demised premises. This is supported by the fact that fixtures and fittings are separately referred to in the lease when the context requires.

[34] Such an interpretation does not, contrary to Jamacs' argument, render many of the clauses illogical. The most problematic clauses are 14 and 15. Under Norfolk's interpretation, the tenant is not required to notify the landlord of problems with the fixtures and fittings and nor is the landlord able to enter the building in order to inspect the fixtures and fittings. However, I do not think these problematic aspects are enough to warrant interpreting the demised premises as including the fixtures and fittings when the operative clause expressly gives only a right to use them.

[35] The lease deliberately refers to "fixtures and fittings" in the operative clause (as being subject to a right to use) and in clause 10. Had the parties intended the landlord to be liable for *all* repairs the tenant is not liable for, clause 13 would also refer, as does clause 10, to the "interior of the premises, including the Landlord's

fixtures and fittings", rather than the very different phrasing of "building and building services". Moreover, given that landlords are not liable for maintenance unless there is a term to that effect, I do not think that clause 13 can be read as making the landlord liable for *all* repairs with the tenant's responsibilities carved out of that.

Alternative argument: is an obligation to maintain to be implied?

[36] Both parties acknowledge that, in general, landlords are not under an obligation to repair unless an express covenant to do so has been entered into: *Felton v Brightwell*. Jamacs submits that there is nevertheless an implied term that where the parties have deleted clauses from the tenant's responsibilities, those items become the landlord's responsibility. In particular, the deletion of a clause requiring maintenance of the carpet from the tenant's responsibilities means that the carpet has become the landlord's responsibility. Jamacs relies on *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348 to argue that such a term is required for business efficacy. It argues that without the implied term, the contract could not work. The purpose of the lease was for the premises to be used as a live theatre and the theatre could not operate without the maintenance of the items deleted from clause 10.1 (the electrical system; painting and decoration of the interior; keeping floor coverings clean and replacing worn and damaged floor coverings; keeping and maintaining the storm or waste water drainage system clear and unobstructed).

[37] Norfolk counters that Jamacs is still responsible for the items by virtue of clause 10.1(a); its obligation is simply limited by the fair wear and tear exception. Norfolk also argues that whereas there is authority that a deleted term may be relevant to determine that the tenant definitely does not bear the obligation that has been deleted, it is a step too far to then use the deletion to resolve ambiguities in the remaining words, in this case to argue that the landlord bears the deleted obligations. Norfolk submits that if this is what the parties had intended by deleting the items from the tenant's responsibilities, they would have added them in to clause 13. Norfolk refers to several authorities that show that the fact that a "black hole" will arise if no term is implied is not in itself justification for implying a term; nor is the fact that implication will make commercial sense: *Avondale Hotel No. 1 Ltd & Anor*

v Portage Licensing Trust; *Credit Suisse v Beegas Nominees Limited* [1994] 4 All ER 803.

[38] There are three broad classes of implication in contracts: *Vickery v Waitaki* [1992] 2 NZLR 58. Two are relevant here. They are terms deduced by implication or interpretation from the express terms of the contract; and terms held to be implied to give business efficacy to the contract. Since Jamacs focused its submissions on the business efficacy ground, I will deal with this first.

[39] The formulation of the business efficacy test for when a term may be implied most commonly referred to is the five-step one set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363:

1. It must be reasonable and equitable;

2. It must be necessary to give business efficacy to the contract, so that no term would be implied if the contract is effective without it;

3. It must be so obvious that "it goes without saying":

4. It must be capable of clear expression;

5. It must not contradict any express term of the contract.

[40] The test is a strict one: it is not simply whether there is a question of commercial sense; the term must be required for the contract to work at all. Applying the test from *BP Refinery*, the second step is problematic for Jamacs. The contract could be effective without anyone being contractually required to maintain the electrical system, painting and floor coverings for repairs arising out of fair wear and tear.

[41] The present case can be distinguished from the classic example of implication for business efficacy, *The Moorcock* (1889) 14 PD 64, where the implied term – that the riverbed was deep enough for the plaintiff ship owners to moor at the defendant's wharf in a contract for moorage – went to the heart of the purpose of the contract. In

this case, the purpose of the contract is for Jamacs to use the premises as a live venue and it can do this without an obligation on the landlord to repair for fair wear and tear; it simply means that if such maintenance is necessary for use of the venue as a live venue, Jamacs will either have to pay for it itself or negotiate with Norfolk. In this regard, I consider the Court of Appeal's finding in *Avondale Hotel* that commercial sense alone is not sufficient to imply a term is helpful insofar as it underlines the difference between commercial sense and necessity.

[42] Jamacs faces a further problem in relation to the business efficacy test. The business efficacy Jamacs relies on is the business purpose to which it wants to put the venue. In effect, Jamacs argues that the implied terms are necessary if Jamacs is to use the venue for the purpose for which both parties are aware Jamacs intends to use it. However, as Norfolk points out, an implied purpose such as this runs counter to an express clause of the contract. Clause 40 expressly provides that there is no warranty by Norfolk that the building either was, at the time of signing, or would remain suitable for adequate use by Jamacs. The presence of clause 40 is another factor that undermines Jamacs' argument that the purpose for which it wants to use the venue can be the basis for implying an obligation on Norfolk to maintain the landlord's fixtures and fittings.

[43] The other ground on which a contractual term can be implied is when that term can be deduced by implication or interpretation from the express terms of the contract. The test to be applied for establishing this ground is set out in *Vickery v Waitaki International Ltd* at 64-65.

[44] In *Vickery*, Mr Vickery had entered into a written contract with Waitaki for the catering and cleaning of a freezing works. In 1986 Waitaki closed the freezing works permanently. Mr Vickery sought compensation for his losses. The Court of Appeal concluded that the express contract itself gave rise to an implied term that Waitaki would provide a workforce for Vickery to cater for and clean up after.

[45] I do not think the *Vickery* test can help Jamacs. The test is one whereby terms are inferred or deduced from the express wording of the contract on the basis that the parties have taken the implied term for granted. The test is sometimes

applied by posing the question: what would the parties have intended, had they addressed their minds to the issue at the time they entered into the contract: *Avondale Hotel* at [70]. The Court found at [70] of *Avondale Hotel* that:

> The fact that a proposition makes commercial sense does not, of itself, lead to the conclusion that a requirement to bring about that commercial outcome must be implicit in what the parties agreed. That is especially so when the parties have recorded their commercial agreements in considerable detail and revisited and renegotiated them more than once.

In *Avondale Hotel* the Court of Appeal held that the mere fact that fair wear and tear is excepted from the tenant's covenant to repair does not impose an obligation on the landlord to make good damage caused by fair wear and tear.

[46] Jamacs has tried to distinguish *Avondale Hotel* on the basis that the parties' contractual relationship in that case was very complex and had been revisited and renegotiated on more than one occasion. Jamacs argues that the Court of Appeal was alive to this factual matrix and placed significant emphasis on the revisiting and renegotiations of the contract in reaching its conclusion.

[47] I accept that *Avondale* involved a different fact situation. The documents in that case had been drawn up with the expectation that they would not remain in force for very long (because Avondale was expected to be able to obtain a licence in its own right). To some extent the parties in *Avondale* were caught out when the documents became of longer lasting significance than had been anticipated. However, at [70], the Court of Appeal in my view has added the number of renegotiations and revisitations as an afterthought that further strengthens, but is not indispensable to, its conclusion. Whilst the factual context in *Avondale* must be borne in mind, I do not think that *Avondale* need be confined to its facts. The case can be understood as an authority for the more general proposition that a fair wear and tear exception to the tenant's obligations does not necessarily impose an obligation on the landlord. This is particularly so given that *Avondale* cites two other cases (*Keasey v Thompson* [1947] NZLR 392 and *Collings v Winter* [1924] MZLR 44) at [67] in support of this generally phrased statement.

[48] Jamacs also attempts to rely on *Barrett v Lounova.* However, I do not think that the case covers the present circumstances. *Barrett v Lounova* concerned a "correlative obligation". That is, an obligation was implied on the part of the landlord because such an obligation was necessary for the tenant to be able to meet one of its express obligations. In that case the tenant was unable to comply with his obligation to keep the inside in good repair if the outside fell into disrepair, therefore, an obligation was implied in respect of the landlord to maintain the outside of the building.

[49] In its written submissions, Jamacs appears to suggest a correlative obligation exists when it says that in order to comply with its covenants (e.g. to pay rent), it requires that fairly worn and torn fixtures and fittings be replaced. However, to use this argument to bring the case within the realm of *Barrett* would be straining matters, and I do not think this is what Jamacs is attempting to do. Rather, Jamacs submits that in order to use the premises for the purpose for which it has leased them, if Norfolk does not pay for the maintenance of failed, worn and torn items, Jamacs will have to. This is, indeed, the practical result of there being a "black hole" in such a case. The Court of Appeal found in *Avondale* that this was not sufficient reason to imply an obligation upon the landlord. There is the further problem for Jamacs here that clause 40 of the subject leases expressly provides that the landlord does not warrant the building will remain suitable for adequate use by Jamacs.

[50] Jamacs has failed to make out a case for there being either an express or implied obligation of maintenance on the landlord to maintain the landlord's fixtures and fittings. As a result, the second issue raised by Jamacs does not fall to be considered.

Result

[51] The appeal is unsuccessful and is dismissed.

[52] The parties have 15 days from the issue of the judgment to file costs memoranda.

Duffy J