

## Insights

# LANDLORD'S DUTY TO MITIGATE AFTER TENANT DEFAULT

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## SUMMARY

A recent Hong Kong Court of First Instance judgment, in *Foxhill Investments Ltd v Sino Golden International Group Holdings Ltd* [2021] HKCFI 3662 (HCA 2938/2018, 15 December 2021), clarifies the scope of the obligation of the landlord to mitigate its loss upon a tenant's repudiatory breach of a tenancy agreement.

## BRIEF FACTS

This was a typical case of a delinquent tenant.

In repudiatory breach of the Tenancy Agreement, the Tenant had failed to pay rent, management expenses and government rates for the Premises.

The Landlord commenced legal proceedings against the Tenant before the Court of First Instance. The Tenant failed to file an intention to defend within the prescribed time.

A final and interlocutory judgment was entered in favour of the Landlord, ordering the Tenant to (a) give the Landlord vacant possession of the Premises and (b) pay the arrears of rent and/or mesne profit, management fees and rates.

Subsequently, the Tenant delivered to the Landlord vacant possession of the Premises by a notice of surrender.

The judgment dated 15 December 2021 related to the assessment of damages.

## ASSESSMENT OF DAMAGES

The general rules for the assessment of damages for repudiatory breach of a tenancy agreement are:-

- a. Where a landlord accepts a tenant's repudiation of the tenancy agreement, the landlord is entitled to claim as damages against the tenant for rent for the unexpired term of the tenancy agreement, rates, service charges and reinstatement costs.
- b. This is subject to a duty on the landlord to mitigate its loss by acting reasonably and take such steps as are necessary to re-let the vacant premises at market rent.
- c. The landlord's duty to mitigate is not onerous. The landlord is not required to do anything other than in the ordinary course of business.
- d. The burden is on the tenant to show that damages has not been mitigated. If a tenant wishes to set up a positive case that the landlord has failed to mitigate its loss, the tenant must plead the allegation with particulars specifically in its defence.

In the present case, the Court was satisfied that the Landlord has taken reasonable steps to mitigate its loss after the delivery of vacant possession of the Premises by the Tenant:-

- a. First, the Landlord actively advertised the Premises in the market for leasing after its acceptance of the Tenant's repudiation of the Tenancy Agreement. Eventually, the Landlord managed to enter into a new tenancy agreement with a replacement tenant at a rent higher than that under the Tenancy Agreement with the Tenant.
- b. Secondly, the Tenant did not give an intention to defend within the prescribed time. Therefore, it was not open for the Tenant to say that the Landlord failed to mitigate its loss.

The Court assessed the damages to be the amount of rent, management fees and rates from the day after the Tenant delivered vacant possession to the day before the commencement of the new tenancy agreement.

The Court further ordered the Tenant to pay interest on the damages assessed at the contractual rate pursuant to the Tenancy Agreement, and thereafter at judgment rate until full payment.

## DEPOSIT

The Landlord held a deposit.

The Tenancy Agreement provided that the Landlord had the right to deduct from such deposit *"the amount of any rent rates and other contributions or charges payable hereunder and any costs expenses loss or Tenant sustained by [the Landlord] as the result of any non-observance or non-performance by [the Tenant] of any of the said agreements stipulations obligations or conditions..."*.

The Court expressed the view that the Landlord was at liberty to exercise its contractual right as it deemed fit, and the Court did not need to, and would not, give any order regarding the Landlord's

application of the deposit to satisfy any sum due by the Tenant to it.

## TAKEAWAY

This decision will be welcomed by landlords, because it provides landlords with guidance and clarity on the scope and limits of their duty to mitigate following the delivery of vacant possession by a defaulting tenant.

## RELATED PRACTICE AREAS

- Real Estate
- Real Estate Disputes

## MEET THE TEAM



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