

CANADA / JUDGMENT

He v. Yeung

2010 BCSC 571

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 571 He v. Yeung IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: He v. Yeung, 2010 BCSC 571 Date: 20100503 Docket: S094135 Registry: Vancouver Between: Shu Xian He Plaintiff And Carmen Mei Lan Yeung Defendant Before: The Honourable Mr. Justice Burnyeat Reasons for Judgment Counsel for the Plaintiff: D.H. Lou Counsel for Defendant: K.H. Jang Place and Date of Trial: Vancouver, B.C. March 29-31, April 1, 12-16, 2010 Place and Date of Judgment: Vancouver, B.C. May 3, 2010

- [1] The Plaintiff and her common law spouse run a restaurant located in a strata lot ("Unit") within Parker Place Mall in Richmond ("Mall"). The Unit is owned by the Defendant. The Plaintiff claims that the Defendant should have been aware that the HVAC system within the Unit had not been properly maintained and that, as a result, was not properly functioning or was not functioning at all. The Plaintiff alleges that she is not able to operate her restaurant business during the afternoons of the summer months because of the excessive heat within the Unit. The Plaintiff alleges that she has suffered damage as a result of this failure.
- [2] The Plaintiff alleges that the HVAC system is owned by the Defendant, that the Defendant has the responsibility to maintain the HVAC system in an operating function, that it is the responsibility of the Defendant to make arrangements for the timely maintenance of the HVAC system, that it is the responsibility of the Defendant to remove obstacles within the Unit belonging to the Defendant so that maintenance of the HVAC system can be undertaken, and that the Plaintiff has been denied quiet enjoyment of the Unit as a result of these failures of the Defendant.
- [3] The Defendant states that it is the Plaintiff who has the full responsibility for all costs and expenses relating to the HVAC so that any alleged damages suffered by the Plaintiff are a result of her refusal or inability to maintain, repair or replace the HVAC system as she is required to do. The Defendant also states that it is the Plaintiff or a previous tenant who has put obstacles within the Unit so that the HVAC system cannot be maintained or, if necessary, replaced because the HVAC cannot be accessed safely.

BACKGROUND

- [4] The Unit was purchased by the Defendant in 2004. The Defendant was the original landlord under a May 2005 lease ("Lease"). There were a number of assignments of that Lease as new tenants occupied the Unit.
- [5] The Plaintiff entered into an April 8, 2007 "Asset Purchase Agreement" ("Agreement"). Under the Agreement, the Plaintiff purchased the restaurant business from the previous tenant. Recital III indicates that the Plaintiff agreed to purchase: "... all the property, assets and undertaking of the Business ... as a going concern ...". What was purchased is described as follows under the Agreement: Upon the terms and subject to the conditions of this Agreement, the Vendor agrees to sell, assign and transfer to the Purchaser, and the Purchaser agrees to purchase from the Vendor as a going concern all the undertaking, property and assets of the Business of every kind and description above situate (except as provided in Clause 1B), including without limiting the generality of the foregoing:
- (a) the interests in the leased property and the improvements , appurtenances and fixtures on the ... [Unit];
 - (b) all equipment, fixtures, furnishings, machinery, supplies and related business tools used in connection with the Business as listed out in Schedule "A" (the "Equipment"); and
 - (c) the goodwill of the Business, together with all permits, licences, consents, authorizations, approvals and contracts pertaining to the Business which are assignable (the "Goodwill"); ...
- [6] The total purchase price of \$76,000.00 included \$3,000.00 "for the equipment", \$36,500.00 for the "Leasehold Improvements", and \$36,500.00 for the "Goodwill". The "equipment, fixtures, furnishings, machinery, supplies and related business tools" set out in Schedule "A" to the Agreement included a number of items necessary to run the kitchen of a restaurant business. The HVAC is neither listed in Schedule "A" nor referred to in the Agreement.
- [7] Under the Agreement, the Vendor represented and warranted that it: "... owns and possesses and has good marketable title to the Assets free and clear of all claims, liens, charges, pledges, security interest, and encumbrances of every kind and nature whatsoever." The Plaintiff signed the Agreement in the presence of Derrick Yeung, barrister and solicitor, who was acting for the Plaintiff in 2007.
- [8] An April 8, 2007 Assignment of Lease ("Assignment") was signed on behalf of the former tenant as Assignor, the Plaintiff as "Assignee" and the Defendant as "Landlord". The Assignor represented that there was no defaults under the Lease and saved the Assignee harmless from: "... all actions, suits, costs, losses, damages, charges and expenses for or in respect of the performance of the Tenant's obligations under the Lease for the period up to [April 8, 2007]". The Plaintiff signed the Assignment in the presence of Derrick Yeung, barrister and solicitor, who was acting for the Plaintiff in 2007.

- [9] There were a number of covenants and agreements on behalf of the Plaintiff as Assignee under the Assignment. However, there were no similar covenants or agreements provided by the Plaintiff to the Defendant . The covenants and agreements provided to the Assignor were that the Plaintiff agreed that she would:
- (a) assume all of the Assignor's rights, title, interest, duties and liabilities of the Assignor under the Lease, including any assignment of a security deposit; and
 - (b) observe, perform and comply with all the terms, covenants and conditions of the Lease, bylaws and management regulations in respect of the Premises and promptly pay the monthly rent, additional rent, management fee, property tax, water and utility charges as and when they are due and payable pursuant to the Lease.
- [10] In consideration of the Landlord consenting to the assignment of the Lease, the Assignor guaranteed to the Landlord the due payment of all monies required to be paid on the part of the Plaintiff under the Lease and further guaranteed the due performance and observance by the Plaintiff of all covenants, conditions, stipulations and provisos in the Lease. There was an additional proviso that the Assignor had the right to take back the Lease in case of default by the Plaintiff.
- [11] There was no covenant in the Assignment that the Plaintiff that would make all payments required under the Lease or would perform and observe the covenants, conditions, stipulations and provisos within the Lease.
- [12] While the Defendant consented to the assignment of the Lease, the only agreement of the Defendant under the Assignment states: "The parties hereto hereby confirm that the Lease is in full force and effect, unchanged and unmodified, except as in accordance with this Assignment of Lease."
- [13] Before the Agreement and the Assignment were signed by the Plaintiff, the Plaintiff was aware of the fact that there was hole in one of the walls within the Unit. The hole once contained a switch for the HVAC system for the Unit. The Plaintiff was advised that it would be a simple and inexpensive matter to reconnect the HVAC. Unfortunately, that was not done prior to the transfer pursuant to the Agreement so that the Plaintiff was not aware that the HVAC was inoperative.
- [14] The HVAC in the Unit is bolted to the concrete ceiling of the Unit and is located above the dropdown ceiling of the Unit, above a wall which separates the front of the restaurant from the kitchen area, above a countertop which is in the restaurant area and above a shelf which is in the kitchen area. It is agreed that the ceiling in the front area is 7 feet 6 inches below the concrete "roof" of the Unit, that the dropdown ceiling in the kitchen area is 7 feet 1 inch below the concrete "roof" of the Unit, and that the HVAC unit is 6 feet 4 inches above the dropdown ceiling.

- [15] The Mall is comprised of a number of strata units. The Strata Council is elected by the owners of those strata units. The Strata Council of the Mall deals only with the owners. If improvements or renovations are contemplated by a tenant or by an owner, the Strata Council will only allow the improvement if the owner makes the request or if the owner indicates its approval on a request made by a tenant.
- [16] In evidence are a May 30, 2005 letter regarding June 2005 renovations by a previous tenant involving "removing and reinstall new kitchen cabinet, repainting the wall and the ceiling, and install a new store sign" and a similar letter relating to the "Painting and change of sign" to be undertaken by a different tenant in July 2006.
- [17] The available records of the Strata Council do not indicate any request for renovations to the ceiling for the Unit. At her October 29, 2009 Examination for Discovery, the Defendant was asked the following question and gave the following answer: "Q. Did any previous tenant request permission to change the ceiling in the Unit? A. Not according to my recollection." At her September 30, 2009 Examination for Discovery, the Defendant indicated that she was not aware whether the ceiling had been changed since the property was purchased by her in June 2004. While I can make no finding as to when the ceiling for the Unit was added, I do find that it was not added by the Plaintiff.
- [18] The Mall has a contract with Honeywell to maintain equipment in the Mall. Included within the "List of Maintained Equipment" are 101 "Heat Pump Units", with the indication that the "Base Level Inspection" of heat pump equipment will be quarterly for "Preventative Maintenance", "Predictive Maintenance", and "Filter Changes". The contract with Honeywell provides in part: The client will provide a safe working environment and reasonable means of access to all equipment covered by this agreement. Honeywell will be free to start and stop all primary equipment incidental to the operation of the system(s) as arranged with the client's representative.
- [19] In a September 10, 2007 notice to "All Shop Owners/Operators", the Mall advised that Honeywell would be changing the air filters for the heat pumps in shops between September 11 and 14, 2007. That notice also stated, in part: You are not required to pay any charge for the work as it is covered by the Mall's maintenance contract with the company. To facilitate the above work, please remove temporarily any commodities/obstruction under your air conditioning units. Also, please sign the Air Filter Replacement Sheet as a record for service. The Problems with the HVAC
- [20] The Defendant at her September 30, 2009 Examination for Discovery stated that Mr. Ho on behalf of the Plaintiff phoned her several times after April 2007 to advise her about the air conditioning problem. In early May 2007, the Plaintiff made arrangements to add a thermostat with a locking cover to the wall of the Unit. At his October 29, 2009 Examination for Discovery, Mr. Ho stated that he did not notify the Mall manager because: "... it was merely an electrical switch".

- [21] When it then became apparent that the HVAC was not operative, the Plaintiff forwarded a July 12, 2007 letter to the Defendant stating in part: Please reply within 5 days to the tenant with respect to the maintenance of the air-conditioning system. If the tenant does not receive a reply regarding the maintenance of the air-conditioning system within 5 days, the landlord of this commercial unit will be responsible for all matters happened in this regard.
- [22] Although it is undated, it appears that a letter was sent by the Defendant in July 2007 to the Plaintiff stating in part: As mentioned in the letter from the Air-Conditioning Co. of Parker Place, which we had a copy delivered to you in the morning on Thurs, July 2007, the ceiling of our unit needs to be re-covered with accessible ceiling before the management office will agree to inspect the air-conditioning system above it. Thus the responsibility on the fix was discussed. The tenant should be responsible for this matter due to 2 reasons. First of all, a new tenant, before buying a business, has the responsibility to check for any unpaid bills, unfixed equipment, or improper construction passed on from the preceding tenant(s). It was indicated clearly that any of the above which was caused by previous tenants should remain as the tenant's responsibility in all time. If the last tenant was not asked to pay, the new tenant automatically takes the responsibility when you agree to buy the business. The landlord will only pay originally what should be paid by the landlord. In the case of this time, although it was one of your preceding tenants who has performed the improper ceiling construction, the fix will remain as the tenant's responsibility. Moreover, any of the unit equipment or constructions was sold from tenant to tenant along with the unit location and the leasing agreement without the landlord's interference, thus tenants should take full responsibility on what was purchased. For example, if the cooking unit or the refrigerator breaks down, the landlord will not be responsible for the repair because they are not the unit's property. An improper constructed ceiling goes the same way: since the current tenant has agreed to buy everything the previous tenant was selling, thus has the full responsibility. If the tenant agrees that the construction belongs to the landlord, then for the next sale of the business the landlord should gain a share, for the unit constructions we own. After the ceiling is fixed, please contact me as soon as possible. I will then ask the management office of Parker Place to fix the air-conditioning system above the ceiling.
- [23] Around September 12, 2007, the HVAC caused a short which required the attendance of an electrician who provided a September 12, 2007 invoice to the Plaintiff for \$227.20 relating to the installation of a replacement fuse. Time was spent at the Trial attempting to establish whether Mr. Ho was or was not qualified as an electrician so the conclusion could be drawn that he did the work himself. I am satisfied that nothing turns on that question. While Mr. Ho described himself as an "electrician" at the number one electrical company in Guanju Province in China and although he could not remember the name of the electrician who had undertaken the work on behalf of the Plaintiff, I am satisfied that it is irrelevant whether Mr. Ho did the work himself or whether a "particular individual [who] comes to our place to have breakfast on a regular basis" did the work.

- [24] There were many attempts by the Plaintiff to obtain records relating to the repair, maintenance and servicing of the HVAC within the Unit. Records relating to the "changing of air conditioning filter" between 2004 and 2007, as well as an "air conditioning repairing, maintenance and/or service report relating to the Shop made on or around June 2007 from the service provider Honeywell" was requested in an October 29, 2007 letter to the Defendant from the solicitor for the Plaintiff. Similarly, the lawyer for the Plaintiff in January 11, 2008, December 17, 2008 and July 7, 2009 letters continued to request building renovation records, building permits and alteration applications concerning the Unit starting from the year 2005.
- [25] The Defendant also made attempts to obtain the records requested by the Plaintiff. In a November 5, 2007 letter to the Mall, the Defendant requested documents regarding the air conditioning. In response to this request for information, the Defendant in an undated letter stated: In regard to your request for reviewing the minutes of the Landlord Committee and the management office, I have checked the lease and rental regulations, sorry that you do not have the rights. Saying that you have the right to do so because you pay the management fees, sorry, the system is not operating in this way. Just like; you are paying the property tax but you have no right to check any documents of the City of Richmond and the landlord. If I am incorrect, please advise me in writing by stating which clause, section and regulation that is relying on for my reconsideration!
- [26] In a March 8, 2008 letter to the Plaintiff, the Defendant stated that, as the Plaintiff: "... continues to refuse in fixing the ceiling, which is his asset, we will not search for any other document or answer any further question regarding the incidents. Anything could be done have been done already."
- [27] The Mall, Honeywell and the Defendant consistently have taken the position that the HVAC cannot be accessed because of the nature of the dropdown ceiling which is installed in the Unit and the placement of the HVAC within the Unit. It was the position taken on behalf of the Defendant that it was the responsibility of the Plaintiff to replace the ceiling so that Honeywell could not only maintain the HVAC but could also ascertain whether the HVAC needed to be replaced.
- [28] The Defendant took various steps to ascertain the position of the Mall and of Honeywell. That included attending a meeting of the Strata Council, although he was not a member of the Strata Council. The position of the Mall and the position of the Defendant are set out in a November 5, 2007 letter to the solicitor for the Plaintiff from the Defendant: In the August owner and management meeting of Parker Place, I have raised this problem on the discussion. I was told by the council that the ceiling in the unit was improper, against the by-law, and had to be re-constructed to an open-ceiling as soon as possible. The meeting had come to a conclusion that we needed to fix the ceiling before Honeywell would send another technician for a check-up. If it was a simple incident as jumping out of fuse due to dirty filter, no charge would apply. If, on the other hand, it was a more serious breakdown, the according split of charge between the management office, the owner and the tenant will

then be discussed after a quote of price. In the meeting, I had also requested a record on the cleaning and maintenance of the air conditioning system, as well as paying attention to the maintenance in the future, though no reply was given after the meeting.

- [29] Honeywell consistently indicated that it was not in a position to access the HVAC for maintenance or repair because of safety concerns. In a January 13, 2008 letter to the Mall, Honeywell stated: Based on my recollection of this unit during my site visit to Parker Place on June 27th, 2007, the current access to this heat pump requires the employee to ascend a ladder approximately 10' to remove and climb through a .ceiling tile. The employee then needs to stand on a wall support approximately 8-10" wide and reach about 5-6' in the air to change the heat pump filter. During this process if the employee were to loose [sic] their balance they would fall through the drop ceiling to the retail unit floor approximately 10' below. Accessing and performing work on this specific heat pump results in numerous violations of health and safety legislation. Honeywell's most important corporate priority is health and safety of its employees. Since my June 27th inspection of this heat pump location, I have instructed my employees not to access this heat pump unless the ceiling tiles are all removed and a mechanical lift or platform is constructed to safely access the heat pump.
- [30] The Plaintiff stopped paying rent as a result of the failure of the HVAC system. In a March 8, 2008 letter to the lawyer for the Plaintiff, the Defendant stated: This incident was raised from the break-down of the air-conditioning system since July 2007. As previously discussed, nothing could be done if Mr. He [Ho] continues to refuse in fixing the unit ceiling, which avoided the Honeywell technicians to enter for repair. As the landlord, we have done our best to assist Mr. He in obtaining the documents he acquired by raising the issues several times in the Owners' Council Meetings and to Honeywell (the maintenance company). Honeywell, in response, had sent out their first letter on Jan 13, 2008. We did not find this letter helpful because it did not provide us the maintenance record, so we made a second request to Honeywell on Feb 15, 2008. Their letter following was again only re-stating the current situation: if the ceiling is not fixed, it will be unsafe to repair the air conditioner (both letters are enclosed). Bob Tai, the president of the Owners' Council, stated that there was no way to force Honeywell to answer our question, so we have, once again, come to the same conclusion: If the Mr. He [sic] does not fix the ceiling, then nothing can be done. Stop paying the rent is obviously not a wise decision because it will only lead to legal actions.
- [31] Eventually, all rent was paid up to date. However, fines from the Strata Council levied against the Defendant for late payment of strata fees and "fines" arising as a result of the restaurant operation of the Plaintiff closing down a number of times remain unpaid.
- [32] On June 12, 2008, the Plaintiff had Bayside Industries Ltd. check the HVAC system for the Plaintiff and the following report along with an invoice for \$336.00 was obtained: "electrical breaker trip off"; "evaporator is cover[ed] with grease from the front to the back"; "Recommendation to replace the whole unit"; "Notice: The unit has no maintenance"; "filter replace should be done every 3 months"; and "Unit was install[ed] year 1992".

- [33] Subsequently, a quotation of \$12,320.00 to replace the HVAC was obtained by the Plaintiff. In a December 4, 2008 letter from the solicitor for the Plaintiff to the Defendant, permission was requested to proceed with repairs using Bayside. As well, the letter stated: "The Tenant preserves her right to initiate legal proceedings to recover the costs of the Replacement from the Landlord."
- [34] There were a number of negotiations in 2009 regarding the work that would be necessary so that Honeywell could access the HVAC. The Plaintiff obtained a quotation from R2 Square Renovation Co. on April 19, 2009 indicating the cost of \$7,623.00 to "remove the existing GWB ceiling with structure and lights" and after the new A/C unit installed, build the new T-Bar ceiling & panels and new pot-lights". A request was made to the Mall and to the Landlord to allow that to occur. In a May 4, 2008 letter to the solicitor for the Plaintiff, the Defendant advised: We, the Landlord of the Unit, will not consent to the repair of the Unit's ceiling until we receive a written letter by Mr. He, the Tenant of the Unit indicating he will be responsible to all related cost of the repair as the reasons we have mentioned in our previous letters. Please note that if Mr. He insists to proceed with the repair without the Landlord's and the Strata Council's approval, he will hold full responsibility to the consequence.
- [35] In a May 10, 2009 communication, the Defendant indicated that she would have permitted the Plaintiff to proceed if the Plaintiff had agreed to cover all of the related costs and that she had received a quotation from Fantastic Contracting Inc. to replace the existing ceiling at \$1,200.00. The letter then stated that if the Plaintiff: ... agrees to proceed with the construction with Fantastic Contracting Inc. (or any construction company with a comparable quotation), we will permit [the Plaintiff] ... to repair the ceiling first and then claim the cost in this law suit, if indeed we, the Landlord, are responsible for the repair. After the ceiling is fixed, we will repair the HVAC system ASAP if there is no evidence showing the damage was done by the current Tenant ...
- [36] In a May 29, 2009 letter from the solicitors for the Plaintiff to the Defendant, the solicitor for the Plaintiff stated: As we have advised you before, our client is prepared to immediately pay for the cost of repairing the T-bar ceiling and access to the HVAC system. Mr. He will then claim such cost in this lawsuit, and it will be up to the Court to ultimately decide who is responsible for such cost. If you are right, then it will be Mr. He's responsibility. However, you are refusing to even allow Mr. He to make the necessary repairs, forcing him to shut down his business and incur significant damages. We ask again that you permit Mr. He to repair the ceiling. If you continue to refuse, we reserve the right to bring this letter to the attention of the Court, in which case we will claim not only the damages Mr. He has, is and will continue to incur, but also aggravated and punitive damages.
- [37] An application was made by the Defendant to "change drywall ceiling to T-bar ceiling" with the renovation period being shown as "2009/06". While I am not in a position to come to a conclusion as to who contacted Fantastic to instruct them to proceed, Fantastic did proceed to replace the drywall ceiling in the front part of the Unit with a T-bar ceiling. While I find

that there was an agreement in place that each party would pay for one-half of the \$1,200.00 cost, I also find that the Plaintiff ultimately did not pay \$600.00. In a June 15, 2009 letter to the solicitor for the Plaintiff, the Defendant advised that the Plaintiff had refused to pay a \$600.00 deposit to Fantastic. As a result of that, the Defendant stated that: "Our promise of repairing the air-conditioning system after ... [the Plaintiff] fixes the ceiling is cancelled."

- [38] In a June 30, 2009 letter to the Defendant the solicitor for the Plaintiff stated that paragraph 5.1(a) of the Lease did not apply as: "The HVAC unit is part of a multi-use system, and is accordingly not exclusive to our client. That is why Honeywell performs the necessary maintenance and repairs for all of the users and the expenses of which are covered by the common area maintenance fee which our client proportionately pays."
- [39] In a July 7, 2009 letter to the Defendant, the solicitor for the Plaintiff indicated that a portion of the drywall ceiling had been replaced a T-bar ceiling but that: Honeywell then attended, inspected the ceiling and advised our client that nothing had changed and that they are still unable to access the heat pump to perform the needed maintenance. In this regard we direct your attention to our letter to you of June 1, 2009 in which we expressed our concern that the quotation from Fantastic Contracting Inc. did not appear to address the requirement of Honeywell to provide a secure platform on which servicemen could access the air conditioning unit. As it turns out, our concern was legitimate. The only solution is to have Honeywell directly involved in determining what renovation is necessary. Our client has in the past advised that it is prepared to undertake the necessary renovation in concert with Honeywell the cost of which would be ultimately determined by the court. You have continually refused to permit this. You are well aware that our client can not commence any such work without the written consent of Parker Place Management and you as the landlady. Our client accordingly continues to suffer significant damages all of which will be part of the ongoing law suit. THE LEASE
- [40] The applicable provisions of the May 2005 Lease are as follows: NEW LEASE 1.3 The Tenant acknowledges and agrees that it is intended by both parties that this Lease shall be a completely carefree net lease for the Landlord, except as expressly hereinafter set out, that the Landlord shall not be responsible for any costs, charges, expenses, and outlays of any nature whatsoever arising from or related to the Leased Premises, or the contents thereof but shall be responsible for those arising from or related to repairs (the "Structural Repairs") to the foundations, structural subfloors, columns, beams and the structural portions of bearing walls and of the roof of the Leased Premises and the Shopping Centre and the Tenant shall pay all charges, impositions, costs and expenses of every nature and kind relating to the Leased Premises and a proportionate share based on Unit Entitlement of charges, impositions, costs and expenses in connection with the Shopping Centre as set out in Article 2 hereof, and the Tenant covenants with the Landlord accordingly. ADDITIONAL RENTAL 2.1 (b) Commencing from the Commencement Date and notwithstanding any free rent period, the Tenant's Portion, for the duration of the Term, of the aggregate of the following:

- (i) The common expenses, insurance, etc. as charged by the Strata Corporation for the Leased Premises except for those arising from or related 'to Structural Repairs'. ... (iv) Any reasonable fixtures the Strata Corporation may require on the Leased Premises as a result of the operation of business in the Premises; ACCEPTANCE OF LEASED PREMISES 3.1 The possession of the Leased Premises by the Tenant shall constitute an acknowledgement by the Tenant that the Leased Premises are in the condition called for by this Lease and acceptable to the Tenant. TENANT'S REPAIRS 5.1 The Tenant covenants with the Landlord that:
 - (a) The Tenant shall at all times during the Term at its own cost and expense, repair, maintain and keep the Leased Premises, all equipment, fixtures and mechanical systems within the Leased Premises or elsewhere if such equipment, fixtures or system are provided exclusively for the use or benefit of the Leased Premises, including but not limited to the hot water tank, air conditioner, ice maker, grease trap, front aluminum gate, ventilating fan, and countertops, and any improvements now or hereafter made to the Leased Premises in good order and repair, as a careful owner would do, reasonable wear and tear, Structural Repairs, and repairs for which the Landlord is responsible under Clause 5.2 [which deals with a scenario where the Mall or the Unit is "wholly unfit for the business of the Tenant or partially unfit for the business of the Tenant" or where there is a destruction of the Mall] and damage by Insurable Hazards only excepted, and the Tenant covenants to perform such maintenance, to effect such repairs and replacements and to decorate at its own cost and expense as and when necessary or reasonably required so to do by the Landlord.
- (e) LANDLORD'S RIGHT TO ENTER FOR REPAIRS. The servants, agents or representatives of the Landlord or the Strata Corporation shall have the right to enter the Leased Premises at any time during business hours to make alterations or repairs as they shall deem necessary for the safety or preservation or proper administration or improvement of the Leased Premises, the Shopping Centre, or any premises adjoining the Leased Premises, and at all times to perform as they see fit, to maintain and repair the Landlord[']s Work. INSURANCE 9.1 The Tenant covenants with the Landlord that:
 - (a) The Tenant shall take out and keep in force during the Term:
 - (i) fire insurance with extended coverage endorsements and vandalism and malicious damages endorsements, including sprinkler leakage, sewer leakage and burst water pipes, plus such additional coverage as the Landlord may deem necessary to cover the stock-in-trade, furniture, fixtures, equipment, machinery, improvements and all other contents of the Leased Premises, for amounts sufficient to replace these items; PAINTING AND DECORATING 10.1 The Tenant may at any time and from time to time at its expense, paint and decorate the interior of the Leased Premises, install trade fixtures and equipment, and make such changes, alterations, additions and improvements in and to the Leased Premises, all as will in the judgement of the Tenant better adapt the Leased Premises for the purposes of which the same are permitted to be used provided, however, that no changes, alterations, additions or improvements to the structure, any perimeter wall, the store front, the

sprinkler systems, the heating, ventilating, air-conditioning, plumbing, electrical or mechanical equipment or the concrete floor or the roof shall be made without the prior written consent of the Landlord and Strata Corporation and without the use of contractors or other qualified workmen to be approved by the Landlord and Strata Corporation. All changes, alterations, additions and improvements, whether structural or otherwise, shall comply with all applicable statutes, regulations or by-laws of any municipal, provincial or other governmental authority and the Strata Corporation. The Tenant shall pay to the Landlord the amount of the increase for any insurance coverage and/or Municipal Taxes to the extent that insurance or tax increase is directly attributable to any action by the Tenant pursuant to this paragraph and the Tenant covenants that such insurance shall not thereby be made liable to avoidance or cancellation by the insurer by reason of such changes, alterations, additions or improvements. LANDLORD'S PROPERTY 10.2 The Tenant agrees that at the expiration or earlier termination of the Lease, all changes, alterations, additions and improvements made to or installed upon or in the Leased Premises whether made pursuant to this Article 10 or otherwise and which in any manner are attached in, on or under the floors, walls or ceilings other than unattached moveable trade fixtures shall remain upon and be surrendered to the Landlord with the Leased Premises as a part thereof, without disturbance, molestation or injury, and shall be and become the absolute property of the Landlord without any payment or indemnity by the Landlord or any third party to the Tenant, unless the Landlord shall by notice in writing require the Tenant to remove all or part thereof, in which event the Tenant covenants and agrees to promptly remove the same in accordance with such notice, and to restore the Leased Premises to the state in which they were prior to commencing any of the Tenant's work. ... LANDLORD'S COVENANTS 16.1 The Landlord covenants with the Tenant: QUIET ENJOYMENT

(a) That if the Tenant pays the rent hereby reserved and performs the covenants herein on its part contained, it shall and may peaceably possess and enjoy the Leased Premises for the Term hereby granted without any interruption or disturbance from the Landlord or any other person or persons lawfully claiming by, from or under the Landlord. STRUCTURAL REPAIRS

(b) That the Landlord shall be responsible at its own cost for Structural Repairs. DISCUSSION - WHO OWNS THE HVAC AND WHO MUST REPLACE IT?

[41] While there is no evidence in this regard, I believe it is more than likely that the HVAC system was put in place when the Mall was built and when the Unit was first occupied by the first owner. If the HVAC was in place when the Unit was purchased by the Defendant in 2004, it became an asset of the Defendant upon the purchase of the Unit. If, on the other hand, it was installed by a tenant after the Lease was signed, then it became an asset of the Defendant upon installation as it became affixed to the ceiling of the Unit. Paragraph 10.2 of the Lease makes it clear that the HVAC system would be owned by the Defendant at the expiration or earlier termination of the Lease.

- [42] Under paragraph 10.2 of the Lease, on the expiration or early termination of the Lease, all "changes, alterations, additions and improvements made to or installed upon or in the Leased Premises ... and which in any manner are attached in, on or under the floors, walls or ceilings other than unattached moveable trade fixtures shall remain upon and are surrendered to the Landlord with the Leased Premises are a part thereof ... and shall be and become the absolute property of the Landlord without any payment or indemnity by the Landlord ...". In accordance with paragraph 10.2, the HVAC system which was "attached ... under the ... ceilings" would become the property of the Defendant once the Lease expired or terminated. This is further evidence that the HVAC became the property of the Defendant when it became attached to the ceiling of the Unit as the Lease distinguishes clearly between a moveable trade fixture and that which becomes a landlord fixture because of its attachment and the nature of the attachment to the ceiling of the Unit. The HVAC was not a trade fixture which the previous tenant or the Plaintiff had a right to sever from the freehold during the tenancy. That being the case, there was no right to sell the HVAC.
- [43] It is also clear that the Agreement did not purport to transfer the HVAC to the Plaintiff. First the Agreement deals only with all of the "property, assets and undertaking of the business ... as a going concern...". Second, the "Description of Assets" does not include anything owned by the Landlord/Defendant, and in particular, the HVAC was not included in what was set out in the Agreement. That is the case because it was not an asset of the previous tenant to transfer to the Plaintiff.
- [44] The fact that the Plaintiff was indirectly paying for the cost of maintaining the HVAC by paying strata council assessments has no bearing on the question. First, the Lease was a "completely carefree net lease" so that the "Landlord shall not be responsible for any costs, charges, expenses, and outlays of any nature whatsoever arising from or related to the Leased Premises". Second, the Plaintiff was required under the Lease to pay "all charges, impositions, costs and expenses of every nature and kind relating to the Leased Premises". Third, under paragraph 5.1 of the Lease, the Plaintiff was required "at its own cost and expense" to at all times "repair, maintain and keep the Leased Premises, all equipment, fixtures and mechanical systems within the Leased Premises or elsewhere if such equipment, fixtures or system are provided exclusively for the use or benefit of the Leased Premises, including but not limited to the hot water tank, air conditioner ... ventilating fan ... and any improvements now or hereafter made to the Leased Premises in good order and repair, as a careful owner would do, reasonable wear and tear ... only excepted ...".
- [45] The question which arises is whether the Plaintiff had an obligation not only to repair and maintain the air conditioner, but also to replace it. I am satisfied that this question was determined by the Saskatchewan Court of Appeal decision and that the Plaintiff is obligated to pay for the replacement of the HVAC. That lease provided that the "Additional Rent" included amounts payable for "maintaining, operating and repairing the Leased Premises, excepting structural and roof repairs ... including without limiting the generality of the foregoing ... the cost for general maintenance and repairs to the plant and equipment

supplying climate control. ..." In concluding that the phrase was broad enough to require the tenant to replace as well as repair, Cameron J.A. on behalf of the Court, stated: I begin, then, with the terms "maintain" and "repair." The natural and ordinary meaning of these words is easy enough to come by. They are defined by The Concise Oxford English Dictionary (10th ed.) to mean this: "Maintain" means to keep (a building, machine, etc.) in good condition by checking and repairing it regularly. "Repair" means to restore (something damaged, worn, or faulty) to good condition. These words have long been employed in leases of this nature, since it is common practice for tenants to covenant to keep the demised premises in good repair, and their general import is widely accepted. Thus Woodfall: Landlord and Tenant (London: Sweet and Maxwell, Looseleaf ed.) says this at para. 13.029: The concept of repair is the converse of disrepair. Accordingly before liability can arise under a covenant to repair, the subject matter of the covenant must be out of repair. Disrepair cannot exist unless the subject-matter of the covenant is "in a condition worse than it was at some earlier time," for disrepair "connotes a deterioration from some previous physical condition" [Post Office v. Aquarius Properties [1987] 1 All E.R. 1055 (C.A.) and Quick v. Taff-Ely Borough Council [1986] Q.B. 809, 821, per Lawton L.J.] Turning to the covenant appearing in paragraph 2.b.i with this in mind, it should be noted that the subject-matter of the tenant's covenant is reduced by clause (5) to the maintainence [sic] and repair of "the plant and equipment supplying climate control." This expression was clearly intended to include the heating and air conditioning units, so the subject-matter of the covenant as reduced by clause (5) encompasses each of the furnaces located in the building. That the three furnaces fell into a state of disrepair during the term of the lease is equally clear. When the lease was entered into on January 2, 2001, they were in good working condition according to the November 2000 inspection and the written acknowledgement of the tenant. However, that was no longer so at the end of the first year of the term, as revealed by the annual inspection carried out in December of 2001. By then the heat exchangers had developed cracks and holes and could not themselves be fixed or replaced, making it necessary to replace the furnaces or see them shut them down. Now the tenant, having covenanted to bear the cost of maintenance and repair of the plant and equipment supplying climate control, of which the furnaces form part, was obliged to pay the cost of "maintaining" the furnaces during the term of the lease, which is to say the cost of keeping them in good working condition by checking and repairing them regularly. The tenant was also obliged to pay the cost of "repairing" the furnaces, which is to say the cost of restoring them to good working condition as necessary. These obligations were engaged when it became apparent that three of the furnaces were no longer in that condition, and could no longer be operated as a result of that condition. It follows that the tenant was obliged to pay the cost of replacing the furnaces unless the covenant to repair does not extend to replacement, or unless the cost of doing so is otherwise excluded from the covenant. Were the furnaces themselves the subject-matter of the tenants' covenant, there might be something to be said for the proposition that repair does not to extend to replacement. But that is not so. The subject-matter consists of "the plant and equipment supplying climate control," of which the furnaces are but component parts. In consequence, the proposition founders in light of the case law

exploring the boundaries of tenants' covenants to repair. A useful profile of the case law is provided by Murray J. Ross, *Drafting and Negotiating Commercial Leases* (3d ed.) (London: Butterworths, 1989) at p. 220: There is no absence of authorities, and the general principles are clear. The problem is the practical one of applying those principles to particular work required to a specific building. Inevitably, in cases of dispute, a judge will have to decide. He will, no doubt, be appropriately and carefully referred to the plethora of authorities' including, almost certainly, the following well-known passages: However large the words of the covenant may be, a covenant to repair ... is not a covenant to give a different thing from that which the tenant took when he entered into the covenant. Repair is restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole. The true test is, as the cases show, that it is always a question of degree whether that which the tenant is asked to do can properly be described as a repair, or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised. It seems to me that the correct approach is to look at the particular building, look at the state which it is in at the date of the lease, look at the precise terms of the lease, and then come to a conclusion whether, on a fair interpretation of those terms in relation to that state, the requisite work can be fairly called repairs. However large the covenant it must not be looked at in vacuo. [*Brew Bros Ltd v. Snax (Ross) Ltd* [1970] 1 All E.R. 587 (C.A.), per Sachs L.J. at p. 602]. Thus if the work in question looked at in this way, involves a reconstruction of substantially the whole, or giving back to the landlord a wholly different thing from that demised, then the party who has covenanted to repair will not be required to undertake that work.[Footnotes omitted except for that relating to the *Brew Bros* and *Snax (Ross)* case]. Applying this to the case at hand, I believe it may fairly be said that the tenant's obligation with respect to the repair of the furnaces extends to their replacement, for the furnaces are but component parts of the heating system, which is itself but a component part of the whole of "the plant and equipment supplying climate control." The replacement of the furnaces, I might add, was the only means available in the circumstances to restore them to the working condition they had been in at the inception of the lease. That this is what the parties apparently intended finds reinforcement in the fact the lease bears many of the marks of a "net" lease. As such, its object appears to have been to provide the landlords with rent net of cost, except for the costs of insuring only the building and of repairing only structural defects in the building (not "the leased premises" but the "building"). It may be supposed that this feature of the lease is attributable to the fact: (i) that William Brennan desired to retire; (ii) that his brother and his brother's partners wished to buy out his interest and continue the business; (iii) that the building was transferred to William Brennan and his wife as a means of paying out his interest; and (iv) that the base rent was meant to provide him with retirement income. Added to that is the fact the tenant undertook to pay, by means of additional rent, the costs associated with the maintenance, operation, and repair of the leased premises, which undertaking is specifically expressed to include the cost associated with the maintenance and repair of the plant and equipment supplying climate control. (at paras. 25-31)

- [46] I find that the phrase at paragraph 5.1 of the Lease is broad enough to require not only the repair and maintenance of the HVAC, but also the replacement of the HVAC if it already requires or in the future requires replacement.
- [47] A further provision under the Lease emphasizes that it is the Plaintiff and not the Defendant responsible for "changes, alterations, additions or improvements" to the HVAC. Under paragraph 10.1 of the Lease, no "... changes, alterations, additions or improvements to the structure, any perimeter wall, the store front, the sprinkler systems, the heating, ventilating, air-conditioning, plumbing, electrical or mechanical equipment or the concrete floor or the roof shall be made without the prior written consent of the Landlord and Strata Corporation" This provision is in contrast with what the tenant can do without the approval of the Defendant and the Strata Corporation. In particular, the Tenant under paragraph 10.1 can "paint and decorate the interior of the Leased Premises, install trade fixtures and equipment, and make such changes, alterations, additions and improvements in and to the Leased Premises, all as will in the judgment of the Tenant better adapt the Leased Premises for the purposes of which the same are permitted to be used ...". I am satisfied that this paragraph and the separation of the two types of "alterations, additions and improvements" is further evidence that it was contemplated that the HVAC system belonged to the Defendant and not to the Plaintiff even though it was a responsibility of the Plaintiff to replace the HVAC system if necessary. DISCUSSION - WHO MUST MAINTAIN THE HVAC?
- [48] Under paragraph 5.1 of the Lease, the Plaintiff was required to keep "all equipment, fixtures and mechanical systems ... including ... [the] air conditioner ... in good order and repair, as a careful owner would do". It appears that previous tenants and the Plaintiff have not done that. While the Defendant through the Mall has made arrangements for Honeywell to undertake the quarterly Preventative Maintenance, the Predictive Maintenance, and the Filter Changes, Honeywell cannot do so. The inability of Honeywell to maintain the HVAC is caused by tenant improvements which have been added to the Unit.
- [49] At her expense, the Plaintiff should take whatever steps are necessary to allow Honeywell to access the HVAC to take whatever steps are required to "repair, maintain and keep ... in good order and repair" the HVAC. Because there is an obligation on the Plaintiff to repair and maintain the HVAC, the Plaintiff is not in a position to "deny" access to the HVAC for those purposes by making access either unsafe or unavailable and then claim damages because the HVAC is not working. The Plaintiff must take whatever steps are recommended Honeywell to allow Honeywell to access the HVAC system to assess it, to make whatever changes are required to make it operative, and to determine whether it will be necessary to replace the HVAC system. Once access is available to Honeywell, Honeywell can determine what must be done so that the HVAC is fully operable. ALLEGED LOSS OF BUSINESS
- [50] The Plaintiff claims it was necessary to shut down the restaurant operation because of lack of air conditioning after 3:00 p.m. on March 28, 29 and 30, and a total of 74 days between May 28 and August 9, 2009. The Mall "fines" tenants/operators if they do not remain open

during regular business hours in the Mall. The records of the Mall indicate fines for the following days: May 17, 29, 30 and 31, 2009; June 1, 4, 5, 6, 7, 9, 11, 12, 13, 18, 19, 20, 21, 23, 26, 27 and 28, 2009; July 1, 3, 4, 5, 11, 12, 17 and 24, 2009 (a total of 29 "violations"). The records for August, 2009 and for 2008 and 2010 are not in evidence.

- [51] At his October 16, 2009 Examination for Discovery, Mr. Ho stated that, between May 28, 2009 and August 10, 2009, he was required to shut down the business for a total of 75 days after 3:00 p.m. He is adamant that it was always at 3:00 p.m., and he was adamant that he and his common law spouse were always there to witness the shutdown.
- [52] It was the submission on behalf of the Plaintiff that her sales and net profits suffered as a result of the inability to operate during regular business hours during the May through August 2009 period. In evidence were summaries of the sales and costs relating to the business of the Plaintiff for four months in 2007, for 2008 and for 2009. By agreement, the following summaries are "true and accurate summaries as verified by the Plaintiff's accountant" of the sales revenue for the business based upon daily sales receipts and the expenses for the business based upon the expense receipts provided by the Plaintiff to the Plaintiff's accountant. I am satisfied that the sales and costs which are set out accurately represent the sales and costs for the Unit. The only figures available for 2007 are as follows:
- | Item | Date | Sales | Rent | Mgmt Fee | Gas | Electricity |
|----------|----------|----------|--------|----------|--------|--------------|
| 2007 May | 6,437.00 | 2,462.00 | 417.27 | 2,106.48 | 443.10 | Jun 7,243.00 |
| 2007 Jun | 7,243.00 | 2,462.00 | 417.27 | 870.51 | 443.10 | Jul 7,168.50 |
| 2007 Jul | 7,168.50 | 2,462.00 | 417.27 | 821.05 | 404.31 | Aug 8,843.50 |
| 2007 Aug | 8,843.50 | 2,462.00 | 417.27 | 945.95 | 297.93 | |
- Item Date Water Telephone Materials Sundries Expenses Salary 2007 May 91.37 966.54 59.6 2,496.00 Jun 103.87 1,106.55 2,704.00 Jul 623.29 87.42 1,040.40 2,704.00 Aug 375.49 90.31 1,006.08 2,704.00
- [53] The corresponding figures for 2008 and 2009 are available. For 2008, the expenditures total \$146,498.58, so that the net income after subtracting expenses was \$62,995.67, or 30.07% of the gross sales. For 2009, expenditures total \$158,698.03 so that the net income after subtracting expenses was \$14,389.93, or 8.31% of the gross sales.
- | Item | Date | Sales | Salary | Rent | Gas | Mgmt Fee | Electricity |
|----------|------------|-----------|-----------|-----------|----------|----------|---------------|
| 2008 Jan | 16,784.25 | 2,400.00 | 2,406.00 | 972.98 | 413.34 | 376.95 | Feb 15,384.75 |
| 2008 Feb | 15,384.75 | 2,400.00 | 2,406.00 | 1,079.20 | 413.34 | 390.70 | Mar 13,800.25 |
| 2008 Mar | 13,800.25 | 2,400.00 | 2,406.00 | 933.86 | 413.34 | 373.89 | Apr 14,343.25 |
| 2008 Apr | 14,343.25 | 1,200.00 | 2,406.00 | 1,090.48 | 413.34 | 439.43 | May 17,428.00 |
| 2008 May | 17,428.00 | 1,200.00 | 2,406.00 | 922.41 | 413.34 | 380.86 | Jun 17,443.75 |
| 2008 Jun | 17,443.75 | 1,600.00 | 2,406.00 | 1,265.63 | 413.34 | 239.75 | Jul 19,206.75 |
| 2008 Jul | 19,206.75 | 1,000.00 | 2,369.00 | 1,240.72 | 413.34 | 409.05 | Aug 20,554.75 |
| 2008 Aug | 20,554.75 | 1,200.00 | 2,369.00 | 1,405.35 | 413.34 | 468.02 | Sep 18,301.50 |
| 2008 Sep | 18,301.50 | 1,200.00 | 2,369.00 | 1,203.37 | 413.34 | 420.36 | Oct 20,070.50 |
| 2008 Oct | 20,070.50 | 1,200.00 | 2,369.00 | 1,368.72 | 413.34 | 455.48 | Nov 17,682.75 |
| 2008 Nov | 17,682.75 | 1,200.00 | 2,369.00 | 1,253.27 | 413.34 | 397.58 | Dec 18,493.75 |
| 2008 Dec | 18,493.75 | 1,200.00 | 2,369.00 | 1,368.80 | 413.34 | 401.90 | Total |
| Total | 209,494.25 | 18,200.00 | 28,650.00 | 14,104.79 | 4,960.08 | 4,753.97 | |
- Item Date Telephone Water Materials Sundries Expenses Insurance Food Materials 2008 Jan 49.31 992.06 150.00 4,602.70 Feb 54.08 1,045.35 4,082.88 Mar 51.78 971.30 979.34 110.25 3,620.79 Apr 51.78 1,069.19 310.59 918.00 3,711.87 May 51.78 1,209.31 62.47 4,600.08 Jun 51.78 902.42 918.84 47.83 4,895.81 Jul 52.83 1,116.79 5,285.46 Aug 51.78 1,376.70 206.25 5,474.94 Sep 51.78 1,257.99 270.66 4,842.49 Oct 56.93 1,140.59 1,423.18 114.09 5,267.03 Nov 51.78 1,168.52 136.00 4,725.72 Dec 51.78 1,169.92 30.30 4,994.74 Total

627.39 3,014.21 13,727.19 1,438.44 918.00 56,104.51 Item Date Sales Salary Rent Gas Mgmt Fee
 Electricity 2009 Jan 13,455.85 1,200.00 2,369.00 1,349.50 413.34 417.31 Feb 12,243.39 1,200.00
 2,369.00 1,281.50 413.34 398.16 Mar 14,267.06 2,400.00 2,369.00 1,247.70 413.34 419.85 Apr
 15,977.96 2,400.00 2,369.00 1,278.66 413.34 402.89 May 18,508.72 3,150.00 2,369.00 1,519.10
 413.34 492.25 Jun 10,455.56 3,500.00 2,369.00 1,223.62 413.34 414.95 Jul 11,315.11 3,500.00
 2,427.44 1,164.07 413.34 390.17 Aug 13,344.42 3,250.00 2,427.44 1,097.62 413.34 380.45 Sep
 15,589.63 3,500.00 2,427.44 1,329.61 413.34 422.01 Oct 18,374.53 3,500.00 2,427.44 1,496.22
 413.34 478.85 Nov 15,380.27 3,500.00 2,427.44 1,264.23 413.34 428.90 Dec 14,175.46 3,500.00
 2,427.44 1,351.40 413.34 466.63 Total 173,087.96 34,600.00 28,778.64 15,603.23 4,960.08
 5,112.42 Item Date Telephone Water Materials Sundries Expenses Insurance Food Materials
 2009 Jan 56.51 1,533.54 1216.48 526.54 3,294.24 Feb 54.97 1093.34 3,453.38 Mar 54.97 1279.79
 3,556.25 Apr 54.97 1219.98 3,939.58 May 54.97 1410.28 483.75 985.00 4,233.88 Jun 54.97
 1,500.40 963.57 3,279.74 Jul 54.97 1078.75 3,441.95 Aug 54.97 1,610.78 1299.37 3,632.75 Sep
 54.97 1261.09 4,111.87 Oct 56.23 1143.94 133.73 3,711.36 Nov 56.09 1,535.09 1238.02 52.88
 3,211.98 Dec 56.09 1243.76 189.98 3,318.07 Total 664.68 6,179.81 14,448.37 1,386.88 985.00
 43,185.05

- [54] Although it is clear that sales in the Unit have dropped \$36,406.29 between 2008 and 2009, and while the net income after subtracting expenses fell \$48,605.74 between 2008 and 2009, I cannot conclude that the drop in sales or the drop in net income can be attributed to the lack of air conditioning. The submissions on behalf of the Plaintiff ignore the economic downturn experienced during 2009 and that almost all expenses were higher in 2009 than they were in 2008. For instance, rent of \$128.64 higher, gas was \$1,498.44 higher, and electricity was \$358.45 higher. The largest increase also relates to salary. If, in fact, the increase in salary costs could be attributed solely to the problem with the air conditioning, it would have been anticipated that this increased salary cost would be associated more with the months of May through August, whereas the \$3,500.00 monthly salary amount is also present in September through December 2009. As well, Mr. Ho was candid at Trial that some of the reduction in sales was due to changes in the food available from the different cooks that were available, and that these changes were not all attributable to the May through August 2009 time period.
- [55] It is the claim of the Plaintiff that the actions or inactions of the Defendant resulted in there being a breach of the covenant of quiet enjoyment contained under the Lease, and that the Plaintiff is entitled to damages because of that breach.
- [56] In order to make a finding that there has been a breach of quiet enjoyment so that the Defendant must pay damages to the Plaintiff, I must conclude that there must have been "substantial interference" with the use contemplated. In *Shun Cheong Holdings B.C. Ltd. v. Gold Ocean City Supermarket Ltd.* (2002), 4 B.C.L.R. (4th) 234 (C.A.), Newbury J.A. on behalf of the Court stated: Since the terms of the lease between Shun Cheong and Gold Ocean were skeletal, the only term on which a fundamental breach could be based was the implied term of quiet enjoyment, referred to by the trial judge at para. 59 of her Reasons quoted above.

Williams [Williams & Rhodes, Canadian Law of Landlord and Tenant (6th ed), 1988] defines the "covenant for quiet enjoyment" as follows: The covenant for quiet enjoyment is an assurance against the consequences of a defective title including any disturbance found thereon, and against substantial interference, by the covenantor or those claiming under him with the enjoyment of the premises for all usual purposes.... The principle that no one is allowed to derogate from his own grant is applicable to a lessor, and even an express covenant for quiet enjoyment will not permit a lessor to derogate from his grant by using adjoining premises in such a way as to be an injury to those demised. [s. 9:1; emphasis added.] This court has stated that to establish a breach of the covenant of quiet enjoyment, the plaintiff must show its enjoyment of the demised premises was "substantially interfered with" by the lessor or someone acting under its authority. In *Firth v. B.D. Management Ltd.* (1990) 73 D.L.R. (4th) 375, a tenant sought a declaration that the right of quiet enjoyment was breached, or alternatively, that the lease was fundamentally breached, when the landlord granted a third party an easement to use various parking stalls previously available to customers of the tenant. Wallace J.A. for the Court affirmed the dismissal of the tenant's action. In his analysis: Mere temporary inconvenience is not enough - the interference must be of a grave and permanent nature. It must be a serious interference with the tenant's proper freedom of action in exercising its right of possession. See *Kenny v. Preen* [1963] 1 Q.B. 499 (C.A.). Similarly, when one considers whether a landlord's acts can be construed as a derogation from its grant, the appellant must demonstrate that there has been some act which renders the premises substantially less fit for the purposes for which they were let. [at 379-80; emphasis added.] With respect to the question of fundamental breach, Wallace J.A. continued: To constitute fundamental breach the landlord's conduct must be such as to go to the very root of the contract - not merely to part of it - so that it makes further performance impossible or it deprives the tenant of substantially the whole benefit which it was the intention of the parties to the lease that the tenant should obtain as consideration for the rentals it was obliged to pay. Unless the alleged breach is of this character the tenant's remedy lies in damages for breach of its contract - not in rescission of the lease agreement The evidence in this case does not demonstrate a breach of the lease by the landlord which could be properly characterized as "fundamental." [at 380; emphasis added.] Williams, *supra*, at s. 9:1:7, cites many cases in which a neighbouring tenant has created or permitted a nuisance to exist, thus interfering with the plaintiff's enjoyment of the premises, and in which the plaintiff's remedy has been to sue the landlord for damages: see, e.g., *Billingsgate Fish Ltd. v. B.C. Sugar Refining Co.* [1933] 1 W.W.R. 530 (B.C.S.C.); *Rocca Group Ltd. v. M & J Slacks Ltd.* (1980) 33 N.B.R. (2d) 364 (N.B.Q.B.); *Poirier v. Turkewich* (1963) 42 D.L.R. (2d) 259 (Man. Q.B.); *Abdelmissih v. Freedman*, [1993] O.J. No. 368 (Ont. Ct. J.); *Smith v. Buster* [1988] B.C.J. No. 2739 (B.C.S.C.). See also *Goodyear Canada Inc. v. Jet Centre Mgmt. Ltd.*, [1998] O.J. No. 4124 (Ont. Gen. Div.), which involved a leaking roof. The question, then, is whether the leaks in the case at bar constituted only a breach of the implied covenant of quiet enjoyment giving rise to a damage claim, or whether they were also such as to make further performance of the lease impossible or to deprive the tenant of substantially the whole benefit of the lease. Although I would not have thought that this case

differed materially from those cited above in which the tenant's only remedy was damages, the trial judge found that Gold Ocean was effectively prevented from operating its business. That finding has support in the evidence and cannot be said to be clearly and palpably wrong. (at paras. 9-11)

- [57] I find that the situation here was much like the situation found in *B.G. Preeco 3 Ltd. v. Universal Explorations Ltd.*, [1987] 6 W.W.R. 127 (Alta. Q.B.), where the issues included whether the presence of a defective air conditioning system amounted to a fundamental breach of contract because the premises were not usable as intended and whether the non-operating air condition system amounted to a breach of the covenant of quiet enjoyment. In this regard, MacCallum J. concluded: I am satisfied from the evidence that Universal's staff had suffered sporadic, serious discomfort by reason of the lack of air-conditioning and ventilation during the time when Stellar was its landlord. The main problem was with the air-conditioning. Sometimes the premises would be very cold in the morning and very hot in the afternoon. This was not always the case, but it happened often enough to cause serious discomfort to Universal staff. Through it all, however, they worked and no business loss has been demonstrated by the defendant. The discomfort caused by the erratic operation of the air-conditioning system did not, in my opinion, amount to a fundamental breach in the sense that it made the premises unusable. Nor did Stellar interfere with Universal's quiet enjoyment of the premises. Stellar, in fact, did very little except collect the rent which Universal dutifully paid each month. (at p. 130)
- [58] I cannot make the finding that there was a breach of the covenant for quiet enjoyment. First, there has not been "substantial interference". The interruption in the afternoons of 74 days would not qualify as "substantial interference". This interruption, even if it could be traced to the lack of air conditioning, is not a substantial interference in the operation contemplated by the Plaintiff in the Unit. Rather, it is "mere temporary inconvenience". It is not interference which can be described as being of a "grave and permanent nature".
- [59] As well, I cannot find that the lack of air conditioning relates to any breach or obligation owed by the Defendant to the Plaintiff. Rather, the lack of air conditioning relates solely to that which was within the responsibility and control of the Plaintiff. First, to allow maintenance. Second, to pay for replacement if replacement was required. I cannot conclude that the damages as alleged by the Plaintiff occurred as a result of the failure of the air conditioning system. In any event, that failure was totally within the control of the Plaintiff.

CONCLUSION

- [60] The claim of the Plaintiff is dismissed. Unless the provisions of Rule 37A of the Rules of Court apply, the Defendant will be entitled her costs. Those costs will be on a Scale "B" basis. An argument was made on behalf of the Defendant that "solicitor and own client" costs should be available as a result of paragraph 13.3 of the Lease which provides: The Tenant shall pay to that Landlord on demand all costs and expenses, including lawyers' fees and

disbursements (calculated on a solicitor and own client basis), incurred by the Landlord in any steps taken to enforce any of the obligations of the Tenant under this Lease. All such costs and expenses shall be deemed to be rental hereunder.

[61] I am satisfied that these proceedings do not relate to an enforcement by the Defendant of obligations of the Plaintiff under the Lease. Rather, it relates to the costs ordinarily available to a successful litigant arising out of litigation. ____ "Burnyeat J." ____ The Honourable Mr. Justice Burnyeat

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