

HONG KONG / JUDGMENT

ARTWELL TEXTILES CO LTD v. WALLTEX LTD

COURT

District Court

DECIDED

10 October 2007

CASE / FILE NUMBER

DCCJ21386/2001

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bjbj DCCJ21386/2001 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION CIVIL ACTION NO. 21386 OF 2001 BETWEEN ARTWELL TEXTILES Plaintiff COMPANY LIMITED and WALLTEX LIMITED Defendant Coram: HH Judge Lok in Court Date of Hearing: 10 October 2007 Date of Judgment: 10 October 2007 J U D G M E N T This case arose out of an aborted tenancy transaction. By an agreement dated 19 August 2001 (the Agreement), the Defendant as a landlord agreed to let the property known as Unit B, 15th Floor, Block 2, Sky Lodge 2, together with a car park space, at No. 8 Yin Ping Road, Dynasty Heights, Kowloon to the Plaintiff for domestic purposes for a term of 2 years, commencing on 15 October 2001 at a monthly rent of \$43,000 per month. The Agreement provided that the parties would enter into the formal tenancy agreement on or before 15 September 2001. On 12 September 2001, the Defendant s then solicitors sent a draft formal tenancy agreement to the estate agent acting for the parties, Centaline Property Agency Limited (Centaline). The Plaintiff received the draft tenancy agreement on the following day. As the Plaintiff needed more time to consider the terms of the formal agreement, the Plaintiff asked for an extension of time to sign the formal tenancy agreement. However, the Defendant only agreed to extend the time to 17 September 2001. As the Plaintiff did not sign the formal agreement nor pay the balance of the rental deposit and the first six months of rent to the Defendant before the extended deadline, the Defendant s solicitors sent a letter to the Plaintiff on 18 September 2001 to accept the latter s purported repudiation of the Agreement. However, the Plaintiff denies that it had repudiated the Agreement and brought the present action to claim for the return of the rental deposit in the sum of \$43,000 paid upon the signing of the Agreement and liquidated damages in the same amount. The relevant clauses of the Agreement are as follows: 2: The landlord and the Tenant have agreed to enter into the formal tenancy agreement before 15 September 2001 subject to the terms and conditions herein contained. 8: Upon signing of the formal Tenancy agreement, the Tenant shall pay: the balance of the rental deposit HK\$43,000; the rent for the first six months HK\$258,000. ... 9: Should the Tenant fail to complete the deal in the manner herein contained the deposit paid hereunder shall be forfeited and the Landlord shall then be entitled at his absolute discretion to let the said premises to anyone he thinks fit and the Landlord shall not sue the Tenant for any liabilities and/

or damages caused by the Tenant's default of this agreement. 10: Should the Landlord fail to let the said premises to the Tenant in a manner herein contained the Landlord shall compensate the Tenant with a sum equivalent to the amount of the deposit together with the refund of deposit and the Tenant shall not take any further action to claim for damages or to enforce specific performance. Apart from the following two issues, there is no material dispute between the parties about the facts of the present case. Firstly, it is the Plaintiff's case that the parties, when they signed the Agreement, agreed that the formal tenancy agreement was to be in the form of a simple standard tenancy agreement obtainable in many stationery shops in Hong Kong, and that the parties would not engage solicitors in the preparation of such document so as to save costs. This is denied by the Defendant. However, as the director of the Plaintiff, Mr Chu Ming-keung, concedes that this was not a definite arrangement, and the parties were free to engage solicitors to prepare the formal tenancy agreement, such factual dispute becomes a non-issue in the present case. The second dispute relates to the reason for the Plaintiff's request for time to consider the draft formal agreement. According to Mr Ou Zin-zhao, a director of the Defendant, one Madam So of Centaline told one Ms Lau of the Defendant that as the Plaintiff's boss died in the terrorist attack on 11 September 2001 in the United States, the Plaintiff asked for one week extension of time for arranging payment of the balance of the rental deposit and rent for the first six months. Such allegation is disputed by the Plaintiff, and Mr Chu of the Plaintiff affirms that the only reason for the extension of time was that, contrary to the understanding between the parties at the signing of the Agreement, he did not foresee that the Defendant would engage a solicitor to prepare such a detailed formal tenancy agreement. Hence, the Plaintiff would need time to instruct a lawyer and to consider the terms in the formal agreement. In my judgment, the outcome of this case does not depend on the determination of such factual dispute. But if I need to consider the same, I would certainly prefer to accept the evidence of the Plaintiff in this regard. Firstly, Madam Lau's statement that the Plaintiff's boss died in the 911 attack was simply not true, and there was no logical reason as to why Madam So had to make up such an excuse. Secondly, Mr Ho Yuen-cheong of Centaline testifies that he was the agent responsible for the communication between the parties after the signing of the Agreement. Coupled with the fact that the Plaintiff was Mr. Ho's own client, there was no reason for Madam So to get involved in the communication between the parties after the signing of the Agreement. Thirdly, the Defendant's evidence is hearsay in nature. Without Madam Lau to come forward to verify the truth of the conversation, it is not very reliable for the court to rely on her evidence. Hence, I find this factual issue in favour of the Plaintiff. I then turn to the defence and the legal principles involved in this case. According to paragraph 8 of the Defence and the contents of the letter by the Defendant's solicitors dated 18 September 2001 purportedly to accept the repudiation of the Agreement by the Plaintiff, the Defendant's case is a simple one. As the Plaintiff did not pay the balance of the rental deposit and the first six months of rent on or before 15 September 2001 pursuant to clauses 2 and 8 of the Agreement, the Plaintiff was in breach of the term of the Agreement. As a result, the Defendant was entitled to accept such repudiation. I immediately see the difficulty of such argument. Firstly, upon a proper construction of the Agreement, the payment of the balance of the rental deposit and the first six months of rent tied with the signing of the formal tenancy agreement. If the formal agreement was not signed on 15 September 2001,

there was simply no obligation on the part of the Plaintiff to make the payment on that date. Secondly, the Plaintiff was not obliged to accept the terms of the draft formal tenancy agreement proposed by the Defendant. Thirdly, the Plaintiff was entitled to reasonable time to consider the terms of the formal agreement. Even Mr Jim, solicitor for the Defendant, accepts that if the draft formal agreement was only sent to the Plaintiff on 14 September 2001, the Plaintiff was not obliged to sign the agreement on the following day, i.e. 15 September 2001. In particular, on the facts of this particular case, the Defendant had engaged his solicitors, Messrs. Chan & Partners, to handle the tenancy transaction immediately after the signing of the Agreement on 19 August 2001, there was then a long delay and the draft formal agreement was only supplied to the estate agent by the Defendant's solicitors on 12 September 2001. Mr Jim for the Defendant very fairly accepts the 3 propositions stated in the last paragraph. In such case, what exactly is the defence case? In reply, Mr Jim puts forward the following argument. Firstly, without knowing who were the solicitors acting for the Plaintiff, there was no delay on the part of the Defendant's solicitors in supplying the draft formal tenancy agreement. Secondly, while the Plaintiff was entitled to reject the Defendant's proposed term of the formal Agreement and the Plaintiff should be given reasonable time to consider the Defendant's proposed terms, there was already sufficient time for the Plaintiff to reply on or before 15 September 2001 as to what particular terms that it did not agree to. Without giving any reply on the proposed draft formal agreement on or before 15 September 2001 or the extended deadline on 17 September 2001, the Plaintiff had evinced an intention not to perform his obligation under the Agreement, and hence the Defendant was entitled to accept the repudiation on 18 September 2001. However, I agree with Mr Chang, counsel for the Plaintiff, that the Defendant is not entitled to take up such argument. Firstly, it has not been pleaded in the Defence. Secondly, the Defendant was not relying on the same ground in accepting the purported repudiation of the Agreement on the part of the Plaintiff. In the letter dated 18 September 2001, the Defendant's solicitors just relied on the non-payment of the balance of the rental deposit and the first six months of rent as the ground of repudiation. No mention was made about the failure to sign the formal tenancy agreement or the need to reply to the Defendant's proposed terms. In such case, it is not permissible now for the Defendant to raise such new ground of repudiation. However, even if the Defendant were to be allowed to take up such argument, the outcome of the case would be the same. It took the Defendant's solicitors nearly 3 weeks to a month to prepare the draft formal agreement. Mr Jim argues that perhaps as the Defendant's solicitors were not aware of the identity of the solicitors acting for the Plaintiff, the Defendant's solicitors did not know to whom should the draft Agreement be sent. However, this is all speculation by Mr Jim without the support of concrete evidence. As conceded by Mr. Jim, the Plaintiff was not bound to accept the Defendant's draft agreement, and the Plaintiff should be entitled to a reasonable time to consider the Defendant's draft. Hence, even if the Plaintiff did not reply to the Defendant's proposed draft terms on 15 or 17 September 2001, the Plaintiff had not evinced an intention not to perform the Agreement. Further, I accept the evidence of Mr Ho of Centaline that the Plaintiff did, in fact, reply to the Defendant or his solicitors that the Plaintiff required more time to consider the draft agreement. In such case, the Plaintiff had shown every intention to continue with the performance of the Agreement. As the obligation to pay the balance of the rental deposit and the first 6 months of rent tied with the

signing of the formal tenancy agreement, and such agreement was not signed by that time, there was no repudiation on the part of the Plaintiff. On the contrary, it was wrongful for the Defendant to terminate the Agreement by the letter dated 18 September 2001, and so the Plaintiff's claim must succeed. Based on the aforesaid, the Plaintiff is entitled to the refund of the rental deposit in the sum of \$43,000 paid under the Agreement. As the Defendant does not seek to argue that clause 10 of the Agreement is a penalty clause, the Plaintiff is also entitled to liquidated damages in the same amount of \$43,000. The Plaintiff is not pursuing for the other declaratory relief stated in the Statement of Claim, and I therefore grant judgment in favour of the Plaintiff in the amount of \$86,000. (David Lok) District Judge Mr Jonathan Chang, instructed by Messrs. Rowland Chow, Chan & Co, for the Plaintiff Mr Jerry Jim, of Messrs. Raymond Chan, Kenneth Yuen & Co, for the Defendant

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Prepared on 29 October 2026 · Esheria