

HONG KONG / JUDGMENT

CHAN WAI SHEUNG AND ANOTHER v. SHNET AUDIO VISUAL TECHNOLOGY LTD

COURT
District Court

DECIDED
21 May 2007

CASE / FILE NUMBER
DCCJ610/2007

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1. This is the Plaintiffs' application for Summary Judgment. The 1st and 2nd named Plaintiffs (collectively "the Plaintiffs") were legally represented. The Defendant appeared in person. It involves a tenancy dispute. The undisputed evidence before me is that one Fong Chung Leng had by an Assignment dated 15 October 2003 assigned the premises known as Flat 2 on Ground Floor, Koon Kay Mansion, Nos. 153, 157 & 159 Fuk Wing Street, Nos. 57, 59, 61 & 63 Yen Chow Street, Kowloon ("the entire Flat 2") to the Plaintiffs. There is also undisputed evidence that prior to the above assignment, the said Fong Chung Leng had let a portion of the entire Flat 2 to the Defendant to be used as a shop for a fixed term of two years from 15 December 2002 to 14 December 2004 ("the prior tenancy").
 2. The Writ with Statement of Claim endorsed was filed on 1 February 2007.
 3. The Statement of Claim pleaded that the Plaintiffs were and are at all material times the registered owners of the premises known as "Portion (known as Shop A) of Flat 2 on Ground Floor of Koon Kay Mansion, Nos. 153, 157 & 159 Fuk Wing Street, Nos. 57, 59, 61 & 63 Yen Chow Street, Kowloon" ("the suit premises"). This was admitted by the Defendant in its Defence.
 4. The Statement of Claim pleaded that the Plaintiffs had entered into a Tenancy Agreement dated 8 January 2005 ("the Tenancy Agreement") with the Defendant whereby the Plaintiffs let the suit premises to the Defendant for a term of two years from 15 December 2004 to 14 December 2006 at the rent of \$8,800.00 per month exclusive of rates payable in advance on the 15th day of each successive calendar month ("the subject tenancy"). This was also admitted by the Defendant in its Defence.

5. The Statement of Claim also pleaded that the Defendant was in breach of the Tenancy Agreement in that the Defendant had failed to pay the rent for the period from 15 September 2006 to 14 December 2006 and the rates for the period from 1 October 2006 to 14 December 2006. This was denied in the Defence.
6. The Statement of Claim made no reference to Clause 2 of the Tenancy Agreement which provided in effect that the Plaintiffs had to give the Defendant one month's notice to recover possession of the suit premises, among other things. There is some room for argument for the proper construction of the provisions of the Tenancy Agreement but I consider that the Tenancy Agreement, properly construed, does impose an obligation on the part of the Plaintiffs to serve one month's notice to terminate the subject tenancy. Prior to the signing of the Tenancy Agreement, the Plaintiffs were already the Landlord of the Defendant under the prior tenancy which was for a fixed term from 15 December 2002 to 14 December 2004. There is no evidence that any notice of termination was served to determine the prior tenancy. There is also no evidence that there is any contractual requirement of a notice of termination under the prior tenancy. The Landlord & Tenant (Consolidation) Ordinance was amended by the Landlord and Tenant (Consolidation) (Amendment) Ordinance 2004 which took effect on 9 July 2004. Then, the prior tenancy was still in subsistence. It was a Part V tenancy. Insofar as Part V tenancies are concerned, the change in law that is relevant to the present case is that the former statutory requirement for the service of a minimum notice in writing to determine a Part V tenancy has been removed. Under the amended statute, a Part V tenancy may be terminated in accordance with the terms of the tenancy or as agreed between the parties. I consider the correct view of the law is that the prior tenancy had come to an end upon the expiry of its fixed term. In any event, even if my view of the law is not correct and so that the correct view of the law is that the prior tenancy had continued despite the expiry of its fixed term, it would have made no difference as the prior tenancy would have been terminated in any event through surrender by operation of law upon the parties' entering into the Tenancy Agreement. The Tenancy Agreement does require a one month's notice of termination to be served.
7. There is undisputed evidence that the above one month notice of termination was in fact given. The Plaintiffs had through their solicitors issued a demand letter dated 24 October 2006 to the Defendant giving the latter notice that the subject tenancy of the suit premises would be terminated on 14 December 2006. The letter also required the Defendant to deliver up vacant possession of the suit premises upon the termination of the subject tenancy.
8. The Plaintiffs however had not expressly pleaded the requirement of the one month's notice to terminate the subject tenancy, nor did they plead the compliance of that requirement in the Statement of Claim. These essential averments are missing.

9. Instead, the Plaintiffs made the following averments in paragraph 7 of the Statement of Claim: "According to the relevant provisions of the Amendment Ordinance, the Tenancy Agreement was terminated upon expiration of the term created thereunder on 14th December 2006 in the absence of any contractual notice requirement or other mutual agreement between the Plaintiff and the Defendant on the issue." This was denied in the Defence.
10. Although paragraph 7 of the Statement of Claim is not entirely free from ambiguities, it does create the impression that the Plaintiffs' case is that there was no contractual requirement for the service of any notice to terminate the subject tenancy. Read in context, it gives that first impression although on a closer and more careful examination one may say that one is not sure what the Plaintiffs are trying to say there. It creates misunderstanding on first impression, and embarrassment as well as confusion on closer examination.
11. Judgment cannot be entered pursuant to a defective pleading. Can Order 18 Rule 7(4) of the Rules of District Court be of any assistance to the Plaintiffs in such circumstances?
12. Order 18 Rule 7(4) of the Rules of District Court is in the following terms: "A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading."
13. Relevant authorities on Order 18 Rule 7(4) would include, for example, (1) *Gates v. W.A. and R.J. Jacobs Limited*, (1920) 1 Ch 567, and (2) *Treasure Rock Development Limited v. Splendid Duesseldorf Production Limited*, HCA 1784/1995, 18 October 1995.
14. Order 18 Rule 7(4) may be invoked to supply a missing averment that "constitutes a condition precedent necessary for the case of a party". Order 18 of the Rules of District Court is all about pleadings. I consider that the expression of "the case" in Order 18 Rule 7(4) refers to a party's pleaded case but not the party's evidential case or case on submissions. A reading of *Gates v. Jacobs supra* tends to support this view and I would proceed on this basis.
15. What is the Plaintiffs' pleaded case here?
16. It is possible to view the Plaintiffs' pleaded case as saying that there was no contractual requirement for the service of any notice to terminate the subject tenancy. Viewed in this light, there cannot be any condition precedent that there was a contractual requirement for the service of a notice to terminate. What is to be implied cannot contradict what is explicitly pleaded. What I am not prepared to do is to read into the Plaintiffs' pleading an averment to the effect that there was a contractual requirement to serve a notice of termination and that the requirement had been complied with.
17. It is possible to view the Plaintiffs' case as simply saying that the subject tenancy was terminated upon the expiry of the fixed term without more. Viewed in this light, does it make any difference?

18. I think not. The missing averments are not necessarily implied in the Statement of Claim.
19. I would elaborate on the above. In the present case, a Part V tenancy may at law be terminated in a variety of circumstances which include at least: (1) upon the expiry of a fixed term pursuant to statute simpliciter; and (2) upon the expiry of a fixed term plus the service of a notice to terminate pursuant to contract. Thus, there are at least two possible modes of termination. To plead that the subject tenancy was terminated does not necessarily imply that a notice of termination had to be served and that the notice was in fact served. When one looks at the Statement of Claim, it does not show at all that the service of a contractual notice of termination is a necessary part of the Plaintiffs' case.
20. In any event, I do not consider that the Plaintiffs may pray in aid of Order 18 Rule 7(4) when they had not only failed to supply the essential averments but had by the manner in which they pleaded their case intentionally or unintentionally made it likely that the Defendant would be misled into believing that the Plaintiffs' case is that there was no contractual requirement for the service of a notice of termination. Such conduct runs contrary to the ethos of modern litigation and the purpose of the scheme of pleadings.
21. The matter being not pleaded, it is not open for me to adjudge that the subject tenancy was terminated although the evidence does show that it was.
22. I do not consider that the Plaintiffs may pray in aid of the decision in *Poon Hau Kei v. Hsin Chong Construction Company Limited Taylor Woodrow International Limited Joint Venture*, FACV No. 18 of 2003, 30 April 2004 in this connection. In *Poon Hau Kei supra*, there is dictum to the effect that provided that it does so in a fair manner, a Court is entitled to decide in favour of a party on the basis of a scenario that he has not pleaded but his opponent has pleaded.
23. An Order for possession is not the only claim of the Plaintiffs. The Plaintiffs are also claiming for arrears of rent and rates, as well as mesne profits. It is therefore necessary to consider the background of these disputes in greater detail.
24. The Defence was filed on 28 February 2007. As observed earlier, it contains the two admissions noted above. The rest of the Defence consists of non-admissions and bare denials.
25. The Plaintiffs took out an application for Summary Judgment on 30 March 2007. The application was supported by an Affirmation made by the 2nd named Plaintiff ("the Plaintiffs' 1st Affirmation"). In the summons, the application was stated to be made under Order 14 (Summary Judgment) and also under Order 27 Rule 3 (Judgment on Admission) of the Rules of the District Court.
26. I would note that at the hearing before me, solicitor for the Plaintiffs only proceeded on the basis of this being a Summary Judgment application.

27. Mr. Tai Kam Ho, a Director of the Defendant, had filed an Affirmation in opposition on 18 April 2007 ("the Defendant's 1st Affirmation").
28. On 20 April 2007, the parties appeared before the Master of the District Court who gave directions for the filing of further Affidavits and adjourned the application to be heard by a District Judge in chambers.
29. On 30 April 2007, the Defendant filed an Affirmation of its witness one Mr. Tai Chung Ho.
30. On 7 May 2007, the Plaintiffs filed an Affirmation made by the 2nd named Plaintiff ("the Plaintiffs' 2nd Affirmation").
31. As noted earlier, the undisputed evidence is that the Plaintiffs have by virtue of an Assignment dated 15 October 2003 become the registered owners of the entire Flat 2.
32. It is indisputable that the suit premises were a portion of the entire Flat 2.
33. The Defendant had admitted the Plaintiffs to be the owners of the suit premises. It had also admitted the existence of the Tenancy Agreement. Admissions cannot be withdrawn without leave. Even without such an admission, a Tenant may not deny his Landlord's title and the Defendant is estopped from disputing that the Plaintiffs were its Landlord under the Tenancy Agreement. Even without such estoppel, on evidence it is indisputable that the Plaintiffs were the Defendant's Landlord under the Tenancy Agreement. It matters not that the Tenancy Agreement is in Chinese and had employed an abbreviated description of the suit premises in Chinese whereas the Statement of Claim had used the fuller description in English. It is indisputable that the suit premises pleaded in the Statement of Claim refer to the same premises leased to the Defendant under the Tenancy Agreement.
34. The Defendant has queried whether Cheers Success Limited is its direct Landlord. There is evidence that Cheers Success Limited is the tenant of the Plaintiffs in possession of the other portion of the entire Flat 2 (the Defendant being in possession of the portion known as Shop A). I do not consider the Defendant's query amounts to an arguable defence or supplies any reason that there should be a trial.
35. The main thrust of the Defendant's opposition is a compromise which was not pleaded in its Defence.
36. The Defendant's 1st Affirmation was home-made and lacks legal precision in the choice of its expressions. However, on a fair reading of its contents, I should take that the Defendant is alleging a verbal compromise with the Plaintiffs made in September 2006.
37. In brief, the Defendant's 1st Affirmation stated that there was water leakage affecting the entire Flat 2 during June to September 2006. In July to August 2006, the Plaintiffs and the Defendant met to discuss the question of compensation. The Plaintiffs offered to waive the remainder of the rent payable during the year 2006 on condition that (1) the Defendant was to vacate the suit premises before 31 December 2006; and (2) the Defendant was to waive its claim against the Plaintiffs for the Defendant's property damage and business loss caused by

the water leakage. Notwithstanding the offer, the Defendant continued to pay another two months' rental thereafter. It was not until September 2006 that the Defendant made the verbal compromise with the Plaintiffs. I accept that the alleged delay is somewhat odd. As to the terms of the alleged verbal compromise, in essence, the terms were that "the t^gQ vz 0) t the lobby of the Shamshuipo MTR station wherein Mr. Tai Chung Ho witnessed the Plaintiffs and Mr. Tai Kam Ho argued on question of compensation for the water leakage. The Plaintiff proposed to waive 3 months' rent and expressed their wish to recover possession of the suit premises by the end of December 2006.

39. There is no documentary support for the alleged verbal compromise made in September 2006.
40. The Plaintiffs' 2nd Affirmation refers to a water leakage incident in February 2006. The Plaintiffs said that they were not aware of any other water leakage incident apart from that. The Plaintiffs also denied that there was a compromise as alleged by the Defendant.
41. However, the Plaintiffs did not deny that there was a meeting in September 2006 between Mr. Tai Kam Ho and themselves, as referred to in the Defendant's 2nd Affirmation.
42. Further, the demand letter dated 24 October 2006 issued by the solicitors for the Plaintiffs to the Defendant made no mention of the alleged default of the Defendant in the payment of the two months' rents due payable on 15 September 2006 and 15 October 2006 respectively.
43. I do not consider that the Defendant's opposition based on the verbal compromise allegedly made in September 2006 was unbelievable or practically moonshine in the circumstances.
44. Granted that what the Defendant had said is not unbelievable, there is still the question of whether the vagueness of the Defendant's assertion should prevent the alleged verbal compromise from constituting an arguable Defence.
45. Although the Defendant's 1st and 2nd Affirmations lack legal precision, and hence the exact terms of the alleged verbal compromise remain to be somewhat ambiguous, I am not prepared to say that no arguable defence has been raised.
46. In any event, this would appear to be a case that calls for investigation, not summary disposal. I am not prepared to shut out the unrepresented Defendant at this stage.
47. I have considered what is said in (1) *Miles v. Bull* (1969) 1 QB 258, (2) *Bank fur Gemeinwirtschaft v. City of London Garages Ltd. & Others*, (1971) 1 All ER 541, (3) *State Trading Corporation of India v. Doyle Carriers Inc. & Others*, (1991) 1 Lloyd's Rep 55, and (4) *Talent Wise Limited v. Cheung Shui Ching*, HCA 11309/1997, 27 April 1998 on the question of whether there should be some other reasons for a trial of the Plaintiffs' claims. I have also noted the discussion in *Hong Kong Civil Procedure 2007*, para 14/4/10.
48. I would note in particular the following dictum in *Miles v. Bull* supra: "Accordingly, if the question is whether or not the defendant has an arguable defence to the claim, I would have to answer No: for as matters stand I can perceive no such defence. All that can be said is that

this is a transaction which ought to be scrutinised with some care; for plainly it bears something of the appearance of a device to evict the defendant. A device may, indeed, be a perfectly genuine transaction and no sham: that it was devised for a particular purpose by no means necessarily implies that it pretends to be what it is not. However, if a transaction is carried through not for its own sake, but in order to achieve some ulterior purpose, it may be found on examination that it has travelled the road from artifice and artificiality to sham. In these circumstances, I think that it is necessary to examine the precise wording of Order 14. Under the former Order 14, r. 1, a defendant could obtain leave to defend if he satisfied the judge that he had a good defence to the action on the merits, or disclosed 'such facts as may be deemed sufficient to entitle him to defend the action generally.' I do not see how that can be said to be the case here. The language of Order 14 has, however, been changed, and it is the new language that I must apply. Under rules 3 and 4 of the present Order 14, the defendant can obtain leave to defend if (and I read from rule 3(1)) the defendant satisfies the court 'that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial.' These last words seem to me to be very wide. They also seem to me to have special significance where, as here, most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think that those concluding words are invoked. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff. In the present case the plaintiff's evidence initially consisted of a single affidavit in which brevity could scarcely be carried further. He has now amplified this by further evidence, but this is certainly not exhaustive or conclusive. The words 'there ought for some other reason to be a trial' seem to me to give the court adequate powers to confine Order 14 to being a good servant and prevent it from being a bad master. If I may adapt the language of Lord Parker of Waddington in *Daimler Company Ltd. v. Continental Tyre & Rubber Co. (Great Britain) Ltd.*, referred to in the notes to Order 14 in the Supreme Court Practice, 1967, p. 122, if the circumstances of the case are 'such as to require close investigation,' this will 'preclude the propriety of giving leave to sign judgment under Order 14, r. 1.' The question is thus whether this is such a case. I think it is. In my judgment 'there ought for some other reason to be a trial'; and the reason is that of justice. By carrying through a transaction at unusual speed the defendant's husband is seeking to enable the plaintiff to do what he himself cannot do, namely, evict the defendant from her home. The husband has whatever rights the law gives him, and so has the plaintiff; but in the circumstances of the case I do not think that it would be just if the plaintiff were able to enforce the rights which he claims without being put to strict proof that they do enable him to evict the defendant. I was told that, in granting leave to defend, Master Jacob said that the case was 'too near the bone for Order 14.' That, if I may say so, seems to me to summarise admirably what I have tried to express in greater detail. Order 14 is for the plain and straightforward, not for the devious and crafty. There is here a

case for investigation, and so not for summary decision."

49. I am of the view that the Defendant has an arguable defence on the Plaintiffs' money claim. Also, this is a case that calls for investigation, there ought to be a trial in the interest of fairness.
50. In the circumstances, I do not consider it necessary for me to deal with other aspects of the Defendant's opposition, save that I should say that I find it unbelievable that the subject tenancy had been extended or renewed in early 2007 subsequent to its termination. The Defendant says that such extension or renewal is to be implied in the alleged verbal compromise. That cannot be right. The Defendant in his submissions confirmed the Plaintiffs' evidence that a mere sum of \$500.00 per month was deposited into the Plaintiffs' bank account towards the alleged rental payments. The Plaintiffs said that they did not agree to such unilateral payments and had no knowledge of such payments. This is not a triable issue.
51. Nonetheless, the Plaintiffs' application for Summary Judgment fails for the reasons that I have given above.
52. I anticipate that the Defendant would in due course apply to amend its Defence to plead the alleged verbal compromise, and the Plaintiff would in due course apply to amend their Statement of Claim to plead the correct factual basis for the termination of the subject tenancy.
53. At present, I would order that there be unconditional leave for the Defendant to defend. There be an Order Nisi that the Plaintiffs do pay the Defendant's costs of and incidental to this application. For the avoidance of doubt, this includes the costs of the hearing on 20 April 2007. Pursuant to Order 62 Rule 9(4)(b) of the Rules of District Court, I would specify such costs to be \$1,200.00. Unless there is an application to vary this Order Nisi, it will become absolute in 14 days. (R. Cheung) Deputy District Judge Representation: Miss Jennifer Fan, of Messrs. Gallant Y.T. Ho & Co., for the Plaintiff The Defendant: appearing in person PAGE - PAGE A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V &`#\$ <j6f= T|>`.9]Rn %.Qp %.Qp @\\Hc-oa-ws-656\\HP LaserJet 1200 Series PCL 6 Ne00: winspool HP LaserJet 1200 Series PCL 6 \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) \\Hc-oa-ws-656\\HP LaserJet 1200 Letter HP LaserJet 1200 Series PCL 6 Hjc)b 97wfj B]gT)Yn@{i9Z -9]pVvr) Normal.dot setup Microsoft Word 9.0 Title Microsoft Word Document MSWordDoc Word.Document.8

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