

HONG KONG / JUDGMENT

CHANWAY SHATIN v. NEW TOWN DEVELOPMENT LTD AND ANOTHER

COURT

Court of First Instance

DECIDED

10 April 2007

CASE / FILE NUMBER

HCA2018/2006

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bjbj HCA2018/2006 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE ACTION NO. 2018 OF 2006 BETWEEN CHANWAY SHATIN Plaintiff NEW TOWN DEVELOPMENT LIMITED and SUN MATE HOLDINGS Defendant (H.K.) COMPANY LIMITED Coram: Deputy High Court Judge Carlson in Chambers Date of Hearing: 4 April 2007 Date of Judgment: 10 April 2007 J U D G M E N T This is a landlord-and-tenant dispute which relates to commercial premises. The plaintiff is the owner and landlord of a good quality shopping centre at Sha Tin known as the Wai Wah Centre which comprises a large number of shops that it lets out to tenants. One such shop is at 9B on the 2nd floor in which the defendant as tenant operates a health food store. The tenancy is regulated by a lease in writing for one year starting on 1 August 2006 at a monthly rental of \$130,000 exclusive of rates, service charges, air-conditioning and other outgoings. The plaintiff alleges that the defendant has been operating its business in breach of certain important covenants in the lease to the annoyance of other tenants and in a manner that tends to diminish the good standing and reputation of the shopping centre as a whole. Having regard to the gravity of the alleged breaches, it has brought this action to forfeit the lease and it also claims damages. In the interim, it seeks an injunction to put an end to the breaches of covenant which is the matter that I am required to decide. The defendant, having fitted out the shop at a cost of about \$200,000, started to operate its business on 5 September 2006. In order to advertise its presence, the defendant's staff distributed pamphlets to passers-by in the vicinity of the shopping centre, informing the public of its products. It would appear that these particularly appealed to older people who came to the shop when it opened in very great numbers. Long queues formed, extending a very long way back from the shop's entrance. These queues were slow-moving as each customer had to be served individually. Of its nature, the queue would obstruct the easy passage of persons wishing to move along the walkways outside the shops quite apart from the unsightly appearance of such a long queue in circumstances such as these with some people standing, others leaning against the walls and others squatting or sitting on the floor. On occasions, persons from these queues would peel off into other shops and ask to use their lavatory facilities. The queues, given the numbers involved, also generated a lot of noise which detracted from the more quiet and leisurely environment of the shopping centre.

The photographs starting at page 38 of the bundle capture the effect of these queues very well. Complaints to the shopping centre's management company from the other tenants was immediate, resulting in the management writing two letters to the defendant on 6 and 8 September 2006, insisting that this should stop and warning them of action through the courts (pages 113 and 114). These letters were not responded to by the defendant. Nevertheless, it is right to say that the complaint from the management appeared to have had some effect because the defendant has changed the way in which it now operates. It has devised some form of membership system by which its customers now attend the shop by appointment restricted to about 100 members at a time. This has eliminated the problems created by the queues because each appointment session is spread out in such a way that there is a sufficient gap in time to allow one batch of customers to leave the shop before the arrival of the next. Such a system would appear to be perfectly reasonable save for what happens once a session begins. These sessions are conducted behind closed doors which are locked. Only members are allowed in, and once a session begins at its appointed time, the doors are shut. Adding to the privacy is the fact that the full-length glass panelling of the shop front has been covered with advertising material which completely blocks out from view the interior of the shop from the outside. As I will come to more fully in a moment, this contravenes one of the terms of the lease. The next and perhaps the most serious complaint by the plaintiff arises from what happens once the session begins. The members are then treated to an instruction or perhaps a mini-lecture on the properties of the health food that is available for sale. It appears that they are warned about the dosages so as not to harm themselves by consuming too much at one time, and they are also told about the range of available stock. These sessions are conducted by an expert in such things. He comes from Taiwan and he speaks to the assembly in Mandarin. All those attending are seated in rows of chairs provided for them. Whilst this may appear to be perfectly sensible, the evidence is that the lectures are conducted in a very animated and loud manner. The speaker addresses them through a loudspeaker amplifier system. Those attending join in organised singing and dancing to the accompaniment of loud music, not unlike a prayer meeting of the type one frequently finds in some southern states of the United States. Presumably, this is done not only to inform the potential purchasers of the products but also to animate them and put them in the mood to purchase the products in the shop. The volume of noise generated by these selling sessions is said to be so loud that it is upsetting the other tenants. It is audible some distance away and this is now a specific aspect of the plaintiff's case which it seeks to put a stop to by injunction. Tenants have put in evidence in support of these facts as have two undercover agents which the plaintiff's solicitors have sent in to attend these sessions and also to go to a nearby caf from where the noise was clearly audible. The other complaint is that at these sessions, as part of the Defendant's marketing policy, those attending are treated to some sort of auction during which they can bid for non-health-food items such as bags of rice and dried fungus. The auctions are said to be noisy. The defendant denies that it conducts auctions but accepts that by way of incentive, the members are able to purchase items such as rice and fungus and biscuits at low promotional prices, this being a means of attracting their attendance in order that they might then purchase the health food products. What I have just described comes from the affidavit evidence filed by the plaintiff in support of its case. The defendant, whose case has been conducted with great moderation and

very persuasively by Mr Anthony Cheung, do not deny that they conduct business from the shop in an unconventional way. He submits that the noise is not as bad as the plaintiff suggests and that in any event it is only intermittent, occurring during the appointed times of the lectures/meetings. Secondly, no auctions take place. Thirdly, the sale of promotional items at low cost such as rice and fungus is unobjectionable; and, lastly, the total obstruction of the shop front by advertising material, although prima facie disallowed by the lease, has been acquiesced in by the defendant. There are numerous shop fronts that have been blocked out in the shopping centre as the defendant's photographs amply demonstrate. Mr Cheung also submits that the plaintiff has been guilty of delay in applying for this injunction which I ought to take into account in the exercise of what is a discretionary jurisdiction and that I should refuse the application and order a speedy trial to have the issues addressed in a conventional trial rather than on affirmation evidence, much of it being disputed and some of it turning on questions of fact and degree which certainly cannot be resolved on paper. The lease is exhibited to the affirmation of Vanessa Lee starting at page 68 of the bundle. The following appear to be the relevant terms. The user at page 89 is restricted to use as a health care product shop only and for no other purpose and business whatsoever. Clause 5 starting at page 77 is concerned with restrictions and prohibitions imposed on the tenant. Clause 5(5) relates to obstructions to outside windows and is in these terms: not to block up, darken or obstruct or obscure the shop front window.... without having obtained the express written consent of the landlord which consent may be given subject to such conditions as the landlord may in its absolute discretion consider fit to impose. Clause 5(6) is concerned with noise; Not to cause or produce or suffer to permit to be produced on or in the premises any sound or noise (including sound produced by.... any apparatus or instrument capable of producing or reproducing music and sound) or other acts or things in or on the premises which is or may be a nuisance or annoyance to the tenants or occupiers of the adjacent or neighbouring premises or to users and customers of the same or to the landlord. Clause 5(7) is about nuisance; Not to do or permit or suffer to be done any act or thing which may be or becomes a nuisance or annoyance to the landlord or to the tenants or occupiers of the premises in the building or in any adjoining or neighbouring building or in anywise against the laws or regulations in Hong Kong. Lastly, clause 5(9) prohibits auctions and sales; Not to conduct or permit any auction, fire, bankruptcy, closeout or similar sale of things or properties of any kind to take place on the premises provided that this provision shall not preclude the conduct of genuine periodical, seasonal or promotional sales. I now come to the argument. Mr Cheung has submitted that the relief sought under the injunction does not appear in the writ nor in the statement of claim which is restricted to forfeiture and damages. Mr Wong for the plaintiff rightly submits that this does not matter because under the Rules of the High Court, Order 29, Rule 1(1): An application for an injunction may be made.... whether or not a claim for the injunction was included.... (the) writ.... There has also been an argument as to whether, provided I am otherwise satisfied that the injunction should go, I should hold that on the balance of convenience I should refuse interim relief and let the matter proceed to a speedy trial. As to this, Mr Wong again correctly points out that the balance-of-convenience test does not apply in the case of (such as this) applications to restrain breaches of express negative covenants. See Order 29/1/32; The defendant's promise is upheld irrespective of the balance of convenience although the grant of an interlocutory injunction

remains of course a matter for discretion. Once the plaintiff establishes a serious question to be tried, the balance-of-convenience test becomes inappropriate and the court has little option but to grant the injunction to restrain the breach of negative covenant. [See Hong Kong Civil Procedure 2007, page 519] The other general point taken by Mr Cheung is that the delay has been inordinate. Overall, I do not believe this to be so. Letters were written in September 2006, to which I have already referred, followed by further correspondence in September which was also not responded to. The writ came on 13 September 2006 which was answered on 24 October by the defence and counterclaim. The application for this relief was issued by summons dated 28 November. Whilst I accept that the application for the injunction did not accompany the writ which frequently happens in this sort of case, the present delay cannot really amount to a bar to the exercise of my discretion. The matter could have come on more quickly since the summons was issued, but there have been hearings of a procedural kind before Muttrie DJ on 8 December 2006 and subsequently before Sakhrani J. The plaintiff has always been attentive and assertive of its right to have these alleged breaches stopped and I will now proceed to decide whether the plaintiff has made out a case which contains the necessary element of showing that there is a serious issue to be tried. I have no doubt that it has more than adequately made out a case on noise and nuisance. This method of selling by closed lecture sessions by appointment with attendant music and hand clapping and cheering with the music and the speakers coming through very loud and clear by amplification simply cannot be allowed to continue. The evidence has persuaded me that this is far too loud and that it is audible in the surroundings and is causing upset and annoyance to other tenants and to the plaintiff. It must stop forthwith. As to the current mode of business by closed-door appointment and instruction sessions to those attending, it seems to me that this can be allowed to go to trial provided it is done quietly, that is to say, not so loudly that this causes a nuisance. It strikes me that the injunction will put an end to motivational music, indeed to any music, to clapping and dancing and cheering. Quietly conducted explanations as to the properties of the defendant's products can continue for the time being, behind closed doors if need be. As I say, this aspect will need to be further argued over at the trial. The shop front windows must also be unobstructed forthwith save for modestly sized notices giving the name of the shop and the nature of its business. At present, the shop windows are completely blocked up and the obstructions must come down immediately. Although other shop fronts appear to be blocked, I am not at this stage, on sparse evidence, prepared to hold that the plaintiff is to be taken as having waived this breach. No doubt more will be learnt about those other shops at the trial. The complaint about an auction taking place has not been made out by the plaintiff. Modest promotional selling of rice, biscuits and the like does not breach the prohibition on auctions. This will also need to be further pursued by the plaintiff at the trial if it wishes to. To this extent, therefore the plaintiff must have its injunction. I will now hear from counsel about the precise form of the order. Mr Cheung has submitted that this type of order will be impossible to police, but I do not believe this to be so. If clear infractions of the injunction as to noise and the blocking-out of the windows are made out, I will have no difficulty in holding the defendant in contempt. I have not made any order concerning the formation of queues or the distribution of pamphlets which fall foul of a restriction on touting contained in the lease because I believe that this has now stopped, and any order to this effect will be unnecessary.

Lastly, I will also hear the parties on any further directions, including on a speedy trial and of course on costs. (Discussion re injunction and costs) I think despite Mr Cheung s valiant efforts to the contrary that this is a case where the plaintiff has made very substantial progress. Important injunctions have been obtained as a result of this hearing and they would not have got these orders unless they had made the application and come to court and obtained what they have. I have not been shown any offers to compromise the application by Mr Cheung. I am sure that is because there was no offer. So it will be plaintiff s costs in any event, to be taxed if not agreed, including costs previously reserved. (Ian Carlson) Deputy High Court Judge C K Wong, of Messrs Charles Yeung Clement Lam Liu & Yip, for the Plaintiff Anthony P W Cheung, instructed by Messrs K W Luk & Co., for the Defendant PAGE - PAGE DCCRT39/10.4.2007/SC HCA2018/2006/ Judgment 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 &`#\$&`#\$ Normal.dot setup Microsoft Word 9.0 Judiciary Hong Kong SAR Title Microsoft Word Document MSWordDoc Word.Document.8

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