

HONG KONG / JUDGMENT

RISING DEVELOPMENT LTD v. JOY GLORY (HONG KONG) LTD

COURT

District Court

DECIDED

30 March 2007

CASE / FILE NUMBER

DCCJ1436/2004

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bjbj DCCJ 1436/2004 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION CIVIL ACTION NO. 1436 OF 2004

BETWEEN RISING DEVELOPMENT LIMITED Plaintiff and JOY GLORY (HONG KONG) LIMITED
Defendant

Coram: Deputy District Judge R. Cheung in Court Date of Hearing: 19th March 2007 Date of
Handing down Judgment: 30th March 2007

JUDGMENT

Introductory matters

1. This is a tenancy dispute. However, since the Plaintiff has already assigned the premises that had once been subject to a tenancy, an issue has arisen as to whether the Plaintiff is still entitled to sue.
2. The issue may be briefly stated here. The law is that a landlord who has assigned a property subject to a tenancy is not entitled to sue for arrears of rent before the sale, see *Elegant Profit Limited v. Chung Lai Sang & Another*, HCSA 8/2005, 19 August 2005. The Plaintiff has no disagreement with *Elegant Profit Limited* supra, but says the facts of the present case can be distinguished.
3. The above is the main, though not the only, issue at trial.

4. The Plaintiff has claimed against the Defendant for arrears of rent and/or damages for the Defendant's wrongful repudiation of the tenancy agreement, as well as damages for other breaches of the tenancy agreement on the Defendant's part.
5. The Plaintiff was legally represented at the trial. The Defendant was absent. Factual background
6. The Defendant's case appears in its Defence filed on 17 June 2003. The following matters are not in dispute or indisputable. I accept such to be facts.
7. By a tenancy agreement in Chinese dated 21 August 2000 ("the subject tenancy agreement") which contains an Appendix, the Plaintiff had agreed to let and the Defendant had agreed to rent the premises known as Rooms 802-806 on the 8th Floor of Hung Tai Industrial Building, Nos. 37-39 Hung To Road, Kwun Tong, Kowloon, Hong Kong ("the subject premises").
8. The subject tenancy is for a fixed term of three years from 1 October 2000 to 30 September 2003. It does not contain a break clause. The agreed monthly rental is \$34,490 per month inclusive of government rent and rates but exclusive of management fees. The monthly rent is due payable in advance on the 1st day of each successive calendar month. A rental deposit in the sum of \$68,980 was paid to and held by the Plaintiff.
9. The Defendant has not paid the Plaintiff the rent due payable on 1 August 2002 under the subject tenancy nor any rent due payable thereafter.
10. On about 31 August 2002, the Defendant unilaterally faxed a notice to the Plaintiff purporting to terminate the subject tenancy on 1 September 2002. The Defendant also moved out of the subject premises. The faxed notice is at Trial Bundle B, page 144A (hereafter "B144A", *mutatis mutandis*).
11. On 1 September 2002, the Defendant unilaterally returned the keys of the subject premises to the Plaintiff. The witnesses
12. The Plaintiff has called 4 witnesses to testify: PW1, PW2, PW3 and PW4. I have considered their evidence and would note the more salient features of their evidence, as follows. PW1
13. PW1 is the executive director of the Plaintiff. He said in paragraph 8 of his Supplemental Witness Statement that he had instructed a staff called Ms. Eva Ng to contact various estate agents to offer the subject premises for rent or sale. This took place in the middle of September 2002. Ms. Eva Ng has not testified.
14. In Court, PW1 said that he had not given instructions to offer the subject premises for rent or sale. It was another executive director of the Plaintiff who had given such instructions. The other executive director has since left the Plaintiff's employ.

15. In Court, PW1 also said that it was since about December 2002 that he became involved in the matters concerning the proposed re-letting or sale of the subject premises. He said that he remembered the estate agency Centaline was engaged by the Plaintiff in the process but he could not remember the other estate agency involved.
16. Paragraph 8 of PW1's Supplemental Witness Statement says that the Plaintiff had engaged Centaline, Midland and one Development Property Agency Company Limited in the process.
17. In Court, PW1 also said that he was not aware of the Plaintiff's signing any estate agency agreement with the estate agents involved. He said that PW2 would be in a better position than him to give the Court the factual details of the process of the proposed re-letting or sale of the subject premises. PW2
18. PW2 is the general secretary of the Plaintiff. She joined the Plaintiff only on 8 September 2003. Before that, she was not involved in the Plaintiff's affairs.
19. In Court, PW2 said that from the time she joined the Plaintiff to 10 June 2004, she had not personally handled matters relating to the proposed re-letting or sale of the subject premises.
20. PW2 also said that shortly after she joined the Plaintiff's service, the female accountant of the Plaintiff had spoken to her about the situation concerning the subject tenancy and passed the relevant file to her. PW2 however did not say that she was then told that the subject premises would be offered for sale or rent.
21. In Court, PW2 said that it was sometime before 10 June 2004 that she was instructed by PW1 to contact the estate agents involved to obtain some documentary proof of the Plaintiff's having engaged them with a view to re-let or sell the subject premises back in 2002. She did approach Centaline who supplied the Plaintiff with print-outs from their computer system the posters said to be relating to the proposed re-letting or sale of the subject premises (see B109 to B112). The posters were all dated 10 June 2004 and not 2002. PW2 explained that she was told by the Centaline staff that as the documents were printed out on 10 June 2004, their computer system could only show the date of the printing out and could not show the earlier date of the Plaintiff's engagement of their services in 2002. I find it a bit odd. PW2 said that she had also contacted Midland who said that no such information could be printed out for the Plaintiff.
22. PW2 said that before she contacted Centaline and Midland in 2004, she had read the Plaintiff's files on the matter. The file contained the business name cards of Centaline and Midland. There was no estate agency agreement of any sort inside the file of the Plaintiff. PW3
23. PW3 is the marketing manager of the Plaintiff. She joined the Plaintiff on 2 April 2002 as a secretary. In general, her evidence is that she knew very little about the proposed re-letting or sale of the subject premises after the Defendant's moving out on 1 September 2002. She said that it was a senior officer of the Plaintiff who was responsible for the handling of such

matters. Insofar as she herself was concerned, she was assigned to open the door of the subject premises to let the estate agents to bring in the interested parties to view the subject premises. She said that from October 2002 to 1 February 2003, there were 10 odd such viewings and she attended to the majority of these viewings personally. After that, another secretary of the Plaintiff had taken up her duties in that regard and she was no longer involved.

24. PW3 said that she had no conversation with the estate agents and the interested parties during those viewings that she had attended to. She had not heard of any conversation as to whether the interested parties were minded to rent or buy the subject premises. She had not heard of the estate agents persuading the interested parties to rent or buy the subject premises. In re-examination, PW3 said that she had little conversation with the estate agents and interested parties as the subject premises were large in size and she had often just stayed outside at the entrance while the estate agents went inside with the interested parties to view the interior of the subject premises.
25. PW3 said that she was instructed by the Plaintiff to take photographs of the subject premises on 19 September 2002, which she did. The photographs are now marked exhibit P2. PW4
26. PW4 is the senior accounting manager of the Plaintiff. She mainly clarified to which part of the subject premises the photographs in exhibit P2 relate to. She has provided two sketches as illustration. See exhibits P3 and P4. Did the Plaintiff accept the Defendant's repudiation shortly after 1 September 2002?
27. I find that there was no consensual surrender of the subject tenancy at about the time of the return of the keys of the subject premises to the Plaintiff by the Defendant. The evidence does not show that a consensual surrender had taken place.
28. The Plaintiff had not exercised its right of forfeiture of the subject tenancy at about that time or thereafter. There is no such evidence.
29. I find that the Defendant's failure to pay the rents due payable on 1 August 2002 and 1 September 2002, coupled with the giving of the above faxed notice and its moving out and returning to the Plaintiff the keys of the subject premises amounted to a repudiation of the subject tenancy agreement.
30. The Plaintiff was entitled to accept the repudiation and treat the subject tenancy as thereby terminated and thus claim damages from the Defendant. Alternatively, the Plaintiff was entitled to hold on to the subject tenancy and insist on the Defendant's continued performance.
31. The Plaintiff's case at the trial is that it had opted for the former. But, does the evidence support that?

32. On the evidence before me, I am not prepared to find that the Plaintiff had in fact engaged estate agents to re-let the subject premises shortly after the Defendant's repudiation. The situation remained to be so for months, for reasons obscure to me. Did the Plaintiff accept the Defendant's repudiation by the issue of these proceedings?
33. The Plaintiff's alternative case is that by the issue of the proceedings herein, the Plaintiff had accepted the Defendant's repudiation. Is that true?
34. The Writ with Statement of Claim endorsed was filed herein on 15 May 2003. Paragraph 6 of the Statement of Claim pleaded the Plaintiff's case as a claim for arrears of rent from August 2002 to September 2003. The Statement of Claim did not claim for an order for possession nor was there an averment that the Plaintiff had accepted the Defendant's repudiatory breach.
35. The Statement of Claim was amended on 3 June 2003. There was no change to the Plaintiff's case above.
36. It was on 15 June 2005 that there was a re-amendment of the Statement of Claim. Paragraph 6A of the Re-amended Statement of Claim then pleads the Plaintiff's loss as comprised by the rent in arrears for the month of August 2002 and for the period from September 2002 to September 2003 as "damages/loss of rental".
37. In the circumstances, I am not prepared to find that the Plaintiff had accepted the Defendant's repudiation by the issue of these proceedings. The subject tenancy is a Part V tenancy
38. The legislation concerning the letting of non-domestic premises has undergone changes. At the material times, however, the subject tenancy did not come to an end at the expiry of the agreed term unless a proper notice of termination was served either by the Defendant or by the Plaintiff. No such proper notice was served.
39. So, unless there was an acceptance of the Defendant's repudiation, the subject tenancy would have been continued by statute notwithstanding the expiry of the agreed term and notwithstanding the Defendant's repudiation. The significance of all these is that the Plaintiff's subsequent act of assigning the subject premises to the new purchasers which purported to be free of the encumbrance of the subject tenancy would be to no avail. The assignment would nonetheless be subject to the tenancy. Contracting out would be invalid, more so when the tenant Defendant was not a party to the agreement. In such a situation, the rule in *Elegant Profit Limited supra* will apply, stripping the Plaintiff of its right to sue the Defendant after the assignment of its reversion. Did the Plaintiff subsequently accept the Defendant's repudiation?

40. On 28 August 2003, the Plaintiff entered into a provisional agreement for the sale and purchase of the subject premises ("the Provisional Agreement") with two purchasers both surnamed Chan ("the purchasers"). The Provisional Agreement provides that on completion, vacant possession of the subject premises would be delivered to the purchasers.
41. Shortly afterward, a formal agreement for the sale and purchase of the subject premises ("the Formal Agreement") was executed on 4 September 2003.
42. It is abundantly clear that the agreed sale of the subject premises under the Formal Agreement is not a sale subject to the above tenancy. Clause 1 as read with Schedule 3, Clause 7 and Clause 26 of the Formal Agreement are apposite here. The Plaintiff's agreement with the purchasers to assign the subject premises to them with vacant possession is inconsistent with the Plaintiff's election to hold on to the subject tenancy. Clause 11 of the Formal Agreement and the covenants in Part A of Schedule 2 of the Conveyancing and Property Ordinance, Cap. 219 do not detract from the above.
43. The Assignment of the subject premises was executed on 29 October 2003. It was a straightforward sale of the subject premises not subject to any tenancy. It was not a sale and assignment of the Plaintiff's reversionary interest.
44. Paragraph 235.445 of Halsbury's Laws of Hong Kong (2007 Release) states the law concerning the acceptance of a repudiation as follows: "A repudiation which is not accepted by the innocent party will not terminate the lease. Acceptance consists of unequivocal words or conduct by the innocent party which are incompatible with his own continued performance, or the subsistence of, the lease. It is not, however, necessary to give any notice of intention to claim repudiation damages when accepting the repudiation." Chitty on Contract, 29th edition, Vol. 1, para 24-013 says as follows: "An act of acceptance of a repudiation requires no particular form. It is usually done by communicating the decision to terminate to the party in default, although it may be sufficient to lead evidence of an 'unequivocal overt act which is inconsistent with the subsistence of the contract without any concurrent manifestation of intent directed to the other party.'"
45. I would make the following findings of facts: the Plaintiff had upon the signing of the Provisional Agreement accepted the Defendant's repudiation. If I were wrong on that, I would find that the Plaintiff had upon the execution of the Formal Agreement accepted the Defendant's repudiation. Again if I were wrong on that, I would find that the Plaintiff had upon the execution of the Assignment accepted the Defendant's repudiation.
46. I consider the Defendant's repudiatory breach to be a continuing breach. A fresh breach of the subject tenancy agreement occurred whenever the Defendant failed to pay any rent as and when the same fell due for payment. I do not consider that the Plaintiff is precluded from accepting the subsequent breach even though it had waived the earlier breaches. I consider that communication of the Plaintiff's acceptance of the Defendant's repudiation is not required. If I were wrong on that, I would hold that such communication was made by the service of the Re-amended Statement of Claim herein on about 22 June 2005.

47. In the circumstances, I would find that the Plaintiff is entitled to recover from the Defendant (1) the arrears of rent prior to the termination of the subject tenancy agreement and (2) after termination of the subject tenancy agreement, damages measured by reference to its loss of rental income. *Elegant Profit Limited supra*, has no application to the facts of this case as the sale of the subject premises was not subject to the above tenancy. Rather, the principles that are adumbrated in the case of *In re Lyne-Stephens and Scott-Miller's Contract*, (1920) 1 Ch 472 are applicable to the facts of this case and I should follow them. In gist, the facts of *Lyne-Stephens* are that the Vendor therein has agreed to sell a property to the Purchaser therein when there is a tenancy. The tenancy would expire by the time of the completion of the sale. The agreement is for the sale of the property with vacant possession at the time of completion. It was held that the sale of the property was not subject to the tenancy and that it was not a sale of the reversion. Applying the principles of *Lyne-Stephens*, I consider that the Plaintiff herein is entitled to sue at the time the proceedings were issued, and remain to be so entitled up to the date of trial.
48. I find that the damages recoverable upon the Plaintiff's acceptance of the Defendant's repudiation would be for the same amount as the monthly rentals payable under the subject tenancy.
49. The Plaintiff may therefore recover from the Defendant its loss of rental and damages in the same measure for the period from 1 August 2002 to 30 September 2003 totalling 14 months at the rate of \$34,490 per month totalling \$482,860. Other breaches of the subject Tenancy Agreement
50. The Plaintiff has abandoned some of its such claims at the trial.
51. The remaining claims which the Plaintiff still pursued were in respect of the following: (1) the loss of 27 desks; (2) the loss of a telephone system; (3) the loss of a CCTV-alarm system; (4) damage of the backdoor bell; (5) damage to the backdoor alarm; (6) arrears of electricity charges. However, the solicitor for the Plaintiff has conceded that a small amount of damages in respect of these claims are all that the Plaintiff would ask for. The Plaintiff's solicitor employed the expression of "symbolic damages" which I understood to carry the meaning of "a small amount of damages" instead of "nominal damages").
52. These claims will be briefly examined in turn.
- (1) the loss of 27 desks
53. The Plaintiff has pleaded its loss of 27 desks in paragraph 8 of the Re-amended Statement of Claim. The Defendant has not traversed that averment in its Defence. Rather, the Defence avers and admits that about 25 desks were disposed of, albeit with the agreement of one Miss Kwong acting on behalf of the Plaintiff.
54. The subject Tenancy Agreement shows that 31 desks were provided for the Defendant's use by the Plaintiff.

55. On the Defendant's admission, I find that 25 desks were disposed of. There is no evidence that the disposal of the 25 desks were carried out with the Plaintiff's agreement or authority.
56. Clause 5 of the subject Tenancy Agreement provides inter alia that the Defendant shall return the 31 desks to the Plaintiff at the expiration or earlier termination of the subject tenancy.
57. The Defendant is accordingly in breach of the subject Tenancy Agreement and liable to pay damages to the Plaintiff therefor.
58. As to quantum, there is some evidence that the desks were purchased by the Plaintiff in about 1993 at the cost of about \$1,500 each. I find that the Defendant is liable to pay the Plaintiff damages measured by reference to the replacement cost of the 25 desks at \$200 each. That gives \$5,000.
- (2) the loss of a telephone system
59. The Plaintiff has pleaded its loss of the entire telephone system (see A8). The Defence has made no admission to that although it says that it might have lost 2 telephone sets. The Defence also says that the telephone system should still be in good working order (see A25 and A27). The Supplemental Witness Statement of PW1 (see A130) says that the telephone system consisted of 1 main PABX unit/console and 32 telephone sets. The main PABX unit/console and 1 telephone set was missing. The gist of the complaint is that the system is not workable without the main PABX unit/console.
60. I am not prepared to find that there was a loss of the entire telephone system. It was not properly pleaded.
- (3) the loss of a CCTV-alarm system
61. The Plaintiff has pleaded its loss of the CCTV-alarm system (see A8). The Defence says that the system was there (see A25). PW1 in his witness statement complained that the wiring of the system was damaged by the Defendant (see A130), not that the system was missing.
62. I am not prepared to find that there was a loss of the CCTV-alarm system. It was not properly pleaded.
- (4) damage to the backdoor bell
63. I am prepared to find that the backdoor bell was damaged and that the Defendant was liable to repair the same. The reasonable cost of such repairs would be at most a few hundred dollars, say \$300.
- (5) damage to the backdoor alarm
64. I am prepared to find that the backdoor alarm's wiring and infrared sensors were damaged and that the Defendant was liable to repair the same. The reasonable costs of such repairs would be about \$1,000 dollars.

- (6) arrears of electricity charges
65. Liability was admitted by the Defendant and I would find that the Defendant is liable to pay the Plaintiff the sum of \$568.50 on account of arrears of electricity charges. Total amount of damages payable for the other breaches
66. The total amount of such damages payable would be $\$5,000 + \$300 + \$1,000 + \$568.50 = \$6,868.50$ say \$6,869. Total
67. The Defendant is liable to pay the Plaintiff the sums of $\$482,860 + \$6,869 = \$489,729$. The Plaintiff has agreed to give credit for the rental deposit of 68,980 that it has been holding. The amount payable by the Defendant is therefore $\$489,729 - \$68,980 = \$420,749$.

Orders

68. In the circumstances, I would make the following orders:
- (1) the Defendant do pay the Plaintiff the sum of \$420,749 together with interest thereon from 1 October 2003 at half judgment rate until Judgment and thereafter at the full judgment rate until satisfaction.
- (2) there be an Order Nisi that the Defendant do pay the Plaintiff the costs of this action to be taxed if not agreed. For the avoidance of doubt, the Order made herein on 10 March 2004 that costs before 10 March 2004 shall be taxable on the High Court scale and thereafter on the District Court scale is hereby noted and confirmed. Unless an application is made to vary this Order Nisi for costs, it shall become absolute in 14 days. (R. Cheung) Deputy District Judge Representation: Mr. Luke K.C. Yip, of Messrs. Cheung & Yip, for the Plaintiff The Defendant: unrepresented, absent 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 & `# \$ eA_@ eA_@ @\\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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