

HONG KONG / JUDGMENT

SHIU YUK TONG v. GOLDMAY DEVELOPMENT LTD

COURT

Court of First Instance

DECIDED

17 January 2007

CASE / FILE NUMBER

HCA62/2003

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bjbj HCA62/2003 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE ACTION NO. 62 OF 2003

BETWEEN SHIU YUK TONG Plaintiff and GOLDMAY DEVELOPMENT LIMITED Defendant

Before : Hon Burrell J in Court Dates of Hearing : 4-5 and 8-9 January 2007 Date of Judgment : 17
January 2007

J U D G M E N T

AUTONUMOUT There are two issues in this case. They have been referred to as the lift lobby
issue and the flood issue.

- (a) THE LIFT LOBBY AUTONUMOUT In 2001 the plaintiff purchased a flat on the 6th floor of a new development at 488 Jaffe Road, Wanchai. AUTONUMOUT Floors 1-5 of the building were non-residential. The residential flats were on floors 6-29. There was only one flat on each of floors 6-29. The plaintiff's flat on the 6th floor was unique in that it was surrounded by a small flat roof area. The lift system to the residential units was operated by a smart card system. This meant that access to a particular floor could only be gained by use of a card. On arrival at the 6th floor, a person would step into a small lift lobby. On the left was the door to the flat, straight on was a door to a stair well which went from the ground floor of the building to the very top. AUTONUMOUT The gross area which was conveyed to the plaintiff included the flat itself, the flat roof surrounding it and the lift lobby. It was the fact that the lift lobby was not a common area but was conveyed for the exclusive use of the plaintiff which gives rise to the first issue in this case. AUTONUMOUT Three other non-controversial

matters which are of some relevance to this issue are that the occupation permit of the building had been issued on 28 February 2001; the deed of mutual covenant () regulating the rights and obligations of the owners is dated 19 March 2001 and, thirdly, the plaintiff had visited the flat three times after the issuance of the occupation permit and before he signed the sale and purchase agreement in April 2001. THE FLOOD AUTONUMOUT On 5 September 2001, water flooded into the plaintiff's flat, which was unoccupied at the time (and has been ever since it was purchased). AUTONUMOUT I find as a fact that the cause of the flood was obvious. A brief description of the structure is necessary to explain why. AUTONUMOUT On opening the back kitchen door of the flat there is a short step downwards onto the flat roof area. The flat roof area is paved. There are shallow drainage channels built into the paving which flow towards drains and drainage pipes which are built into the exterior walls of the flat roof area. AUTONUMOUT For reasons which were not clear, the drainage grids and/or pipes had become blocked, water accumulated on the flat roof, it rose to a level higher than the step into the kitchen and seeped into the flat and caused damage. AUTONUMOUT It is the plaintiff's case that the height of the step was only 110 mm whereas according to Building Regulations, it should have been a minimum of 150 mm. This gives rise to the second issue. AUTONUMOUT On either ground the plaintiff's primary claim is rescission of the contract and loss of rent. Alternatively the plaintiff claims damages. AUTONUMOUT More fully defined, the two issues are as follows. THE ISSUES AUTONUMOUT

- (1) Having purchased the property did the plaintiff have the exclusive right and privilege to hold, use, occupy and enjoy the lift lobby? If not, what are the consequences and what is the remedy? Has the plaintiff proved non-conformity of Building Regulations amounting to an incumbrance on title arising out of the height of the step onto the flat roof? If so, did the non-conformity cause or contribute to the damage following the flood? AUTONUMOUT I shall now deal with each issue. The lift lobby AUTONUMOUT It is accepted that the lift lobby was included in the conveyance to the plaintiff. The plaintiff claims however that he does not have exclusive rights to it. His primary complaint is that the door from the lobby to the stair well is not and should not be locked. People could therefore come up the stairs and walk into the lobby. AUTONUMOUT The fact that there was evidence that owners of other flats above the plaintiff had put locks on the same door is neither here nor there. The fact is that the door in question is a fire door and I proceed on the basis that this door, to comply with fire regulations, should be unlocked. The issue therefore is not whether or not it is lockable but whether or not exclusive rights have been conveyed bearing in mind that the door in question should remain unlocked. AUTONUMOUT Another, less significant, example of non-exclusivity, relied on by the plaintiff, is that the lighting in the lobby is controlled by the building management office. AUTONUMOUT George Chu, counsel for the plaintiff, submits that the fact that a fireman or a burglar or indeed any trespasser could walk into the lift lobby from the stair well constitutes a defect in title. He submits that the plaintiff's enjoyment of the lift lobby cannot amount to vacant possession. He supports his submission with three examples; first, putting a lock on the door would or might be an offence, secondly, the plaintiff cannot control the lighting in the lobby and thirdly, lift repairmen can

be given access to it. AUTONUMOUT Factually, all Mr s submissions are perfectly correct, however, I am satisfied that, for the reasons advanced by Mr Keith Yeung, counsel for the defendant, there are circumstances in Hong Kong where the factual exclusive right to hold and enjoy etc. is not the same as the legal exclusive right to hold and enjoy etc.

AUTONUMOUT The DMC regulates the rights and obligations of all the owners of the units in the building. It confers on the plaintiff the exclusive right to hold, use and occupy the 6th floor lobby. As owner of the flat on the 6th floor the plaintiff is the only person who is entitled to enforce such a right. It is unnecessary to analyse the entire DMC, there is nothing controversial in its wording. Suffice it to say that, on any common sense view, the DMC does not create any rights which are inconsistent with the plaintiff s exclusive occupation of the lobby. No other co-owners have any rights in respect of the lobby and the plaintiff would be in breach of various regulations and ordinances if he denied access to firemen, building management staff, repairmen, etc. In this particular building the plaintiff has the comfort of knowing, that because of the smart card system it is impossible for any co-owner or visitor to enter the lobby from the lift, even inadvertently. As observed by Mr Yeung, a similar situation arises when a roof space on the top of a building is sold to the owner of the top flat. Such a space does not always have exclusive access, neither is it capable of being locked. It can still nonetheless be lawfully conveyed without it being a defect in title. AUTONUMOUT In short, I find that because, in Hong Kong, the exclusive right and privilege to hold etc. is not always an absolute right in fact, there has been no defect in title constituting a fundamental breach nor any breach of covenant giving rise to a diminution in value. If I am wrong about the latter part of the above finding, there has been no evidence about the quantum of damages payable for a breach of covenant arising from the fact that a trespasser could walk into the lobby from the stair well. It would have been difficult to persuade me that the damages would have been any more than nominal. The flood AUTONUMOUT Chu submits that the developer has breached Building Regulations. He points to two regulations in the Building (Construction) Regulations under Cap.123 (the Building Ordinance).

AUTONUMOUT Regulation 35 provides as follows Floor next above external ground level The level of the floor next above the external ground of every building shall be not less than 150 mm above the level of the external ground or paving at the entrance to that floor.

AUTONUMOUT Regulation 49 provides that Flat roof A flat roof adjoining any building shall be at a level of not less than 150 mm below any adjoining usable floor space. AUTONUMOUT The plaintiff s expert s report and the plaintiff s pleadings focus, wrongly, on Regulation

35. It seems plain, on any ordinary reading, that Regulation 35 applies to the floor above the ground floor. The regulation leaves no doubt about that by its use of the word external ground floor. AUTONUMOUT Regulation 49 is applicable. It is apposite to note, first of all, that when taking measurements for the purpose of Regulation 49 there is no reference to paving which is referred to in Regulation 35. AUTONUMOUT In my judgment, therefore, the plaintiff must prove (at least) that the distance from the concrete base of the flat roof (before the application of screeding and paving tiles) up to the level of the usable floor space (as built inside the flat) is less than 150 mm. This they have failed to do. AUTONUMOUT It is

agreed that the measurement taken by the plaintiff's expert witness of about 110 (as pleaded) relates to the depth of the visible concrete of the step. The additional depth of the floor covering above is not included and the depth of the tiling and screeding below is not accounted for either. Neither were measured. AUTONUMOUT The thickness of the tiling and screeding alone would not be insignificant. The reason being because of the gradient of the flat roof floor. The approved plans show that the concrete base of the flat roof is indeed flat. However the tiles which have been put on the flat concrete floor have been built so that there is a 1:100 gradient towards the outside walls where the drainage grids are located. AUTONUMOUT Thus, if, for example, it is four paces (or 4 metres) from the back door to the outside wall of the flat roof (a not unreasonable estimate by looking at the agreed photographs) the depth of the tiling and screeding at the back door would be 40 mm (so as to achieve a gradient of 1:100 down to the drainage grid in the wall approximately four paces away). AUTONUMOUT It is also worthy of note that the occupation permit had been successfully applied for and granted on 28 February 2001. This is at least a persuasive fact in favour of there being no breaches of the Building Regulations at that time. AUTONUMOUT There was also no clear evidence about the existence or the thickness of the floor covering at the top of the step either. This also could make some significant difference to the measurement for the purposes of Regulation 49. AUTONUMOUT I also weigh in the balance of the evidence given by Mr Felix Lok, the architect and authorized person for the development, who was called as a witness by the defence. He stated that if a regulation had not been complied with (a proposition with which he did not agree), he was confident that the Building Department would have granted an exemption pursuant to Practice Note 266 which states Level Difference for Floor Adjoining External Ground Level or Flat Roof Regulations 35 and 49(1) of the Building (Construction) Regulations (B(C)Rs) require that the level of an internal floor shall not be less than 150 mm above the level of the external ground or adjoining flat roof. The objective of these requirements is to prevent the ingress of rainwater. These requirements can generally be catered for at the design stage by allowing sufficient difference in level between the internal floor and the external ground or adjoining flat roof. However, there could be cases where authorized persons wish to depart from the prescribed requirements due to special circumstances of their cases or as a result of the unique nature of their designs. In such circumstances, the Building Authority (BA) is prepared to consider granting exemption from the above regulations to allow flexibility in design if means to guard against the ingress of water to the inside of the building are provided to the satisfaction of the BA. AUTONUMOUT In conclusion I am satisfied that the plaintiff's claim for rescission based on the non-compliance with Building Regulations must fail. AUTONUMOUT As no non-compliance has been proved, it follows also that any claim for damages must fail. The cost of repairs following the flood was approximately \$42,000. The plaintiff is also claiming loss of rent thereafter. It should be noted, in passing, that this flat has never been let out by the plaintiff in the 5 years since he purchased it. This is remarkable. The flood damage was repaired in 2001. In evidence Dr Shui, the plaintiff, cited water seepage in two of the walls as reasons for not letting out the premises. This was new evidence which had not hitherto been relied on. AUTONUMOUT In any event, it seems that

no satisfactory reason has been advanced to explain why this flat has not been made available for letting since September 2001. AUTONUMOUT The matter is in fact academic because I would have found, had it been necessary to do so, that the alleged breach of regulations was not causative of the damage complained of. The blocked drains caused the damage. Where the liability for those blockages lay has not been an issue in this case. AUTONUMOUT This claim must be dismissed with costs to the defendant. (M.P. Burrell) Judge of the Court of First Instance High Court Mr George Chu, instructed by Messrs Francis Kong & Co., for th 1udk 1udk H I J K L M N O P Q R S T U V & `#\$ [B= cT1\$ J=jy & 6" ABC-j.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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