

HONG KONG / JUDGMENT

WHARF REALTY LTD v. EUGENE MARKETING LTD

COURT

District Court

DECIDED

18 July 2007

CASE / FILE NUMBER

DCCJ2286/2006

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bjbj DCCJ 2286/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION CIVIL ACTION NO. 2286 OF 2006

BETWEEN WHARF REALTY LIMITED Plaintiff and EUGENE MARKETING Defendant Limited

Coram : Her Honour Judge Mimmie Chan Dates of hearing : 28-29 June, 3 July 2007 Date of
handing down Judgment : 18 July 2007

JUDGMENT

This is a claim made by the Plaintiff for outstanding rent and other charges due from the Defendant in respect of the property known as OT- G16, Ground Floor, Ocean Terminal, Harbour City, Kowloon, Hong Kong (" Property"). The Plaintiff is the owner of the Property and by a Letter of Offer ("Letter of Offer") signed by the Defendant on 5 August 2004 and countersigned by the Plaintiff by way of acceptance on 17 January 2005, the Defendant agreed to lease the Property from the Plaintiff for three years commencing from 8 September 2004 on the terms set out in the Letter of Offer. A minimum rental was expressed to be payable at HK \$70 per square foot per month for the first 12 months of the term, HK \$73.50 per square foot for the second 12 months of the term, and HK \$77 per square foot for the third 12 months of the term. There were additional air- conditioning charges, service charges and promotional charges expressed to be payable at specified rates per square foot per month. Paragraph 3 of the schedule to the Letter of Offer ("Schedule") provides that the "Approximate Area" of the Property is " 1770 sq.ft. (subject to final measurement to be conducted by the Landlord) based on lettable area as defined in paragraph 10 (of the Schedule) ". Paragraph 10 of the Schedule states that the lettable area of the Property "shall include (a) up to 75 mm of all external walls, core wall and screen, (b) half thickness of inter-tenancy partition walls separating (the Property) from adjoining shop units and full thickness of walls separating (the Property) from common areas, (c) outer edge of shop front adjoining public

arcade and (d) all partitions and columns inside (the Property)". Paragraph 10 of the Letter of Offer refers to the obligation of the Plaintiff as landlord to make available to the Defendant a shop frontage in accordance with the Plaintiff's specification and design. The Plaintiff's case is that upon final measurement of the Property being made by the Plaintiff's representative on 6 September 2004, the area of the Property was determined to be 1880 square feet, and the Defendant was so informed. The Defendant refused to accept that it is bound by this measurement of 1880 square feet as the area of the Property, and has refused to pay rental on the basis of 1880 square feet. Since commencement of the term of the tenancy, the Defendant has been tendering monthly rent on the basis of the area of the Property being 1770 square feet. In its Defence, the Defendant claims that the measurement of 1770 square feet provided by the Plaintiff should be accurate, and that no final measurement was in fact made by the Plaintiff. Alternatively, the Defendant pleads that if the area of 1770 square feet was subject to final measurement, the Plaintiff should have conducted the measurement and informed the Defendant of the final measurement before the commencement of the tenancy on 8 September 2004. The Defendant pleads that since the Plaintiff had not conducted its measurement and had not informed the final measurement to the Defendant before the commencement of the tenancy, the Plaintiff had waived its right to, or is estopped from relying on, the alleged final measurement. Further or alternatively, the Defendant pleads that the Defendant had relied on the representation made by the Plaintiff that the area of the Property was 1770 square feet, and since the Plaintiff only notified the Defendant of the alleged final measurement after the commencement of the tenancy and the Defendant had started renovation of the Property, it would be unfair and inequitable for the Plaintiff to rely, and the Plaintiff is estopped from relying, on the final measurement to claim a higher rent from the Defendant. No claim of misrepresentation was pleaded in the Defence, and the Defendant has not sought to rescind the tenancy agreement nor to seek damages sustained as a result of any misrepresentation made by the Plaintiff. Construction of paragraph 3 First and foremost is the meaning and effect of paragraph 3 of the Schedule, on its true construction. The approach to construction is objective. The question is not what one or other of the parties meant or understood by the words used, but the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to all the parties in the situation in which they were at the time of the contract (Chitty on Contracts, 29th edition, 12-043). "The cardinal presumption is that the parties have intended what they have in fact said, so that their words must be construed as they stand. That is to say, the meaning of the document or a particular part of it is to be sought in the document itself." (Bewise Motors Company Ltd v. Hoi Kong Container Services Ltd. (1997-8) 1 HKCFAR 256 at 275F19) The approach to construction is also clearly stated in Jumbo King Ltd. v. Faithful Properties Ltd. (1999) 2 HKCFAR 279 at 296: "Of course in serious utterances such as legal documents, in which people may be supposed to have chosen their words with care, one does not readily accept that they have used the wrong words. If the ordinary meaning of the words makes sense in relation to the rest of the document and the factual background, then the court will give effect to that language, even though the consequences may appear hard for one side or the other. The court is not privy to the negotiation of the agreement -- evidence of such negotiations is inadmissible -- and has no way of knowing

whether a clause which appears to have an onerous effect was a quid pro quo for some other concession." The relevant background to the Letter of Offer is that the Defendant had been shown a vacant shop unit at a shopping arcade. The glass shopfront had not yet been installed, only wooden hoarding was present at the vacant unit, and the Letter of Offer was sent to the Defendant prior to the entering of a formal tenancy agreement. The agreement was that the landlord was to provide the Property to be let with a glass shopfront, a main entrance and, for the Property in question, a rear exit. The glass shopfront, the main entrance and the rear exit were to be completed by the landlord on or before 22 September 2004. In the light of the aforesaid background, the meaning of paragraph 3 of the Schedule cannot reasonably be capable of any dispute. Objectively construed, paragraph 3 can only mean that the area of 1770 square feet is not to be final or conclusive, and that the area of the Property to be let must be subject to and be determined by the final measurement which will be conducted by the Plaintiff as landlord. Paragraph 3 clearly provides that the final measurement is to be based on the area to be let, and that is defined in paragraph 10 of the Schedule, i.e. to include up to 75 mm of all external walls, core wall and screen; half thickness of inter-tenancy partition walls separating the Property from adjoining shop units and full thickness of walls separating the Property from common areas; outer edge of shopfront adjoining public arcade, and all partitions and columns inside the Property. Paragraph 3 means just as it provides, that the area is only approximately 1770 square feet, and that the area is subject to the final measurement to be conducted by the Plaintiff. Whether the Defendant made final measurement In the Defence, the Defendant avers that the Plaintiff did not make any final measurement. In the correspondence exchanged between the parties prior to the commencement of these proceedings, the Defendant had also alleged that any final measurement should have been notified to the Defendant prior to the commencement of the tenancy on 6 September 2004, and this is maintained in the Defence. Danny Leung Chi Fai, employed at the material time as senior technical officer of the Plaintiff's agent, Harbour City Estates Ltd. ("Agent"), gave evidence on behalf of the Plaintiff. He confirmed that in the usual course of his work, he visited the Property in the morning of 6 September 2004 and did the final measurements on the basis of a design layout plan provided by the Defendant in early September. The Agent had the keys to gain access to the Property, and it took Danny Leung not more than half an hour to do the measurements. His measurements included the partition walls, etc. in accordance with the formula set out in paragraph 10 of the Schedule. When Danny Leung returned to his office, he did his calculations using the measurements he had made and produced the final area of 1880 square feet, as shown in the calculations which he had written down on a sketch plan of the Property. This plan was later sent to the Defendant on 14 October 2004. Prior to delivery of possession of the Property to the Defendant, the parties had discussed the proposed shopfront layout of the Property. On 19 August 2004, William Lam of the Agent faxed to Cheryl Lee of the Defendant the Plaintiff's proposed shopfront layout, stating that the dimensions shown would be subject to verification on site. The Defendant was requested to notify the Agent of any intention to modify the shopfront entrance, so that the necessary arrangements could be made before handover of the Property. The proposed shopfront layout sent to Cheryl Lee shows a front entrance on the side of the shopfront, and a proposed "set back rear exit". It is stated on the layout plan that "all dimensions and layouts are not guaranteed" and that the tenant's verification

on site is recommended. According to the evidence of Cheryl Lee, the Defendant asked for the position of the front entrance to be moved to the center of the shopfront for feng shui purpose, and as a result, a revised layout plan was sent by William Lam to Cheryl Lee on 31 August 2004. This revised layout plan retained the set back rear exit mentioned in the earlier plan. There was then some argument and negotiations in relation to the set back rear exit. According to the Agent, the design of the set back rear exit provided by the Plaintiff was in order to comply with the means of escape regulations prescribed by the Fire Services Department. The Defendant insisted on the rear exit door opening out into the driveway or common area behind the Property, instead of having an area set back in the Property to provide space for the exit doors opening into the Property. According to the evidence of William Lau, it was finally agreed by 6 September 2004 that the original design of the set back rear exit as provided by the Agent would be altered in accordance with the Defendant's wishes, despite the fact and with the Defendant's acceptance that the altered design was not in compliance with fire regulations. According to the Plaintiff's evidence, the altered design of the rear exit is one of the causes of the increase in the final lettable area of the Property. The Plaintiff's evidence is that on 9 September 2004, William Lau notified the Defendant that the lettable area of the Property as measured was 1880 square feet, and asked Cheryl Lee to verify this on site. According to Cheryl Lee, such notification did not take place until 17 September 2004, but she accepted that she was asked to verify the measurement on site but refused to do so. The Plaintiff accepts that the notification of the lettable area of 1880 square feet was done after the commencement of the tenancy on 8 September 2004. As the Defendant refused to verify the final measurement of 1880 square feet on site, the Agent wrote to the Defendant on 14 October 2004 to confirm the final measurement and enclosed a plan which shows the measurement and the calculations made by Danny Leung. A lot of time was spent on the cross-examination of Danny Leung, as to how he had produced the final measurement of 1880 square feet. The Defendant's case is not that Danny Leung had made the wrong measurements or calculations of the area of the Property, nor that the Property should have been measured in any particular way. The Defendant simply disputed whether Danny Leung had made the measurements as he claimed on 6 September 2004, and generally attempted to discredit Danny Leung as to how he had produced the figure of 1880 square feet. In particular, a lot of emphasis was placed on Danny Leung's evidence that the original figure of 1770 square feet was used as the area on the assumption made by him that there would be two front entrances and one rear exit for the Property, and the area covered by the doors opening into the Property would be excluded from the lettable area. However, Mr. Leung had made it clear in his evidence that he did not have any detailed or exact calculations in mind for the front entrances and the rear exit, and that 1770 square feet was just a rough estimate. After hearing all the evidence, I find that it is highly improbable that the Plaintiff had failed to carry out the final measurement of the Property, as alleged by the Defendant in its Defence. I see no reason why Danny Leung should lie about his measurement of the Property on 6 September 2004, and I accept his evidence. The Agent had easy access to the Property as it held the keys. If final measurements were not made by the Plaintiff, there was no reason for the Plaintiff to invite Cheryl Lee to verify the figure of 1880 square feet on site. I am satisfied on a balance of probabilities that the Plaintiff did make final measurements of the Property on 6 September 2004. Whether the final measurement was too late

On a plain reading of paragraph 3 of the Schedule, there is no provision for when the final measurements are to be conducted by the Plaintiff as landlord. Further, there is no provision in the Letter of Offer or the Schedule that the final measurements must be made prior to the commencement of the tenancy or the expiry of the rent free period. I have already found that I am satisfied that the final measurement was made on 6 September 2004 before the commencement of the tenancy. In any event, the final measurement was notified to the Defendant by 17 September 2004 even on the Defendant's case, and this was within a reasonable period after the final measurements and a reasonable period after the commencement of the tenancy bearing in mind the rent free period. The Defendant simply refused to verify the final measurement on site. Counsel for the plaintiff has referred me to paragraph 235.194 of Halsbury's Laws of Hong Kong, Vol. 17(1), 2007 Reissue : "Rent is sufficiently certain if it can be calculated with certainty at the time it becomes payable even if the increase is dependent upon the whim of the landlord and, even if it has not been ascertained by the due date, will be payable retrospectively if the lease so requires on its true construction, there being no absolute rule that rent must be ascertained by the due date (C H Bailey Ltd. v. Memorial Enterprises Ltd. [1974] 1 All ER 1003)." On the construction of paragraph 3 of the Schedule and the Letter of Offer, the Plaintiff as landlord is not contractually bound to make the final measurement of the area of the Property before the commencement of the tenancy and the fact that the final measurement was only notified to the Defendant after the commencement of the tenancy does not render the provision on payment of rent as contained in the Letter of Offer uncertain in any way. As counsel for the plaintiff pointed out, the final measurement and hence the rent payable was ascertained prior to the Plaintiff's issue of the debit note and when the rent became payable. Waiver The plea made by the Defendant is that because the Plaintiff had not conducted its measurements and had not informed such measurements to the Defendant prior to the commencement of the tenancy, the plaintiff had waived its right or is estopped from claiming the higher rent. For waiver to apply in this way, there must be some unambiguous representation arising as the result of a positive and intentional act done by the Plaintiff with knowledge of all the material circumstances : Halsbury's Laws of Hong Kong, Vol. 7 para 115.384. On the facts and evidence of this case, I cannot find any un-ambiguous or un-equivocal representation on the part of the Plaintiff to the effect that the Plaintiff would not be claiming higher rent on the basis of the area of the Property being other than 1770 square feet. To the contrary, the evidence adduced by the Plaintiff is consistent that the rent to be paid by the Defendant would be based on and calculated by reference to the final measurements to be made by the Plaintiff, and that 1770 square feet is only the approximate area of the Property. The contemporaneous documents, plans and correspondence are all qualified when they refer to the area and dimensions of the Property : the e-mail from Maggie Lee to Cheryl Lee dated 26 July 2004 and the plan attached; William Lam's fax to Cheryl Lee dated 19 August 2004 and the proposed shopfront layout attached; the revised floor plan attached to the fax from William Lam to Cheryl Lee dated 31st August 2004; paragraph 3 of the Letter of Offer and the plan attached. They all refer to the area being subject to final measurement, that the plans are for reference only and to be verified, and that the dimensions and layout are not guaranteed. According to the evidence of Grace Leung who gave evidence on behalf of the Plaintiff, when she first showed the Property to the Defendant, she had stated that

the area was approximately 1770 square feet, and that the rent would be based on the landlord's final measurements. I cannot accept that any alleged delay or inactivity on the part of the Plaintiff whilst the design of the shopfront layout was being negotiated between the parties and being finalized can be relied upon as waiver on the Plaintiff's part. Such inactivity or delay is equivocal, to say the least, and cannot possibly be taken by the Defendant to mean that the Plaintiff will not be claiming rent on the final measurement of the area of the Property. Even if there were any representation made or arising from the Plaintiff's act (which I have found there was none), it would have been unreasonable for the Defendant to rely on any such representation in view of the clear language of paragraph 3 of the Schedule. Estoppel Cheryl Lee claimed in the course of cross-examination that when she saw the words "approximate area 1770 square feet subject to final measurement" in paragraph 3 of the Letter of Offer, she had telephoned Maggie Lee of the Agent to ask why these words had appeared. According to Cheryl Lee's evidence, Maggie Lee informed her that the area was 1770 square feet and that paragraph 3 was a normal standard term. Cheryl Lee said in evidence that she had seen similar wording in other tenancy agreements before, although she had never experienced any actual dispute with other landlords in relation to the area of the premises let. Her evidence is that she did read the terms of the Letter of Offer, and she knew that the Letter of Offer had binding effect upon her signature and acceptance by the Plaintiff. In the Defendant's letters sent to the Agent before the commencement of legal proceedings, Cheryl Lee did not dispute that the area of the Property is stated in the Letter of Offer to be subject to final measurement by the landlord. The only complaint made by the Defendant before the commencement of proceedings was that the landlord's final measurement should have been made before the commencement of the term of the tenancy and before delivery of possession of the Property to the Defendant. This can be seen from the letters dated 11 November 2004 and 2 December 2004 which Cheryl Lee sent to the Agent. This lends support to the fact that the Defendant was aware at all material times that the area of 1770 square feet was subject to final measurements to be made by the Plaintiff. In the circumstances, I can see no inequity in holding the Defendant bound by the clear provisions of paragraph 3 of the Schedule. It is clear from Cheryl Lee's evidence that she is an experienced businesswoman who, on her own evidence, had negotiated leases with different landlords involving over 20 shops during the past 10 years. She clearly knew she was signing legal documents and entering into binding legal relationships. It is trite law that a contracting party has no duty to explain the contents of a written document to another contracting party (*Kincheng Bank v. Kao Yu Kuei* [1986] HKC 212 215F), and the Defendant does not allege in its Defence that she was deceived or misled in any way. Needless to say, if she was mistaken as to the legal effect of paragraph 3, her subjective understanding as to its meaning cannot afford any defence to the Defendant. The Defendant has sought to argue the application of estoppel by convention. As this was never pleaded, it cannot be relied upon by the Defendant. In any event, I fail to see how it can possibly be argued by the Defendant that there was any mistaken assumption that was shared by or common to both the Plaintiff and the Defendant. This is an essential element of estoppel by convention (*Unruh v. Seeberger & Another* [2007] 2 HKC 609). It is obviously clear that the Plaintiff had throughout proceeded on the basis that the area of the Property is to be subject to final measurements to be made, and that the rental payable by the

Defendant is to be calculated by reference to the final measurement of the area of the Property. Award For the reasons stated above, I give judgment to the Plaintiff as claimed for the sum of HK \$172,977.81, being the balance of the rent, air-conditioning charge, promotional charge and service charge due on the basis of the area of the Property being 1880 square feet. The Plaintiff claims interest on the sum due in accordance with clause 6 of Section VIII of the tenancy agreement. The formal tenancy agreement has not been entered into between the parties as a result of the dispute of the area of the Property. However, under paragraph 6 of the Letter Of Offer, the Defendant agreed to execute a tenancy agreement in the standard form which is sent with the Letter of Offer. In the interim, the rent and other charges expressed to be payable in the Schedule follow the provisions of the standard form tenancy agreement, including the payment of a percentage of the tenant's gross receipts from the Property. A copy of the standard form tenancy agreement was sent by the Agent to the Defendant with the Letter of Offer. An acknowledgment chop was countersigned by Cheryl Lee on behalf of the Defendant and returned to the Plaintiff, acknowledging that the Defendant had read the document and would abide by its contents. When Cheryl Lee gave evidence, she accepted that she had read this acknowledgment and that Maggie Lee had sent her the standard form tenancy agreement for her to review in the interim before the final execution of the agreement. She said that she knew that the provisions of the standard form tenancy agreement on payment of rent were binding on the Defendant by virtue of the provisions of the Letter of Offer. Cheryl Lee also said in evidence that from experience, she knew that landlords would not agree to changes in their standard form documents. In actual fact, the Defendant has been paying a percentage of its gross receipts to the Plaintiff as part of the rental for the Property since commencement of the tenancy. Since the Defendant knew the binding effect of the standard form tenancy agreement, I will allow the Plaintiff's claim for interest at the contractual rate of 3% over the best lending rate from time to time of The Hong Kong and Shanghai Banking Corporation Ltd. from the respective due dates of the sums claimed up to the date of judgment, and thereafter at judgment rate until full payment. However, since costs are always in the discretion of the court, I will only allow the Plaintiff's costs of the action on party and party basis, to be taxed if not agreed, with certificate for counsel. (Mimmie Chan) District Judge Mr. Lee Siu Ho instructed by Charles Yeung Clement Lam Liu & Yip, solicitors for the Plaintiff Mr. Vincent Lam instructed by Cham & Co, solicitors for the Defendant

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