1983 WL 953132 (HC), [1983] HKEC 357

Keith Stevens McConnell
v Bak Ling Enterprises Ltd

23rd
December
,
1983
.

High Court
HC
High Court Action No 4246 of 1983

Presiding Judges:
Mantell J

Counsel in the Case:
M. Bunting (Baker & McKenzie) for Plaintiff.

B. Yu (P. C. Woo & Co.) for Defendant.

Phrases:
Unclassified

Judgment:

Mantell J:
Advertised as princely residences for a select few, Tai Pan Court in Stubbs Road is a block of apartments owned by the defendant company of which Mr. Au Bak Ling is the Managing Director. They are truly luxurious. At today's prices, the interior appointments of each would cost around HK$1,000,000. The rents are to match. They were only completed towards the end of 1980, some might say not even then, and in about October or November, they were offered for letting. Those were halcyon days for landlords. You did not need to pay agents. Agents were only too pleased to take their commission from the purchaser or the tenant. One of the firms of agents given the chance to let Tai Pan Court was Jones Lang Wootton, of which firm, a Mrs. Tricia Carton was most immediately concerned.

The plaintiff is a senior partner, may be the senior partner, of a well known firm of solicitors. He joined the Hong Kong office at the beginning of 1981 and, therefore, in November 1980 was searching out suitable accommodation for himself and his family. He got in touch with Mrs. Carton who showed him the Tai Pan Apartments which, at that time as I find, were not quite finished. Having seen the apartment, Mr. McConnell, who had to return to Australia, was concerned as to a number of matters subject to which he was prepared to enter into a tenancy agreement. He left the negotiations to a Mr. Morgans, one of his partners. Mr. Morgans wrote to the agent on 25th November 1980 asking for confirmation of some eight matters and in particular wanting an assurance that the floors would be polished prior to the commencement of the tenancy. The same letter enclosed a cheque for HK$60,000 which was eventually to become the tenant's deposit and the subject of much controversy in this action. That letter was responded to by Mrs. Carton for Jones Lang Wootton on 26th November 1980 in which she stated. "We would confirm .... the floors will be polished prior to commencement of the tenancy." Thereafter, acting on Mr. McConnell's behalf, Mr. Morgans agreed to enter into a tenancy agreement with the plaintiff for three years commencing on 16th December 1980 at a monthly rental of $30,000 for the first two years and a monthly rental of $60,000 for the third year. when Mr. McConnell and family came to move into the apartment on 5th January 1981, it was discovered that the floors had not been wax polished as promised by Mrs. Carton. So, instead of moving straightaway, Mr. McConnell took himself and family to an hotel. Since the defendant company did not seem to be getting on with it and Mrs. Carton had told him that he could deduct the cost from his rent, Mr. McConnell himself arranged to have the floors polished. That was done at a cost of $1,200 which Mr. McConnell claims to be entitled to deduct from the rent on the strength of Mrs. Carton's promise. The floor polishing being completed, the McConnell family moved into their new apartment on 13th January 1981. It was not an auspicious beginning and Mr. McConnell soon found that there were a number of other defects which Mr. Au has described as teething troubles but which Mr. McConnell regarded as substantially detracting from the enjoyment of the property. Indeed, until the first day of the hearing of this action, Mr. McConnell was contending that the flat was not ready to move into on 5th January and therefore, no rent was owing by him not only for the period 5th January to 13th January but for the whole of the period 16th December 1980 to 13th January 1981. Indeed, so confident was Mr. McConnell in making that assertion, that he did, in fact, withhold rent in respect of the whole of that period until 15th December 1982. Now, it will not be forgotten that between the beginning of 1981 and the end of 1982, the property

market in Hong Kong suffered a sea change. Prices and rents started to fall, particularly in the last quarter of 1982, and to such an extent that the prospect of staying on at Tai Pan Court for a third year at double the rent cannot have been an appealing one. The tenancy agreement contained a break clause. It gave the tenant the opportunity to determine the lease at the end of two years. On 29th October 1982, the plaintiff wrote to the defendant as follows:

"Apt. 2B Taipan Court
I hereby give notice to terminate the Tenancy Agreement in respect of the above premises in accordance with clause 4(k) thereof."

The defendant must have thought that the tenancy had commenced earlier than in fact it did, because on 10th **December** 1982, their solicitors wrote to Mr. **McConnell** in these terms:

"Re: Taipan Court Apt. 2B
We act for **Bak Ling Enterprises** Ltd. We were ins tructed that you have failed to pay the rental for the abovementioned premises for the month of November 1982. We are therefore instructed to demand immediate payment of the same from you. Unless the same is received within the next five days from the date hereof, we have firm instructions to commence legal proceedings against you for the recovery of the same.

We were further instructed that you have served a notice to our client that you intend to surrender possession of the said premises to our client on or before the 6th **December** 1982. We were given to understand that up to the present date hereof you are still occupying the said premises. We were therefore instructed to inform you that unless vacant possession of the said premises is surrendered to our client within the next seven days from the date hereof we shall deem it that you have withdrawn your said notice of earlier determination of your tenancy in the said premises and the rental demand note based on the agreed rate of rental will be issued to you for payment.

Our client will reserve all its rights to claim against you for mesne profit for your occupation of the said premises from the 7th **December** up to the time when vacant possession of the said premises is surrendered by you to our client."

Then, Mr. **McConnell** wrote what has turned out to be a most important letter. It is dated 15th **December** 1982 and addressed to the defendant's solicitors. It reads as follows:

"Taipan Court, Apt. 2B
I acknowledge receipt of your letter of 10th **December**.

My tenancy agreement gives me the right to terminate the tenancy today and not on 6th **December** as you alleged. I have exercised this right in accordance with my notice to your client dated 29th October. As from tomorrow, my contractual tenancy will be at an end but I intend to remain in occupation as a tenant under the Landlord and Tenant Ordinance until 7th January **1983**.

Entirely without prejudice to my rights under the tenancy agreement, I enclose my cheque for $36,322 made up as follows:

(a) $26,129 for rent for the period 16th **December** 1980 to 12th January 1981;
(b) $30,000 for rent for the period 13th November 1982 to 12th **December** 1982;
(c) $2,903 for rent for the period 13th **December** 1982 to 15th **December** 1982;
(d) $21,290 for rent as agreed by me, alter-natively mesne profits for the period 16th **December** 1982 to 7th January **1983**;
(e) $6,000 on account of management fee properly due until I vacate the premises.

I have always maintained that I was not given possession of the apartment until 13th January 1981. I intend to sue your clients for damages for failing to deliver up possession to me at the start of the tenancy, namely, on 16th **December** 1980. I also intend to sue your client for a refund of part of all of the management fees which I have paid on the grounds that the amounts charged are excessive and are unverified by proper accounts. Please let me know by return whether you have instructions to accept service of the writ.

Furthermore, I wish your client to be on notice that if my deposit is not returned in full within 14 days after I have delivered up possession, I shall start immediate proceedings for its recovery.

To complete your client's records, I enclose in duplicate Form TR5 signed by me."

I have not been told why Mr. **McConnell** wrote in the terms he did but I suppose that it must have been inconvenient for him and his family to move out just before Christmas. On any view, it was a bold thing to do and, perhaps, foolish. It is the kind of letter which should only be written by someone who is quite sure of his facts and of the law. As to the law, Mr. **McConnell** was dismally wrong. As to the facts he was fortunate because it seems that he neither knew nor cared as to whether or not the defendant had found a new tenant. Not surprisingly, Mr. Au was furious. He took the adivce of his solicitors who told him that Mr. **McConnell** might well be entitled in law to do as he proposed. In any event, it is obvious that there was little that the defendant could do to evict Mr. **McConnell** between 15th **December** 1982 and 7th January **1983**. It was a fait accompli. He has told me that he was worried about the cheque and fearing that it might be countermanded if he waited any longer he banked it on 5th January **1983**. On 8th January **1983**, Mr. Au drafted a letter in response to that of Mr. **McConnell's** of 15th **December** 1982. But on 10th January **1983** before it could be typed, he received Mr. **McConnell's** note returning two of the keys to the flat. In consequence, his draft was amended save for the date, typed out, signed, handed to the messenger for posting but for some reason never arrived on Mr. **McConnell's** desk. In those circumstances, the relevance, or at any rate the importance, of that letter is doubtful to say the least but it has played its part in this action and I shall reproduce its terms here:

"Taipan Court Apt. 2B
This is to refer to your letter of 7th January **1983** with which you have returned two keys to the abovementioned apartment.

We must, however, remind you that you must arrange for all appliances, equipment and fixtures to be inspected by and duly handed over to our Supervisor and make good any defects and damage to our satisfaction at your expense. The mere return of two keys out of 20 sets does not relieve you of your responsibility to deliver vacant possession of the premises in good and rentable condition as stipulated in the Tenancy Agreement.

Moreover, you have unilaterally occupied the premises without our consent after your tenancy had expired on 15th **December** 1982, thus making yourself liable to pay the monthly rent of $60,000 for January at least if you can hand over the premises to us after the joint inspection. What is more, you will have to settle the unpaid share of your Maintenance fees for the period **December** 1980-September 1982 of $5,089.19 and that for Oct.'82-January '83, if any, as well as $1,200 you deducted from your March 1981 rent and the Rates for July-Sept '82 of $2,449.50 plus interest $694.50.

In your interests you should arrange with our Supervisor, Mr. Tsang, to have a joint inspection of all the appliances, equipment and fixtures as well as the general condition of the premises by 15th January **1983** before noon so that you can formally surrender the premises to us. Failure to do so will make yourself liable to pay the rental at the rate of $60,000 per calendar month and to pay damages resulting from your unwarranted delay in handing over the premises and the keys properly."

So as matters turned out, there never was any reply from Mr. Au to either the plaintiff's letter of 15th **December** 1982 or his note of 7th January **1983** and the next thing that happened was the issue of the writ.

I shall need to mention management charges and rates, but those matters apart, I have set out the facts as I have found them to be. There were really only two areas of conflict for me to resolve. One concerned the wax polishing of the floors and the other the letter written by Mr. Au dated 8th January **1983**. As to the first of those matters in contention, it was said by Mr. Au and a Miss Chan, who works for him, that Mrs. Carton was never told that the floors would be polished; that she was not their agent for any purpose and that certainly she was not authorised to make any promises about waxing floors or to offer for it to be done. I have heard Mrs. Carton as well as Mr. Au and Miss Chan. Mrs. Carton has told me that when she wrote the letter of 26th November 1980, she did so with Mr. Au's express authority and that, likewise, she only suggested to Mr. **McConnell** that he have the floors polished himself and deduct the cost from the rent having first spoken to Miss Chan. If that be so, the question of agency or holding out may appear to be of small significance. But Mrs. Carton also told me that she was engaged as the defendant's agent and indeed, was, at one stage, offered the sole agency. Mr. Au' s and Miss Chan's recollections are different. And on the question of agency, they point to the fact that the commission was to be earned from the tenant, not the defendant. Well, it would be a wonder if after this interval of time and without recourse to documents, anyone could remember what was said about floor polishing. It is not a question of veracity: it is a question of recollection, I prefer the evidence of Mrs. Carton, supported to an extent as it appears to be by contemporaneous

correspondence. Likewise, if it had been necessary for me to find whether or not Jones Lang Wootton were the defendant's agents or were held out as being so for the purpose of writing the letter of 26th November 1980, I would have so held.

The letter of 8th January **1983** is controversial because counsel insisted on cross-examining Mr. Au on the basis that it been manufactured for the purpose of this litigation. The foundation for that suggestion was that (1) the date was plainly wrong because the letter to which it purported to reply was not delivered until 10th January **1983**; (2) it was never received; (3) Mr. Au retained the draft which is said to be odd. Now, when looked at, the draft is seen to be written on the back of a blank application form which would have had to have been if completed and submitted by 12th January **1983**. In other words, it is the sort of piece of paper that might have been lying around at the time when the draft is supposed to have been written. The draft itself has obviously been corrected to take account of the receipt of the second letter and entirely accords with Mr. Au' s explanation. The fact that the letter was never received is explicable on a number of grounds, not all of which have to do with carelessness at Mr. Au' s end. The allegation is a very serious one and I gave counsel the opportunity in the absence of the witness to explain on what basis it was being pursued and to what issue in the case it related. As to the former, the only bases offered were those which I have set out and as to the latter, counsel was unable to say how the cross-examination might be relevant to any issue in the case, but sought to justify the course taken on the ground that some use might be made of the letter which he was unable to anticipate. I suppose it might also have been said that it went to the question of credibility though, with little force, since Mr. Au' s word was not being called in question on any other matter. Now, counsel does have a duty to put his case plainly and fearlessly as occasion requires. But in this instance, I thought it right to intervene to cut short a line of cross-examination which was offensive to the witness, irrelevant to any issue in the action and grounded upon an insufficient basis. Before leaving the subject, I shall make two further observations. The first is that the letter even if received could not have advanced the defendant's case as presented in the slightest degree, and the second is that counsel, very properly and commendably, assumed full responsibility for the cross-examination making it absolutely clear that it was not a line suggested to him by either his professional or lay client.

Those facts have been productive of a great many issues. A glance at the colourful pleadings will show that the issues have changed from time to time and indeed, at one stage on one matter, there was as between the parties a complete reversal of position. Some of the matters are relatively trivial but have not been neglected because of that. They seem to fall into three groups: (1) matters of dispute arising between the parties during the two-year period, **December** 1980 to **December** 1982. (2) matters connected with the so called termination of the tenancy after two years and the plaintiff's status thereafter. (3) the deposit. I shall deal with them in that order but counsel must forgive me if I fail to refer to all of their arguments. I shall content myself with reference to those which have been material to my decision.

1.(a) The polishing of the floors

Did the defendant company through Mr. Au or Miss Chan promise to wax polish the floors of the flat? I have found that Mr. Au did and that his promise was transmitted to the plaintiff's agent, Mr. Morgans, by the letter of 26th November 1980. Does it matter in those circumstances whether Mrs. Carton was acting as the plaintiff's agent or merely as a conduit-pipe through which the promise was passed? In my judgment, it matters not and the practical effect is the same. If it were necessary for me to do so, as indicated, I should find that Mrs. Carton was acting as the defendant's agent for the purpose. Did the promise amount to a collateral warranty? In my judgment it did, and it was a warranty which Mr. **McConnell** through his partner, Mr. Morgans, relied upon in entering into the tenancy agreement. Was the defendant company in breach? Clearly, as at 5th January 1981, the floors had not been wax-polished and no one suggested that they had. The defendant was in breach. What is the proper measure of damages? It should be remembered that Mr. **McConnell** and his family went into an hotel for a few days until at Mrs. Carton's suggestion, he had the floors wax-polished himself. At one time, it was being suggested that the claim for breach of this warranty would include all the rent, rates and management charges from 16th **December** 1980 through to the date when actual occupation took place on 13th January 1981. That is the pro-position put forward in Mr. **McConnell's** letter of 15th **December** 1982. It was the basis on which he retained rent for that period until 15th **December** 1982, and it was reproduced in his Statement of Claim. Of course, the suggestion is nonsense. On the first day of the hearing, very sensibly the claim in that form was abandoned. What Mr. **McConnell** has lost through the breach of warranty is the enjoyment of the flat for so long as it took to have the floors polished. He would not have been entitled in **December** 1980 any more than he was in January 1981 to sit back in his hotel room and allow time to run during which the work was

not carried out. He was bound to remedy the defect and so to migitage his damage. That is what he did when it became apparent that the defendant company was not about to honour its promise. He had the work carried out. It cost $1,200. The only matter that exercised my mind for a time was whether or not it was reasonable for the **McConnell** family to decline to move in or whether they should have simply moved out for the day or however long it took for the work to be done. I have come to the conclusion that it was reasonable for them to do as they did. Mr. **McConnell** was not to know that the work would not have been carried out on 5th, 6th or 7th of January. As soon as he realised that there was every chance that it would not be carried out, very rightly he took the matter into his own hands. Mr. Yu has argued that the only damages properly recoverable would be the charges made upon Mr. **McConnell** by the hotel. They have not been asked for. Well, I agree, they might have been claimed and they might well have come to a greater amount than that which Mr. **McConnell** is going to recover under this head. I take the view that what Mr. **McConnell** lost was the enjoyment and therefore the value of his flat for the period 5th January 1981 to 12th January 1981. The rent and management fees appropariate to that period would have been $8,423.74. That is the amount together with the cost of the work which, in my judgment, he is entitled to recover for breach of warranty.

(b) Other defects

Complaint was made in the Statement of Claim of a number of other defects which Mr. **McConnell** found in the flat after moving in. They have been the subject matter of correspondence. They were made the basis of a claim by the plaintiff for breach of an implied warranty that the demised premises would be in a reasonably fit state for habitation prior to the commencement of the tenancy. By and large, they do not appear to have been of a serious nature but there is no doubt that an investigation into each and everyone of them in this hearing would have been lengthy and disproportionately expensive. The plaintiff has not pursued his claim in relation to them.

(c) Rent

It seems that after Mr. **McConnell** paid his cheque for $86,322 on 15th **December** 1982, there was still a shortfall of rent of $2,168. That sum is counterclaimed by the defendant. The claim is not resisted and, in due course, the defendant must succeed on his counterclaim for that amount at least. There is no counterclaim for interest on rent withheld by Mr. **McConnell** but that is not to say that the breach of agreement alleged to arise out of the failure to pay rent on due date is to be disregarded for all purposes.

(d) Rates

There was a mix-up over rates for the period 1st January 1981 to 30th June 1982. Mr. Au wrote to Mr. **McConnell** at his firm's address on 16th July 1982 pointout out that there had been a demand for rates for that period of $15,431.85 and that the Legal Department was threatening action. He asked Mr. **McConnell** to send him a cheque by 20th July. Mr. **McConnell** paid the amount of the rates to the Rating Authority on 20th July but instead of letting Mr. Au know in terms what he had done or was about to do, someone of his firm wrote a rather silly letter dated 17th July 1982. In the result, the defendant also paid the rates a few days later and it took several months for them to recover their money back from the department concerned. That has resulted in the claim for interest. Now, I, think that the whole business was completely unnecessary and it is regretable that the defendant was not told that the rates had been paid on 20th July when, in fact, they were. I am asked to infer, however, that Mr. **McConnell** must have received an earlier rates demand which, in breach of his tenancy agreement, he neglected to pay. The evidence does not go as far as that in my judgment and the defendant's claim for interest on the sum of $15,431.85 fails. But at the end of the day, there was still an underpayment of rates in the amount of $2,168 which Mr. **McConnell** is bound to pay. The defendant will recover that sum under its counterclaim. I am not satisfied, however, on the evidence before me that there was any breach on Mr. **McConnell's** part to pay that modest sum on due date.

(e) Management Fees

Both parties make claims in relation to management fees. Put shortly, the defendant claims that Mr. **McConnell** owes $5,194.47. Mr. **McConnell** claims that on an account being taken, it will appear that far from being indebted to the defendant, he has overpaid. He says that the charges made of him have never been explained properly, some are unsupported by vouchers and some related to matters which it is not correct to include under this head. I was told that the investigation of this part of the case was likely to take a very long time indeed and, once again, would have resulted in costs quite disproportionate to the amount involved. Very

sensibly, therefore, the parties have agreed that I should order an account to be taken by the Master and, in due course, that is what I shall do in terms which have the agreement of both counsel.

2.(a) The plaintiff's notice of termination

The plaintiff's case is that his letter of 29th October 1982 was good to determine the tenancy at the end of the second year. The result is, he says, that the most he is liable to pay is a mesne profits at the rate of $30,000 per month for the period of his occupation which was up to either 7th January or 10th January depending on the view taken of the facts, mine being that it was on the earlier date. The defendant contends that the notice was ineffective and, therefore, that the tenancy continued to run into the third year with the serious consequence for the plaintiff that he has become liable for a rent for the third year at the enhanced rate of $60,000 per month.

The break clause is 4(k) of the tenancy agreement:

> 4
>
> (k) "If the Tenant is desirous of determining this present tenancy at the end of the first 24 calendar months of the term hereby granted and of such his desire delivers to the Landlord or sends by registered post to its registered office not less than one calendar month's notice in writing and pays all rent and performs and observes all the terms and conditions hereinbefore contained and on his part to be performed and observed up to such determination then and in such case immediately after the expiration of the said period of 24 calendar months this present tenancy shall cease and be void but without prejudice to any claim by either party against the other in respect of any antecedent breach of any term or condition herein contained."

Mr. Yu would have wished to argue that the notice was ineffective by reason of the letter of 15th **December** 1982 which was tantamount to a withdrawal of the earlier notice of determination. Also, Mr. Yu would have wished to put forward the breach by the plaintiff of the covenant to pay rent under clause 2 of the agreement as a ground for disentitling the plaintiff to take advantage of the break clause provision. The first of those matters was ventilated on the first day but no application to amend to rely either on the letter of 15th **December** or any breach of covenant to pay rent was made until during final speeches. I refused the application when first made in the exercise of my discretion because at that time, it seemed probable that any such amendment would lead to the hearing being adjourned in such a way as to cause unfairness to the plaintiff, and when the application was renewed quite understandably because, by that time, I had allowed a further application to amend by Mr. Bunting, I again refused for the same reason and also because upon reflection, it seemed to me that the amendment might give rise to issues which, if disclosed earlier, might have had a bearing upon the course of the evidence and in particular, upon the line taken in cross-examination. So, Mr. Yu was left with the point pleaded namely that the failure to deliver up possession was a breach of clause 2(w) or 4(g) and as such, disentitled the plaintiff to take advantage of the break clause. But, of course, the obligation to yield up possession arises at the "expiration or sooner determination of this agreement" and the condition precedent, if that is what it is, envisaged by clause 4(k) is the performance and observance of all terms and conditions "up to such determination". Therefore, in my judgment, the failure to deliver up possession could not be a breach of any term or condition antecedent to such determination and is not such as would disentitle the plaintiff to take advantage of the break clause. As to whether the failure to pay rent on due date would have been, is a matter upon which I deem it unnecessary to comment.

(b) The Landlord and Tenant (Consolidation) Ordinance

At one stage, during 0.14 proceedings, the plaintiff was claiming in the pleadings that he had been entitled to remain under the provisions of the Landlord and Tenant (Consolidation) Ordinance and by its draft defence, the defendant averred the contrary. Now, their positions are reversed. The relevant portion of section 117 of the Landlord and Tenant (Consolidation) Ordinance reads as follows:

> 117
>
> (1) "A tenancy shall not come to an end unless terminated in accordance with this Part â€¦
> (2) Subsection (1) shall not prevent the coming to an end of a tenancy by notice to quit given by the tenant, ... unless -
>
> (a) in case of a notice to quit, the notice was given before the tenant had been in occupation in right of the tenancy for 1 month."

Here there was a notice to quit given by the tenant which was within the definition given to such a notice by section 115 subsection (1) being a notice to terminate the tenancy in accordance with the express or implied provisions of that tenancy. Any argument, therefore, that there was, in fact, a continuation of this tenancy under the provisions of Part IV of the Ordinance must fail and in fairness to Mr. Yu, I must say that it was not pursued with any great enthusiasm. The second branch of Mr. Yu' s argument under this head is that by reason of the letter of 15th **December** 1982, the plaintiff is precluded from denying that he continued in occupation under a statutory continuing tenancy. The importance of the contention, it it be right, lies in the fact that such continuing tenancy was not determined until well into **1983** by any notice sufficient for the purpose, and it would follow that Mr. **McConnell** would remain liable for rent at the old monthly rate at least until that time. The argument must proceed upon the basis that there was a promissory estoppel created by that letter because any representation which the letter can be said to contain must be a representation of law. Even on the alternative basis, that is promissory estoppel, I have the greatest difficulty in reading into the letter anything other than a representation of the plaintiff's belief that he was entitled to remain in occupation. Secondly, there is no evidence that the defendant relied upon any such promise, if that is what it amounted to, and certainly none that it altered its position because of such a promise. Such evidence as there is goes to the contrary effect. Mr. Au told me that, having received this letter, he took the advice of his solicitors and it was they who told him that the plaintiff might be able to carry out his intention under the protection of the Ordinance. If Mr. Au relied upon anything, it was upon the advice which he received from his own solicitors and for that reason if no other, the plea of estoppel fails. It is not necessary for me to go on to consider the other arguments against this proposition, not the least impressive of which is that here is an attempt make offensive use of the doctrine.

(c) Monthly tenancy

Clause 4(n) of the tenancy agreement provides that in the event of a tenant continuing in occupation after the expiration of the term with the landlord's consent, he shall be considered to be a monthly tenant. It is alleged in the alternative that that is what Mr. **McConnell** became and, if so, from his point of view the consequences are dire because it could be argued that the monthly tenancy under that clause has never been determined by notice of one calendar month as required. Mr. Bunting has argued that clause 4(n) can have no application where the tenancy has been brought to an end by operation of the break clause. As a matter of construction he may well be right but it matters not because I decide the point in his favour, on the ground that the continuing occupation was not at any time consented to by the defendant. The letter of 10th **December** 1982 cannot be read as giving consent to anything other than Mr. **McConnell** remaining in occupation under the terms of the original tenancy agreement and the reference to mesne profits in the final paragraph is a clear indication that his remaining there on any other basis would lead the defendant to treat him as a trespasser. Nor, in my opinion, can any consent be inferred from the banking of the cheque which was, in any event, tendered on a without prejudice basis. So that argument fails also.

3. The deposit

The plaintiff claims back the $60,000 deposit. Inter alia, he pleads in paragraph 15 of his Statement of Claim that:

"Notwithstanding that the Plaintiff delivered up vacant possession of the demised premises to the Defendant on 8th January **1983**, has observed all the terms and conditions of the Tenancy Agreement and has paid rent, alternatively mesne profits for the period 16th **December** 1982 to 8th January **1983**, the Defendant, despite demand has failed to refund the Plaintiff's said deposit or any part thereof."

In so doing, he picks up the provisions of clause 5 of the tenancy agreement which it is necessary to set out in full:

> 5. "To secure the due performance and observance of the terms and conditions on the part of the Tenant herein contained the Tenant shall on the signing hereof pay to the Landlord by way of deposit the sum of HONG KONG DOLLARS SIXTH THOUSAND ONLY (HK$60,000.00) being the equivalent of two (2) months' current rent, which shall be subject to increase in the event of any rental revision or increases in rates and management fees.
> After the determination of the said term and provided the said rent hereby reserved shall have been paid on due date and all other terms and conditions herein contained shall have been duly performed and observed by the Tenant the Landlord shall return to the Tenant the said deposit money without interest within a period of 14 (fourteen) days after the Tenant shall have duly delivered to the Landlord vacant possession of the said Premises."

Originally, the defendant had contended that the plaintiff was not able to avail himself of any right to recover the deposit

by reason of the provisions of clause 4(a). It appears that that clause had not been read with sufficient care because, of course, it relates to the consequences of re-entry by the landlord under the provisions of the agreement. It was only by a relatively late purple amendment during the hearing that the defendant prayed in aid the terms of clause 5 set out above. It was for that reason and because it raised an issue which could not have been affected in any way by the evidence that I allowed Mr. Bunting, at a very late stage indeed, to plead in the alternative that clause 5 is a penalty. On my findings, Mr. **McConnell** was in breach of his covenant to pay rent on due date and also of his covenant to yield up the premises at "the expiration or sooner determination of the term". But Mr. Bunting argues that clause 5 which, he rightly says should be construed contra proferentem, is not to be read as disentitling the tenant to the return of the deposit in the event of breach but as an attempt to compensate the landlord in money terms for loss or damage resulting from breach. He seems to think that the omission of any words expressly forfeiting the deposit is conclusive of the matter. What should happen, he says, is that any sum not necessary to satisfy a properly made out money claim by the landlord should now be returned. I am afraid that I cannot agree with his construction of the clause. It is not expressed as being a sum paid to secure the landlord against breach of covenant but "to secure the due performance and observance of the terms and conditions on the part of the tenant herein contained". It seems to me that the absence of the word "forfeiture" is of no consequence if otherwise the meaning and effect of the clause is plain from the words used which, to my mind, is the case. It is intended that the whole of the deposit should be irrecoverable if there have been breaches of the agreement on the part of the tenant and the mere fact that a single minor breach would lead to that result is, as a matter of construction, unimportant if the meaning of the words is plainly to that effect.

So, if the clause is not to be construed as compensatory, it must, says Mr. Bunting, be a penalty. I agree. That is precisely what it is, a penalty clause. But it does not mean as Mr. Bunting submits that it is void. It means that if the money had not been paid, the clause might not be enforceable save, perhaps, insofar as might be necessary to compensate the landlord and if, as in this case, it has been paid, the court may, in certain circumstances, give relief. It rather seems that as a matter of practice the courts have declined to relieve against forfeiture of deposits given in contracts for the sale of land,[(1)] and that the learned authors of Woodfall on Landlord and Tenant considered that the same approach is likely to be followed in cases of deposits paid pursuant to tenancy agreements. I do not think that any general principle is to be extracted from decisions which must necessarily turn upon their own facts but that the right approach, if I may respectfully say so and one which in any event I am bound to follow, is that of the Full Court in Wong Kam Kong v. Intercontinent Mercantile Co .,[(2)] That case is authority for the proposition that there may well be jurisdiction in equity to grant relief against forfeiture of a deposit if either the agreement providing for forfeiture or, possibly, the act of forfeiture itself is unconscionable. I see nothing in that statement of the law which is inconsistent with other decided cases and it is one which I respectfully propose to adopt and to apply to the facts of the present case. Now, had Mr. **McConnell's** breaches been of the kind postulated by Mr. Bunting in his arguments on construction it might well have been unconscionable for the defendant to retain the deposit or more than a modest portion. If at the end of the day, the amount of rent outstanding was small and that due only to some arithmetical mistake on Mr. **McConnell's** part or had his only breach been some minor misuse of the premises at an early date in the term, matters might have stood differently. But here the breaches were substantial. They involved the retention of rent due and owing for upwards of 18 months and the subsequent misguided refusal to deliver up possession on due date. It was to secure the performance and observance of such terms and conditions that the deposit was taken and it was by reason of their breach, that as I now find, the plaintiff is disentitled to its recovery.

After making all adjustments, there will be judgment for the plaintiff on the claim in the sum of $8,423.74. There will be judgment for the defendant on the counterclaim in the sum of $4,611.97 which include an agreed sum for management fees in arrear of $1,194.47. Plaintiff's costs on claim on District Court upper scale with certificate for counsel. No order as to costs on counterclaim. Order account as to management fees to be taken by the Master in terms of the draft order agreed between the parties. Order for payment out of $3,811.77 from $60,000 to the plaintiff's solicitors within 7 clays. The balance be paid out to the defendant's solicitors within 7 days.

Footnotes

(1) See Hinton v. Sparkes (1868) LR 3 CP 161

(2) /1968/ H. K. L. R. 331

[1983] HKEC 357

Thomson Reuters Hong Kong Limited

End of Document