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DCCJ 4857/2004

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

CIVIL ACTION NO. 4857 OF 2004

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BETWEEN

KO CHING CHUNG Plaintiff

and

FULLTIN INVESTMENT LIMITED Defendant

———————

Coram : Her Honour Judge H.C. Wong in Court

Dates of Hearing : 20 – 22, 24 March and 9 May 2006

Date of Handing Down Judgment : 29 June 2006

JUDGMENT

1. In this action, the Plaintiff claims against the Defendant for the return of the deposit in the sum of $284,000.00 paid by the Plaintiff to the Defendant pursuance to a provisional tenancy agreement dated 2nd August 2004 together with damages in the sum of $13,088.00.

2. The Defendant is and was at all material times a company incorporated under the Laws of Hong Kong carrying on its business at

Rooms 2101-4, 21st Floor, China Merchants Building, 152-155 Connaught Road Central, Hong Kong. The Defendant is and was at all material times the registered owner of Shops A, B, C, D and E, Mezzanine Floor, Nam Wing Building 49 – 51A Sing Woo Road, Happy Valley, Hong Kong ("the suit premises").

The Plaintiff's Case

3. In or about July 2004, the Plaintiff and his partners decided to embark on a Japanese restaurant business and began looking for suitable premises in Happy Valley. On or about 28th July 2004, the Plaintiff visited the suit premises with a Mr. Gary Ching of C & C Properties Consultants Limited. He was introduced to a Mr. Edmund Lau of the Defendant. At that meeting, Mr. Lau was informed by the Plaintiff that he intended to rent the premises and operate a Japanese restaurant therein.

4. It is Mr. Ko's evidence that at that visit to the suit premises Mr. Lau informed him the premises were once used as a Thai restaurant and suitable for use as a restaurant. The Plaintiff claimed this was the first representation made by Mr. Lau on behalf of the Defendant. At the time, Mr. Lau had introduced himself as a senior real estate administrator and managing director of the EC group, which owned the suit premises.

5. At the subsequent meeting on 2nd August 2004, Mr. Ko claimed that Mr. Lau again represented to him that the suit premises were fit for restaurant operation. Mr. Ko regarded the representation made on 2nd August the 2nd representation by the Defendant. He claimed Mr. Lau told him to trust him and rely on his professional qualifications in real

estate.

6. It is the Plaintiff's case that in reliance of the 1st and 2nd representations, the Plaintiff was induced into entering a provisional tenancy agreement on 2nd August 2004. It is the Plaintiff's case that the provisional tenancy agreement was therefore partly in writing and party oral incorporating the two representations made by Mr. Lau to Mr. Ko. As a result, Mr. Ko drew 2 cheques, the first dated on 2nd August 2004 in the sum of $142,000 and the second in the sum of $142,000 dated 14th August 2004.

7. It is Mr. Ko's evidence that on or about 4th August 2004 the surveyor engaged by Mr. Ko, Mr. Leung Ka Hung of Excel (Building Services) Associated Limited, and his contractor informed him that the suit premises were not structurally adequate to be used for general restaurant purposes and Mr. Ko would not be able to obtain a general restaurant licence at the suit premises.

8. Mr. Ko informed Mr. Lau of the matter on 5 August 2004 and Mr. Lau recommended Mr. Raymond Chan of Raymond Chan Surveyors Limited to Mr. Ko to handle the application for a general restaurant licence for the suit premises. On 23rd August 2004, he was informed by Mr. Raymond Chan that the suit premises were structurally inadequate to be used for general restaurant purpose and that Mr. Ko would not succeed in obtaining a general restaurant licence for the suit premises. He advised Mr. Ko to operate a club house at the suit premises because it was structurally suitable for club purpose.

9. Consequently, Mr. Ko decided not to commit to the tenancy and demanded the return of the deposit paid to the Defendant in the sum of $284,000.00. The Plaintiff further claimed for damages incurred because of the misrepresentations made by the Defendant in the sum of $8,088.00 stamp duty paid on the provisional tenancy agreement and professional fees paid to Raymond Chan Surveyors Limited for the inspection of and report on the suit premises in the sum of $5,000.00, making a total of $13,088.00.

The Defence's case

10. It is the Defendant's case that prior to 28th July 2004, Mr. Ko had visited the suit premises on no less than three occasions. That Mr. Ko's party who visited the suit premises prior to 28th July 2004 had included a gentleman who introduced himself as a Japanese designer of restaurants and they were shown the suit premises by Mr. Chan of the management company of the building.

11. It is Mr. Lau's evidence that at the site visit on 28th July 2004, Mr. Ko was with Mr. Terrance Tang, Mr. Ono and Mr. Gary Ching, the Plaintiff's estate agent. The Defendant was represented by Mr. Lau. He supplied information on the suit premises to Mr. Ko including particulars of the construction area, government lease period, user of the premises together with pictures and floor plans of the suit premises.

12. It was Mr. Lau's evidence that he informed Mr. Ko on that occasion that according to his knowledge, part of the suit premises namely Units A, B, C and D, were once used as a Thai food restaurant. Mr. Lau

denied that he had ever on that particular occasion or at any other time represented to Mr. Ko in any way that the suit premises were fit for a restaurant business. Mr. Lau claimed that he had informed Mr. Ko unequivocally that whether the suit premises would be suitable for restaurant business was a matter entirely for the tenant and it is up to the tenant to make an application for restaurant licence before the operation at the suit premises.

13. Mr. Lau admitted that on 5th August 2004, Mr. Ko contacted him and informed him that according to the surveyor and a contractor appointed by him there were certain difficulties in the application for a general restaurant licence and the suit premises were suitable for used as a club house only. Mr. Ko indicated he was seeking a second opinion in the application of restaurant licence for the suit premises. At Mr. Ko's request, Mr. Lau introduced Mr. Raymond Chan Surveyors Limited to Mr. Lau to seek a second professional advice on the application of restaurant licence.

14. On or about 12th August 2004, Mr. Lau said he was contacted by Mr. Ko who requested postponement of the deadline for signing of the formal tenancy agreement on 14th August 2004. The parties then agreed to the postponed date of 24th August 2004 on condition that Mr. Ko would pay the balance of the rental deposit and the first month's rental. Mr. Ko also agreed that he would pay to the Defendant the rent for the period from 15th August to 24th August 2004 as an additional compensation to the Defendant.

15. It is the Defence's case that the terms of the provisional tenancy agreement had clearly stipulated it was the responsibility of Mr. Ko to obtain the lawful operation licence from the relevant government authorities before the operation of the business and that the suit premises were let to the Plaintiff on a "as is" basis.

16. The Defendant denied there were any condition precedent or implied terms to the provisional tenancy agreement to the effect that the premises were suitable for general restaurant purposes during the subsistence of the proposed tenancy term. The Defendant further denied that it had committed any breach of the provisional tenancy agreement or that it had through Mr. Lau or anyone made the two representations to Mr. Ko. The Defendant further denied that Mr. Ko had accepted or relied on the two representations even if they were made.

17. The Defendant counterclaims against the Plaintiff for breach of the provisional tenancy agreement by refusing to sign the formal tenancy agreement on or before 14th August 2004 or alternatively on or before 24th August 2004. The Defendant claimed that it had suffered loss and damages as a result, and that it is entitled to recover from the Plaintiff compensation due to the Plaintiff's breach of contract in the sum of $21,935.48 being the rental for the period from 15th – 24th August 2004. Further, the Defendant claims that it is entitled to forfeit the rental deposit after the Plaintiff repudiated the provisional tenancy agreement. The Defendant further claims damages to be assessed against the Plaintiff for his breach of contract.

The Issues

18. The issues in this case are:

(1) Did Mr. Lau of the Defendant make the two representations to Mr. Ko before the signing of the provisional tenancy agreement?

(2) If the two representations were made, did they become a term or condition of the provisional tenancy agreement, or were they misrepresentations.

(3) Who was in breach of the provisional tenancy agreement?

Findings

Were the Representations made?

19. At the close of the Plaintiff's case, the Plaintiff applied to amend the Statement of Claim to include under Paragraph 6 the representation allegedly made by Mr. Lau to the Plaintiff that the premises "Was once used as a restaurant and was fit for restaurant business and also fit for an application for restaurant licence from relevant government authorities" ("1st Representation"). Under paragraph 7 of the amended Statement of Claim, the 2nd Representation was pleaded as follows: "At the meeting held at the Defendant's offices on or about 2nd August 2004 it was again represented by Lau on behalf of the Defendant that the premises was fit for carrying on the business and also fit for an application for a

restaurant licence from relevant government authorities (2nd Representation)."

20. It was Mr. Ko's evidence in paragraph 6 of his witness statement that during the inspection on 28th July 2004 he had unequivocally informed Mr. Lau he planned to open a Japanese restaurant and he had asked Mr. Lau if the suit premises could be used for restaurant purpose. Mr. Ko claimed that Mr. Lau expressed he understood Mr. Ko's intention and said to him and his party that the suit premises had been used as a Thai restaurant about 5 or 6 years ago. He also unequivocally told Mr. Ko that "the premises could definitely be used for restaurant purpose and even guaranteed what he said by his professional qualifications." (paragraph 6 of Mr. Ko's witness statement). Mr. Ko further stated that he then bought two structural plans of the suit premises from Mr. Lau for $20. Mr. Lau then told him he could recommend a surveyor to help him to apply for a restaurant licence.

21. Mr. Ko and Mr. Lau met again on 2nd August 2004 to discuss the terms of the tenancy at the Defendant's office. Mr. Ko claimed Mr. Lau told him he was one of the directors of the landlord company and again stated to Mr. Ko the premises could be used for restaurant purpose and urged Mr. Ko and his partners not to worry. It was because of this assurance that when Mr. Lau took out the provisional tenancy agreement printed on the Defendant's letterhead, Mr. Ko signed the agreement. It stated that the tenancy agreement to be a 5 year term commencing from 15th August 2004 at a monthly rental of $68,000 for the 1st to 3rd years and for the 4th and 5th years at $75,000 a month. It is not disputed that Clause 9 of the provisional tenancy agreement stated that the deposit of

$213,000.00 equivalent to three months rental plus three months rates and management fees have been paid by the tenant to the landlord on signing of the provisional tenancy agreement. Clause 14 further stipulated, "during the tenancy term, the premises shall be used for general restaurant purpose or other lawful business to be approved by the Landlord," and that application of the relevant operational licence would be the tenant's responsibility.

22. It is not disputed that Mr. Ko and his partner Mr. Cheng after perusing the provisional tenancy agreement signed the provisional tenancy agreement. He requested the deposit be split up into two instalments, he then drew two cheques in favour of the Defendant, dated 2nd August 2004 and 14th August 2004 in the total amount of $284,000.00.

23. It was Mr. Lau's evidence that at the 28th July visit, Mr. Ko had asked him about restaurant licence applications. Mr. Lau claimed he told Mr. Ko he could not offer much help for he had neither knowledge nor experience of such applications but he did inform Mr. Ko that units A, B, C and D had previously been used as a Thai restaurant. Mr. Lau also claimed he told Mr. Ko unequivocally that whether the premises would be suitable for restaurant business was a matter entirely for the Plaintiff. He said the Defendant would not give any guarantee to such a matter.

24. Mr. Lau admitted that he believed the Plaintiff was a sophisticated businessman even though he may not be knowledgeable in the setting up of a restaurant. Mr. Lau denied on 2nd August 2004 he had made any representation to Mr. Ko or gave any assurance or guarantee to him that the premises would be fit for general restaurant purpose. He

reiterated to Mr. Ko that the suit premises would be let out on an "as is" basis and that it was his own responsibility to ascertain if the suit premises were suitable for his purposes and reminded him he had to obtain the requisite licence from government authorities. Mr. Lau claimed Mr. Ko was fully aware of his position and his responsibility before he signed the provisional tenancy agreement.

25. On the other hand, Mr. Ko claimed that Mr. Lau had introduced himself at the 28th July 2004 visit as an experience real estate administrator. Mr. Lau gave him a name card that described him as a senior real estate administrator, Secretary-General of Hong Kong Chamber of Economics and Trade, Member of the Political Consultative Committee of Changchun City and Managing Director of EC Group, with a list of companies under the EC Group. Mr. Ko claimed that because of the aforesaid introduction he accepted Mr. Lau to be an experienced real estate administrator and who had served a long time in the real property industry. During that 28th August 2004 visit by Mr. Ko which lasted 2 to 3 hours, he claimed he was assured by Mr. Lau there should be no problem for Mr. Ko to operate a Japanese restaurant at the suit premises and he could recommend an expert surveyor to Mr. Ko for the application of a restaurant licence at the premises.

26. At the 2nd August 2004 meeting with Mr. Lau, Mr. Ko expressed an intention to lease the suit premises, he asked again if he and his partner could get a restaurant licence at the suit premises. He was again informed by Mr. Lau that there should be absolutely no problem in getting a restaurant licence. Mr. Ko claimed Mr. Lau had guaranteed to him with his qualification as a real estate administrator. He also stated he would

introduce his good friend, Mr. Raymond Chan, a surveyor and a license application specialist, to Mr. Ko for the purpose. After that Mr. Lau produced the provisional tenancy agreement for Mr. Ko to sign.

27. Mr. Ko claimed that he had wanted to instruct surveyors to do a feasibility study of the premises, but it was not done before he signed the provisional tenancy agreement because Mr. Lau had guaranteed the premises could be used as a restaurant with his professional qualification, that was why he agreed to sign the provisional tenancy agreement on 2 August 2004. As a matter of caution, he decided to split up the deposit payment in two instalments.

28. Based on the evidence of Mr. Ko, there was clearly a representation from the Defendant's managing director, Mr. Lau, that the suit premises were fit for the operation of a Japanese restaurant and a restaurant licence could be obtained. On the other hand, Mr. Lau claimed he had merely made a reference that there was a Thai restaurant at units A., B, C and D before. The reason why Mr. Lau made the reference to the Thai restaurant at the suit premises previously was clearly intended to assure Mr. Ko that the premises must have had a restaurant licence before.

29. Based on the evidence of both Mr. Ko and Mr. Lau, on a balance of probabilities, there were clearly representations made by Mr. Lau to Mr. Ko that the suit premises were suitable for the operation of a Japanese restaurant. Mr. Lau admitted that Mr. Ko was a sophisticated businessman but he was inexperienced so far as operating a restaurant was concerned. I accept Mr. Lau had also informed Mr. Ko he shall need a team of people to assist him to design the premises, contractors to

construct the interior of the restaurants, to install plumbing and fire fighting equipments suitable for a restaurant and, most of all, a surveyor who would be knowledgeable about licence requirements for the application to be made. The reason that Mr. Lau referred to these matters was obviously because he understood Mr. Ko to be inexperienced in opening a restaurant and ignorant of the requirements for a restaurant licence to be obtained. Mr. Ko had confessed his lack of experience in the operation of restaurants and reiterated his concerns for a restaurant licence at the suit premises at the 2nd August meeting to Mr. Lau. I accept that Mr. Lau reassured him that because the premises had been a Thai restaurant there should be no problem but informing Mr. Ko it is up to the tenant to make the necessary application for a licence as stated in the provisional tenancy agreement.

The Law on Representations and Warranty

30. According to the authors of Chitty on Contract 29th ed. volume 1, page 203, para. 2 – 161:

> "Other statements which induce persons to enter into contracts have some effect in law, but exactly what that effect is often turns on whether they are "mere representations" or have contractual force. The distinction between these categories turns on the test of contractual intention. In cases concerning the effect of such statements, the test of intention generally determines the contents of a contract, the existence of which is not in doubt. But where the inducing statement for some reason cannot take effect as a term of the main contract it may, nevertheless, amount to a collateral contract; and whether it has this effect again depends on the test of contractual intention."

The authors further stated:

> "It follows that an oral statement made in the course of negotiations will not take effect as collateral contract where the terms of the main contract show that the parties did not intend the statement to have such effect. This was, for example, the position where the main contract contained an "entire agreement" clause: this showed that statements made in the course of negotiations were to "have no contractual force."

31. In the English Court of Appeal Case of *Esso Petroleum v. Mardon* [1976] 1 Q.B. page 801, Lord Denning M.R held at page 820:

> "A professional man may give advice under a contract for reward; or without a contract, in pursuance of a voluntary assumption of responsibility, gratuitously without reward. In either case he is under one and the same duty to use reasonable care: see *Cassidy v. Ministry of Health* [1951] 2 K.B. 343, 359-360. In the one case it is by reason of a term implied by law. In the other, it is by reason of a duty imposed by law. For a breach of that duty he is liable in damages: and those damages should be, and are, the same, whether he is sued in contract or in tort."

32. At page 824 of the same report Lord Ormrod went on to consider the difference between representation and warranty. He cited at 824 a dicta of Lord Denning M.R. in *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.* [1965] 1 W.L.R. 623, 627:

> ' "Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act upon it, and actually inducing him to act upon it, by entering into the contract, that is prima facie ground for inferring that it was intended as a warranty."
>
> On the other hand there are dicta, particularly in the speeches in *Heilbut, Symons & Co. v. Buckleton* [1913] A.C. 30, which suggest a more restrictive or conservative approach: for example, Viscount Haldane L.C. said, at p. 37:
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> > "It is contrary to the general policy of the law of England to presume the making of such a collateral

> contract in the absence of language expressing or implying it …" …….

At p.825F, Lord Ormrod continued:-

> " A variety of tests have been suggested to determine the intention of the parties. For example, it is said that to constitute a warranty a representation must be of fact and not of opinion; or a statement about existing facts as opposed to future facts such as a forecast. To quote again, in *De Lassalle v. Guildford* [1901] 2 K.B. 215, 221, A. L. Smith M.R. said:
>
> > "In determining whether it was so intended, a decisive test is whether the vendor assumes to assert a fact of which the buyer is ignorant, or merely states an opinion or judgment upon a matter of which the vendor has no special knowledge, and on which the buyer may be expected also to have an opinion and to exercise his judgment."
>
> But he went too far in speaking of the "decisive test" which was strongly disapproved of by Lord Moulton in the *Heilbut, Symons* case [1913] A.C. 30, 50.
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> In my judgment, these tests are no more than applied common sense. A representation of fact is much more likely to be intended to have contractual effect than a statement of opinion; so it is much easier to infer that in the former case it was so intended, and more difficult in the latter."

33. Chitty on Contract Volume 1 Chap. 6 at paragraph 6–010 page 434 has this to say:

> "It is suggested that the fundamental principle which underlies the cases is not so much that the statements as to the future, or statements of opinion, cannot be misrepresentations; but rather that statements are not to be treated as representations where, having regard to all the circumstances, it is unreasonable of the representee to rely on the representor's statements rather than on his own judgment. In general this seems to be the reason why statements as to the future and statements of opinion have been held not to ground relief; in dealing with statements of this nature it has usually been felt that the representee ought not

> to have relied on the representor. It has been recognised that sometimes a statement which was on its face a statement of fact was really only one of opinion because it was apparent that the maker had no real knowledge or was simply passing on information for what it was worth. On the other hand there are circumstances in which it is perfectly reasonable for the representee to rely on the representor's statements even where those statements are matters of opinion, or statements as to the future, and where this is the case, it is thought that the statement should be treated as representation in the relevant sense."

Representation/Misrepresentation

34. I find after considering the witnesses' evidence and their demeanour in Court that Mr. Lau did make the two representations to the Plaintiff Mr. Ko at the suit premises and at his office on those two occasions.

35. Mr. Leo, counsel for the Defendant, submitted that if the Court should find the two representations were made, he would submit that:

(1) The statement that the premises were once used as a restaurant is a statement of fact and is true.

(2) The statement that the premises was fit for restaurant business, fit for carrying on the Plaintiff's business of a Japanese restaurant and fit for an application for a restaurant licence from relevant government authorities were statements of opinion.

36. Mr. Leo argued that even if the above two statements were made in strong terms they could only have amounted to strong expressions of opinion because there were insufficient grounds for any credible certainty. The application had yet to be made to the Food and Environmental Health Department ("FEHD"); such an application covers compliances of Fire Services Regulations, Health & Safety Regulations involving various government departments. Neither did the Defendant have any knowledge of what the Plaintiff intended to include in his application.

37. Mr. Leo further submitted that Mr. Lau had never suggested he was a specialist in the application of restaurant licences. He had advised Mr. Ko to retain the services of a surveyor specializing in that area, and the alleged statements remained statements of opinion.

38. The difficulties faced by the Plaintiff in the application of restaurant licence were

(1) Structural calculations submitted showed a few slabs in the concrete floor of the suit premises have a load bearing capacity of less than 5 kpa;

(2) The Building (Construction) Regulations Cap. 123B required a minimum loading capacity 5 kpa for restaurants, night clubs, dining rooms, canteens and fast food shops;

(3) The Guide to Application for Restaurant Licences

produced by the Food and Environmental Health Department stated "minimum designed loading of the premises should be not less than 5 kpa.

39. It was based on the aforesaid that the Plaintiff upon retaining two separate surveyors was advised that it would be unlikely that he would be granted a restaurant licence at the suit premises. He was advised to consider applying for a club licence at the suit premises that required a lower load bearing capacity than 5 kpa.

40. Mr. Leo, on the other hand, submitted that even if the Plaintiff's structural calculations were correct, it does not automatically mean that the premises were unsuitable for a restaurant licence to be granted. The Defendant based its opinion on the fact that the suit premises were previously used as a Thai restaurant at the time the Defendant purchased the premises in 8th August 1991. The Defendant maintained that the structural requirements for a restaurant in 1990 were the same as those today.

41. The Defence further relied on the fact that the load bearing capacity requirement of a shop is the same as a restaurant and the Building Department had approved the Defendant's change of use of the suit premises to a shop on 6th May 1994. Furthermore, a provisional light refreshment licence for the suit premises was granted on 26th April 2005 by the Food and Environmental Health Department, it became a full light refreshment licence on 4th November 2005. The Defendant maintained the structural requirement for a general restaurant licence and a light refreshment licence are the same, the load bearing capacity of the floor

slab for both remained the same at 5 kpa. Mr. Leo submitted that the Defendant knew of no structural alterations made by the present tenant at the suit premises. Mr. Liu, the Plaintiff's structural expert, admitted in Court that he had to tell his client if the floor was structurally inadequate and he would not recommend taking the risk because of the insufficient load capacity floor slabs although the Building Department may have a discretion over the matter.

42. I am not concerned as to whether a light refreshment licence was granted to the suit premises subsequently, particulars of the circumstances of the Defendant's present tenant had not been placed before the Court at the trial.

43. I am satisfied that Mr. Lau did make the representations to Mr. Ko, and I accept that those representations were made with the effect that the Plaintiff was induced into signing the provisional tenancy agreement. It is possible that Mr. Lau genuinely believed those statements to be true when the representations were made based on the history that 4 of the 5 units at the suit premises were used as a Thai restaurant when the Defendant purchased the premises. He might have mistakenly believed there should be no problem for a restaurant licence to be granted and Mr. Raymond Chan could help the Plaintiff to get that licence.

44. On the other hand, so far as the Plaintiff was concerned, Mr. Ko had confessed to Mr. Lau when they met on those two occasions that he had never operated a restaurant before although he was an experienced businessman. It was apparent to Mr. Lau that Mr. Ko was relying on one of the partners, who was a Japanese chef and Mr. Ono a Japanese

restaurant designer with little local experience in restaurant licence application. Against this background, it was reasonable for Mr. Ko to rely on Mr. Lau's representations.

45. I am satisfied that Mr. Lau did hold himself out as an experienced real estate administrator and an expert in the management of properties in Hong Kong with a history of previous long service as a director of Hong Kong Land. On that basis, Mr. Ko accepted his representations and at the end of their second meeting, he and his partners signed the provisional tenancy agreement drafted by Mr. Lau. If Mr. Lau had told Mr. Ko he should first check the regulations concerning licence application before signing the provisional tenancy agreement it is unlikely Mr. Ko would have sign the provisional tenancy agreement and paid the deposit on 2nd August 2004. The intention of Mr. Lau in making the representations was obvious for it resulted in Mr. Ko and his partner signing the provisional tenancy agreement on 2nd August 2004.

46. It is a similar situation to that described in Chitty on Contract Vol. 1 Chapter 6, paragraph 6 – 010 at page 434:

> "On the other hand there are circumstances in which it is perfectly reasonable for the representee to rely on the representor's statements even where those statements are matters of opinion, or statements as to the future and where this is the case, it is thought that the statement should be treated as a representation in the relevant sense."

47. It has been suggested during the trial that if the Plaintiff amended his draft plans on the Japanese restaurant at the suit premises, it might be possible for him to obtain a restaurant licence. The amendment

to the Plaintiff's restaurant floor plan may involve repositioning of the main entrance from the main street to the side street because it was at the main street Shing Wo Road access point of the suit premises that one of the floor slabs was found to be below the required 5 kpa loading capacity according to the expert reports. However, this proposition of repositioning the entrance to the restaurant to the side street was never made by any of the experts at the trial. This suggestion remained speculative.

48. Mr. Leung, counsel for the Plaintiff, relied on the case of *Esso Petroleum v. Mardon* [1976] 1 Q.B. 801 where the plaintiff Esso Petroleum built a petrol station on a busy main street which it considered suitable for a fueling station as an outlet for the petrol sales. One of Esso's servants with 40 years experience in the trade calculated the potential throughput was likely to reach 200,000 gallons by the third year of operation. Unfortunately the local planning authority refused permission for the pumps to front onto the main street and the station have to be built back to front. Despite that material alteration to the siting, Esso Petroleum entered into a tenancy agreement with the defendant for three years after informing the Defendant the estimated throughput would be 200,000 gallons. The Defendant had his doubts but they were quelled by his trust in the greater experience and expertise of Esso's servants. The defendant after failing to achieve the represented throughput, generated a great deal of losses, gave up possession. Esso claimed against him for vacant possession, rent in arrears and mense profits. The defendant counterclaimed for damages for breach of warranty as to the potential throughput and alternatively for negligent misrepresentation that he had been induced to enter into the contract. The English Court of Appeal allowed the defendant's appeal and dismissed the plaintiff's cross-appeal,

it held:

> "(1) That the statement as to potential throughput was a contractual warranty for it was a factual statement on the crucial matter made by a party who had, or professed to have, a special knowledge and skill with the intention of inducing the other party to enter into the contract of tenancy; that it did induce the defendant to enter into the contract and therefore the Plaintiffs were in breach of the warranty and liable in the damages for the breach.
>
> (2) That in any event the statement was a negligent representation made by a party holding himself out as having special expertise in circumstances which gave rise to the duty to take reasonable care to see that the representation was correct; that the duty of care existed during the pre-contractual negotiations and survived to making the written contract which was the outcome of the negotiations; and that therefore the Plaintiffs were also liable for damages for the tort of negligence." (p.802)

49. I am satisfied on a balance of probabilities that Mr. Lau did make the two representations to Mr. Ko to assure him and put his worry over the restaurant licence at rest using his own experience and professional qualification as a real estate administrator to reinforce the assurance. The representations induced Mr. Ko to sign the provisional tenancy agreement. Consequently, there is ground for Mr. Ko to infer the representations and assurances made by Mr. Lau to him to be a warranty. Applying Lord Denning's dicta in Dick Bentley Productions Ltd., the Plaintiff had entered into the contract based on the inducement from Mr. Lau, consequently, the representations can be inferred as intended to be a warranty.

50. I am satisfied further that Mr. Ko accepted Mr. Lau's

representations and assurances that Mr. Raymond Chan should be able to help him to get the licence, he therefore agreed to pay additional rental as compensation to the Defendant when the date of signing of the formal tenancy agreement was postponed pending Mr. Chan's report on the matter.

51. In the present case, a formal tenancy agreement was never signed. Within a matter of three weeks after the signing of the provisional tenancy agreement, both parties became well aware when the Plaintiff obtaining separate advice from two different surveyors that it was unlikely for the Plaintiff to obtain a restaurant licence at the suit premises. Mr. Ko was advised to apply for a club licence for the suit premises instead. One of the two surveyors consulted was recommended and introduced by Mr. Lau whom he highly regarded as an expert in the field of licence application. It is therefore reasonable for the Plaintiff to accept the advice that the suit premises were not suitable for the operation of a Japanese restaurant and repudiated the provisional tenancy agreement.

52. For the aforesaid reason, I further find the Plaintiff's repudiation of the agreement and refusal to enter into a formal tenancy agreement to be reasonable under S.2 (a) of the Misrepresentation Ordinance Cap. 284 even though the misrepresentation may have been an innocent misrepresentation.

53. I give judgment to the Plaintiff for the return of the deposit paid in the sum of $284,000 and damages in the sum of $13,088.00 consisting of $8,088.00 stamp duty for the provisional tenancy agreement and $5,000.00 paid to Raymond Chan Surveyors Limited for the

inspection of and report on the suit premises. I also allowed interests at half judgment rate from the date of writ to the date of judgment and thereafter at full judgment rate.

54. I dismiss the Defendant's counterclaim for the reasons set out above.

55. Costs: cost nisi - costs to follow the event. The Plaintiff's costs to be borne by the Defendant to be taxed if not agreed, with certificate for Counsel.

(H.C. Wong)
District Judge

Mr. Richard Leung instructed by Messrs. Tang & Lee for the Plaintiff.

Mr. Donald Leo instructed by Messrs. Alvan Liu & Partners for the Defendant.