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CACV 337/2006

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF APPEAL  
CIVIL APPEAL NO. 337 OF 2006  
(ON APPEAL FROM DCCJ NO. 4857 OF 2004)**

BETWEEN

\_\_\_\_\_  
KO CHING CHUNG

Plaintiff

and

FULLTIN INVESTMENT LIMITED

Defendant

\_\_\_\_\_  
Before: Hon Rogers VP, Sakhrani and Reyes JJ in Court

Date of Hearing: 11 July 2007

Date of Judgment: 11 July 2007

Date of Handing Down Reasons for Judgment: 13 July 2007

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**REASONS FOR JUDGMENT**  
\_\_\_\_\_

Hon Rogers VP:

1. This was an appeal from a judgment of HH Judge H C Wong given on 29 June 2006. The matter before the judge was a claim by the plaintiff for the return of a deposit of \$284,000 which had been paid by the plaintiff to the defendant in pursuance of a provisional tenancy agreement dated 2 August 2004. The plaintiff also claimed a small amount in damages in respect of expenses that had been incurred. The judge gave judgment in favour of the plaintiff and dismissed the defendant's counterclaim for rent of some \$21,935.40 for the

period between 15 and 24 August 2004 and for damages. At the conclusion of the hearing, this appeal was dismissed with reasons to be given in writing.

### *Background*

2. In about July 2004, the plaintiff together with partners, decided to open a Japanese restaurant. Apparently, premises in the Causeway Bay area had been considered, but in July 2004 the plaintiff contemplated renting premises in Sing Woo Road, Happy Valley. Although the plaintiff had been to the premises before, the first important meeting took place on 28 July 2004. On that occasion the plaintiff went to the premises with a Mr Ching, who was a property consultant. He was introduced to Mr Edmund Lau, who was the managing director of the defendant, the owner of the premises.

3. The judge found that the plaintiff told Mr Lau that he intended to operate a Japanese restaurant at the premises but that he had no previous experience of running restaurants. The judge summarised the evidence as to what took place on that occasion. A few days later, on 2 August 2004, the plaintiff signed a provisional tenancy agreement, to rent the premises for 5 years, agreeing to pay initially a total of \$284,000 as the rental and management fees deposit and the first month's rental for the period between 15 September and 14 October 2004 when the rent was to be \$68,000 per month. In paragraphs 28 and 29 of her judgment the judge made the following findings as to what had been said by Mr Lau to the plaintiff:

“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.

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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.”

4. In paragraph 43 of the judgment of the judge said:

“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.”

5. And later in paragraph 49 the judge went on to hold:

“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.”

6. The plaintiff’s difficulty arose because after consulting his own surveyor he was told that the premises would not comply with the Building (Construction) Regulations relating to restaurants because there were slabs which only took a loading of 4 kPa whereas the Building (Construction) Regulations made under the Buildings Ordinance, Cap. 123 stipulated that the minimum imposed load on a building in respect of the distributed loads applied uniformly should be 5 kPa.

7. Mr Lau had previously informed the plaintiff that he could introduce him to reliable surveyors, namely Raymond Chan Surveyors Ltd. who

A could assist the plaintiff in obtaining a restaurant licence. The plaintiff then  
B engaged that company. Mr Raymond Chan of Raymond Chan Surveyors Ltd,  
C signing as an Authorised Person, informed the plaintiff by letter dated  
D 23 August 2004:

E “We would like to report you that, based on the structural records  
F retrieved from the BD, structural checking by Registered Structural  
G Engineer revealed that the existing M/F of the captioned building is  
H structurally not sufficient to carry 5.0 Kpa for general restaurant usage  
I at slabs MS-8, MS-13 & MS-21. Additional solid partitions and  
J raised screed will further worsen the case. You are, therefore,  
K advised that the subject premises is structurally inadequate for  
L restaurant purpose.”

H 8. It was in those circumstances that the judge held that the plaintiff  
I was entitled to rely upon the representation and warranty that the premises were  
J fit for use as a restaurant and that a licence could be obtained.

K *This appeal*

L 9. On this appeal Mr Hingorani, who appeared on behalf of the  
M defendant in this court, sought to take two main points. In the first place he  
N argued that the representations in paragraphs 28 and 29 of the judgment were  
O opinions and not matters of fact and not representations. They were, if  
P anything, statements as to the future prospects. Furthermore he argued that  
Q Mr Lau told the plaintiff to engage a surveyor. In this respect he relied very  
R heavily on the following interchange during the course of the plaintiff’s  
S evidence in chief:

R “A. We wanted to pay for one month but Mr Lau insisted on us  
S paying three months. He said otherwise there were many  
T other people waiting to rent the shop premises.

S Q. What’s your response?

T A. We hoped to separate the cheques into two instalments.

U Q. Any reason why?  
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A. Because it was Mr Lau who said that it can be done, meaning it can be operated as a restaurant but we need to look for surveyor to see whether that is feasible not.

Q. Why didn't you finish the feasibility study first before signing on this one?

A. Because Mr Lau guaranteed that with his professional qualification.

Q. Guaranteed what?

A. That it can-that we can definitely get it.

Q. "It," will mean what?

A. The restaurant licence."

10. It was argued that this demonstrated that what Mr Lau really said, and admittedly he was not an engineer, was simply that the plaintiff should employ a surveyor and he was making a statement as to something that might happen in the future. The judge dealt with this matter in the remaining part of paragraph 29 of the judgment where she said:

"...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."

11. Taken to its logical conclusion, however, the argument came very close to challenging the judge's finding of fact, that the two representations referred to above had been made, was wrong. Having considered the transcript

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of the plaintiff's evidence and the passages in the evidence of Mr Lau that were cited to us, I consider that the judge was amply justified in making the findings of fact which she did and that what was stated by the plaintiff in the passage quoted above did not detract from that. There were, as the judge pointed out, many matters which a surveyor would have to deal with in order to get a licence to operate a restaurant.

12. The other matter relied upon by Mr Hingorani was that as a matter of fact a Thai restaurant had been operated some five or six years earlier at the premises and that now a light refreshment restaurant was operated in the name of a well-known chain. Whilst it is conceded that both these restaurants are and were being operated at the relevant times and that the regulations which apply in respect of them are the same as those which would have applied in respect of a Japanese restaurant the matter cannot end there.

13. Irrespective of the fact that a restaurant licence might have been granted and that, as part of that process, the Buildings Department might have been consulted, the fact remains that the operation of a restaurant at the premises would be in breach of the Building (Construction) Regulations. In those circumstances the representation and warranty that the premises were suitable for the operation of a restaurant was clearly wrong and the representation and warranty that a restaurant licence could be obtained was also wrong. Although it would appear that there might be some discretion which could be exercised to overlook a breach of the Building (Construction) Regulations when granting a licence to operate a restaurant, it was by no means certain that any such discretion would be exercised, and, even if it were, that could not operate to protect the plaintiff against any continuing breach of the Regulations.

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14. It was for these reasons that I considered that this appeal fell to be dismissed.

Hon Sakhrani J:

15. I agree.

Hon Reyes J:

16. I agree.

(Anthony Rogers)  
Vice-President

(Arjan H Sakhrani)  
Judge of the  
Court of First Instance

(A T Reyes)  
Judge of the  
Court of First Instance

Mr Richard Leung, instructed by Messrs Tang & Lee, for the Plaintiff/Respondent

Mr Jeevan Hingorani, instructed by Messrs Alvan Liu & Partners, for the Defendant/Appellant