HCA 1747/2002

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

ACTION NO. 1747 OF 2002

BETWEEN

INCORPORATED OWNERS OF FU NING GARDEN	1st Plaintiff
FUNING PROPERTY MANAGEMENT LIMITED	2nd Plaintiff

and

GRANTWIN DEVELOPMENT LIMITED	1st Defendant
CHAN WAI HING	2nd Defendant

Before: Deputy High Court Judge A Cheung in Chambers

Date of Hearing: 17 May 2002

Date of Judgment: 17 May 2002

J U D G M E N T

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1. This is an application for an interlocutory injunction by the Plaintiffs, the Incorporated Owners of a development in Junk Bay and the management company of the development respectively, against the Defendants, respectively the registered owner of certain ground floor commercial premises and the tenant or former tenant of the premises.

2. The dispute between the parties may be stated very briefly. The development is governed by a deed of mutual covenant and a sub-deed of mutual covenant. The 1st Defendant used to let the ground floor premises to a tenant for use as a restaurant. Late last year, it entered into a provisional tenancy agreement with the 2nd Defendant, a new tenant, for using the ground floor premises as a care and attention home for the elderly. Right from the beginning, the parties rightly anticipated that there would be opposition from the Incorporated Owners and the Manager regarding the intended use of the premises. There was correspondence between the parties' legal representatives relating to the intended use.

3. Suffice it to say that the Incorporated Owners and the Manager objected to the intended use. At one stage, they relied on a clause in the sub-deed of mutual covenant prohibiting the use of the commercial premises for domestic or residential purposes. At a later stage, they also relied on another clause in the deed of mutual covenant itself prohibiting the use of the premises as a boarding house. That remains the position up to today's hearing.

4. Pursuant to the provisional agreement, a formal tenancy

agreement was entered into between the Defendants on 5 February 2002, and the user under the tenancy was for the operation of a care and attention home. There was contained in the tenancy agreement an escape clause to the effect that if the intended use was objected to by the Incorporated Owners or Manager, either party could give notice to terminate the tenancy agreement.

5. As I said, the Plaintiffs did object and eventually both Defendants gave notice at different times to each other to terminate the tenancy agreement, but notwithstanding that plans had been submitted to the Building Authority for approval to convert the premises for use as a care and attention home, various permits and approvals had been obtained from various government authorities and substantial construction work had been carried out by the 2nd Defendant to convert the premises for use as an elderly home. Even after the parties' respective purported terminations of the tenancy, the work did not stop.

6. As I understand it, the elderly home or intended elderly home has not yet opened for service and it is under those circumstances that the Incorporated Owners and Manager apply for an injunction against the 2 Defendants. The injunction sought also covers the erection of signage as well as the submission of the building plans. I shall deal with the matters one by one.

7. Firstly, in relation to using the commercial premises as a residential care home for the elderly, in accordance with usual principles, I need first to consider whether there is a serious question to be tried, and then secondly the balance of convenience. In relation to the first

question, I have read the relevant clauses in the deed of mutual covenant and the sub-deed of mutual covenant. I have taken into account the authorities (including *Cheung Yu Hon v. Luk Ngai Lin Irene*, HCA 7588/2000 (10/08/2001); *Park Kit Investment Limited v. Cheung Wan Ping*, HCA 5349/1998 (23/11/1998)) relied on by Mr Lin, counsel for the Plaintiffs, and I am satisfied that based on those clauses, the intended use of the premises as a residential care home for the elderly may well amount to a breach of the prohibition in the sub-deed of mutual covenant against the use of the commercial premises for a residential purpose and the prohibition in the deed of mutual covenant against the running of a boarding house within the commercial premises.

8. In this regard, I have taken into account the submission of Mr Chan, counsel for the 2nd Defendant, to the effect that if one construes those crucial clauses in the deed of mutual covenant and the sub-deed of mutual covenant against the known legislative control relating to residential and non-residential uses of premises in the landlord-and-tenant context, and boarding houses in the hotel and guesthouse accommodation context, as well as the known framework of land use control in Hong Kong, one may come up with a different interpretation and may conclude that the running of a care and attention home for the elderly is not for a residential purpose and does not amount to the running of a boarding house. But I do not understand Mr Chan as going so far as to suggest that in relation to whether there would be a breach of the deed of mutual covenant and the sub-deed of mutual covenant by the intended user, the Plaintiffs have not shown a serious question to be tried. I can understand the arguments of both sides and at this stage, all I need to consider is whether the Plaintiffs have shown a serious question to be

tried. As I said I am satisfied that there is indeed a serious question to be tried; and I should add for the sake of completeness that in relation to this issue, Ms Yang appearing for the landlord, i.e. the 1st Defendant, does not take issue with the conclusion that I have reached.

9. Moving on to the question of balance of convenience, by definition, in this type of situation, the loss or potential loss of the Incorporated Owners or indeed the owners of the building and development as represented by the Incorporated Owners would be difficult to quantify and assess. So for example in this sort of cases, one could say that the running of an elderly home, which is apparently opposed by some of the co-owners according to the evidence in the present case, might affect the market value of the residential units upstairs. This sort of allegation or suggestion would be difficult to establish or prove by real evidence in a court of law. That is precisely why in this sort of situation, an injunction is a much more effective and adequate form of relief than say, an award of damages at the end of the day. Moreover, we live in a city of multi-storeyed buildings and the ownership, management and so forth in relation to multi-storeyed buildings co-owned by various co-owners are to a great extent dependent on deeds of mutual covenant or more correctly, the due observance and enforcement of the rights and obligations laid down in the deeds of mutual covenant. It is a matter of public interest that deeds of mutual covenant be observed and if necessary duly enforced by the Court.

10. On the other hand, the loss of or injury to the Defendants, and particularly the 2nd Defendant, would not be difficult to quantify or assess if, at the end of the day, the Court concludes that the interlocutory

injunction has been wrongly obtained by the Plaintiffs. Because in that situation, the 1st Defendant's loss would be represented by say, loss in rental income; and the 2nd Defendant's loss would be represented by the abortive costs in setting up the elderly home or the loss of anticipated profit in losing the opportunity to run the elderly home no doubt for commercial purposes. And in this regard, I also take into account the cross undertaking as to damages which I require from the Plaintiffs; and of course the 1st Plaintiff is the Incorporated Owners and, as Mr Lin puts it, the Defendants would have the whole development available for them to enforce the undertaking as to damages, in the event that the Court concludes that the undertaking as to damages should be enforced against the Plaintiffs. Moreover, in this case, fortunately the elderly home has not started operating yet, there has not been any intake of residents, and so no third party interest is involved.

11. Taking the above as well as all the surrounding and relevant circumstances into account, I have no hesitation in concluding that the balance of convenience comes down heavily on the side of the Plaintiffs and certain injunctive relief should be granted in favour of the Plaintiffs relating to the intended use of the commercial premises as a home for the elderly.

12. Moving on to the second subject of complaint, i.e. the affixing or displaying of certain advertisement sign or banner outside and at the entrance of the commercial premises without the written approval of the Manager, I have again heard submissions from all sides relating to whether that would amount to a breach of the relevant clause in the deed of mutual covenant in question. In particular, the Defendants say that

the Manager has no right to stop a commercial tenant from exhibiting advertisement signs and banners and the Manager's discretion is only in relation to the size, location and design of the advertisement sign. That is a legitimate reading of the relevant clause in question, i.e. Clause 22(c) on page 120 of the bundle. But an alternative and equally attractive reading of the clause is that that only provides for one of the situations where the Manager may refuse consent to the sign. This is because the deed of mutual covenant has to be read as a whole and the deed not only empowers but also obliges the Manager to prevent any breach of the deed of mutual covenant. Now the contents of the advertisement sign relate no doubt to the business or intended business of the elderly home. If the running of an elderly home is in breach of the deed of mutual covenant or the sub-deed of mutual covenant, certainly it is arguable that the Manager should have the power to refuse the putting up of the advertisement sign of the infringing business in question. As I have said, at this stage, I am only concerned with seeing whether there is a serious question to be tried, and again I am of the view that there is indeed a serious question to be tried. Moreover, regardless of Clause 22(c), the injunction relating to the advertisement sign may be viewed as an ancillary injunction in aid of the earlier injunction restraining the Defendants from running a residential care home at the commercial premises. Viewed in that light, I can see no good reason for opposing the injunction once the seeking of the earlier injunction is found to be justified.

13. As regards the balance of convenience, since the advertisement sign is in relation to the business of running the elderly home, and since I have already come to the conclusion that the elderly home should not be run at the commercial premises at this stage pending

the trial of the matter, the balance of convenience again comes down heavily on the side of the Plaintiffs. I can see no real loss to the 2nd Defendant by restraining her from displaying the sign if she is at the same time already under an injunction not to carry out the business intended by her.

14. Moving on to the third complaint, i.e. the carrying out of any building works at the premises without first having obtained the Manager's written consent, again I have heard the parties' submissions relating to the relevant clause in the sub-deed of mutual covenant in question, i.e. Clause (k)(i) on page 134 of the bundle. My comment is the same. It is arguable whether Clause (k)(i) provides exclusively for the situation where the Manager may refuse to give consent to any building plans. And moreover, the injunction applied for relates to restraining the Defendants from carrying out the building works. The building works no doubt relate directly to converting the premises for use as an elderly home. Again, I think the injunction prayed for may be viewed as being in aid of the injunction against the use of the premises as an elderly home, and viewed in that light, there can be no real objection to the injunction, regardless of the dispute over the meaning of the actual clause in the sub-deed of mutual covenant. And again, I am only concerned with whether there is a serious question to be tried, and in my judgment, there is no doubt a serious question to be tried. Likewise, so far as the balance of convenience is concerned, once one concludes as I have done, that an injunction on an interlocutory basis should be granted restraining the Defendants from operating an elderly home at the premises, the balance of convenience comes down on the side of the Plaintiffs relating to restraining the Defendants from carrying out the

building works in question.

15. Fourthly, the Plaintiffs ask for an injunction relating to submitting plans to the Buildings Department for building works at the premises, converting the premises for use as an elderly home. In this regard, I am not sure if there is a risk of further submission of plans to the Building Authority. In the light of the injunctions that I am prepared to grant as set out above, I do not think it necessary for the Court to grant this further injunction relating to submission of plans.

16. Finally, there is this last injunction asked for by the Plaintiffs, namely an injunction restraining the Defendants from "enabling, assisting, causing, procuring or authorizing others to do any of the acts aforesaid". This is a sort of catch-all injunction. I do not think, given the very detailed manner in which the injunctions discussed above are drafted, that the Plaintiffs need this last injunction.

17. At the end of this judgment, I shall examine the actual wordings of the injunctions again. But I would like to deal specifically with the position of the 1st Defendant now. As I said, the 1st Defendant is the registered owner of the premises, and it is, or, depending on whether the tenancy agreement has come to an end, was, the landlord of the 2nd Defendant. I do not accept the submission by Ms Yang to the effect that the 1st Defendant was innocent in the matter. Having read the papers and having heard counsel's submissions, I am of the view that the 1st Defendant did play an important role in this matter, for the 1st Defendant knew from the very beginning that there might well be opposition from the Incorporated Owners or Manager to the intended use

of the premises as an elderly home. Yet without obtaining a concrete reply from the Plaintiffs relating to their stance, it entered into a provisional agreement and subsequently a formal agreement, letting the premises to the 2nd Defendant for the intended use. The formal agreement contained an escape clause but it only catered for the position between the Defendants *inter se*, and did not deal with whether in truth and as a matter of law, the intended use is prohibited by the deed of mutual covenant and the sub-deed of mutual covenant. It simply threw the burden onto the Incorporated Owners and the Manager to take action. Eventually when the opposition from the Plaintiffs was made apparent to the 1st Defendant, i.e. on 1 March 2002, the 1st Defendant did not take decisive steps to ensure the stoppage of building works at the property and the eviction of the 2nd Defendant from the premises, particularly after the 2nd Defendant had evinced an intention to carry on with the building works and to continue with her planned operation of the elderly home.

18. No doubt certain letters were written and there were some negotiations between the parties, but in my view, the 1st Defendant did not do everything that it could have done in order to stop the works from being continued with or the intended use of the premises as an elderly home. So in a fairly true sense, the 1st Defendant may be said to have brought the present litigation and the application for injunction upon itself. In this regard, having considered specifically the position of the 1st Defendant and having considered the question of balance of convenience, I would have concluded in favour of extending the injunction to cover the 1st Defendant as well, but for one matter, namely, the offer of an undertaking in terms of paragraphs 1.1, 1.2 and 1.3 of the summons for injunction by the 1st Defendant, with the exception that any

act or omission by the 2nd Defendant would be excluded from the ambit of the undertaking by the 1st Defendant. The only paragraphs missed out from the proposed undertaking relate to the submission of plans and the so-called catch-all injunction I mentioned above. For the reasons I gave above, I consider that the proposed undertaking is good enough for the purpose.

19. So in conclusion, I am ordering an injunction in terms or substantially in terms of paragraphs 1.1, 1.2 and 1.3 against the 2nd Defendant; and upon the undertaking offered by the 1st Defendant through counsel substantively in terms of paragraphs 1.1, 1.2 and 1.3 of the summons with the exception that any act or omission by the 2nd Defendant be excluded from the ambit of the undertaking, I make no order against the 1st Defendant.

20. Finally, in relation to the actual wordings of the injunctions and undertaking, having heard further submissions, I would add the words "relating to any residential care home for the elderly (including a care and attention home)" immediately after the words "any advertising sign or banner" in paragraph 1.2. Further, I would add the words "relating to the conversion of the property into any residential care home for the elderly (including a care and attention home)" at the end of paragraph 1.3 of the summons. I would leave the actual wordings of the 1st Defendant's undertaking and the Plaintiffs' cross undertaking as to damages to counsel to settle for the Court's approval.

21. So far as the costs are concerned, having heard arguments from all parties, in my view, the Plaintiffs are substantially successful in

their application for an interlocutory injunction. The 1st Defendant did not put forward the undertaking in question until after some prompting from the bench; and in relation to the position of the 2nd Defendant, she came to oppose the injunction but failed substantially. So in my judgment, the usual order in this type of situation should apply, i.e. the Plaintiffs' costs in the cause, and I so order.

(A Cheung)
Deputy Judge of the Court of First Instance
High Court

Mr Kenny Lin, instructed by Messrs Alvan Liu & Partners, for the Plaintiffs

Ms Elizabeth Yang, instructed by Messrs Samuel L C Yang & Co , for the 1st Defendant

Mr Kenny Chan, instructed by Messrs Philip Ng & Wong, for the 2nd Defendant