

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1998] SGHC 43

Suit No 1477 of 1997 (SIC 6262/97)

Between

Acro Investment Pte Ltd

... Plaintiff

And

Lim Bee Huat
Lee Goo Tee
Lee Geok Huay

... Defendant

GROUND OF DECISION

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Acro Investment Pte Ltd v Lim Bee Huat and Others

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Suit No 1477 of 1997 (SIC 6262/97)
Judith Prakash J
14 February 1998

1 Judgment:

2 Background

3 1. The defendants have appealed against an order which I made ordering them to surrender possession of certain premises to the plaintiff.

4 2. The plaintiff company was, at all material times, the lessor of the premises known as Block 11 Upper Boon Keng Road #01-79 ('the premises') under an agreement for lease dated 31 March 1995 ('the head lease') between itself and the Housing Development Board ('HDB'). The premises were used as an eating house.

5 3. On 8 March 1996, the plaintiff entered into a lease agreement with the defendants whereby it agreed to lease the premises to the defendants for a term of three years commencing on 1 April 1996. Under this lease, the defendants agreed to use the premises as an eating house establishment as defined in the head lease and subject to the rules and regulations of the HDB. They also covenanted to comply promptly with any the requirements that might be

imposed on the premises by the HDB. Further, they agreed not to carry out any offensive trade or business on the premises so as to cause a nuisance or annoyance to the occupiers of adjoining premises.

6 4. Some time in March 1997, the plaintiff was informed by the HDB that residents who lived above the premises had complained about heat emanating from them. Subsequently a meeting was arranged between the HDB, the plaintiff's director, Mr Goh Ah Jee and the second defendant to inspect the premises and to discuss possible solutions to the heat nuisance problem. According to Mr Goh, after the meeting, he left it to the defendants to deal with the problems as they were the ones who were operating the premises. He considered it the defendants' responsibility to resolve the problem to the satisfaction of the HDB.

7 5. On 3 April 1997, the plaintiff gave an option to a prospective purchaser in respect of the sale of the property. The sale was made subject to HDB's consent. On 5 May, the plaintiff's lawyers were informed that the HDB was withholding its approval because, among other things, the problem of the heat nuisance had not been resolved. On 15 May, the said lawyers gave the defendants notice that they were in breach of the lease because the stalls in the premises had been causing a heat nuisance to the residents on the upper floors of the building and required the defendants to remedy and cease the continuance of the nuisance within seven days from the date of receipt of the notice failing which the plaintiff would re-enter upon the premises and the lease would absolutely cease and determine.

8 6. According to Mr Goh's affidavit, there was, following this letter, a meeting on 20 May 1997 between the plaintiff and the defendants. At the

meeting, the defendants undertook to resolve the heat nuisance problem by 3 June 1997 but they failed to do so.

9 7. On 5 June the parties attended a meeting called by the HDB. At the meeting, the second defendant and Mr Goh were directed to resolve the heat problem. After the meeting, Mr Goh says that he informed the second defendant that as the defendants had created the problem, they should take active steps to resolve it and their attitude was jeopardising the plaintiff's relationship with the HDB.

10 8. It should be noted that according to a letter that the HDB sent out on 6 June 1997, at the meeting, the second defendant had agreed to reinforce the insulation at the false ceiling in the premises and also he and Mr Goh had agreed to look into ways of improving the exhaust system in the premises. In the same letter, the HDB notified the plaintiff that as a lessee it was its duty to ensure that the heat nuisance problem was resolved without further delay. On 12 June, the HDB wrote to the mortgagee of the premises stating that they were considering taking action against the plaintiff for not resolving the heat nuisance.

11 9. On 8 July, the plaintiff's solicitors wrote to the defendants stating that despite repeated requests and demands the problem of the heat nuisance continued and the plaintiff had been threatened with action from the HDB under the head lease. The letter asserted that the defendants were in breach of the covenants in the lease and that the plaintiff accepted the defendants' breach of contract. The defendants were given notice that the plaintiff wanted to re-enter upon the premises and that unless they handed over vacant possession by 14 July 1997, legal proceedings would be commenced for recovery of the premises. The defendants did not vacate as requested.

12 **Course of the proceedings**

13 10. The writ in this action was filed on 22 July 1997. The plaintiff
claimed the following reliefs:

14 (1) an injunction to restrain the defendants from operating or continue
to operate the premises in the manner which would cause annoyance by way of
heat nuisance to the persons living above the premises;

15 (2) an order for delivery of possession of the premises by the defendants;

16 (3) mesne profits from 15 July 1997 or alternatively, damages.

17 11. The defendants filed their defence on 12 August 1997. Briefly, they
denied that they were in breach of the lease or of the head lease and denied that
they had caused any heat nuisance as alleged by the plaintiff. They also said that
they were not given reasonable time by the plaintiff to remedy the alleged heat
nuisance. Further, they asserted that the plaintiff was entirely to blame for the
continued existence of the heat nuisance. On 29 August, they amended their
defence by stating that they had taken all reasonable steps to solve the problem
of the heat nuisance and giving further particulars of the steps taken.

18 12. Two days later, the plaintiff filed an application for summary
judgment. It was accompanied by an affidavit made by Mr Goh. This affidavit
recited the facts that I have set out in paras 4 to 9 above.

19 13. On 5 September 1997, the second defendant filed an affidavit in
response to the summary judgment application. He asserted that the defendants
had not caused the heat nuisance and that had the approved electrical load and
existing electrical installation been sufficient and the exhaust system been

effective, there would have been no such problem. He went on to say that the defendants had taken all necessary steps to remedy the heat nuisance but the plaintiff had allowed it to continue to exist and remain unresolved. In support of this, he repeated various particulars pleaded in the defence.

20 14. The main factual assertions made by the second defendant were as follows. First, he stated that some time in August 1996 when they were first informed of the heat nuisance, an extra cooker hood was installed above the stall selling fried chicken. Then in October 1996, the defendants installed a false ceiling. Thereafter, they switched stall holders and reminded them to reduce the heat generated. Despite the aforesaid measures, the heat problem could not be totally resolved and the second defendant then suggested to the plaintiff that the power supply in the premises had to be upgraded. The plaintiff, however, did nothing about this.

21 15. At a meeting on 20 May between the parties, the second defendant told Mr Goh again that the power supply had to be upgraded. It was agreed at the meeting that the plaintiff would bear the costs of upgrading the cables and that the defendants would install a 100A Switch Board and re-wire the premises to receive the 100A power supply. This could only be done after cable upgrading. They agreed to resolve the heat problem by 3 June 1997. The purpose of the cable upgrading was to facilitate the defendants' installation of an extra exhaust fan to improve the exhaust system.

22 16. In June 1997 the defendants insulated the ceiling board. The plaintiff, however, did nothing about upgrading the cables until mid July 1997. This was completed on 5 August 1997. In the meantime the defendants had arranged for the installation of the 100A switch board and the re-wiring of the premises. The re-wiring was completed in the first week of August 1997 whilst

the new switch board was installed on 11 August 1997 and the increased power supply was turned on 13 August 1997.

23 17. The second defendant also said that to improve the exhaust system, the defendants had informed the HDB on 28 July 1997 that they would install another exhaust fan. This could only be done after the power supply had been upgraded. A drawing to this effect had been submitted to the HDB for its evaluation but the HDB had not as yet responded.

24 18. On 19 September 1997, Mr Goh affirmed an affidavit in which he replied to the assertions made by the second defendant. He stated that the premises were let to the defendants as an eating house together with all the fixtures, fittings and furniture therein and they had exclusive possession of them. The nature of the stall holders and the use of the premises were entirely within their control.

25 19. Mr Goh went on to describe the existing heat exhaust systems. The premises had been let with two fully functional exhaust systems which were sufficient for normal use for eight food stalls. These systems were designed by professional engineers and were approved by the HDB. The first system served stall numbers 4, 5, 6 and 7 and the other served stalls 1, 2, 3 and 8. He explained that the efficiency of an exhaust system can be reduced if it is not serviced or cleaned properly or if additional exhaust hoods are put into the system. He gave details of stall no. 1, the fried chicken stall, which the plaintiff considered to be the source of the heat nuisance and gave an explanation as to why this was. Mr Goh's conclusion was that it was not the failure of the existing exhaust systems which caused the heat nuisance but the unusually great amount of heat, coupled with wrongful usage and tampering with the system.

26 20. Mr Goh also dealt with the issue of the upgrading of the power supply. His position was that it was the defendants who wanted to upgrade the power supply though the application was made by the plaintiff as it was the official tenant of the premises. In August 1996, the HDB wanted payment of some \$12,000 as the charge for upgrading the power supply. The plaintiff sent this letter to the defendants and only discovered in May 1997 that the defendants had not proceeded with the upgrading. On 20 May 1997, in order to assist in the resolution of the heat problem, the plaintiff offered to pay for the costs of upgrading the cables. The defendants did nothing about this until mid July 1997.

27 21. Mr Goh stated that, up to the time of his affidavit, the heat nuisance had not been rectified and was still continuing. Exhibited to the affidavit was a letter dated 4 September 1997 from the HDB acknowledging that they had received a letter from the defendants' solicitors stating that the defendants had insulated the ceiling board and also intended to install an additional exhaust fan. A drawing had been forwarded to the HDB. The HDB's comment was that such drawing was not acceptable because it was not the detailed drawing they had wanted. Further, during their site inspection in July they had mentioned to both plaintiff and defendants that the insulation at the ceiling board was not effective and they had advised the tenants to contact the insulation material supplier on the proper installation of such materials. The letter also stated that the exhaust system had been altered without the HDB's approval and this had resulted in a breach of the head lease.

28 22. The first hearing of the plaintiff's application for judgment came on before me on 22 September 1997. Mr Yuen, counsel for the plaintiff, submitted that the heat nuisance had not been abated and had continued up to and after the termination of the defendants' lease on 8 July 1997. The plaintiff had given notice to the defendants to abate the nuisance on 15 May 1997 and when the

nuisance continued thereafter the plaintiff had no option but to terminate the tenancy in order to protect its interest.

29 23. The position taken by Mr Tan, counsel for the defendants, was that they were not in breach of cl 3.8 of the lease because they were not carrying on an offensive or dangerous trade, business or occupation. Secondly, the defendants did not cause the heat nuisance and it had resulted because the exhaust system installed by the plaintiff was ineffective and the electrical load was insufficient. He stated that the plaintiff had only upgraded the cables in mid July and therefore no reasonable time had been given to the defendants to rectify the nuisance as required by s 18(1) of the Conveyancing Law of Property Act. He also pointed out that there had been no prejudice to the plaintiff because there was no default by the defendants in payment of rent. In reply, Mr Yuen pointed out that from 5 May until the date of the application, the only thing the defendants had done to rectify the nuisance was to put in an insulation board and this was inadequate. He submitted that, at the least, the plaintiff should be granted an injunction as it was in danger of being evicted by the HDB.

30 24. There was no real dispute that as at the date of the hearing, the heat nuisance had not been rectified. As long as it existed, the plaintiff was at risk under the head lease. The defendants as the tenants were in exclusive occupation of the premises and therefore it was they who had the duty not to cause a nuisance to adjoining premises. I considered that cl 3.8 of the lease prohibited the defendants from using the premises in such a manner as would cause a nuisance to the occupiers of adjoining premises and that this prohibition was an independent one and operated even if the defendants did not carry out any offensive or dangerous trade, business or occupation upon the premises. The facts as disclosed in the affidavits showed that the defendants were in breach of this covenant and the plaintiff therefore had a right to re-enter. Whilst I

considered that the defendants had already had a reasonable time to rectify their breach I did not want to forfeit the lease at that stage as the defendants had paid their rent regularly and it appeared from the facts that the problem was on the verge of being resolved. Accordingly, I granted the plaintiff the injunction orders it sought and adjourned the hearing of its other prayers for a further two weeks.

31 25. The next hearing was on 6 October 1997. By then each of the parties had made a further affidavit. The second defendant's affidavit, made on 3 October 1997, stated that since the power supply in the premises had been upgraded in mid August, the heat problem had been greatly improved. Further, the defendants had installed an extra exhaust fan above stall no. 3 even though they had not yet obtained the HDB's approval for the work. A drawing incorporating the fan had been given to the plaintiff for its endorsement and onward transmission to the HDB for its approval. Since the installation of the fan, the second defendant had visited the flat above the premises on two occasions and found that the flat was no longer hot. The occupier of the flat had confirmed that he no longer felt any heat in his flat. A copy of the occupier's letter dated 29 September to the HDB to this effect was annexed to the affidavit.

32 26. Mr Goh's third affidavit made on 6 October itself stated that he had received the defendants' drawing from their solicitors on 3 October 1997. He saw that the drawing was an incomplete drawing of the existing exhaust system and that it was not an amendment of the previous drawing no. 95-MV01 which had been approved by the HDB. However, as he had been advised not to prevent delay or hinder the defendants' efforts to rectify the nuisance, he had endorsed the drawing with the plaintiff's consent and taken it the same morning to the HDB. The drawing was rejected by the HDB. The details of what they required were set out in their letter of 3 October 1997, a copy of which was immediately

sent to the defendants. The plaintiff was been asked by the HDB to resubmit its application within the next ten days. Mr Goh expressed his concern that the defendants had not as yet come up with a long term solution to the heat problem.

33 27. Mr Yuen submitted that the defendants were clearly not making a serious effort to solve the problem since they had not submitted a proper plan. The HDB had rejected the plan and insisted on a new plan being submitted within the next ten days. He pointed out the defendants could have used the previously approved plan and argued that since they had not, their efforts were not reasonable and the court was entitled to disregard such efforts and allow the forfeiture to proceed.

34 28. Mr Tan on the other hand submitted that since the time of the previous hearing, his clients had installed an extra exhaust fan which had led to an abatement of the heat nuisance. His clients had done their best in relation to the submission of the drawing. They had had it endorsed by a professional engineer and were entitled to rely on his expertise. Since the HDB had nevertheless rejected the drawing, they were going to re-submit a proper one and were doing their best to solve the problem. Although Mr Yuen pointed out that until the position was regularised, the plaintiff was at risk from the HDB, I thought it would be reasonable to give the defendants a further chance to show their bona fides. I therefore adjourned the hearing for further two weeks until 21 October 1997. I warned the defendants that if the plan had not been re-submitted by 15 October or the re-submission was rejected, then the plaintiff would get its order.

35 29. The position as at the hearing of 21 October was recited in Mr Goh's affidavit of the same date. He stated that on 13 October the defendants' solicitors had written requesting the plaintiff to endorse seven sets of drawings for

submission to the HDB. Mr Goh had received this letter on 14 October and on the next day he personally submitted all seven sets, duly endorsed, to the HDB. On 17 October, he received a letter from the HDB informing the plaintiff that:

36 (a) the proposed changes should be clearly itemised on the HDB form attached to the letter;

37 (b) the duct work should be constructed up to the roof-top level; and

38 (c) a processing fee of \$206 was payable.

39 The plaintiff was further asked to re-submit the seven sets of drawings incorporating the required amendments within the next 14 days. On the same day, the plaintiff forwarded the HDB's letter to the defendants' solicitors.

40 30. On 20 October, the plaintiff was asked to re-submit the seven sets of drawings. Mr Goh signed and affixed the plaintiff's company's stamp on the HDB form and returned the complete documents to the defendants' solicitors. At the hearing, Mr Tan confirmed that the defendants had paid the fees which the HDB required and stated that as he had just received the documents back from the plaintiff, he would be submitting the amended plans the next day. I therefore adjourned the matter for one further week.

41 31. The final hearing was on 28 October 1997. Both parties had filed affidavits on that day itself. The second defendant's affidavit stated that the drawings had been re-submitted to the HDB on 22 October and that on 25 the HDB had informed their professional engineer that the plans could not be approved unless certain technical directions were complied with. The defendants had immediately complied with those directions and re-submitted

the plans and on 27 October the HDB had issued a letter to their professional engineer approving the plans. A copy of this letter was attached to his affidavit. The plaintiff's affidavit was brief. It exhibited a fax dated 28 October 1997 from the HDB advising them that the defendants' plans had certain problems. The material paragraph of this fax read:

42 'Although our Mechanical Engineer has issued a notice of approval dated 27 Oct 97 for the M & E plans submitted. However, our site inspection revealed that there is an additional exhaust hood was (*sic*) not included in the M & E plans. Therefore, we are not able to grant the approval for the above works until this additional exhaust hood is included in the fresh M & E drawings and submitted to us for further evaluation.'

43 32. Mr Yuen submitted that five months had passed since the defendants had first breached the lease and five weeks had passed since the first hearing of the matter. The defendants had still not succeeded in remedying the problem on a long term basis to the satisfaction of the HDB. The HDB now wanted fresh drawings for re-evaluation and no one knew how long it would actually take before everything was done properly. He asked for judgment. Mr Tan's response was that the plaintiff was not prejudiced because the defendants had not defaulted in payment of rent. He had just seen the plaintiff's affidavit and wanted time to take instructions.

44 33. In my judgment, the defendants had been given more than enough time to rectify their breach of the lease. What they had done appeared to be too little and too late and there was little prospect of a permanent solution to the problem being effected soon. I did not think it was right to keep on adjourning the matter to allow the defendants to keep trying to rectify the problem. They had not convinced me that they had been able to remedy the breach within a

reasonable time of its occurrence. Accordingly, they were not entitled to relieve from forfeiture. I accordingly made the following orders against which the defendants have now appealed:

45 (1) that an injunction be granted against the defendants to restrain them from operating or continuing to operate the premises in a manner which would cause in annoyance by way of heat nuisance or otherwise to the residents living above the premises;

46 (2) that the defendants do deliver to the plaintiff possession of the premises within two weeks;

47 (3) interlocutory judgment for damages to be assessed; and

48 (4) costs to be taxed if not agreed.

49 JUDITH PRAKASH

50 JUDGE

51 *This does not merit reporting*

Judith Prakash J

Simon Yuen (Chong Yeo & Partners) for the plaintiff
Robin Tan (Robin Tan & Co) for the defendants
