Overview of Disputes relating to Old Lease Clause

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Offensive Trades Clause

"that (the said Lessee) or any other person or persons shall not nor will during the continuance of this demise, use, exercise, or follow, in or upon the demised premises or any part thereof, the trade or business of a Brazier, Slaughterman, Soap-maker, Sugar-baker, Fellmonger, Melter of Tallow, Oilman, Butcher, Distiller, **Victualler or Tavern-keeper**, Blacksmith, Nightman, Scavenger or any other noisy noisome or offensive trade or business whatever without the previous licence of Her said Majesty signified in writing by the Governor or other person duly authorized in that behalf"

Meaning of Victualler

A supplier of victuals, i.e. a person whose business is the provision of food and drink*

* Shorter Oxford English Dictionary

LAO Practice Note Issue No. 6/2007

Agreement by Government to license the offensive trades relating to sugar-baker, oilman, butcher, victualler and tavern-keeper subject to technical premium

The question was what original general meaning the parties to the Lease intended it to bear when set against the circumstances in 1950 when the lease was granted.

Mount Cook Land Limited v. Joint London Holdings Limited & Another
[2005] EWCA Civ 1171

General Principles of Construing Contractual Documents

- "the overriding objective in construction is to give effect to what a reasonable person rather than a pedantic lawyer would have understood the parties to mean", and
- the attempt to discover what a reasonable person would have understood the parties to mean "involves having regard, not merely to the individual words they have used, but to the agreement as a whole, the factual and legal background against which it was concluded and the practical objects which it was intended to achieve." (underline added)

* *Jumbo King Ltd v. Faithful Properties Ltd* (1999) 2 HKCFAR 279, 296D-I

"(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background …… includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) …….

* Judgment of Lord Hoffmann in *Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896 at 912H-913F which is also summarised in *Woodfall Landlord & Tenant* §§ 11.007 & 11.008.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B.* 19851 A.C. 191, 201: "if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense."

Crown Lease for No. 1 Homantin Hill Road

- "And shall not develop or redevelop the lot … in any manner which would result in the roofed-over area of the lot or section being such that-

  100/25 x roofed-over area of 3-storey buildings plus

  100/23.539 x roofed-over area of 4-storey buildings

  would be greater than the area of the lot or section...

  And shall obtain the approval of the said Director to the design, disposition and height of any building to be erected on the lot …. "
- "the lessee is [only] prohibited from developing the lot so that the roofed-over area of 3 or 4 storey buildings exceeds the specified area."
- "The covenant says nothing about development with buildings of other than 3 or 4 storeys. "

* *Polorace Investments Limited v. Director of Lands*, HCMP 703 of 1996 (1 May 1997)

Meaning of “dwelling houses”

- The relevant parts of the Government Lease are as follows:-

  “…… And will not …… erect any buildings on the said piece of ground hereby demised or any part thereof other than twenty dwelling houses the design thereof to be subject to the special approval of the said Director ……”

- The Lands Tribunal found the plain, ordinary and popular meanings of the words “dwelling”, “residential” and “domestic” are the same and that commercial or business activities are therefore not permitted in “domestic houses” and thus “dwelling houses”.

* *Pandix Limited v. Hui Kam Kwei and Another*, LDCS 4000 of 2009 (dated 14 October 2010)

Meaning of “house”

- Concessions were made by the Government in two cases, namely:
  - *Wong Bei Nei & Anor v A-G* [1973] HKLR 582 and
  - *Hang Wah Chong Investment Co Ltd v A-G* [1981] HKLR 336

  to the effect that a block of flats can be included in the term ‘residential premises’ and ‘dwelling house’.

Practice Note Issue No. 3/2000

- “[the Director of Lands] will henceforth accept that a building with one main entrance and one secondary entrance, together with such means of escape (MoE) as may be required under the Building Ordinance to serve the buildings [providing such MoE] are designed and constructed to be for exit purpose only and are openable only from the inside is one house…
- *For the avoidance of doubt, a multi-storey residential/ commercial development with shops on the ground floor, each shop having its own separate access to and from the street, would not comply with the definition of one house.*”

Fully Profit (Asia) Limited v. Secretary for Justice, HCMP 82 of 2010 (20 April 2011)

- Fully Profit intended to replace the 5 existing houses by one composite multi-storey building with some 26 storeys on 5 lots each of which is governed by a separate Crown Lease containing the same covenant. .
- Covenant of the Government leases of the Land:
  - "AND will not erect or allow to be erected more than one house on the demised premises …" (for N.K.I.L. Nos. 4036, 4038, 4039 and 3665)
  - "AND will not erect or allow to be erected more than one house on the said piece or parcel of ground …" (for N.K.I.L. No. 4037)
- The nature and extent of the composite multi-storey building intended by the Plaintiff to be erected on the 5 lots are such that each portion of the composite multi-storey building resting on each of the 5 lots should fairly be regarded as "*more than one house*", and hence will infringe the subject covenants. .

“house” in *Fully Profit (Asia) Limited*

- In *Jasmin Enterprises Ltd. v. Chan Yuk Hon* [1998] 4 HCA 224, the court remarked that each case must be decided on its own facts and one has to bear in mind that in 1934 when the Government lease was executed. It raised queried whether there were any 22 storeys multi-storey buildings existing in Hong Kong.
- Whilst Litton PJ in *Wah Yick Enterprises Co. Ltd. v. Building Authority* (1999) 2 HKCFAR 170 recognized that “*a residential block with one common entrance but containing a number of flats within the building envelope*” can be considered as a “*house*”, his Lordship made it clear that not every residential block is a “*house*”, particularly a block with nearly 30 storeys.
- In all probabilities, a person in 1965 (if asked) would describe the structure as a “*high rise block of flats/apartments*” or “*a multi-storey building of flats/apartments*”.
- “it is not difficult to see that the object of the subject covenants was to control the nature and extent of building activities on each lot. The overall concern was to prevent over crowdedness. Accordingly, restriction under the covenant can consists of both quantitative and qualitative aspects.”

The Anti Proposer Rule*

- In the case of doubt about the meaning of a contractual provision, the provision should be interpreted against the person who put it forward.
- In the context of a covenant in a lease restricting the tenant's use of the demised premises, it is the landlord who requires and puts forward the clause, and, if the Rule applies, the landlord will be treated as the proposer.

** also known as the contra proferentem rule*

“not to sublet”

- In *Cook v. Shoesmith* [1951] 1 K.B. 752, the tenant agreed in writing "not to sublet".
- The Court of Appeal unanimously held that that undertaking was not broken by subletting part of the suit premises.
- "I think that the words 'to sublet' in this lease must have an object and that the only possible object that they can be given is 'the above house' - 'I further agree not to sublet the 'above house'. I do not think that the words 'not to sublet' can be construed as meaning 'I further agree not to sublet the above 'house or any part of it, or make any sublease in relation to it': all that can be implied is 'the above house'. I think …… that a sublease of part of premises is not a breach of the covenant against subletting them….."

“lot shall not be used for industrial purpose”

- Ground floor premises in Ma Tau Kok used for making metal moulds and frames for civil engineering use were resumed by Government in 1992.
- Lands Tribunal, applying the contra proferentum rule, held the Crown Lease did not prohibit use of part of the lot for industrial purpose .

* *Hop Kee Iron Work v. Director of Lands*, LDLR 10 of 1995 (23 May 1996)

Contra proferentum rule not necessarily against landlord's interest

- Use of premises restricted to "research development testing manufacture repair and training in the use of engines motors and components and mechanical devices"
- "mechanical devices" held not to be limited by reference to the preceding words "engines motors and components"
- Contra proferentum rule does not mean that one has got to decide the case, if one possibly can, against the landlord's interest in every particular circumstance, but that one construes the clause in its context against the interest of the person who put it forward.
- The indication derived from the contra proferentum rule is that a larger rather than a smaller construction is appropriate to the tenant's activities permitted by the lease

* *Skillion plc v. Keltec Industrial Research Ltd* [1992] 1 EGLR 123

Proper legal advice should be sought on the meaning and effectiveness of the clauses