

## LEASES

### Implied covenant of quiet enjoyment and non-derogation from grant Overseas Union Enterprise Ltd v Three Sixty Degree PTE Ltd [2013] SGHC 71

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#### Summary

A tenant failed in its bid to rely on implied covenants of quiet enjoyment and non-derogation from grant when it could not obtain a required fire safety certificate and suffered delays in its fit out works due to defects for which the landlord was responsible.

The case highlights risks for tenants:

- Failing to undertake sufficient due diligence;
- Relying on implied covenants rather than negotiating express provisions.

#### Facts

Overseas Union Enterprise (OUE) leased to Three Sixty Degree PTE (Three Sixty) the 39<sup>th</sup> floor of a wing of the Mandarin Orchard, Singapore (Property) for the operation of a bar/lounge.

Problems arose due to the unusual access arrangements: the passenger lift stopped at the 38<sup>th</sup> Floor and access to the premises was then by an internal feature staircase up from the 38<sup>th</sup> Floor. The Singapore Civil Defence Force (SCDF) (being the fire safety authority) considered the 38<sup>th</sup> Floor and the Premises to be one unit due to the open staircase and would only grant a fire safety certificate (which Three Sixty needed to obtain a licence to operate the bar) on the condition that the combined occupancy for the 38<sup>th</sup> Floor and the Property did not exceed 120 people. Three Sixty and OUE could not agree the apportionment of the occupancy limit between the two floors and ultimately Three Sixty abandoned its plan to operate the bar from the Premises. It remained in possession and defaulted in rent due and other sums due under the Lease.

OUE re-entered the Property and terminated the Lease demanding vacant possession, payment of arrears, interest and damages for failure to commence trading on the agreed trading date

and to obtain the relevant licences required to operate the bar.

Three Sixty counter-claimed for damages arguing:

- OUE had breached its implied covenant of quiet enjoyment on the basis that the Premises were not well maintained causing several power cuts and severe water leakage;
- OUE had breached its implied covenant against derogation from grant by failing to give Three Sixty the necessary assistance to obtain the fire safety certificate and refusing to allocate the entire occupancy load imposed by the SCDF to the Property.

#### Legal principles

Two covenants are implied in all leases:

- The landlord cannot derogate from its grant - this prevents a landlord from taking steps or granting rights that would render the leased property unsuitable for the purposes for which they have been leased;
- The landlord must allow the tenant quiet enjoyment of the leased property - this requires the landlord to give possession of the property without interference from the landlord or anyone claiming under the landlord (for example, a tenant, licensee or the landlord's assignee).

The two principles are similar in that there cannot be substantial interference with the tenant's reasonable use of the property. However, the principle of non-derogation from grant has distinguishing features:

- The covenant is implied into all contracts whereas quiet enjoyment is confined to property related documents;
- Where a landlord has reserved rights under the lease, a tenant's covenant against

derogation from grant could be implied and enforced by a landlord where the tenant is impeding a reserved right;

- The principle may give rise to proprietary rights in certain circumstances.

The court set out the following five principles derived from case law as guidance in the analysis of potential breaches of the two implied covenants:

- The covenant against non-derogation from grant does not amount to an implied obligation on the landlord to underwrite the profitability of the tenant's business;
- A landlord has no obligation to take measures outside the reasonable contemplation of the parties with regard to the leased property unless they were specifically bargained for in the lease;
- Non-physical interference can constitute substantial interference with the ordinary enjoyment of premises in respect of both covenants;
- The existing use of adjoining premises is always a material consideration when determining whether either covenant has been breached;
- Both covenants are prospective in nature and do not apply to acts of the landlord before the grant of the lease.

## Decision

The court held there was no breach of either of the implied covenants:

- OUE's insistence on apportioning the occupancy load between the two floors did not substantially interfere with the utility of the Property even if Three Sixty's profitability was adversely affected. In addition, Three Sixty had visited the Property before signing the Lease and should have negotiated express protections in relation to access rather than rely on the implied covenants once the disputes arose.
- There was no substantive evidence to show that OUE had not dealt with any defects diligently and that none of the incidents substantially interfered with the utility of the Property.
- OUE was not responsible for Three Sixty's failure to obtain a fire safety certificate. It had provided all the relevant information to Three Sixty as well as reasonable assistance with the application and the failure to obtain a fire safety certificate was a result of Three Sixty's disorganisation.

## Comments

- Tenants should carry out full investigations as to regulatory requirements before signing into a lease.
- If there are conditions to the tenant's continued occupation they should be expressly included in the lease.
- Most landlords will include an express quiet enjoyment covenant in their leases which restricts the implied covenant so that it is subject to the tenant paying rent and complying with the tenant's covenants.

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