

Insights

LANDLORD TENANT DISPUTE: TENANT'S LIABILITY TO MAKE GOOD DAMAGE AND DEFECTS AFTER THE EXPIRY OF THE TENANCY

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SUMMARY

What is the allocation of responsibility for damage and defects after the expiry of a tenancy

The dispute in *So Hon Ming Francis v Cheung Lau Shau Chun and Another* ([2021] HKDC 1494, DCCJ 367/2019, 29 November 2021) concerned the liability of the tenant to make good alleged damage and defects after the expiry of the tenancy.

BRIEF FACTS

By a tenancy agreement, the Plaintiff rented (a) a flat from the 1st Defendant and (b) a car parking space from the 2nd Defendant, a company beneficially owned by the 1st Defendant. The Plaintiff paid a security deposit of HK\$102,000 to the Defendants.

After the expiry of the tenancy agreement, the Defendants refused to return the security deposit to the Plaintiff, on the basis that the Plaintiff had failed to make good damage and defects allegedly found in the rented flat.

THE PROVISIONS IN THE TENANCY AGREEMENT AND THE LAWS

Relevant provisions in the tenancy agreement included:

Clause 6: “*The tenant shall during the Term of Tenancy keep the interior of the Premises in good and tenantable repair and condition except fair wear and tear and damage caused by fire and white ants (not attributable to the negligence or default of the Tenant), typhoon, earthquake, and other acts of God and shall deliver up vacant possession of the Premises in the same repair and condition except fair wear and tear on the expiration or sooner determination of this Agreement.*” (emphasis added)

Clause 7 of Schedule II: “*The Tenant shall responsible [sic] to keep the said premises in well and clean condition during the tenancy period and return same condition [sic] to the Landlord at expiry or termination of the tenancy.*” (emphasis added)

The Court held that it was clear from the express and clear wording of the above two clauses that the Plaintiff contractually was obliged to return the rented flat in the “same” condition, except for fair wear and tear. Such obligation was not predicated on any fault or causation.

The Court emphasised that it was incumbent upon the Defendants, for them to establish a breach of Clause 6 and Clause 7 of Schedule II, to prove, among other things, the condition of the part of the rented flat complained of when the rented flat was handed over to the Plaintiff. In the absence of evidence to the contrary, there is no presumption that the rented flat was in a tenable condition when it originally had been handed to the Plaintiff and the burden should not be shifted to the Plaintiff to prove the contrary.

As to the tenant’s obligation to keep and deliver premises in good and tenable repair, the standard will vary with (a) the length of the lease, (b) the obligations to repair undertaken by tenant and landlord in other covenants, and (c) the age, character and location of the premises at the time the lease was entered into.

ASSESSMENT OF DAMAGES

The Tenant relied on *Burkeman v G E Capital Europe Limited* [2002] EWHC 2863 (QB), which advanced the proposition that, where, particularly with “attractive” property fetching high rent, potential tenants expect perfection and as fair wear and tear are excepted and expected, re-decoration between tenancies is required and often undertaken to bring the property back to perfection, the task of assessing damages is “to identify and compensate, if anything can be identified consequent thereon, for the extra re-decoration necessitated by the proven or admitted breaches”.

The Court held that the measure in *Burkeman* is one of many measures available to the Court in assessing damages if the facts of the case render such a measure appropriate and fair.

ALLEGED DAMAGE AND DEFECTS

The following is a discussion of the various heads of damage or defects claimed by the Defendants, whether the Plaintiff failed to make good the rented flat, and if so, what the appropriate damages would be.

(1) Cleaning costs

The Court found that there had been some white dots on the balcony floor when the rented flat was returned to the Defendants, and that these dots did not exist when the Plaintiff first moved in.

The Court also found some dark spots of mould in the master bedroom. The Plaintiff submitted that those dark spots constituted “fair wear and tear”, which fell under the carve-out of the Plaintiff’s obligation under Clause 6. This was rejected by the Court, because the operative clause is Clause 7 of Schedule II (which obliged the Plaintiff to return the rented flat in the “same” clean condition) meant that whether those dark spots were “fair wear and tear” was irrelevant.

The Defendants claimed HK\$600 and HK\$1,900 for the cleaning costs. Pursuant to *Burkeman*, the Court assessed the damages at the extra cleaning costs necessitated by dealing with the white dots and dark spots of mould at HK\$900 only, because (a) on the evidence, the Defendants only paid HK\$1,900 for cleaning the entire rented flat and (b) the Defendants in any event would otherwise have conducted a general cleaning to the rented flat to ready it for rent by the next tenant.

(2) Labour costs to repaint the ceiling light spot in one of the bedrooms

During the term of tenancy agreement, the Plaintiff changed the ceiling light in one of the bedrooms. Part of the ceiling covered by the base of the original lighting, which was not as white and clean as other part of that ceiling, was then exposed.

In fact, the Plaintiff kept the original lighting and returned it to the Defendants. A reinstallation of the original lighting effectively would cover the ceiling light spot. The Plaintiff agreed to pay HK\$300 for the labour costs to reinstall the original lighting.

As a result, the Court found the Defendants had not suffered any loss in this regard and rejected the Defendants’ claim of HK\$1,400 for the labour costs to repaint the ceiling.

(3) Replacement costs of the kitchen faucet

Due to profuse water leakage from the faucet, the Plaintiff replaced the kitchen faucet. However, the Plaintiff did so without the Defendants’ consent and in breach of the tenancy agreement. The Defendant claimed HK\$2,000 for the replacement costs of the kitchen faucet.

During the trial, the Plaintiff informed the Court that she kept the original faucet and was willing to return it to the Defendants. The Court refused to allow the Plaintiff’s submission because (a) it was not part of the Plaintiff’s pleaded case and (b) it was far too late to do so only during the trial.

Although the expert evidence showed that the replacement costs at HK\$2,300 was reasonable, the Defendants’ claim was limited to what they had pleaded, i.e. HK\$2,000.

(4) Repainting costs of the ceiling and the affected walls

The Court found that there were various scuff marks and dirty areas over the emulsion painted walls in the dining and living areas and the three bedrooms. For those which could not be cleaned effectively, the Plaintiff had painted over them patch-by-patch.

The Court accepted the Defendants' complaint that the paint-over areas were in a slightly different colour than the rest of the walls, such that aesthetically speaking, it was unsightly and not commensurate with the class and level of the rented flat as a residence.

The Defendants claimed HK\$32,200 as the costs of repainting the ceiling and all affected walls.

The Court was of the view that there was little basis to award the costs to repaint the ceiling because (a) there was no evidence showing the paint or condition of the ceiling was other than in tenable and good condition and (b) the outgoing tenant's obligation to make good did not impose on it a duty of redecorating the rented flat to the satisfaction of the new tenant.

The Plaintiff submitted that no award ought to be made under this head because the Defendants would have re-decorated the rented flat by repainting anyway. The Court disagreed, and found on the evidence that, even though minor redecoration, maintenance to and touch up of the rented flat would be caused between tenancies, the Defendants did not necessarily repaint the entire flat every time.

The Court found it appropriate and fair to award HK\$7,000 only as the repainting costs for the affected walls.

(5) Replacement costs of lower kitchen cabinet and its doors

The Defendants alleged the Plaintiff had damaged the lower kitchen cabinet and its doors.

Based on expert evidence, the Court found no structural damages to the lower kitchen cabinet, and the only damage was its abraded edge which was within the range of fair wear and tear, bearing in mind the kitchen cabinet has been so used for 20 years.

Regarding the doors to the kitchen cabinet, the Court was of the view that, if the conditions were indeed good at the start of the tenancy and so visibly and noticeably damaged (which would include expanded and bulged out wood), it would be "*most surprising and most highly improbable*" that the Defendants did not notice it, or make any record and complaint. The Defendants' lack of complaint was "*completely inconsistent*" with their case.

Thus, the Court found the Defendants' claims on the lower kitchen cabinet and its door were not established.

CLAIM FOR LOSS RENTAL INCOME

The Defendants claimed loss of rental income of three months (HK\$153,000) as the time required to repair the lower kitchen cabinet. This claim for loss rental income fell with the Court's rejection of the Defendants' claim on the lower kitchen cabinet.

The Court noted that, in any event, it was clear from the evidence that the Defendants would have performed, and did perform, minor renovation, maintenance and touch up to the rented flat between tenancies. There was no evidence to show that the items of repairs found by the Court would have taken any longer than the usual minor renovation.

CONCLUSION

In the opening remarks of the judgment, the Court expressed the view that the matter involved was trivial, and such kind of dispute should have been resolved reasonably and amicably between the parties.

This case demonstrates the proper approach to how the Court will interpret the tenancy agreement, analyse the evidence, and (if needed) assess the damages for each head of claim. This serves as helpful guidance for landlords and tenants in such kinds of dispute in the future and hopefully, may facilitate amicable resolution between parties without the need – and disproportionate cost - of escalating to the Court.

RELATED PRACTICE AREAS

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MEET THE TEAM



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