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SINGAPORELAWBLOG

Understanding an Option to Renew a Lease: AREIF (Singapore I) Pte Ltd v NTUC Fairprice Co-operative Ltd [2015] SGHC 28

Introduction

The dispute in this case arose from the attempt by NTUC Fairprice Co-operative Ltd (“NTUC”), operator of the well-known chain of Fairprice supermarkets, to renew a lease of seven units (“the premises”) in a commercial building located close to the busy Orchard shopping district. The landlord, AREIF (Singapore I) Pte Ltd (“AREIF”), refused renewal and eventually leased the premises to a competing supermarket chain, Cold Storage. Before the High Court, the legal issue to be decided was whether, on the proper construction of the relevant term of lease agreement, AREIF was under any obligation to renew the lease.

Facts

The lease to which NTUC and AREIF were parties was for a period of 4 years, beginning 1 April 2010 and ending 31 March 2014. The lease agreement contained an option to renew the lease (“the option”), the relevant parts of which are set out here for ease of reference:

6.15 Option to Renew

(a) If the Tenant makes a written request not less than six (6) months nor more than nine (9) months before the expiration of the Term and at the time of such request, there is no existing breach or non-observance of any of the terms and covenants on the part of the Tenant contained in this Lease, the Landlord shall grant to the Tenant a new lease of the Demised Premises at the cost and expense of the Tenant, subject to the following conditions:

(i) the new lease shall be for a term of four (4) years (the “New Term”) commencing from the day following the date of expiry of the Term;

- (ii) the rent payable for the New Term (the “New Rent”) shall be at an aggregate Monthly Rent and Monthly Service Charge of not exceeding Singapore Dollars Eighty Seven And Cents Eighty Four Only (S\$87.84) per square metre per month of the floor area;
- (iii) the amount payable as the monthly service charge shall be determined by the Landlord;
- (iv) The Tenant shall be granted a one month rent free period in the 1st month of the renewal term;
- (v) the new lease shall contain no option for renewal;
- (vi) the new lease shall contain such covenants and provisions as shall be imposed by the Landlord; and
- (vii) the new lease must be signed by the Tenant at a date not later than four (4) months before the expiration of the Term.

On 29 July 2013, NTUC made a written request to AREIF to renew the lease. Negotiations then commenced to determine the New Rent. It shall be noted that although condition (ii) does not provide a formula for determining the New Rent but merely sets out the maximum amount payable, it was within the clear understanding of both parties that the New Rent is to be determined by agreement between them ([5]). Unfortunately, even after negotiating past 30 November 2013, which was the deadline by which NTUC must sign the new lease (if granted) as required by condition (vii), the parties failed to arrive at an agreement. AREIF eventually agreed to let the premises to Cold Storage, after which AREIF informed NTUC that the lease would not be renewed. Although NTUC eventually offered to pay the maximum rent, AREIF remained committed in fulfilling its contractual obligation to Cold Storage.

Both parties commenced proceedings against each other. AREIF claimed that it was under no obligation to renew the lease on two grounds. First, the parties did not agree on the New Rent, as envisaged by condition (ii). Second, NTUC did not sign a new lease by 30 November 2013 (ie 4 months prior to the expiration of the original lease) as required by condition (vii). AREIF demanded vacant possession and delivery up of the premises when the lease expired. On the other hand, NTUC claimed that AREIF was in breach of its contractual obligation to renew the lease, arguing that conditions (ii) and (vii) were not conditions precedent to AREIF’s obligation to grant the new lease. NTUC claimed specific performance of AREIF’s (alleged) obligation to renew the lease.

To be clear, it was not in dispute that NTUC fulfilled the requirements as to timing of the request for renewal as well as the observance of terms and covenants in the original lease on NTUC’s part. Conditions (i), (iii) through (v) were also undisputed. The dispute centred on conditions (ii) and (vii).

Decision

The High Court, presided by Coomaraswamy J, held that conditions (i) to (vii) constitute conditions precedent to AREIF's obligation to renew the lease ("the preferred construction"). Several reasons were given.

The parties' choice of language

Focusing on the language of the option, the Court observed that the phrase 'shall grant to the Tenant a new lease' was clearly qualified by the phrase 'subject to the following conditions' (see [26]–[29]). The option would have taken a very different form were it otherwise.

The purpose of stipulating a maximum rent

Turning its attention to condition (ii), specifically the implied requirement that both parties must agree on the New Rent, the Court held that the preferred construction is natural and commercial for it takes into account the clear commercial purpose of stipulating only the maximum rent (see [30]–[35]). It is implied that the New Rent is to be determined by agreement of both parties. Importantly, it was not intended that if the parties fail to arrive at such an agreement AREIF would be bound to renew the lease at the maximum rent. The tenor of negotiations between both parties clearly demonstrated an understanding that no obligation pertaining to renewal arises in the absence of such an agreement ([35]).

The preferred construction does not render the option illusory

The Court also explained that the preferred construction does not render the option illusory, as argued by NTUC (see [36]–[40]). Even if AREIF refuses to negotiate, NTUC could make an offer to pay the maximum rent, which AREIF is obliged to accept ([33], [36], [40], citing *Corson & ors v Rhuddlan Borough Council*(1990) 59 P & CR 185). AREIF's assent to such an offer is presumed ([36]). The preferred construction also grants NTUC the freedom of whether to continue leasing the premises, which is an important function of an option ([48]).

No duty to bring about fulfilment of the conditions precedent

The Court further explained about the extent of AREIF's obligation under the option. It was held that AREIF was under no legal obligation to bring about fulfilment of the conditions precedent ([52]–[54]), relying on the English case of *Little v Courage Ltd* [1995] CLC 164 where Millett LJ held that it is against principle to imply a term to this effect (at 167–68). The Court observed that there is nothing harsh about this legal position especially when both parties negotiated at arm's length and is reasonably expected to understand their own rights and obligations ([55]).

No duty to negotiate in good faith

Neither is AREIF under any obligation to act in good faith in negotiating the New Rent ([62]–[66]). While an express obligation to this effect is enforceable, such a term will not be implied (following *HSBC Institutional Trust Services (Singapore) Ltd (trustee of Starhill Global Real Estate Investment Trust v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738; *Ng Giap Hon v Westcomb Securities Pte Ltd* [2009] 3 SLR(R) 518). In any event, the court held that AREIF had in fact negotiated in good faith ([66]–[67]).

A duty not to prevent fulfilment of the conditions precedent by breach of a contractual duty

Notwithstanding the general reluctance to imply positive obligations on the grantor of an option, however, AREIF will be precluded from claiming that a condition precedent was not fulfilled if its non-fulfilment was brought about by AREIF's breach of contract. The underlying principle is that no person may take advantage of his own wrong (*Little v Courage*, at 168). Two issues in this case turned on this principle.

First, while the condition was capable of fulfilment, AREIF was under a duty not to put it out of its power to grant a new lease to NTUC (*Little v Courage*, at 168). On the facts, AREIF offered to lease the premises to Cold Storage before 30 November 2013 (the condition (vii) deadline). Before the deadline expired there was still a possibility that NTUC and AREIF could have arrived at an agreement on the New Rent. However, the Court held that AREIF did not put itself out of power to grant a new lease to NTUC as the offer to Cold Storage was revocable and, importantly, it was not accepted until 18 December 2013 ([56]).

Second, if AREIF had refused to grant a lease to NTUC for the latter to sign notwithstanding that all other conditions precedents had been satisfied, AREIF could not insist on NTUC's compliance with the deadline requirement stipulated in condition (vii). But, of course, that was not the case here - the Court had already ruled that AREIF was under no obligation to renew the lease as the New Rent was not agreed upon.

Offer to pay the maximum rent past the deadline not legally binding

While AREIF is bound to grant a new lease if NTUF offers to pay the maximum rent (see above), this does not apply to an offer made after the deadline ([40]). This was why AREIF was not legally obliged to grant a new lease for NTUC to sign even though the latter eventually offered to pay the maximum rent.

No waiver or promissory estoppel

NTUC claimed that AREIF had waived compliance with the deadline by engaging in negotiations with NTUC past that date. On 28 November, NTUC made a revised offer of the New Rent to AREIF, and AREIF replied the next day that that its management would consider the offer. After the deadline passed, on 17 December 2013 and on 22 January 2014, AREIF replied that its

management was still reviewing the offer, in response to NTUC's reminders. The Court held that these facts did not, by themselves, constitute waiver ([74]–[75], citing *Super Chem Products Ltd v American Life and General Insurance Co Ltd* [2004] 2 All ER 358). In substance, AREIF's replies did not amount to an unequivocal representation to waive the deadline requirement in its entirety ([76]–[77]). They amounted to no more than a promise not to insist on compliance with the deadline requirement if, and only if, it eventually decides to accept NTUC's offer (ibid). Due to this finding, there is also no possibility of establishing promissory estoppel. Also, even if AREIF's replies amounted to an unequivocal waiver, it was found that the real reason NTUC allowed the deadline to lapse was its failure to appreciate the significance of the deadline or its mistaken belief that the operative deadline was before the expiry of the original lease ([69]). There was therefore no reliance on AREIF's replies on 17 December 2013 and 22 January 2014.

Concluding remarks

As an option to renew is very commonly included in modern leases, the present decision deserves serious attention. While it does not lay down any novel propositions of law, the Court's exposition of the relevant principles in interpreting an option to renew proves to be most helpful. The practical significance of this decision lies in its reminder about the importance of understanding one's rights and duties pursuant to an option to renew. As the Court observed, '[t]he lease envisages renewal as a process, not as an event', and this process could last for several months ([48]). The parties need to have a clear grasp of what the process entails so as to avoid or minimise, at the very least, common but preventable risks and complications. On the facts, both parties could have acted more vigilantly. On NTUC's part, it should have appreciated the strict nature of the condition (vii) deadline in the absence of an express waiver by AREIF. If NTUC was prepared to pay the maximum rent in the event that no agreement was reached, as appeared to be the case here, it should have done so before the deadline ends. On AREIF's part, its offer to lease the premises to Cold Storage should have been made conditional upon the non-exercise of the option by NTUC. Were it otherwise (as in this case), and if by chance Cold Storage were to accept the offer before the condition (vii) deadline expired, AREIF would be in dilemma as to which obligation to fulfill and would certainly be in breach of contract towards one party. As the Court observed, it was a risky move on the part of AREIF ([57]–[58]). Commercial parties are therefore implored to pay heed to the advice and guidance that this decision has to offer.

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