IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ace Okoman Holdings Ltd. v. Onni North Road Development,* 2015 BCSC 407

Date: 20150317
Docket: 126856
Registry: Vancouver

Between:

Ace Okoman Holdings Ltd.

Plaintiff

And

Onni North Road Development Limited Partnership

Defendant

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the plaintiff:	T. Goepel
Counsel for the defendant:	J.W. Zaitsoff
Place and Date of Hearing:	Vancouver, B.C. March 02, 2015
Place and Date of Judgment:	Vancouver, B.C. March 17, 2015

INTRODUCTION

[1] The issue between the parties on this summary trial is the correct interpretation of the lease renewal term in their commercial lease agreement ("the lease agreement") dated February 22, 2008. The plaintiff, Ace Okoman Holdings Ltd., entered into the lease agreement with a company called North Road Holdings Ltd., the previous owner of a commercial complex comprised of multiple commercial tenancies located at 3355 North Road, Burnaby, which was purchased by the defendant, Onni North Road Development Limited Partnership, in August 2012.

BACKGROUND

[2] The plaintiff owns and operates a restaurant called Okoman within the demised property, which was empty and bereft of improvements when the lease agreement was signed. The plaintiff was poised to spend a great deal of money establishing an upmarket restaurant in what, at the time of signing the lease, would have amounted to a bare and no doubt unprepossessing rectangle within a suburban strip mall. The parties struck a long-term agreement affording the plaintiff the sort of comfort and security of tenure that any restaurateur would require before investing heavily in a property owned by someone else. The lease was for a six-year term with a six-year renewal option exclusively for the benefit of the plaintiff. To date, the plaintiff has spent over $300,000 on equipment and improvements. After a couple of lean years finding its niche in the local market, the restaurant is now turning a profit and there is a fighting chance that the plaintiff will achieve a return on investment.

[3] The trouble for the plaintiff began as soon as the defendant purchased 3355 North Burnaby Road. Formal notice of the change in ownership was distributed to all tenants by mail, but the plaintiff did not receive it because the defendant sent it to the wrong address. The plaintiff contacted the previous owners, who told them that their successors would be in touch presently. Because of this minor and innocent misunderstanding, the plaintiff was late paying rent for September 2012 for the simple reason that they did not know where to send the cheque. Payment was made

and accepted by the defendant on September 10, 2012, but not before the defendant had issued the plaintiff with a notice of lease termination for failure to pay rent. These proceedings were commenced to enjoin the defendant from taking any steps to evict the plaintiff. A hearing scheduled for October 15, 2012 was adjourned after a "standstill agreement" was reached between the parties, under which the defendant was deemed to have re-entered the premises but the plaintiff's tenancy continued until further agreement or court order. This is where things stood until the following summer, when it came time to exercise the option to renew the lease.

THE LEASE RENEWAL OPTION

[4] The option to renew the lease is in the following language:

> 2.04 **Option to Renew**
>
> a) If Tenant has performed all Tenant's covenants and is not in default under any of the terms of the Lease, the Tenant, on giving written notice to Landlord not later than six (6) months prior to the last day of the Term of the Lease, shall have the right to renew the Lease for ONE (1) renewal term of SIX (6) years upon, the terms and conditions contained in the lease but not limited to the Landlord's additional terms and conditions at the time of renewal, the minimum rent and the rate at which percentage rent is payable and any further right of renewal. Such renewal term shall commence on the day immediately succeeding the last day of the term of the Lease, and shall end at midnight on the day immediately preceding the sixth anniversary of the renewal term, unless sooner terminated in accordance with the provisions of the Lease. The minimum rent payable during such renewal terms shall be at the then current market rental rates for the leased premises (provided that the annual minimum and percentage rent payable during such renewal term shall not be less than the annual minimum rent and percentage rent payable during the last year of the Term), or failing agreement by the parties on such market rental rate within one hundred twenty (120) days prior to the expiry of the Term of the Lease, as determined by arbitration based on the criteria set out above, by an arbitrator under the Commercial Arbitration Act of BRITISH COLUMBIA, and amendments thereto, or any like statute in effect from time to time, and the decision of such arbitrator shall be final and binding upon the parties. Such arbitrator shall not be restricted to charging the fees provided for in the said Arbitration Act. The costs of such arbitration shall be borne equally by parties. Except as otherwise provided for herein, the provisions of the said Commercial Arbitration Act shall apply.
>
> b) As soon as the Basic Rent to be paid for the Renewal Term has been determined, the Landlord and the Tenant will enter into a

> supplementary Lease modifying and extending this Lease in accordance with the terms and conditions of the Article 2.
>
> c) If the Tenant fails to give the appropriate notice within the time limit set out herein for renewing the Term of the Lease, then this Option to Renew shall be null and void and of no further force or effect and the Lease shall automatically terminate at the end of the running current Term of the Lease.

[5] The plaintiff gave notice of renewal by means of a letter to the defendant dated July 15, 2013 referring to the above paragraph of the lease and concluding "It is our position that this letter is sufficient notice and compliant with the lease, and is all that is required to renew the lease. If you take a different position, please advise immediately." The defendant did not respond to this letter. The plaintiff's solicitor followed up on September 9, 2013 with a letter addressed to the defendant's corporate solicitor confirming the renewal. He also requested the defendant's position on rents for the new term so the plaintiff could consider whether or not to invoke the arbitration provision.

[6] The defendant responded to this correspondence in an email dated December 6, 2013 ("the December 6 proposal") which the plaintiff claims not to have received. The letter attached to this email went as follows:

> The following is the landlord's proposal to Ace Okoman Holdings Ltd. for the [leased] premises:
>
> | | |
> |---|---|
> | Term:six | (6) years |
> | Commencement Date: | March 16, 2014 |
> | Expiry Date: | March 15, 2020 |
> | Annual Basic Rent per square foot: | Year 1 — 3 $40.00 per square foot |
> | | Year 4 — 6 $45.00 per square foot |
>
> Total Square Footage: Approximately 1,763 square feet of retail space.
>
> This proposal is open for acceptance until December 13, 2013 and is subject to review and approval by the landlord's board of directors. Please acknowledge your acceptance of the above terms by signing below and emailing or faxing this document back to our office . . . if you have any questions please do not hesitate to call.
>
> Upon acceptance, the landlord will prepare formal documentation for your execution.

[7] It will be noted that this proposal refers only to rent for the renewal term and to no additional terms and conditions. The defendant did not follow up this letter with any further correspondence, and I agree with the defendant there was no obligation to do so.

[8] On February 28, 2014, the defendant wrote to the plaintiff saying that, as they had received neither a response to the December 6 proposal nor notice to proceed to arbitration, the lease would terminate on March 15, 2014. The plaintiff responded on March 3, 2014 that the December 6 proposal had not been received and asked for it to be sent again. The defendant responded on March 4, 2014 that the plaintiff had "failed to properly exercise its option to renew under the lease" and confirmed that the lease would terminate on March 15, 2014. In the alternative, the defendant sent along a "lease renewal and modification agreement" which, tracking the language of the lease renewal provision, purported to include the "landlord's additional terms and conditions," including the unilateral imposition of rents for the new term, a large additional security deposit, and the landlord's right to terminate the lease at any time on six months written notice.

DISCUSSION

[9] On this hearing, the defendant argued that the plaintiff's alleged breach of the obligation to pay rent on September 1, 2012 constituted a failure to comply with the covenants and terms of the lease such that the plaintiff was disqualified from exercising the renewal option. I disagree. In my view the want of strict compliance was caused by an error of the defendant for which the plaintiff bears no responsibility and by which they ought not to be prejudiced. This is not a question of relief from forfeiture, but an explicit finding that the plaintiff committed no breach.

[10] In my view, all that was required to renew the lease was written notice to this effect from the plaintiff to the defendant no later than six months prior to lease term expiry. This was done. In my view the notice was clear, unequivocal, unconditional, and binding. There is no merit to defendant's position that the notice somehow failed because there was no agreement on renewal term rent within 120 days of lease

expiry. Such an agreement could only logically follow a valid renewal, in the absence of which no discussion about rents, or anything else for that matter, would be necessary.

[11] An agreement on renewal term rent within the specified time period was not an obligation imposed on either party, furthermore, but a merely a contingency which, if unmet, permitted the parties to go to arbitration on a schedule of their own devising. In the alternative, if the defendant is correct and the parties were obligated by the language of the renewal provision to arbitrate the rent within the 120 period, the defendant also defaulted on this obligation and cannot use this default to deny the existence of a valid renewal or to excuse liability under the contract: *Springhill Farms Limited Partnership v. Nose*, 2013 BCSC 850, at para. 28, aff'd 2014 BCCA 66, para. 25; *Church of Scientology of British Columbia v. Ahmed et al.*, [1982] B.C.J. No. 2399 (S.C.) at paras. 46-47.

[12] Finally, the defendant argued that the plaintiff did not validly exercise the renewal option because they failed to agree to the "lease renewal and modification agreement" sent on March 14, 2014 purporting to contain the "Landlord's additional terms and conditions". For ease of reference, I will repeat the material language of the provision, which states that the plaintiff "shall have the right to renew the Lease for ONE (1) renewal term of SIX (6) years upon, the terms and conditions contained in the lease but not limited to the Landlord's additional terms and conditions at the time of renewal" [emphasis added].

[13] As I was saying to counsel during the hearing, this would seem to me to be some kind of error or infelicity of drafting. The language, to me at any rate, lacks clarity. Nevertheless, as held in *Empress Towers Ltd. v. Bank of Nova Scotia*, 1990 CarswellBC 226 (C.A.), I must strive to ascribe a sensible meaning to this imprecise language (para. 7). If a lease renewal provision constitutes merely an agreement to agree it will not be enforceable, but this will not be the case where the provision provides certainty by means of a mechanism or formula for ascertaining the parties' respective obligations on renewal.

[14] In *Rumrunner Pub Ltd. v. Seaport Place Holdings ULC*, 2010 BCSC 736, the Court considered a lease renewal option clause containing language which permitted the landlord unrestricted discretion, after notice had been given, to require the tenant to carry out major improvements to his property. That part of the renewal clause was found to be unenforceable because it failed to provide the parties with certainty as to their future rights and obligations (paras. 54-57). Similarly, in *Mannpar Enterprises Ltd. v. Canada,* [1997] B.C.J. No. 906 (S.C.), aff'd 1999 BCCA 239, the Court reviewed the applicable case law at length, concluding that a renewal clause will be void for uncertainty where it is merely an "agreement to negotiate in the absence of some objective measure" (para. 55).

[15] On the present application, notwithstanding the December 6 proposal which, as I have said, referred only to rent for the renewal term, the defendant has argued that the words "Landlord's additional terms and conditions" in the lease renewal provision vested them with the discretion to impose material changes to the existing lease arrangements, including length of tenure. The defendant argued that the six year renewal term, offered for the sole benefit of the plaintiff as an inducement to sign the original lease, could be truncated by as much as five and a half years at the sole option of the new owners. If these words of the renewal provision are capable of such broad interpretation, and there was truly no restriction at all on the defendant's ability to impose additional terms and conditions, or if the basic fundamentals of a lease contract, including term length, were left to be decided after the plaintiff had committed to renewal, then the renewal provision is a mere agreement to agree and is void for uncertainty.

[16] In which case, the remaining question is whether the words "Landlord's additional terms and conditions" in the lease renewal clause are severable, or whether the entire renewal clause is unenforceable. The Court in *Rumrunner Pub Ltd.* cited the following principles with approval in determining whether an uncertain clause could be severed (para. 63):

> 1) the clause must be void, but not illegal;
>
> 2) it must be possible to strike out the clause without rewriting or rearranging the contract;
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> 3) severance of the clause must not alter the scope or the intention of the agreement; and
>
> 4) the contract once the offending clause is removed must retain the characteristics of a valid contract.

[17] In my view, these principles weigh in favour of the plaintiff's argument that only the impugned words, and not the whole clause, should be severed. The renewal clause is not illegal. The remainder of the contract after severance is enforceable. No rearrangement of the lease is necessary. To the contrary, in my view, the scope and intention of the agreement is not altered but is preserved by this severance. The parties agreed upon a long-term commercial relationship to which the lease renewal provision was central. It was clearly intended to afford the plaintiff a lengthy measure of quiet enjoyment and security of tenure subject to an agreed or arbitrated rent adjustment for the renewal term. This intention would be substantially defeated and the plaintiff materially prejudiced if the entire lease renewal provision were struck. Finally, following the removal of the offending words, the lease retains the characteristics of a valid contract, particularly in its provision of an objective mechanism for determining the market rental rates for the renewal term.

CONCLUSION

[18] In the result, I hereby order that the words "Landlord's additional terms and conditions" are severed from Article 2.04 of the lease agreement. I declare, furthermore, that the plaintiff's option to renew the lease agreement was validly exercised, and that the lease agreement between the parties continues to be binding, enforceable and in full force and effect with a six year renewal term starting on March 15, 2014, subject to agreement or arbitration, if necessary, on rent for the duration.

[19] The plaintiff has asked for an order of special costs which I decline to make. The defendant's conduct overall, especially in agreeing to the maintenance of the *status quo* pending resolution of this dispute, has been reasonable enough. The plaintiff will have costs on Scale B.

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"Baird J."