Leasing Updates

Date : November 19, 2012

Westpac Banking Corporation (as Plaintiff) v Kurobe Holdings Pty Ltd and Karovel Nominees Pty Ltd (as Defendants) [2010] NSWSC 537

This case, between landlord and tenant, concerned the validity of an exercise of option, in relation to a lease.

Two issues arose:

1) whether the notice is valid; and

2) if not, whether the defendants are estopped from denying that it is.

The facts:

- On 6 August, Kurobe's (Landlord's) managing agent, Sydney Property Management Pty Ltd (SPM), sent a letter to United, Westpac's leasing agent, a letter asking them to consider taking up the option period.
- On 29 August Mr Loblay, director of Kurobe and SPM, sent a letter to Westpac (Tenant) notifying them to send future notices to Kurobe's new address.
- On 16 October United (Tenant) sent a letter to SPM (Landlord) with a notice of intention to exercise the option.
- On 20 October, Mr Mann of SPM acknowledged receipt of United's notice of intention by signing it and returning it to United.
- On 8 November 2008, the option period expired.
- On 1 December 2008, Mr Loblay sent a letter stating "we note you have not exercised your option to renew the lease".

Issue 1: Is the notice of intention to exercise the option valid?

Held: The notice of exercise of option was valid for the following reasons:

1. The notice satisfied the essential requirement that it communicate a clear and unequivocal intention to exercise the option. This is determined by what a reasonable recipient of the notice familiar with the terms of the lease and the surrounding circumstances including the dealings between the parties would have understood. Provided the notice conveys an unequivocal intent, it is not fatal that it does not use terminology precisely conforming to the terms of the option or that it misstates its terms or that it is addressed to the agent of the lesser and not the lessor. The importance lies in the conveyance of a clear and unequivocal intention.

2. Notice of exercise of option may be given by and to the duly authorised agents of the lessee and the lessor. Clause 15.1 of the lease specified no formalities in relation to giving notice of intention to exercise the option.

3. Clause 14.1 of the lease contained general provisions about notices including that any notice must be in writing and is valid if it is signed by an authorised person of the party.

In particular, Clause 14.1(a) states:

In writing:

Any notice given under this Lease must be in writing. A notice is valid if signed by an officer or solicitor of the party giving it or any other person nominated by that party. At [14] Pembroke J stated that: *"one of the apparent commercial purposes of the limited language of the second sentence of 14.1(a) is to obviate the need for proof of authority where the notice is signed by one of the three specified categories referred to in the clause. But in a context where the validity of the exercise of an option by an agent on behalf of a lessee is well recognised as a matter of general principle under the law of agency and under the law of landlord and tenant, I would be reluctant to read the second sentence of cl 14.1(a) in a manner that gives it the effect of limiting valid notices only to those signed by the specified persons".*

In relation to this issue, Pembroke J held that the notice signed by an officer of United (Westpac's leasing agent) on behalf of Westpac was a valid notice.

4. Another issue that arose was in relation to cl 14.1(d) which stated:

Service of Notice on Landlord

The Tenant may serve a notice on the Landlord by leaving it at, or posting by certified or registered mail to the Landlord's office set out in item 1 of the Reference Schedule or at the last address notified to the Tenant.

5. For the following reasons it was held that the failure of United to serve the notice of exercise of option at the address notified in the letter dated 29 August 2008 did not invalidate the notice.

6. The letter of 29 August 2008, notifying the new address for SPM and Kurobe did not comply with cl 13.2 specified the address that notices to the tenant had to be sent to. As a result, and given the size and complexity of Westpac, the letter did not come to the attention of the relevant officer of Westpac or United who was responsible for the lease. Pembroke J held that the letter of 29 August 2008 did not have any contractual effect as a notice to the tenant under the lease. Consequently, the letter did not constitute notification of a new last address of the tenant pursuant to cl 14.1(d).

Regardless however, Pembroke J's interpretation of cl 14.1(a) is that is in a 'permissive' form which leads to the conclusion that compliance with its terms is not a condition precedent to

validity. *"In the overall context, it hardly seems likely that the parties could have intended that strict and literal compliance with the requirement for service at the last address of the landlord notified to the tenant should be a condition precedent to validity regardless of whether the landlord has, in fact, received the notice*".

7. To support his reasoning, Pembroke J turned to the observations of Megarry VC in Townsend Carriers Ltd v Pfizer Ltd (1979) 33 P & CR 361 at 366: *"If the notice was addressed to the wrong person, but was nevertheless delivered to the right person, the question would be whether the mis-addressing prevented the notice from being given to the right person. The purpose of a notice is, of course, to convey information and if the notice, despite its being misaddressed, suffices to convey the requisite information to the right person, I would have thought that it would satisfy the terms of the lease*".

8. In consideration of the terms of the lease and the particular circumstances in which the error of address arose, Pembroke J concluded that the notice of exercise of option is valid.

Issue 2: Are the defendant's estopped from denying the validity of the notice?

Held: The defendants are estopped from denying the validity of the notice for the following reasons:

1. The plaintiff contended that it had been induced or encouraged by the conduct of the defendant to assume that its notice of exercise of option was valid notwithstanding that it was addressed to and served upon SPM as the defendant's agent.

2. In considering the reasonableness of the plaintiff's assumption, Pembroke J looked to previous dealings between the parties in relation to the lease. The letter from SPM to United on 20 October acknowledged receipt of the notice of intention to exercise the option as it was signed and sent back. The letter did not inform the plaintiff's that the notice of exercise of option should have been addressed to and served upon the defendant's.

3. The founding principle of equitable estoppel is that equity will grant relief to a plaintiff who has acted to its detriment on the basis of a fundamental assumption in the adoption of which the defendant has played such a part that it would be unfair or unjust if it were left free to ignore it (Grundt v Great Boulder Gold Mines Ltd (1937) 59 CLR 641 (per Dixon J).

4. A defendant may remain silent except when it has induced or encouraged the false assumption on which, to its knowledge, the plaintiff has acted to its detriment. It is unconscionable that the defendant induced or maintained the adoption of the assumption, with knowledge that it would be relied upon and in doing so failed to fulfil the assumption or otherwise permit the plaintiff to avoid the detriment to which it has been exposed (Waltons Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 at 423 (per Brennan J). The emphasis must be on the part which the defendant played in the adoption or maintenance of the assumption by the plaintiff as well as their intention. The defendant's deliberate silence, supported by evidence, together with their knowledge of the error supports an estoppel.

5. Pembroke J concluded that the plaintiff's assumption, and the maintenance of that assumption until beyond 9 November 2008 (when the option expired), was caused or induced, contributed to and maintained, by the conduct of the defendants and its agent, SPM.

For advice on Leases, contact our Property team on 9635 7966