Right of first refusal in relation to real estate

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Introduction

This article aims to provide an overview of what constitutes a right of first refusal ("ROFR") in relation to real estate (referred to herein as "property") and the salient considerations to be borne in mind by parties considering a ROFR agreement.

Overview of ROFR

A ROFR in relation to real estate essentially arises where the owner of the land (Grantor) contracts that, if and when he decides to sell the property, he will *first* offer it to the other contracting party (Grantee) ahead of any other purchaser. The ROFR, unlike an option to purchase, is not an offer to sell, and does not give the Grantee the right to buy.

An instance where a party may wish to obtain a ROFR is when a tenant desires to extend its continued occupation at the property. In such a case, the tenant may, other than or in addition to an option to renew the tenancy, negotiate for a ROFR to be included in the tenancy agreement, with the tenant effectively being placed in the position of a preferential purchaser.

In Singapore, the ROFR features in industrial property leases issued by the Housing Development Board (HDB) and the Jurong Town Corporation (JTC). With effect from 15 April 2010 for JTC industrial land leases and 1 January 2015 for HDB industrial land leases respectively, ROFR clauses have been imposed on all new allocations of leases, as well as for lease renewal and lease assignment cases. In such instances, where a lessee desires to assign or sell the industrial property leased from JTC or HDB, the lessee is required to give JTC or HDB (as the case may be) the first right to buy the property.

Key considerations

While a ROFR may take various forms, some key considerations when negotiating for a ROFR include the following:

(a) Nature of the right granted –

Whether the Grantor is contractually obliged to make an offer to sell to the Grantee on certain terms, or is merely obliged to notify the Grantee of his desire to sell, leaving the Grantee to make an offer to buy which the Grantor may accept or decline;

Is the ROFR intended to be exercisable, for example, only during the first two years of the tenancy, or for the entire

(b) Duration of the right –

term of the tenancy?

(c) The triggering event –

Whether the exercise of the ROFR should be limited to circumstances when the Grantor desires to sell the property, or if other dispositions of the property (by way of gift or otherwise) are intended to fall within the ambit of the ROFR;

(d) Timeline for the exercise of the right –

Whether the Grantee is given a specific duration to exercise the ROFR upon the Grantee being notified of a third party's offer or of the Grantor's desire to dispose of the property;

(e) Non-exercise of the right –

If the Grantee chooses not to exercise the ROFR on the first occasion when it becomes exercisable, does the Grantor remain bound by the ROFR on a rolling basis such that the Grantee remains in the position of a preferred purchaser each time the Grantor desires to sell? Further, if the Grantor's sale to a third party is unsuccessful, is the Grantor obliged to go through the process of notifying or making a further offer to the Grantee in the event of another potential sale?

(f) Terms of the sale –

Among other things, the terms could include the price to be paid for the property (and the basis for arriving at such price, where applicable), the encumbrances subject to which the property will be sold (if any), and whether the Grantee is to pay a deposit upon exercise of the ROFR; and

(g) Transferability of the ROFR –

Do parties intend for the Grantor's successors in title to be bound by the ROFR? In addition, parties may also wish to consider if the ROFR is intended to be personal to the Grantee only.

Enforceability of a ROFR which terms are vague

A review of the Singapore and UK cases suggests that a court would hesitate to find that a ROFR is unenforceable even where the terms of the ROFR are vague. In the absence of a comprehensive ROFR which clearly delineates the parties' respective rights and obligations, a court will, so far as possible, strive to give some sensible meaning to the terms of the ROFR. This is particularly so where commercial parties have taken the trouble of negotiating, preparing and concluding an agreement granting or otherwise incorporating the ROFR.

For example, where the terms of the ROFR do not stipulate a clear timeframe for the exercise of the ROFR by the Grantee upon occurrence of the triggering event, there are at least two avenues by which a court may seek to give effect to operation of the ROFR. The court may find that:

1. The Grantor is entitled to revoke the offer to sell at any time before the Grantee exercises the ROFR; or
2. The Grantor is obliged to give the Grantee a reasonable timeframe to exercise the ROFR, having regard to the circumstances of the particular case. While case authorities are lacking on what would constitute a reasonable and sufficient timeframe for the Grantee to exercise the right, this could be any time between one week and three months from the date on which a third party's offer (or the Grantor's offer to sell, as the case may be) is communicated to the Grantee.

By way of another example, it may be that a ROFR has been granted as part of or pursuant to a tenancy agreement but is silent on the duration of the ROFR. A court may, in these circumstances, find that the rights and obligations conferred by the ROFR were intended to have effect for the full duration of the tenancy agreement, unless any other term of the tenancy agreement suggests that the ROFR was intended to survive the agreement (for example, renewal term of the tenancy) or to cease before the expiry of the tenancy.

Threatened breach / actual breach of the ROFR

A ROFR is a *caveatable interest* under Singapore law. Accordingly, a Grantee's caveat registered claiming an interest under a ROFR may stand in the way of a Grantor who purports to sell his property to another party in breach of the ROFR. Such a caveat may be removed by the Grantor only if the Grantor has properly discharged his obligations under the ROFR, or if the ROFR has lapsed or been revoked whether by effluxion of time or by agreement of the Grantor and Grantee. Alternatively, a Grantee may obtain an injunction to restrain the Grantor's sale of the property to a third party until the Grantor has first complied with the ROFR.

Where a Grantee realises only too late that the Grantor has transferred the property to another party in breach of the ROFR, his recourse would lie in an action for breach of contract by the Grantor. In such a scenario, the Grantee's remedy will likely lie in damages.

Conclusion

Given the intricacies of any grant of a ROFR and the likelihood that a court would uphold a validly granted ROFR, contracting parties should seriously consider the above issues and obtain legal advice on the rights and obligations which they may assume pursuant to a ROFR, prior to entering into any agreement for the grant of a ROFR..

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