IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2016] SGHC 194

Suit No 292 of 2015

Between

Ngee Ann Development Pte Ltd

… *Plaintiff*

And

Takashimaya Singapore Ltd

… *Defendant*

JUDGMENT

[Contract] — [Contractual Terms] — [Express Terms]

Ngee Ann Development Pte Ltd
v
Takashimaya Singapore Ltd

[2016] SGHC 194

High Court — Suit No 292 of 2015
Debbie Ong JC
29–31 March; 1, 5–6 April; 8 August 2016

13 September 2016 Judgment reserved.

Debbie Ong JC:

Introduction

1 Ngee Ann Development Pte Ltd ("NAD") and its tenant, Takashimaya Singapore Ltd ("Takashimaya"), are familiar names associated with Ngee Ann City, a well-known and formidable presence along Orchard Road, in the heart of Singapore's renowned shopping belt. NAD had leased Strata Lot U5784W of Town Subdivision 21 at 391 Orchard Road, Ngee Ann City, Singapore (the "Demised Premises") to Takashimaya since 1993 for an initial period of 20 years with six consecutive options to renew the lease for a period of 10 years each, ending on 30 March 2072. The maximum lease period if all the options were exercised would amount to almost 80 years. When the end of the initial 20-year lease term drew near, Takashimaya gave notice in January 2013 of its intention to exercise its first option to renew the lease. However, the parties were unable to agree on the rent in respect of the renewed lease.

2 In the present suit, NAD, the plaintiff, seeks to compel Takashimaya, the defendant, to complete the rent valuation process so that the rental value reached may be used as the rental price of the Demised Premises for the next five-year period of the lease. The present dispute centres on the interpretation of the phrase "*prevailing market rental value of the Demised Premises*" in cl 12 of the lease agreement. NAD argues that the phrase does not require the valuers to determine the rent based on any specific configuration of the Demised Premises and that they may determine, using their professional discretion, the rent based on the highest potential of the property (the "Highest and Best Use principle"). Takashimaya contends that the rent must be determined with reference to the layout and configuration that is applied at the Demised Premises (the "Existing Configuration principle") and that this had been agreed between the parties.

Background facts

The parties

3 NAD is the landlord of the Demised Premises and a subsidiary of Ngee Ann Kongsi, a charity incorporated under the Ngee Ann Kongsi (Incorporation) Ordinance (Cap 370, 1985 Rev Ed).

4 Takashimaya has operated the Takashimaya departmental store located within the Demised Premises for more than 20 years. Takashimaya is a wholly-owned subsidiary of Takashimaya Co. Ltd ("Takashimaya Japan"). Collectively, the Takashimaya group of companies ("Takashimaya Group") is well known for its main business as an operator of large and prestigious departmental stores. Takashimaya Japan also invested in NAD and currently owns approximately 26.3% of its shares, while the remaining 73.7% of the

shares are owned by Ngee Ann Kongsi. In other words, the plaintiff in this suit is 26.3% owned by the defendant's parent company.

The beginning of the parties' relationship

5 In 1988, representatives from both Ngee Ann Kongsi and Takashimaya Japan discussed the possibility of the Takashimaya Group investing in and leasing the Demised Premises. The parties then entered into a conditional agreement for the lease ("the Conditional Agreement") dated 18 July 1989 prior to the construction of the commercial complex, which we now know as "Ngee Ann City". The parties agreed that they would execute an "Agreement for Lease", which was appended to the Conditional Agreement, after the necessary approvals had been obtained by the relevant authorities for the building construction plans. The specific clauses relevant in the present dispute are found in a further document appended to the "Agreement for Lease" which is entitled "Lease" and will hereafter be referred to as such. The Lease is the document which sets out the terms governing the relationship between the parties, and which contains the provisions in issue.

6 At the commencement of the Lease, Takashimaya used an area of 38,000 square metres to operate a departmental store, out of approximately 56,000 square metres leased to it. The remaining area was largely used by specialty shops and as common access areas. According to Takashimaya, its use and configuration of the Demised Premises reflects Takashimaya Japan's business model of operating large-scale, full-service departmental stores. This business model is applied across its stores in Japan as well as several other countries in which it operates. Today, the designation of 38,000 square metres of the Demised Premises as a departmental store remains substantially unchanged. Although NAD disputes this, I find that there is ample

documentary evidence to support this configuration – the valuation reports by Dr Lim Lan Yuan, Knight Frank Pte Ltd and CBRE Pte Ltd show that the Demised Premises' configuration has remained fairly consistent over the years.

7 Pursuant to the negotiations between Takashimaya Japan and Ngee Ann Kongsi, Takashimaya Japan also invested in NAD and currently owns approximately 26.3% of NAD's shares. Takashimaya Japan has also appointed four out of the 13 directors on NAD's Board of Directors.

The Lease

Overview

8 The Lease between the parties was for an initial term of 20 years, commencing on 8 September 1993 and expiring on 7 September 2013. After the commencement of the Lease in 1993, the parties continued to re-negotiate some parts of the Lease. For example, the rent value was only agreed in 1998.

Material clauses under the Lease

Option to renew: Clause 12

9 Clause 12 of the Lease provides Takashimaya six consecutive options to renew the lease for a period of 10 years each (each referred to as an "option period") after the initial 20-year term. NAD is obliged to renew the lease for the option period if Takashimaya has fulfilled its obligations as provided. The final option period has a slightly shorter term as it was stipulated to end on 30 March 2072. The total lease period if all options were exercised under the agreement would amount to almost 80 years. At the time of the agreement,

therefore, the parties had clearly envisaged a very long-term business relationship.

10 The rent to be applied at the start of each option period was to be determined by way of the mechanism provided in cl 12 (the "Rent Renewal Mechanism") whereby the *prevailing market rental value* of the Demised Premises, either as agreed between the parties or determined by a licensed valuer, shall be the renewal rent for the relevant option period. After the first five years of each 10-year option period, the rent would be subject to review in accordance with cl 2 of the Lease (which is analysed below). The present dispute concerns the determination of the renewal rent for the first five years of the first option period after the expiry of the initial 20-year term.

11 The material portions of cl 12, which provides for the "OPTION TO RENEW" the Lease, are reproduced here:

> The Lessee shall be entitled to six (6) consecutive options to renew its lease hereunder, (each such renewal period shall hereinafter be called "option period"), on the following terms and conditions: -
>
> (a) Option period: The option period for each of the first five consecutive options to renew shall be for a period of ten years each; the option period for the final sixth option shall be for a period commencing from the expiry of the lease term then in force and ending on the 30th day of March 2072.
>
> ...
>
> (c) *Prevailing market rental value*: Upon receipt of the Lessee's notice referred to in the preceding sub-clause (b), the parties shall endeavour to agree on the *prevailing market rental value* of the Demised Premises (excluding service charge and disregarding the value of all fixtures and fittings installed by the Lessee) for purpose of determining the rent (the "renewal rent") for the relevant option period, if by three months before commencement of the relevant option period, the parties have not reached agreement on the renewal rent, the Lessor shall *appoint a licensed valuer* to determine the prevailing market rental value. The

> licensed valuer may be nominated by agreement between the Lessor and the Lessee or in the absence of agreement, nominated by the President for the time being of the Singapore Institute of Surveyors and Valuers (or its successor institute) on the application of the Lessor. If the said President is not available or is unable to make such nomination at the time of application, the nomination may be made by the Vice President or next senior officer of the said Institute then available and able to make such nomination. All costs and expenses of and in connection with the appointment of the licensed valuer shall be borne by the Lessor and the Lessee in equal shares. The licensed valuer shall act as an expert and not as an arbitrator and his decision shall be conclusive and binding on the parties.
>
> (d) Renewal rent: The *prevailing market rental value* of the Demised Premises thus agreed or determined by the licensed valuer shall be the renewal rent for the relevant option period.
>
> (e) Rent review: The rent for each option period shall be subject to review every five years, each rent review period shall commence five years after commencement of each option period, and the provisions of clause 2(c)(i), (ii), (iii) and (iv) of this Lease shall apply mutatis mutandis. The provisions of clause 2(c)(v) of this Lease shall not apply for purpose of this sub-clause (e).
>
> …
>
> [Emphasis added in italics]

Configuration of the Demised Premises: Clauses 2, 3 and 11

12 Subject to restrictions under cll 2, 3 and 11 of the Lease, Takashimaya had the discretion to decide on the appropriate layout or configuration of the Demised Premises. The main restrictions on its discretion are that: (a) under cl 3(a), the use of the Demised Premises should conform to the list of "approved uses" in the Lease; and (b) under cl 11(d), 10,000 square metres ("the Retained Area") of the Demised Premises must either be sublet to only one sub-lessee acceptable to NAD or retained by Takashimaya. Clause 11(d) provides as follows:

> A portion of the Demised Premises having a lettable area of not less than 10,000 square metres shall be retained by the Lessee ("the Retained Area") and the Lessee shall not sublet the Retained Area except to one sublessee (acceptable to the Lessor whose approval shall not be unreasonably withheld) who shall be required to operate such trade or business on the Retained Area in accordance with its approved use.

13 Thus the Lease does not stipulate any particular configuration which Takashimaya should apply to the Demised Premises, save for the "Retained Area" which is to be either retained by Takashimaya or sublet to one sub-lessee that is acceptable to NAD. It appears that the stipulation on the "Retained Area" serves to protect both parties' (including NAD's) vision, at the time of negotiations, of the Demised Premises having a departmental store as its anchor tenant. This point is explained further below.

Rent review: Clause 2(c)

14 Clause 2(c) of the Lease provides for a rent review once every five years after the initial five years of the 20-year lease term. Thus there were three rent review periods under the initial 20-year lease term As indicated above, cl 12, which provides for the "option to renew", imports cl 2(c) on rent review into the renewed option periods via cl 12(e).

15 Clause 2(c)(iii) contains what is known to the parties as the "floor and cap" provision under the Lease. After the "prevailing market rental value of the Demised Premises" had been agreed between the parties or determined by a valuer, cl 2(c)(iii) would operate to restrict the amount by which the rent could be increased or decreased (thus setting a maximum and minimum rental value for the next relevant period). It appears that the commercial purpose of the "floor and cap" provision is to protect both the landlord and the tenant by preventing excessive fluctuations in the rent payable during any subsisting lease term. To protect the landlord in a falling market, the existing rent would

continue to apply for the next rent review period if the "prevailing market rental value of the Demised Premises" was determined to be less than the existing rent at the time of the rent review. Conversely, to protect the tenant in a rising market, the rent for the next rent review period would be capped at a maximum increase of 30% of the existing rent even if the prevailing market rental value was determined to be more than 30% of the existing rent at the time of the rent review. The new rent determined at each rent review would then constitute the "current rent" for the purpose of the next rent review. The parties accept that the interpretation of the "prevailing market rental value" under cl 12 should be the same as the interpretation under cl 2(c).

16 The material aspects of cl 2 relating to the rent review are reproduced here:

> (c) Rent Review: The monthly rent for each successive period of five years, after the first five years of the Lease Term, (each of such five year period shall hereinafter be called a "rent review period") shall be determined in the following manner: -
>
> (i) Prior to the commencement of each rent review period, the Lessor and the Lessee shall endeavour to agree on the *prevailing market rental value* of the Demised Premises (excluding service charge and disregarding the value of all fixtures and fittings installed by the Lessee) for purpose of determining the new rent for the relevant rent review period.
>
> (ii) If by three months before commencement of the relevant rent review period, the parties have not reached agreement on the new rent, the Lessor shall appoint a licensed valuer to determine the prevailing market rental value of the Demised Premises. The licensed valuer may be nominated by agreement between the Lessor and the Lessee or in the absence of agreement, nominated by the President for the time being of the Singapore Institute of Surveyors and Valuers (or its successor institute) on the application of the Lessor. If the said President is not available or is unable to make such nomination at the time of application, the nomination may be made by the Vice President or next senior officer of the said Institute

> then available and able to make such nomination. All costs and expenses of and in connection with the appointment of the licensed valuer shall be borne by the Lessor and the Lessee in equal shares. The licensed valuer shall act as an expert and not as an arbitrator and his decision shall be conclusive and binding on the parties.
>
> (iii) The prevailing market rental value of the Demised Premises thus agreed or determined by the licensed valuer shall be the new rent for the relevant rent review period
>
> Provided Always that:-
>
> (aa) if the prevailing market rental value is less than the rent (hereinafter called the "current rent") operative for the lease period preceding the commencement of the relevant rent review period, the current rent shall continue in force and shall be deemed to be the new rent for the relevant rent review period; and
>
> (bb) if the prevailing market rental value is an amount which exceeds one hundred and thirty percent (130%) of the current rent, the new rent for the relevant rent review period shall be fixed at an amount equivalent to one hundred and thirty percent (130%) of the current rent.
>
> [Emphasis added in italics]

The rent in the initial 20-year lease term

The first rent review period

17 On 17 November 1998, NAD and Takashimaya entered into a supplemental agreement to the Lease (the "1998 Supplemental Agreement"). As stated earlier above at [8], the parties did not agree on the rent payable until 1998, a few years after the commencement of the Lease. By way of the 1998 Supplemental Agreement, the parties agreed that they would accept the net floor area of the Demised Premises to be 56,105 square metres. The parties also agreed on the initial rent and the rent payable for the first rent review

period (*ie*, 8 September 1998 to 7 September 2003), at $5,011,680 per month, or approximately $60m per annum.

The second rent review period

18 For the second rent review period (*ie,* 8 September 2003 to 7 September 2008), the parties were unable to agree on the new rent. The procedure set out in cl 2(c)(ii) of the Lease was invoked whereby the Singapore Institute of Surveyors and Valuers ("SISV") was asked to nominate a licensed valuer. Dr Lim Lan Yuan ("Dr Lim") was nominated and subsequently appointed to conduct the valuation. The parties accepted Dr Lim's valuation as the rent payable for that period.

19 Dr Lim, currently a Managing Director of his own valuation consultancy firm and formerly the Council Chairman of the SISV, gave evidence as Takashimaya's witness. According to Dr Lim, he conducted the valuation based on the use and configuration that Takashimaya applied to the Demised Premises at the material time, and he had sought specific information for this purpose. Dr Lim gave evidence that, absent an agreed configuration and basis for the valuation, it would have been "very difficult, if not impossible" for him to conduct the exercise. NAD has challenged Dr Lim's evidence on these points based on its own expert's evidence.

20 I understood from Dr Lim's evidence at the trial that, although it was not expressly stated in his report dated 3 December 2003, he had conducted the valuation based on the Existing Configuration principle:

> Q: … I took you through your 2003 report, would you agree with me that your 2003 report doesn't say specifically that you are valuing it based on the existing configuration?

> A: No. As I said, it is understood, because you are valuing that subject property, you look at how the subject property is being configured, being used. …
>
> The valuation -- not just based on existing use, or whatever use, you know. It is not that. It is valuing the subject property as it is right now. Because you are talking about a revision, rental revision.
>
> Q. Right.
>
> A. You are not talking about a re-development. That is a completely different exercise.

21 Before Dr Lim produced his report in December 2003, NAD had provided Dr Lim with copies of relevant documents for the valuation by way of letters which were also copied to Takashimaya. This included the Lease document, building details, plans of the Demised Premises, and rental details for retail space. Dr Lim had also carried out site inspections at the Demised Premises and met with representatives from both NAD and Takashimaya to obtain information from them. According to Takashimaya's director Mr Masahiro Yoshino, who was one of the representatives at the site inspections, Dr Lim had asked questions about the configuration that Takashimaya had applied to the Demised Premises. Although disputed by NAD, Dr Lim's own evidence at the hearing was that he had valued the Demised Premises in a manner consistent with the Existing Configuration principle.

The third rent review period

22 For the third rent review period (*ie,* 8 September 2008 to 7 September 2013), the parties were similarly unable to agree on the applicable rent and invoked the procedure set out in cl 2(c)(ii). Once more, Dr Lim was nominated by the SISV and appointed by the parties to undertake the rental valuation.

23 Dr Lim conducted the rental valuation on the same basis that he had done in respect of the second rent review period. As with the second rent

review period, parties did not object to Dr Lim's basis for valuation. However, NAD wrote to Dr Lim in June 2009 after his report was issued, requesting an explanation for the "huge difference" between his rental valuation figure for Takashimaya and the rental then payable by Toshin Development Co Ltd ("Toshin") for the remaining retail area in Ngee Ann City. Dr Lim responded that an important factor affecting the rental rate was the difference in lettable areas. Dr Lim informed NAD that it was not unreasonable for the rental rate to be higher in terms of rate per square foot of lettable area for a much smaller area, and in the instant case the Demised Premises rented by Takashimaya was 2.67 times the size of that rented by Toshin. There was no further query or response from NAD following Dr Lim's reply. Parties thus appeared to have accepted Dr Lim's valuation as the rent payable for that period.

Parties' variation of cl 12

24 On 18 January 2013, Takashimaya wrote to NAD stating its intention to exercise its option to renew the lease for a period of ten years commencing on 8 September 2013 (the "First Option Period"), pursuant to cl 12(b).

25 In order to prepare a rental proposal for Takashimaya, NAD engaged Savills Valuation and Professional Services (S) Pte Ltd ("Savills"), which provided a report setting out its opinion on the prevailing market rental value of the Demised Premises (the "Savills Report"). The Savills Report relied on considerations that determined the rental value of the Demised Premises based on the Highest and Best Use principle.

26 On 17 May 2013, NAD wrote to Takashimaya to propose a renewal rent of $19.83 per square foot per month, calculated based on the floor area of 56,105 square metres, with the Savills Report enclosed in support of this value. This was a significant increase from $8.78 per square foot per month,

which was the last rent based on Dr Lim's assessment in the third rent review period. Takashimaya rejected NAD's proposed rent, stating that the Savills Report did not "accord with the provisions of the Lease".

27 In June 2013, the parties were still unable to agree on the renewal rent for the First Option Period. NAD proceeded to nominate a valuer, to which Takashimaya responded by proposing to nominate a second valuer. The parties then agreed to vary cl 12 to provide an alternative mechanism to determine the renewal rent (the "Revised Rent Renewal Mechanism") in accordance with this new arrangement. Under the Revised Rent Renewal Mechanism, therefore, NAD and Takashimaya would each appoint a valuer. The two valuers would separately determine the prevailing market rental value of the Demised Premises, and the average of the two values would be taken as the renewal rent for the First Option Period. This was a variation of the mechanism in cll 12 (c) and (d) of the Lease which had provided for one licensed valuer to determine the renewal rent.

28 Further to Takashimaya's proposal to submit a joint letter to appoint and instruct each of the valuers (the "Joint Appointment Letter"), NAD sent a draft of the letter to Takashimaya on 5 July 2013 which provided, amongst other things, that:

> [E]ach licensed valuer shall take into account the terms of the Lease, and in this regard we would highlight:
>
> …
>
> (ii) clause 11(d) of the Lease which requires a portion of the Demised Premises having a lettable area of not less than 10,000 square metres to be retained by Takashimaya …, *and this is the provision in the Lease that requires Takashimaya to use a minimum of 10,000 square metres for its departmental store*; and
>
> (iii) *there is no restriction in the Lease to restrict the prevailing market rental value of the Demised Premises*

> *to be determined by reference to the existing use of the Demised Premises[.]*
>
> [emphasis added]

29 These terms were not acceptable to Takashimaya who reverted with amendments to the Joint Appointment Letter "to reflect the terms of the Lease". Amongst other things, Takashimaya's proposed amendments deleted the following words from NAD's draft:

(a) "and this is the provision in the Lease that requires Takashimaya to use a minimum of 10,000 square metres for its departmental store"; and

(b) "there is no restriction in the Lease to restrict the prevailing market rental value of the Demised Premises to be determined by reference to the existing use of the Demised Premises".

30 NAD replied that the lines that Takashimaya proposed to be deleted "correctly reflect[ed] the terms of the Lease". However, NAD was prepared to accede to Takashimaya's proposed deletions on the condition that Takashimaya agreed to vary the Lease by deleting cl 11(d) in its entirety. It appears that NAD intended the deletion to free Takashimaya from the constraint in cl 11(d) in configuring the Demised Premises so that it could maximise its profit. NAD also proposed that the variation to use the Revised Rent Renewal Mechanism be applicable to all the six consecutive options to renew and not just for the first option only.

31 Takashimaya replied to NAD, explaining that the line on minimum use was deleted as it was "not part of clause 11(d) of the Lease" and the line that there was no restriction to determining rent based on existing use was incompatible with cl 3(a) of the Lease, which prescribed the permitted uses of

the Demised Premises. Takashimaya also emphasised that it had no intention to vary the Lease, except to provide for the alternative mechanism (of two licensed valuers instead of one) to determine the renewal rent which it stated would apply only to the first option period. Takashimaya did not agree to NAD's proposed deletions of any provisions in the Lease.

32 NAD rejected Takashimaya's explanation but agreed, "in the interest of moving ahead with the Joint Appointment Letter", to set out the exact terms of cl 11(d) and cl 3(a) of the Lease in the draft Joint Appointment Letter.

Issuance of the Joint Appointment Letter

33 The parties finally reached an agreement on the terms of the Revised Rent Renewal Mechanism on or around 20 March 2014. Under the varied cl 12, the renewal rent for the first five years of the First Option Period was to be determined by way of the Revised Rent Renewal Mechanism as reflected in the Joint Appointment Letter issued to the valuers on 11 April 2014. Its relevant paragraphs are as follows:

> 3. NAD and Takashimaya have agreed to jointly appoint [the valuers] to separately determine the prevailing market rental value of the Demised Premises … with material date of valuation as at 8 September 2013, for purpose of Clause 12 of the Lease, and the average of the two prevailing market rental values as determined by [the valuers] shall be the renewal rent for the first 5 years of the first option period for purpose of Clause 12 of the Lease, being the period from 8 September 2013 to 7 September 2018, both dates inclusive.
>
> 4. ...
>
> (a) each licensed valuer shall have reference to the terms of the Lease, and in this regard we would highlight:
>
> …
>
> (ii) the floor area of 56,105 square metres shall be used as the basis for computing the rent … for the Demised Premises;
>
> …

(iv) clause 3(a) of the Lease which requires the Demised Premises to be used as a prestigious commercial shopping complex comprising a suitable mix of departmental store, retail space, restaurant and food outlets, supermarket, specialty stores, theatre, fitness centre, community education centre, car rental and retail and other uses which must be compatible with a prestigious commercial shopping complex and provided that all such proposed uses are approved by the relevant authorities. Takashimaya shall not use or permit to be used the Demised Premises or any part thereof otherwise than for the purposes specified above, unless it has obtained the prior written approval of NAD which approval shall not be unreasonably withheld; and

(v) clause 11(d) of the Lease which requires a portion of the Demised Premises having a lettable area of not less than 10,000 square metres to be retained by Takashimaya ("the Retained Area") and requires Takashimaya not to sublet the Retained Area except to one sublessee (acceptable to NAD whose approval shall not be unreasonably withheld) who shall be required to operate such trade or business on the Retained Area in accordance with its approved use;

(b) each licensed valuer shall be independent and shall not be bound by any previous valuations conducted at any time in the past in respect of the Demised Premises;

(c) each of NAD and Takashimaya shall be entitled to make written representations to each licensed valuer, on its views of the prevailing market rental value of the Demised Premises … , and a copy of each party's written representations to the licensed valuers shall be provided contemporaneously to the other party for its information;

(d) each licensed valuer shall provide its valuation report to NAD and Takashimaya within eight weeks from the date of this Joint Appointment Letter, each valuation report shall contain the methodology and explanation of the determination of the prevailing market rental value of the Demised Premises … ; and

> (e) the costs and expenses of the two licensed valuers shall be borne by NAD and Takashimaya in equal shares.

34 NAD nominated Ms Sim Hwee Yan of CBRE Pte Ltd and Takashimaya nominated Ms Low Kin Hon of Knight Frank Pte Ltd as the licensed valuers (hereafter jointly referred to as "the Valuers").

Events following the issuance of the Joint Appointment Letter

35 After the Valuers had been appointed, NAD submitted written representations to them on 22 April 2014 (the "22 April 2014 Submissions"). NAD enclosed the Savills Report and stated, amongst other things, that the prevailing market rental value of the Demised Premises ought to be determined based on "the most probable use of an asset which is physically possible, appropriately justified, legally permissible, financially feasible, and which results in the highest value of the asset being valued" (*ie,* the Highest and Best Use principle). However, NAD did not provide contemporaneously a copy of its submissions to Takashimaya. This was in breach of para 4(c) of the Joint Appointment Letter.

36 Takashimaya discovered NAD's breach only after the Valuers had issued their respective valuation reports on 6 June 2014. The valuation reports had been based on different hypothetical reconfigurations of the Demised Premises. Takashimaya's solicitors wrote to Knight Frank on 9 June 2014 regarding the basis for their valuation. Knight Frank responded on the same day, informing Takashimaya that its valuation was in accordance with NAD's 22 April 2014 Submissions and attached a copy of the said Submissions in its correspondence.

37 On 11 June 2014, Takashimaya wrote to NAD, objecting to the contents of the 22 April 2014 Submissions. Takashimaya requested that the Valuers undertake fresh valuations as their reports dated 6 June 2014 were "not in compliance with the Joint Appointment Letter and the Lease and [were] therefore not acceptable to Takashimaya". When it received no response from NAD, Takashimaya sent a further letter on 27 June 2014 and again on 17 July 2014 seeking NAD's response. NAD finally responded on 21 July 2014, stating that the omission to forward a copy of the letter was "an administrative error and oversight" and agreed to have the Valuers undertake fresh valuations.

The present dispute

38 In the ensuing discussions, it became apparent to the parties that they disagreed on how the Revised Rent Renewal Mechanism was to be carried out. Takashimaya's position is that, in accordance with the Lease and the Joint Appointment Letter, parties must agree on the basis of the valuation. In this regard, the "prevailing market rental value of the Demised Premises" ought to be determined by reference to the Existing Configuration principle. NAD's position is that there is nothing in the Lease and the Joint Appointment Letter which requires the Valuers to determine the prevailing market rental value based on any specific configuration of the Demised Premises. NAD eventually commenced the present suit against Takashimaya claiming, amongst others, the following:

(a) A declaration that Takashimaya is in breach of the lease as varied by the parties;

(b) An order, by way of specific performance of the lease as varied by the parties, that Takashimaya join NAD to instruct the Valuers to

perform the re-valuation exercise in accordance with the terms of the Joint Appointment Letter; and

(c) Damages in lieu of or in addition to specific performance.

39 Pursuant to its position on how the "prevailing market rental value" ought to be determined, Takashimaya seeks the following in its counterclaim:

(a) A declaration that, based on a true construction of the Lease and Joint Appointment Letter and/or by reason of the parties' course of dealing, the prevailing market rental value to be determined at the time of an option renewal must take into account the existing configuration of the Demised Premises; or a declaration that it is an implied term of the Lease and Joint Appointment Letter that the prevailing market rental value to be determined at the time of an option renewal must take into account the existing configuration of the Demised Premises; or a declaration that the efficacy of the Rent Renewal Mechanism (as amended) requires parties to agree and jointly instruct the Valuers on the scope and basis of the valuations pursuant to the Joint Appointment Letter;

(b) Alternatively, an order to have the Lease and Joint Appointment Letter rectified and read and construed as if it contained and had at the time of its execution contained a provision that the prevailing market rental value to be determined at the time of an option renewal must take into account the existing configuration of the Demised Premises.

The applicable legal principles

40 The key issue in the present case is the interpretation of the phrase "prevailing market rental value" in the Lease, in the context of determining the renewal rent for the relevant option period. The main dispute is in the parties' differing positions of what "prevailing market rental value" means, in particular, whether the basis for the valuation employs the Existing Configuration principle or the Highest and Best Use principle.

41 Recent decisions have given welcome clarity and guidance on the approach to contractual interpretation. The Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* ("*Sembcorp*") [2013] 4 SLR 193 explained at [33] that "interpretation is the ascertainment of the meaning which the *expressions in a document* would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties at the time of the contract." The court's task is to ascertain, "based on ***all the relevant objective evidence***, ***the intention of the parties at the time they entered into the contract***" (emphasis in original) (see *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187 ("*Y.E.S F&B"*) at [32]).

42 The modern approach to contractual interpretation is a contextual one (see *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 ("*Zurich*") at [53] and *Sembcorp* at [34]). The Court of Appeal remarked that "[t]he utility of the contextual approach is to place the court in the best possible position to ascertain the parties' objective intentions by interpreting the expressions used by the parties in the relevant instrument in their proper context" (see *Sembcorp* at [72]).

However, "the context *cannot* be utilised as an excuse by the court concerned to *rewrite* the terms of the contract according to its (*subjective*) view of what it thinks the result ought to be in the case at hand" (emphasis in original) (see *Y.E.S F&B* at [32]).

43 Although the context is important, "the ***text*** ought always to be ***the first port of call*** for the court" (emphasis in original) (*Y.E.S F&B* at [32]; see also *Zurich* at [57]). The court should endeavour to give nuanced consideration and pay close attention to both the text *and* context, noting that both *interact* with each other (see *Y.E.S F&B* at [35]).

44 Where the text concerned is ambiguous, "the relevant *context* will *generally* be of *the first importance*" (emphasis in original) (*Y.E.S F&B* at [34]). In this regard, extrinsic evidence may be relied upon to aid contractual interpretation if it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context. The principle of objectively ascertaining contractual intentions remains paramount, and the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon. This was clearly established in *Zurich* (at [132(d)]).

Application of the law to the facts

45 In interpreting what is meant by "prevailing market rental value", I sought to ascertain, by relevant objective evidence, the intention of the parties at the time they entered into their agreement. As the text and context interact with each other, I considered first the text of the agreement, and then the relevant context under which the agreement was entered into, to interpret the text in the light of the context.

46 The parties have referred to both the Lease and the Joint Appointment Letter in their arguments relating to the interpretation of the "prevailing market rental value". The variation that had been agreed between the parties contained in the Joint Appointment Letter was, however, a narrow one which pertained to the Revised Rent Renewal Mechanism. The variation allowed each party to appoint a valuer and use the average of the two values as the renewal rent for the next option period. This is a variation of the terms in cl 12(d) and (e) providing for the appointment of *one* licensed valuer. In other words, the variation related to the *process* of determining renewal rent and did not change the *meaning* of the phrase "prevailing market rental value" which was the subject of the valuation. The Joint Appointment Letter in fact makes clear reference to the Lease and its terms. NAD had also highlighted in its Closing Submissions that "although the parties had amended the process for determining the renewal rent, the parties had no intention of amending the substantive terms of the Lease. In fact, both parties specifically wanted the Valuers to refer to the existing terms of the Lease" (emphasis in original). Thus there was no agreement to vary the *meaning* of "prevailing market rental value" as agreed upon by the parties at the time the Lease had been entered into. It is therefore the terms of the (original) Lease and the intentions of the parties at the time they entered into the said Lease which are most relevant in interpreting the phrase "prevailing market rental value" for the First Option Period.

47 I find it pertinent that the parties had contemplated a long-term business relationship based on mutual trust and confidence when they entered into the Lease for an aggregate lease period of nearly 80 years. Their mutual trust is demonstrated by, amongst other things, the fact that the parties had agreed on the quantum of rent as well as the net floor area only in 1998 when the Lease had already begun in 1993. This is somewhat unusual in typical

landlord-tenant relationships but quite understandable in a long-term joint venture relationship.

48 In my view, the parties' relationship is unlike that of a typical landlord-tenant relationship and bore greater resemblance to a joint business partnership. Apart from the lease of the Demised Premises to Takashimaya, Takashimaya Japan, which wholly owned Takashimaya, also invested in NAD by buying 26.3% of its shares and appointed four directors to the NAD Board. Theirs was a relationship with characteristics that resembled those in joint venture relationships.

Whether the text in the present case is plain and unambiguous

49 I considered whether the meaning of "prevailing market rental value" is plain and unambiguous. NAD argues that the plain and unambiguous text of the Lease does not require the determination of the prevailing market rental value to be based on any particular configuration. Takashimaya argues that, in the absence of contractual or judicial definition, the term is not one that presents a plain and obvious meaning.

50 NAD submits that the valuer was to have the sole discretion to decide on the basis on which the valuation for the next option period should be carried out. NAD's expert witness, Associate Professor Yu Shi Ming of the National University of Singapore's School of Design and Environment, was of the view that the "market value" basis should generally be used for valuations, and that "[t]he highest and best use principle applies with greatest force to valuation conducted on the market value basis". He opined that on the present facts, the purpose of the valuation and the lease documents provided sufficient information for a professional valuer to determine the prevailing market rent of the Demised Premises.

51 On the other hand, the evidence of Takashimaya's expert witness, Mr Tan Keng Chiam, Head of Valuation Advisory Services of Jones Lang Lasalle Property Consultants Pte Ltd, was that "in order to perform a rental valuation of the Demised Premises under the Joint Appointment Letter, parties must first agree on the basis of the valuation". Dr Lim, who had conducted previous rent reviews, also testified for Takashimaya that if the parties did not agree on the basis of the valuation, it would be difficult for the valuer to conduct the valuation. Further, it would give rise to problems because there would be a large variation between the values obtained depending on the approach to the valuation exercise. In his view, if the parties "had not agreed on the basis of the valuation, i.e. that it should be based on the existing use and configuration in its entirety applied by Takashimaya in the Demised Premises", he "would not have proceeded with the valuation without clarifying the position with the parties, and asking that they agree on the configuration and basis" before proceeding with the valuation.

52 In my view, against the relevant context of the case, the meaning of "prevailing market rental value" is not plain and unambiguous. There has been no evidence proving a settled industry definition of the phrase. Neither has there been shown any case authorities which have defined its meaning. It is evident from the differing views offered by the experts and witnesses of NAD and Takashimaya that the phrase "prevailing market rental value" can refer to values reached with considerations based on either the Existing Configuration principle or the Highest and Best Use principle. There is nothing in the Lease that suggests in a definitive manner that one interpretation should be preferred over the other. In fact, NAD has argued that it is for the valuers to decide what "prevailing market rental value" means in terms of whether to proceed on the basis of the Existing Configuration principle or the Highest and Best Use principle, suggesting that there is a need to decide its meaning, although

disputing who is best placed or intended by the parties to decide the meaning. Under these circumstances, the context of the agreement is important and evidence relevant to the context will be useful in determining the interpretation of the term.

Evidence in relation to the context and parties' intentions at the time of agreement

53 NAD's expert witness, Associate Professor Yu Shi Ming, under cross-examination, affirmed the special and uncommon relationship of the parties:

> Q: Would it be correct to say, Professor Yu, that this is not the sort of typical lease situation between landlord and tenant? I mean, it is a particular set of circumstances in this case. Would that be fair? Which you don't find in the usual landlord-and-tenant situations.
>
> A. I would say, from what you have told me and described, I would say yes, there are not many such situation, such arrangement in this property market per se, but I am sure it is not unique, and there are probably similar other such structures and arrangements overseas and so on.
>
> Q. I don't think I was suggesting that it was unique, it is the only one in the world, but it is not the usual sort of like run-of-the-mill landlord and tenant, it is a particular set of circumstances.
>
> A. I would agree, it is not a direct landlord/tenant relationship.
>
> Q. Thank you. You would assume there might be some similar type of arrangements overseas; you are not aware of any similar arrangement in Singapore, right?
>
> A. Not that I know of.

54 The parties were both clearly aware of their respective areas of expertise at the material time, and entered into an agreement which envisaged a very long-term relationship. This is consistent with the respective expertise and background of the parties at the material time. According to Takashimaya,

its use and configuration of the Demised Premises reflects Takashimaya Japan's business model of operating large-scale, full-service departmental stores. Takashimaya's evidence is that Takashimaya Japan was chosen by NAD for its expertise in managing departmental stores and had a well-established reputation for doing so at that time. If Takashimaya were to occupy the Demised Premises, it would be able to lend its reputation to the Premises, while at the same time giving Takashimaya Japan an opportunity to operate and manage a departmental store in Singapore. There is strong evidence that NAD wanted Takashimaya to serve as the anchor tenant for Ngee Ann City and, as a flagship store, draw customers to Ngee Ann City. The building construction plans of Ngee Ann City included the configuration of Takashimaya's departmental store before it was completed and opened in 1993.

55 NAD's main factual witness, Mr Teo Chiang Long, an Executive Director of NAD, admitted at the trial that Takashimaya was the anchor tenant and that its departmental store was, at least "previously", the main draw for the development:

> Q: … the departmental store was the anchor tenant and the main draw for your development since its beginning; correct?
>
> A: Currently no. Previously, yes.
>
> Q: Currently no. But despite you saying "Currently, no", you still didn't want them to close their department store; correct?
>
> A: Yes.

56 Further, there is also documentary evidence from the minutes of an NAD Board meeting held on 18 November 2014 which records Mr Teo Chiang Long informing the Board that:

> … when the Company first negotiated with [Takashimaya Japan] to be its anchor tenant for Ngee Ann City … Ngee Ann Kongsi … actually wanted a departmental store and was afraid that after Takashimaya Japan takes over, it would not want to have a departmental store. Hence, that is the reason why in the description of the usage in the Tenancy Agreement it has stated that departmental store should not be less than 10,000 square metres of the demised premises …

57 This evidence goes towards the actual intentions of the parties at the time of executing the agreement which clearly indicates that the Demised Premises were to comprise a departmental store of substantial size run by Takashimaya as the anchor tenant of Ngee Ann City.

58 The provisions in the Lease further reflected the parties' intentions that the relationship was to continue for a considerable length of time. Turning to the Lease as a whole, it is apparent that Takashimaya's rights under the Lease are fairly extensive. Subject to some restrictions under cll 2, 3 and 11 of the Lease, Takashimaya has full discretion to decide on the appropriate layout or configuration for the Demised Premises. The Lease does not stipulate any particular configuration which Takashimaya should apply to the Demised Premises save for the Retained Area. The list of "permitted use[s]" specified in cl 3(a) of the Lease is also worded very broadly: a suitable mix of departmental store, retail space, restaurant and food outlets, supermarket, specialty stores, theatre, fitness centre, community education centre, car rental and retail and other uses which must be compatible with a prestigious commercial shopping complex. This is consistent with Takashimaya being the anchor tenant with an established reputation in operating its Takashimaya brand of departmental stores and the expertise in determining the appropriate layout and configuration of its stores.

59 There are also several other aspects of the parties' Lease which lend weight to the special character of their relationship. For example, Takashimaya has the first option to rent any additional area in the building that NAD puts up for lease. If NAD wants to sell all or part of the Demised Premises, Takashimaya also has pre-emption rights. In addition, Takashimaya is entitled to install the Takashimaya signage (in fact, up to ten signs under cl 3(e)) on the external façade of the Ngee Ann City building, with at least one sign facing Orchard Road.

60 Another such provision is cl 2 of the Lease containing the "floor and cap" to the rent review mechanism which operates to protect both parties from excessive fluctuations in the market during the rent review process. NAD argues, however, that the interpretation of the term sought by Takashimaya would give Takashimaya the option to change its configuration immediately after the start of a lease period and then change it back again just before the rent review. This would then be to NAD's disadvantage. In my view, however, such a scenario is practically unrealistic – making such drastic changes in configuration affecting a large departmental store and sub-lessees twice within a five-year period is highly impractical and commercially questionable. It is thus not surprising that the parties had mutually agreed to have a rent review once every five years – they could have decided on a review at more frequent intervals, such as once every three years, but they did not. They had put their minds to the period relevant for rent review and agreed on a five-year period. In the event that Takashimaya changes the use and configuration of the Demised Premises, the new configuration would then be the "existing configuration" at the next rent review.

61 The parties' relationship set out above provides the relevant context which greatly assists in the interpretation of the term in question. I find that

the intention of both parties at the time they entered into the contract was to have a long-term relationship in which Takashimaya would operate its departmental store as Ngee Ann City's anchor tenant and NAD would enjoy strong property values as a result of that. It is not unreasonable to surmise that the rental for space in Ngee Ann City and its vicinity has been positively affected by the presence and success of Takashimaya operating as a departmental store, which was expected to attract high volumes of customer traffic. The parties thus had a somewhat symbiotic relationship.

62 Given this foundational context to the relationship, it would be inconsistent with the parties' core understanding and agreement for NAD to obtain rent based on the highest and best hypothetical use of the Demised Premises even while Takashimaya continues to use nearly 70% of its leased space for its departmental store. The consequence of using such a basis is that Takashimaya would pay far higher rent based on a hypothetical reduced area designated for departmental store use that fails to cohere with its actual use.

63 It appears that NAD's attempt to obtain Takashimaya's agreement to vary the Lease by deleting cl 11(d) was to provide Takashimaya with the freedom to use the Demised Premises in a manner that would maximise its profits should it have to pay a higher rent based on the Highest and Best Use principle. The intention of NAD in this respect was evident in the trial:

> Q: Mr Teo, what you wanted to do with your new proposal is you wanted to improve your case to tell the valuers, "There is no restriction at all to have any minimum size for the department store", so that they would value the space higher. That was your real reason, right, Mr Teo?
>
> A. Right.
>
> Q. Yes, and like a clever businessman, you know how to make this point and disguising your real intention, right, Mr Teo?

A. I think it would be good for both parties. Yes.

64 However, if maximising profits entails Takashimaya subletting the entire Demised Premises or reducing its departmental store drastically in size, then it runs contrary to the parties' intention at the time of the Lease, as well as Takashimaya's main business of operating a Takashimaya brand of departmental store. It is doubtful whether Takashimaya would have entered into the Lease if it contemplated that it may one day have to run a property leasing business instead of operating its departmental store, while NAD delegated the leasing operations to Takashimaya and enjoyed guaranteed rental of the Demised Premises.

65 There is also evidence that in discussing the Revised Rent Renewal Mechanism, NAD's suggestion to allow parties to make representations to the appointed valuers (such as its 22 April 2014 Submissions to use the Highest and Best Use principle as the basis for valuation) was a *new* term which the parties never agreed to in the original Lease. NAD's Mr Teo Chiang Long admitted during the trial that when NAD attempted to put in some of the proposed terms of the Joint Appointment Letter in 2013, it was in fact attempting to change the terms of the original Lease, rather than reflect what it understood the terms of the Lease to be:

Q: …Mr Teo, you were trying to put in Ngee Ann Development's own interpretation of the lease; correct?

A: Yes. We were trying to put in a new proposal.

Q: Well, I will come to that. You were originally trying to put in your interpretation, and although you have said that you were not happy with Professor Lim Lan Yuan's second rent review report, even for the third rent review report you didn't make these points to Professor Lim. Correct?

A: Correct.

Q: This was being done for the first time here; correct?

A: After Takashimaya said, "Let's do two valuers instead of one".

Q: Yes, and Mr Teo, like the good businessman you are, so saw the opening to change some of the terms of the lease to Ngee Ann Development's advantage; correct?

A: That is what businessmen do. Thank you.

Decision

66 I find that based on the text of the Lease, particularly cll 2, 3, 11 and 12, and the context of the Lease as a whole including the relationship of the parties at the material time of contracting, Takashimaya's interpretation of the "prevailing market rental value" was what the parties had intended. Applying the contextual meaning of the term, I find that the "prevailing market rental value" was intended to be based on the existing configuration of the Demised Premises at the time of valuation.

67 As I have found that the interpretation of "prevailing market rental value" in the Lease, and the Joint Appointment Letter which makes reference to the Lease and its terms, is based on the existing configuration of the Demised Premises, it is not necessary to consider Takashimaya's alternative arguments for implying a term into the Lease and the Joint Appointment Letter or for the rectification of the Lease. I would briefly add that the circumstances in which the court will imply a term are fairly limited, and that it would only imply a term where doing so would be giving effect to the parties' presumed intentions by "filling the gaps in the contract" (*Sembcorp* at [93]). If there were "to be any express words, that would be a matter of interpretation, not implication" (*Sembcorp* at [93]). It is also significant to note that, even though the rent renewal mechanism had been varied by the parties in respect of the First Option Period, it was substantially based on the previous rent renewal mechanism, which had in fact been applicable and workable for three distinct

rent review periods. While the process of obtaining the new rent had been varied, the parties' agreement to use the prevailing market rental value in the original Lease had not changed.

68 Having reached this conclusion, I dismiss NAD's claim. I make only a brief observation here in respect of the main remedy that NAD is seeking, which is a claim for specific performance to compel Takashimaya to complete the valuation process under the Revised Rent Renewal Mechanism. While a claim for specific performance can be ordered in respect of a sale and purchase of land, it is much less common, and almost exceptional, to make a claim for specific performance outside of this factual scenario or even in relation to breaches of leasehold covenants. Tan Sook Yee, Tang Hang Wu & Kelvin FK Low, *Tan Sook Yee's Principles of Land Law* (LexisNexis, 3rd Ed, 2009) states at para 17.152 that "[i]t is settled practice that the courts do not ordinarily grant specific performance in the context of breaches of covenants to repair or to carry on a business." In any event, it is unclear what "breach" Takashimaya has committed in this case. The deadlock appears to be the result of a disagreement between the parties on how to proceed to obtain the fresh valuations. It cannot be solely attributed to Takashimaya's actions. It is noted that NAD had first breached the terms of the agreement contained in the Joint Appointment Letter by failing to give Takashimaya a copy of the 22 April 2014 Submissions.

69 I therefore dismiss NAD's claim for specific performance and find for the defendant Takashimaya on the issue of contractual interpretation – I declare that the meaning to be ascribed to "prevailing market rental value" in the Lease and the Joint Appointment Letter refers to a valuation based on the existing configuration of the Demised Premises. I exhort the parties to proceed with the Revised Rent Renewal Mechanism in accordance with this

interpretation and to seek to resolve their disputes amicably in the light of the long-term business relationship that both parties have and do enjoy.

70 Having succeeded in these proceedings, Takashimaya is entitled to its costs. I therefore order that Takashimaya shall be entitled to costs, to be agreed between the parties and if not, to be taxed.

Debbie Ong
Judicial Commissioner

Ang Cheng Hock SC and Benjamin Koh (Allen & Gledhill LLP) for the plaintiff;
Alvin Yeo SC, Lim Wei Lee and Joel Chng (WongPartnership LLP) (instructed), Rajan Menon and Napolean Rafflesson Koh (RHTLaw Taylor Wessing LLP) for the defendant.