

LEGAL UPDATE

Purchase options to make letting attractive? Be careful!

Date: 13 December 2019

The District Court of North Holland has given an interesting [ruling](#) on (among other things) the qualification of purchase options and pre-emption rights, error, the impact of the intention to occupy the leased property for personal use again (for health reasons) and annulment of spouses' obligations to sell. I will mention a number of lessons for the transactional practice.

This is a rented home that was inhabited by a (now emigrated) couple 12 years ago. Since then, the couple has let the property to various parties and offered it for sale at the same time. As they have in this case. The current tenants stipulated at the beginning: *"In an addendum to the contract, we would like to include an option to buy the home, at the current asking price, for a period of 1 year."* Accordingly, the following was included in the tenancy agreement: *"The tenant has an option to purchase the rented property at the currently set purchase price of (...) for a maximum period of 1 year (...)".* It is important to note that only the landlord (not his wife) had signed the tenancy agreement. The tenants have invoked their purchase option in good time and demand performance, but: the landlord does not want to sell anymore.

The landlord's defence is as follows: (1) only a (non-binding) pre-emption right sale has been stipulated, no purchase option, (2) the arrangement is based on error, at least on incorrect information from his estate agent, (3) the requirement that the stipulation be set out in writing is missing, (4) any obligation to sell is annulled by his wife and (5) exercising a purchase option is unacceptable according to standards of reasonableness and fairness in view of his medical need to return to the home and the circumstance that the home's worth has increased by €65,000.

The defence is rejected on all counts. I will discuss the 5 counts step by step.

1. Qualification. The contractual provision is brief and – given the choice of words *"option to purchase"* – is not open to interpretation, nor has the wording been negotiated, meaning that this cannot shed any other light on the matter. It is therefore not a pre-emption right, which is a conditional right that only entails an obligation to offer if the landlord wishes to sell (passive right, on the part of the landlord). This is a purchase option: an unconditional right which is an irrevocable offer to sell (active right, on the part of the tenant). The purchase is effected when the tenant exercises their purchase option. Bottom line: the arrangement must be sufficiently determinable. That is the case here, because the parties agreed on a concrete purchase price, a term of validity and a clearly defined property. The lack of negotiations on further conditions is irrelevant.
2. Error. According to the landlord, the only purpose of granting a pre-emption right is to attract more interest in (the tenancy of) the property. The estate agent was said to be to blame in this respect. In the tenant-landlord discussion, this argument does not stand a chance. And the (later) intention to occupy the home for personal use cannot interfere with an (already stipulated) purchase option.
3. Requirement that the provision be in writing. Section 7:2 of the Dutch Civil Code has (already) been complied with at the time that the purchase option is part of the tenancy agreement. Acceptance is by signature.

4. Annulment. As the landlord's wife had not accepted the purchase option, an attempt was made to annul this option pursuant to Section 1:88 of the Dutch Civil Code. An appeal for annulment must be based upon (among other things) actual residence. But the couple no longer lived in the home. However, a few ways out are conceivable, so that – in case of non-residence – the above-mentioned condition can still be met. Two examples. According to case law, actual residence is the case if a spouse had to leave the home because of a court ruling or if the home is intended for future occupancy. Both situations are not comparable to the present one. The property was abandoned with the intention of selling it. And the wish to reoccupy the rented property was made known too late. Consequently, it no longer counts.

5. Reasonableness and fairness. As usual, the court is cautious in this regard. The landlord had based his claim on both the increase in the value of the home (after the stipulated purchase option) and the medical need for him to return to his dwelling. Such circumstances are insufficient. A good argument in this respect is that the landlord could easily have foreseen his medical condition – given his advanced age – at the time the arrangements were made. All in all: such argumentation is (in retrospect) a missed opportunity. In addition, it has rightly been noted that the increase in value is less important if the need is (actually) so pressing that the landlord *has* to reoccupy the property himself. Perhaps the landlord could have earned more sympathy from the court if this argumentation had taken a different slant.

Please feel free to contact one of our specialists if you have any questions about the formulation of purchase options, pre-emption rights or if you have any questions about the fulfilment of such rights.

This is a Legal Update from the Commercial Tenancy Law practice group.

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