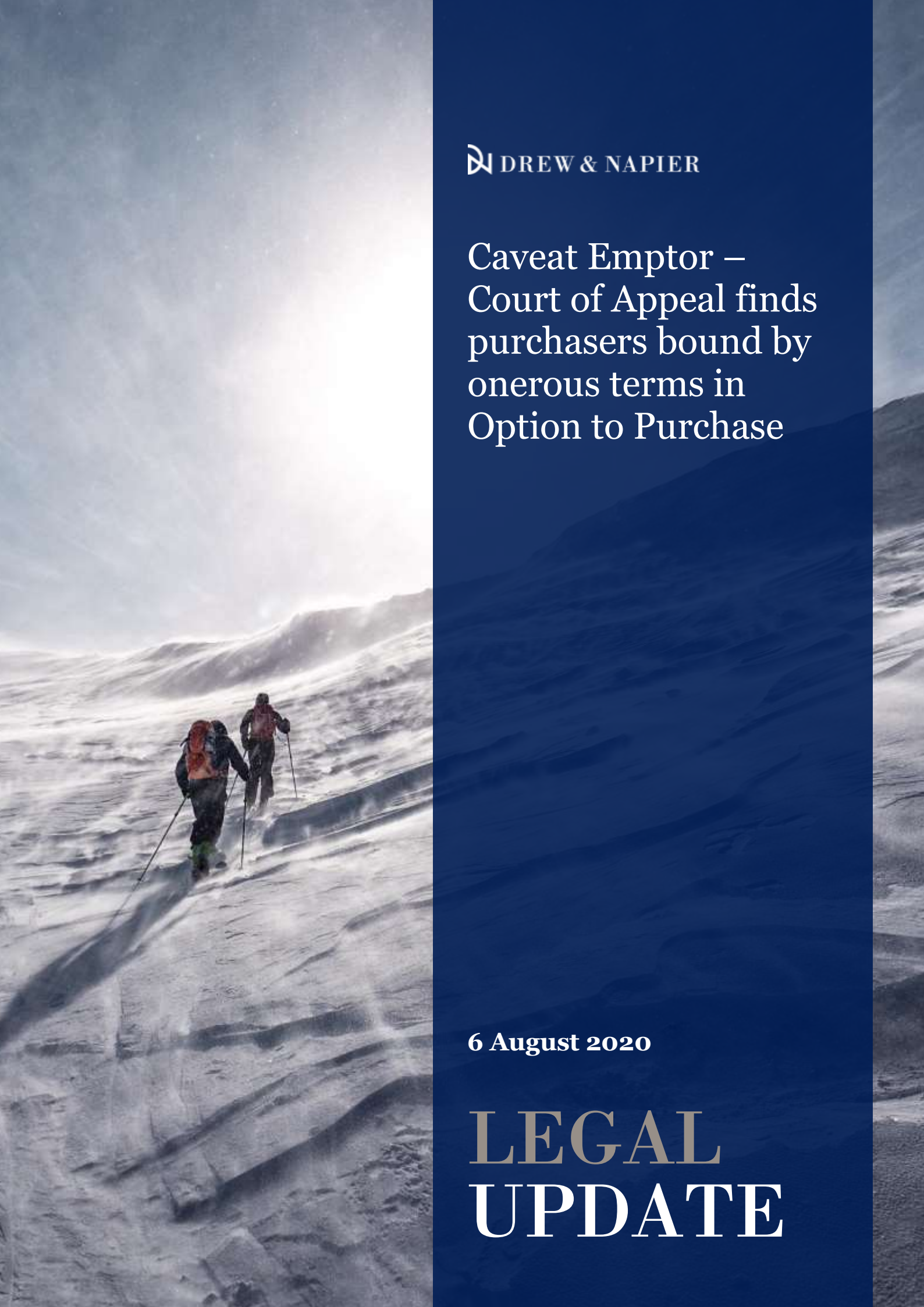


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Caveat Emptor – Court of Appeal finds purchasers bound by onerous terms in Option to Purchase

6 August 2020

LEGAL UPDATE



In this Update

In the recent case of *Ong Keh Choo v Paul Huntington Bernardo and another* [2020] SGCA 69, the Court of Appeal held that a purchaser who furnished a cheque for an option fee, and subsequently received an Option to Purchase, was bound by the onerous terms therein as she did not qualify her acceptance of the same.

This case offers a timely reminder to purchasers to seek legal advice before taking any step towards the purchase of property.

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INTRODUCTION

In the recent case of *Ong Keh Choo v Paul Huntington Bernardo and another* [2020] SGCA 69, the Court of Appeal dismissed a claim by a property owner for an option fee she was allegedly owed under an Option to Purchase ("**OTP**").

The Court of Appeal held that the OTP had been validly terminated by mutual agreement between the parties and therefore the Respondents had been released from their obligation to pay the option fee. However, the Court of Appeal disagreed with the Respondents' contention that they were not bound by the onerous terms of the OTP, because they did not qualify their acceptance of the same after having paid the option fee.

BACKGROUND

The Appellant was an experienced real estate agent who owned Balmoral 8 #05-03 ("**Property**"). The Respondents were a married couple, Paul Huntington Bernardo ("**R1**") and Tran Hong Hanh ("**R2**"), who were interested in buying a home in Singapore.

In the morning of 7 October 2017, the Appellant showed the Property to the Respondents. The Appellant conducted herself as a real estate agent acting on behalf of the Property owner, and did not reveal that she was the owner of the Property.

The parties met again in the afternoon the same day. On the Appellant's request, R1 issued a cheque for S$316,000 in favour of Property owner ("**Cheque**"), not realising that the Appellant was in fact the Property owner.

KEYPOINT

Most purchasers do not negotiate the full terms of the Option to Purchase before issuing payment of the Option Fee.

Later in the evening, the Appellant met up with R2 and passed her the OTP. Though R2 was unfamiliar with the terms of the OTP, she accepted the document without qualification.

R2 was later advised by her lawyer that the terms of the OTP were not in line with usual practice. In particular, the OTP required full payment of the purchase price upon the exercise of the OTP, rather than on completion. This resulted in a flurry of correspondence, in which R2 and the Appellant discussed amending the terms of the OTP. R2 also proposed cancelling the Cheque due to financial concerns.

KEYPOINT

It would be prudent to agree on the key terms of the Option to Purchase prior to paying the Option Fee.

Although R2 discovered that the Appellant was the owner of the Property the following day, they continued to discuss amending the terms of the OTP. Sometime in the evening of 8 October 2017, R2 and the Appellant exchanged a series of messages and a telephone call, the nature of which is the subject of dispute between the parties - the Respondents asserted that the Appellant had agreed to terminate the OTP, whereas the Appellant asserted that she had merely agreed not to bank in the Cheque until parties could resolve the matter.

The Appellant later attempted to deposit the Cheque into her bank account and found that it had been countermanded by R2. She then began proceedings against both Respondents for payment due under the Cheque, with R2 being the party who signed the OTP, and R1 as being the drawer of the Cheque.

DECISION AT THE FIRST INSTANCE

At first instance, the High Court ("**HC**") held that the Respondents' cheque had not been intended as payment of an option fee because it was merely given to show their sincerity as genuine buyers.

The HC also held that the OTP was not binding as it was a contract which had not been fully formed:

(a) R2's signature on the OTP was meant to countersign against the cancellation of certain words in the OTP, and was therefore not an acknowledgement or acceptance of the OTP; and

(b) the parties had not agreed on the terms of the OTP.

Further, even if the OTP was binding, the HC held that R2 had been fraudulently misled into agreeing to the OTP.

DECISION ON APPEAL

On appeal, the following issues were raised:

(a) whether the cheque was only issued "for show" and was not intended as payment;

(b) whether the OTP constituted a validly formed contract binding on the Respondents;

(c) whether R2 could rely on the defence of *non est factum*;

(d) whether the OTP was voidable due to misrepresentations made by the Appellant to the Respondents; and

(e) whether the OTP had been mutually terminated.

The Court of Appeal ("**CA**") re-examined the evidence and found that the cheque had not been issued "for show" as the Respondents had alleged. This was clear from the parties' correspondence, which showed that the price had been finalized and the cheque was given with the knowledge that it would be handed over to the owner of the Property.

In addition, the CA held that the OTP was binding on the Respondents. The CA emphasized that, by receiving the OTP without qualification in exchange for the cheque, R2 had accepted the terms of the OTP by conduct. This rendered it unnecessary for R2 to have signed the OTP.

KEYPOINT

Upon receipt of the Option to Purchase, purchasers should inform the vendor that the terms of the Option to Purchase will be reviewed and that the purchasers will let the vendor know if they have any objections to any term therein.

The CA also rejected the Respondents' defence of *non est factum* as the evidence suggested that R2 knew the nature of the OTP she received. The CA further held that none of the misrepresentations relied on by the Respondents applied as they were either unsupported by evidence, not false, or were not material to their decision to accept the OTP.

However, the CA ultimately held that the Respondents were not liable to pay the option money, as the OTP had been mutually terminated by the parties. After clarifying that the legal burden lay with the Respondents to show that the OTP had been mutually terminated, the Court examined the correspondence between the parties and concluded that the Appellant's conduct was consistent with a seller who had agreed to terminate the contract on the Respondents' request.

As a result, the CA dismissed the Appellant's claim, albeit for different reasons than the decision at first instance.

COMMENTS

This case provides an important reminder for purchasers of property to seek legal advice early, particularly when pressured by property agents or vendors to take action to secure the purchase of a property, such as the issuance of cheques. They may find themselves inadvertently bound to contractual terms which they were not aware of or were not agreeable to.

In instances where options to purchase are issued, it is important to clarify and understand the key terms of the same prior to making payment of the option fee. As pointed out by the CA in this case, the Respondents could have expressly informed the Appellant to hold on to the cheque while they reviewed or sought advice on the terms of the OTP. Accepting an OTP without qualification, after having tendered payment of the option fee, may have the effect of binding the purchaser to the terms of the OTP, even if the terms therein are onerous or unusual.

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