

1 OCTOBER 2021

## Importance Of Seeking Legal Advice Prior To Signing The Option For Purchase

### Contact Persons:

Chia Loong Thye  
Partner

+604 370 1122

lchia@rdslawpartners.com

Mohd Farizal Farhan  
Partner

+603 6209 5400

farizal@rdslawpartners.com

Ooi Bee Hong  
Partner

+603 6209 5401

beehong@rdslawpartners.com

Ong Eu Jin  
Partner

+603 6209 5488

eujin@rdslawpartners.com

Tan Gek Im  
Partner

+04 370 1122

gekim@rdslawpartners.com

Annabel Kok Keng Yen  
Senior Associate

+603 6209 5400

annabel@rdslawpartners.com

An Option to Purchase is a legal document recording the preliminary agreement between a vendor and purchase for sale and purchase of a property. It is a document usually prepared by a real estate agent, detailing the particulars of the property, its selling price, the parties involved, the option period as well as other basic conditions of the property transaction.

Unfortunately, it has been noted that at times, the Option to Purchase prepared by real estate agents does not sufficiently cover certain issues that could be a potential dealbreaker to the transaction. Disagreements could arise between the vendor and the purchaser at the drafting stage of the sale and purchase agreement, resulting in the property transaction being terminated. This may result in the forfeiture of the earnest sum due to the lack of proper agreement and clarity between parties prior to signing the Option to Purchase.

This alert discusses the enforceability of a signed Option to Purchase and highlights the need for parties to engage solicitors to have the Option to Purchase reviewed prior into entering into an agreement.

### Enforceability Of The Option To Purchase After Signing

A signed Option to Purchase creates a unilateral contract by a vendor to sell a property to a purchaser. This unilateral contract is conditional upon the purchaser exercising the option in the time and manner specified in the Option to Purchase<sup>1</sup>. Once the purchaser has exercised the option, the conditional contract for the sale and purchase of the property evolves into a binding and absolute contract<sup>2</sup>.

**REIMAGINING  
LEGAL  
SOLUTIONS**

<sup>1</sup> *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd*; *United Dominions Trust (Commercial) Ltd v Eagle Aviation Ltd*. [1968] 1 WLR 74 (United Dominions Trust).

<sup>2</sup> *Subramaniam Chettiar & Ors v JC Chong Ltd* [1969] 2 MLJ 176.

The Option to Purchase is irrevocable as the vendor is not allowed to sell the property to another person<sup>3</sup>, and is bound to sell the property to the purchaser once the purchaser has exercised the option. The purchaser is required to exercise the option in the stipulated time and manner or the earnest sum shall be forfeited by the vendor.

In *Elizabeth Jeevamalar*<sup>4</sup>, the Federal Court held that the vendor's refusal to deposit the cheque for the purchaser's payment for the 10% deposit did not signify that the vendor had not "accepted" the Option to Purchase. This was because the option had been exercised by the purchaser. As a result, the vendor is bound to sell the property to the purchaser.

Therefore, once parties have signed the Option to Purchase, a whole set of legal mechanisms are set in motion. Parties are not allowed to refuse to proceed with the transaction just because they have had a change of heart. It is imperative that professional legal advice is obtained by parties prior to signing the Option to Purchase.

## Importance Of Seeking Legal Advice

A signed Option to Purchase is a legally enforceable document and the failure or refusal by either party to sign the sale and purchase agreement may bring legal ramifications to the defaulting party.

Therefore, it is prudent to have the Option to Purchase reviewed by a solicitor so that it avoids any disagreement from arising at the time of drafting of the sale and purchase agreement due to a poorly drafted Option to Purchase.

A good example where disagreements could arise due to the lack of clarity in the Option to Purchase is when parties disagree to the condition, state, and nature of the property to be delivered to the purchaser once the transaction is complete.

### OUR EXPERTISE:

Anti-bribery and Anti-corruption

Banking & Finance (Conventional & Islamic)

Competition Law

Corporate & Commercial

Capital Markets (Debt & Equity)

Energy, Infrastructure & Projects

Fintech

Foreign Direct Investments

Mergers & Acquisitions

Personal Data Protection

Real Estate Transactions

Regulatory Compliance

<sup>3</sup> *United Dominions Trust*

<sup>4</sup> *Karuppannan Ramasamy & Anor v Elizabeth Jeevamalar Ponnampalam & Ors; Sundaram Marappa Goundan & Anor (Intervener); Raya Realti (Third Party) & Another Appeal* [2009] 4 CLJ 225

Examples of issues that could arise include:

- (a) Was the property purchased on an “as is where is” basis? If yes, was it based on the date of inspection, or the date of the sale and purchase agreement?
- (b) Was the purchaser allowed to move into the property pending completion of the transaction?
- (c) Was the property purchased with vacant possession or together with furniture and fittings on the property?
- (d) If the property was purchased with vacant possession but it is currently tenanted, what is the condition, state and nature of the property upon delivery of vacant possession of the property to the purchaser?

Take (d) above as an example, the vendor has an obligation to terminate the existing tenancy and ensure that the tenant vacates the property prior to the completion date so that vacant possession of the property can be delivered to the purchaser.

However, is the vendor required to ensure that the tenant restores the property to its original condition, state and nature prior to the tenancy agreement if it was not clearly stipulated in the Option to Purchase?

From a purchaser’s point of view and as the incoming owner of the property, he would wish to have the property restored by the existing tenant to a clean condition with all debris and rubbish on the property removed. What happens if the tenant, being a disgruntled tenant, intentionally damages the property before vacating the property? As the purchaser is not a party to the tenancy agreement, the purchaser is unable to exercise the rights and remedies made available to the vendor-landlord under the tenancy agreement.

Conversely, from a vendor’s standpoint, if it was not clearly stated in the Option to Purchase that the property is to be delivered in a clean condition, with all debris and rubbish on

#### OUR EXPERTISE:

Anti-bribery and Anti-corruption

Banking & Finance (Conventional & Islamic)

Competition Law

Corporate & Commercial

Capital Markets (Debt & Equity)

Energy, Infrastructure & Projects

Fintech

Foreign Direct Investments

Mergers & Acquisitions

Personal Data Protection

Real Estate Transactions

Regulatory Compliance

the property removed, he would point out that it was only agreed in the Option to Purchase that the vendor is to deliver vacant possession of the property, nothing further.

When both parties are unable to compromise and come to an agreement under such circumstances, the transaction could be aborted. In such a situation, who would be the defaulting party? What happens to the earnest sum that was paid earlier?

In this situation, a purchaser would want the earnest sum refunded and compensation paid to the purchaser as the vendor's refusal in accepting the proposed term in the sale and purchase agreement amounts to a breach of the Option to Purchase.

On the other hand, the vendor would argue that it was the purchaser who defaulted in exercising the Option to Purchase. The proposed term is not part of the agreed material term in the Option to Purchase and thus it was the purchaser who has refused to sign the sale and purchase agreement.

Under such circumstances, it is unclear who is the defaulting party as each parties' contention raised are valid. Thus, in view of such uncertainty, it is advisable that both parties engage solicitors at the beginning of the transaction to ensure that all relevant clauses are clearly stipulated in the Option to Purchase.

## Conclusion

Contrary to popular belief, there is no one-size-fit-all document in a real estate transaction. This is because each transaction varies from one another and what one sees as important in a real estate transaction could be different to another person.

It is impractical to have an Option to Purchase that encompasses every aspect of the sale and purchase agreement as it would render the purpose of an Option to Purchase superfluous. However, it is strongly advised for parties to seek advice from legal professionals to avoid

### OUR EXPERTISE:

Anti-bribery and Anti-corruption

Banking & Finance (Conventional & Islamic)

Competition Law

Corporate & Commercial

Capital Markets (Debt & Equity)

Energy, Infrastructure & Projects

Fintech

Foreign Direct Investments

Mergers & Acquisitions

Personal Data Protection

Real Estate Transactions

Regulatory Compliance



## Contact Persons:

Chia Loong Thye  
Partner

+04 370 1122  
ltchia@rdslawpartners.com

Mohd Farizal Farhan  
Partner

+603 6209 5400  
farizal@rdslawpartners.com

Ooi Bee Hong  
Partner

+603 6209 5401  
beehong@rdslawpartners.com

Ong Eu Jin  
Partner

+603 6209 5488  
eujin@rdslawpartners.com

Tan Gek Im  
Partner

+04 370 1122  
gekim@rdslawpartners.com

Annabel Kok Keng Yen  
Senior Associate

+603 6209 5400  
annabel@rdslawpartners.com

unnecessary hardship, stress when dealing in a real estate transaction.

Authored by Khoo Jia Hui, an associate with the firm's Corporate and Commercial practice at our Penang office.



## About Us

We are a full-service commercial law firm with a head office in Kuala Lumpur and a branch office in Penang. Our key areas of practice are as follows:-

- Appellate Advocacy
- Banking & Finance (Conventional and Islamic)
- Capital Markets (Debt and Equity)
- Civil & Commercial Disputes
- Competition Law
- Construction & Arbitration
- Corporate Fraud
- Corporate & Commercial
- Personal Data Protection
- Employment & Industrial Relations
- Energy, Infrastructure & Projects
- Construction & Arbitration
- Fintech
- Government & Regulatory Compliance
- Intellectual Property
- Medical Negligence
- Mergers & Acquisitions
- Real Estate Transactions
- Shipping & Maritime
- Tax, SST & Customs
- Tax Incentives
- Trade Facilitation

**REIMAGINING  
LEGAL  
SOLUTIONS**