



WHETHER AN AGREEMENT TO PURCHASE ('ATP') GIVES THE PURCHASERS A CAVEATABLE INTEREST IN THE LAND?

----- Authored by the Conveyancing Team of Miranda & Samuel -----

Caveatable interest is an interest which does not require a formal or official registration in the land and/or property. In other words, it is a type of interest which need not to be a 'registered interest' and it would be sufficient so long the caveator is able to show that they have a title to, or **any 'registrable interest'** to the divided land and/or undivided part of the land and/or property as defined in section 323(1)(a) of the National Land Code 1965 ('NLC').

A caveator who wish to lodge a caveat may apply to the Registrar for the entry of a private caveat. The Registrar may upon enquiry, **enter a caveat on the register document of land title to prohibit** the registration, endorsement or entry on the register document of title thereto. A private caveat is commonly used as a mechanism to **secure the purchasers' interest after the execution** of a Sale and Purchase Agreement ('SPA') **but before completion** of the SPA , to prohibit the owner from selling the property to another party.

In *Loo Kian Aik & Anor v Aliran Raya Sdn Bhd & Anor [2023] CLJU 2249*, the issue arose as to whether an **Agreement To Purchase (ATP)** grants a purchaser the right to caveat a property?

Case facts

The defendants (Aliran Raya Sdn Bhd & Anor) vide an Agreement to Purchase ('ATP') dated 11.7.2022 agreed to sell and the plaintiffs (Loo Kian Aik & Anor) agreed to purchase two pieces of land in Melaka ('the lands') for RM 3,200,000.00. Pursuant to the ATP, the plaintiffs paid RM 96,000.00 as the earnest deposit to the defendants.

A dispute arose over the purchase when the defendants were found to be had failed, refused or neglected to complete the sale of the lands. The plaintiffs commenced a suit against the defendants where the plaintiffs seek for specific performance for the sale of the lands and filed a caveat in the lands. It was in the plaintiffs' belief that by entering into the ATP, there was a caveatable interest in the lands granted to them. The defendants then sought to cancel the caveat pursuant section 326 of the NLC and the plaintiffs filed an application to the court to preserve the caveat.

The core issue before the court was **whether the ATP** conferred upon the plaintiffs a **caveatable interest** in the lands which granted them the right to enter a private caveat on the lands.

The plaintiffs' arguments

The plaintiffs contended that they have a caveatable interest in the land based on the following:-

- (a) that the ATP was a binding contract and legally binding agreement between the parties;
- (b) the payment of earnest deposit of RM 96,000.00; and
- (c) the progress in negotiations of the SPA where the parties almost executed the SPA if not for last-minute changes in the terms of the SPA requested by the defendants.

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The defendants' arguments

Whereas, the defendants contended that the ATP did not confer the plaintiffs any caveatable interest in the lands because:-

- (a) the earnest deposit was refundable under the ATP and was not a forfeitable part payment;
- (b) the ATP was subject to the execution of the SPA by the parties; and
- (c) the terms and conditions of the SPA such as the retention sum, period to release balance purchase price and period for payment of redemption sum have not been finalised by the parties.

The decision of the High Court

First of foremost, the High Court noted that **no SPA for the lands has been executed** by both parties. The plaintiffs and the defendants were still in the negotiations to finalize the terms and conditions of the SPA. Nonetheless, the court recognized that the ATP is a legally binding contract between the parties as the parties and subject matter of the ATP were certain and the initial consideration of the earnest deposit had been paid by the plaintiffs to the defendants.

However, as to the issue of whether the ATP as a legally binding contract would give the plaintiffs a caveatable interest in the land, the court held that it need not be necessarily so. Whilst the ATP can be a binding agreement to the parties' intention to purchase and sell the lands, its binding effects only extend to the duties, obligations of parties to execute the SPA and the consequences of either party's failure to execute the SPA. It was in the High Court's view that the fact that relief was provided by the ATP in the event of failure to execute the SPA in which either party may withdraw from the transaction by refusing to execute the SPA subject to the forfeiture of earnest deposit or damages has clearly shown that the ATP was not a conclusive document for the sale of the lands but an illustration of the parties' intention to sell and purchase the land.

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Further, the fact that a full SPA was prepared and the parties have negotiated for the terms and conditions of the SPA illustrated that the **ATP was not intended to be the only and conclusive document governing the transaction of the lands**. Thus, the ATP was **merely a contract to contract** in which the transaction of the lands was **subject to the execution of the SPA with all terms to be incorporated**. “An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondences exchanged between the parties and to say whether that is the result intended by the parties” (Charles Grenier Sdn. Bhd. v. Lau Wing Hong [1997] 1 CLJ 625).

Also, it was decided by the court that the payment of earnest deposit was not sufficient to confer any caveatable interest in the lands. The refundable payment of earnest deposit as a mere pecuniary interest in the lands did not lead to a registrable interest which entitle the party to lodge a caveat under section 322 of the NLC (Institut Teknologi Federal Sdn Bhd v HUM Education Sdn Bhd [2008] 1 CLJ 74).

Thus, the **ATP only** provides the plaintiffs **a right in personam** against the defendants for any breach of the ATP **but not a right in rem in the land**. When the ATP is executed, the plaintiffs **merely acquired a contingent or future interest** instead of present or existing registrable interest in the lands as illustrated in *Score Options Sdn Bhd v Mexaland Development Sdn Bhd* [2012] 7 CLJ 80.

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On another point, the court found that the SPA was not ready for execution as the defendants have yet to conclude their negotiations on the terms and conditions of the SPA. The parties of the contract can always opt to not conclude any contract, albeit at the risk of payment of damages or specific relief.

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Thus, the plaintiffs were not conferred with any registrable and/or caveatable interest as per the case of *Murugappa Chettiar Lakshmanan v. Lee Teck Mook* [1995] 2 CLJ 545 that “negotiations for a contract, however advanced, do not amount to a contract.... Until and unless a purchaser has an enforceable contract for the sale of land, he can lay no claim to the title to registered land.”

Conclusion

The High Court found that the plaintiffs have failed to satisfy that they have registrable and caveatable interests in the lands as the SPA had yet to be concluded. If the ATP was intended to be the governing contract for the sale of the lands, the defendants would have already demanded payment and the plaintiffs would have been under the obligation to make the payment. However, based on the facts, neither was done by either party.

Thus, it should be noted that in a transaction for the purchase of land or property, although an agreement to purchase the said property had been signed by both seller and purchaser, generally, the **registrable and caveatable interest will only be granted to the purchaser upon the execution of a sale and purchase agreement**. Failure to execute the agreement merely conferred the party a right in personam against the default party for any breach of the agreement but not a right in rem in the land. An agreement to purchase a land is a mere contract to contract. The purchasers have no caveatable interest to enter a caveat for the land.

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