IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 69

Civil Appeal No 175 of 2019

Between

Ong Keh Choo

… *Appellant*

And

(1) Paul Huntington Bernardo
(2) Tran Hong Hanh

… *Respondents*

In the matter of Suit No 258 of 2018

Between

Ong Keh Choo

… *Plaintiff*

And

(1) Paul Huntington Bernardo
(2) Tran Hong Hanh

… *Defendants*

JUDGMENT

[Contract] — [Consideration] — [Failure]

[Contract] — [Formation] — [Acceptance]
[Contract] — [Misrepresentation] — [Materiality]
[Contract] — [Termination]

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v
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Court of Appeal — Civil Appeal No 175 of 2019
Judith Prakash JA, Belinda Ang Saw Ean J and Woo Bih Li J
20 May 2020

16 July 2020 Judgment reserved.

Woo Bih Li J (delivering the judgment of the court):

Introduction

1 This appeal arises from a claim by the owner of a property for $316,000 as an alleged option fee in respect of an option to purchase the property granted by the owner to a prospective purchaser. The property in question was known as Balmoral 8 #05-03 ("the Property"). Payment of the option fee was allegedly done pursuant to a cheque issued by the husband of the prospective purchaser. The judge below ("the Judge") dismissed the claim with costs and the owner appeals against that decision.

2 The plaintiff owner was Ong Keh Choo, a Singapore citizen. That is her name according to her formal identity document. She is also known as Jeannette

Ong. At the material time, she was a real estate agent with 34 years of experience.[1] We will refer to her as "the Appellant".

3 The defendants are a married couple, Paul Huntington Bernardo and Tran Hong Hanh, also known as Alice. They are the respondents in this appeal. We will refer to them collectively as "the Respondents" and respectively as "R1" and "R2".

4 R1 is a citizen of the United States of America and a permanent resident of Singapore. He was previously working as a scientist and consultant. R2 is a citizen of Vietnam and a permanent resident of Singapore. Her affidavit of evidence-in-chief ("AEIC") described her occupation as a medical concierge. Importantly, R2 is able to read and write English.

Background

5 The Appellant commenced HC/S 258/2018 against the Respondents, claiming $316,000 against R1 and R2 respectively. She alleged that she had granted an option to purchase the Property dated 7 October 2017 ("the OTP") to R2 and/or her nominee in exchange for a cheque issued by R1 in her favour for $316,000 ("the Cheque"). Her claim against R1 was as drawer of the Cheque. Her claim against R2 for the $316,000 was for the option fee payable under the OTP.

6 On 6 October 2017, the Respondents saw an online advertisement for the sale of the Property.[2] The Property was marketed by the Appellant under the

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1 Record of Appeal ("ROA") Vol III (B) pp 70 to 71.

2 ROA Vol III (C), p 36, para 7.

name of Jeannette Ong. At all material times, the Respondents discussed the Property with the Appellant in the belief that she was a real estate agent representing the owner. They only knew her by the name Jeannette Ong. They did not know that her formal name was Ong Keh Choo or that she was the owner. Such information only surfaced later as we elaborate below.

7 A series of events took place on 7 October 2017. First, on that morning, the Respondents viewed the Property and were shown around it by the Appellant.

8 There was a second meeting at about 2.00pm that same day between the Appellant and the Respondents at the residence of the Respondents. During that meeting, R1 issued the Cheque in favour of "Ong Keh Choo".

9 There was a third meeting that day at about 7.00pm between R2 and the Appellant. The Appellant was accompanied by another real estate agent, one Lee Chew Hsia who is also known as Judi Lee ("JL"). The Respondents had met JL earlier that same day while JL was marketing another unit in the same development as the Property. The third meeting was at the residence of R2's friend where R2 was attending a dinner party hosted by her friend. At that meeting, the OTP was handed to R2.

10 After the Appellant and JL left the third meeting, R2 sent a copy of the OTP to her lawyer who advised her on it that same night of 7 October 2017. The substance of the advice was that, normally, the terms of an OTP would provide for payment of 1% of the price as the option fee and for another 4% to be paid upon exercise of the OTP, with the 4% being held by the owner's lawyer

pending completion of the sale.[3] However, under the terms of the OTP, 10% of the price was payable as the option fee and 90% was payable upon exercise of the option by 4.00pm of 23 October 2017. Completion was to take place only some 14 weeks thereafter.

11 R2 conveyed this advice to the Appellant either directly or through JL, who was acting as an intermediary. Thereafter, R2 and the Appellant discussed amendments to the OTP. R2 wanted to bring the terms of the OTP in line with those normally found.

12 However, later that night, R2 asked the Appellant if the Cheque could be cancelled as R1 was worried that the Respondents might not have enough money to cover their expenses if it were cashed.

13 The next day, on 8 October 2017, the Respondents learned that the Appellant was the owner of the Property but R2 continued to discuss amendments to the payment terms in the OTP with the Appellant.

14 Later in the evening, there was a flurry of messages about the cancellation of the Cheque and a telephone call between R2 and the Appellant. The Respondents' position was that they were entitled to terminate the OTP for misrepresentation and they did do so that evening. The Respondents also asserted that during the telephone conversation, the Appellant had agreed to terminate the OTP and to return the Cheque after she returned from an intended trip overseas. R2 also informed the Appellant that the Respondents had countermanded the Cheque. The Appellant's version was that she had only

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[3] ROA Vol III (C) p 74.

agreed not to bank in the Cheque while she was away in Zurich and until the parties had a chance to meet to resolve the matter. This aspect of the OTP was also heavily disputed and we will elaborate on it later.

15 Although the Appellant knew that R2 had said that the Cheque had been countermanded, she proceeded to deposit the Cheque for payment into her bank account on 21 October 2017. Unsurprisingly, she was notified on 24 October 2017 by her bank that payment on the Cheque had been countermanded.

16 On 1 November 2017, the Appellant's lawyer sent a written notice of dishonour of the Cheque to R2 and demanded payment of $316,000. On 6 November 2017, R2's lawyer replied to deny liability to pay the sum. The Writ of Summons against the Respondents was filed on 9 March 2018. The Appellant sold the Property to another buyer for $3.682m in June 2018.

The decision below

17 The suit was heard before the Judge in July 2019. The main witnesses were the Appellant and the Respondents. In addition, JL was a witness for the Appellant and R2's friend, who hosted the dinner party on 7 October 2017, was a witness for the Respondents.

18 On 3 September 2019, the Judge dismissed the claim of the Appellant with costs to be taxed, if not agreed. His written judgment in *Ong Keh Choo v Paul Huntington Bernardo and another* [2019] SGHC 204 ("Judgment") said nothing about the counterclaim of the Respondents for a declaration that the OTP was *void ab initio* and for damages.

19 The Judge found R2 to be a credible and forthright witness and accepted her version that the Cheque was only "for show" in that it was issued to show

the Respondents' sincerity as genuine buyers and the Cheque would not be handed to the owner pending negotiation with the Respondents on the price. He also found that the Appellant had procured R2's signature on the OTP without informing her of its nature. He accepted that R2 was not familiar with the procedure for purchasing a property as she was buying property in Singapore for the first time (Judgment at [7]). The Judge also found R1's evidence to be direct and unwavering and that it corroborated R2's evidence.

20 On the other hand, the Judge was of the view that the Appellant's general demeanour throughout the trial suggested that she was an untrustworthy person. She had failed to disclose that she was the owner of the Property and this was contrary to the Council of Estate Agents' Professional Service Manual, which serves as a guideline for ethical conduct. He found that she had engaged not only in an omission but in active deception as her messages to R2 referred to the owner as a third party (Judgment at [8]).

21 Furthermore, the Appellant's persistent refusal to acknowledge that the terms of the OTP were unusual also detracted from her credibility. She had insisted that there was no normal option fee and refused to admit that paying the full price upon exercise of the option was clearly disadvantageous to the buyer. Her repeated refrain was that the OTP was unusual because R2 wanted it to be so. This created the impression of an opportunistic owner taking advantage of an unsuspecting and ignorant buyer.

22 The Judge was of the view that JL's evidence appeared rehearsed to corroborate the Appellant's evidence. JL also refused to acknowledge the unusual terms of the OTP.

23 The Judge also found that R2's signature on the OTP was not an acknowledgment or acceptance of the OTP. The Appellant had told R2 to sign it to countersign against the cancellation of certain words in the OTP. This was corroborated by a message from the Appellant to R2 shortly thereafter (after R2 had received her lawyer's advice on the night of 17 October 2017) (Judgment at [12]).

24 The Judge did not agree with the Appellant that R2 had engaged in extensive discussions about the terms of the OTP. Furthermore, when R2 had mentioned that the OTP had contained unusual terms (after receiving advice from her lawyer) including payment of the balance of the price upon exercise of the OTP (instead of payment of the balance being made later upon completion of the sale), the Appellant replied to say that this had been written by JL by mistake.

25 In the Judge's view, a "mistake" as fundamental as the amount due upon exercise of the option suggested that there was no agreement on the terms of the OTP. He was of the view that the OTP was inchoate for want of proper endorsement (Judgment at [15]).

26 The Judge was also of the view that the Appellant had misled R2 into thinking that the Respondents were complying with a normal process of the sale and purchase of real property in which the Cheque was only "for show" (Judgment at [16]).

The main issues

27 The main issues from Defence (Amendment No 1) ("the Defence") were:

(a) Whether the Cheque was issued "for show" only.

(b) Whether R2 understood the nature of the OTP when she received it.

(c) Whether the OTP was binding on R2.

(d) Whether R2 was entitled to rely on any of the Appellant's alleged representations to terminate the OTP unilaterally.

(e) Whether the OTP was terminated unilaterally or mutually.

(f) Whether any breach by the Appellant of any code of conduct entitled the Respondents to avoid liability under the Cheque or the OTP.

(g) Whether certain provisions of the Bills of Exchange Act (Cap 23, 2004 Rev Ed) (the "Bills of Exchange Act") allowed R1 to avoid liability under the Cheque.

Was the Cheque issued "for show" only?

28 An appellate court should be slow to disturb the findings of fact of a trial judge who has had the benefit of observing the demeanour of the witnesses and will not do so unless it can be shown that (a) the findings of fact are plainly wrong or against the weight of the evidence; or (b) the trial judge overlooked material facts and/or took into account irrelevant facts (*Seng Swee Leng v Wong Chong Leng* [2011] SGCA 64 at [18]). After considering all the evidence, including the objective evidence in the form of various messages between R2 or R1 on the one hand and the Appellant on the other hand, as well as the counterfoil of the cheque book of the Respondents, we are unable to agree with

many of the Judge's findings of fact although eventually we reach the same ultimate decision. Our reasons, however, are different as we elaborate below.

29 We should also mention that the intended purchase of the Property was not the first time that R2 was buying property in Singapore as the Judge had thought. Each of the Respondents had said in their respective AEICs that this was the first time that they were buying a *private* property in Singapore. They had previously purchased a resale Housing and Development Board flat with the assistance of an agent. According to them, save for choosing locations and contacting agents to arrange viewings, the entire purchase process and all the paperwork for that purchase was handled by R1.[4] From 2015 till the time that they were to view the Property, the Respondents were living in rented property.

30 If the Cheque had been issued "for show" only, just to demonstrate to the owner that the Respondents were serious buyers who wished to acquire the Property subject to negotiations on the price, then it would not have been issued to secure an option to purchase from the owner. That was the Respondents' case but the Appellant contended otherwise.

31 As mentioned, the Judge concluded that the Cheque was issued "for show" only. He preferred the evidence of R2 to that of the Appellant whom he did not find credible, for reasons we have mentioned above. However, the Judgment did not address an important piece of objective evidence which was the counterfoil of the Respondents' cheque book containing entries made by R1 when he prepared four cheques on 7 October 2017 in respect of the Property.

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4 ROA Vol III (C), p 4 para 7; p 35 para 6.

32 According to R1, he had prepared four cheques but had cancelled the first three of them in the following circumstances:[5]

(a) R1 was writing the amount and the name of the owner "Ong Keh Choo" on the first cheque as suggested by the Appellant. He inquired as to the purpose of the cheque and she said it was "for show". The Appellant repeatedly asked him to hurry as she had to leave soon. Due to the hurry, he made a mistake and therefore tore up the first cheque.

(b) As R1 was writing the second cheque, it occurred to him that the amount should not matter as it was only "for show". So he proceeded to insert the figure of $3.15m instead and passed it to the Appellant. However, the Appellant was annoyed and insisted that the amount should be $3.16m to convince the owner to sell to them, even though R1 said it should not matter as it was "for show". R1 relented and tore up the second cheque.

(c) As R1 was writing the third cheque for $3.16m, R2 came back downstairs. Upon seeing the cheque being written for $3.16m, R2 became uncomfortable and immediately expressed her concern about the writing of a cheque for a sum that they did not have. Both R1 and the Appellant tried to assure R2 that the cheque was "for show" and thus the amount did not matter. However, R2 was adamant.

(d) At this point of time, the Appellant suggested that they could issue a cheque for $316,000 instead, being 10% of the $3.16m. She said that this was "the norm". The Appellant did not explain further and the

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5 ROA Vol III (C) pp 8 to 10.

Respondents had no chance to clarify as everything was rushed. The Appellant repeatedly emphasised that the cheque was for the purpose of showing the owner their sincerity and that she would hold on to it and not hand it to the owner.

(e) The Respondents relied on the experience and expertise of the Appellant and trusted her assurances that the cheque was "for show" only and she would not hand it to the owner. Hence R1 tore up the third cheque and wrote a fourth one for $316,000 in favour of "Ong Keh Choo". This fourth cheque is the one we have referred to as "the Cheque" and is the subject of the Appellant's claim. R1 said he would not have written and handed the Cheque to the Appellant if he had known that she was the owner.

33 We come now to the relevant page of the counterfoil of the cheque book which had various columns for different information of an issued cheque to be entered:[6]

(a) the first column from the left was for the date;

(b) the second column from the left was for the cheque number;

(c) the third column from the left was for the name of the payee with the heading "Payment To";

(d) the fourth column from the left was for the amount of the cheque;

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6 Appellant's Core Bundle ("ACB") Vol II p 155.

(e) the fifth column from the left was for any amount deposited into the account; and

(f) the sixth column from the left was for the balance.

The counterfoil of the chequebook contained the following information:

(a) For the first cheque, R1 had written between the third to the sixth columns the following words, "Cancelled 3.16M 'for show' 8 Balmoral 05-03".

(b) For the second cheque, R1 had written the same words except that the amount stated was "3.15M" instead of "3.16M".

(c) For the third cheque, R1 had written the same words as for the first cheque.

34 In summary, the words "for show" were written each time in the counterfoil between the amount of the cheque and the address of the Property for the first three cheques.

35 Coming to the fourth cheque, which is the Cheque in question, the entries were different. Under the third column from the left, R1 inserted "ONG KEH CHOO". Under the next column, he wrote "316K". To the right, he inserted some other word or words and then the address of the Property. The word or words had been blocked off by R1 so that it was difficult to make out what they said. Below the address, he inserted the words "for show only".

36 The important question then concerns the time at which R1 had blocked off the words to the right of "316K" and had inserted the words "for show only" beneath the address. Was this done at the time when the Cheque was issued or

later in order to alter evidence which could contradict the Respondents' case that the Cheque was issued "for show" only?

37 In oral evidence, R1 denied that it was the latter. On the other hand, the Appellant contended that it *was* the latter. The Appellant also claimed that from the original of the counterfoil, one could faintly decipher the words which had been blocked off as reading "For Payment" instead.[7]

38 We have said that the words in question were blocked off because R1 had taken the trouble to scribble heavily over the words such that they could hardly be read, in addition to drawing a horizontal line across all the entries for the Cheque. This was in stark contrast to the deletion of the entries for the first three cheques as each deletion for these entries was done by drawing a single horizontal line across the entries but the entries could still be read easily. Not so for the words which were blocked off.

39 In our view, R1 had deliberately blocked off the words and inserted the words "for show only" beneath the address only *after* the Respondents had decided not to proceed with the purchase. We take this view because the words he had blocked off were different from the description for the first three cheques and would have suggested or established that the Cheque was not written "for show" unlike the first three cheques.

40 There is also other evidence which the Judge overlooked. It was the oral evidence of R1 that when he wrote the Cheque during the second meeting, the parties had not discussed the price.[8] It was also the oral evidence of R2 that

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7 ROA Vol III (D) p 203 ln 28 to p 204 ln 2.

8 ROA Vol III (D) p 198 ln 14-15.

when the Appellant called her on the evening of 7 October 2017, just before the third meeting, the Appellant said that the owner had agreed to sell the Property to them but did not mention the price.[9] There was no evidence from R1 or R2 as to when the price of $3.16m was discussed if not at the second meeting. It is unbelievable that the Appellant had informed R2 that the owner had agreed to sell the Property without mentioning the agreed price unless the Respondents already knew that the price would be $3.16m because that was the price they had offered at the second meeting. It is also unbelievable that R2 did not ask about the price when she was told that the owner had agreed to sell the Property to the Respondents if they had not earlier agreed to the price.

41 Furthermore, R2 did send a message on 8 October 2017 at 2.10pm through JL wherein she referred to "the agreed price" of $3.16m three times.[10] If the Cheque was "for show" only and the price was still to be negotiated, when did the Respondents negotiate the price after the second meeting? There was no evidence of any further negotiation.

42 We note that it was also R1's evidence that when he saw the OTP later on the night of 7 October 2017, he saw the Cheque number and amount on the OTP. He was furious that the Appellant had lied to them and had passed the Cheque to the owner. He immediately called the Appellant to demand an explanation as the Cheque was "for show" only. The Appellant replied that she could not get the Cheque back. R1 was adamant and demanded that the Appellant return the Cheque. He then sent a message to the Appellant stating,

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9 ROA Vol III (D) p 248 ln 25-27.

10 ROA Vol III (B) p 253.

"[d]oes the seller cash the deposit check straight away, or only after option is exercised[?]".[11] The Appellant did not reply.

43 It is not disputed that R1 had a telephone discussion with the Appellant that night. However, his message thereafter did not support his allegation that the Cheque was "for show" only. There was no suggestion in his message that he was furious with the Appellant because the Cheque was "for show" only and was not to be handed to the owner pending negotiation of the price. Indeed, his message suggested otherwise, *ie*, that he knew that the Cheque was to be handed to the owner, if the owner agreed to the price of $3.16m. His only query was about the stage when the owner would present the Cheque for payment. Furthermore, his message referred to the Cheque as "the deposit check" and not the "for show" cheque. This supported the Appellant's version, *ie*, that the Cheque would be handed over to the owner if the owner agreed to the price of $3.16m.

44 Also importantly, in all the messages from R2 to the Appellant, after R2 had received her lawyer's advice and was asking for the Cheque to be cancelled or returned, there was no suggestion that the Cheque was "for show" only or should not have been handed to the owner.

45 In our view, the Cheque was not issued "for show" only. It was issued to secure an agreement by the owner to sell the Property to the Respondents (or either of them). The Respondents, and in particular R2, were not as lukewarm about the Property as they sought to portray. Hence, on 7 October 2017 at 2.27pm, R2 sent the message to the Appellant saying that she was "so excited"

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11 ROA Vol III (C) p 12 para 30.

and at 4.51pm, sent another message asking the Appellant to let the Respondents know the owner's decision "by today". After the Appellant informed R2 that the owner had agreed to sell the Property to the Respondents, R2 sent a message to inform the Appellant at 6.48pm that the Respondents needed the key to the Property by 1 November 2017. By then R2 must have been told that the owner had agreed to the price of $3.16m. That was why she then asked for the key by 1 November 2017. As mentioned, there was no negotiation about the price.

46 Even if the Cheque *had* initially been issued at the second meeting "for show" only, that would not have been the end of the matter in the light of events that transpired at the third meeting.

47 It is correct to say that at the time the Cheque was handed to the Appellant at the second meeting, the owner had not yet issued the OTP. Hence, at that point of time, there was no consideration for the $316,000. However, it is undisputed that the OTP was eventually handed to R2 at the third meeting and that the owner had signed the OTP to grant R2 an option to purchase the Property at $3.16m.

Did R2 know the nature of the OTP?

48 The important question then is whether R2 received the OTP knowing the nature of that document. Unfortunately for the Respondents, their position on this was inconsistent.

49 In R2's AEIC, she suggested that she did not know the nature of the document she received at the third meeting. At para 37 of the AEIC, she said that she found out only later that the document she received was the OTP. At para 38, she said that the Appellant and JL did not explain the contents of the document to her or tell her that it was a legal document or advise her to seek

independent legal advice. In any event, she would have found it difficult to understand the contents of the document. At the material time, she had no idea either what an option to purchase was or its legal effect.

50 The Respondents' case on appeal continued to paint the same picture. They argued that R2 did not understand the nature of the OTP she had received. She took it because she was told that it was an administrative document. She was clueless about the conveyancing process.[12]

51 The Respondents accepted that the defence of *non est factum* was not pleaded in the Defence. The Latin words of this defence mean that, "this is not my deed". It is a defence that allows a party to an agreement to avoid liability under an agreement if it is fundamentally different from what she thought she had agreed to.

52 The Respondents argued that it was not necessary for them to have pleaded this defence because R2 did not sign a contract or enter into any agreement with the Appellant. While it is true that R2 did not sign as a party to the OTP, she did sign to acknowledge an amendment or amendments to the OTP. Arguably, she ought to have pleaded the defence of *non est factum* but we do not need to decide the point on the basis of the omission of this defence in the pleading.

53 There are various points which militate against the Respondents' position that R2 did not understand the nature of the OTP. The Respondents had pleaded, as part of their misrepresentation defence (at [27(d)]), that R2 had been

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12 See paras 54, 56 and 76 of the Respondents' Case.

led to believe by the Appellant's action and conduct at the third meeting that the payment terms in the OTP were normal (market) practice. However, in our view, if R2 did not understand the nature of the document she was receiving that night, she could not have been led to believe that the payment terms thereof were normal practice.

54 Moreover, there was evidence to suggest that R2 knew the nature of the document she was receiving. First, she noticed the particulars and signature of the owner on the document.[13] Yet she did not query what that was about.

55 Secondly, and more importantly, she never asked about the Cheque at the third meeting. If she had really not known that the document she was receiving was legally binding document and genuinely believed that the Cheque was "for show" only, she would have queried about the Cheque especially since she had thought that the Appellant was supposed to be travelling that night. The fact that she did not query leads us to an irresistible inference that she knew that the Cheque had been handed to the owner in exchange for the document she was receiving.

56 Thirdly, after she had received her lawyer's advice that night (after the third meeting), her concern was about the terms of the OTP, *eg*, that the option fee should be 1% of the price and the amount to be paid on exercise of the option should be 4%. She did not allege that she was unaware of the nature of the document.

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13 ROA Vol III (C) pp 43 to 44 para 35.

57 The Respondents sought to rely on the evidence of R2's friend for the third meeting. The friend's AEIC said that when the friend entered the room to check on R2 that night, she noticed that R2 was preoccupied. After the Appellant and JL left the friend's residence, the friend realised that R2 still appeared dazed. After the party ended, she asked R2 what had happened and what document she had signed and if she read the document to which R2 said she had not.[14] The friend was not cross-examined on her AEIC.

58 However, the friend's AEIC also said that when she entered the room, she saw R2 with a document and the two agents hovering around her. She asked R2 if everything was okay and the older lady (meaning the Appellant) was eager to reply that everything was fine. The friend specifically directed her question to R2 again in response to which R2 said that everything was okay.

59 It is also not disputed that even if R2 did not read all the terms of the OTP, she did notice the name and signature of the vendor on the OTP. To the extent that the Appellant said she had signed the OTP (as the owner) in the presence of R2, we do not believe that evidence. It was pre-signed by the Appellant as she did not want R2 to know that she was the owner.

60 In the circumstances, we are of the view that the evidence of R2's friend is not sufficient to assist the Respondents to establish that R2 did not understand the nature of the document she was receiving that night. It is also unnecessary to elaborate on the evidence of JL who was giving evidence for the Appellant.

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14 ROA Vol III (C) pp 157 to 158.

61 Accordingly, we find that R2 knew the nature of the document she was receiving although it appears that she was unaware that the payment terms therein were disadvantageous to her and were not the usual terms for property purchases. We will say more about the payment terms later. At this stage, it suffices for us to say that R2 knew that she was receiving an option to purchase and that this was granted by the owner in exchange for the Cheque for $316,000. Thus, even if the Cheque had been initially issued "for show" only, it was no longer "for show" by the end of the third meeting.

Whether the OTP was binding on R2

62 In the circumstances, there was consideration for the Cheque when the OTP was handed to R2 at the third meeting.

63 We now turn to the Respondents' defence that there was no agreement because R2 did not discuss the terms of the OTP with the Appellant or JL at the third meeting. The Appellant sought to convey the impression that there was a discussion as she said R2 had raised various matters at the third meeting:[15]

(a) R2 asked if the price indicated on the OTP could be reduced so as to save on additional buyer's stamp duty. She was told that it would be illegal to do so.

(b) R2 asked what would happen to the ownership of the Property if she divorced R1. The Appellant said that she had suggested that if R2 needed some time to consider the manner of the holding of the Property, the OTP could be issued to R2 "and/or [her] nominee". R2 agreed.

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15 ROA Vol III (B) pp 14 to 16.

(c) R2 reiterated that they wanted to move into the Property on 1 November 2017 and the Respondents did not require time to obtain financing as they had the funds to pay the full price. The Appellant said she informed R2 that the tenant of the Property had agreed to move out prior to completion.

64 For reasons which we elaborate on later, we do not agree that R2 had said that the Respondents did not require time to obtain financing as they had the funds to pay the full price.

65 We do not need to decide whether R2 had raised matters stated in [63(a)] and [63(b)] above at the third meeting although we accept that R2 had not discussed the payment terms with anyone at the third meeting. We are of the view that she did not do so because she was not familiar with the usual terms of an option to purchase (even though she understood the nature of such an option). However, that does not assist the Respondents. The maxim *caveat emptor* is a basic legal principle in commercial transactions. It is a Latin term meaning "buyer beware". In other words, it is for the buyer to take his own precautions and familiarise himself with the terms of a document he is accepting.

66 The Respondents relied on *Woo Kah Wai and another v Chew Ai Hua Sandra and another appeal* [2014] 4 SLR 166 ("*Woo Kah Wai*") when the Court of Appeal said at [68] that in a normal scenario, a vendor is free to stipulate any term that he likes in an option to purchase in addition to terms already orally agreed which would typically include the price, the description of the property, the parties, the payment terms and the option period.

67 We do not think that *Woo Kah Wai* assists the Respondents. While we agree that it would be normal for such terms to be discussed, it does not follow

that such terms must always be discussed first. This was a case in which the Cheque was not handed contemporaneously in exchange for the OTP. It was handed first to the Appellant and the OTP was issued later and handed to R2 who received it without protest or qualification. Furthermore, R2 did not tell the Appellant to hold onto the Cheque while R2 read or sought advice on the terms of the OTP.

68 This does not mean that the Appellant was entitled to foist the terms of the OTP on R2. If R2 had said that she wanted time to read the OTP or seek advice on it, then the terms of the OTP would not yet be binding on R2 and the OTP would not yet have been received by R2 in exchange for the Cheque. However, no such qualification was made by R2 and as we have said, the general principle is *caveat emptor*. By receiving the OTP without qualification R2 had, by conduct, accepted the terms therein, leaving aside the question of her signature.

69 We now come to R2's signature on the OTP. On one of the copies, there are two signatures by R2. One of the signatures is beside a handwritten error which is immaterial and we say no more about it. The other signature is next to the cancellation of certain printed words which were no longer applicable as the balance of the price was payable upon exercise of the OTP. The other copy also has this signature beside the cancellation of certain printed words.

70 The Judgment emphasised that this signature of R2 was not an acknowledgement or acceptance of the entire OTP or an "acknowledgement, endorsement or acceptance of a binding contract" (Judgment at [12] and [13]). We agree that R2's signature was to acknowledge the cancellation of certain printed words. In itself, it might not signify acceptance of a binding contract.

71 However, it is important to consider the nature and terms of the OTP. It is an agreement by the owner to sell the Property to R2 by granting an option to her to buy the Property on the terms stated in the option. The OTP has to be signed by the owner. It is given in exchange for an option fee which, in this case, is the sum of $316,000 for which the Cheque was issued. The OTP is received in exchange for the Cheque. This may be done contemporaneously or at different times. As mentioned, it was R2's conduct in parting with the Cheque and receiving the OTP without qualification that signified that she had agreed that the Cheque was given in payment of the option fee for the OTP and had also agreed to the terms of the OTP. In the circumstances, it was not necessary for her to agree to the OTP by signing on it. Her agreement was constituted by her conduct and her signature would only be required later if and when she exercised the option (aside from the question of signing to acknowledge an amendment to the terms). It was immaterial that, in this case, the Cheque was issued by R1.

72 R2's signature beside the cancellation of certain printed words in the OTP was for a different purpose. It was to signify that those words ceased to apply should she decide to exercise the option. That signature did not mean that a signature from her was necessary to make the OTP a legally binding document. In other words, assuming that it was not necessary to cancel the printed words in question and she had not signed on the OTP at all, the OTP would still be a valid agreement by the owner to sell the Property to R2 by granting an option to R2 in consideration of the Cheque for $316,000 received by the owner.

73 We agree with the Judge that the terms of the OTP were clearly disadvantageous to R2, in particular, the term which required R2 to pay the balance of the price (after taking into account the option fee) upon exercise of

the option. As R2's lawyer had advised, the payment at that stage should have been for a much smaller percentage and the balance would normally be payable only upon completion. We add that according to the lawyer's advice, the option fee should normally be 1% and not 10% and this is borne out to some extent by the standard printed terms of the OTP which had to be amended. The standard terms suggested that 5% or 10% of the price was payable upon exercise of the option, less the option fee. This suggested that the option fee would normally be less than 5%.

74 The Appellant's evidence was that the requirement to pay the balance upon exercise of the OTP was agreed to by R2 because the Respondents had told her that they had sufficient funds and did not need to take a loan.[16] This was a poor excuse. It is significant to note that after R2 had informed the Appellant about her lawyer's advice that only another 4% of the price was payable on the exercise of the OTP (assuming that the option fee was 1% of the price), the Appellant did not say that the payment term requiring full payment of the balance upon exercise of the OTP was worded that way because R2 had said that the Respondents did not need to take a loan and R2 had agreed to this payment term. Significantly, her response was instead that "[o]k it was written by [JL] by mistakes [*sic*] the consideration is another 10% when u exercise option will amend tks Ok?"

75 The Judge said that this "mistake" suggested that there was no agreement on the terms. He said, "[i]t was an indication that [the Appellant] was trying to land a quick sale before her unsuspecting client got wise to it. As such,

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16 ROA Vol III (D) p 40 ln 30 to 31.

I am of the view that there was no binding agreement between [the parties]. The [OTP] was inchoate for want of proper endorsement" (Judgment at [15]).

76 While we agree that the Appellant was trying to take advantage of R2 in imposing payment terms which were disadvantageous to R2, it was incorrect for the Judge to refer to R2 as the Appellant's client. R2 was not the Appellant's client and the Appellant was not the Respondents' agent.

77 Importantly, there was no mistake in the terms requiring R2 to pay the balance of the price upon exercise of the OTP. The allegation of a mistake was an excuse by the Appellant to disguise the fact that she had tried to take advantage of R2 by requiring payment of the balance of the price at the time the OTP was to be exercised. When R2's lawyer advised otherwise, the Appellant claimed that it was a mistake and put the blame on JL. It could not have been a mistake because both the Appellant and JL were real estate agents with considerable experience. The Appellant said she herself had about 34 years of experience at the material time. JL's evidence was that as at 2019, when she gave oral evidence, she had been a full-time agent for three years and a part-time one since 2009. Furthermore, the standard terms of the printed form indicated a payment of the equivalent of 5% or 10% of the price upon exercise of the option less the option fee. As mentioned above, those printed words had to be cancelled during the third meeting because the entire balance of the price was to be paid upon exercise of the option. In the light of that specific amendment, the alleged mistake was clearly a lie to cover up the Appellant's attempt to obtain early payment of the full price.

78 As there was no mistake, we do not agree that the "mistake" suggested that there was no agreement on the terms. Indeed, the Defence did not plead the "mistake" to assert an absence of agreement. The point was different, *ie*, that

there was no agreement because there was no discussion of the terms.

79 It is also unclear what the Judge meant when he said that the OTP was inchoate for want of proper endorsement. If he meant that R2 had to sign on the OTP to signify her acceptance of the terms, we have explained why her signature was not necessary at that stage. If he meant that the OTP was incomplete because of the "mistake", there was in fact no mistake at all.

Whether R2 was entitled to rely on any of the Appellant's alleged representations to terminate the OTP unilaterally

80 We now come to the question of misrepresentation. For easy reference, we summarise the five representations of the Appellant ("the Representations") pleaded in the Defence by the Respondents:[17]

(a) The Appellant had held herself out to be the agent and not the owner of the Property ("the 1st Representation").

(b) The Appellant had told the Respondents that the Cheque was "for show" only ("the 2nd Representation").

(c) The Cheque would be held by the Appellant and would not be given to the owner or be encashed ("the 3rd Representation").

(d) As the Appellant had purported to act as a real estate agent, she had led the Respondents to believe, by her action and conduct, that it was normal practice to pay 10% of the price as an option fee and the remaining 90% upon exercise of the option ("the 4th Representation").

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17 ROA Vol II pp 55 to 56 para 6.

(e) The Appellant had asked R2 to sign on the OTP as the Appellant had made a mistake and the signature was to acknowledge "the cancellation of certain words that [were] not applicable" ("the 5th Representation").

81 It is undisputed that the Appellant did not disclose that she was the owner of the Property. Not only that, she referred to the owner in the third person at all material times. In doing so, she led the Respondents to believe that a third person was the owner. This was untrue.

82 However, the Respondents accepted that it is for them to establish that a false representation was material in inducing them to part with the Cheque and to receive the OTP without qualification. The question of materiality is discussed in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [187] and [188] where the Court of Appeal said:

> 187 Indeed, the law in Singapore has been quite settled on this front. In *JEB Fasteners Ltd v Marks Bloom & Co (a firm)* [1983] 1 All ER 583 ('*JEB Fasteners*'), the English Court of Appeal held (at 589):
>
> > *[A]s long as a misrepresentation plays a real and substantial part, though not by itself a decisive part,* inducing a plaintiff to act, *it is a cause of his loss and he relies on it,* ***no matter how strong or how many are the other matters which play their part in inducing him to act***. [emphasis added in italics and bold italics]
>
> 188 The above passage in *JEB Fasteners* has been cited with approval by numerous courts in Singapore, including this court in *Panatron Pte Ltd v Lee Cheow Lee* [2001] 2 SLR(R) 435 at [23], and more recently, by Andrew Ang J in *Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co* [2007] 1 SLR(R) 196 at [55]–[56]. Simply put, the representation must have a real and substantial effect on the representee's mind such that it can be said to be *an* inducing cause which led him to act as he did; it need not be *the* inducing case: *BP Exploration* at [105]; *Edgington v Fitzmaurice* (1885) 29 Ch D 459 ("*Edgington*").
>
> [emphasis in original]

83 The Appellant relied on *ERA Realty Network Pte Ltd v Puspha Rajaram Lakhiani and another* [1998] 2 SLR(R) 721 ("*Puspha*"). In that case, the vendors had agreed to appoint a real estate company "E" to act as their agent in the proposed sale of their property. The commission payable to E was also agreed. The individual from E who represented the vendors was "S". She secured a purchaser "A" and an option to purchase was granted to A "and/or nominee". S informed the vendors that A was her sister-in-law but she did not inform them that her own husband, *ie*, S' husband, was a director of a property investment company which eventually exercised the option. S also did not advise the vendors about an increase in plot ratio which meant that the property could possibly be sold more profitably *en bloc*. The sale was completed but the vendors refused to pay the agreed commission to E. E then commenced an action against the vendors to claim the commission. The vendors resisted the claim and counterclaimed a declaration that E was in breach of duty or in breach of their agreement and also prayed for a declaration that E was liable for all loss and damage suffered by the vendor and damages to be assessed.

84 One of the issues was whether S was obliged to disclose to the vendors that A was in fact a trustee for the ultimate purchaser. The High Court took into account the fact that the option had been granted to A "and/or nominee" and concluded at [18] that, "[i]n my opinion, unless it has been specifically expressed otherwise, the buyer's identity is immaterial in a property transaction". It seems to us that the presence of a nominee provision merely reinforces this view and the court's observation would ordinarily apply even in the absence of such a provision.

85 In our case, the question is whether the identity of the seller was important to the Respondents. We are of the view that ordinarily the seller's identity would be immaterial. Here, R1 made a statement that if the Respondents

had known that the Appellant was the owner, he would not have issued and handed the Cheque to her.[18] However, this was a bare statement.

86 There was also a suggestion that if the Respondents had known that the Appellant was the owner, they would not have believed her when she said she could get a good deal for them before or at the second meeting.[19]

87 We do not accept the Respondents' suggestion that they believed that the Appellant could get a good deal for them. On their own evidence, the Respondents had found the Appellant to be rude and unprofessional when they alleged that she had asked them at the first meeting if they could afford to buy the Property. She had also allegedly rushed them in the viewing of the Property. They would not have simply accepted that she was going to help them to get a good deal. They would have known that that was just a puff even if she did say it.

88 Besides, the messages from R2 to the Appellant, after the Respondents found out that the Appellant was the owner, showed that the identity of the vendor was not material to them. At 1.11pm of 8 October 2017, R2 sent a message to the Appellant stating that the Appellant was the owner of the Property. Yet, at 1.18pm, R2 sent another message to ask the Appellant to amend the terms of the OTP along the lines suggested by R2's lawyer.[20] Then at 2.10pm, R2 sent a message through JL to say that she was prepared to honour the offer to buy at the agreed price of $3.16m provided the payment terms were amended in accordance with her lawyer's advice.

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18 ROA Vol III (C) p 10 para 25.

19 ROA Vol III (D) p 198 ln 17 to 19.

20 ROA Vol III (B) p 71.

89 These two messages, at 1.18pm and 2.10pm, could constitute affirmation of the OTP or waiver of the false representation after knowledge of the falsity but, as the Appellant did not rely on affirmation or waiver, we will say no more about them. Nevertheless, these two messages showed that the identity of the vendor was not material to the Respondents.

90 Furthermore, at no time thereafter did R2 or R1 send any message to the Appellant to say that they wanted the return of the Cheque because they had found out that she was the real owner. Instead, the reason which R2 gave was that they had not taken into account their other expenses.[21]

91 Thus, we are of the view that the identity of the owner was not material to the Respondents, although we accept that they would have wanted to know the truth. Accordingly, the Respondents have failed to establish that the 1st Representation to them was material.

92 The 2nd and 3rd Representations may be considered together. We have discussed the circumstances leading to the issue of the Cheque. Even if the first three cheques were intended to be issued "for show" only, the Cheque was not issued "for show" for the reasons we have set out above. Accordingly, any representation of "for show" did not relate to the issue of the Cheque. It follows that we do not agree with the Judge's conclusion that the Appellant misled the Respondents into thinking that they were complying with a normal process for the purchase of a property in which the Cheque was only "for show". We add that it was not pleaded in the Defence that the Appellant had said that a cheque "for show" was a normal feature of negotiation. The question of normal features

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[21] ROA Vol III (C) p 78.

in the Defence pertained to the payment terms in the OTP and not to the issuance of the Cheque "for show". The Respondents have failed to establish the 2nd and 3rd Representations.

93 We come to the 4th Representation. As we stated above, the 4th Representation is inconsistent with the Respondents' allegation that R2 did not understand the true nature of the OTP. However, this does not mean that the Respondents have established that the 4th Representation was made. Unfortunately for the Respondents, their case about this representation was also inconsistent.

94 When the Respondents were asked to provide further and better particulars as to whether the 4th Representation was made verbally, they did not stick to the Defence to say that it was made through the Appellant's action and conduct. Instead, they said that it was made "[v]erbally".[22] This was a contradiction.

95 To make matters worse for the Respondents, the AEIC of R2 made no mention of the 4th Representation whether by reference to the Appellant's action or conduct or to an oral statement from her. Instead, R2's AEIC was about how she had thought the document was an administrative one only (see [50] above). Thus, even though the Respondents continued to rely on the 4th Representation in their submissions before us, there was no evidence from R2 to support these submissions. Accordingly, the Respondents have failed to establish the 4th Representation.

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22 ACB Vol II p 15.

96 As for the 5th Representation, we are of the view that it was true that R2's signature was to acknowledge the cancellation of certain words that were not applicable. Hence, this was not a false representation. As we have discussed, R2's signature was unnecessary to establish that the OTP is legally binding on R2.

97 Therefore, for one reason or another, none of the Representations can constitute a defence for the Respondents.

98 We digress to mention one other allegation in the Defence. Paragraph 10(e) thereof states that the terms of the OTP were deliberately drafted so that the option fee would be forfeited as no financial institution would be able to grant a loan to the Respondents within the approximately 14 days for the option to be exercised. This allegation was not pursued in the appeal. In any event, it was baseless. It is clear from the exchange of messages that when R2 mentioned her lawyer's advice about the payment terms, the Appellant did not insist on full payment of the balance on exercise of the OTP. She was more interested in having a successful completion than in forfeiting the option fee.

Whether the OTP was terminated unilaterally or mutually

99 We come now to the next main issue, *ie*, whether the OTP was terminated unilaterally or mutually. The Appellant submitted that the Defence was confined to unilateral termination by R2 and, therefore it was not open to the Respondents to argue that the Appellant had agreed to terminate the OTP. This submission was made because at the outset of para 13 of the Defence, the Respondents had pleaded that R1 and/or R2 had elected to rescind the OTP, *ie*, unilateral termination. However, fortunately for the Respondents, the particulars they had pleaded in the paragraph also referred to the Appellant's

acceptance of R2's rescission and orally confirming that the deal between the parties was off, *ie*, mutual termination. The Defence ought to have pleaded both unilateral and mutual termination at the outset of para 13 of the Defence but we are of the view that the omission to do so did not preclude the Respondents from relying on mutual termination as an alternative to unilateral termination. Mutual termination had also been raised in the trial.

100 Coming to the evidence, the Respondents alleged that R2 had validly terminated the OTP because of the Representations which were false. As they have failed to establish that R2 was entitled to rely on any of the Representations, it follows that R2 was not entitled to unilaterally terminate the OTP. The question then is whether the Appellant and R2 had agreed to terminate the OTP. If so, the Appellant would not be entitled to claim the $316,000 option fee.

101 After R2 had pointed out to the Appellant that they had learned that she was the owner of the Property, the Appellant replied at 4.18pm on 8 October 2017. She said that life was too short to argue over the money and she reserved her right not to reveal her assets. She also said, "if you still decide to go ahead with the deal as promised fine if not talk to my lawyer I fine not to sell".[23]

102 R2 replied at 4.55pm. The material part of her message said:

> As things have become so unpleasant, I have no desire to carry on with this purchase.
>
> I trust that you'll return or destroy the [C]heque and signed documents (kindly send me a photo) so that we can consider the matter closed.

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23 ROA Vol III (B) p 73.

103 There was then a telephone conversation between R2 and the Appellant at 5.04pm. R2's version of the telephone conversation was that the Appellant had agreed to the termination of the OTP and to return the Cheque to the Respondents when she returned from her overseas trip.[24] The Appellant told R2 not to worry as the Cheque was still with the Appellant and she had offered to send a picture of the Cheque to R2.[25] R2 also informed the Appellant that the Respondents had countermanded the Cheque. The Appellant's version was that she had only agreed to hold off presentation of the Cheque until she returned to Singapore and the parties would then discuss the matter further.

104 At 5.18pm, the Appellant sent a copy of the Cheque to R2. At 5.20pm, the Appellant sent a message to R2:

> Tks [R2] May God bless u with abundance of joy every day and good health

105 R2 replied at 5.21pm:

> Please confirm that there is no deal and we don't have to pay you anything. Thanks. God bless you

106 The Appellant said at 5.23pm:

> Don't worry I am not poor or unethical I deserved [*sic*] to be respected for who I am

107 R2 said at 5.34pm:

> Ma [*sic*] Ong, this is the first time I'm buying property. It is not that I don't trust you but I really want the peace of mind that there will be no trouble.

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24 ROA Vol III (C) p 13 para 35.

25 ROA Vol III (D) p 258 ln 18 to 21.

> Please let me come and collect my cheque or just tear it up (you have my permission) and send me a photo of the destroyed cheque.
>
> I beg you so that I do not need to spend sleepless nights thinking about this unpleasant incident.

108 The Appellant replied at 5.39pm:

> OMG you make your life miserable yourself all trouble happen because you cannot trust people you may not meet another kind soul like me

109 The Appellant must then have been travelling. The next message from her to R2 was on 10 October 2017 at about 4.39am (Zurich time) and about 10.49am (Singapore time). After she landed in Zurich, she sent a long message to R2.[26] This time the substance and tone of the message was different from the last few ones. She mentioned that she had lost a potential buyer after granting the OTP to R2. She made it clear that she considered R2 to be in breach of contract for countermanding the Cheque.

110 This was followed by another message the next day, 11 October 2017, at 9.50am in which the Appellant informed R2 that keeping quiet did not mean that she was not in breach of contract. The Appellant reiterated that she had missed a potential buyer.[27]

111 R2 replied at 10.22am, referring to a telephone conversation she had had with the Appellant on 10 October 2017 at 5.04pm. R2's message said:

> On October 10th at 17:04hrs, I called you and you said your tenant wanted to stay until their tenancy agreement ended.

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26 ROA Vol III (B) pp 111 to 113.

27 ROA Vol III (B) p 79.

> You added that you are fine not to sell as you are not poor and your unit will be double in price in no time.
>
> You agreed we don't have a deal and will return me my cheque when you are back in Singapore for me to tear it.
>
> I replied that I did not want to proceed with the purchase and you agreed.
>
> I believe you are a person of integrity and honor and will not pursue this matter further.

112 R2 clarified that the date of the telephone conversation that she meant to refer to in this message was 8 October 2017 instead. It is undisputed that R2 and the Appellant did have a telephone conversation on 8 October 2017 at 5.04pm.

113 The Appellant sent a message at 10.33am of 11 October 2017 to say:

> In the first place you have no right to decide whether to go ahead or withdraw the option granted to you now you are telling me about integrity this is a big joke to me who started all these troubles? Just because I am kind to you you take my kindness for granted just answer to my questions if you make me furious I will take this case otherwise

114 R2 replied at 12.21pm to say:

> You gave me the option to choose whether I wanted to proceed with the sale and I decided to terminate.

115 The Appellant replied at 12.41pm to say:

> After when I landed in Zurich I read through your sms from [JL] and yours to me I want to clarify myself so just answer to my questions anyway your option is still legal bound giving you an option is on goodwill not a must

116 The burden is on R2 to establish her version of events, failing which the Appellant would be entitled to the $316,000 option fee. If the evidence is equivocal, then R2 has failed to establish her version but her burden is to establish this on a balance of probabilities and not beyond a reasonable doubt.

117 R2 relied on her oral evidence about the telephone discussion as well as the messages between 4.18pm and 5.39pm of 8 October 2017. R2 had not been credible in respect of other aspects of the defence of the Respondents. However, the Appellant was also not credible in alleging that the term to pay 90% of the price arose because R2 had said that the Respondents did not need to take a loan or that this payment term was a mistake. In any event, the messages which R2 relied on supported her version more than the Appellant's. Although these messages did not yet explicitly assert that the Appellant had agreed to terminate the OTP and return the Cheque, they were more consistent with an agreement to release R2 from her obligations than just an agreement to defer the matter for the time being.

118 Indeed, in the Appellant's own AEIC at paras 76 and 77, she said that her messages (telling R2 not to worry as she was not poor and unethical and deserved to be respected for who she was and telling R2 not to make her own life miserable because R2 would not trust a kind soul like the Appellant) were meant to assure or to reassure R2. In our view, such messages would not amount to much of an assurance or reassurance if all the Appellant was agreeing to was to defer the matter until she returned to Singapore.

119 Furthermore, if the Appellant had only agreed to defer the matter until she returned to Singapore, there was no need for her to send a message to R2 when she arrived in Zurich to tell R2 that R2 was not legally entitled to countermand the Cheque.

120 In our view, this message suggested that the Appellant had agreed to terminate the OTP but was still having a lingering doubt as to whether she should have agreed. Hence, she held onto the Cheque without destroying it. During her flight she must have been mulling over her agreement and then

regretted it and changed her mind. Hence, her long message to R2 when she arrived in Zurich.

121 This is supported by the Appellant's earlier message to JL at 10.06am of 10 October 2017 which was about 40 minutes before the Appellant sent the long message to R2. The Appellant's message to JL said:

> Hi I am in Zurich I happens [*sic*] to meet a lawyer during my flight he told me that buyer [*sic*] are taking my kindness for granted can you help me send OTP to Edwin call him. And ask him to advise [*sic*] just tell him I have given in because buyer stop cheq during the week end and I have to leave for Europe Don't have to say further tks

The reference to "given in" supported R2's version that the Appellant had agreed to terminate the OTP.

122 In any event, R2 did send two messages to the Appellant at 10.22am and 12.21pm on 11 October 2017 in response to the two messages from the Appellant that day. We have referred to R2's two messages above at [111] and [114]. This time, R2 stated explicitly that the Appellant had "agreed" that "we don't have a deal" and that the Appellant had given R2 "*the option* to choose" [emphasis added] whether to proceed and R2 then decided to terminate the OTP.

123 The Appellant's response to the second of these messages is telling. We have set out the response in full at [115]. We repeat the material part which states, "… giving you an option is on goodwill not a must". In context, the reference to giving R2 an option out of goodwill would not be a reference to the OTP because the OTP was not granted out of goodwill. It was granted in exchange for the option fee of $316,000. Hence, the Appellant's reference to an option being granted out of goodwill must have been a reference to the "option"

mentioned in R2's message at 12.21pm, *ie*, the option to R2 to choose whether to proceed or not.

124 Indeed, the Appellant's explanation of this message at para 79 of her AEIC accepted that the reference to the option being given out of goodwill was to a choice whether or not to terminate the OTP. However, she said that her message had clarified that the OTP was legally binding and should she "subsequently" decide to terminate the OTP, it would be solely based on goodwill. We do not accept this explanation which was a clever attempt by the Appellant to avoid the clear context and meaning of what she had said. She was replying to R2's message which had referred to the past, "You *gave* me the option to choose …" [emphasis added]. When the Appellant replied to say that giving the option was out of goodwill, the Appellant had in fact confirmed R2's version of what had transpired in the telephone conversation on the evening of 8 October 2017.

125 Even if we leave aside this important part of the Appellant's response, the fact is that the Appellant did not deny the explicit assertions contained in the two messages from R2.

126 Therefore, although it is true that the Appellant was not obliged to offer R2 the chance to terminate the OTP, the Appellant could not resile from the offer once R2 accepted it. There was agreement to terminate, *ie*, mutual termination. Each of them was released from her obligation to the other under the OTP. The Appellant was released from her obligation to keep her offer to sell the Property at $3.16m open for acceptance and R2 was released from her obligation to pay $316,000 for the OTP.

127 We conclude that as the OTP was terminated by agreement, the Appellant is not entitled to claim the $316,000 under the OTP or the Cheque as the underlying transaction for which the Cheque had been given had been terminated. In the circumstances, we reach the same outcome as the Judge but for a very different reason.

Other Defences

128 Accordingly, it is unnecessary for us to elaborate on (i) the Respondents' reliance on alleged breaches by the Appellant of various provisions of the "Code of Ethics and Professional Client Care" in subsidiary legislation pertaining to real estate agents and (ii) on R1's reliance on certain provisions of the Bills of Exchange Act.

129 We would also mention that the Respondents' case relied on unjust enrichment and the lack of any damage to the Appellant arising from the termination of the OTP. These defences were not pleaded. In any event, they would have failed. There would have been no question of unjust enrichment if the Appellant's claim had been allowed. There would also have been no need for the Appellant to prove any damage. Before the mutual termination of the OTP, R2 had received what she was entitled to under the OTP, *ie*, the right to exercise an option to buy the Property for $3.16m. The $316,000 was given in exchange for this right. If R2 did not exercise the option, the Appellant would be entitled to sell the Property to someone else at a lower or a higher price. That development would be for her own account.

Conclusion and other observations

130 We dismiss the appeal of the Appellant.

131 The counterclaim of the Respondents is not before us but we take this opportunity to stress that it was an unnecessary counterclaim. Where a claim is made on a contract, it is usually sufficient for a defendant to file and serve his defence. Ordinarily, a counterclaim seeking a declaration that the contract is void or unenforceable is meaningless because all that is needed is a dismissal of the plaintiff's claim. This was the situation before us. Furthermore, the counterclaim of the Respondents for damages would also have been meaningless if the Appellant's claim had succeeded. In that event, it would have meant that the Defence had failed and there would have been no basis to counterclaim damages. The counterclaim would also have been meaningless if the Appellant's claim had failed because the Respondents would then not have suffered any damage. The facts before us are different from those in *Puspha*. There, it was possible for the plaintiff to lose its claim for an agreed commission and also be liable for damages which the defendant vendors had suffered for allegedly selling their property at a lower price than they might have obtained if certain information had been disclosed to them. Parties should avoid pleading unnecessary counterclaims.

132 Although the Respondents are ultimately successful in the appeal and also in the court below, it will be obvious from what we have said that they have succeeded on one main issue only although that is good enough for the eventual outcome. Much time and costs have been wasted by various unsuccessful defences which they raised, some of which were inconsistent with other positions which they took. This is not to say that we overlook the Appellant's conduct in misleading the Respondents as to who the true owner was and, in particular, in seeking to take advantage of R2 by imposing disadvantageous terms of payment in the OTP. In our view, the Appellant had acted unscrupulously in the latter.

133 In the circumstances, we will allow the Respondents 25% of the costs of the appeal. We also allow them 25% of the costs of the trial. To that extent, we vary the Judge's order on costs of the trial.

134 We assess the costs of the appeal to be $30,000, inclusive of disbursements. 25% is $7,500.00. We understand that the costs of the trial (including disbursements) have been taxed. The Respondents are entitled only to 25% thereof. The usual consequential orders will apply.

Judith Prakash Judge of Appeal	Belinda Ang Saw Ean Judge	Woo Bih Li Judge

Lee Peng Khoon Edwin and Ng Wei Ying (Eldan Law LLP) for the appellant;
Narayanan Sreenivasan SC, Muralli Raja Rajaram, Tan Kai Ning Claire and Partheban s/o Pandiyan (K&L Gates Straits Law LLC) for the respondents.