The “As Is, Where Is” Clause Revisited:
Practical situations where the clause has arisen and how it may be enforced in such situations.

Previously, we discussed the “as is, where is” clause, a contractual term most typically found in an option to purchase real property (“Option”). The effect of incorporating this clause into the Option is that the seller gives no warranty as to the fitness of the property for the purpose of the buyer. Consequently, the buyer bears the responsibility to conduct proper checks and inspect the property thoroughly beforehand, for the buyer shall be regarded as having inspected and accepted the property in its actual state and condition once the Option is accepted and exercised.

This article seeks to delineate the respective rights and obligations of the contracting parties who enter into such agreements, by looking at practical situations in which the “as is, where is” clause arises.

Caveat emptor rule - Common law principles concerning defects

The caveat emptor rule stems from an old doctrine predicated on principles of land law. It has guided the English courts since medieval time, an age where the law was “primarily concerned to protect real rights.” Its literal meaning is “let the buyer beware” and its underlying concept is that all the burden should be placed on the buyer to ensure that no stone is left unturned when he inspects the property to check for any defects.

The common law principles that developed in alignment with this doctrine is that the seller, even if he is aware of any such matters, is under no obligation to disclose to the buyer any patent defects (regardless of title or of quality) and latent defects of quality or other matters (as opposed to defects of title) which may affect the value of the property sold. Moreover, this rule is relevant even when the “as is where is” clause is absent in the contract.

If the caveat emptor rule is to be accepted a rule, then it necessarily follows that the seller would not owe the buyer a duty to disclose any defects in the property. However, it is well established that the law draws a distinction between defects of quality and defects of title, and between patent and latent defects.

Patent defects are defects which are discoverable by inspection and ordinary vigilance on the part of the buyer. Conversely, latent defects are defects that would not be revealed by any inquiry which a buyer is in a position to make before entering into the contract for purchase.

The differences between a defective title and a defect of quality are set out in the leading case of Huang Ching Hwee v Heng Kay Pah below.

Huang Ching Hwee v Heng Kay Pah and another [1992] SGCA 79

The appellant was a property owner who granted an option to purchase to the respondents. After exercising the option, the respondents discovered that the appellant had carried out certain demolition works and substantial additions and alterations to the property without the necessary planning permission. The respondents wanted to rescind the contract and demanded for the return of the deposit paid.

Here, the Court of Appeal (“CA”) highlighted the principle that in a contract for the sale and purchase of immovable property, there was no duty on the part of the seller to disclose patent defects relating to title and to quality. There was also no general duty to disclose latent defects of quality. However, a seller was under a duty to disclose latent defects of title.

The CA ruled that the unauthorised works was to be regarded as a defect of quality, since there was no evidence that the authorities threatened to take action against the infringement: “The mere fact that a state of affairs existed which might bring into operation the provisions of a law...

1 CNP Update - “as is where is” clause, Issue 10/01, 18 January 2010.
4 Halsbury’s Laws of Singapore vol 14(2) (LexisNexis, 2009) at [170.1221].
imposing a liability or burden was not enough to constitute a defect of title. Before any question of defect of title can arise, any intention to invoke the provisions of the law should have been manifested and brought to the notice of those concerned before the conclusion of the contract."

As such, the CA concluded that as the appellant had no general obligation to disclose latent defects of quality, the respondents were not entitled to rescind the contract.

It is thus clear from the judgment of the CA in Huang Ching Hwee v Heng Kay Pah that the common law rules on real property remain applicable in dealings with land. A major consequence of this approach is that the courts will continue to interpret the contractual provisions of such agreements to accord with established principles and rules (which include the caveat emptor rule) concerning land.

Incorporating the caveat emptor rule into an agreement – Purpose of including the “as is, where is” clause as a contractual provision

Since the law is clear on its position that a property seller owes no obligation to the buyer for any defects (a separate provision always exists to address the seller’s obligations with regard to the issue of title) except for latent defects of title, it becomes especially important for buyers to be aware that they will be held personally responsible for ensuring the fitness and quality of the property which they are contracting to buy.

As such, the “as is, where is” clause is invariably present in every Option, as a contractual provision to affirm the caveat emptor rule in conformity with established property law principles. In a nutshell, this clause defines the respective rights and obligations of a buyer and of a seller and expressly deals with the apportioning of risk for damage to the property in a way that reflects the caveat emptor rule.

Foo Ah Kim v Koo Chen Lim and another [1995] SGCA 66

The buyer had agreed to purchase a freehold property, “Lots 223-224 and 223-229, Mukim 26, together with the building known as No 125 Joo Chiat Place, Singapore.” The Option also provided (under special condition G) that, “the property is sold on an ‘as is where is’ basis and the Purchaser shall be deemed to have inspected the Property on or before signing this Agreement and to be satisfied as to the state and condition thereof or otherwise.”

Further, if any encroachment was found to exist on the property, the buyer was to be entitled to rescind the agreement.

The buyer subsequently found an encroachment on the property identified as a wooden store straddling between a neighboring Lot 3310 and Lots 223-224. The buyer sought to rescind the agreement and a refund of the 10% deposit. The sellers responded that the buyer was not entitled to rescind the agreement since the sellers’ obligation to deliver the property free from encroachment was to be complied only on completion, and that any encroachment would be removed on or before the completion date.

The buyer then demanded that the wooden store be retained, and that the sellers give good title to the wooden store. The sellers argued that this was unreasonable and sought a declaration from the court that the agreement had been annulled or rescinded in accordance with Condition 5 of the Law Society’s Conditions of Sale 1999, which the court subsequently gave. The CA affirmed the sellers’ right to annul the sale and dismissed the appeal by the buyer.

The significance of citing Foo’s case above is the CA recognised special condition G as a valid provision of the Option. This reinforces the view that the “as is, where is” clause can be applied as a contractual provision in other types of situations such as tenancy agreements as demonstrated in the following.

Chip Hup Hup Kee Construction Pte Ltd v Tng Peck Guek [2010] SGDC 351

The plaintiff tenant was a construction company who entered into a tenancy agreement (“TA”) with the defendant landlord of a building for the purpose of accommodating its 240 workers. The letter of intent which preceded the TA specifically stated that the premises were leased on an “as is where is” basis.

Subsequently, governmental agencies issued warning notices and enforcement summonses for building-related infringements including the unauthorised use of the premises as workers quarters.

The tenant sued the landlord to rescind the tenancy agreement on grounds of misrepresentation, claiming they were induced into making the tenancy agreement by the landlord’s representation that the property could be used as workers’ quarters. The main issue before the court was whether the landlord had made any pre-contract representation to the tenant that the premises was licensed for use as workers’ quarters.

Based on the evidence submitted before the District Court (“DC”), the court found that the defendant did not make any representation (both express and implied) that the building had a licence in place to be used as workers’ quarters.

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5 Supra n 4 at [170.1224].
6 Per Karthigesu JA in Foo An Kim v Koo Chen Lim and another [1995] SGCA 66 at para. 17
7 ibid. at para 14.
The DC found that the statement “the premises can be used for workers” merely meant that the landlord allowed the tenant to use the premises as workers’ quarters and that the building had sufficient space to be used as workers’ quarters. The learned judge opined that it was unreasonable for the tenant to assume that the landlord had already procured such licenses for him, since the tenant had contractually agreed (under Clause 3(10) of the TA) to apply for “all such necessary licenses” in connection with his intended use. Furthermore, even before the execution of the TA, the tenant had agreed to take over the premises on an “as is where is” basis, which in the judge’s view, the tenant should have been prompted to conduct due diligence checks.

It would appear from the cases discussed, that the courts are generally inclined to uphold the “as is, where is” clause especially when it had been expressly stated during the parties’ negotiations, thereby preventing the buyer or tenant from reneging from the deal afterwards. However, its interpretation has been qualified by the fact that the essential terms had already been agreed when Norwest accepted Newport’s firm letter of offer. However, the HC’s interpretation of the “as is, where is” clause in respect to the sale meant that:

(a) the buyer could not ask for the subject matter to be better than it actually is; but
(b) at the same time, the buyer had not agreed to accept anything less.

Accordingly, it was entirely possible for the contract between Norwest and Newport to be affected by the damage caused by the Sichuan earthquake to the Chinese Business.

Since the parties did not specify the mechanics of the sale process, the court structured the sale of the Chinese Business and purchase of the Norwest shares into mutually dependent conditions to be performed simultaneously, such that a failure to perform one would justify the non-performance of the other.

As Norwest was unable to deliver the Chinese Business in the state and condition that it was actually in at the time of the offer, Newport would not be receiving what it offered to buy. Hence, the learned judge held that Newport was not bound to accept the company’s shares or make payment. The HC ruled that Norwest’s purported acceptance of the firm letter of offer at 4.20pm that day was invalid since the Chinese Business was not in the state and condition that it was actually in at the time of the offer.

**Conclusion**

In the final analysis, whether a court upholds an “as is where is” clause, will depend upon the circumstances of the case. As shown in the cases above, any buyer should bear in mind that the onus is on him to ensure that all proper due diligence and proper inspection of the property.

That being said, the law does not preclude the buyer from taking actions against the seller for any defects which could have been discovered through due diligence and proper inspection of the property.

If you wish to have further information on this update or wish to discuss how it may potentially have an impact on your business, please feel free to contact the following:

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