



Leases and options to purchase

1. Option to purchase to purchase

An option to purchase is the right for one party to obtain a contract for sale at some time in the future on agreed terms (Option to Purchase). An Option to Purchase is distinct from a pre-emptive right to purchase, also known as a first right of refusal.

2. First right of refusal

Typically a first right of refusal is where an owner agrees to provide another party (grantee) with the first opportunity to purchase land if the owner receives an offer to purchase the same land from a bona fide third party on terms acceptable to the owner (First Right). Ordinarily the terms of the offer to the grantee are the terms as those in the third party's offer.

3. Caveatable interests?

It is generally accepted that Options to Purchase and First Rights are, as stand alone rights, personal rights. That is, they are not rights that "touch and concern the land" or covenants that run with the land. This characterisation changes once the Option to Purchase or First Right has been exercised. Upon the exercise of the particular right, the interest holder will have a proprietary interest in the land.

Practically this situation is not ideal. The Courts, by their decisions, have over time altered this strict position. It is now accepted that Options to Purchase, provided that they are not conditional on an independent event, are caveatable interests. First Rights are not. The distinguishing aspect is that under an Option to Purchase the owner is obliged to sell the land to the Option to Purchase holder while under a First Right an owner is simply restrained from selling the land to a third person until the grantee has had the opportunity to purchase the land.

4. Leases

It is not uncommon for leases to contain Option to Purchase or First Right clauses. In addition to the general difficulties with Options to Purchase and First Rights, special consideration needs to be given to such provisions contained in leases. We here deal only with Options to Purchase.

Options to Purchase are not regarded as being integral to, or directly connected with, a lease. They are said to be collateral to a lease. Registration of the lease or a caveat to secure the leasehold interest will not necessarily be sufficient to secure the lessee's rights under the Option.

(a) Assignment of Lease

A general assignment of a lease will not automatically assign to the assignee any rights under an Option to Purchase contained in the lease. There are some commentators who differ on this position and consider that sections 62, 63, 82 and 95 of the Transfer of Land Act 1893 (WA) support the proposition that the benefit of the Option to Purchase passes to the assignee of a lease provided that the lease and the transfer of lease are registered on the Certificate of Title. This is not supported by any court decision in Western Australian.

When determining if:

¹ Robert Chambers, *An Introduction to Property Law in Australia* (2001) 263.

² *Griffith v Pelton* [1957] 3 All ER 75 at 84; *Mercantile Credits Ltd v Shell Co of Australia Ltd* (1976) 136 CLR 326 at 346.

- i) it was contemplated by the parties that the Option to Purchase would be assigned; and
- ii) the assignment document did assign the Option,

Courts have given significant consideration to the actual terms used in, and the context of, the lease and any assignment document

In the cases that held that particular wording was sufficient to assign the Option to Purchase the factual scenario included that the parties had executed, in addition to the general assignment of lease document, a document which specifically assigned the Option. Many of the Judges in these cases commented that if their view that the general assignment of lease was sufficient to assign the Option to Purchase was incorrect, then the later executed document was sufficient to assign the Option to Purchase in any event.

(b) Sale of Freehold

Similar difficulties arise when considering whether an Option to Purchase contained in a lease will be binding on a subsequent purchaser of the land. The general position is that irrespective of whether the lease is registered on the Certificate of Title, because an Option to Purchase is not integral to the lease and does not run with the land, a subsequent purchaser will not be bound. Some States have specific legislation which provides that an Option to Purchase will automatically assign to the new purchaser upon the transfer of the land provided that the lease is registered. This is not the case in Western Australia.

5. Conclusion

This article is a reminder that any Option to Purchase granted under a Lease must be dealt with specifically to ensure that an assignee acquires all the rights that they bargained and, if applicable, paid for.



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³ Christopher Rossieter, Principles of Land Contacts and Options to Purchase in Australia (2003) 83.

⁴ Woodall v Clifton [1902] 2 Ch 257; Griffith v Pelton [1957] 3 All ER 75; Price v Murray [1970] VR 782.

⁵ Griffith v Pelton [1957] 3 All ER 75 at 86; Price v Murray [1970] VR 782 at 786

⁶ Mercantile Credits Ltd v Shell Co of Australia Ltd (1976) 136 CLR 326 at 346.

⁷ Real Property Act 1900 (NSW) s 53(3); Real Property Act 1861 (Qld) s 53 and Real Property Act 1886 (SA) s117.