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LAU HOY @ LOW HOY (p) v. HIEW KAT LEONG & 3 ORS  
HIGH COURT, PULAU PINANG  
ABDUL HAMID MOHAMAD J  
GUAMAN CIVIL NO: 22-143-96  
27 AUGUST 1997  
[1997] 1 LNS 280

### JUDGMENT

This is a dispute between members of Hiew Pau family. Hiew Pau had died. He had two wives and children by them. The Plaintiff was the Second wife. The First Defendant is the executor of Hiew Pau's will and trustee. He is also the eldest son of Hiew Pau from the first wife.

According to the Plaintiff's Statement of Claim, the Second Defendant was the developer of land held under Grant Ho. 2674, lot 586, George Town ('the said land"). The land was registered in Hiew Pau's name. Hiew Pau was also a director and majority share-holder of the Second Defendant Company.

According to the Plaintiff, on or about 16th January 1974, the Plaintiff and the Second Defendant entered into a Sale and Purchase Agreement whereby the Second Defendant sold two units of shop-lots which came to be known as lot Nos. 54-A1 and 54-5, Bangunan Tung Han for RM26,000.00 and RM42,000.00 respectively, which she said had either been paid or caused to be paid by her. According to the Plaintiff, she was given vacant possession of the two lots and had been enjoying it for the past 20 years. However the First Defendant had failed or neglected to transfer the said property to her. So, essentially, she wants the First Defendant to transfer the property to her.

The First and Second Defendants filed a joint defence. Briefly, the Defendants admitted that Hiew Pau was the registered owner of the said land. However, they denied that there were such agreements between the Plaintiff and the Second Defendant. The Defendants also said that according to the books and records of the Second Defendant, no payment was made for lot 2/1 (lot 54-A1).

The Defendants also said the two agreements, the authenticity of which were disputed, were void and unenforceable because Hiew Pau, the registered proprietor of the said land was not a party to the agreements and it was only Hiew Pau, the registered proprietor, who could sell the two units to the Plaintiff, not the Second Defendant.

The way I see it, there are three issues. First, whether there were such Sale and Purchase Agreements. Secondly whether the purchase had been paid in full. Thirdly, whether the

agreements are void and unenforceable.

### **Whether there were Sale and Purchase Agreements**

The Plaintiff could not produce the original documents. She produced one photocopy (P4) in respect of lot 54-5. As regards the other Agreement she said she had lost it. She had made police reports and statutory declaration to that effect. In her evidence she said that she signed the two agreements at Mr Rajasingam's office.

Mr Rajasingam, an advocate and solicitor (PW 2), said that the agreements for the sale and purchase of the units were attested by him. He thought the agreements were drafted by his office. However he could not trace the file.

Besides there are some documentary evidence which appear to support the existence of the sale of the two units to the Plaintiff. First is the voucher (PS) dated 6.8.79 which contains particulars "final settlement to purchase price of unit 54-5 for Madam Lau Hoy". Secondly, a receipt dated 31.1.77 (P6) in favour of Madam Lau Hoy with particulars "final settlement to balance purchase price of 54A/1 Tung Hing Building, Penang". I do not at this stage say whether these two documents prove that the full purchase price had been paid. That I will discuss later. All that I say at this stage is that those two documents also support the Plaintiff's contention that the two units were sold to her.

Besides there are two other letters from the Second Defendant to Pengarah Penilaian. The first is dated 22nd February 1975 (P7). The letter reads:

"Sir,

Re: 54A/1 First Floor,

Tung Hing Building

Burmah Road, Penang

We are to inform you that the abovementioned has been sold to Madam Lau Hoy in January this year for \$25,000.00. Madam Lau Hoy is presently running a dress making business in the premises and correspondence could reach her there.

Your's faithfully

...

Hiew Pau

Managing Director.

The other letter is dated 27th August 1976 (P8). It, inter alia, reads:

"Tuan,

Re: Change of Property Owners

We are pleased to inform you that the premises of:-

(a) 54 A/land 54/5, Tung Hing Building, Jalan Burma, Penang... are now in the name of Mdm. Lau Hoy of 54 All, Tung Hing Building, Jalan Burma, Penang... are now in the name of mdm. Lau Hoy of 54 a/l, Tung Hing Building, Jalan Burma Penang;

(b)...

Further correspondence regarding the above said premises, please send to the right owners as mentioned."

What do the witnesses for the Defendants say about the agreements? DW1, the eldest son of Hiew Pau by the first wife, did not say anything about the existence or non existence of the Agreements, but he repeatedly said that there was no proof of payment.

DW2, the other son of Hiew Pau by the first wife said;

"I found out about Plaintiff's claim when Plaintiff's lawyer wrote to us. I went through all record, receipt books, files. I found no S & P ...".

That is basically the Defendant's case regarding Agreements.

In the circumstances, on the balance of probability I am of the view that the Plaintiff and the Second Defendant did enter into sale and purchase agreements regarding two units.

Whether the full purchase price had been paid

In her statement of claim, the Plaintiff said that she had paid or caused to be paid the purchase price. However in her evidence she did not say she paid. Instead she said "Hiew Pau paid in full for these 2 units. This is what he told me."

What documentary evidence of payment do we have? First there is the Journal Voucher of the Second Defendant (P5) which I have quoted earlier. The Plaintiff said that a copy of P5 was given to her by Hiew Pau. She added "He told me that the purchase price in respect of unit 54-5 had been paid in full."

Secondly, there is the receipt (P6) in respect of unit 54 A/l which I have also quoted earlier. The Plaintiff also said that it was given to her by Hiew Pau. She also said "He told me payment for 54-A1 had been made fully."

What do the Defendants' witnesses say about P5 and P6? DW1 said he was not aware of PG. Asked about P5 he said "I did not know of this full and final settlement."

DW2, another son of Hiew Pau by the first wife said:

"No agreement with Plaintiff, no payment made. Of cause we don't recognise Journal voucher. In other cases receipts were there, and they were prepared to pay more."

He admitted he was not involved in the management of the Second Defendant prior to 1979. He admitted he did not have personal knowledge of what transpired in the Second Defendant Company prior to 1979.

About the journal voucher (PS) and the receipt (P6), he said, he was aware of them. However, he reversed the journal voucher without informing the Plaintiff even though he said he discussed with his late father about the two units before doing so. (It should be noted that the date of the journal voucher (P5) is 6.8.79. The journal voucher reversing P5 is dated 31.12.79 (D15). Hiew Pau died on 22nd February 1980, which is about three months later).

The Plaintiff also relied on the fact that she has been paying assessments in respect of the two units for more than twenty years. I agree that such payments cannot "be used as barometers to gauge ownership of land" - see Punca Klasik Sdn Bhd v All Persons in Occupation of Wooden House erected on a portion of land held under Grant No. 26977 in the Township of Johor Bahru, Johor (1996) 5 MLJ 52. But one point must be noted here that the assessment must have been made in the name of the Plaintiff pursuant to the letters from the Second Defendant informing the authority that the said units had been sold to Plaintiff and that further correspondence on the subject should be sent to her - see P7 and P8 reproduced earlier.

Further, we have long and uninterrupted possession of the two units by the Plaintiff. Of course DW1 and DW2 said that they allowed the Plaintiff to stay in the two units as an act of kindness because at that time there were three minor children. If we were to take the date of death of Hiew Pau (1980), it was only 14 years later that the Second Defendant gave notice to the Plaintiff seeking to "terminate the Plaintiff's licence to occupy the properties and to deliver vacant possession with immediate effect." The date of the notice is 1/9/94(D21).

In my judgment, considering all the circumstances of the case, on the balance of probabilities, I am satisfied that the full purchase price had been paid.

#### Whether Agreements void and Unenforceable:

Another defence put up by the Defendants is that the Agreements are void and unenforceable. As regards the Second Defendant it was argued that the second Defendant was never the legal/beneficial owner of the properties nor had they any beneficial interest therein or about the time the agreements were purportedly executed between them.

DW2 gave evidence that in early 1972, Tung Hing Sdn Bhd authorised Hiew Pau to purchase land and to hold it for Tung Hing Sdn Bhd. On 1st January 1976 Syarikat Perniagaan Tung Hing Sdn Bhd wrote to the Director of the Second Defendant saying that Tung Hing were "willing to sell to you our Tung Hing Building Business Project in Penang in consideration of \$370,601.54..." - D28.

On the same day Tung Hing passed a resolution (D29) which reads:

"Resolution of all directors of Sharikat

Perniagaan Tung Hing Sdn. Bhd.,

Sandakan

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Resolved and it is hereby approved:

That the Company shall sell the business of Tung Hing Building Project at lot No. 586, P.B.15. Daerah Timur Laut, Pulau Pinang, situated at Burmah Road, Pulau Pinang to Sabah Penang Development Sdn. Bhd., for a consideration of \$370,601.54 and the said Sabah Penang Development Sdn. Bhd., agree to take over the business, all assets and liabilities of the project

as set out in the audited accounts made up to 31<sup>st</sup> December, 1975.

And it is hereby declared that Mr. Hiew Pau, the managing director of the company, by virtue of the fact that he is the registered owner of the said land being Lot No. 586, P.B.15, Daerah Timur Laut, Pulau Pinang on which the said building stands and over which Chung Khiaw Finance (M) Bhd. of 105A Jalan Penang, Pulau Pinang holds a Charge, shall hold the said land in trust for the said Sabah Penang Development Sdn. Bhd., and shall execute any transfer or transfers that may be deemed necessary in the issue of title to the Purchasers of the flats contained in the said "Tung Hing Building.

Dated this 1st day of January 1976.

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Director Director

On 6th January 1976 the Second Defendant replied to Tung Hing (D30):

Re: Tung Hing Building Project

With reference to your letter dated 1st January 1976 on the above, we accept your offer to sell the Tung Hing Project for a consideration of \$370,601.54, subject to the terms and condition as set out in your Resolution dated 1st January, 1976.

Yours faithfully

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...

HIEW PAU

It should be noted that the alter-go of the companies was no other than Hiew Pau. Hiew Pau as the signatory of both letters (D28 and D30).

So, the Second Defendant said that it was only in 1976 that the Second Defendant acquired

any interest, legal or beneficial over the land. As such the Second Defendant could not have entered into agreements with Plaintiff. And as the land was registered in Hiew Pau's name Hiew Pau should be a party to the said agreements. Tung Hing should be sued, not the Second Defendant.

We see now what kind of man Hiew Pau was. He was not only the husband" of his two "wives", the father of two sets of children, he was also the alter-ego of his two known companies. And, yet when it came to the land, probably the most valuable asset, he kept it registered in his name. According to his son (DW2) when he (Hiew Pau) died he owed the Second Defendant about RM700,000.00.

Be that as it may, should the Court allow the Defendant to avoid the Agreements?

First, whatever evidence we have before this court what was discovered by DW2 from the books and records of Second Defendant. We do not know whether they are complete or not. We do not even know-whether complete and proper records of the two companies were kept.

Secondly, the Second Defendant was the developer or said property. DW2 himself said "There are numerous agreements signed between Sabah Penang (ie Second Defendant) other purchasers between 1974 - 1976. Some of the agreements were renegotiated (purchase price changed) , some agreements, supplementary agreements were made, including Hiew Pau as owner. But in almost all of them the titles have been transferred to purchasers/nominees after full payment have been made."

I think this passage sums up the whole position of the Defendants. It all boils down to money. If the Plaintiff (whom they recognise as the father's second wife, and mother of their father's children) was prepared to "renegotiate the purchase price and pay more, it appears that most probably they would have honoured the agreements as they had done in respect of other purchasers. But since the Plaintiff clearly was not willing they said that the agreements were void.

Moneys have been paid by the purchasers to the Second Defendant pursuant to the sale and purchase agreements with the Second Defendant and received by the Second Defendant.

Further more, the Second Defendant (indeed it was the father) who signed the letters written to Pengarah Penilaian (P7 and P8) informing the latter, I am sure for purpose of assessment, that the two units had been sold to the Plaintiff.

In the circumstances I think it will be most unjust to allow the Second Defendant to now say that the agreements are void because the Second Defendant did not have the beneficial or legal interests in the units which they themselves sold, at the time they sold, those units.

In the circumstances I think that the Second Defendant is estopped from questioning the validity of the Agreements. For authorities, see Industrial & Commercial Realty Co. Ltd. v Merchant Credit Pty. Ltd (1980) 1 MLJ 208, Boustead Trading (1985) Sdn. Bhd. v Arab-Malaysian Merchant Bank Bhd (1995) 3 MLJ 333 and Chor Phaik Har & Ors Choong Lye Hock Estates Sdn. Bhd & Ors (1996) 2 MLJ 206.

For these reasons, the Second Defendant is the proper party to be sued.

Regarding the First Defendant, I am of the view that he is also the proper party to be included as he is the executor and trustee of the Estate of Hiew Pau and the property remains registered in the name of Hiew Pau as trustee of the Second Defendant.

In the circumstances I give judgment to the Plaintiff as per Order against the First and the Second Defendants. The Third and Fourth Defendants are unnecessary parties. Indeed no claims were made against them.

Dated 27 day of August 1997.

(Dato' Abdul Hamid bin Haji Mohamad)

High Court Judge

Penang