FOO LIAN SIN & ANOR v. NG CHUN LIN & ANOR
COURT OF APPEAL, PUTRAJAYA
ABDUL HAMID MOHAMAD, JCA; K C VOHRAH, JCA; MOHD NOOR AHMAD, JCA
CIVIL APPEAL NO: A-02-316-2000
28 AUGUST 2004
[2004] 4 CLJ 220

***LAND LAW**: Sale of Land - Conveyancing - Vendor disposing of two shophouses to two different purchasers - Both purchasers claiming to have purchased the same shophouse - Whether there was a mutual mistake - Description of Land as per qualified title, sale and purchase Agreement, and charge and schedule to annexture - Whether prevails over shophouse number assigned by local authority - Whether there was a collateral Contract as between both purchasers - Whether issue/register document of title should have been rectified under s. 30 of the Specific Relief Act 1950*

***CONTRACT**: Sale and purchase of Land - Agreement for sale of Land and Building erected thereon - Vendor disposing of two shophouses to two different purchasers - Both purchasers claiming to have purchased the same shophouse - Whether there was a mutual mistake - Description of Land as per qualified title, sale and purchase Agreement, and charge and schedule to annexture - Whether prevails over shophouse number assigned by local authority - Whether there was a collateral Contract as between both purchasers - Whether issue/register document of title should have been rectified under s. 30 of the Specific Relief Act 1950*

The 2nd plaintiff ('Lim') occupies a certain shophouse no. 9 as a tenant and runs a grocery thereat whilst the 1st defendant ('Foo') occupies and resides in the adjoining shophouse no. 11 as a tenant of the same landlord. Foo also operates a mini-market at shophouse no. 7 which he owns. It was the plaintiffs' claim that a mutual mistake had occurred in the **subsequent** conveyance of the two said shophouses, thereby resulting in the defendants being registered as the owners of shophouse no. 9 and the plaintiffs as the proprietors of shophouse no. 11 instead. The defendants denied that there ever was such a mistake. The learned judge accepted the plaintiffs' version that there was a mutual mistake and gave judgment in their favour. His Lordship believed the evidence of the landlord (subsequently, the vendor) as well as that of the solicitor who handled the sale and transfer of the said shophouses. The learned judge also held that there was a contractual relationship between the plaintiffs and the defendants - arising by way of a collateral contract - thereby enabling the rectification of the instrument (register/issue document of title) under s. 30 of the Specific Relief Act 1950.

Held (allowing the defendants' appeal)

Per Abdul Hamid Mohamad JCA delivering the judgment of the court:

> **[1a]** Although the learned judge had made a finding of fact that there was a mutual mistake in the sale of the said shophouses by the landlord/vendor to the

plaintiffs and the defendants, there were sufficient grounds for the justices of appeal to take a different view.

[1b] It was clear from the defendants' sale and purchase agreement, the charge and the schedule to the annexture thereto, and the 'suratan hakmilik sementara' that the defendants had wanted to purchase the plot of land known as HS(D) Ka 6792/79 PT 18177 together with the shophouse erected thereon. The confusion only arose because the sale and purchase agreement wrongly named this shophouse as 'no. 11' when it was actually 'no. 9'.

[1c] Similarly, the plaintiffs' sale and purchase agreement and the 'suratan hakmilik sementara' showed that the plaintiffs had wanted to purchase the plot of land known as HS(D) Ka 6793/79 PT 18178 together with the shophouse erected thereon. Again, there was confusion because this very shophouse was in fact no. 11 and not no. 9 as was named in the sale and purchase agreement.

[1d] Clearly, the shophouse number (as assigned by the local authority for the purpose of assessment) cannot prevail over the description of the land in the 'suratan hakmilik sementara' or the 'PT number' in all the relevant documents.

[1e] The plaintiffs themselves and/or their solicitors might have been mistaken but there was **no** mutual mistake as between the plaintiffs and the defendants.

[2] There was no main contract as between the plaintiffs and the defendants; hence, there could be no collateral contract between them.

[Orders of High Court set aside.]

*[**Bahasa Malaysia** Translation Of Headnotes*

Plaintif kedua ('Lim') menghuni sebuah rumah kedai di no. 9 sebagai penyewa dan menjalankan perniagaan kedai runcit disitu, sementara defendan pertama ('Foo') menduduki rumah kedai di no. 11 disebelahnya juga sebagai penyewa kepada tuan rumah yang sama. Selain itu, Foo juga menjalankan perniagaan pasaraya mini di rumah kedai no. 7 miliknya. Plaintif-plaintif mengatakan bahawa telah berlaku kesilapan fakta pada pindahmilik kedua-dua rumah kedai tersebut, yang berakibat defendan-defendan telah didaftarkan sebagai pemilik rumah kedai no. 9 dan plaintiff-plaintif pula sebagai pemilik rumah kedai no. 11. Defendan-defendan menafikan bahawa wujud kesilapan seperti yang dikatakan. Yang arif hakim menerima versi plaintif-plaintif bahawa terdapat kesilapan fakta dan memberi penghakiman kepada mereka. Yang arif hakim mempercayai keterangan oleh tuan rumah (kemudiannya sebagai penjual) serta peguamcara yang mengendalikan penjualan dan pindahmilik rumah-rumah kedai tersebut. Yang arif hakim juga memutuskan bahawa wujud hubungan kontraktual di antara plaintif-plaintif dan defendan-defendan - yang berbangkit dari satu kontrak kolateral - sekaligus membolehkan pembetulan dibuat kepada instrumen (daftar/keluaran dokumen hakmilik) di bawah s. 30 Akta Relif Spesifik 1950.

Diputuskan (membenarkan rayuan defendan-defendan)

Oleh Abdul Hamid Mohamad HMR menyampaikan penghakiman mahkamah:

[1a] Walaupun yang arif hakim telah membuat dapatan fakta bahawa terdapat kesilapan bersama dalam penjualan rumah-rumah kedai tersebut oleh tuan rumah/penjual kepada plaintif-plaintif dan defendan-defendan, terdapat alasan-alasan mencukupi bagi hakim-hakim rayuan untuk mengambil pendapat yang berbeza.

[1b] Adalah jelas dari perjanjian jualbeli defendan-defendan, dari gadaian dan jadual kepada annexure disitu, serta dari suratan hakmilik sementara bahawa defendan-defendan berhasrat untuk membeli plot tanah yang dikenali sebagai HS(D) Ka 6792/79 PT 18177 beserta dengan rumah kedai yang ada di atasnya. Salah faham hanya timbul sebab perjanjian jualbeli silap menamakan rumah kedai itu sebagai 'no. 11' sedangkan ia sebenarnya 'no. 9'.

[1c]Begitu juga, perjanjian jualbeli plaintif-plaintif dan suratan hakmilik sementara menunjukkan bahawa plaintif-plaintif berhasrat untuk membeli plot tanah yang dikenali sebagai HS(D) Ka 6793/79 18178 beserta dengan rumah kedai yang ada di atasnya. Sekali lagi, salah faham wujud disebabkan rumah kedai itu sebenarnya no. 11 dan bukannya no. 9 sepertimana ianya dinamakan dalam perjanjian jualbeli.

[1d]Adalah jelas bahawa nombor rumah kedai (sepertimana diberikan oleh pihak berkuasa awam untuk tujuan penilaian) tidak dapat mengatasi pemerihalan tanah dalam suratan hakmilik sementara atau 'nombor PT' dalam dokumen-dokumen yang relevan.

[1e] Plaintif-plaintif sendiri atau peguamcara-peguamcara mereka mungkin tersilap, tetapi kesilapan bersama tidak wujud di antara plaintif-plaintif dan defendan-defendan.

[2]Tidak terdapat sebarang kontrak utama di antara plaintif-plaintif dan defendan-defendan; oleh itu tidak boleh wujud sebarang kontrak kolateral di antara mereka.

Perintah-perintah Mahkamah Tinggi diketepikan.]

[Appeal from High Court, Ipoh; Civil Suit No: 22-118-1996]

Reported by Gan Peng Chiang

Case(s) referred to:

*Clarke v. The Earl of Dunraven and Mount Earl [1897] AC 59 (**refd**)*

*Kluang Wood Products Sdn Bhd v. Hong Leong Finance Bhd [1994] 4 CLJ 141 HC (**refd**)*

Legislation referred to:

Specific Relief Act 1950, s. 30

Counsel:

For the appellant/defendant - Chan Kok Keong (Yan Wai Leong); M/s Chan & Assoc

For the respondent/plaintiff - Ng Poh Tat (Ng Whin Cheng); M/s Ng Poh Tat & Co.

Case History:

High Court : [2000] 6 CLJ 133

JUDGMENT

Abdul Hamid Mohamad JCA:

As there has been some confusion in the description of the two shophouses in question, we shall first make it clear that, in our judgment, shophouse no. 9 refers to the shophouse standing on land held under HS(D) Ka 6792/79 PT 18177 and shophouse no. 11 refers to the shophouse standing on land held under HS(D) Ka 6793/79 PT 18178. The two shophouses are adjoining to each other. The second plaintiff was occupying shophouse no. 9 as a tenant of a company called Hung Chun Sdn. Bhd. and operating a provision shop. The first defendant was occupying shophouse no. 11, also as a tenant of the same company. He operated a mini market at his own shophouse no. 7 which is adjoining shophouse no. 9.

As pointed out by the learned judge, both the first plaintiff and the second defendant were uninvolved parties in the action. They were cited as parties because they were co-proprietors of the respective land on which the two shophouses ware erected.

The plaintiffs claim that a mutual mistake had occurred in the conveyance of the two shophouses resulting in the defendants becoming the registered proprietors of shophouse no. 9 which was purchased by them and the plaintiffs becoming the registered proprietors of shophouse no. 11. The defendants denied that there was such a mistake.

The learned judge, after a full trial, made a finding of fact that there was a mistake in the conveyance of the two shophouses to the parties. He believed Mr. Yee Weng Thong, the Managing Director of Hung Chun Sdn. Bhd and landlord of the two shophouses whose evidence, in his view, was corroborated by Dato' Daniel Tay, the solicitor who prepared the sale and purchase agreements for the transfer of the two shophouses to the respective parties. The learned judge found that their evidence lent credence to the second plaintiff's claim.

On the first defendant's claim that he had intended to purchase shophouse no. 9, the learned

judge said:

> On the other hand, the 1st defendant's claim that he had intended to purchase only shop No. 9 is inconsistent with his inactivity immediately after the purchase. He had not, as he would be expected to, taken any step to obtain vacant possession of shop No. 9 which was being occupied by the plaintiffs. Neither did he take any step to move out of shop No. 11 which he was occupying in order to allow the plaintiffs to occupy it.
>
> His conduct after the purchase clearly shows that he had settled on the *status quo* before the respective purchase of the lots by the parties - with him occupying and remaining at shop No. 11 and the plaintiffs remaining where they were at shop No. 9 to continue to operate their provision shop. Even more telling is the fact that he had continued to collect rent from the tenant of the upstairs portion of shop No. 11 well after the purchase, stopping only after April 1995 after the 2nd plaintiff informed him of the discrepancy.
>
> In the event and for the reason aforesaid, I must so find that the respective land had been conveyed to the respective purchaser by mistake when the correct conveyance should have been as follows:
>
> The land described as HS (D) Ka 6792/79 PT 18177 to the plaintiffs. The land described as HS (D) Ka 6793/79 PT 18178 to the defendants.
>
> I must also find for the same reasons that the mistake was mutual to the plaintiffs and the defendants at the time of the conclusion of the respective Sales and Purchase Agreement in that the plaintiffs had indeed intended to purchase shop No. 9 and the defendants shop No. 11 - although there was no direct contractual relationship between the plaintiffs and the defendants, a salient point of law raised by counsel for the defendants which I shall consider shortly.

On the issue whether there was privity of contract between the plaintiffs and the defendants, the learned judge held:

> The rule with respect to the rectification of instruments under s. 30 of the Specific Relief Act 1950 is concerned with " mutual mistakes of the parties " which could only arise between parties to a contract. It follows that unless the plaintiffs are able to establish in law that there is a contractual relationship with the defendants, a rectification of the register document of title of their property does not arise - an issue which I shall now consider.

The learned judge then went on to discuss the issue whether there was a contract between the parties and concluded that there was a collateral contract between them. Having been satisfied that there was a mutual mistake in the conveyance of the respective lots to the respective parties, the plaintiffs " are entitled to activate the provision of s. 30 of the Specific Relief Act 1950 to rectify the respective entry in the register document of title to express the true intent of the parties. " He therefore made the order directing the Registrar or Land Administrator to make the necessary rectification in the respective register document of title as well as on the issue document of title.

Was there a mutual mistake? Whilst we appreciate that that is a finding of fact by the learned trial judge, we are of view that there are sufficient grounds for us to differ. Both parties had wanted to purchase shophouse no. 9, the second plaintiff because he was occupying it and the first defendant because he was operating a mini-market at the adjoining shophouse no. 7 and wanted to extend his mini-market.

Let us look at the documents more closely. The sale and purchase agreement dated 11 May 1994 between Hung Chun Sdn. Bhd. (the vendor) and Foo Lian Sin and Law Yoke Lan (appellants/defendants) states that the land in question is HS(D) Ka 6792/79 PT 18177 but it

went on to say " with a shophouse erected thereon known as No. 11 ". The shophouse described as " No. 11 " is clearly wrong. The shophouse standing on that land is shophouse no. 9.

Form 16A (" gadaian ") dated 14 September 1994 prepared by Daniel Tay Kwan Hui, the same solicitor, described the land charged by the appellants/defendants to Malayan Banking Berhad as " No. P.T. 18177 " and " Jenis dan No. Hakmilik " as " H.S.(D) Ka 6792/79 ". The same description of the land is stated in the Schedule to the Annexture thereto.

Form 11 A, the " Suratan Hakmilik Sementara " dated 24 February 1995 shows that the appellants/defendants are the registered proprietors of land described as " No. PT 18177 ".

On the other hand, the sale and purchase agreement dated 13 May 1994 (two days after the date of the sale and purchase agreement executed by the appellants/defendants with the same vendor and prepared by the same solicitor) described the subject land as " HS(D) Ka 6793/79 P.T. 18178 " and went on to say " with a shophouse erected thereon known as No. 9 ". Here again there is a mistake. The number of the shophouse standing on that land is shophouse no. 11.

Form 11A (" Suratan Hakmilik Sementara) in respect of PT 18178 shows that the registered proprietors are Ng Chun Lin and Lim Lian Tiam (respondents/plaintiffs).

It is clear that the sale and purchase agreement, the charge and the Schedule to the Annexture thereto and " Suratan Hakmilik Sementara " are consistent in that it was HS(D) Ka 6792/79 PT 18177 that was purchased by the appellants/defendants. However, in the sale and purchase agreement the shophouse number was wrongly described as " No. 11 " when it should be " No. 9 ". That is the only document that mentions the shophouse number.

It is also clear that the sale and purchase agreement and the " Suratan Hakmilik Sementara " are consistent that HS(D) Ka 6793/79 PT 18178 was purchased by the respondents/plaintiffs. Again, the mistake is in the description of the shophouse number which was wrongly described as " No. 9 " when it should be " No. 11 ".

Which should prevail, the shophouse number or the description of the land in the " Suratan Hakmilik Sementara " and the " P.T. No. " in all the documents, including the sale and purchase agreements? Clearly the shophouse number cannot prevail over the later. Shophouse number is the number given by the Local Authority for the purpose of assessment. Furthermore, the shophouse is part of the land. It cannot be sold without the land. It is the land that is sold with the shophouse standing on it.

So, from the point of view of the appellants/defendants they wanted to buy the land described as HS(D) Ka 6792/79 PT 18177 with the shophouse standing on it. That is what they got. The respondents/plaintiffs might have been mistaken in thinking that they were purchasing shophouse no. 9 when they bought the land described as HS(D) Ka 6793/79 PT 18178. If that is the case, that is their mistake. It may be that the solicitor had made a mistake. If that is the case, then the respondents/plaintiffs should have sued the solicitor. Whether it was the mistake of the respondents/plaintiffs or the solicitor, the mistake is not a mutual mistake between the appellants/defendants and the respondents/plaintiffs.

On that ground we are of the view that there was no mutual mistake as between the parties.

On the issue of privity of contract between the parties, the learned judge had correctly held that there was no privy of contract between them.

However, the learned judge also found that there was a collateral contract between the parties. He cited a number of authorities. We do not think that it is necessary to discuss them as we are of the view that they are not on point. For example, the case of *Clarke v. The Earl of Dunraven and Mount Earl* [1897] AC 59 concerned two participants in a regatta organised by a yatch club, the rules of which club bound the participants to pay all damages caused by fouling. Hence, when one of the participants fouled the other's yatch, he was liable to pay damages to the other. The House of Lords held that there was a contract between the participants collateral to the main contract with the yatch club. That is because the participants had accepted the rules to be binding on them.

This is not such a case. Here the only thing in common was that the vendor was the same. By the respective sale and purchase agreements the vendor sold two different pieces of land to two different purchasers. There were no terms common, binding an affecting both parties as in that case.

Kluang Wood Products Sdn Bhd v. Hong Leong Finance Bhd. [1994] 4 CLJ 141 concerns an oral representation by one of the contracting parties to provide end financing. That was held to be a collateral contract besides the main contract as between the same parties.

The " mistake " in this appeal is not such a case. There is no main contract as between the plaintiffs and the defendants.

It is also pertinent to note that the existence of a collateral contract between the parties was not even pleaded.

On these grounds we allowed the appeal and set aside the orders of the learned judge. As, at the time we gave our decision we understood that no decision had been given in respect of the counterclaim we directed the learned judge to give his decision on the counterclaim. We also ordered the respondents/plaintiffs to pay the costs of this appeal and the costs in the court below and that the deposit to be paid to the appellants/defendants towards taxed costs.