

Thai Courts Just Held the “Secured”/“Collective” Lease Structure VOID – bad news for many foreign real estate investors

Some real estate development structures that are marketed to foreigners in Thailand are commonly referred to as a “collective lease” or a “secured lease”. For simplicity’s sake we will refer to it in this article as a **“Secured” Lease**.

As a general rule foreigners cannot own land and apartment units, but it is possible for foreigners to lease them and that is the reason why these are commonly marketed to foreign buyers on a leasehold basis. Under Thai law the maximum lease term is thirty years, which may be renewed upon expiration of that term. And the leases marketed to foreigners typically provide for an initial thirty-year term plus two additional successive thirty-year renewal terms. However, for reasons we will not explore in this article, the renewal of a lease in Thailand is by no means assured even if it is provided for in the original lease agreement. To overcome this issue the “Secured” Lease is marketed to foreigners. It is meant to secure the lessee’s renewal terms and insure that the lease is renewed as originally agreed. Purportedly, the way this “security” is provided is by the buyer not only entering into a lease agreement with the developer’s land/apartment owning Thai company but also entering into a share sale and purchase agreement for shares that control the developer’s land/apartment owning Thai company.

In a previous two-part article (here: <http://www.thephuketnews.com/phuket-law-does-going-collective-fix-your-lease-renewal-problem-38440.php> and here: <http://www.thephuketnews.com/phuket-legal-the-hidden-dangers-lurking-in-collective-leasehold-contracts-39265.php>) we have detailed why we believe that “Secured” Lease actually does not in fact provide any significant assurance that your lease will be renewed. However, beyond our own legal opinion on the subject, two different Thai courts have recently concluded that the “Secured” Lease is “void” as a matter of law. A contract that is found to be void is considered to have never existed.

If other courts confirm these courts' opinions, then not only will any renewal term of "Secured" Leases be invalid but also their current lease terms. It should be noted that this would be the case *regardless of whether or not such a lease was already registered*.

Why? Because a finding that a lease is void means that it never legally existed and, therefore, as far as the law is concerned a void lease cannot be, nor ever could have been, registered. Even if the legally void lease went through the land office formalities of registration, with registration fees paid, papers signed and stamped by the land officials, it simply does not change the legal non-existence of the void lease, as legally, nothing happened by such acts.

In the abovementioned court cases the buyers entered into the project's "Secured" Lease structure. Leases, in this case for apartments, were registered several years ago. The lessees filed a civil case against the developer of the project in the Civil Court to protect their leasehold rights. Neither the buyers nor the developer argued that the leases were not valid. Quite the contrary: they both relied on provisions of the leases to support their arguments. However, the court deemed on its own that the leases — when considered in light of the share sale and purchase agreement for the shares that control the developer's land/apartment owning Thai company — were actually fictitious agreements made to conceal what the parties actually agreed, to sell and purchase the relevant real estate.

Section 155 of the Civil and Commercial Code of Thailand (the "CCC") provides that if two parties enter a fictitious agreement in order to conceal their real agreement, the fictitious agreement is void. Section 155 goes on to state that although the fictitious agreement is void, the hidden agreement that the parties actually made must then be evaluated under the provisions applicable to it.

In this case, the court deemed that the parties had entered into fictitious lease agreements through the "Secured" Lease structure and had done so in order to hide their actual agreement to sell and purchase the properties. According to the court, this meant that the leases were void and that the provisions of Section 456 of the CCC applied to the "real" sale and purchase agreements. Section 456 provides, in pertinent part, that *"a sale of immovable property is void unless it is made in writing and registered by the competent official."* The court then concluded that since these sales were not made in writing nor registered with the competent official and that, therefore, they were void.

This ruling, by two trial court judges, was then appealed to a three-judge appeal court panel. The appellate court confirmed the trial court on the very same factual and legal grounds as the trial court outlined above:

a) the “Secured” Leases with their leases + share sale purchase agreements were fictitious agreements meant to conceal actual sale and purchase agreements for the real estate; thus

b) the leases and share sale purchase agreements were void; as were

c) the actual concealed real estate sale and purchase agreements because they were not made in writing and registered with the competent official.

Taking these new decisions into account the “Secured” Lease not only does little if anything to address the very real insecurity that your long-term lease will not be renewed, but it also could have the disastrous consequence that your current lease could be considered legally void. And by these courts’ analysis, anyone who has already or is considering investing in such a structure is facing the immediate loss of the investment. Fortunately, however, there are far better legal means than the “Secured” Lease that do provide actual long-term lease security and without any downside to the developer. This can be achieved by securing the pre-paid renewal terms with a mortgage over the land plot in question. It is a simple and straightforward legal structure that provides security for the investor and, therefore, a marketing opportunity for the developer. And in some circumstances a current “Secured” Lease can be restructured into this better and actually secure alternative, before it is too late. But, as always, you should first engage competent legal and tax counsel in order to successfully implement this preferred lease security structure.

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