

IN THE HIGH COURT OF FIJI
[WESTERN DIVISION] AT LAUTOKA

Civil Action No. HBC 229 of 2010

BETWEEN : **WAI HINGH LEE** of Hong Kong, Dentist

PLAINTIFF

AND : **YUK LUEN LEE** and **RICHARD YING HIN LEE** of Auckland,
New Zealand, Company Directors as executors and trustees of
the Estate of Allen Lee

FIRST DEFENDANTS

AND : **THE PUBLIC TRUSTEE OF FIJI** on behalf of the estate of **LUM**
SUI FONG late of Sydney, Australia formerly of Lautoka, Fiji,
Deceased, Company Director, pursuant to s.8 of the
Succession Probate and Administration Act (Cap. 60)

SECOND DEFENDANT

Counsels Appearing:

Mr B.C. Patel for the Plaintiff
Mr Anu Patel for the First Defendants

Solicitors: Young & Associates for the Plaintiff
S.B. Patel & Company for the First Defendants

J U D G M E N T

Introduction

1. In these proceedings the Plaintiff claims against the First and Second Defendants an Order Setting aside the Transfer of Shares dated 20th October, 2006 made between Lum Sui Fong as Transferor and Allen Lee as Transferee, pursuant to Section 51(1)(Cap 130) of the Property Law Act; Alternatively an Order directing the First Defendants to transfer 77,919 shares it holds in Lum Sui Fong Investments Limited as Executors and Trustees of the estate of Allen Lee to the Second Defendant as Administrator of the estate of Lum Sui Fong and a further Order that pending such

transfer the First Defendants are holding those shares in trust for the Second Defendant as Administrator.

2. The Plaintiff in her Statement of Claim states that she lent NZ\$315,000 to Allen Lee prior to July 1997 and that the said debt was taken over by his parents Lee Wah Yip (Father) and Lum Sui Fong (Mother) pursuant to an agreement dated 25th July, 1997. It is also stated that Lee Wah Yip and Lum Sui Fong are the parents of Allen Lee and the Plaintiff Wai Hing Lee. The other facts stated by the Plaintiff in her Statement of Claim are as follows:

- (i) That Lee Wah Yip and Lum Sui Fong made two payments to the Plaintiff in Hong Kong and on 28th March, 2006 they owed to the Plaintiff a balance sum of NZ\$174,867.26 and interest.
- (ii) That the Plaintiff after the death of her father Lee Wah Yip sued her mother Lum Sui Fong and Allen Lee as executors and sole beneficiary of the father in Lautoka High Court Action No. HBC 87 of 2006 on 28th March, 2006 claiming the balance of the loan and interest.
- (iii) That on 20th October, 2006 Lum Sui Fong owned 77,920 out of 100,000 issued shares in Lum Sui Fong Investments Limited and the said shares were worth by virtue of the Company's properties as well as its shares in Flexible Packaging (Fiji) Limited in excess of \$1,000,000.00.
- (iv) That on 11th August, 2008 following the death of Allen Lee, the First Defendants were joined in Action No. 87 of 2006 as executors and trustees of the estate of Allen Lee and as ultimate executors and trustees of the estate of Lee Wah Yip.
- (v) That while the Plaintiffs' claim in Action No. 87 of 2006 was pending, Lum Sui Fong deliberately and with intent to defraud the Plaintiff as Creditor transferred her 77,919 shares in Lum Sui Fong Investments Limited worth in excess of \$1,000,000.00 to Allen Lee for a total monetary consideration of \$100.00 and for natural love and affection.

- (vi) That on 27th August, 2010 Inoke J gave judgment in Action No. 87 of 2006 in favour of the Plaintiff and entered judgment against the First Defendants as executors and trustees and against Lum Sui Fong in the sum of NZ\$487,421.00 together with interest of NZ\$67.40 per day from 23rd April, 2010 to date of payment.
3. In the Statement of Defence of the First Defendants it is stated inter alia that Allen Lee in his personal capacity had rendered valuable services and assumed management control of Lum Sui Fong Investments Limited at the request of Lum Sui Fong and the same was the consideration for the transfer of shares. The First Defendant deny that the said shares were worth in excess of \$1,000,000.00 at the time of the said transfer, and says that the assets of Lum Sui Fong Investment Limited were and are encumbered by significant debt at all material times.
4. The First Defendants in their Statement of Defence prays that the Plaintiffs Statement of Claim be dismissed with costs.
5. According to the minutes of the Pre-Trial Conference main issue to be determined in this matter is whether on 20th October, 2006 while the Plaintiffs' claim in Action 87 of 2006 was pending, Lum Sui Fong had deliberately and with intent to defraud the Plaintiff as Creditor transferred her 77,919 shares in Lum Sui Fong Investments Limited to Allen Lee for a total monetary consideration of \$100.00 and for natural love and affection.

The Hearing

The Plaintiffs Evidence

6. Mr Jay Lal, Chartered Accountant was called by the Plaintiffs' Counsel to give evidence on the share value of Lum Sui Fong Investment Limited at the time of transferring the shares to Allen Lee. Valuation report prepared by Mr Jay Lal was marked in evidence as Exhibit PA 2. He explained to Court that the valuation was done by using "asset backing method". He stated further that there are other methods known as "capitalisation of profits" and "dividend yield" to value shares.

He stated that he choose the asset backing method to value the shares because of the limited information he received to do the valuation. He explained that the basis of asset backing method is to take the nett asset value taking the Northern Property Valuation PA (2) value of the Land and building and subtracting there from the indebttness of Lum Lui Fong Investments Limited and its subsidiaries, Flexible Packaging (Fiji) Limited and Canplast Trading Limited shown in the annual returns filed in the Companies office. In answer to examinations in chief he said that he did a search at Companies office to get the information necessary and that he did not have the privilege of having the company accounts. According to Mr Jay Lal depending on the method of valuation adopted the value of the shares at the date of the transfer was \$34.67 per share (PA 2). However he stated that the value of shares differs depending on the method of valuation adopted. He stated the share value will be \$21, (\$21.09) \$34 (\$34.67) or \$44 (\$44.67) per share according to the valuation method adopted.

He also explained that dividend yield method was normally used where minority shares were being transferred and therefore that did not apply here. He further explained that as he did not have the financial accounts or information necessary to adopt the capitalisation of profit method.

7. The Plaintiffs' next witness was S. K. Toronibau Registered Valuer of "Northern Property Valuations" who prepared the valuation report of the properties of Lum Sui Fong Investments Limited and Flexible Packaging Limited as at 2006. (Exhibit PA 12). He stated in evidence that he got information from Tenancy Agreements, Sub Leases, Lease Agreements and Transfers to do the valuation. He said that the valuation given in past sales reflect the market value of properties at that period.

In cross-examination Counsel for the Defendants queried only the value of NL 25640 of \$250,000 on the basis that clause (g) required cane to be planted and that the valuer has not taken that into consideration even though the lease was zoned Industrial.

In answer to questions the witness explained why clause (g) did not make difference to his valuation method. The Defendants Counsel did not

challenge the witness on the value of the other properties given in the valuation report.

The Defendants Evidence

8. The 2nd named 1st Defendant Richard Ying Hin Lee gave evidence on behalf of the First Defendants. He said that he cannot agree with the valuation of shares as Mr Jay Lal has ignored debts, non-current assets, current liabilities, Bank loans and Overdraft and that there is no valuation of Inventory. He also stated that selling all the land will not satisfy the debts. He explained that the Company had to pay \$65,664 monthly with interest in settling the loans. When asked what is the value of the share at the date of transfer, he stated that the value depends on selling all assets and settling debtors. He stated further that the Company was trading at a loss and it did not have the ability to pay creditors and therefore the shares had a negligible value. He contended that Mr Jay Lal should have gathered all data to prepare the share valuation and his valuation must be questioned.

9. In cross-examination he was shown copies of Annual Returns of Lum Sui Fong Investments Limited PA 3 and PA 4. He admitted that charges should be registered in company's office and also particulars of indebtedness of the company should be shown in the Annual Returns submitted by the company signed by his father. When questioned whether his father had lied deliberately by not disclosing all charges against the company the witness stated that he does not think so but he cannot ascertain.

He admitted that there was no evidence produced to prove that the equipment is less than the amount disclosed by Price Waters Accounts. He also admitted that he did not get a share valuation and stated that the valuation for October 2006 was only the book value and not the market value.

10. It was admitted by the witness that while challenging their own accounts on plant and machinery, they have not produced any evidence to prove that the valuation was incorrect. He admitted further that not a single question was

put to Plaintiffs witness Jay Lal about the Company “starving for liquidation” in 2006.

In cross-examination he stated that Jay Lal has come up with three methods of valuations in his report but had not come with the 4th. He admitted that he has not come up with any method of valuation to value the shares.

Analysis and Determination

11. Though the 2nd named First Defendant attempted to distort the Financial Statements in an endeavour to challenge Jay Lals’ evidence he did not put forward any alternative valuation of the shares. On the other hand the Plaintiff submits share valuation prepared by Jay Lal who is a very experienced Chartered Accountant who had share valuation experience and has a very impressive CV (A 7). He explained the three methods of valuation of shares and also why he used the asset backing method to value the shares of Lum Sui Fong Investment Limited. He said he used asset backing method taking the Northern Property Valuations (A 12) value of the land and building and subtracting there from the indebtedness of Lum Sui Fong Investments Limited and its subsidiaries.
12. The evidence of S. K. Toronibau of Northern Property valuations was barely challenged in cross-examination. Counsel of the First Defendants only queried the value of NL 25640 of \$250,000.00 on the basis that clause (g) required cane to be planted and that the witness had not taken that into consideration even though the Lease was zoned Industrial. Toronibau explained why clause (g) did not make any difference to his valuation method. Counsel did not challenge him on any other values in valuation report (A 12) which gives valuation of 13 leases.
13. Richard Lee admitted in cross-examination that his Counsel did not put any question to Plaintiffs’ witness Jay Lal about Lum Sui Fong Investment Limited “starving for liquidation” before October 2006. I am of the view it is improper to let a witness’s evidence go unchallenged in cross-examination and later argue that the witness’s evidence should not be believed because he did not take those matters into consideration.

14. As discussed above I find that only evidence before the Court on share valuation is of Jay Lal. In the absence of alternative valuation and lack of credible attack of his evidence I hold that the valuation given by him must be accepted. As such it's my view that the shares were transferred at a considerable undervalue and was in reality a transaction of gifting to the son. The transferor and the transferee must be taken to have known that the shares were worth a lot more than the \$100.00 on 20th October, 2006.
15. Next issue to be considered in this matter is whether the alienation of the shares was done by Lum Sui Fong with intent to defraud Creditors. The Plaintiff is seeking to set aside the Transfer of shares dated 20th October, 2006 from Lum Sui Fong to Allen Lee pursuant to Section 51(1) of the Property Law Act (Cap 130) on the grounds that the transfer was made with intent to defraud Creditors, namely the Plaintiff.

Section 51 provides :

“51 - (1) Save as provided by this section every alienation of property with intent to defraud Creditors shall be voidable at the instance of the person thereby prejudiced.

(2) This section does not affect any law for the time being in force relating to bankruptcy.

(3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intention to defraud Creditors”.

16. Section 51 of the Property Law Act is identical with Section 60 of the Property Law Act 1952 (NZ) and the said section was considered by the Supreme Court of New Zealand in **Regal Castings Limited v Lighbody (2009) 2 NZLR 433.**

Discussing the meaning of “Intent to Defraud” his Lordship Elias C.J. said

[5] The meaning of “intent to defraud” has been held to include the purpose of delaying as well as defeating creditors, as the Elizabethan statute had expressly provided. [3] **The question of intent to defraud is one of fact.** [4] **It must be determined at the time of alienation,** [5] **but the intended prejudice may be to future creditors rather than creditors existing at the date of the alienation.** [6] **Absence of full value obtained for an asset transferred is evidence from which an inference of intent to defraud may be taken.** [7] But full value of itself may not be sufficient to displace an intent to defraud, as is illustrated by *Lloyds Bank Ltd v Marcan*. [8] There, the grant of a lease for a term of 20 years was held to have been made with intent to defraud the mortgagee seeking to enforce the mortgage, despite the fact that the lease was granted for full market rental. **If an alienation is voluntary (that is to say, not for valuable consideration) or is at a clear undervalue, so that the fund available to creditors is depleted,** [9] **it may be easy to infer an intent to defraud.** [10].....

[6] **If the debtor retains the benefit of the property, that may be evidence of fraudulent intent.**

[7] The financial position of the transferor at the time of the alienation is always a key consideration. It is not determinative against intent to defraud if the transferor is solvent at the time, particularly if he is contemplating entering into a risky venture. [20] **But where the transferor’s financial position is precarious, it is objective evidence of an intention to defraud if he acts to put property beyond the reach of creditors.** [21] **Other indications of fraud commonly occurring are transfers to close relatives, particularly where the transfer is at an undervalue, alienations in which the transferor retains the use or benefit of the property.** [22] **and secrecy in the transfer or a misleading explanation for it.** [23]

[emphasis added]

17. In the same case referring to **Freeman v Pope (1870) LR 5 Ch App 538**

Tipping J said:

[89] *That case was a Chancery Appeal from Vice-Chancellor James heard by Lord Hatherley LC and Giffard LJ. At the start of his judgment Lord Hatherley said:*¹²²

“The principle on which the statute of 13 Eliz c 5 proceeds is this, that persons must be just before they are generous, and that debts must be paid before gifts can be made.”

[90] *A little later the Lord Chancellor added:* ¹²³

“But it is established by the authorities that in the absence of any such direct proof of intention, if a person owing debts makes a settlement which subtracts from the property which is the proper fund for the payment of those debts, an amount without which the debts cannot be paid, then, since it is the necessary consequence of the settlement (supposing it effectual) that some creditors must remain unpaid, it would be the duty of the Judge to direct the jury that they must infer the intent of the settlor to have been to defeat or delay his creditors, and that the case is within the statute.”

[emphasis added]

18. In the light of the guidelines set by the above authorities it is clear that in this matter the transfer of shares at a considerable undervalue by the mother to the son was done with the intent of defrauding the Creditors.

The following facts revealed in evidence clearly prove the intent of Lum Sui Fong to defraud the Creditors.

- (i) Lum Sui Fong owed the Plaintiff a debt of \$NZ174,867.26 plus interest at the time of the transfer of shares.
- (ii) Her assets consisted of 77,920 shares in Lum Sui Fong Investment Limited.

- (iii) Plaintiffs' legal action to recover the debt was pending in Court at the time of the transfer of shares.
- (iv) Lum Sui Fong transferred her shares at gross undervalue for \$100 and natural love and affection towards the transferee.
- (v) The transfer of shares depleted her assets and made her unable to pay the Plaintiffs' debt.

18. In examination in chief Richard Lee attempted to introduce new consideration for the transfer of shares, work done and services rendered. He stated that Lum Sui Fong was an aged lady of 75 years and requested her son Allen Lee to leave New Zealand to help her with the business of Lum Sui Fong and its subsidiary companies and as a result transferred the shares to Allen Lee.

However, it is clear from share transfer document (Exhibit PA I) that the transfer of shares was for "\$100 and natural love and affection" and not "for services provided or work done".

At this point it is relevant to quote Lord Hatherley's words in ***Freeman v Pope (1870) LR5 Ch App 538***. He said:-

".....Persons must be just before they are generous and debts must be paid before gifts are made".

In this matter too Lum Sui Fong should have paid her debts before she made the gift of her shares to her son.

19. In the absence of a credible explanation by the evidence adduced the only inference that could be drawn is that Lum Sui Fong intended to defraud or defeat or defect her creditors, the Plaintiff by transferring her shares. From the evidence adduced I find that the transferee had full knowledge of the background facts and was not an innocent third party without notice for value.


20. In the written submissions filed the Learned Counsel for the First

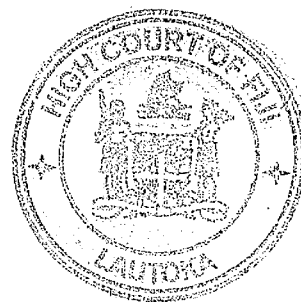
Defendants it is stated that the authorities cited in the written submissions were related to a insolvent person who deliberately part with his respective property to defeat the claim of his creditors and in this matter there is no proof of Lum Sui Fong being insolvent at the time she disposed of her shares to her son.

21. The authorities cited by the Plaintiffs does not say that a person has to be insolvent at the time of transfer of shares. The onus was on the First Defendants to rebut the inference of intent by showing that she had other assets sufficient to meet the Plaintiffs' debt. They have failed to adduce evidence to that effect.

Orders

22. In considering all of the above I hold that the Plaintiff has proved her case on a balance of probabilities and therefore make the following orders:
- (a) An Order setting aside the Transfer of Shares dated 20th October, 2006 made between Lum Sui Fong as transferor and Allen Lee as transferee pursuant to Section 51(1) of the Property Law Act (Cap 130).
- (b) The First Defendants to pay the Plaintiff costs summarily assessed in a sum of \$3,500.00.


Lal S. Abeygunaratne
Judge



At Lautoka
17th February, 2015