

The inheritability of a lease in Thailand – a legal issue not well understood

Recently, our attention was called to an **Article**, which raised an end of the world zombie scenario for certain real estate investors in Thailand. We were surprised to also see the several comments and confirmations of this purported apocalypse by a number of Thailand based legal professionals — a number of whom specialize in real estate. The article alleges that an heir cannot inherit leased land (or for that matter, a villa, or a condominium) because Thai law simply does not allow for it. Of course, such an investor with such an heir would be right to be fearful of such an outcome – if true. It is not.

It is well known that ownership of land by foreigners in Thailand is restricted. Thus, a long-term leasehold is often the best option for a foreigner to invest in land. The Article argues that if a lessee dies during the lease term, any heir of such a lessee is not legally entitled to inherit the remaining lease term. The provisions of the Civil and Commercial Code of Thailand (“CCC”) that regulate leases in Thailand are silent as to whether or not a lease may be inherited — they do not say it can, nor do they say it cannot. Thus, we need to look elsewhere, first to the provisions of law that regulate inheritance and then see how they apply to the provisions that regulate leases.

Inheritance or “succession” is regulated by Section 1599ff of the CCC. Section 1599 of the CCC states that “[w]hen a person dies, his estate devolves on the heirs.” Section 1600 of the CCC then goes on to define the “estate” as follows: “Subject to the provisions of this Code, the estate of a deceased includes his properties of every kind, as well as his rights, duties and liabilities, except those which by law or by their nature are purely personal to him.” [emphasis added]. The reason for this exception is that rights and duties implicate someone else, the third party on the other end of the deceased’s right or duty — if that party agreed to grant a right or undertake a duty to the deceased, specifically because they were doing so with that particular person, that right and

duty is “purely personal” and should not be given to or put upon an heir. Therefore, in order to be inheritable, a lease must not be a “purely personal” right.

If we then turn to how this applies to leases, the law itself does not define a lease (or what the law refers to as a “hire of property”) as a “personal right”. However, a lease can, in some instances, be interpreted as being “purely personal” by the nature of a given lease transaction. A lessor surely has an interest in who leases their property.

This is why apartment owners, for example, screen their potential lessees before entering into an agreement with them. They want to ensure that the person they choose will handle the property with care; and the law recognizes this. Section 544 of the CCC provides that: *“Unless otherwise provided by the contract of hire, a hirer cannot sublet or transfer his rights in the whole or part of the property hired to a third person.”* Thus, the law assumes that the lessee’s rights are of a purely personal nature to the lessor, that the lessor would not allow such rights to anyone else. The Article cites a Supreme Court of Thailand case that confirms this understanding of the law [Dika No. 1008/2537 (1994)]; and we agree with that understanding.

However, the law also recognizes that this starting assumption may not be applicable in every case . . . *“unless otherwise provided by the contract.”* There was no such provision in the lease contract at issue in the Supreme Court case cited above; there was no “otherwise provided” option for the lessee to assign the lease to anyone the lessee wished without further consent from the lessor.

The law allows that a lease agreement can provide otherwise. By entering into an assignment (“succession clause”, in the case of inheritance) in a lease agreement, the lessor surrenders the protection afforded to him under Section 544 of the CCC that forbids any third party not specifically chosen by the lessor to become the new lessee. The lessor agrees with the lessee that the right that he is providing to the lessee is not a personal right – they “otherwise provide” that the lease is not “purely personal”, that the lessor does not need the law’s presumptive protection to control who possesses the property under the lease. In other words: with such a provision the parties “un-personalize” a lease and, therefore, make it inheritable.

We also note that Land Department appears to interpret the law in accordance with what we have laid out above. The Land Department’s administrative regulations allow for the registration of transfer of real estate to an heir as the “new” lessee where

the lease provides that the lessor and original lessee “otherwise agreed” that the lease would be freely assignable to the lessee’s heir.

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Followup Note: this article was inspired by a LinkedIn publication we came across here:

<https://www.linkedin.com/pulse/article/20140815051558-11220814-zombie-apocalypse-in-thai-property-lease>

and our final post in discussion with the author of that post was as follows:

Ulrich, we had hoped to have a legal discussion re: “is a lease inheritable in Thailand?” However, apparently that is not possible with you, at least on this issue. So, we close with the following for you benefit and, more importantly, for the benefit of anyone still mistakenly worried about your “zombies”:

1) your quote from doing Google law research above that begins: “However, when it comes to protection of the lessee’s inheritance respectively beneficiaries, ...” is from a non-lawyer who has, not surprisingly, published erroneous legal opinions on several occasions previously, such as here:

http://www.phuketgazette.net/articles/articles/print_detail/8804

and as a service to the community we correct such glaring legal errors when we see them as we did in this case, here:

<http://www.thepuketnews.com/phuket-legal-does-a-building-permit-confer-ownership-32512.php>

you apparently agree, Ulrich, that we were correct about that. But yet you still trust this source?...without checking and without any analysis of the law from that source in any case?

So in the future Ulrich, what you should do is adhere to the simple rules of legal analysis (not googled opinions from a layperson) as follows:

2) look at the law, all the relevant law, think about it, analyze it, come to conclusions, then have it tested by having others who are competent attack it. Which, on this issue, we did here:

<http://www.duensingkippen.com/thailandpropertylawblog/?p=109>

Then, if your opinion passes muster:

3) check any relevant court opinions. For example, in this case you wrongly quoted a “Dika”/supreme court to support your mistaken opinion. We now provide to you a case you should have reviewed:

Dika (Thai Supreme Court) Ruling no. 100/2531 (briefly summarized and translated in pertinent part):

“As there was no clause in the Lease Agreement, which obliged the Lessor to assign the lease right to anyone if the Lessee died, when the Lessee died, the lease right remained a personal right under section 537 and therefore terminated upon the decedent’s death and cannot become the estate of the deceased.”

and in the original Thai here:

โจทก์ฟ้องว่า นายไต้ ธารีสาร ทำพินัยกรรมยกทรัพย์สินให้โจทก์ครึ่งหนึ่ง และยกให้จำเลยกับทายาทอื่นอีกครั้งหนึ่ง สิทธิการเช่าตึกแถวเลขที่ ผ. 157/1 จากสำนักงานทรัพย์สินส่วนพระมหากษัตริย์เป็นมรดกของนายไต้ จำเลยจะไปขอเช่าแต่ผู้เดียว ขอให้พิพากษาว่าโจทก์จำเลยมีสิทธิการเช่าร่วมกัน จำเลยให้การว่าสิทธิการเช่าตึกแถวพิพาทไม่ใช่ทรัพย์สินมรดก โจทก์ไม่มีอำนาจฟ้อง ศาลชั้นต้นพิจารณาแล้วพิพากษายกฟ้อง โจทก์อุทธรณ์ ศาลอุทธรณ์ พิพากษายืน โจทก์ฎีกา

ศาลฎีกาวินิจฉัยว่า “ตามพยานหลักฐานที่โจทก์จำเลยนำสืบรับกัน ข้อเท็จจริงเบื้องต้นฟังได้เป็นยุติว่า ตึกแถวเลขที่ ผ.157/1 ตำบลห้วยรอ อำเภอพระนครศรีอยุธยา จังหวัดพระนครศรีอยุธยาเป็นของสำนักงานทรัพย์สินส่วนพระมหากษัตริย์ เดิมนายไต้ ธารีสารเจ้ามรดกเป็นผู้เช่า วันที่ 2 พฤษภาคม 2524 นายไต้ตาย ต่อมาสำนักงานทรัพย์สินส่วนพระมหากษัตริย์ได้ทำสัญญาให้จำเลยเป็นผู้เช่าตึกแถวพิพาท คดีมีปัญหาค้างขึ้นฎีกาว่า เมื่อนายไต้ผู้เช่าตึกแถวพิพาทตายแล้ว สิทธิการเช่าตึกแถวพิพาทเป็นทรัพย์สินมรดกของนายไต้ผู้ตายหรือไม่

พิเคราะห์แล้ว เมื่อข้อเท็จจริงไม่ได้ความว่า ได้มีข้อตกลงกันในสัญญาเช่าตึกแถวพิพาทให้สำนักงานทรัพย์สินส่วนพระมหากษัตริย์ผู้ให้เช่าโอนสิทธิการเช่าตึกแถวพิพาทให้แก่ผู้หนึ่งผู้ใดในกรณีที่นายไต้ผู้เช่าตายลง เมื่อนายไต้ผู้เช่าเดิมตาย สิทธิการเช่าอันเป็นสิทธิเฉพาะตัวของนายไต้ผู้เช่าซึ่งมีอยู่ชั่วระยะเวลาอันมีจำกัดตามประมวลกฎหมายแพ่งและพาณิชย์ มาตรา 537 ก็ระงับไปไม่เป็นทรัพย์สินที่ตกทอดกันทางมรดก สำนักงานทรัพย์สินส่วนพระมหากษัตริย์ผู้เป็นเจ้าของตึกแถวพิพาทย่อมมีสิทธิที่จะใช้ดุลพินิจให้ผู้ใดเช่าต่อไปก็ได้ โจทก์จะอ้างว่าเป็นทายาทนายไต้และ

เรียกร้องให้โอนสิทธิการเช่าตึกแถวพิพาทให้โจทก์หาได้ไม่โจทก์จึงไม่มีอำนาจฟ้อง ไม่จำเป็นต้องวินิจฉัยประเด็นอื่นต่อไป ศาลล่างทั้งสองพิพากษายกฟ้องโจทก์ชอบแล้วฎีกาโจทก์ฟังไม่ขึ้น”

4) Finally, you should check the relevant administrative procedure, in other words, how is the relevant law actually being implemented in Thailand? And, we now also provide to you what also you should have reviewed in that regard:

Land Department No: Mor Tor 0608/ Wor 6475: 15 August 1967 (briefly summarized and translated in pertinent part):

“When the Lessee dies, the lease terminates, unless the lease agreement specifies that the lease right will be transferred to the Lessee’s heir in which case the heir inherits the lease rights.”

and in the original Thai here:

เมื่อ ผู้เช่าตาย สัญญาเช่าระงับ เว้นแต่ในสัญญาเช่าจะระบุว่าให้สิทธิการเช่าตกไปยังทายาท ของผู้เช่า หรือเป็นสัญญาเช่าต่างตอบแทนยิ่งกว่าสัญญาเช่าธรรมดา ทายาทของผู้เช่าย่อมมีสิทธิรับมรดก สิทธิการเช่าได้ (หนังสือกรมที่ดิน ที่ มท ๐๖๐๘/ว ๖๔๗๕ ลงวันที่ ๑๕ สิงหาคม ๒๕๑๐)

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We trust that helps you Ulrich and that this issue is now clear for all: there are no zombies, leases can be inherited Thailand.

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