Guan Soon Development Pte Ltd v Yeo Gek Lang Susie (administratrix of the estate of Teo Lay Swee, deceased) and Others
[2006] SGCA 18

Case Number	: CA 134/2005
Decision Date	: 14 June 2006
Tribunal/Court	: Court of Appeal
Coram	: Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Tan Lee Meng J
Counsel Name(s)	: Siraj Omar (Tan Kok Quan Partnership) for the appellant; Tan Bar Tien (B T Tan & Co) for the respondents
Parties	: Guan Soon Development Pte Ltd — Yeo Gek Lang Susie (administratrix of the estate of Teo Lay Swee, deceased); Yeo Gek Lang Susie; Teo Kok Woon; Teo Cheng Woon; Teo Cheng Woon

Companies – Memorandum and articles of association – Articles of association amended but effective date of amendments not evident on face of amendments – Whether minutes of directors' meeting indicating effective date of amendments can serve to qualify amended articles

Companies – Shares – Transfer – Articles of association referring to transfer of shares – Whether shareholders intending for "transfer" to apply to transmissions of shares – Whether transmission of shares of deceased member under testamentary disposition or otherwise by operation of law subject to pre-emption right of existing members

14 June 2006

Chan Sek Keong CJ (delivering the grounds of decision of the court):

1 This is an appeal against the decision of the High Court directing the appellant company ("the company") to register the third, fourth and fifth respondents as shareholders of the company. The appeal concerns the construction of certain articles of association of the company, in particular, the scope of such articles in giving pre-emption rights to shareholders in the event that a member wishes to transfer his shares to a non-member. At the conclusion of the hearing, we dismissed the appeal. We now give our reasons for doing so.

The facts

2 One of the co-founders of the company, Teo Lay Swee ("the deceased"), who held 2,154 shares in the company amounting to slightly less than 27% of its issued share capital, died intestate on 10 February 2002. Under the provisions of the Intestate Succession Act (Cap 146, 1985 Rev Ed) ("the Act"), the first respondent, the widow of the deceased (who was also the second respondent *qua* beneficiary), and his children, the third, fourth and fifth respondents (collectively, "the beneficiaries"), became entitled to his estate in the shares as provided under the Act. As a result, as part of the estate distribution, the shares held by the deceased in the company were distributed to the beneficiaries in the following manner:

(a) 1,526 shares in the name of the widow;

(b) 626 shares in the name of Teo Kok Woon, a son of the deceased ("the third respondent");

(c) one share in the name of Teo Cheng Woon, another son of the deceased ("the fourth respondent"); and

(d) one share in the name of Teo Soo Swan, a daughter of the deceased ("the fifth respondent").

3 On 11 April 2005, the first respondent, then the sole administratrix of the estate of the deceased, wrote to the company requesting the registration of the transfers of the distributed shares to the second to fifth respondents. The company eventually agreed to register the second respondent as a member (as she was an existing member of the company) but declined to register the other respondents on the ground that the transfers of the shares were subject to pre-emption rights under Art 28 of the articles of association of the company.

4 As a result, the first respondent, as sole administratrix, and the beneficiaries brought this action to compel the company to register the latter as members. In the course of these proceedings, the third respondent was appointed co-administrator, and accordingly, became a party to the action *qua* administrator as well. The High Court held that the beneficiaries were entitled to have their distributed shares registered and ordered accordingly.

5 The unusual feature in this case is that the widow's request to the company to register the beneficiaries as members was made on 11 April 2005, more than three years after the death of the deceased, but in the meantime, the company had on 30 June 2003 amended the articles of association of the company to such effect that, as contended by the widow, the beneficiaries were entitled to be registered as members. The company, however, disagrees that the amendments were applicable to the beneficiaries and, in any event, to the shares distributed to them.

The articles of association

6 We turn now to the relevant articles. Article 28 of the company's articles of association as amended on 30 June 2003 (the amendments, which are additions, are underlined) reads:

> A share may be transferred by a member or other person entitled to transfer to any member or any person approved by the Board of Directors (<u>which approval shall not be unreasonably withheld</u>), but save as aforesaid and save as provided by articles 31 <u>and Article 31A</u> hereof, no share shall be transferred to any person, who is not a member, so long as any member is willing to purchase the same at fair value. The Directors shall refuse to register a transfer of any shares in the Company to any of the persons mentioned in Article 9A(2) hereof. Every instrument of transfer shall be accompanied by a Statutory Declaration made by the Transferee stating his citizenship and identity card or passport particulars and declaring that he is purchasing the shares beneficially and in his own name and not otherwise. The Company may call upon such declarant to make such additional statements by Statutory Declaration as are necessary to satisfy itself of the qualification of the declarant to have himself registered as a member of the Company.

7 The other relevant article in the articles of association, Art 31A, reads:

> The provisions of Articles 29 and 30 hereof relating to members' rights of pre-emption shall not apply in respect of any transfer of shares following the death of a member where the deceased's shares are transferred to: –
>
> (a) such person(s) who shall become entitled to a share in consequence of the death of the member in accordance with the applicable laws of intestacy; or
>
> (b) any or a combination of the following category of persons in accordance with the

deceased member's last will and testament: –

(i) the deceased's spouse;

(ii) the deceased's sibling;

(iii) the deceased's child, adopted child or step-child;

(iv) the child, adopted child or step-child of any other member.

8 It is also convenient to set out the terms of Arts 29, 30 and 31 of the company's articles of association, as they, together with Arts 28 and 31A, constitute the scheme of pre-emption rights. The scheme is relevant to our consideration of the company's argument that the third, fourth and fifth respondents' entitlements to the shares of the deceased as distributed to them were not in accordance with the applicable laws of intestacy. The point we wish to make here is that there are no provisions in these articles, unlike those of other companies, which require that the shares of a deceased member be offered to existing members. Articles 29, 30 and 31 (with the amendments similarly underlined) read as follows:

> 29. Except where the transfer is made pursuant to articles 28 or 31 or 31A hereof, the person proposing to transfer any share (hereinafter called the proposing transferor) shall give notice in writing (hereinafter called the transfer notice) to the Company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the Company his agent for the sale of the share at the price so fixed, or at the option of the purchaser, at the fair value to be fixed by two arbitrators, both of whom shall be members of the Company, one to be appointed by each of the parties in difference and their umpire.
>
> The transfer notice shall not be revocable except with the sanction of the Directors.
>
> 30. If the Company shall within the space of 14 days after being served with such notice find a member willing to purchase the share and shall give notice to the proposing transferor, he shall be bound upon payment of fair value, to transfer to the purchasing member.
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> 31. If the Company shall not within the space of 14 days aforesaid find a member willing to purchase the shares and give notice in manner aforesaid, the proposing transferor shall at any time within 2 months afterwards be at liberty to sell and transfer the share to any person at any price.

9 The company's main argument, which the High Court had rejected, and which was pursued before us, was that Art 31A had no application to the beneficiaries because it was not intended to apply to any member dying before 30 June 2003 and that, accordingly, any transfer of the deceased's shares would be subject to the pre-emption rights of members under Art 28. As evidence of such an intention, the company produced the minutes of the shareholders' meeting held on 30 June 2003, at which the amendments were unanimously approved. The minutes contained the following qualification ("the qualifying statement"):

> The intent is that Article 31A shall only apply where the death of a member takes place after the date on which the resolution adopting Article 31A is passed.

10 The High Court rejected this argument on the ground that Art 31A itself did not stipulate the time from which it was to apply and that accordingly the amendment took effect from the day it was

made. We agree with this decision, but would add that there were other circumstances in the case that would estop the company from relying on the minutes of the meeting to show the intention of the shareholders. Not only had the secretary of the company filed Form 11 (notice of resolution) with the Registrar of Companies the text of Art 31A without the qualifying statement, but it would also appear that, subsequently, the same text was incorporated in the reprinted memorandum and articles of association. A reasonable inference to be drawn from these facts is that the text of Art 31A as filed with the Registry of Companies was that which was actually passed by the meeting and that the qualifying statement was merely a statement of intention of the shareholders present.

11 A more important consideration is that when the company first sent out its notice of annual general meeting dated 6 June 2003, the agenda included the relevant amendments under the item "Special Business", and the attached text of Art 31A did not contain the qualifying statement. The respondents' case is that the then sole administratrix relied on this representation and did not attend the meeting. Whether or not she did rely on this representation (and her affidavit did not say so) is not relevant in this case because it was, in any event, improper for the company to change the text of Art 31A and approve it at the shareholders' meeting without giving prior notification to the administratrix. If notice of the qualifying statement had instead been given to the administratrix, it would not be possible for us to affirmatively say that she would not have attended the meeting so as to object to it. Indeed, there would be reason for her to object to it as it was discriminatory and it was within her power to prevent it from being adopted at the meeting, as she was holding 31% of the company's shares (being the aggregate of the shareholdings she held *qua* member and *qua* administrator). Article 31A, read with the qualifying statement, would have discriminated against the estate of the deceased as it purported to give the existing shareholders more rights with respect to the transfer of their shares than the deceased's estate.

Meaning of Article 31A

12 Counsel for the company has however contended further that even if Art 31A were read without the qualifying statement, it would still not apply to the shares that were distributed to the third, fourth and fifth respondents as it applies only to transfers and not to transmissions of shares. He pointed out that the distinction between a transfer and a transmission of shares in the company's articles is well established and that, in essence, a transfer is the result of an act of a member, whereas a transmission results from an operation of law: see, *inter alia*, *Lee Eng Eow v Low Ah Lian* [1992] 1 MLJ 678 at 680*, In re Bentham Mills Spinning Company* (1879) 11 Ch D 900 at 904–905, *per* James LJ and *Barton v London and Northern Western Railway Company* (1889) 24 QBD 77 at 88, *per* Lindley LJ. In the present case, the subject shares were transmitted to the second and third respondents in their capacity as co-administrators of the estate of the deceased. According to him, on the authority of *Lee Chee Ngor Moreta v Prudential Enterprise Ltd* [1991] 2 HKC 499 ("*Lee Chee Ngor Moreta*"), any subsequent divestment of the same shares from them would involve a transfer, not a transmission, and would therefore be subject to any restrictions contained in Art 28 on the transfer of shares. In the present case, the administratrix had forwarded to the company transfer forms of the distributed shares duly signed by her as administratrix transferring the shares by "way of gift" to herself and to the third, fourth and fifth respondents respectively.

Distinction between transfer and transmission in a company's articles of association

13 In our view, counsel's argument has no merit, but before we give our reasons, it would be useful to consider the distinction between a transfer and a transmission in the pre-emption articles of a company as it will throw some light on the substance of the company's submission on the distinction above. First, as counsel for the company has submitted, a transfer involves an act of the member, but a transmission does not as it occurs by operation of law. It has been said that the "distinction

between transfer and transmission on death is well recognised in company law": see *Moodie v W & J Shepherd (Bookbinders) Ltd* [1949] 2 All ER 1044 ("*Moodie v Shepherd*") at 1054, *per* Lord Reid. To that end, the transmission of shares to the personal representatives of the deceased member is not a "transfer" in its ordinary sense as used in the articles of a company: see, *inter alia*, *Moodie v Shepherd* at 1050, *per* Lord Porter and *Scott v Frank F Scott (London), Limited* [1940] Ch 794 at 805.

14 We note that while the Supreme Court of Queensland, in*Re Kenzler* (1982–1983) 7 ACLR 767 at 772–773, has held that the direct transfer of the shares by the executor to the legatee is not a "transfer" from the executor to the legatee in relation to pre-emption articles in that case, there is no direct authority, to our knowledge, that an application by an administrator to register the deceased's shares in the name of a beneficiary acquiring the beneficial title to the shares on intestacy has been regarded as a "transfer" of the shares by the administrator to the beneficiary.

15 In principle, it may be argued that having regard to the fundamental purpose of a pre-emption article in a family company, *ie*, keeping outsiders out of the affairs of the company, the expression "transfer", when used in an article that merely provides that no member may transfer his shares to "any person, who is not a member, so long as any member is willing to purchase the same at a fair value", should be construed as not to apply to beneficiaries taking the deceased member's share upon intestacy as that would be consistent with the founders' goal of keeping the shares in the family. In the same context, the argument may have less force in the case of a testamentary disposition where the legatee is not a member of the deceased's family. However, as this point has not been raised before us or in the authorities cited to us, we do not propose to deal with it as the relevant articles in the present case are clear enough for us to construe their meaning.

16 As we have stated earlier, the scope of pre-emption clauses in private companies is purely a question of construction in the context of all the other related articles. As Lord Greene in *Greenhalgh v Mallard* [1943] 2 All ER 234, at 237 had noted:

> Questions of construction of this kind are always difficult, but in the case of a restriction of transfer of shares I think it is right for the court to remember that a share, being personal property, is *prima facie* transferable, although the conditions of the transfer are to be found in the terms laid down in the articles. If the right of transfer, which is inherent in property of this kind, is to be taken away or cut down, it seems to me that it should be done by language of sufficient clarity to make it apparent that that was the intention.

17 In the present case, counsel for the appellants has conceded that a transfer of shares does not include a transmission of shares by operation of law under a testamentary disposition. However, he has contended that the expression "transfer" in Art 28 covers a transfer of shares by an administrator to a beneficiary resulting from an intestacy and, accordingly, the purported transfers signed by the administratrix in favour of the third, fourth and fifth respondents would be subject to the pre-emption rights of the existing members. Counsel has referred us to the Hong Kong decision in *Lee Chee Ngor Moreta* ([12] *supra*) as authority for this proposition. However, it is clear to us that decision was also based on the construction of the applicable articles and does not purport to enunciate any overarching principle. There, Art 36 of the company's articles had provided that, unless the transfer of shares was a result of a sale, any other disposition was subject to a right of pre-emption. The articles provided that any person entitled to shares either by virtue of the death or bankruptcy of a member must offer them to the other members. Article 36(g) of the said articles provided an exception to the pre-emption rule with respect to a transfer by *a member* or bequest by will by him to a family member. The court held that as a matter of construction, the word "member" in Art 36(g) did not include a personal representative. Hence, the application by the personal representative to transfer the shares to the intestate's next-of-kin upon the death of the deceased

member would be subject to the pre-emption provision.

18 However, we do not need to address this point in this judgment. When Art 28 is read with Art 31A, it is arguable that the shareholders, at least those who attended the meeting on 30 June 2003, must have understood the expression "transfer" in Art 28 to apply to a transmission of the shares of a deceased member under a testamentary disposition or otherwise by operation of law and also to a transfer by an administrator to a beneficiary. The reason is that Art 31A excludes the pre-emption right in Arts 28, 29 and 30 in respect of any *transfer of shares* following the death of any member where the deceased's shares are *transferred* to:

> (a) such person(s) who shall become entitled to a share in consequence of the death of the member in accordance with the applicable laws of intestacy; or
>
> (b) any or a combination of the … category of persons in accordance with the deceased member's last will and testament [as prescribed therein.]

The effect of Art 31A is that, on the basis that Art 28 applies to transmissions of shares, it removes the pre-emption right of members against beneficiaries of the deceased member's shares arising from an intestacy while restricting the category of testamentary beneficiaries. Article 31A thus widens and restricts the scope of the pre-emption rights in Art 28 with respect to rights arising upon intestacy and under a testamentary disposition respectively.

19 Having regard to the clear intent of Art 31A in relation to the "transmission" of rights in the deceased's shares consequent upon the distribution of his estate, it is unnecessary for us to determine the meaning of the expression "transfer" in Art 28. On the assumption that it does apply to transmissions of the shares of a deceased member, a reading of Arts 28, 31 and 31A together makes it abundantly clear that Art 31A(a) was intended to exclude and did exclude the operation of Art 28 to "transfers" of shares in the company arising from intestacy. In this respect, it should be noted that there is no doubt that the second to fifth respondents acquired their rights to the deceased member's shares in the company *in consequence of the death of a member* (*ie*, the deceased) *in accordance with the applicable laws of intestacy.*

20 Indeed, counsel for the company did not disagree that the second to fifth respondents became entitled to the shares upon intestacy. His argument instead was that they became entitled to receive a share of the deceased's total assets in accordance with the *proportions* set out in the Act and that the personal representatives were free to distribute *any number of shares* to them so long as the statutory proportions were maintained. That being the case, it was further argued that the respondents' claim was not based on any provision of the Act or any other provision of law and that the actual number of shares they received by way of distribution was not in accordance with the applicable laws of intestacy.

21 We could not accept this submission. Article 31A merely requires that the beneficiaries' entitlements resulted from the death of a member "in accordance with the applicable laws of intestacy". A beneficiary entitled to 25% of an intestate's estate will not necessarily get 25% of the shares of a company owned by the deceased. What he is entitled to is the statutory proportion of the estate that is distributed to him, which may or may not include any shares *in specie*. In our view, whatever the number of shares *in specie* he gets from the distribution of the assets of the estate, such distribution would accord with the applicable laws of intestacy even though the number of shares so distributed does not correspond to the number of shares he would have received if the shares had been distributed *in specie.* These words should be read purposively to give effect to the fundamental objective of pre-emption articles to keep the ownership of the shares within members of

the same family or of the families who originally agreed to associate themselves in that way: here, the third, fourth and fifth respondents are clearly not outside persons but the next-of-kin of one of the founders of the company. Such a construction would be consistent with pre-emption rights scheme, as set out in Arts 28 to 31A, which does not require that the shares of a member be offered to the existing members upon his death.

Conclusion

22 For the above reasons, the appeal was dismissed with costs.