



HIGH COURT ALLOWS SHARE TRANSFERS NOTWITHSTANDING THE PRE-EMPTION CLAUSE IN THE COMPANY'S MEMORANDUM AND ARTICLES OF ASSOCIATION

06 April 2020

For any queries relating to this article, please contact:

Yang Yung Chong
Senior Partner, Litigation & Dispute Resolution
DID: 6557 4639
yangyungchong@leenlee.com.sg

Authors:
Yang Yung Chong
Tan Jin Yong

Lee & Lee
50 Raffles Place, #06-00 Singapore
Land Tower, Singapore 048623
Tel: +65 6220 0666

For more legal updates, please visit the News & Publication Section of Lee & Lee's website at www.leenlee.com.sg or follow Lee & Lee's facebook page at www.facebook.com/leenlee.com.sg/

Disclaimer: The copyright in this document is owned by Lee & Lee. No part of this document may be reproduced without our prior written permission. The information in this update does not constitute legal advice and should not form the basis of your decision as to any course of action.

Introduction

1. In *Lim Beng Nga v Yat Guan Pte Ltd* [2020] SGHC 54, the High Court upheld the difference between the transmission of the equitable interest in shares and the transfer of the legal interest in the shares by the registration of the shares by the company.
2. On the facts, the High Court decided that the relevant pre-emption clause in Yat Guan Pte Ltd (the "**Company**") does **not** prevent a person from receiving the equitable interest in the shares given to him upon the death of the original shareholder. The equitable interest in the shares is given to the person by operation of law and is properly characterized as a transmission, and not a transfer of shares.
3. However, as the person still has to register the shares to receive the legal interest in the shares, the relevant pre-emption clause in the Company would have applied if not for the fact that the person fell within the exception in the pre-emption clause by being a person approved by the Board of Directors.
4. The successful 3rd and 7th Defendants were represented by Mr Yang Yung Chong, Mr Tan Jin Yong, and Ms Vanessa Koh of Lee & Lee.

Facts

5. The 2 Plaintiffs, who are brothers and shareholders of the Company, sued their other siblings and nephews to challenge the validity of certain share transfers on grounds that they were in breach of a pre-emption clause in the Company's Memorandum and Articles of Association ("**M&AA**"). They also challenged the resolutions for these share transfers as being void for lack of proper notice.
6. The first transfer of shares took place at a board meeting on 17 November 2014. The 2 directors at that time, the eldest brother as well as the 2nd Plaintiff, attended the meeting together with the Company Secretary and the 4th Defendant who is the son of the eldest brother.
7. At the meeting, the 2 directors appointed the 4th Defendant as a director of the Company and allowed the 2nd Plaintiff to resign as director. As the Company's M&AA required the director to hold at least 1 share in the Company, the 2 directors also approved the transfer of 1 share from the eldest brother to the 4th Defendant.

CASE UPDATE



8. The second transfer of shares took place at an extraordinary general meeting (“EGM”) on 14 September 2016. These shares to be transferred were held by the eldest brother and second eldest brother who had both passed away.
9. For the eldest brother, in his will, he gave all of his 1,021 shares in the Company to the 4th Defendant, his son. As for the second oldest brother, he died without a will, leaving his 670 shares in the Company to his wife and 3 children. However, the wife and 2 of the children signed a Deed of Disclaimer relinquishing their claims to his shares, which resulted in the 7th Defendant, the eldest son, being entitled to all of his shares.
10. The notice for the EGM issued by the Company Secretary did not specify who the 1,021 shares and 670 shares will be transferred to and the number of shares to be transferred to each person receiving the shares. The Plaintiffs complained about the notice and asked for the EGM to be postponed. The Company Secretary replied the next day providing the details of the persons receiving the shares and the number of shares received by each person and declined to postpone the EGM.
11. The Plaintiffs did not attend the EGM and the shares transfer were approved at the EGM. The Plaintiffs subsequently commenced the proceedings in question.

The EGM Notice

12. Regarding the issue of whether the EGM Notice was valid, the High Court reiterated the clear law that notices need to give sufficient particularity on the matters to be discussed and resolved at the meeting. The crucial test is whether the notice contains enough information to enable the recipient to decide for himself whether he should attend, or appoint a proxy on his behalf, or whether he is content to let matters take their course at the meeting.
13. The High Court held that it was **not** necessary for the Plaintiffs to know the recipients of the shares as the notification that shares were being transferred contained sufficient particulars to notify them of a potential occasion for the exercise of their pre-emption rights.
14. In this case, the EGM Notice also contained a minor inaccuracy in that 2 out of the 1,021 shares belonging to the eldest brother were not transferred in accordance with his will as the eldest brother had willed all of his shares to the 4th Defendant, his son. However, these 2 shares were instead transferred to the 5th and 6th Defendants, who were the other 2 children of the eldest brother.
15. Nevertheless, the High Court held that Section 392 of the Companies Act can apply to cure such procedural irregularity. Such a minor inaccuracy would also have had been rectified when the Company Secretary informed the Plaintiffs about the specific recipients of the shares. Given that the Plaintiffs’ presence at the EGM would not have changed the outcome as it was the board of directors’ approval that was conclusive (and not the shareholders’ approval), there was no substantial injustice and the proceedings were valid.

The Share Transfers on 17 November 2014 and 8 September 2016

16. On the facts, the Court first examined the disposition of shares by the eldest brother and second eldest brother, before examining the registration of the shares by the Company.
17. Regarding the disposition of shares by a personal representative to a beneficiary, the High Court held that such a disposition is a **transmission** of the equitable interest in the shares, and **not a transfer**. The High Court relied on the earlier cases of *Guan Soon Development Pte Ltd v Yeo Gek Lang Susie (administratrix of the estate of Teo Lay Swee, deceased)* [2006] 3 SLR(R) 387 and *Seah Teong Kang v Seah Yong Chwan* [2015] 5 SLR 792 in reaching this holding.
18. The fact that the 7th Defendant received all 670 of his father's shares in the Company because his mother and 2 other siblings had relinquished their claims to the shares by executing the Deed of Disclaimer also did not change the disposition of shares from a transmission to a transfer. The High Court held that a renouncement by a beneficiary passes the benefit to the other beneficiaries by way of operation of law. The 7th Defendant therefore obtained the 670 shares by transmission, not by transfer.
19. However, for the beneficiary to obtain the legal interest in the shares, the shares still had to be registered by the company in order to transfer the legal title.
20. The High Court therefore went on to interpret the relevant pre-emption clause in the Company's M&AA, which is Article 28, to address the issue of whether a bare transfer of a legal interest would fall within the pre-emption clause. Article 28 reads as follows:

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, but save as aforesaid and save as provided by Articles 31 and 32 hereof, no share shall be transferred to a person, who is not a member, so long as any member is willing to purchase the same at fair value.
21. The High Court held that pre-emption clauses should be interpreted on a case-by-case basis to determine what kind of transfers would fall under the clause as it is a matter of construction in the context of the articles as a whole. Further, similarly worded clauses should be interpreted in the same way, unless the context points otherwise.
22. In this case, the proper interpretation of Article 28 in its context meant it applies to bare transfers of legal title. There is nothing in the Company's M&AA to suggest that Article 28 only applies when there is a transfer of beneficial title, or that it applies only to sales of shares.
23. This is also supported by the courts' earlier interpretation of similarly worded pre-emption clauses in the cases of *Khoh Chen Yeh Shane (administrator of the estate of Ching Kwong Kuen, deceased) v Seng Realty & Development Pte Ltd* [2012] 3 SLR 1, *Sing Eng (Pte) Ltd v PIC Property Ltd* [1990] 1 SLR(R) 792, and *Safeguard Industrial Investments Ltd v National Westminster Bank* [1980] 3 All ER 849.
24. The various dispositions of shares were therefore not caught by Article 28 since these dispositions were transmitted by operation of law rather than characterized as transfers.

CASE UPDATE



25. As for the registration of the shares by the Company, it is likewise not caught by Article 28 as Article 28 did not apply when the legal interest in shares is transferred to a person approved by the Board of Directors. Article 28 plainly states that “[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...**” (emphasis added).
26. In this case, the transfers on 17 November 2014 and 8 September 2016 were both approved by the Board of Directors at that time, namely the 2nd Plaintiff and the late eldest brother as the Company’s only 2 directors for the transfer on 17 November 2014, and the 4th Defendant as the sole director for the transfer on 8 September 2016.
27. There was therefore no basis to challenge the share transfers and the 2 Plaintiffs’ application was dismissed in its entirety.

About Lee & Lee

Lee & Lee is one of Singapore’s leading law firms being continuously rated over the years amongst the top law firms in Singapore. Lee & Lee remains committed to serving its clients’ best interests, and continuing its tradition of excellence and integrity. The firm provides a comprehensive range of legal services to serve the differing needs of corporates, financial institutions and individuals. For more information: visit www.leenlee.com.sg.

The following partners lead our departments:

Kwa Kim Li
Managing Partner
kwakimli@leenlee.com.sg

Quek Mong Hua
Litigation & Dispute Resolution
quekmonghua@leenlee.com.sg

Owyong Thian Soo
Real Estate
owyongthiansoo@leenlee.com.sg

Tan Tee Jim, S.C.
Intellectual Property
tanteejim@leenlee.com.sg

Adrian Chan
Corporate
adrianchan@leenlee.com.sg

Louise Tan
Banking
louisetan@leenlee.com.sg