

IN THE COURT OF APPEAL OF MALAYSIA

Coram: Hamid Sultan Abu Backer, JCA; Abdul Rahman Sebli, JCA; Mary Lim, JCA

Ng Chong Wee v Ng Chong Geng & Sons Sdn Bhd

Citation: [2018] MYCA 221 **Suit Number:** Civil Appeal No. P-02(NCVC)(A)-1946-09/2017

Date of Judgment: 24 July 2018

Corporate law – Shares – Jurisprudence relating to transmission and transfer of shares

JUDGMENT

[1] The appellant, who is one of the beneficiaries of the estate of his father Hwang Eng Pei @ Ng Eng Puah (deceased), appeals against the decision of the learned Judicial Commissioner. The court had refused his application for the shares he has acquired through the deceased to be transferred onto his name. The application was not to transmit all shares of the deceased in his name as personal representative of the deceased's estate. The distinction of the phrases 'his share', 'all shares', 'transmission and transfer' is important to appreciate this judgment and to derive a correct conclusion in law. The Originating Summons read as follows:

"1. That 250 shares out of the following share certificates transmitted to the Plaintiff by operation of law pursuant to the Grant of Probate of Hwang Eng Pei @ Ng Eng Puah dated 30.04.2015 be registered by the Defendant in the Plaintiff's name within 60 days from the date of this Order herein:-

- (i) Ng Chong Geng & Sons Ltd Certificate No. 0017 dated 27.3.1961 for 30 shares;
- (ii) Ng Chong Geng & Sons Ltd Certificate No. 0018 dated 27.3.1961 for 30 shares;
- (iii) Ng Chong Geng & Sons Ltd Certificate No. 0019 dated 27.3.1961 for 25 shares;
- (iv) Ng Chong Geng & Sons Sdn Berhad Certificate No. 0007 dated 30.12.1975 for 255 shares;
- (v) Ng Chong Geng & Sons Sdn Berhad Certificate No. 0028 dated 7.1.1980 for 215 shares;
- (vi) Ng Chong Geng & Sons Sdn Berhad Certificate No. 0043 dated 23.9.1981 for 30 shares.

2. Costs; and

3. Such further and/or other relief deemed fit and appropriate by this Honourable Court.”

[2] The Memorandum of Appeal reads as follows:

“1. The learned High Court Judge erred in fact and/or in law to fail to appreciate that the Defendant/ Respondent had surreptitiously amended the company's Memorandum and Article of Association upon receiving the Plaintiff's/ Appellant's request to transfer the belated father's shares unto his name;

2. The learned High Court Judge erred in law and/or in fact to fail to appreciate that the transmission and/or transfer of shares belongs to Appellant's belated father is by operation of law;

3. The learned High Court Judge failed to appreciate that the Companies Act 2016 provides that the Respondent shall register the Appellant as a shareholder upon receiving his notification showed evidence of grant of probate has been granted.

4. The learned High Court Judge erred in law and/or facts when he failed to appreciate that there will be no dilution of shares at this juncture and the Respondent's concern that the company will have more than 50 shareholders is premature;

5. The learned High Court Judge erred in law and/or facts when he failed to appreciate that the transaction shown in the Respondent's Affidavit in Reply, Exhibit D-5 is different than the Appellant's. It is a sale and purchase transaction and not by operation of law.

6. The learned High Court Judge failed to appreciate that the Respondent's board of directors is acting in bad faith to prevent registered Appellant to register as a shareholder in Respondent company accordance with his late father's wishes and is attempting to circumvent the deceased's intention and wishes;

7. The learned High Court Judge failed to appreciate that the Appellant has taken all the necessary steps to effect the registration of his late father's shares unto his name;

8. The learned High Court Judge failed to appreciate and/or erred in law and fact that the Board of Director failed to act for the benefit of the company;

9. The learned High Court Judge failed to consider relevant facts and/or law and take into account irrelevant facts and/or law;

10. The learned High Court Judge failed to appreciate that the case *David Hey v New Kok Ann Realty Sdn Bhd* and *Kwality Textiles (Malaysia) Sdn Bhd v Arunachalam & Ors* are distinguishable and/or not applicable in the current suit;

11. The learned High Court Judge failed to appreciate that the Court has the jurisdiction to interfere with the exercise of the company's Board of Directors decision; and

12. The learned High Court Judge failed to consider that the Companies Act 1965 and/or Companies Act 2016 provide the Court discretion to decide on a Company's affair.”

Brief Facts

[3] The brief facts of the case are well articulated by the learned Judicial Commissioner. We will summarise it as follows:

(a) the respondent (a family company) was incorporated on 27-01-1961 by three persons. One of them is the appellant's grandfather Ng Chong Geng.

(b) The grandfather left his shares to his 14 children and 3 grandsons.

(c) Hwang Eng Pei @ Ng Eng Pauh was the father of the appellant who left his 565 shares to his beneficiaries, namely:

(i) The appellant - 250 shares

(ii) Ng Chong Thian - 250 shares

(iii) Ng Xian Jin - 65 shares

(d) Only the appellant's transfer is in dispute here as the directors of the respondent, acting in the best interest of the company and in order to avoid share dilution, decided “not to approve the proposed transfer or transmission”. The respondent however would approve a transfer “to a corporation which is wholly owned by the descendants of the deceased”. The other two beneficiaries accepted the condition imposed by the directors. The appellant refused and sought an order of the court to get his share as beneficiary of the deceased's estate registered under his name.

(e) The request for transfer was made by a letter dated 23-05-2016 and the respondent through its secretary by a letter dated 21-06-2016 rejected the transfer and provided the reasons. The rejection was done within one month as provided by law. Both letters read as follows:

LETTER DATED 23RD MAY 2016

“Your Ref:

OurRef: N0701/CLP/j

Date: 23rd May 2016

The Secretary of
Messrs Ng Chong Geng & Sons Sdn Berhad
c/o System & Administration Sdn Bhd
Persatuan Un Khuay Building
1st Floor, Blok 201

Jalan Macalister
10450 Pulau Pinang.

Dear Sirs/ Madam,

Re: Estate of Hwang Eng Pei @ Ng Eng Puah, deceased Ng Chong Geng & Sons Sdn Berhad

1. We act for the executors of the above deceased estate.
2. We are instructed that the deceased was the shareholder of your company.
3. We are therefore instructed by our client to enclose the following documents for your further action:-

(i) certified true copy of the Grant of Probate (we are instructed that the original copy has been delivered to you with acknowledgement receipt as enclosed);

(ii) original share certificates as follows:-

(a)	Ng Chong Geng & Sons Ltd. Certificate No. 0017 dated 27.3.1961	30 shares
(b)	Ng Chong Geng & Sons Ltd. Certificate No. 0018 dated 27.3.1961	30 shares
(c)	Ng Chong Geng & Sons Ltd. Certificate No. 0019 dated 27.3.1961	25 shares
(d)	Ng Chong Geng & Sons Sdn. Berhad Certificate No. 0007 dated 30.12.1975	255 shares
(e)	Ng Chong Geng & Sons Sdn. Berhad Certificate No. 0028 dated 7.1.1980	215 shares
(f)	Ng Chong Geng & Sons Sdn. Berhad Certificate No. 0043 dated 23.9.1981	10 shares

4. According to the Will, you are obliged to transmit/ transfer the shares into the following names:-

	<u>Transferee</u>	<u>Number of Shares</u>
(a)	NG CHONG THIAM (NRIC No. 641219-08-5521)	250 shares
(b)	NG CHONG WEE (NRIC No. 691129-08-5793)	250 shares

(c)	NG XIAN JIN (NRIC No. 960731-07-5363) (shares held by NG CHONG THIAM as Trustee)	65 shares
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5. Kindly therefore do the necessary in accordance with the company's Memorandum & Articles to have the names transferred into the transferees as above and return to us the new original share certificate in due course.

6. Your urgent attention is much appreciated.

Thank you.

sgd

Yours faithfully,

Encl:

c.c.

Clients”

LETTER DATED 21ST JUNE 2016

“Your Ref.: N0701/CLP/j

Our Ret: N1762/6/DA6/tap/llm

21st June 2016

Messrs. Chua & Ng
Advocates & Solicitors
Suite 3-01, Wisma Sri Weld
3A Pengkalan Weld
10300 PENANG

Dear Sirs,

NG CHONG GENG & SONS SDN. BERHAD
Estate of Hwang Eng Pei @ Ng Eng Puah, deceased

We refer to your letter dated 23rd May 2016 pertaining to the above matter and have been directed by the Directors to inform you that the Directors had at the Board Meeting held on 20th June 2016, decided not to approve the proposed transfer or transmission of shares from the Estate of Hwang Eng Pei @ Ng Eng Puah, deceased to the transferees as stated in your above letter dated 23rd May 2016 based on the following grounds:-

1. To avoid shares dilution and to act in the best interest of the Company, the Directors will

only approve where the shares are transferred to a corporation which is wholly-owned by the descendants of the deceased;

2. According to Article No. 44 of the Company's Articles of Association, the Directors may refuse to register any transfer of a share where the Company has a lien on the shares, or where the Directors are not of opinion that it is desirable to admit the proposed transferee to membership; and

3. According to Article No. 50 of the Company's Articles of Association, the Directors shall have the same right to refuse to register a person entitled by transmission to any shares or his nominee, as if he were the transferee named in an ordinary transfer presented for registration.

As such, we return herewith the Share Certificate Nos. 0017, 0018, 0019, 0007, 0028 and 0043 for your safe keeping.

Kindly acknowledge receipt of the above Share Certificates by signing and return the duplicate of this letter.

Yours faithfully

For and on behalf of

NG CHONG GENG & SONS SDN. BERHAD

sgd

As Secretary

c.c.

The Board of Directors

Ng Chong Geng & Sons Sdn Berhad"

[4] On the date of hearing, after hearing the parties we posed two issues:

(a) Whether the **Companies Act 1965 (CA 1965) or 2016** applies as the appellant had relied on the 2016 Act during the submissions and the learned Judicial Commissioner did not appear to have dealt with this important question.

(b) Whether the issue of transmission of shares relate to the personal representative and not to the beneficiaries, as transfer and transmission are not one and the same.

Preliminaries

[5] This case essentially involves the rights of beneficiaries of deceased shareholder in a private limited company as opposed to public company to be registered as a shareholder as of right. We are of the view that this issue must be dealt with under CA 1965 and not CA 2016 because the rights and obligations of the parties concerned arose under the old CA 1965. Section 620 (4) of **CA 2016** preserves and saves such rights and objections to be dealt with under CA 1965. On this point alone,

the Originating Summons which was moved under CA 2016 ought to have been dismissed *in limine*.

[6] To appreciate the second issue which is the real problem in issue and to arrest any form of convoluted jurisprudence, it must be noted that a private limited company cannot have more than 50 members. [See section 15 of CA 1965]. To say a deceased with 60 sons can all be registered as shareholders is not logical and the law may not entertain such construction. Unlike public companies, Articles of Association of private companies may provide the discretion to accept a transfer of share from its existing member to a third party. However, when it comes to a deceased member, the law recognises that the personal representative (Administrator or Executor) can represent the deceased shareholder with limited rights. This process in law is called rights acquired by transmission. What is important to note is that the law does not give a right to beneficiaries of the deceased estate to have their portion of entitlement to the deceased estate to be registered by way of transfer as of right. This is evident from the terms of section 103(2) which reads as follows:

“(2) A transfer of the share, debenture or other interest of a deceased person made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of the execution of the instrument of transfer.”

[7] To put it simply, personal representative who is recognised by the company to have stepped into the shoes of the deceased is said to have been vested with the shares by transmission. Personal representative having agreed to distribute the shares to the relevant beneficiaries according to law is a separate exercise and does not fall under the concept of transmission as envisaged usually by the Articles of Association as well as legislation. As we said earlier, if such construction is allowed it may breach the 50 member rule.

[8] The appellant's position in the submission appears to be that he had requested for transmission of his entitlement only in his late father's share and not all of the shares of the deceased. In the letter dated 23-05-2016 which we have reproduced above, the appellant request to “transmit/ transfer” shares. However, the prayer in the Originating Summons is related to transfer of his late father's shares to the appellant qua beneficiary and not for the transmission to the appellant as the executor of his late father's estate. On these misconceived letter, prayers in the Originating Summons as well as the submission, the appellant's appeal must be dismissed *in limine*. It is best for purpose of clarity on this issue we set out in verbatim the submission of the learned counsel for the appellant which *inter alia* reads as follows:

“5. Upon obtaining the Grant of Probate, the Appellant sent a letter to the Respondent on 23.5.2016 and requested that his late father's shares to be transmitted to him.

6. However, on or about 21.6.2016 the Respondent's company secretary sent a letter to reject the Appellant's request The content of the Respondent's company secretary's letter is as follows:-

"We refer to your letter dated 23rd May 2016 pertaining to the above matter and have been directed by the Directors to inform you that the Directors had at the Board Meeting held on

20th June 2016, decided not to approve the proposed transfer or transmission of shares from the Estate of Hwang Eng Pei @ Ng Eng Puah, deceased to the transferees as stated in your above letter dated 23rd May 2016 based on the following grounds:-

1. To avoid share dilution and to act in the best interest of the Company, the Directors will only approve where the shares are transferred to a corporation which is wholly-owned by the descendants of the deceased;
2. According to Article No. 44 of the Company's Articles of Association, the Directors may refuse to register any transfer of a share;
3. According to Article No. 50 of the Company's Articles of Association, the Directors shall have the same right to refuse to register a person entitled by transmission to any shares or his nominees..."

7. Upon receiving the letter dated 21.6.2016 from the Respondent's company secretary, the Respondent filed an Originating Summons in the High Court to seek for the following prayers:-

"That 250 shares out of the following shares certificates transmitted to the Plaintiff by operation of law pursuant to the Grant of Probate of Hwang Eng Pei @ Ng Eng Puah dated 30.4.2015 be registered by the Defendant in the Plaintiffs name within 60 days from the date of this order herein. "

C. DISTINCTION BETWEEN TRANSMISSION OF SHARES AND TRANSFER OF SHARES

8. The Learned High Court Judge erred in his decision when he failed to draw a distinction between transmission of shares and transfer of shares. A "transmission" of shares is distinct from a "transfer" and is not subject to the requirement that it must be accompanied by an instrument of transfer.

9. A transfer is a voluntary disposition of legal title to the shares brought about by an act of the shareholder; a transmission, by contrast, is an automatic devolution of title which takes place by operation of law upon the occurrence of a legally significant event, i.e. the death of the shareholder or the shareholder being adjudged a bankrupt.

10. The term 'transmission' is defined in the case of Re L Y Swee & Co Ltd [TAB 1 of Appellant's Bundle of Authority [ABOA]] by Raja Azlan Shah J as follows:-

"Transmission is the term used when shares vest in some person by the operation of law, such as on the death or bankruptcy of a member."

11. A transfer, on the other hand is defined by Lord Reid in the case of Moodie v W & J Shepherd (Bookbinders) Ltd [1946] 2 All ER 1044 [TAB 2 of ABOA] as follows:-

"... *"Transfer," if the word is used in the ordinary sense, means a transfer from one person to another and implies that there must be both a transferor and transferee. But where in respect of shares forming part of the deceased's estate, there is no transfer from one person to another..."*

12. This position in *Moodie v W & J Shepherd (Bookbinders) Ltd* [1946] 2 All ER 1044 was further reflected in the case of *Re L Y Swee & Co Ltd* [1968] 2 MLJ 104, where Raja Azlan Shah J held as follows:-

"The distinction between transfer and transmission on death is important and is well recognised in company law. Transmission is the term used when shares vest in some person by operation of law, such as on the death or bankruptcy of a member..."

See also: JX Holdings Inc and Another v Singapore Airlines Ltd [2016] SGHC 212 [TAB 3 OF ABOA]

13. In the Appellant's case, the process of passing and/or transferring the Appellant's late father's shares to the Appellant by probate of the deceased is a transmission of share by the operation of law.

D. TRANSMISSION OF SHARES

14. The Learned High Court Judge has erred in his decision when he failed to take into account of Section 109 of the Companies Act 2016 and/or Section 103 of the Companies Act 1965. The Learned High Court Judge has only referred to Section 105 of the Companies Act 1965 [TAB 4 ABOA] where it provides as follows:-

"(1) if a company refuses to register a transfer of any shares, debentures or other interest in the company it shall, within one month after the date on which the transfer was lodged with it, send to the transferor and to the transferee notice of the refusal."

15. It is clear that Section 105 of the Companies Act 1965 only deals with transfer of shares and not transmission of shares. While, Section 103 of the Companies Act 1965 [TAB 5 of ABOA] provides as follows:-

"(1) Notwithstanding anything in its articles, a company shall not register a transfer of shares or debentures unless a proper instrument of transfer in the prescribed form has been delivered to the company, but this subsection shall not prejudice any power to register as a shareholder or debenture holder any person to whom the right to any shares in or debentures of the company has been transmitted by operation of law.

...

(4) In this section, instrument of "transfer" includes a written application for transmission of share, debenture or other interest to a personal representative."

16. The Parliament was aware of the distinction between transfer and transmission and understood that transmission is by operation of law. Section 103(2) and (3) of the Companies Act 1965 states that:-

“(2) A transfer of the share, debenture or other interest of a deceased person made by his personal representative shall, although the personal representative is not himself a member of the company, be as valid as if he had been such a member at the time of execution of the instrument of transfer.

(3) The production to a company of any document which is by law sufficient evidence of probate of the will, or letters of administration of the estate, of a deceased person having been granted to some person shall be accepted by the company, notwithstanding anything in its articles, as sufficient evidence of the grant.”

17. Based on the wording of Section 103 of the Companies Act, it would seem like the Parliament, when drafting this Act, intended to make it mandatory for the Company to accept a Probate and act upon it notwithstanding anything in the company’s articles. A transfer will only be made by personal representative i.e. executor or administrator when the shareholder is dead. Therefore, this Section of the Act is relevant to the Appellant's case because it is dealing with the transmission of shares of a dead shareholder.

18. Section 103(3) clearly provides that upon production of the probate of the will of a deceased person, the transfer of shares shall be accepted by the company, notwithstanding anything in the company's articles.

19. The intention of the Parliament to adduce automatic transmission of shares by devolution of law is further amplified in the amended Section 109 of the Companies Act 2016 [TAB 6 of ABOA] which provides as follows relating to the registration of transmission of shares in a company:-

“(1) This section applies if the right to shares or debentures is transmitted to a person by operation of law and the person notifies the company in writing that the person wishes to be registered as a shareholder or debenture holder of the company in respect of the shares or debentures.

...

(4) Any document which is by law sufficient evidence of probate of the will or letters of administration of the estate of a deceased person having been granted to a person shall be accepted by the company as sufficient evidence of the grant.

(5) the company shall register the person as a shareholder or debenture holder of the company in respect of the shares or debentures within sixty days from receiving the notification.”

20. The Appellant humbly submits that both the Companies Act 1965 and Companies Act 2016 compel a company to register the transmission shares to a person in the company by operation of law, i.e. pursuant to probate of the deceased estate but the latter provides clearer explanation specifically with regards to the transmission of shares.

21. Section 619(2) of the Companies Act 2016 states that:-

"Any act made, executed, issued or passed under the corresponding previous written law and in force and operative at the commencement of this Act, shall so far as it could have been made, executed, issued or passed, under this Act have effect as if made, executed, issued or passed under this Act."

22. Section 619(3) of the same Act further states that:-

"The memorandum of association and articles of association of an existing company in force and operative at the commencement of this Act, and the provisions of Table A under the Fourth Schedule of the Companies Act 1965 if adopted as all or part of the articles of association of a company at the commencement of this Act, shall have effect as if made or adopted under this Act, unless otherwise resolved by the company."

23. Based on these provisions, the Learned High Court Judge has erred in his decision by only referring to Companies Act 1965. The Companies Act 2016 expressly states that any act made under the previous law must have effect as if made under the new Act. The Companies Act 2016 clearly stated that it is mandatory to register the Appellant as a shareholder of the company in respect of the shares within 60 days from receiving the notification.

24. Therefore, when Ng Eng Puah passed away, his shares vested in his personal representative, i.e. the Appellant herein. The Respondent has no power to refuse the registration of transmission of shares once the Appellant produces a proper legal representation to the Respondent. The Appellant is entitled to be registered as shareholder of the company upon presenting the Grant of Probate of his belated father.

25. It is also noted that section 109(8) of the Companies Act 2016 expressly provides the Court the permission to intervene with a company's decision as follows:-

"The company and every officer who contravene this section commit an offence and shall, on conviction, be liable to a fine not exceeding ten thousand ringgit and, in the case of a continuing offence, to a further fine not exceeding five hundred ringgit for each day during which the offence continues after conviction."

E. WHETHER THE REASONS GIVEN BY THE RESPONDENT TO REFUSE THE TRANSFER IS VALID

26. The letter dated 21.6.2016 shows that the Respondent refused to effect the transmission of shares based on the following reasons:-

- a. To avoid share dilution and to act in the best interests of the company;
- b. In accordance with the Articles 44 and 50 of the Company's Memorandum and Articles of Association (M&A), the directors have the discretion to refuse or register any transfer of shares in the company.

DILUTION OF SHARES

27. It is trite law that the Directors of a company have the discretion to make decisions for a company but it must be made in the interests of the company. The case of Allied Properties Sdn Bhd v Semua Holdings Sdn Bhd & Ors [1988] 3 MLJ 185 [TAB 7 of ABOA] held as follows:-

"Coming now to the all-important issue as to whether the second to seventh respondents had properly exercised their discretion to refuse registration under art. 23, it must be first borne in mind that they had every right to do so. But when exercising their discretion, it must be done bona fide."

28. The only justification that was provided by the Respondent to justify its refusal to transfer the share is that there will be a dilution of shares in the Respondent's company and the only way to prevent the dilution from happening is by incorporating another private company and transferring the shares into the newly incorporated company.

29. The reason given by the Respondent is premature as there are only 17 shareholders in the Respondent's company to date and there is no basis for the Respondent to claim that the number of shareholders will multiply and/or be more than 50 shareholders at this juncture.

30. The Respondent failed to provide any valid reasons for its refusal to proceed with the transmission of shares to the Appellant other than alleging that there will be dilution of shares in the Respondent's company. The dilution factor is not sufficient to justify the act of the refusal itself.

31. Further, the Appellant submits that there is no consensus between the Appellant with the other beneficiaries, i.e. Ng Chong Thiam and Ng Xiao Jin to form a company and/or a corporation for the purpose. It is unreasonable in all circumstances to compel the Appellant and the other beneficiaries to incorporate a company just to get the shares to be transferred to them.

32. The Learned High Court Judge made an observation in paragraphs 22 to 25 that in meeting on 26.6.2015, the Respondent approved the transfer of estate of Ng Eng Kee to Ng Chong Lam as the executor of his estate and the transfer of shares to Ng Eng Kee and Sons Sdn Bhd, a company incorporated. This indicates that the refusal of the Respondent towards the Appellant's request is effecting the resolution first made on 26.6.2015 and not applicable only towards the Appellant and in effect the resolution applies to all other shareholders.

33. However, the Learned High Court Judge failed to appreciate that the particular document is only a meeting minutes and not a resolution that has been passed. The Respondent has failed to

show that the resolution has been passed in the company.

34. Furthermore, the transfer of shares from Ng Chong Lam to Ng Eng Kee & Sons comes with a consideration of RM148,070.00 which is a purchase transaction and not a transmission of shares by operation of law. This is different from the Appellant's case which is a transmission by law as it was the intention of the Appellant's late father to give the shares to the Appellant and the other beneficiaries without any consideration in return.

35. At all material times, the Appellant has no knowledge of the transactions of the transfer stated above. The Respondent cannot rely on the fact that since Ng Cheong Guan, Ng Chong Lam and Hwang Cheong Synn have proceeded to transfer their shares in compliance with the resolution, the same should be done by the Appellant as well.

THE BOARD OF DIRECTORS DOES NOT HAVE DISCRETION TO REFUSE TRANSMISSION OF SHARES

36. The Learned High Court Judge failed to appreciate that Article 44 of the Memorandum and Article of Association which provides directors the discretion to refuse a transfer do not apply here.

37. Article 44 of the Memorandum and Article of Association is not applicable in the current case as the method of passing the share to the Appellant is through transmission and not by transfer:-

"44. The Directors may refuse to register any transfer of a share where the Company has a lien on the shares, or where the Directors are not of opinion that it is desirable to admit the proposed transferee to membership."

38. The chronology of factual events are as follows:

No.	Date	Event
1.	21.12.2014	Appellant's late father, Mr. Ng Eng Puah passed away
2.	30.4.2015	Appellant obtained a grant of probate pursuant to his late father's will
3.	26.6.2015	Meeting minutes where the executive chairman concerned on the possibility that the number of shareholders of the company would exceed 50 in the near future *this meeting minutes was only approved and signed as correct record on 20.6.2016
4.	23.5.2016	Appellant requested from the Respondent for transmission for the late father's shares unto his name
5.	20.6.2016	Production of the alleged signed correct record of meeting minutes dated 26.6.2015

6.	21.6.2016	The Respondent's company secretary rejected and/or refused to transfer as they are afraid that there is dilution of shares and relied on Article 44 and 50 of the M&A
7.	12.7.2016	<u>The Respondent passed resolutions and deleted Article 41</u>
8.	21.11.2016	Transfer of shares from Ng Chong Lam to Ng Eng Kee & Sons Sdn Bhd
9.	27.1.2017	Transfer of shares from Ng Cheong Guam to Ng Eng Gim & Sons Sdn Bhd

39. Furthermore, the Appellant submits that the Board of Directors of the Respondent is acting in bad faith as article No. 41 of the M&A was deleted in its entirety right after the Appellant requested for the transfer of shares. Article No. 41 of the M&A states the following:-

"41. Any share may be transferred by a member to any child or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, wife or husband of such member, and any share of a deceased member may be transferred by his executors or administrators to any child or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, widow or widower of such deceased member to whom such deceased member may have specially bequeathed the same, and shares standing in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to the trustees for the tie being of such will."

40. Although Article No.41 is related to the transfer of share of a deceased member and not transmission, it can still be evidence that it was deleted right after the Appellant's request to transfer the shares with the intention of preventing and obstructing the Appellant from being registered as a shareholder.

41. The Learned High Court Judge has erred in relying on the case of David Hey v New Kok Ann Realty Sdn Bhd (1985) 1 MLJ 167 [TAB 8 of ABOA] and Kwaliti Textiles (Malaysia) Sdn Bhd v Arunachalam & Ors [1990] 3 MLJ 361 [TAB 9 of ABOA] as these cases discussed on the merits of transfer of shares in a company but not the transmission of shares.

F. CONCLUSION

42. The Appellant submits that the Respondent cannot refuse to register the transmission of 250 shares to the Appellant.

- a. The transmission of the late father's shares is by operation of law and through a valid instrument of transfer (probate);
- b. The Companies Act expressly states that the transmission of those shares is mandatory, whereby failing to do it will result in committing an offence;

- c. The Respondent did not have the discretion to refuse the transmission as Article 50 which gives them the power to refuse was deleted in a special resolution;
- d. The Respondent did not exercise its discretion in a way that is *bona fide*; and
- e. The Respondent did not have sufficient and/or valid reason to refuse the transmission.

43. The Appellant humbly prays that this Honourable Court to allow the Appellant's Appeal with costs.”

Jurisprudence relating to transmission and transfer

[9] It is well established that share transmission is a mechanism by which the title to shares is devolved other than by transfer. The concept will be relevant in cases related to inheritance, succession, devolution by death, etc.

[10] Transmission by operation of law is not a transfer. This concept has been explained by authors as well as by case laws from various jurisdiction where their Companies Act has some relevance to Malaysian Company Law. For example:

(a) The learned authors of Guide to The Companies Act, A. Ramaiya, 11th ed. at page 371 observed:

" 'Transmission by operation of law' is not a transfer. It refers to those cases where a person acquires an interest in property by operation of any provision of law, such as by right of inheritance or succession or by reason of the insolvency or lunacy of the shareholder or by purchase in a Court-sale, while a transfer is effected by act of parties. *Cf. Maheshwari Khetan Sugar Mills v. Ishwari Khetan Sugar Mills*, (1963) 2 Comp LJ 74(81): (1963) 33 Com Cases 1142 (DB) (All): [*Reversed* on another point in (1977) 47 Com Cases 185 (SC)]; *Indian Chemical Products Ltd. v. State of Orissa*, (1966) 2 Comp LJ 63: (1966) 36 Com Cases 592 (SC).

Where the person or persons to whom any shares have been transmitted by operation of law, do not get the shares registered in their own names, as shareholders, they will not be entitled to exercise voting or other rights nor receive dividends on the shares. But at the same time, it should be noted, any dues on the shares such as call amounts may be enforced against them in their capacity as legal representatives of the deceased shareholder.”

(b) The learned authors of Datta on The Company Law, 5th ed. at page 352 sets out the practice notes which says:

“*Transmission is not transfer* so instrument of transfer is not required to be executed in such cases. The secretary must note that the successor who applies for the transmission of shares has sufficient proof of title as evidenced by the Succession Certificate or other appropriate evidence. After verifying the claim of the applicant the transmission of shares be approved by

the board of directors. The share certificate shall be sent to the applicant within two months from the date of deposit of the application for endorsing such transmission of shares.”

And at page 351 observes:

“Transmission-The Board may register the name of a shareholder or debenture-holder without execution of a transfer form but on an application made to that effect in case of transmission by operation of law, such as on the death or insolvency of a member.

Where a shareholder died and his widow obtained succession certificate in respect of 900 shares and the company refused to register all 900 shares in her name as there were two minors also who were entitled to those shares, the court held that it could not be said that the directors acted arbitrarily, capriciously or *mala fide* in refusing to register the transmission as prayed for by the widow on the strength of the succession certificate. Normally if the court found that the directors gave reasons which were legitimate, the court would not overrule that decision merely on a ground that the court would not have come to the same conclusion.” [Smt. Bina Barua v Dalowjan Tea Co. Pvt. Ltd., (1981) 51 Comp. Cas. 660 (Gau)].

(c) In **Seah Teong Kang and another v Seah Yong Chwan** [2015] SGCA 48 it was held that the shares devolved upon the executor was via the process of transmission which takes place by operation of law as follows:-

"In this regard, we should add that we agree with the judge that the proper characterization of the manner by which the shares devolved upon the executor was via the process of transmission (which takes place by the operation of law) and not by a transfer (which occurs as a result of an act of the parties)."

(d) In the English case of **Moodie v W & J Shepherd (Bookbinders) Ltd** [1946] 2 All ER 1044, it was held that 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. This position was followed by the Singaporean case of **Guan Soon Development Pte Ltd v Yeo Gek Lang Susie** [2006] 3 SLR 387; [2006] SGCA 18.

(e) In **Re Kenzler** [1982-1983] 7 ACLR 767 it was held by the Supreme Court that:-

"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."

[11] The net effect of an administrator or executor of estate vested with shares by way of transmission *per se* is not a transfer but some recognition by the company that the deceased shareholder share is represented by the administrator and/or executor. His rights, obligations, etc. may be limited in contrast to a shareholder. The law as well as Articles of Association may allow the administrator and/or executor to be registered as a shareholder. Once, he is registered as a

shareholder, all the rights of shareholder will naturally follow.

[12] In addition, it must be noted that transmission of shares is by virtue of operation of law as opposed to transfer of shares where additional requirements as well as consent have to be satisfied.

[13] Section 103(4) of the **Companies Act 1965**, makes it clear that an instrument of transfer will include application for transmission to personal representative and not to the beneficiaries of the deceased estate. The said section read as follows:

“(4) In this section "instrument of transfer" includes a written application for transmission of a share debenture or other interest to a personal representative.”

[14] For example, if there are three (3) beneficiaries to the estate of the deceased and one of them is a personal representative, then only a transmission in the name of the personal representative is permissible by operation of law. All the beneficiaries cannot as of right get their portion of the shares in the company to be registered in their individual name as of right, unless otherwise provided by the Articles of Association.

[15] For transmission, the requirement to fill up the transfer forms related to share transfer as well as payment of *ad valorem* stamp duty may not be a requisite. However, for transfer to be executed, share forms as well as *ad valorem* stamp duty may need to be paid.

[16] In essence, transmission is related to the transmission of the shares to the personal representative. Transmission is not related to the beneficiaries of the estate. For that, the concept of transfer is involved-see section 103(2).

[17] In this facts of this case, the respondent did not apply Table A Articles 24 to 27 concerning “Transmission of Shares”. Those articles, if incorporated would have read as follows:

“Transmission of Shares

24. In case of the death of a member the survivor or survivors where the deceased was a joint holder, **and the legal personal representatives of the deceased** where he was a sole holder, **shall be the only persons recognized by the company as having any title to his interest in the shares**; but nothing herein contained shall release the estate of a deceased joint holder from any liability in respect of any share which had been jointly held by him with other persons.

25. Any person becoming entitled to a share in consequences of the death or bankruptcy of a member may, upon such evidence being produced as may from time to time properly be required by the directors and subject as hereinafter provided, elect either to be registered himself as holder of the share or to have some person nominated by him registered as the transferee thereof, but the directors shall, in either case, have the same right to decline or suspend registration as they would have had in the case of a transfer of the share by that member before his death or bankruptcy.

26. If the person so becoming entitled elects to be registered himself, he shall deliver or send to the

company a notice in writing signed by him stating that he so elects. If he elects to have another person registered he shall testify his election by executing to that person a transfer of the share. All the limitations, restrictions, and provisions of these regulations relating to the right to transfer and the registration of transfers of shares shall be applicable to any such notice or transfer as aforesaid as if the death or bankruptcy of the member had not occurred and the notice or transfer were a transfer signed by that member.

27. Where the registered holder of any share dies or becomes bankrupt his personal representative or the assignee of his estate, as the case may be, shall, upon the production of such evidence as may from time to time be properly required by the directors in that behalf, be entitled to the same dividends, and other advantages, and to the same rights (whether in relation to meetings of the company, or to voting, or otherwise), as the registered holder would have been entitled to if he had not died or become bankrupt; and where two or more persons are jointly entitled to any share in consequence of the death of the registered holder they shall, for the purposes of these regulations, be deemed to be joint holders of the share.” [Emphasis added].

[18] Instead the Respondent had in its Articles of Association these provisions of which articles 37, 41, 42, 43, 44, 48, 49 and 50 are relevant:

“TRANSFER AND TRANSMISSION

37. In case, any difference arises between the proposing transferor and the purchasing member as to the fair value of a share, the auditor shall, on the application of either party, certify in writing the sum which in his opinion, is the fair value, and such sum shall be deemed to be the fair value, and in so certifying, the auditor shall be considered to be acting as an expert, and not as an arbitrator, and accordingly the Arbitration Ordinance, shall not apply.

41. Any share may be transferred by a member to any child or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, wife or husband of such member, and any share of a deceased member may be transferred by his executors or administrators to any child or other issue, son-in-law, daughter-in-law, father, mother, brother, sister, nephew, niece, widow or widower of such deceased member to whom such deceased member may have specially bequeathed the same, and shares standing in the name of the trustees of the will of any deceased member may be transferred upon any change of trustees to the trustees for the time being of such will.

42. No transfer shall be registered unless a proper instrument of transfer has been delivered to the Company. The instrument of transfer of any share shall be signed both by the transferor and transferee and the transferor shall be deemed to remain the holder of such share until the name of the transferee is entered in the register in respect thereof.

43. The instrument of transfer of any share shall be in writing in the usual common form.

44. The Directors may refuse to register any transfer of a share where the Company has a lien on the shares, or where the Directors are not of opinion that it is desirable to admit the proposed

transferee to membership.

48. The executors or administrators of a deceased member (not being one of several joint holders) shall be the only persons recognised by the Company as having any title to the shares registered in the name of such member, and in case of the death of any one or more of the joint registered holders of any registered shares, the survivors shall be the only persons recognised by the Company as having any title to or interest in such shares.

49. Any person becoming entitled to shares in consequence of the death or bankruptcy of any member, upon proper evidence of the grant, of probate or letters of administration or such other evidence that he sustains the character in respect of which he proposes to act under this clause, or of his title, as the Directors think sufficient, may with the consent of the Directors (which they shall not be under any obligation to give), be registered as a member in respect of such shares, or may subject to the regulations as to transfers hereinbefore contained, transfer such share. This clause is hereinafter referred to as “the transmission clause”.

50. The Directors shall have the same right to refuse to register a person entitled by transmission to any shares or his nominee, as if he were the transferee named in an ordinary transfer presented for registration.

[See pages 139-141 of the Record of Appeal Jil. 2/2]”

[19] It would appear from the terms of Article 49 that the respondent was prepared to treat a person such as the appellant who is entitled to shares “in consequence of the death of a member” as a “transmission”. The respondent has recognised this as a “transmission clause”.

[20] Be that as it may, under the terms of Article 50, the respondent always retained the right to refuse registration, even of a person entitled by transmission. This is consistent with the view of learned authors in their field of law. We add that the respondent’s subsequent amendment and deletion of the abovementioned articles in its Articles of Association have no effect on the above reading as the amendments were made after the decision rejecting the request for registration. With the amendments the respondent’s Articles of Association are more in line with those found in Table A.

[21] Whether transmission or transfer, the Articles of Association may place some restrictions to get a transmission or transfer done as of right. Learned author Walter Woon on Company Law, 2nd ed. at page 473 on restriction of transfer of shares as well as Directors’ Discretion to refuse registration of a transfer, says:

“Restriction on Transfer of Shares

Shares are freely transferable unless restrictions are imposed by the memorandum or articles. [*Re Smith, Knight & Co, Weston's Case* (1868) 4 Ch App 20 (Court of Appeal in Chancery, England); *Re Bede Steam Shipping Co Ltd* [1917] 1 Ch 123, 132 per Lord Cozens-Hardy MR (Court of Appeal, England); *Lim Ow Goik v Sungei Merah Bus Co Ltd* [1969] 2 MLJ 101, 104 per BTH Lee

J (High Court, Malaysia)]. The right to transfer shares may also be restricted by agreement. [*Ontario Jockey Club Ltd v McBride* [1927] AC 916]. In the case of a private company, the transfer of shares must be restricted in some way. [Section 18(1) (Malaysia: s 15(1)(a))]. This is commonly done by giving a discretion to the directors to refuse to register a transfer, or by stipulating to whom shares may be transferred, or by giving to the existing members a right to have any shares offered to them first before they can be transferred ('pre-emptive rights'). A public company may have share transfer restrictions in its memorandum and articles, but this is not compulsory. In the case of public companies that have securities quoted on the stock exchange, there will usually be no restriction on the transfer of shares, since the whole point of a listing is to create a vibrant secondary market. [Some strategic companies have restrictions on transfer of shares to foreigners, eg. banks and some privatized government companies].

Directors' Discretion to Refuse Registration of a Transfer

Directors have no discretion to refuse to register a transfer of shares unless the articles so provide. [*Re Smith, Knight & Co, Westons Case* (1868) LR 4 Ch App 20 (Court of Appeal in Chancery, England)]. Where a discretion is given to the board of directors to refuse to register a transfer, this power must be exercised *bona fide* in what they consider is in the interests of the company and not for any collateral purpose. [*Re Smith & Fawcett Ltd* [1942] Ch 304 (Court of Appeal, England); *Kesar Singh v Sepang Omnibus Co Ltd* [1964] MLJ 122 (High Court, Malaysia); *Lim Our Goik v Sungei Merah Bus Co Ltd* [1969] 2 MLJ 101 (High Court, Malaysia)]. A transferor does not warrant that the consent of the directors will be given when he sells shares to a purchaser. [*London Founders Association Ltd v Clarke* (1888) 20 QBD 576].

If a company refuses to register a transfer by reason of a discretion conferred upon the directors, a notice stating the facts which are considered to justify refusal must be served on the applicant for transfer within one month of the date the application is made. [Section 128(2) (no Malaysian equivalent). In *Xiamen International Bank v Sing Eng (Pte) Ltd* [1993] 3 SLR 228 (High Court, Singapore) Judith Prakash J treated this as requiring the company to state its reasons for refusing to register the transfer]. Where the directors have given reasons for the refusal to register a transfer, the court may evaluate the sufficiency of those reasons. [*Xiamen International Bank v Sing Eng (Pte) Ltd* (1993) 3 SLR 228 (High Court, Singapore); *Lim Ow Goik Sungei Merah Bus Co Ltd* (1969) 2 MLJ 101 (High Court, Malaysia)]. The court may interfere if the directors have acted from some improper motive or arbitrarily and capriciously. [*Re Gresham Life Assurance Society* (1872) LR 8 Ch App 446, 447, 452 (Court of Appeal in Chancery England); *Allied Properties Sdn Bhd v Semua Holdings Sdn Bhd* [1988] 3 MLJ 185 (High Court, Malaysia)]. In *Kwality Textiles (Malaysia) Sdn Bhd v Arunchalam* [1990] 3 MLJ 360, the Malaysian Supreme Court held that:

The court should not interfere with the proper exercise of discretion of the board of directors conferred by the articles to refuse registration for the well being of the company. Indeed the court should be slow to question the exercise of the discretion in the absence of evidence that the board of directors had acted *mala fide*.”

[22] In this case, the respondent had given their reasons for their decision. Not only is the decision one that the respondent is entitled to take, the reasons given (as set out in the letter earlier) do not amount to bad faith.

[23] We have read the appeal records and able submissions of the learned counsel. After giving much consideration to the submissions of the learned counsel for the appellant in detail, we take the view that the appeal has no merit. Our reasons *inter alia* are as follows:

(a) The learned trial judge has set out the facts and dealt with issues and law related to transfer. Learned counsel for the appellant, notwithstanding the Originating Summons is related to transfer of shares has mixed up the jurisprudence related to transmission, thereby to some extent bordering into confusion as well as convoluted jurisprudence.

(b) In the instant case, any reasonable tribunal appraised with the facts of this case as well as the reasons for refusal of transfer, will not come to the conclusion that it was done mala fide. In fact, two other beneficiaries have agreed to accept the condition for transfer imposed by the Board. In our considered view, this is not a fit and proper case to interfere with the discretion of the Board of Directors. [See **Xiamen International Bank v Sing Eng (Pte) Ltd** [1993] 3 SLR 228].

(c) We are in agreement with the submission of the respondent that the governing Act is CA, 1965 and not Act 2016. That part of the submission reads as follows:

“4.1. The Defendant respectfully submit that the Plaintiff's cause of action arose on or before 21/6/2016 when the Defendant's company secretary replied to the Plaintiff's solicitors letter of 23/5/2016 notifying the Plaintiff that on 20/6/2016, the Board Of Directors resolved not to effect transfer the shares. Therefore, when the cause of action arose on or about 21/6/2016 and at that material time, the Companies Act 1965 was applicable as the Companies Act 2016 comes into operation on 31/1/2017.”

[24] For reasons stated above, we take the view that this is not a fit and proper case for appellate intervention. In consequence, the appeal is dismissed with costs. Deposit is to be refunded.

We hereby order so.

Dated: 24 July 2018

sgd

DATUK DR. HJ. HAMID SULTAN BIN ABU BACKER

Judge

Court of Appeal

Malaysia

COUNSEL

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LEGISLATION REFERRED TO:

Companies Act 1965, Sections 15, 103(2), 103(4)

Companies Act 2016, Section 620 (4)

JUDGMENTS REFERRED TO:

Guan Soon Development Pte Ltd v Yeo Gek Lang Susie [2006] 3 SLR 387; [2006] SGCA 18

Moodie v W & J Shepherd (Bookbinders) Ltd [1946] 2 All ER 1044

Re Kenzler [1982-1983] 7 ACLR 767

Seah Teong Kang and Another v Seah Yong Chwan [2015] SGCA 48

Smt. Bina Barua v Dalowjan Tea Co. Pvt. Ltd., (1981) 51 Comp. Cas. 660 (Gau)

Xiamen International Bank v Sing Eng (Pte) Ltd [1993] 3 SLR 228

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