Seah Teong Kang (co-executor of the will of Lee Koon, deceased) and another *v* Seah Yong Chwan (executor of the estate of Seah Eng Teow)
[2015] SGCA 48

Case Number	: Civil Appeal No 40 of 2014
Decision Date	: 10 September 2015
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Chao Hick Tin JA; Andrew Phang Boon Leong JA
Counsel Name(s)	: Earnest Lau and Tan Tian Luh (Chancery Law Corporation) for the appellants; Tay Yong Seng and Alexander Yeo (Allen & Gledhill LLP) for the respondent.
Parties	: SEAH TEONG KANG @ SEAH HIAN CHOR (as the Co-Executor of the Will of Lee Koon, deceased) — SEAH CHIEW TEE (as the Co-Executrix of the Will of Lee Koon, deceased) — SEAH YONG CHWAN (Executor of the Estate of Seah Eng Teow)

Companies – Shares – Transmission

Probate and Administration – Devolution on legal representatives – Choses in action – Shares of company in winding up

Probate and Administration – Distribution of assets – Assents

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2014] 1 SLR 1439.]

10 September 2015 Judgment reserved.

Andrew Phang Boon Leong JA (delivering the judgment of the court):

Introduction

1 A shareholder of a company dies, leaving under his will a specific gift of his shares to several specific legatees. It so happens that, at the time of his death, the company is in the midst of being wound up. Subsequently, a liquidation surplus is declared and the sole executor of the will takes steps to distribute the deceased's aliquot share of the surplus to the specific legatees according to their respective shares under the will. He does so, however, without first seeking to transfer the deceased's shares *in specie* to the specific legatees.

2 The Appellant in this case is the wife of the deceased ("the Testator"). We will hereafter refer to the wife as the Appellant for ease of reference; as will become apparent, although the wife was the plaintiff below, it is two of her children who are parties before this court as appellants. The wife is one of the specific legatees of the bequeathed shares and, notably, also the sole beneficiary of the Testator's residuary estate. She argues, based on the above facts, that the testamentary gift of shares has failed. Her case centres on s 259 of the Companies Act (Cap 50, 2006 Rev Ed) ("s 259") which provides that "any transfer of shares" in a company made after the commencement of winding up of that company "shall unless the Court otherwise orders be void". Since the executor – who is the Respondent in this case – never sought the court's sanction for a transfer of the shares under s 259, no interest in the shares could have been transferred to the specific legatees. And since the specific legatees never acquired any interest in the shares, they were not entitled to receive any part of the

liquidation surplus as representing their respective portion of those shares; that was so because one's right to receive the liquidation surplus necessarily springs from one's shareholding. On this footing, the Appellant submits that the Respondent's attempts at distributing the Testator's aliquot share of the liquidation surplus to the specific legatees were ultimately misguided since, without them having any interest in the shares to begin with, they were, by logical extension, not entitled to any part of the liquidation surplus as well. In the Appellant's view, therefore, the specific bequest of shares had failed and the liquidation surplus declared in respect of those shares accordingly fell into the residuary estate to which she was wholly entitled in her capacity as the sole residuary beneficiary. If correct, this would no doubt defeat the intentions of the Testator in making a gift of those shares and also the expectations of the rest of the specific legatees in receiving the same.

3 It emerges clearly from this conspectus of the Appellant's arguments that the central issue in this case is this: does a specific testamentary gift of shares in a company in winding up *necessarily* fail for want of compliance with s 259? Putting it in a different way, is s 259 a *mandatory* legal requirement which must strictly be fulfilled before a specific testamentary gift of shares can take effect under the will in question? This issue entails a close examination of the devolution of shares under a will upon a testator's death. In our analysis below, it is clear as a matter of *the law of wills* that the Appellant (as one of the specific legatees) *can* acquire an interest – specifically, an ***equitable*** interest – in the bequeathed shares *quite independently* of any consideration of s 259. This will be so if the executor is shown to have ***assented*** to the shares and that, in our view, was clearly manifested in the steps which the Respondent took to distribute the Testator's aliquot share of the liquidation surplus *in lieu* of the shares themselves. All this is not to say that s 259 is entirely irrelevant; we consider that s 259 has *some* relevance, but that is so only to the extent that compliance with it is necessary for the ***legal*** title in the shares to be transferred to the Appellant. In other words, compliance with s 259 in this case would have the effect of *perfecting* the Appellant's title to the bequeathed shares, but the absence of such compliance does not detract from the fact that, upon the Respondent's assent as executor, the Appellant was constituted as the beneficial owner thereof and, concomitantly, became vested with the right to receive her share of the liquidation surplus.

4 In our judgment, therefore, the specific gift of shares in this case did not fail; it properly took effect under the will when the Respondent attempted to distribute the liquidation surplus declared in respect of those shares. Accordingly, we *dismiss* the appeal. Although we have essentially arrived at the same outcome as the Judge (see *Lee Koon (by her attorneys Seah Teong Kang and Seah Chiew Tee) v Seah Yong Chwan (executor of the estate of Seah Eng Teow, deceased)* [2014] 1 SLR 1439 ("the Judgment")), as will become apparent, our reasons are quite different. For the moment, we turn to set out the relevant background to this appeal.

The background facts

5 The Appellant was the widow of the Testator. She was also the plaintiff in the action below. At the time when she commenced the underlying proceedings in Originating Summons No 875 of 2013 ("OS 875/2013"), she was 83 years old and acting through two of her children as her attorneys. They were her eldest daughter, Seah Chiew Tee ("Chiew Tee"), and her elder son, Seah Teong Kang ("Teong Kang"). Unfortunately, by the time of this appeal, the Appellant had passed away and her attorneys, in their capacity as the co-executors of her estate, were granted leave to carry on with the proceedings in OS 875/2013. The Respondent, who was the defendant below, is the Appellant's youngest son and the sole executor of the Testator's estate.

6 The shares which are the subject matter of this dispute are in a company known as Teow Aik Realty (S) Pte Ltd ("the Company"). It was incorporated in 1983 as a family owned and run company

whose principal business was in mixed construction activities. It had a paid up share capital of $5m in the form of 5m shares valued at $1 each. Prior to the commencement of this action, the shares in the Company were held in the following manner:

(a) The Testator: 1.2m shares

(b) The Respondent: 1.8m shares

(c) Teong Kang: 1.8m shares

(d) Chiew Tee: 200,000 shares

7 On 17 December 2007, winding up proceedings were commenced against the Company by Teong Kang in Companies Winding Up No 143 of 2007 ("CWU 143/2007"). Two days later, on 19 December 2007, the Testator made his will ("the Will") under which the Respondent was appointed as the sole executor. By cl 3(ii) of the Will, the Testator bequeathed his entire shareholding of 1.2m shares in the Company in the following manner: 1m shares were bequeathed to the Respondent while the remainder was bequeathed in equal proportions of 100,000 shares ("the Shares") to the Appellant ("the Gift") and 100,000 shares to Chiew Tee. By cl 4, the Testator gave the rest and residue of his estate absolutely to the Appellant.

8 On 22 July 2008, the High Court made an order granting the application to wind up the Company in CWU 143/2007. An order dissolving the Company and releasing the liquidators was only made some five years later on 19 June 2013. In the meantime, the Testator passed away on 2 March 2011, after which the Respondent obtained a grant of probate on 20 April 2012.

9 During the course of the Company's winding up, on 30 May 2012, the liquidators issued a Notice of Return to Contributories, serving written notice to the Testator's estate that a liquidation surplus of $0.15488 per share had been declared in respect of the 1.2m shares held by the estate. That amounted to a gross sum of $185,862.55; but after certain adjustments for sums due from the estate were made, the net liquidation surplus that was eventually paid out to the estate amounted to $177,550.95 ("the Sum"). The Respondent duly collected the Sum in his capacity as executor and thereafter proceeded to distribute it to the Appellant (and to Chiew Tee) under cl 3(ii) of the Will according to their respective shares. As mentioned previously at [1]–[2] above, the Respondent did not, at any time, take steps to transfer *the Shares themselves* to the Appellant.

10 On 20 June 2012, the Respondent made his first attempt at distributing the liquidation surplus by presenting two cheques of $15,488 each to the Appellant and to Chiew Tee. This sum of $15,488 was calculated based on the *gross* liquidation surplus declared for the Testator's estate *before* adjustments were made (*ie*, $0.15488 per share x 100,000 shares). The Respondent explained that he did so as he was willing to receive a reduced sum from the *net* liquidation surplus declared in connection with his own proportion of the bequeathed shares. However, neither the Appellant nor Chiew Tee accepted the respective cheques that were made out to them. Instead, on 28 February 2013, the Appellant issued a letter of demand through her solicitors, informing the Respondent that there appeared to be an ademption of the bequeathed shares upon the court's order to wind up the Company, with the result that the entire liquidation surplus paid out in respect of the bequeathed shares (*ie*, the Sum) fell into the Testator's residuary estate and thus belonged to the Appellant as the sole residuary beneficiary. On her part, Chiew Tee had filed an affidavit in these proceedings stating that she accepts that she is not entitled to any part of the Sum, the entirety of which should properly be paid to the Appellant as the sole residuary beneficiary to be used for her upkeep and medical expenses. Her brother, Teong Kang, also filed a brief affidavit in support.

11 The Respondent replied to the Appellant's letter of demand through his solicitors on 22 March 2013. His position was that the Shares had not been adeemed. With more than six months having lapsed since the issuance of the first cheque, the Respondent's solicitors expressed concern that it might no longer be valid for presentment and thus enclosed a fresh cheque for $15,488 in full and final satisfaction of the Appellant's entitlement under cl 3(ii) of the Will. The Appellant replied through her solicitors on 12 June 2013, maintaining that the Sum fell into the residuary estate and proposing going for mediation to avoid a family dispute. However, this did not materialise and, in the result, the second cheque was again not presented for payment by the Appellant.

12 On 18 September 2013, the Appellant commenced OS 875/2013. She sought a declaration that the Sum formed part of the Testator's residuary estate under cl 4 of the Will and a consequential order that the Respondent transfer the Sum to her forthwith. Notwithstanding the commencement of the action, the Respondent made a final attempt at distributing the liquidation surplus on 26 September 2013 when he issued through his solicitors a third cheque to the Appellant for $15,488. However, the Appellant again refused to accept this cheque. OS 875/2013 duly came up for hearing before the High Court judge ("the Judge") in the court below on 7 November 2013.

The decision below

13 It was made clear to the Judge in the course of the hearing below that the Appellant was no longer relying on there having been an ademption of the Shares as the basis for her argument that the Gift had failed; she accepted that the Shares were still extant when the Testator passed away notwithstanding that the Company was then in the process of being wound up (see the Judgment at [18]). Instead, the Appellant's position was broadly similar to that which we had earlier outlined at [2] above, namely, that without strict compliance with s 259, the Appellant could not have acquired any interest (legal or equitable) in the Shares; and without any interest in the Shares, it followed that she was not entitled to receive any part of the liquidation surplus (see the Judgment at [13]–[14]). Therefore, the Appellant argued that the Respondent had no basis for believing that he could distribute the liquidation surplus *in lieu* of the Shares themselves to give effect to the Gift.

14 The Judge began his analysis by stating that he agreed with the Appellant's primary submission that she never became the legal or beneficial owner of the Shares because of the operation of s 259 (see the Judgment at [22]). In his view, there was, at most, a *transmission* of the Shares *to the Respondent* in his capacity as the executor, which transmission was not caught by the said provision since this only applied to prohibit share *transfers* (see the Judgment at [34]). Nevertheless, the Judge found that it did not follow from the Appellant's lack of ownership interest in the Shares that she was necessarily precluded from receiving the liquidation surplus declared in respect thereof such that the Gift should fail (see the Judgment at [22]). In his view, the Appellant had acquired, by virtue of the bequest of the Shares, not only a chose in action against the Respondent (as executor) to compel due administration of the Testator's estate upon the Testator's death, but also an "interest" in the "fruits" of that chose which in this case referred to the liquidation surplus declared in respect of the Shares once such surplus had been ascertained – and this result obtained *even though* the Appellant was not at any time constituted as the legal or beneficial owner of the Shares themselves (see the Judgment at [36]–[37]). Based on this reasoning, the Judge ultimately held that the liquidation surplus could validly be distributed *in lieu* of the Shares (as indeed the Respondent had done) such that the Gift under cl 3(ii) of the Will did not fail. Accordingly, the Appellant's claim was dismissed.

The issue on appeal

15 The issue raised by the present appeal is one that arises from the confluence of two quite

different areas of the law, *viz*, company law and the law of wills. It is a deceptively simple one: does a specific bequest of company shares to a specific legatee fail because the requirement in s 259 that any transfer of those shares after the commencement of winding up be ordered by the court was not complied with? Section 259 reads as follows:

> **Avoidance of dispositions of property, etc.**
>
> 259. Any disposition of the property of the company, including things in action, and *any transfer of shares* or alteration in the status of the members of the company *made after the commencement of the winding up by the Court shall unless the Court otherwise orders be void*.
>
> [emphasis added]

Our decision

An overview

16 This case is *unusual* inasmuch as it is the legatee herself (*viz*, the Appellant) who is arguing that the bequest has failed for non-compliance with s 259. She seemingly does *not* desire to receive her *share* of the liquidation surplus that arose for distribution after the Company had been wound up. However, when considering her argument as a whole, it immediately becomes apparent why she takes such a position. She argues that, the bequest having failed because of the non-compliance with s 259, the *entire* liquidation surplus declared in respect of the Testator's 1.2m shareholding (*ie*, the Sum) fell into the residuary estate of the Testator and that, as the sole residuary beneficiary appointed under cl 4 of the Will, she is entitled to the *whole* of the Sum (*instead of* only a *share* of it).

17 We pause to observe that if the Appellant's argument centring on the failure to comply with s 259 is accepted, then that would mean that the Testator's intention to make a gift of the Shares under his will is *defeated*. The Appellant argues that this ought to be the case because s 259 is a *legal* requirement which ***trumps*** the *construction or interpretation* of the Will. Whilst we agree that this argument may, in *form*, be correct, ***the underlying premise of the Appellant's argument is that s 259 is such an integral and (more importantly) indispensable requirement that it must therefore be complied with in order for the Gift to take effect*** . ***If, however, it can be demonstrated that s 259 does not have this effect inasmuch as the Gift could nevertheless take effect (even if it is in a more limited fashion) without complying with it, then the Appellant's argument would fail.*** In order to determine which of these two polar (and opposite) arguments is correct, it is necessary, in our view, to examine the precise legal consequences that obtained *vis-à-vis* the Shares themselves upon the Testator's death.

18 We proceed to do this in two (related) steps. First, we will ascertain whether any interest in the Shares passes under the Will to the Appellant and, if so, ***what precisely*** that legal interest is. Second, assuming that an interest in the Shares does pass under the Will to the Appellant, we proceed to ascertain ***the purpose as well as effect of s 259*** with regard to that particular interest. As we shall see in a moment, the first step entails a consideration of principles relating to the law of wills, whilst the second step entails a consideration of principles relating to company law.

Does any interest in the Shares pass under the Will to the Appellant?

Passing of the whole interest in the Shares to the executor

19 Turning, then, to the first step in our analysis, it is clear that ***no*** interest (whether legal or equitable) in the Shares can pass ***directly*** to ***the Appellant*** under the Will upon the death of the Testator because it is ***the executor*** who must execute the Will, *after which* the specific bequests (including the Shares which are the subject matter of the present proceedings) will be distributed to the respective specific legatees under the Will. There is, in this regard, clear authority that, following the death of the deceased, the ***whole*** ownership interest in his assets passes to the executor ***by virtue of his office*** without distinction as to the legal or equitable interest. As Viscount Radcliffe observed in the following oft-cited statement in the Privy Council decision (on appeal from the High Court of Australia) of *Commissioner of Stamp Duties (Queensland) v Hugh Duncan Livingston* [1965] AC 694 ("*Livingston*") at 707:

> … whatever property came to the executor virtute officii came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. …

Later, in the same vein, Viscount Radcliffe went on (at 712) to describe it as a "fallacy" to search for the existence of a separate equitable interest in the assets of the deceased during the course of administration:

> … When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets. …

20 The parties are agreed on this point. However, we pause to note that there is some academic suggestion that the observations in *Livingston* should be qualified such that they apply only to *the unadministered assets of a deceased's residuary estate* but not to *specific bequests*. On this view, the *equitable* interest in the latter *would* indeed vest in the specific legatees *as soon as the testator dies* (see *Snell's Equity* (John McGhee QC gen ed) (Sweet & Maxwell, 33rd Ed, 2015) at para 33-003). The significance of this view is that, if it is correct, then the present appeal can be quickly disposed of on the basis that, since the Shares here were indeed the subject of a *specific bequest*, the equitable interest therein would have passed immediately (and directly) to the Appellant upon the Testator's death, in which event the Gift to her would *not* have failed.

21 However, whilst we acknowledge that Viscount Radcliffe's comments in *Livingston* were indeed made in the context of a residuary estate on the facts of that case, we do not read them as being intended to have the limited effect of applying only to such circumstances. A similar view was taken by the High Court of Australia in *Official Receiver in Bankruptcy v Schultz and another* (1990) 170 CLR 306. That decision dealt with assets which were, as in the present case, the subject of a specific bequest. Despite noting the somewhat different context in which the views in *Livingston* were expressed, the court nevertheless proceeded on the basis that those views applied "with equal force" in the case of a specific bequest (at 312). We also note that the weight of academic authority in fact expressly casts doubt on the soundness of excluding specific bequests from the general rule in *Livingston* which holds that, on the death of the testator, the whole interest in the assets of his estate passes to the executor only (see, in this regard, Roger Kerridge, *Parry & Kerridge: The Law of Succession* (Sweet & Maxwell, 12th Ed, 2009) ("*Parry & Kerridge*") at para 24-35; John Ross Martyn *et al*, *Theobald on Wills* (Sweet & Maxwell, 17th Ed, 2010) at para 10-007; Francis Barlow *et al*, *Williams on Wills* vol 1 (LexisNexis, 10th Ed, 2014) at para 1.8; Jill E Martin, *Hanbury & Martin: Modern Equity* (Sweet & Maxwell, 19th Ed, 2012) ("*Hanbury & Martin*") at para 2-020; and Joel Nitikman, "The Forgotten Law of Assent" (2012) 18(7) Trusts and Trustees 672 ("*Nitikman*") at 680). As some of

these authors have pointed out, it may well turn out during the course of administration that the assets which are the subject of the specific bequest have to be applied by the executor towards the administration of the estate (see also, in this regard, the New South Wales decision of *Bryen v Reus* [1961] SR (NSW) 396 ("*Bryen*") at 399). If so, then that is inconsistent with the notion of the specific legatees having *already* acquired the equitable interest in those assets at the time of the testator's death; thus, the most which can be said, in our view, is that the specific legatees have, during the period of administration, only a chose in action against the executor to have the testator's estate properly administered.

22 We therefore prefer the view that the ***whole*** interest in the Shares in this case does in fact pass, upon the death of the Testator, to ***the executor***. In this regard, we should add that we agree with the Judge (see the Judgment at [34]) that the proper characterisation of the manner by which the Shares devolved upon the executor was via the process of ***transmission*** (which takes place *by operation of law*) and not by a *transfer* (which occurs as a result of an act of the parties) (see *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (John Ross Martyn and Nicholas Caddick gen eds) (Sweet & Maxwell, 20th Ed, 2013) ("*WMS 2013*") at para 45-65; and *Palmer's Company Law* vol 1 (Geoffrey Morse gen ed) (Sweet & Maxwell, Looseleaf Ed, 2015) at para 6.475). The result is that s 259, which governs only the *transfer* of shares after a company is ordered to be wound up, is *not* attracted at this stage.

Passing of equitable interest in the Shares to the Appellant

23 However, where we depart from the analysis of the Judge is at the next stage of the devolution of the Shares from the executor to the Appellant (as one of the specific legatees). To begin with, we are, with respect, not entirely convinced by the Judge's analysis that the Appellant had acquired an "interest" in her aliquot share of *the liquidation surplus (*ie, *the Sum)*, notwithstanding his finding that no legal or equitable interest in *the Shares* had passed to her (see above at [14]). In this regard, we agree with the Appellant that, as a matter of principle, one's entitlement to the liquidation surplus necessarily derives from one's shareholding. This is why, as we have mentioned above at [3] and [17], the focal lens in this case must be trained on the movement of the interest in *the Shares* upon the death of the Testator. It is only when the final destination of the interest in *the Shares* has been properly investigated that one can then answer the question of whether or not the Appellant was entitled to receive her aliquot share of *the Sum* as representing her interest in the Shares.

24 However, we have a more fundamental disagreement with the Judge's analysis, and this concerns the fact that he had basically accepted the Appellant's argument that s 259 *had* to be complied with in order for any interest (whether legal or equitable) in the Shares to pass to the Appellant. It was precisely because he had started off his analysis on this footing that the Judge's inquiry was then focused (wrongly, as we have explained in the preceding paragraph) on whether the Appellant had any interest in *the liquidation surplus*. In our judgment, the Judge's error was, with respect, in entirely omitting to consider the vital concept of ***assent*** in the context of the law of wills, which is basically a dispositive act by the personal representative of an estate (for example, the Respondent *qua* executor here) resulting in the divestment of property held by him by virtue of his office in favour of the beneficiaries of the deceased's estate. Had the Judge undertaken this analysis, then he would (as demonstrated below) have arrived at the conclusion that the Appellant in this case *did* acquire an ***equitable*** interest in the Shares *quite independently* of any consideration of s 259. Let us elaborate.

25 An *assent* is an acknowledgment by a personal representative that an asset of the deceased is no longer required for the payment of the debts of the estate, funeral expenses or general pecuniary legacies (see *WMS 2013* at para 81-01). Where the facts disclose that there has been an assent,

then its *effect*, in the context of a specific bequest under a will, is to turn the executor into a *trustee* of the bequeathed asset because *equitable* ownership *moves to the specific legatees upon the assent* who, for their part, are turned into *beneficiaries* (see *Hanbury & Martin* at para 2-020). From that point onwards, the executor is precluded from dealing with the bequeathed asset as executor (see *WMS 2013* at para 81-20 and *Nitikman* at 675). The effect of an assent upon the role of an executor was explained by Viscount Haldane LC in the leading House of Lords decision of *George Attenborough & Son v Solomon and another* [1913] AC 76 ("*George Attenborough*") in these words (at 85):

> … The executors had long ago lost their vested right of property as executors and become, so far as the title to it was concerned trustees under the will. Executors they remained, but they were executors who had become divested, by their assent to the dispositions of the will, of the property which was theirs virtute officii; and their right in rem, their title of property, had been transformed into a right in personam, – a right to get the property back by proper proceedings against those in whom the property should be vested if it turned out that they required it for payment of debts for which they had made no provision. My Lords, that right always remains to the executors and they can always exercise it, but it is a right to bring an action, not a right of property …

26 To be clear, we should stress that the passing of equitable ownership in the bequeathed asset is "not by the mere force of the assent of the executor, but by virtue of the dispositions of the will which have become operative because of [the] assent" (see *George Attenborough* at 83). In other words, the significance of the assent is that it is necessary to "cause" the property to vest in the legatee, but it should not be mistaken as "the instrument of the vesting", which is in fact the will (see *Bryen* at 399). This is neatly summed up in the following passage in *Nitikman* (at 673):

> … Once the executor assents, it is the Will, rather than the assent, that determines to whom the property goes, and it is the Will, rather than the assent, that is the legal instrument that effects the passage of beneficial interest. The assent is not a conveyance of the property. The assent makes the Will operative, that is, it perfects the beneficiary's beneficial ownership to the assets gifted under the Will.

27 A final point which we make in relation to the doctrine of assent (which is of some importance in the context of the present case) is that, in determining whether such assent exists, the inquiry is necessarily a *fact-sensitive* one. What is sought is an indication by the executor that the bequeathed asset is no longer required for the purposes of administration and that it may pass under the testator's will – and this he or she may do informally and it may be inferred from his or her conduct (see *George Attenborough* at 83). In other words, it is not necessary in order to prove an assent to show affirmatively that the executor had, either verbally or in writing, made a formal declaration to that effect (see, for example, the English High Court decision of *Wise v Whitburn* [1924] 1 Ch 460 at 467).

28 Before we draw these principles together and apply them to the facts of the present case, it is necessary for us to deal with a submission that counsel for the Appellant, Mr Earnest Lau ("Mr Lau"), had advanced before us at the hearing. According to Mr Lau, a mere assent by the Respondent in his capacity as the executor is (contrary to the observations we have made above at [25]) *not* effective to pass *any* interest in the Shares to the Appellant in the absence of a transfer of the Shares to her in accordance with the articles of the Company resulting in her being properly registered as a member. In effect, his submission was that the doctrine of assent has no application where the bequeathed asset consisted of shares because, ultimately, the passing of interest in this particular species of property turns on the conventional notions of share transfer and registration. Mr Lau relied heavily for

this proposition on the following passage in *Williams, Mortimer and Sunnucks on Executors, Administrators and Probate* (John Ross Martyn and Nicholas Caddick gen eds) (Sweet & Maxwell, 19th Ed, 2008) ("*WMS 2008*") at para 78-09:

> *In general a chose in action is not susceptible of a simple assent alone as is the case with pure personalty.* ***For instance, the title to the share or other interests of any member in a company passes by transmission to the personal representative and is transferable in [the] manner provided by the articles of the company.*** The articles of a company cannot, however, by-pass the representatives. If they purport themselves to operate a transfer the articles are invalid to this extent. ***The title of a legatee of stocks, shares and debentures is not generally <u>completed</u> until he is registered as a member of the company.*** … [emphasis added in italics, bold italics, and underlined bold italics]

29 We pause to point out that this passage appears in a substantially similar form at para 81-08 of *WMS 2013*, which is the latest edition of the text, save that where the footnotes in respect of the two bold italicised statements above previously referred to various provisions of the Companies Act 1985 (c 6) (UK), they now cite the equivalent provisions of the Companies Act 2006 (c 46) (UK) ("the 2006 Act"), namely, s 20 and s 544. Section 544 essentially provides that the shares of any member in a company are transferable in accordance with the company's articles and s 20, in turn, provides that the relevant model articles in operation at the time of the formation of the company will apply by default if they are not excluded or modified. Presently, the Companies (Model Articles) Regulations 2008 is in force in the UK and reg 26(1) of Schedule 1, in particular, caters for the transfer of shares. This regulation provides that a transfer of shares may be done "by means of an instrument of transfer in any usual form or any other form approved by the directors" executed by or on behalf of the transferor.

30 These statutory provisions in the above footnote references are important because they provide the proper context within which the statements in para 81-08 of *WMS 2013* must be read. In our view, it is clear that the gist of these provisions is to prescribe that a certain procedure has to be complied with for the transfer of shares – specifically, that procedure is as set out in the relevant articles of the company and will ordinarily require the execution of some instrument of transfer. But it appears clear to us that compliance with such procedure is, to put it simply, necessary only to get the potential transferee onto the company's register of members. In other words, it is necessary only for the passing of ***legal*** title in the shares to the potential transferee. Viewed in this way, it becomes clear that the intention behind the quoted passage (which, as mentioned above, appears in a substantially similar form in *WMS 2013*) is simply to state that, in so far as what is sought to be transferred is the ***legal*** title to shares, a simple assent by the executor is not ordinarily effective because registration in accordance with the company's articles (which may not be circumvented) is strictly required for this purpose. The quoted passage says nothing which detracts from the general principle that an assent remains effective to pass the ***equitable*** interest in the bequeathed asset to the specific legatee. This in fact appears to be implicit in the passage itself where the authors speak of the title of a legatee of shares not generally being "completed" until he is registered as a member of the company. This statement may be read as operating on the basis that an act of assent at least passes title *partially* to the specific legatee (*ie*, the equitable title); what remains to be done in respect of the *legal* title is, as has been canvassed above, registration in accordance with the company's articles.

31 We are fortified in our interpretation of para 81-08 of *WMS 2013* by somewhat similar observations made in *Parry & Kerridge*. The distinction between the legal and equitable title to shares and, importantly, the effect of an assent on both is made explicit in para 24-40 of *Parry & Kerridge*, which we reproduce here:

> … **[I]n the case of a specific legacy, the** *legal* **title to the subject-matter may not be capable of assignment by an assent.** For instance, company shares are only transferable in the manner provided by the articles of the company, *i.e.* by entering the name of the transferee in the register of members of the company. **After an executor has assented to a specific legacy of company shares, he holds the shares as trustee for the legatee until the legal title is duly transferred to the legatee** … [original emphasis in italics; emphasis added in bold]

The last sentence of this passage makes it clear that, upon the assent of the executor, he is effectively transformed into a trustee of the shares for the specific legatees who are simultaneously constituted as beneficial owners of the same. The fact that the specific legatees have yet to be registered as members of the company relates to the separate matter of their *legal* title to the shares but there is no dispute that, in so far as the *equitable* title is concerned, it is theirs upon the assent of the executor (see also, for similar observations, Rosalind Atherton and Prue Vines, *Australian Succession Law: Commentary and Materials: Families, Property and Death* (Butterworths, 1996) at para 18.8.6).

32 Indeed, there is clear authority for this point as cited in *Parry & Kerridge*. This is the decision of the English High Court in *In re Grosvenor* [1916] 2 Ch 375. In that case, a testator had made various specific legacies which included shares. His executors had assented to the specific legacies and were prepared to transfer them to the legatees, subject to the court's determination of how the costs of transferring these legacies ought to be borne – ought they to have been borne by the specific legatees or by the residuary estate? Astbury J reasoned that it had to be the former because once the executors had assented to the shares, beneficial ownership would have passed from them and be vested in the specific legatees who then had to do what was necessary to complete their title to the shares. As Astbury J stated (at 378):

> In the present case the costs of transfer and stamps are not costs incurred by the executors and trustees in getting in the estate for distribution, but they are incurred and payable after the specific legacies have been assented to. On the principle of *In re De Sommery* and *In re Scott these are costs and expenses which the separate specific legatees must pay in order to complete their title to their specific property, which* ***after assent the plaintiffs are holding as trustees for them, and not as executors*** . [emphasis added in italics and bold italics]

33 We therefore reject Mr Lau's submission that an executor's assent made in respect of a specific bequest of shares was ineffective to pass even the *equitable* interest in such shares to the specific legatees.

34 Turning, then, to the facts of the present case, it appears clear to us that when the Respondent made his first attempt at paying out part of the Sum to the Appellant by way of a cheque payment of $15,488 on 20 June 2012 (see above at [10]), he was signalling unequivocally that this sum, *which represented the monetary value of the Shares upon the Company's winding up*, was no longer required for the administration of the Testator's estate. In other words, it can be inferred from the Respondent's conduct that he was, for all intents and purposes, assenting (in his capacity as the executor) to the passing of the interest in *the Shares* under the Will to the Appellant. And as the foregoing discussion has made clear, the precise nature of this interest is the *equitable* interest in the Shares. The same analysis holds in respect of the Respondent's second attempt at making a cheque payment of $15,488 to the Appellant on 22 March 2013 (see above at [11]); this act would similarly have constituted an implied assent by the Respondent which would have been effective to pass equitable interest in the Shares to the Appellant. In so far as the Respondent's third and final attempt at distributing the liquidation surplus to the Appellant on 26 September 2013 was concerned (see above at [12]), we note that this had occurred *after* the Company was ordered to be fully and finally

dissolved by an order of the court dated 19 June 2013 (see above at [8]). As the Shares would have been extinguished from the dissolution of the Company onwards, it would not have been possible for any equitable interest therein to have passed to the Appellant thereafter. Indeed, this was why it was no longer open to the Respondent to simply apply to court for an order under s 259 sanctioning the transfer of the Shares *in specie* to the Appellant. Had such an application been made prior to the Company's dissolution and received the approval of the court, then it would have obviated the need for these proceedings given the position that the Appellant has taken. Nevertheless, the fact remains that there were already two separate occasions on which the Respondent had assented to the Shares being passed to the Appellant. This was effective to constitute her as the beneficial owner of the Shares. Accordingly, we do not see how the Gift can be said to have failed.

35 ***The important point that arises from the foregoing in the context of the present appeal is that, by situating the analysis within the sphere of the law of wills alone, it is clear that no compliance with s 259 is required in order for the Gift to take effect pursuant to the Will itself, at least to the extent of the Appellant acquiring an equitable interest in the Shares.*** But, if this is the case, what, then, is the *relevance* (if any) of *s 259*? This leads us to *the second step* in our analysis, *viz*, the purpose of s 259 in general and its effect with regard to the facts of the present case in particular.

What is the relevance of s 259 in the present case?

36 It appears clear – even from a cursory reading of s 259 (reproduced above at [15]) – that that provision was intended to prevent any adverse dealing with, or dissipation of, a company's assets without the sanction of the court. This is only logical and commonsensical, especially given the fact that a winding up order has already been made against the company concerned. However, if that is in fact the mischief that was sought to be dealt with by s 259 itself, such mischief is ostensibly *not* present in this case. Indeed, that was one of the main submissions advanced at the hearing by counsel for the Respondent, Mr Tay Yong Seng ("Mr Tay"), although he raised a more literal argument that *another* reason why s 259 had no application here was because it is explicitly stated to be relevant only to the "transfer" of shares post-winding up. In this regard, Mr Tay argued, relying on the Supreme Court of Queensland decision of *Re Kenzler* (1983) 7 ACLR 767 ("*Re Kenzler*"), that the passing of interest in the Shares upon the Respondent's assent is more properly characterised as a *transmission*; and since this process (as explained at [22] above) is an entirely different legal concept from a *transfer*, Mr Tay submitted that the present case fell outside of the express ambit of s 259.

37 Counsel for the Appellant, Mr Lau, candidly admitted at the hearing that s 259 was *not applicable* to the facts of the present case – at least in so far as the basic mischief sought to be addressed by that particular provision was concerned. Yet, he nevertheless sought to argue that s 259 *was* applicable on the facts of this case for *another* reason – that in order for the Shares to take effect as a gift under the Will, it was necessary for s 259 to be complied with in order for the Shares to be transferred to the Appellant pursuant to the gift of the same to her under the Will. Even on this preliminary viewing, the *disconnect* between the admission by Mr Lau that this case did not fall within the mischief sought to be addressed by s 259 on the one hand and his (simultaneous) insistence that s 259 is still relevant in relation to the validity of the gift of the Shares under the Will on the other was quite apparent. Whilst it could be said that these two arguments are different, this is only so at a very *literal* level. Surely, if s 259 was never intended to apply to cases such as the present, it would be logically inconsistent to then argue that that provision nevertheless applied to cases such as the present. It therefore appeared to us that what Mr Lau actually meant to say was that, at the time s 259 was enacted, the Singapore Parliament did not specifically have in mind the case of a testamentary gift of shares post winding-up; nevertheless, that provision must now apply in

such a context (as has arisen in the present case) because the validity of the gift depends on compliance with s 259. Quite apart from this point, Mr Lau also sought to address the Respondent's alternative submission based on *Re Kenzler* by arguing that that case had been wrongly decided.

38 Having heard the parties' oral arguments, it appeared clear to us that there were two points raised in connection with the overarching issue of the relevance of s 259 to the present case which would benefit from further submissions, namely: (a) how had *Re Kenzler* been treated in the leading Australian treatises on company law and/or the law of wills and in the subsequent case law; and (b) what was the purposive interpretation of s 259? Parties duly tendered their respective further written submissions and, having considered them, we agree with the position taken by Mr Tay at the hearing in respect of his submissions regarding both the decision of *Re Kenzler* and the underlying purpose of s 259. We proceed to elaborate on these two sub-issues in turn.

Section 259 is relevant only in respect of the transfer (and not transmission) of shares

39 The facts of *Re Kenzler* are as follows. A testator died leaving behind a parcel of shares in a company to one of the executors of his will who was also the residuary legatee. The executor sought to have the shares registered in her own name and, to that end, instructed solicitors who wrote to the company enclosing a document executed by the executors. However, the application for registration was refused by the board of directors purporting to exercise their discretion under the company's articles to decline to register any proposed "transfer" of shares. This led the executor to apply to court for an order that the shares be registered in her name.

40 McPherson J allowed the application. He held that the directors had no power under the company's articles to refuse registration of what was properly a "transmission" of shares rather than a "transfer". He regarded this application for registration as a "transmission" because title to the shares passed to the residuary legatee *by operation of law under the will* – even though that only occurred pursuant to the executor's assent, the assent was *not* what vested title in the shares in the beneficiary. We pause to mention that this is precisely the point that we had made at [26] above, *viz*, that it is the will that is the instrument of vesting and not the assent of the executor. It was upon this reasoning that McPherson J then went on to observe that the application for registration was not to be understood as a "transfer" of the shares but simply as implying the executors' assent to the "transmission" of the same under the will. The following extracts from McPherson J's judgment (at 772–774) are particularly instructive in this regard:

> … ***As a matter of general principle, it seems to me that the process by which the applicant became entitled to her shares is properly described as one of "transmission" in which no "transfer" is involved.*** *The principle is that a legatee takes title to the subject-matter of the bequest* ***by virtue of the will*** *of the deceased, and* ***not by virtue of any act of the executor*** , and this is so whether the legacy is specific or merely residuary: see Williams & Mortimer: *Executors Administrators & Probate*, at pp 848–850. It is true that, until the executor assents, the legatee has merely an inchoate right to the subject of the bequest, but ***it is not the assent that operates to vest title in the beneficiary*** . *As was said by Viscount Haldane in* George Attenborough & Son v Solomon *[1913] AC 76 at 83: "The transfer is not made by the mere force of the assent of the executor but by virtue of the dispositions of the will which have become operative because of this assent."*
>
> …
>
> It follows that an application to the company for registration of the applicant as shareholder in place of the deceased cannot be regarded as a "transfer" from the executors to the applicant as

legatee. Indeed, the better view appears to be that the deceased remains the "member" or "shareholder" until, if at all, the personal representative is registered: *A L Campbell & Co Pty Ltd v Federal Commissioner of Taxation* (1951) 82 CLR 452 *The document headed "transmission" forwarded by the applicant's solicitors is therefore not to be regarded as an application for transfer of the shares from the executors, but simply as a request implying their* ***assent*** *to the* ***transmission*** *from the deceased of legal title to the shares which* ***by virtue of the will devolved on the applicant by operation of law*** *.* Article 22(b) operates, as I have said, only upon a "proposed transfer" of shares, and consequently does not affect the right of a legatee, such as the applicant, to transmission of the shares into her name. There being no other power in the article on which the directors could or did rely, the applicant was and is entitled to registration of the shares in her own name.

[emphasis added in italics, bold italics, and underlined italics]

41 In our view, the logic applied by McPherson J in *Re Kenzler* is sound and in harmony with the basic principles of succession law – because when a specific legatee of shares ultimately acquires an interest in those shares *under the provisions of the will*, it is *by operation of law* that he takes such interest and that is properly a "transmission". This is notwithstanding the fact that the executor's assent is required to give effect to the provisions of the will. The executor's assent, properly understood, merely "activates the gift of the property *by the testator's will*" [emphasis added] (see *Parry & Kerridge* at para 24-39). If there is any disagreement that we have with McPherson J's analysis, it is only in respect of the quite separate point where he says (in underlined italics in the quoted passage) that it is the "legal" title in the shares that passes to the beneficiary by transmission pursuant to an assent. As we have sought to explain at [28]–[33] above, the effect of an assent in respect of a testamentary gift of shares is effective only to pass the *beneficial* interest therein to the specific legatee. It does not serve also to pass the *legal* title in the shares – that is contingent on the registration of a share transfer that has taken place in accordance with the company's articles.

42 Given that *Re Kenzler* generally rests on sound principles, it is unsurprising to find that the proposition which it lays down has *not* been the subject of any adverse comment in the relevant authorities which have discussed this case (see, for example, H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* vol 2 (LexisNexis Butterworths, Looseleaf Ed, 2000, October 2012 release) at para 21.422; *Halsbury's Laws of Australia* vol 7 (LexisNexis Butterworths, 1993) at para 120-5815; and *Australian Corporation Law: Principles and Practice* vol 2 (R P Austin *et al* gen eds) (LexisNexis Butterworths, 1991) at para 7.6.0085; see also *Nitikman* at 674). In fact, the Respondent was able to point us to several Australian decisions which have accepted the proposition in *Re Kenzler*. For example, in *Waters v Winmardun Pty Ltd and Ors* (1990) 3 ACSR 378, which was a decision of the Supreme Court of Victoria, Master Evans affirmed (at 384) the principle in *Re Kenzler* that shares devolved under a will to the legatee by way of transmission (and not by transfer) as follows:

> The word "transfer" when used in this context without any compelling textual indication to the contrary (*Re Kenzler* 7 ACLR 767 at 771[)] has been held *not* to include:
>
> …
>
> (iii) *A transmission of a deceased shareholder's shares to his legatee*[:]*Re Kenzler*, supra.
>
> …
>
> These are all cases in which in a broad sense a shareholder has been divested of his shares *by*

operation of law …

[emphasis added]

43 *Re Kenzler* was also cited with approval in the recent case of *Atwell v Roberts* [2013] WASCA 37 which was decided by the Supreme Court of Western Australia. In that case, the testatrix, Ada, had bequeathed her partnership interest to her nephew, Keith, who was also appointed as the executor of her will. The latter then transferred the partnership interest to himself (*qua* specific legatee) and the question arose as to whether this "transfer" fell within the meaning of cl 6 of the partnership rules which required that a partner proposing to "dispose" of all or any of his or her partnership interest give notice in writing of that desire. The court held that it did not. Relying on *Re Kenzler*, Murphy JA noted that, in assenting to the bequest of the partnership interest, the executor had caused the partnership interest to devolve upon himself by way of "transmission"; he had not, in so doing, purported to "dispose" of the partnership interest (at [301]):

> There are other reasons why cl 6 of the Rules of the 1976 deed is not engaged in relation to the first, fourth, fifth and sixth transfers. As to the first transfer, Ada's interest in the partnership was vested in Keith, as trustee of the Hamersley Trust, by virtue of the disposition in Ada's will. A legatee of an interest in the partnership takes such interest by virtue of the disposition of the will, which becomes operative by the assent of the executor: *George Attenborough & Son v Solomon* [1913] AC 76 at 83; *Ex parte Kenzler* [1983] 2 Qd R 281 at 287. Transmission of the interest to a legatee is not, generally, regarded as an assignment or transfer of the interest: *Ex parte Kenzler* (285–287); and *Andco Nominees Pty Ltd v Lestato Pty Ltd* (1995) 126 FLR 404 at 421–422. In assenting to the bequest, Keith, as executor of Ada's will, was not "proposing to dispose of … his units" within the meaning of cl 6(1) of the Rules. …

44 In light of the above, we hold that *Re Kenzler* is good law. Applying it to the present case, it means that when the Respondent assented to the passing of property in the Shares by making cheque payments of the liquidation surplus to the Appellant, the equitable interest in the Shares devolved upon the Appellant *under the Testator's will* by the process of ***transmission*** . Accordingly, s 259, concerned as it is with the "transfer" of shares post-winding up, is not attracted at all on a plain reading of that provision.

Section 259 is relevant only to bar the registered transfer of shares post- winding up

45 The conclusion which we have just reached – *viz*, that s 259 does not operate to bar the transmission of the equitable interest in the Shares to the Appellant – is further buttressed by a *purposive* interpretation of s 259.

46 To begin with, it has been observed that our statutory insolvency scheme has its "ultimate roots" in the Companies Act 1948 (c 38) (UK) and the latter's predecessor legislation in England; and, despite certain idiosyncrasies, the fundamental features of our statutory insolvency scheme continue to be found either *verbatim* or in recognisable analogues of the historical English insolvency enactments and their modern descendants (see the decision of the Singapore High Court in *Beluga Chartering GmbH (in liquidation) v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (Deugro (Singapore) Pte Ltd, non-party)* [2013] 2 SLR 1035 at [32]–[33]; that decision was reversed in *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815, but not on this particular point). Indeed, in so far as s 259 of our Companies Act is concerned, it is *in pari materia* with s 127 of the Insolvency Act 1986 (c 45) (UK) ("the 1986 Act"). It is therefore useful to consider the rationale behind s 259 with reference to the English statutory equivalent.

47 As the Respondent has pointed out, it appears clear from some of the leading English insolvency texts that the object of s 127 of the 1986 Act is to prevent shareholders from evading liability as contributories by transferring their shares to a man of straw after winding up has commenced (see, for example, Edward Bailey and Hugo Groves, *Corporate Insolvency Law and Practice* (LexisNexis, 3rd Ed, 2007) at para 22.8 and Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 3rd Ed, 2013) ("*McPherson's*") at para 7-062). Importantly for our purposes, it has also been observed that "this policy is *sufficiently served* by avoiding *only* the transfer itself" [emphasis added] (see *McPherson's* at para 7-062). In other words, the focus of s 127 of the 1986 Act is directed only at avoiding a transfer of the ***legal*** title in shares post-winding up in so far as *the company* is concerned. As between *the parties*, however, they remain free to transact in the shares ***beneficially*** unhindered by the prohibition in s 127. There is *no prejudice* to the creditors of the company in allowing such dealings because the persons *as reflected on the company's register* continue, in so far as the company is concerned, to be liable to pay up on calls made in respect of those shares. This is clear from the following insightful commentary in *Vulnerable Transactions in Corporate Insolvency* (Howard Bennett and John Armour gen eds) (Hart Publishing, 2003) ("*Vulnerable Transactions*") at para 8.44 on the general purpose and effect of s 127 of the 1986 Act:

> In a compulsory winding up the liquidator has a duty to settle a list of contributories and a power (delegated to him by the court) to make calls on those contributories to the extent of their liability. By prohibiting any transfer of the company's shares or alteration to the register of members after the commencement of winding up, section 127 eases that task. The liquidator can be confident that members whose names were on the register at the commencement of winding up should be entered on the list of contributories. *If shares are transferred after the commencement of the winding up, as a result of section 127, the transferee is not entitled to be entered on the register of members. The transferor remains liable for any call and is entitled to participate in any surplus assets.* ***However, it appears that a post-petition transfer is only void as regards any effect to be given to it by or against the company with the consequence that the rights and liabilities of the transferor and transferee*** **inter se** ***are not affected.*** [emphasis added in italics and bold italics]

48 Similar observations on the ambit of s 127 were also made by the House of Lords in *Inland Revenue Commissioners v Laird Group plc* [2003] 1 WLR 2476 ("*Laird Group*") where, in commenting on the insolvency regime's purpose of making shares non-transferable, Lord Millett (who delivered the leading judgment) observed as follows (at [32]):

> … [I]t is only the right to transfer *legal* title to the shares which is affected; shareholders remain free to deal with the *beneficial* interest in their shares. *The purpose of making the legal title to the shares non-transferable is merely to freeze the company's register of members at the date of the winding up so that the liquidator can safely deal with the shareholders whose names appear on the register at that date.* … [emphasis added]

49 The early English Court of Queen's Bench decision of *Rudge v Bowman* (1868) LR 3 QB 689 provides a useful illustration of the operation of s 127 of the 1986 Act in the manner described above (see also the discussion in *Vulnerable Transactions* at para 8.45). In that case, the claimant agreed to sell shares in a company to the defendant after the commencement of winding up. Subsequently, the defendant purchaser sought to avoid the contract of sale by relying on the then statutory equivalent of s 127 of the 1986 Act. This argument was held to be misplaced; the statutory prohibition had no application on the facts. In essence, the court held that an agreement between parties in respect of a transfer of shares, as opposed to a completed and registered transfer, was not caught by the section. As Blackburn J observed (at 696):

> *The object of this section is obvious, inasmuch as when a petition has been filed any shareholder might transfer his shares to an insolvent person, and get him registered, so as to get rid of his own liability, and the register might thus be made to consist of persons who had nothing to lose, the legislature intervenes, and says, that between the petition and the order no transfer of shares shall take place, unless the court otherwise orders.* … ***As soon as the list of contributories is fixed, although no transfer can be made till after that, I see no objection in substance to a transfer of shares.*** *If a man choose to speculate in the shares of a company being wound up on the chance of making a profit, and the holder is willing to sell, what is there in point of law forbidding such a bargain, or what is there in the statute which says such a bargain shall not take place?* ***The seller would still remain a contributory*** ; and there is no section in the statute which says a contributory may not bargain as to shares; nor do I see why one of the terms of the bargain should not be a contract of indemnity; not altering in any way the liability of the transferor to the company, but giving him a right of indemnity over against his vendee if he be called upon by the company to pay any call. [emphasis added in italics and bold italics]

50 We do not see any reason why the position in Singapore should be any different from that which obtains in the UK. The aim of preventing the evasion of liability behind s 127 of the 1986 Act is also what underpins s 259 of our Companies Act and, indeed, our courts have also found this policy to be sufficiently protected by applying s 259 to render void only *registered* share transfers post-winding up, without disturbing the parties' underlying transactions that deal only with the *beneficial* interest in such shares. In *Kong Swee Eng v Rolles Rudolf Jurgen August* [2011] 1 SLR 873, Steven Chong J considered whether s 259 applied to prohibit a sale and purchase agreement of shares on the ground that completion of the sale was scheduled to take place only after the commencement of winding up. Chong J held that it did not. He referred to the Supreme Court of Victoria decision of *Jordanlane Pty Ltd v Kitching and others* [2008] VSC 426 ("*Jordanlane*") – which, we pause to observe, also demonstrates that the Australian position in respect of their statutory equivalent (*viz*, s 468 of the Corporations Act 2001 (Cth)) is similar to that in the UK – before stating as follows (at [30]–[31]):

> … *The primary purpose behind s 468 of the Corporations Act is to prevent a shareholder from evading liability as a contributory by transferring shares to some impecunious person after the commencement of winding up.* The Court [in *Jordanlane*] went on to observe that ***such a purpose can be sufficiently served by avoiding the transfer of the shares only as far as the company is concerned*** . Accordingly, a purchaser of the shares, such as the plaintiff, cannot avoid completion in respect of agreements which were entered into prior to the commencement of winding up, even if the company should subsequently be wound up.
>
> Mr Tan [counsel for the purchaser] quite rightly did not seek to rely on s 259 of the Companies Act to avoid completion of the S&P Agreement.
>
> [emphasis added in italics and bold italics]

51 The significance of the foregoing discussion to the present case is in making clear that s 259 does not stand in the way of the Appellant acquiring an equitable interest in the Shares even though the Respondent's assent as executor (which brought about that consequence) occurred only *after* the Company had been ordered to be wound up. Having regard to the purpose underlying s 259, it can be appreciated why it is sufficient to interpret this provision as barring only the *registered* transfer of shares. This prevents shareholders from substituting themselves with other impecunious persons on the register which may, in turn, place the liquidator (and the creditors of the company) in a quite untenable position when calls are made in respect of the shares. By "freezing" the register, to use Lord Millett's description in *Laird Group* (see above at [48]), the liquidator's position is safeguarded in

the sense that he is able to take those who are listed therein as the persons properly liable as contributories, *notwithstanding* any dealings which such persons may have privately entered into which affect the *beneficial* interest in the shares. In light of this, it is unnecessary to read s 259 in a way that reaches *beyond* the register such that it impinges upon the transactions of parties *inter se*.

52 Therefore, apart from the fact that the equitable interest in the Shares devolved from the Respondent (*qua* executor) to the Appellant (*qua* specific legatee) by way of "transmission", s 259 may *also* be understood as having no application in the present case when one takes into account its policy rationale. The outcome of our analysis pertaining to the underlying purpose of s 259 is that it would only kick in, so to speak, *if* the Appellant had sought to *register* herself as the legal owner of the Shares (which she had not done). In that event, she would have had to seek an order from the court under s 259 approving such a transfer affecting the status of the Company's register. This leads us to our final observation in respect of s 259, which concerns the limited relevance that it has to the present case as alluded to at [3] above.

The limited relevance of s 259 to the present case

53 It should be evident from what we have just said in the preceding paragraph that the Appellant had a *choice* as to whether or not she desired – ***in addition to*** having the *equitable* interest in the Shares – to *acquire the* ***legal*** *title in the Shares as well*. If she had elected to acquire the *legal* title in the Shares *as well*, ***then she would have had to seek a court order as required under s 259*** . ***Indeed, in our view, this is the point of confluence, so to speak, between s 259 under company law on the one hand and the law of wills on the other.*** We would add that so long as the transfer of the Shares is not approved by the court pursuant to s 259, the Appellant would – *despite* her entitlement to *the equitable interest* in the Shares – *not* be entitled to the *legal* title in the Shares. This is notwithstanding the fact that the transfer of the legal title in the Shares to the Appellant in this case, had she chosen to apply to the court for an order to this effect under s 259, would not appear to raise any controversy, it being clear that there was no risk of the Testator's liability being evaded as a consequence of such a transfer. In our view, so long as a transfer of the legal title in shares is sought in a situation where winding up has already commenced and it is not in any way to the detriment of any other party, it is well within the spirit and purpose of s 259 for the court to confirm that the said transfer is appropriately effected.

54 Mr Lau, however, relied upon the English Court of Appeal decision of *In re Fry, Deceased* [1946] 1 Ch 312 ("*Re Fry*") to argue that the failure to comply with s 259 in the present case, akin to the failure of the transferor in *Re Fry* to obtain prior approval for the share transfer in that particular case, must result in the Appellant failing to obtain an equitable right in the Shares (as was the decision in *Re Fry*). *However*, the situation in *Re Fry* was *quite different*. As the Respondent has correctly pointed out, that case involved an *inter vivos* transfer of shares from the shareholder to *a* ***single*** *(and, indeed, the* ***only*** *) other party* (*viz*, the intended transferee of those shares). The failure to obtain the requisite approval as required statutorily in *Re Fry* meant that the *legal* title in the shares concerned could not be passed to the transferee; *neither* could that transferee receive the *equitable* interest in the said shares since that would have had to have been *accompanied* by the receipt of the *legal* interest which had (as we have just noted) *failed to pass because of the failure to obtain the requisite approval*. In the present case, however, the *equitable* title in the Shares *did in fact vest in the Appellant upon the Respondent's assent as executor of the Will*. Put simply, *unlike* the situation in *Re Fry*, the Shares in this case did *not* fall into a legal black hole for want of compliance with s 259 *simply because compliance with s 259 was not required in the first place in order for the equitable title in the Shares to vest in the Appellant*. As already noted above, the whole (legal and equitable) title in the Shares vested in the Respondent *qua* executor by way of transmission *via* the operation of law upon the Testator's death. *Thereafter* (as also noted above), the *equitable* interest

vested in *the Appellant* upon the Respondent's assent.

Conclusion

55 For the reasons set out above, we are unable to accept the Appellant's argument which was premised on the failure to comply with s 259. Whilst s 259 was not (as we have elaborated upon above) wholly irrelevant, it did *not* prevent the *equitable* interest in the Shares from vesting in the Appellant by way of transmission pursuant to the Respondent's assent, and thereby giving effect to the Testator's intentions under the Will. In the circumstances, we dismiss the appeal with costs, together with the usual consequential orders.

56 We should add, however, that we do not, with respect, agree with the Judge's observations, as follows (see the Judgment at [39]):

> I do *not* think the [Appellant], or perhaps in this case her attorneys, *acted properly* in attempting to defeat the bequest made to her so as to be able to *plunder a larger gain* from the estate. Certainly it could not have been the Deceased's intention to permit her so to do. [emphasis added]

57 There is no evidence on record that there was anything untoward in the conduct of either the Appellant or her attorneys. Indeed, although we dismissed the appeal, the legal point that was raised was not an easy one by any means, as demonstrated by the analysis above.