

1 **Gan Cheng Khuan**
v
5 **Gan Kah Yang & 2 Ors**

10 **Court of Appeal** – Civil Appeal No. W-02(NCvC)(A)-363-02/2018
Umi Kalthum Abdul Majid, Suraya Othman
and Stephen Chung Hian Guan JJCA

15 September 14, 2018

20 *Probate and administration – Intestate estate – Distribution – Respondents who are
nephews of deceased, claiming entitlement to distribution of deceased's estate under their
late father's entitlement in the estate under s 7 of the Act – Respondents' late father
predeceased deceased – Whether only brothers and sisters of the deceased living at the
time of the deceased's death are entitled to deceased's estate – Distribution Act 1958,
ss 6(1), 6(1), 7, 7(1) – Administration of Estate Act 1925 (UK), ss 46, 47 – Succession
Act 1925 (India), ss 40, 47 – Wills, Probate and Administration Act 1898-1954 (NSW),
s 49*

25 The appellant is the administrator of the estate of one Gan Cheng Keong ("the
deceased") who passed away on March 27, 2009. The respondents are the
children of one Gan Cheng Yee ("Cheng Yee") who is the eldest brother of the
deceased and who had predeceased the deceased on January 27, 1979.

30 The appellant had in the High Court sought various declaratory relief inter
alia, that pursuant to s 6(1) of the Distribution Act 1958 ("the Act"), only the
brothers and sisters of the deceased living at the time of the his death are entitled
to his estate; and that the the issues of Cheng Yee who had predeceased the
35 deceased, are not entitled to the deceased's estate. The question that arose for
determination before the High Court was whether only the brothers and sisters
of the deceased who were living at the time of the death of the deceased are
entitled to the distribution of the deceased's estate. The High Court was of the
40 view that the applicable provision in this instance is s 7(1) of the Act and based on
the words "the share which their parent would have taken if living at the death of
the intestate" therein, held that the respondents are entitled to their late father's
share in the estate of the deceased. It was further held that although Cheng Yee
had predeceased the deceased, his share in the estate of the deceased is not
forfeited as he had left issue namely, the respondents. Hence the instant appeal.

The appellant submitted inter alia that the High Court had misinterpreted
s 7(1) of the Act as the said provision applies only where the estate of an intestate
is directed to be held on trust for the issue of the intestate and that "intestate" in
s 7(1) refers to the deceased and not Cheng Yee. In this regard, it was submitted
that the respondents are not the issues of the intestate or the deceased but are

nephews. The respondents in reply, submitted that pursuant to ss 6(1)(i) and 7 of the Act, the issues of a sibling who had predeceased the deceased are entitled to the distribution. The respondents made reference to ss 46 and 47 of the English Administration of Estate Act 1925 ("the English 1925 Act") which they claim are in pari materia with ss 6 and 7 of the Act as well as the principles found in ss 40 and 47 of the Indian Succession Act 1925 and s 49 of the Wills, Probate and Administration Act 1898-1954 (NSW) in support of their submission that the entitlement of nephews and nieces is not dependent upon a brother or sister of the intestate surviving the intestate.

Issue

Whether the only the brothers and sisters of the deceased living at the time of the deceased's death are entitled to the deceased's estate.

Held, allowing the appeal with no order as to costs

1. Although they may be similar, ss 46 and 47 of the English 1925 Act as well as the Indian and the NSW legislations are not in pari materia with ss 6 and 7 of the Act. Each piece of legislation must be read and interpreted on its own in accordance to established statutory interpretation principles. [see p 322 para 16]
2. The emphasis should be on the words "living at the date of the estate" in s 6(1)(i) of the Act. In this regard, Cheng Yee did not qualify under "the brothers and sisters of the intestate who were living at the death of the intestate" pursuant to s 6(1)(i) of the Act. Hence the respondents cannot take under their late father's share in the estate of the intestate under s 6(1)(i) of the Act. [see p 323 para 22]
3. Sections 6 and 7 of the Act must be read together since both subsections of s 7 specifically refer to s 6. The respondents who are nephews of the intestate, come within "other classes of relatives" of the intestate and if they are taking a share under their late father's entitlement in the estate under s 7 of the Act, they are caught by s 6(1)(i) of the Act. [see p 324 para 23]

Cases referred to by the court

HSBC (M) Trustee Bhd v Kong Kim Hoh & Ors [1999] 3 MLJ 383, HC (ref)
Lim Geik Hoon v Yap Bon Keat [2012] 1 LNS 1243, HC (ref)

Legislation referred to by the court

Australia

Wills, Probate and Administration Act 1889-1954 (NSW), s 49

1 *India*
Succession Act 1925, ss 40, 47

Malaysia
5 Distribution Act 1958, ss 3, 6, 6(1)(i), 7, 7(1), (2)

United Kingdom
Administration of Estate Act 1925, ss 46, 46(1)(v), 47, 47(1), (3)

10 **Other references**

The Law and Practice of Intestate Succession (2nd edn)
The Distribution Amendment) Act 1997 – Amendments to s 6 of the Distribution Act
15 1958 [2004] JMCL 6

15 *Justin Voon Tiam Yu and Chia Wen Chow* (Chia Wen Chow & Associates) for
appellant

20 *Kevin Sathiaseelan, Leng Wie Mun and Farhanna Rosian* (Kevin & Co) for
respondents

Appeal from High Court, Kuala Lumpur – Originating Summons
No. WA-24NCvC-995-06/2017

25 *Judgment received: October 17, 2018*

Stephen Chung Hian Guan JCA (*delivering the judgment of the court*)

30 **The appeal**

[1] The appellant had filed an ex parte originating summons ("the OS") which
was subsequently amended. The interveners applied for leave and were granted
35 leave to intervene in the OS. The interveners have filed an affidavit in opposition
to the OS which excluded them as beneficiaries under the estate of Gan Cheng
Keong ("the deceased").

40 [2] In the OS the appellant applied for the following declaratory orders that:

(a) pursuant to subsection 6(1)(i) of the Distribution Act 1958 ("the Act"),
only the brothers and sisters of the deceased living at the time of his death
were entitled to his estate;

(b) pursuant to the interpretation in subsection 6(1)(i) of the Act, henceforth
the brothers and sisters who were living at the time of the death of the
deceased who are entitled to equal shares of the deceased's estate namely:

(i) Gan Cheng Hoe;

(ii) Gan Soo Hong;

- (iii) Gan Soo Lian (the deceased); 1
- (iv) Gan Chang Joo;
- (v) Soo Lee Veerasamy; 5
- (vi) Soo May Malakuoti; and
- (vii) Gan Cheng Khuan;
- (c) pursuant to the interpretation in subsection 6(1)(i) of the Act, the issues of the eldest brother of the deceased namely Gan Cheng Yee, who died on January 27, 1979, who predeceased the deceased are not entitled to the deceased's estate; 10
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- (d) pursuant to subsection 7(2) read together with subsection 6(1)(i) of the Act, the issue of the brothers and sisters of the deceased living at the time of his death would be entitled to the deceased's estate; and 20
- (e) pursuant to subsection 7(2) read together with subsection 6(1)(i) of the Act, henceforth the issue of Gan Soo Lian who is the second sister of the deceased who was living at the time of death of the deceased, namely Too Heng Khen, is also entitled to the deceased's estate by virtue of his late mother's share. 25

Facts of the case

[3] The appellant/applicant is the administrator of the estate of the deceased pursuant to a letter of administration dated June 2, 2016. The deceased passed away on March 27, 2009. The respondents' late father, Gan Cheng Yee is the eldest brother of the deceased who had predeceased the deceased on January 27, 1979. 30

[4] The appellant filed the application in the High Court for the court's determination including whether only the brothers and sisters of the deceased who were living at the time of death of the deceased are entitled to the distribution of the deceased's estate. The application was allowed in part with certain modifications to the prayer (b) sought by the appellant and hence this appeal. 35
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[5] In his judgment, the learned judicial commissioner ("JC") was of the opinion that the views expressed by the learned authors in the article entitled "*The Distribution Amendment) Act 1997 – Amendments to s 6 of the Distribution Act 1958*" published in [2004] JMCL 6, that the interest of a child who predeceases the intestate and who leaves issue is not forfeited by virtue of subsection 7(1) of the Act, though written in 2004, are not without basis. He also cited the case of *Lim Geik Hoon v Yap Bon Keat* [2012] 1 LNS 1243.

1 [6] The learned JC said that the learned counsel for the applicant in his
submission in reply took pains to explain the provision on subsection 7(2) of the
Act and he said subsections (1) and (2) of s 7 must be read disjunctively by virtue
of a full stop in between and they are quite independent of each other.

5 [7] It was the learned JC's finding that the applicable provision is subsection 7(1)
of the Act and the pertinent words in subsection 7(1) to his mind are "the share
which their parent would have taken if living at the death of the intestate". He
said these wordings would entitle the three interveners to their late father's share
10 in the estate of the deceased. He went on to say that he agreed entirely with the
opinion of the learned authors in the aforesaid Article and the finding of the
learned JC in *Lim Geik Hoon* and what is more important is subsection 7(1)
explains the operation of subsection 6(1)(i) of the Act.

15 [8] In his judgment the learned JC made the following orders:

20 (a) the three interveners, being the issue of Cheng Yee are entitled to their
respective shares in the estate of the deceased under subsection 7(1) of the
Act;

25 (b) Cheng Yee's share in the estate of the deceased is not forfeited although
he had predeceased the deceased, because Cheng Yee had left issue
namely the three interveners;

30 (c) the issue of Soo Lian would also be entitled to his respective share in the
estate of the deceased pursuant to subsection 6(1)(i) of the Act;

(d) the declarations sought in prayers (a), (c) and (d) of the OS are refused;

35 (e) the declaration sought in prayer (b) of the OS is allowed subject to the
variation that the issue of Cheng Yee and Soo Lian are entitled to equal
shares in the deceased's estate; and

(f) prayer (e) is allowed.

40 **The appellant's submission**

[9] The appellant submitted that the learned JC had erred in his decision because
subsection 7(1) of the Act applies only to situations where the estate of an
intestate is directed to be held on trust for the issue of the intestate. It was
submitted that the respondents in this case are not the issues of the intestate or
deceased but are the nephews.

[10] The appellant submitted that the learned JC had erred in misinterpreting
subsection 7(1) of the Act because the "intestate" in subsection 7(1) refers to the
deceased, that is, the late Gan Cheng Keong and not Gan Cheng Yee, the late
father of the respondents.

[11] It was submitted that although the respondents sought to rely on subsection 7(2) of the Act to support their claim, the appellant contended that subsection 7(2) when read together with subsection 7(1) provided only a trust for the other class of relatives of the deceased (other than the issue of the deceased) who has not attained the age of majority. 1
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[12] Counsel for the appellant submitted that by the decision of the learned JC, it would also mean that the nephews and nieces of the intestate will take in priority over the grandparents of the intestate, in the situation where all brothers and sisters of the intestate had predeceased the intestate but left behind issues and this cannot be the intention of the legislation. If it is the intention of the legislation that other classes of relatives of the intestate, other than the issue of the intestate, includes the issue of the members of that class of relatives, it ought to be specifically stated in the Act like how "issue" is specifically defined in s 3 of the Act to include descendants of the deceased child. 10
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The respondents' submission

[13] The respondents contended that the issues of a sibling who had predeceased are entitled to the distribution pursuant to subsection 6(1)(i) and s 7 of the Act. It was submitted that ss 6 and 7 of the Act are drawn from the English Administration of Estate Act 1925 ("the 1925 Act"), wherein, those sections are in pari materia with ss 46 and 47 of the 1925 Act. 20
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[14] The respondents submitted that the manner in which s 47 of the 1925 Act should be interpreted is guided in a book entitled *The Law and Practice of Intestate Succession* (2nd edn). They submitted that there are similar principles found in ss 40 and 47 of the Indian Succession Act 1925 and in s 49 of the Wills, Probate and Administration Act 1898-1954 (NSW). 30

[15] It was submitted that based on these provisions and the decisions in those jurisdictions, the entitlement of nephews and nieces is not dependent upon a brother or sister of the intestate surviving the intestate. The respondents argued that the issues of a sibling who had predeceased the intestate are entitled to the distribution pursuant to subsection 6(1)(i) and s 7 of the Act and therefore they are entitled to the distribution under the estate of their late uncle. 35
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The court's decision

[16] We have read the provisions of ss 46 and 47 of the English 1925 Act and the provisions of ss 6 and 7 of our Act and we were unanimous in our conclusion that these provisions are not in pari materia with each other. Similarly, the provisions in the Indian and NSW legislations referred to by counsel for the respondents are not in pari materia with ss 6 and 7 of our Act. Although they are similar they are not the same. Each piece of legislation must be read and interpreted on its own in accordance to established statutory interpretation principles.

1 [17] The respondents relied on ss 46 and 47 of the English 1925 Act in
interpreting ss 6 and 7 of our Act. The distribution of the estate is determined by
the priority on the entitlement to the estate as set out in the Act.

5 [18] Under s 46(1)(v) of the 1925 Act, if the intestate leaves no spouse or civil
partner and no issue and no parents, then the residuary estate of the intestate
shall be held in trust for the following persons living at the death of the intestate,
and in the following order and manner, namely; first for the brothers and sisters
10 of the whole blood of the intestate, secondly for the brothers and sisters of the half
blood, thirdly for the grandparents and so on. Under s 46(1)(v), which deals with
other classes of relatives of the intestate, other than the children of the intestate,
the residuary estate of the intestate shall be held on trust firstly for the brothers
and sisters of the intestate living at the death of the intestate. The emphasis is on
15 the words "living at the death of the intestate" and do not apply to and do not aid
the respondents' case in this appeal because their late father predeceased and
was not living at the death of the intestate.

20 [19] Section 47(1) of the 1925 Act provides for statutory trusts to be held for the
issue of the intestate, in equal shares, if more than one, living at the death of
intestate, who attained the age of majority or marry under that age. It goes on to
provide for all or any of the issue living at the death of the intestate, who attained
25 the age of majority or marry under that age, of any child of the intestate who
predeceases the intestate, such issue shall take the share which their parent
would have taken if living at the death of the intestate.

[20] Whereas s 47(3) deals with the statutory trusts for any class of relatives of
30 the intestate, other than the issue or children of the intestate. Sections 46 and 47
clearly make a distinction between the issue, meaning the children, of the
intestate and other classes of relatives of the intestate. Section 47(3) provides for
the residuary estate to be held on trusts for any class of relatives of the intestate
35 corresponding to the statutory trusts for the issue of the estate as if such trusts
were repeated with the substitution of references to the members of that class.

[21] Now coming to the provisions of the Act itself, under subsection 6(1)(i) of
40 the Act, if an intestate dies leaving no spouse, issue, parents or a parent, the
whole of the estate of the intestate shall be held on trust for the following persons
living at the death of the intestate and in the following order and manner,
namely: firstly for the brothers and sisters of the intestate in equal shares, then for
the grandparents and so on. The emphasis is on the words "living at the death of
the intestate": see *HSBC (M) Trustee Bhd v Kong Kim Hoh & Ors* [1999] 3 MLJ 383.

[22] In this appeal, the father of the respondents died on January 27, 1979 and
was no longer living on March 27, 2009, at the death of the intestate. Their late
father did not qualify under "*the brothers and sisters of the intestate who were living
at the death of the intestate*" pursuant to subsection 6(1)(i) of the Act. Therefore the
respondents cannot take under their late father's share in the estate of the
intestate under subsection 6(1)(i).

[23] The respondents had tried to come under subsection 7(1). Subsection (1) deals with trusts to be held *for the issue of the intestate* whereas subsection 7(2) provides for trusts in favour of other classes of relatives of the intestate. Both subsections of s 7 specifically refer to s 6 of the Act which means that both ss 6 and 7 must be read together. It is not in dispute that the respondents are not the issue of the intestate but are the nephews of the intestate which come within "other classes of relatives" of the intestate. If they are taking a share under their late father's entitlement in the estate of the intestate under s 7 of the Act, they are caught by subsection 6(1)(i).

[24] For the reasons given, the appeal was allowed with no costs. The order of the High Court dated January 18, 2018 in paragraphs 1 to 4 were set aside and the amended OS in prayers (a), (b), (c) and (d) were allowed. Deposit was refunded to the appellant.

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