Case

Petition for Divorce by the Spouse at Fault in a Marital Breakdown After Approximately Six Years of Separation

[Tokyo High Court, 26 June, 2002, *Hanrei-Jiho* No. 1801, p. 80]

Key Words : petition for divorce by responsible spouse, term of separation

[Facts]

Mr. X graduated from college in March 1974 and got a job in a corporation. In May of that year, he married Ms. Y, whom he had come to know during his school days. Subsequently, two children were born to the couple. In March 1983, the whole family moved to Iraq when Mr. X was sent there by his company. After the family returned to Japan in September 1985, Ms. Y took up a job teaching Japanese at a Japanese language school. Thereafter, a foreign man began to visit the family's home frequently and Ms. Y began taking trips with this man. Mr. X therefore began to have suspicions that an intimate relationship had developed between his wife and this man.

From that time on, Mr. X did not want to even see Ms. Y. He got to know Ms. A, a woman who worked part-time in a traditional Japanese-style restaurant, and began having an affair with her. In March 1996, Mr. X moved out of the family home and rented an apartment ; thus, Mr. X and Ms. Y began to live separately.

Although Mr. X returned to the family home once a week after that, Ms. A began living with him in his apartment in March 1997. Mr. X then became determined to get a divorce from Ms. Y, so in January 2000, he petitioned the Tokyo Family Court to mediate the case. Since Mr. X and Ms. Y were unable to reach a settlement through the mediation of the Family Court, Mr. X sued for divorce.

In response, Ms. Y claimed that the spousal relationship between Mr. X and herself had not completely broken down, or if it had, the marital breakdown had been the result of Mr. X's adultery, and that the petition for divorce should not be accepted from Mr. X because he was the party at fault.

In the first trial of this case, the Tokyo District Court denied Mr. X's petition, ruling that the court could not accept a petition for divorce from the spouse responsible for the breakdown of the marriage. Mr. X then filed an appeal with the Tokyo High Court.

[Judgments]

The Tokyo High Court reversed the lower court's decision and accepted Mr. X's petition for divorce for the following reasons.

- The couple had already been separated for more than six years.
- The couple had no dependent children, since their two children had already come of

age and graduated from college.

- Ms. Y had a monthly income of ¥350,000 from her work as an English instructor, a job she had taken up after quitting her job as an instructor at the Japanese language school.
- Mr. X had made a number of promises of spousal support for Ms. Y, including giving the family home, which Ms. Y was living in, to Ms. Y and paying off the remainder of the mortgage on it.

The High Court found that, considering these facts, it could not be said that Mr. X's petition for divorce went against the principle of good faith. Therefore, finding that there were grounds for Mr. X's petition, the Tokyo High Court reversed the ruling of the District Court and accepted his petition for divorce.

[Comments]

This case involves a type of divorce petition which has long been the subject of debate in this country — a petition for divorce by the spouse at fault in a marital breakdown based on Subsection 5, Section 1, Article 770 of the Civil Code. This paper considers the grounds on which this petition was accepted and the significance of this judgment.

Divorce laws can be broadly classified into two types : fault systems of divorce, that is, traditional systems which based on the idea that one spouse is at fault in a marital breakdown, and "no-fault" systems which allow divorce without placing blame on either spouse. In Japan, the laws concerning divorce in the Meiji Civil Code were based on the notion that one spouse is at fault in a divorce ; however, when this code was revised, an attempt was made to switch to a no -fault system by including in Subsection 5, Section 1, Article 770, abstract wording which allows divorce "If there exists any other grave reason for which it is difficult for him or her to continue the marriage".

In the point of view adopted by the former Civil Code, a petition for divorce by the spouse responsible for the breakdown of the marriage could not be accepted in principle because the responsible spouse has left him-or herself open to criticism by causing the marital breakdown. When the above-mentioned change in the Civil Code was made, the fact that the marriage had broken down was given more weight than the question of fault for this breakdown, yet the issue of responsibility was still given some consideration. Thus, we can see that no-fault divorce systems can be broadly classified into two types : conservative legal frameworks which do not accept petitions of divorce even when there has been a breakdown of the marriage if the person filing the petition is the spouse who was the cause of the rift, and liberal no-fault laws which will accept petitions of divorce from the guilty spouse as long as there has been a breakdown of the marriage.

After a 1952 decision made in this type of case, although there were some early exceptions in which judges considered the fault of the respondent relative to that of the petitioner (e.g., Supreme Court, 24 November, 1955, *Min-Shu* 9-12, p. 1837, in which the petition for divorce by the guilty spouse was accepted because the respondent's

responsibility was found to be greater than the petitioner's), Japanese courts have consistently taken a conservative stance and refused to accept petitions of divorce from spouses seen to be at fault in the breakdown of the marriage (e.g., Supreme Court, 19 September, 1952, *Min-Shu* No. 6-2, p. 110, and Supreme Court, 5 November, 1954, *Min-Shu* No. 8-11, p. 2033).

Subsequently, this rigid interpretation of the law was changed in a 1987 ruling (Supreme Court, 2 September, 1987, *Min-Shu* No. 41-6, p. 1423) in which a petition for divorce by the spouse responsible for marital breakdown was accepted on the condition that this spouse was acting in good faith, as determined by three conditions which had to be met to protect the interests of the weaker party in the divorce proceedings. The three conditions were 1) separation for a considerable period of time, 2) absence of dependent children, and 3) absence of mental or social hardship.

The case under consideration in this paper involved a married couple who had been separated for approximately six years. After the 1987 case (in which the couple had been separated for approximately 36 years), separation of ten years had been considered the rough standard for interpreting the phrase "separation for a considerable period of time", for on the one hand, a court had judged approximately 10 years and three months as "a considerable period of time" ; (Supreme Court, 8 December, 1988, *Kasai-Geppou* No. 41-3, p. 145), and on the other, a separation of approximately eight years had not been judged "a considerable period of time" in another case (Supreme Court, 28 March, 1988, *Kasai-Geppou* No. 41-7, p. 67).

The 1987 court case led the way for more acceptance of no-fault divorce, and Civil Code revisions proposed in 1996 included a clause defining the "considerable period" of separation necessary for no-fault divorce as more than five years. Judging from the above, the case in question can be viewed as one lying almost exactly on the borderline between what was deemed acceptable in current case law and what was being proposed on the legislative front, and it is important as a recent example of a judicial decision which gave a concrete number of years deemed to be "a considerable period of time". Nonetheless, when a separation is evaluated, not only the number of years it has gone on should be considered ; rather, it should be judged comprehensively, taking into account such other factors as society's evaluation of the effects of the passage of time after the start of the separation.

(SASAKI, T.)

Case in which a doctor is accused of neglect of a subsidiary duty of a medical treatment contract because he did not notify a terminal cancer patient's family of his condition

(Supreme Court, P. B. 3 ; Sep. 24, 2002) Hanrei-jiho No. 1803, p. 28

[Facts]

In November 1990, Patient A was examined at Hospital Y and it was determined that he had lung cancer. The cancer had already reached a stage where recovery was deemed impossible. Since Doctor B, the Hospital Y physician in charge of Patient A, judged that it was not appropriate to inform A himself about his condition, he thought that he would inform Patient A's family instead, and asked Patient A to have his family come to the hospital. However, Patient A refused to do this, so Doctor B stopped asking Patient A about his family and in the end, did not contact X, one of the member's of Patient A's immediate family. Doctor B', a second Hospital Y doctor, took over treatment of Patient A from the first doctor, but he did not contact Patient A's family, either.

Then in March 1991, Patient A was examined at a different hospital, C, and the doctor who examined him there informed X, one of the members of Patient A's family, that Patient A had lung cancer. In October 1991, Patient A died without ever having been informed that he had cancer.

X and other members of Patient A's immediate family then filed a claim for damages against Hospital Y, accusing Doctor B et al. of default liability or tort liability because they were late in finding the cancer and neglected suitable medical treatment. In addition, X et al. filed a claim for the payment of a solatium for Patient A's mental anguish, accusing Hospital Y of default liability or tort liability because it had not explained Patient A's condition to either Patient A himself or to Family Member X.

Both the Akita District Court (March 22, 1996, Hanrei-jiho No. 1595, p. 123) and the Akita Branch of the Sendai High Court (March 9, 1998, Hanrei-jiho No. 1679, p. 40) rejected the claim of X and other members of Patient A's family for damages from Hospital Y, because they did not accept the claim that Doctor B et al. neglected suitable medical treatment and were late in finding Patient A's cancer. The Akita District Court also rejected the claim of the family for the payment of a solatium for Patient A's mental anguish from Hospital Y, because it judged that it was within the doctor's range of discretion to decide whether or not to explain Patient A's condition to Patient A himself or to Family Member X. However, the Akita Branch of the Sendai High Court judged as follows : It was within the range of discretion of Doctor B et al. not to inform Patient A of his condition, but since they had decided not to inform the patient himself, Doctor B et al. had a duty to inform ! Patient A's family of his condition. Doctor B et al. were found guilty of neglecting this duty. Consequently, the Sendai High Court ordered Hospital Y to pay ,200,000 to X et al. as a solatium because of the default liability or tort liability of

Doctor B et al., noting that X et al. had inherited this right of a claim for damages.

Hospital Y appealed to the Supreme Court.

[Judgments]

The Supreme Court rejected Hospital Y's appeal, ruling as follows:

"A doctor has a duty to explain the diagnostic results of a medical examination and the plan for medical treatment, etc., to a patient as part of the medical treatment contract. When a doctor who diagnoses terminal illness in a patient and views the remainder of the patient's life to be restricted judges that he should not inform the patient of his findings, in the view of the importance of the diagnostic result for the patient and his family, the doctor has the following subsidiary duty as part of the medical treatment contract: At the very least he should contact a person who can easily contact the patient's family and investigate whether he should inform the patient himself or the patient's family of the diagnostic results and explain the diagnosis to them when he is able to judge that it is appropriate to do so. A family whom the doctor has informed in this way can understand the doctor's plan for medical treatment and support the patient materially and emotiona ! lly during the treatment; moreover, they will treat the patient as warmly as possible so that the remainder of patient's life may be more peaceful and fulfilling. The cooperation and consideration of the patient's family which would derive from being informed of the patient's condition at an appropriate time are therefore considered benefits of the medical treatment contract which should be protected legally.

When this principle is applied to this case, we see that even though Doctor B, who treated Patient A, could have easily contacted someone in Patient A's family by checking Patient A's family relations listed on the patient's chart, he did not do that, nor did the other doctors at Hospital Y contact Patient A's family in order to determine if they should inform the family of Patient A's condition. If Doctor B et al. had established contact with Family Member X through someone in Patient A's family who was easy to contact in order to judge whether Family Member X and others in Patient A's immediate family should be informed of Patient A's condition, he could have determined that X et al. were indeed persons who should be informed of Patient A's condition, and could then have gone ahead and informed them of his condition. Therefore, such actions of Doctors B et al. were inadequate for a terminal cancer patient diagnosed as having only a short time left to ! live, and Doctor B et al. were found to have neglected their duty of contacting the family of such a patient and informing a suitable family member of the patient's condition. Consequently, X et al. were not able to care for Patient A as warmly as possible to ensure that the remainder of Patient A's life could be more fulfilling, since they did not learn that Patient A had terminal cancer until they were informed by Hospital C. Therefore, the family's claim against Hospital Y for the solatium is valid.

However, Judge Toyozo Ueda filed the following dissenting opinion: It is not clear what duties a medical treatment contract places on a medical organization in terms of

informing a terminal cancer patient or his family about terminal cancer. Accordingly, Judge Ueda felt that the court should reverse the decision and remand the case to the Akita Branch of the Sendai High Court, and also make the Akita Branch of the Sendai High Court judge whether Hospital Y defaulted on a medical treatment contract and neglected its duty as prescribed by it.

[Comments]

This judgment contains two major points : (1) It found that a doctor had neglected a subsidiary duty of a medical treatment contract because he did not inform a terminal cancer patient's family about the patient's condition, and (2) it clearly stated that the cooperation and consideration that would have been provided by the patient's family had it been informed of the patient's condition at an appropriate time were benefits of the medical treatment contract which deserve legal protection. I will briefly comment on these two points.

(1) In Japan, there is debate about whether informing a cancer patient of his condition is included among the duties of a medical treatment contract. (Judge Ueda's dissenting opinion, mentioned above, clearly pointed this out.) The Supreme Court appears to have upheld the judgment of the Akita Branch of the Sendai High Court that not having explained Patient A's condition to either Patient A himself or to Family Member X was within the range of discretion of a doctor, since the wording of the Supreme Court ruling ("When a doctor who diagnoses terminal illness in a patient and views the remainder of his life to be restricted judges that he should not inform the patient of his findings. . . .") assumes that such a choice is within the doctor's discretion. I approve of this judgment of the Supreme Court, because I think that the question of whether or not to inform a cancer patient of his condition should be left to the discretion of the doctor, who needs to base his deci ! sion on a comprehensive judgment about the stage of the cancer and the patient's condition, rather uniformly informing patients of their condition.

(2) I cannot approve of way the Supreme Court ruling turned the need to inform the patient's family into a general principle, stating, "The cooperation and consideration of the patient's family which would derive from being informed of the patient's condition at an appropriate time are therefore considered benefits of the medical treatment contract which should be protected legally." There could be situations in which families do not cooperate with the patient's medical treatment and do not consider it, in actuality, even if the doctor informs them of the patient's condition at an appropriate time. Therefore, it is problematic to "generalize" the benefits a patient might receive from such cooperation and consideration by his family, regarding them as "benefits of the medical treatment contract which should be protected legally". If this type of benefit is generalized in this way, the following danger will arise : the benefit of the medical treatment contract to the ! patient will not only be expanded,

but also, accepting the concept of such infringement of patients' benefits will result in a very broad definition of a doctor's duty to warn patients in order to protect the benefits they are entitled to under the medical treatment contract. Actually, the Supreme Court only described this as a general principle, and did not include any concrete "benefits of the medical treatment contract which should be protected legally" in its ruling. Careful examination is needed to determine whether various benefits are "benefits of the medical treatment contract which should be protected legally"; however, the Supreme Court ruling was not based on such careful examination.

(KIMURA, K.)

Case Concerning Taxation of Profits from the Exercise of Stock Options

(Tokyo District Court, November 26, 2002; *Hanrei-jiho*, No. 1803, p. 3)

Key Words: stock option, earned income, occasional income

[Facts]

The plaintiff in this case, Mr. X, is an employee of Company A, which is incorporated in Japan. Company A is a subsidiary of Company B, which is incorporated in the United States. Mr. X was given stock options by Company B.

Stock options are the right given by a company to directors or employees of that company to acquire a certain number of shares of the company's stock at a fixed price, called the strike price, within a fixed period of time. When the price of the company's stock rises, the directors and/or employees who have been given stock options can exercise this right to purchase stocks at the strike price. If the stocks thus acquired are sold immediately, the difference between the current market price and the strike price of the stocks will serve as profits for the person who exercises the stock option.

The fundamental income tax interpretive regulations issued in 1996 stated that in principle, income derived from the exercise of stock options was to be considered occasional income. However, in 1998, the Tax Bureau established a policy by which the difference between the value of the stocks sold at the current market price and their value when purchased at the strike price would be regarded as earned income for tax purposes. This policy has been in effect since 1998.

The plaintiff in this case, Mr. X, exercised his stock options to acquire common stock of Company B, which he sold immediately to realize a profit. In filing his tax return, Mr. X classified this profit as occasional income.

However, the Superintendent of the Taxation Office, Mr. Y, decided that this income was in fact earned income. He therefore decided to reassess Mr. Y's taxes and levied a penalty for underpayment.

Mr. X then filed a claim against Tax Superintendent Y arguing the following three points.

- Because this income was derived from a fluctuation in the price of the stock, it is not something that could be relied upon. Moreover, it cannot be said that this income is of the same nature as income derived as remuneration for labor. Since the amount of income may vary according to the price of the stock at the time the stock option is exercised, it seems only natural to view this as occasional income.
- Mr. X does not have an employment contract with Company B nor any similar agreement. Therefore, the profit derived from the exercise of stock options does not correspond to earned income.
- For well over 10 years the Tax Bureau supervised by Mr. Y had instructed taxpayers to classify income of this type as occasional income. Mr. X had trusted these instructions in filing his tax return. Therefore, reclassifying such income as earned income constitutes a breach of principle of good faith.

[Judgment]

The Tokyo District Court accepted Mr. X's claim for the following reasons.

Profits obtained through the exercise of stock options are not remuneration for services rendered ; rather, they are incidental income derived from the use of judgment in investment. They are not related to labor ; they are related to assets. Moreover, this type of income is not necessarily generated repeatedly. The reassessment of this income as earned income is therefore not legitimate, and the penalty for underpayment which was based on this reassessment is also illegal.

The defendant, Mr. Y, argued that even if the profits from the exercise of stock options are not considered earned income, they should be classified as miscellaneous income, and therefore the plaintiff's declaration of income still should be considered incorrect. However, the Court stressed that such an interpretation is also based on the view of these profits as remuneration for services rendered and is therefore also mistaken.

The Court concluded that profits obtained through the exercise of stock options are neither earned income nor miscellaneous income, and that therefore, they should be classified as occasional income for tax purposes.

[Comments]

The issue in this case was as follows : Are the profits obtained by exercising stock options earned income, occasional income, or miscellaneous income ? Earned income, occasional income, and miscellaneous income are defined in Individual Income Tax Act as follows.

Earned income : Earned income shall mean income pertaining to salary, pay, wages, yearly allowances and bonuses, as well as earnings of a similar nature. (Individual Income Tax Act, art 28)

Occasional income : Occasional income shall mean income other than interest income,

dividend income, real estate income, business income, earned income, retirement income, timber income or capital gain, which is temporary in nature and which is not accrued from continuous action for the purpose of profit-making nor considered as remuneration for services such as labor or for the transfer of assets. (Individual Income Tax Act, art 34)

Miscellaneous income : Miscellaneous income shall mean income not falling into the categories of interest income, dividend income, real estate income, business income, earned income, retirement income, timber income, capital gain or occasional income. (Individual Income Tax Act, art 35)

On April 24, 1981, the Supreme Court defined earned income as follows : "Earned income is payment which laborers receive from an employer under the following conditions :

- There is an employment contract or agreement similar to one.
- Laborers follow the employer's directions.
- The payment which the laborers receive from the employer is remuneration for services the laborers provide to the employer."

We can therefore judge the profits gained through the exercise of stock options as follows :

- It will be considered earned income if there is an employment relationship.
- If there is no employment relationship, the profits will be considered miscellaneous income if they are regarded as remuneration for services rendered.
- If there is no employment relationship and the income is not regarded as remuneration for services rendered, the profits will be regarded as occasional income.

The Tokyo District Court judge who heard this lawsuit determined that in the case of profits derived from the exercise of stock options, there is neither an employment relationship nor can the income be regarded as remuneration for services rendered. Therefore, the judge held that this income should be classified as occasional income for tax purposes.

Superintendent Y appealed this decision and the case is now under trial in the Tokyo High Court.

(YASUI, E.)

Case in Which a Transfer Recognition Claim Was Withdrawn After a Preemptor Had Been Specified Under Share Transfer Restrictions

(Supreme Court, P. B. 1, Feb. 27, 2003) [Minji-Hanreishu, Vol. 57, p. 202]

Key Words : restriction on transfer of shares, right of first refusal

[Facts]

In this case, Company X, was a shareholder of Company A, holding 180 of the 600 shares issued by the company. The Articles of Association of Company A included a regulation restricting the transfer of shares and requiring shareholders to obtain permission from the Board of Directors before selling its stock. In a document which was delivered on April 21, 2000, Company X asked Company A to grant permission to sell its stock to Company B or to specify another preemptor to whom the stock should be sold. In response, the Board of Directors of Company A informed Company X that it refused to grant permission of the sale of stock to Company B and specified Y, a Member of the Board of Directors of Company A, as the partner of this transfer (preemptor) in a document which arrived on May 1st of the same year. Company X then withdrew its requests for transfer recognition and preemptor specification in a document which arrived May 6th. Nonetheless, on May 8th, Y (acting in accordance with Subsections 1 and 3 of Section 204.3 of the Commercial Code at the time) made a deposit for the sale of the stocks and demanded that Company X sell its Company A stock to him on May 9th.

Y then sought stock sale price mediation by the court of first instance, claiming that there was a disagreement on the selling price (Commercial Code Subsection 1, Section 204.4). However, Company X asserted that since it had withdrawn its transfer recognition request before the sale-and-delivery claim had been made by Y, the deal between X and Y had not been concluded.

The court of first instance dismissed the action by Y, reasoning that Company X was permitted to withdraw its transfer recognition request at any point before sale-and-delivery. Y then filed an appeal.

The appellate court reversed the decision of the court of first instance and remanded the case back to the lower court based on the following reasoning. Once the Board of Directors of Company A had specified the other party of the stock transfer (in this case, Y), the stockholder no longer had the right to withdraw its transfer recognition request. When the transfer of stock is restricted by the company's Articles of Association, a buyer specification request by a stockholder is considered to correspond in substance to an offer to sell the stock, while the sale-and-delivery claim by the person specified by the company is considered to correspond to the acceptance of this offer. An agreement for a stock transfer is therefore concluded when these two declarations of intent are in agreement. Thus, the specified party is regarded in a functional sense as a party who has received an

offer to sell stock. This case should therefore be considered as one involving the binding force of an offer. Subsection 1 of Section 204.3 of the Commercial Code can be interpreted as giving the specified party a 10-day deliberation period during which he or she can accept or reject an offer. Subsection 1 of Section 521 of the Civil Code can also be applied to this case through analogy. Company X was bound by its own offer for a period of 10 days after the buyer was specified and was not free to withdraw this offer. In this case, Company X was not free to withdraw its offer until May 11th. Thus, even though Company X indicated its intention of withdrawing its offer on May 6th, this was meaningless, as it was done during the period when the company was still bound by its offer. Since May 9th, the date on which Y made his sale-and-delivery claim, fell within the deliberation period, the stock transfer deal can be considered to have been concluded.

After this ruling, Company X appealed to the Supreme Court (Subsection 2, Section 337 of the Civil Procedure Code).

[Supreme Court Decision]

The Supreme Court reversed the decision of the lower court and as a result, overturned Y's appeal of the decision made by the court of first instance, ruling as follows.

(1) It can be understood that the meaning of the Proviso of Subsection 1 of Section 204 of the Commercial Code prevents anyone whom the company feels is undesirable from becoming a stockholder. Nonetheless, in a stock corporation, the transfer of stock should be free (Subsection 1, Section 204), and in principle, a stockholder should not be forced to sell his stock to someone he does not wish to sell it to or to sell stock at a price he does not agree to. Therefore, even when a company's Articles of Association place restrictions on the transfer of stocks, a stockholder's will should be respected as much as possible unless it runs contrary to the above meaning (of the Proviso of Subsection 1 of Section 204 of the Commercial Code). Even if a stockholder withdraws his request after asking the company to specify a party to whom the stocks may be transferred, this does not result in an undesirable party becoming a stockholder, so the interests of the company which had the restrictions on stock sales in its Articles of Association will not suffer. Thus, it can be said that allowing a stockholder to withdraw such a request does not run contrary to the purport of the company's restrictions on transfer of shares.

(2) Since a stock transfer can be concluded with a stockholder when the party specified by the Board of Directors makes a sale-and-delivery claim (Section 204.3), it is clear that after such a sale-and-delivery claim is made, a stockholder cannot withdraw his request for specification of a purchaser. However, there are no provisions in Sections 204.2 to 204.5 forbidding the withdrawal of a request by a stockholder before a sale-and-delivery claim is made.

(3) A stockholder who is going to sell stock in a company which restricts stock transfers is in a position which differs from that of someone who offers to sell stock under an

ordinary sales contract because he does not give an asking price. Moreover, a purchaser specified by the Board of Directors is also in a position which differs from that of a party who is entrusted with an offer of a sales contract because he is not someone whom the stockholder himself chose to offer to sell stock to. Therefore, banning the withdrawal of transfer recognition requests by stockholders because it might infringe on the interests of parties specified by the Board of Directors would amount to overprotection of the interests of companies which restrict stock transfers to the detriment of the interests of stockholders whose freedom to sell stock has already been restricted. Therefore, it cannot be understood that a request from a stockholder to specify a buyer in substance corresponds to an offer to sell stock, nor that a party specified by the Board of Directors has substantially the same status as a person who receives such an offer. Hence, it is not appropriate to make such an analogy and apply Subsection 1 of Section 521 and Section 524 of the Civil Code to determine whether or not the stockholder's request can be withdrawn.

(4) From the above, it can be concluded that a stockholder who requests stock transfer recognition and specification of a purchaser can withdraw these requests until such time as a sale-and-delivery claim is made by the specified party. Therefore, the court decision which denied this must be reversed.

[Dissenting Opinion]

One of the Supreme Court judges opposed the Court's decision, filing the following dissenting opinion.

I think that the decision of the appellate court is right and that this appeal should be rejected for the following reasons. When a stockholder requests both stock transfer recognition and specification of a buyer at the same time, he can predict the possibility that the company may specify a buyer that he doesn't like or that a disagreement over the stock price may arise with the specified purchaser, with the result that a court may have to determine the price. Therefore, having made the requests knowing that they cannot with withdrawn even if these possibilities arise, the stockholder cannot be said to have been forced into a disadvantageous position. If a stockholder does not want to take such risks, he can request only stock transfer recognition. On the other hand, when a purchaser is specified, he needs to investigate the stock and start readying funds for the purchase. Since the Commercial Code stipulates that sale-and-delivery claims should be carried out within ten days of the notice of specification, it is very natural that a party who has been specified would think of this time as a period which he himself has been granted for deliberation and preparation. If despite this fact, it is understood that a stockholder can freely withdraw his request for specification of a purchaser until such time as the sale-and-delivery claim has been made by the specified purchaser, the stockholder would be able to repeatedly make and withdraw such requests until the company specifies a purchaser to his or her liking. The stockholder would not be taking any risk, while each time, the specified

buyer would be forced to undertake work on an unstable footing, unsure of whether or not it was undertaken in vain. The company would also have to repeat a complicated procedure whenever the request was withdrawn. If the company did not repeatedly carry out this complicated task, it would run the risk of allowing an undesirable party to become a stockholder. Although there is surely room to eliminate such abuses, it cannot be said that the interests of the company would in no way suffer.

When the above-mentioned advantages and disadvantages for the stockholder, the company and the specified purchaser are considered, the decision of the appellate court based on the application of Section 521 of the Civil Code through analogy was appropriate both in terms of ensuring fairness and in terms of ensuring smooth execution of the transfer procedure as stipulated by the Commercial Code.

[Comments]

This decision determines the point until which a stockholder who has made requests for stock transfer recognition and buyer specification can withdraw his buyer specification request. The Supreme Court judged that the stockholder could withdraw the request at any point until the preemptor had made a sale-and-delivery claim. This was the first case in which the Supreme Court made a decision about this question. Previously, judgments which differed from this decision were pronounced by lower courts. For example, on March 30th, 1985, the Osaka District Court judged that once the company had received the stock transfer recognition and buyer specification requests, the stockholder could no longer withdraw them (*Hanrei Taimusu* No. 674, p. 193), while on January 29th, 2002, the Fukuoka High Court judged that the stockholder could not withdraw his request after the Board of Directors had specified the other party for the transfer (*Hanrei Jiho* No. 1795 p. 158). Thus, this Supreme Court judgment has important practical value in that it brought this question to an end.

Nonetheless, the dissenting opinion has considerable persuasive power. In this case, the Supreme Court weighed the interests of the company which restricted stock transfers — including the interests of the specified purchaser — against the interests of the stockholder when considering the propriety of the stockholder's withdrawal of his request for specification of a purchaser and came to the above conclusion by asking whether withdrawal of the stockholder's request ran contrary to the purport of the restrictions on stock transfers. Certainly in this case, the specified purchaser was an individual member of the Board of Directors of the company in question and therefore the specified purchaser and the company could be considered to be the same in substance. However, if the specified purchaser had been an entirely unrelated third party, it is doubtful whether the same logic would hold. In principle, the specified purchaser (preemptor) should be considered to have inherent interests which are independent of the company. Therefore, the dissenting opinion, which compares the interests of three independent parties — the stockholder, the company and the specified purchaser, is more appropriate than the

majority opinion of the Supreme Court.

As stated in the dissenting opinion, it is possible that a stockholder could repeatedly make and withdraw requests before the specified purchaser was able to make a sale-and-delivery claim, and the company would then be put in the disadvantageous position of having to carry out complicated procedures repeatedly. Moreover, depending upon the case, there is even the risk that repeated submission and withdrawal of requests could be made simply to harass the company. Since the specified purchaser is required to deposit the funds for the purchase of the stock before making his sale-and-delivery claim (Subsection 3, Section 204.3 of the Commercial Code), funding has to be arranged, the funds deposited and then the sale-and-delivery claim made to the stockholder. A stockholder who wished to harass a company could take advantage of the time-consuming nature of this work and repeatedly file requests and then withdraw them. In addition to the burden on the company itself, the specified purchaser would also suffer disadvantages, being forced to carry out potentially useless work and incur expenses that may come to naught.

As the majority opinion of the Supreme Court stressed, if the freedom to sell stock is emphasized, a stockholder should not be forced to sell shares to a party he does not wish to, or to sell them at an unsatisfactory price. However, if a stockholder files only a stock transfer recognition request (unaccompanied by a purchaser specification request), he is protected from having to sell stock to a party against his will by Subsection 1 of Section 204.2 of the Commercial Code. The same can be said about sale at an unsatisfactory price. If a stockholder is worried that, because of the difficulty of appraising the shares of a closed corporation, the identity of the other party may have a direct influence on the appraisal of the stock and even a court might set an unsatisfactory price, he could first find a prospective buyer who accepted the stockholder's desired selling price and then file a request for the transfer of stock to that person. Then, even if the transfer recognition request was denied by the company, he could disregard the company's decision and sell his stock to the buyer at his asking price, since according to the Commercial Code (Subsection 1, Section 204.5) such stock transfers between concerned parties are valid. If the stockholder is unable to find such a buyer, it may well be that the asking price is purely subjective and set too high, without taking the stock's market value into consideration. Thus by filing only a stock transfer recognition request using Subsection 1, Section 204.55 of the Commercial Code, a stockholder can ensure that he does not have to sell stock at a price below his desired level (as long as it is reasonable).

However, in the case in question, the stockholder had made a request for buyer specification in addition to the request for stock transfer recognition. If further emphasis is placed on not forcing the stockholder to sell stock to a party he does not want to sell to and not forcing him to sell at an unsatisfactory price (as was done in the Supreme Court majority opinion), the interest of the stockholder, which is already fully protected by the

framework of Subsection 1 of Section 204.2 of the Commercial Code, may be protected beyond a level that is fair or even necessary and this may be done at the expense of a third party. A justification for protecting the interests of the stockholder to this extent cannot be found in the Commercial Code. In this case, the majority opinion of the Supreme Court has protected the stockholder's interest too much on the one hand, and on the other hand, has made the specified purchaser accept risk which should not have been transferred to him. Therefore, the dissenting opinion of the Supreme Court judge and the decision of the lower court concerning the relative interests of the parties seem to be more suitable.

However, I cannot concur with the Supreme Court justice's dissenting opinion or the decision of the lower court insofar as their refusal to accept the stockholder's withdrawal of his purchaser specification request was based on their application of Section 521 of the Civil Code through analogy. Both the lower court and the Supreme Court justice who filed the dissenting opinion considered the request for specification of a purchaser (Subsection 1, Section 204.2 of the Commercial Code) to be an offer of a stock trade contract and the sale-and-delivery claim of the specified purchaser (Subsection 1 of Sec. 204.3 of the Commercial Code) to be equivalent to acceptance of this offer, and therefore considered a sales contract to have been concluded due to the agreement between these two expressions of will. Hence, they asserted that the stockholder could not freely withdraw his offer during the 10-day deliberation period.

However, the transfer of the right (title) to restricted stock between a stockholder and a preemptor does not arise from a contract (Section 555 of Civil Code) based on mutual agreement or a meeting of minds (as expressed in the exchange of promises between the parties). This transfer of the right (title) to the stock arises from a "unilateral act" which is based on a unilateral declaration of will by the preemptor, since the sale-and-delivery claim of the preemptor (the specified purchaser) legally establishes the right to purchase the stock. In other words, the cause of the transfer of the right (title) to the stock is not a "contract", but rather a "unilateral act" on the part of the specified purchaser. Therefore, unlike in the case of a contract, an offer is not legally required in this case.

Although it is certainly possible to construct a legal fiction in which a request to specify a purchaser could correspond to an offer to trade stock, I think that it would be next to impossible to apply a rule of prohibition of the withdrawal of offers to this on the basis of this legal fiction (although it is an application by analogy), because when one thinks of the nature of this right, an offer of a contract would be impossible. Also in theory, although it is understood that a sales contract has been concluded between a stockholder and a specified purchaser through a sale-and-delivery claim by the specified purchaser in an overwhelming number of cases, in my opinion this understanding is not correct. An accurate understanding is that what has been established is not a sales contract as such, but rather a situation which has the same effect as a sales contract (that is, a sale). The majority opinion of the Supreme Court disputes application of Section 521 of the Civil

Code based on the analogy of the stockholder having substantially the same status as the party who offers a sales contract and the specified purchaser having the status of the person who consents to the sales contract. Legal support for this conclusion also is derived from the above-mentioned nature of the sale-and-delivery claim, which gives the preemptor (specified purchaser) the right to establish a legal relation.

In any case, the preemptor specification request system is a special legal system for stock sales which differs from sales contracts based on the meeting of minds. In consideration of the legal nature of sale-and-delivery claims, and also, in consideration of the fact that there are no provisions which prohibit the withdrawal of such requests by stockholders in the Commercial Code (as the majority opinion of the Supreme Court stated), withdrawals of requests for preemptor specification made before sale-and-delivery claims must be recognized as valid. Although there are many problems in the Supreme Court majority opinion in terms of balancing the interests of the concerned parties, for the above reasons, I approve of the court's conclusion.

Nonetheless, I believe that there should be some mitigation of the disadvantage imposed by this decision on the specified purchaser and Company A — a disadvantage which was justly apprehended in the appellate court's decision and in the dissenting opinion by one of the Supreme Court justices (which was unjustly disregarded by the majority opinion of the Supreme Court.

The dissenting opinion strove to deal with this disadvantage by restricting the right of a stockholder to withdraw his or her request for specification of a preemptor. However, to do this, the justice had to resort to legal grounds (application of Section 521 of the Civil Code through analogy) which were not only impractical but also legally doubtful. For this reason, I think that rather than restricting withdrawal of such a request, any disadvantage incurred by the other parties should be mitigated by ex post facto relief.

I believe the following relief measures should be accepted in such cases. First, if a stockholder repeatedly makes and withdraws transfer recognition and preemptor specification requests, in order to protect the company, the legal fiction of transfer recognition (Subsection 7, Section 204.2 of the Commercial Code) should be denied based on the fact that the stockholder is abusing his rights. This should be done even if the company fails to follow through on the stockholder's requests.

Second, if a stockholder makes a request for purchaser specification in addition to a request for stock transfer recognition and he withdraws those requests before the sale-and-delivery claim is made by the specified purchaser, to protect the specified buyer, he should be able to receive compensation for damages resulting from breach of trust. I believe this should be done for two reasons. First, the stockholder could have made only a stock transfer recognition request, as explained above. Second, when a stockholder makes a request for specification of a purchaser, the specified purchaser normally trusts that the stockholder does in fact intend to sell the stock and will follow the correct procedures to

do so, abiding by the price determination procedure of the court as set out in the Commercial Code if they disagree about the purchase price. (This is clear in the Commercial Code.)

Finally, if such ex post facto relief is thought to be inadequate, we could rely on a shareholders agreement. This type of contractual agreement makes it possible to prevent arguments of this kind in advance by building a structure which prevents abuse of stockholders' rights and which facilitates the setting of stock prices for closed corporations, which are often difficult to evaluate.

(DOKI, T.)

Fred Perry Case

(Supreme Court, February 27, 2003) [*Hanrei-jiho* 1817, p. 33]

Key Words: parallel imports, trademark rights, terms of licensing agreement

[Facts]

Fred Perry Sportswear, Limited, a U. K.-based corporation (abbreviated "FPS" below), held trademark rights to the printed name "Fred Perry" and the use of its laurel leaf logo mark on clothing in ten countries around the world. In Japan, FPS transferred these rights to Corporation X, which then established FPH as a wholly-owned subsidiary of Corporation X that acquired all of the Fred Perry trademarks held by FPS in other countries. Company Y imported and sold polo shirts which had the same trademark on them (the issue of this case). These polo shirts were made by OSIA[1], a Singapore-based corporation. Although OSIA was a licensee of FPS, it had subcontracted the production of these polo shirts to a factory in China without the consent of FPS, in violation of contractual limitations on where OSIA could manufacture Fred Perry products and to whom OSIA could subcontract production of such goods.

Corporation X therefore put an advertisement in trade journal Z, claiming that OSIA's Fred Perry polo shirts were fake. It also requested that procedures for contraband goods stipulated in the tariff rate act be applied to these shirts and filed a suit against Company Y for infringement of its trademark. In response, Company Y sued Corporation X, claiming that Corporation X's actions obstructed its business and damaged its reputation, and sought both (a) damages (based on Article 709 of Japan's Civil Code) and (b) insertion of an advertisement in a trade magazine apologizing for these actions (based on Article 723 of the Civil Code). Meanwhile, Corporation X filed claims against Company

1) Transliteration of the Japanese katakana syllabary used for the company name in the court's records. The researcher was unable to locate the original spelling of the company name.

Y seeking the following : (c) an injunction on the import and sale of the goods in question (based on Article 36 of the trademark act), (d) damages (based on Article 709 of the Civil Code), and (e) insertion of an advertisement in a trade magazine apologizing for its conduct (based on Article 106 of the patent law, which is applied to Article 39 of the trademark law).

Both the Osaka District Court and the Osaka High Court decided that the products in question were not authentic and rejected Company Y's claim, denying its demands for damages (point a above) and a public apology (point b) and partially accepting Corporation X's demand for damages (point d), but denying its demands for an injunction on imports and sales (point c) and public apology (point e). Thereupon Company Y, insisting that its imports were not illegal, but rather, legitimate parallel imports, appealed these decisions. The Supreme Court agreed to review the case.

[Judgment]

The Supreme Court rejected Company Y's appeal. The reasons are as follows.

It is an infringement of trademark rights for an individual or company other than the entity which owns a trademark registered in Japan to import products bearing the same trademark without permission from the trademark owner (Subsection 3 of Article 2 and Article 25 of the trademark law). However, the import of such products may be judged legitimate parallel imports which are not trademark infringements under the following conditions : (1) The trademark in question is lawfully affixed to the product by an entity that has the rights to the trademark in the country where this action takes place or by an entity which has been given permission to do so by the entity which holds the trademark rights there ; (2) the entity that owns the trademark in the foreign country and the entity that owns it in Japan are one and the same or can be considered to be the same due to their legal or economic ties, so that the products bearing the trademark which are produced in that country can be seen to have the same origin as those produced by the owner of the trademark in Japan ; (3) the owner of the trademark in Japan is in a position to directly or indirectly control the quality of the products bearing the trademark in question, so that the products in question can be estimated to have no less quality than those affixed with the trademark by the owner of the trademark in Japan. This is because Article 1 of the trademark law declares that the protection of trademarks is intended to maintain trust in the trademark owner's business, contribute to the development of the industry and protect the interests of purchasers. Imports which fulfill the above conditions are therefore deemed legitimate parallel imports because they do not run counter to the purpose or function of trademarks, which serve to indicate product origin and guarantee product quality. In other words, such imports are not seen as substantial trademark infringements because they do not lead to loss of trust in the trademark owner's business nor do they harm purchasers' interests.

In the present case, production of the goods in question in violation of the licensing

agreement's limitations on production sites runs counter to the functioning of a trademark as an indication of the origin of the product. Moreover, limitations on production sites are extremely important in ensuring product quality, so the infringement in question may undermines the function of a trademark in guaranteeing product quality. Thus, if imports of this type of product were allowed, trust in FPS and the Fred Perry brand it has built up might well erode, resulting in loss of consumer trust. Thus, imports of the shirts in question cannot be regarded as legitimate parallel imports.

[Comments]

Those who own a trademark have the exclusive right to use that trademark (Subsection 3, Article 2 of the trademark law) on specified goods (Article 25 of the same law), so importing or selling the same type of goods bearing the same trademark is a trademark infringement. The issues in this case are, first, whether there exist any circumstances under which it would be possible to conduct legitimate parallel imports of authentic trademark-bearing products, and second, if legitimate parallel imports are indeed possible, whether or not the import of goods bearing the trademark affixed by a licensee who had violated clauses in the licensing agreement should be permitted as such.

Regarding the first issue, the Osaka District Court affirmed the possibility of legitimate parallel imports based on the theory of the function of trademarks in the Parker Case [Osaka District Court, February 27, 1970 ; Hanrei-Jihou 625, p. 75], and subsequently, many similar judgments have been pronounced by district courts. Based on these cases, the conditions necessary for legitimate parallel imports are : (1) the authenticity of the goods in question, (2) the entity owning the trademark in Japan being one and the same as that owning the trademark in the country from which the goods are coming, and (3) the imported goods being of the same quality as those produced in Japan. After the Parker Case, Japanese customs officials changed their policy on dealing with trademarked goods and began allowing parallel imports of authentic products if they met the three conditions outlined above. A number of scholarly theories also accepted the concept of legitimate parallel imports based on similar frameworks. The Supreme Court judgment in question mentioned almost the same conditions as had been set forth in the earlier inferior court judgments, academic doctrines and bureaucratic practices. What the Supreme Court decision refers to as the trademark function of indication of origin of the product is equivalent to conditions 1 and 2 above, while what the Supreme Court refers to as the trademark function of guaranteeing product quality is the same as condition 3 ; however, the Supreme Court judgment also emphasizes the concept of quality control by the trademark owner in much the same way as has been argued in the U. S. and in recent academic doctrines.

As to the second issue, both lower court decisions and academic doctrines were split into those in favor and those opposed to allowing parallel imports of goods bearing the trademark affixed by a licensee who had violated clauses in the licensing agreement. The

Supreme Court decision ruled that the violations of the licensing agreement endangered both the trademark function of indication of the place of product origin and that of guaranteeing product quality, and therefore involved substantial illegality. It should be noted that licensing agreements contain a variety of clauses, so it is not reasonable to treat all breaches of these contracts in the same way. According to the theory of the function of trademarks, each case involving questions of whether or not trademarks had been affixed to products following the stipulations of licensing agreements should be judged individually according to whether the trademark functions of indication of place of origin and guaranteeing quality have been impaired.

Since this was the first time the Supreme Court had ruled on parallel imports and trademark infringements, it was a very important case.

(HIROMINE, M.)