IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2019] SGHC 205

Originating Summons No 14 of 2018

Between

Singapore Medical Council

… *Applicant*

And

BXR

… *Respondent*

GROUNDS OF DECISION

[Professions] — [Medical profession and practice] — [Professional conduct]
[Civil Procedure] — [Costs] — [Principles]

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Singapore Medical Council
v
BXR

[2019] SGHC 205

High Court — Originating Summons No 14 of 2018
Andrew Phang Boon Leong JA, Steven Chong JA and Belinda Ang Saw Ean J
9 July 2019

4 September 2019

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

Introduction

1 In *Ang Pek San Lawrence v Singapore Medical Council* [2015] 2 SLR 1179 ("*Lawrence Ang*"), this court noted that while costs would typically follow the event in ordinary civil proceedings, this would have to be balanced against the fact that in medical disciplinary proceedings, the Singapore Medical Council ("SMC") performs a public and regulatory function. Therefore, the SMC should not be exposed to the risk of an adverse costs order simply because disciplinary proceedings which were *properly* brought ultimately resulted in an acquittal of the medical practitioner. However, we emphasised (at [55]) that the degree of weight to be placed upon the fact that the SMC performs a regulatory function would depend on other factors, such as whether the decision to bring the charges were made *honestly, reasonably, and on grounds that reasonably appeared to*

be sound in the exercise of its public duty.

2 The present appeal arises from *Singapore Medical Council v Dr R* [2018] SMCDT 7 ("GD"), where the Disciplinary Tribunal ("the DT") acquitted the respondent, Dr BXR, of all the charges that were brought against him by the SMC. Significantly, the DT ordered costs to be paid by the SMC in favour of the respondent. This is an appeal by the SMC *solely* against the DT's costs order. Having considered the parties' written and oral submissions, we agreed with the DT that, on the facts of the present case, costs were rightly ordered against the SMC. Accordingly, we dismissed the SMC's appeal. We now provide the detailed grounds for our decision.

Background facts

3 The respondent is a specialist in plastic surgery who was practising at his own medical clinic ("the Clinic") at all material times. Between 5 January 2008 and 24 August 2013, the respondent treated one Ms P ("the Patient") for her condition of enlarged parotid glands with the use of botulinum toxin (more commonly known as "botox") injections. The treatment was a success as the respondent was able to substantially reduce the Patient's parotid glands.

4 On 7 April 2014, the Patient filed a complaint against the respondent alleging that the respondent had, without her consent, used her confidential medical information and unanonymised photographs in a chapter of his book and in at least two medical presentations: GD at [3]. On 9 October 2014, the Complaints Committee of the SMC wrote to the respondent, inviting him to provide his written explanation to the complaint that was filed against him. The respondent did so by way of a letter dated 11 December 2014. The respondent's case was that he *had* obtained the Patient's consent to use her unanonymised photographs and to describe her case in medical publications and presentations:

GD at [4].

5 Almost two and a half years after the respondent had provided his written explanation to the complaint, the SMC issued a Notice of Inquiry dated 25 May 2017 setting out the five charges that were being brought against the respondent. The Notice of Inquiry was subsequently amended on 16 August 2017 to reflect the dates on which the respondent's alleged infringing conduct had occurred.

6 The five proceeded charges (collectively, "the Charges") can be summarised as follows:

(a) Charge 1: The respondent *failed to maintain clear and accurate medical records* of the Patient, in that *insufficient detail of the Patient's consent* given for the use of her photographs and medical information during a consultation on 4 August 2008 and in subsequent consultations from 27 April 2009 to 24 August 2013 was documented, *in breach of Guideline 4.1.2. of the Singapore Medical Council Ethical Code and Ethical Guidelines (2002 edition)* ("2002 ECEG"). The respondent's conduct therefore amounted to an intentional, deliberate departure from standards observed or approved by members of the medical profession of good repute and competency, and he was thereby guilty of professional misconduct under s 53(1)(*d*) of the Medical Registration Act (Cap 174, 2014 Rev Ed) ("the MRA").

(b) Charge 1A: An alternative to Charge 1 alleging that the respondent's conduct in failing to maintain clear and accurate records and failing to document the Patient's consent in sufficient detail amounted to such serious negligence that it objectively portrayed an abuse of the privileges which accompany registration as a medical

practitioner, and he was thereby guilty of professional misconduct under s 53(1)(*d*) of the MRA.

(c) Charge 2: The respondent failed to obtain the Patient's informed consent before *using her unanonymised photographs in a book chapter which he published in 2011*, thereby resulting in a breach of the Patient's confidentiality and privacy, and such conduct amounted to such serious negligence that it objectively portrayed an abuse of the privileges which accompany registration as a medical practitioner, and he was thereby guilty of professional misconduct under s 53(1)(*d*) of the MRA.

(d) Charge 3: The respondent failed to obtain the Patient's informed consent from 4 August 2008 to 2013 for the *use of her unanonymised photographs in at least two medical presentations in 2010 and 2013*, thereby resulting in a breach of the Patient's confidentiality and privacy, and such conduct amounted to such serious negligence that it objectively portrayed an abuse of the privileges which accompany registration as a medical practitioner, and he was thereby guilty of professional misconduct under s 53(1)(*d*) of the MRA.

(e) Charge 4: The respondent failed to obtain the Patient's informed consent from 4 August 2008 to 2011 for *the use of medical information unrelated to her condition of enlarged parotid glands in his book chapter*, and such conduct amounted to such serious negligence that it objectively portrayed an abuse of the privileges which accompany registration as a medical practitioner, and he was thereby guilty of professional misconduct under s 53(1)(*d*) of the MRA.

(f) Charge 5: The respondent failed to obtain the Patient's informed consent from 4 August 2008 to 2013 for *the use of her medical*

> *information unrelated to her condition of enlarged parotid glands in at least two medical presentations in 2010 and 2013*, thereby resulting in a breach of the Patient's confidentiality and privacy, and such conduct amounted to such serious negligence that it objectively portrayed an abuse of the privileges which accompany registration as a medical practitioner, and he was thereby guilty of professional misconduct under s 53(1)(*d*) of the MRA.

7 The respondent claimed trial to the Charges.

8 We note that at the time the Charges were framed, the SMC was aware that during a consultation between the Patient and the respondent on 4 August 2008, the Patient had signed the following written statement ("the Written Statement"):

> "I [the Patient], hereby allow [the respondent] to use my photos in medical/scientific publications & to describe my case"

One of the primary issues that the DT had to consider therefore was whether the Written Statement was sufficient to amount to "informed consent" for the purposes of using the Patient's photographs and medical information in publications and presentations.

The decision of the DT

The DT's findings on conviction

9 Following an inquiry by the DT, the respondent was *acquitted* of the Charges against him. The DT found that on 4 August 2008, the respondent had obtained the Patient's informed consent to use her unanonymised photographs and medical information, both related and unrelated to her condition of enlarged parotid glands, in medical and/or scientific publications and presentations. The

Patient's consent was recorded in writing by the respondent in his case notes on the Patient's medical records, and this was done in a manner which satisfied the applicable standard observed and/or was approved by members of the medical profession with good repute and competency. Further, the Patient had neither revoked nor modified her consent until her e-mail to the respondent dated 22 September 2013. Therefore, the respondent had not acted in breach of the consent that the Patient had given him as alleged in the Charges.

10 We would also highlight the following findings of fact made by the DT which were relevant to the issue as to whether an adverse costs order should be made against the SMC.

11 First, the DT noted that there was no objective evidence adduced by the SMC to support the Patient's assertion that the respondent had given her separate oral assurances in relation to her Written Statement that he would (a) blank out her eyes in the photographs or use photographs that show her face from the nose downwards; (b) only use information describing her condition of enlarged parotid glands and not her past cosmetic procedures; and (c) only use photographs and information in one medical paper: GD at [217(e)], [221]–[223]. The only evidence that the SMC relied on in this regard was the testimony of the Patient and her husband.

12 Secondly, there was no documentary evidence to support the Patient's claims that the respondent had given the presentations in which he had allegedly used her photographs and medical information. In fact, the SMC was unable to pinpoint with any specificity when or where these alleged presentations had taken place. This gave rise to serious doubts as to whether these presentations even existed to begin with: GD at [246], [249]. Even at its highest, the SMC

rested its case entirely on the *respondent's* recollection of the conferences that he had allegedly presented the Patient's case at: GD at [351].

The DT's decision on costs

13 The DT cited *Lawrence Ang* and stated that the power to order costs in disciplinary proceedings served an important function – to "incentivise appropriate conduct in litigation and, to that extent, to discourage behaviour that impedes the administration of justice": GD at [420]. The DT went on to state, quoting *Lawrence Ang*, that a Disciplinary Committee (currently, the Disciplinary Tribunal) had an implied ancillary power under the MRA to order costs against the SMC if it dismissed the charges brought by the SMC: GD at [423].

14 The DT then concluded as follows:

> 424 All the more, the principles applied in the present case where the Complaints Committee ordered that an inquiry be held by a disciplinary tribunal, and there was no reason to depart from the trite principle that costs ought to follow the event.
>
> 425 In the circumstances, [the respondent] should be entitled to costs and we so order.

The parties' cases

15 The SMC argued that the DT had erred in the following areas, and therefore that its costs order should be set aside. First, the DT should not have taken as its starting point the principle that costs follow the event. The burden of proof should instead be on the respondent to establish why costs should be ordered in his favour. Secondly, the DT had failed to afford parties an opportunity to make submissions on costs. Thirdly, the DT failed to appreciate that having a matter referred to it by the Complaints Committee is a reason

against ordering the SMC to pay costs. Finally, the DT failed to consider that the SMC had acted honestly, reasonably, and in good faith in instituting proceedings against the respondent.

16 In response, the respondent argued, first, that the DT is empowered to order the SMC to pay costs even if the respondent did not expressly seek an award of costs in his favour. Secondly, the SMC had in fact made oral submissions on costs before the DT, but these submissions were rejected by the DT. Thirdly, the mere fact that the Charges were brought pursuant to a referral from the Complaints Committee did not necessarily give rise to a presumption that the Charges were brought honestly, reasonably, and on grounds that reasonably appeared to be sound. Finally, it was just and reasonable for the DT to order costs against the SMC given that: (a) the respondent had successfully defended himself against the Charges, (b) the prosecution of the respondent was neither reasonable nor brought on grounds that reasonably appeared to be sound, (c) the respondent would suffer substantial financial prejudice if he were deprived of costs, and (d) there was inordinate delay in the prosecution of the respondent.

The applicable law

The power of the High Court to order costs against the SMC

17 It was definitively stated by this court in *Lawrence Ang* (at [30]) that the Disciplinary Committee has an "implied ancillary power under the [Medical Registration Act (Cap 174, 2004 Rev Ed) ("MRA 2004")] to order costs against the [SMC] if it dismisses the charges brought by the [SMC]". Therefore, it must follow that the High Court has the same power, being an implied ancillary power to the High Court's powers to hear and determine appeals from a

Disciplinary Committee under s 46(7) of the MRA 2004 (currently, s 55(10) of the MRA): see *Lawrence Ang* at [31].

18 Additionally, it was also stated at [35] of *Lawrence Ang* that the combined effect of ss 22 and 38 of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") independently empowers the High Court to make an adverse costs order against the SMC. The provisions state as follows:

> **22.—**(1) All appeals to the High Court in the exercise of its appellate civil jurisdiction shall be by way of rehearing.
>
> (2) The High Court shall have the like powers and jurisdiction on the hearing of such appeals as the Court of Appeal has on the hearing of appeals from the High Court.
>
> …
>
> **38.** The Court of Appeal may make such order as to the whole or any part of the costs of appeal or in the court below as is just.

The principles to be applied in determining whether to make an adverse costs order against the SMC

19 In *Lawrence Ang* at [55], we set out the following principles that a court or disciplinary tribunal should consider in determining whether an adverse costs order should be made against the SMC:

(a) The ultimate objective of the court is to render a costs order that is just and reasonable.

(b) The "event" or the outcome of the proceedings is one of the factors that may be taken into account but it is not the only one.

(c) Similarly, the regulatory function of the entity in question is also only one of the factors that may be taken into account although it will often be an important and sometimes even an overriding one.

(d) The degree of weight to be placed upon the fact that the SMC has a regulatory function will depend on various factors. In particular, the court will consider whether the decision to bring the charges was made honestly, reasonably, and on grounds that reasonably appeared to be sound in the exercise of its public duty. The determination of the Complaints Committee would be pertinent in determining whether the charges were brought on grounds that reasonably appeared to be sound.

(e) The court will also consider the financial prejudice to the doctor amounting to substantial financial hardship.

(f) Finally, the court will consider "any other relevant fact or circumstances".

20 Further, there would be no need to prove egregious conduct to the level of "bad faith" or "gross dereliction" before the making of an adverse costs order would be justified.

Preliminary observations

21 At the outset, it should be emphasised that the SMC has not appealed against any part of the DT's decision on the merits, nor has it challenged any of the DT's findings. Therefore, in determining whether an adverse costs order against the SMC is warranted, we had to proceed on the basis that all of the DT's findings were correct. Counsel for both parties accepted this as common ground. The task of the SMC, therefore, was to show that notwithstanding the findings of the DT, an adverse costs order should not have been ordered against it.

22 We also deal with a threshold argument raised by the SMC, which is that in medical disciplinary proceedings, the onus of proof falls on the successful

litigant to show why the regulatory body should pay his or her costs. However, the SMC pointed out that at the proceedings below, the parties were not afforded an opportunity to make submissions on the appropriate costs order, nor did the respondent seek a costs order against the SMC. Therefore, the respondent could not have discharged his burden of showing that a costs order should be made against the SMC.

23 We disagree. First, we note that counsel for the SMC, Mr Chia Voon Jiet ("Mr Chia"), had in fact made oral submissions relating to costs before the DT at the hearing on 27 August 2018, before the DT was *functus officio*. Secondly, and more fundamentally, we are of the view that a court or a disciplinary tribunal has the power to make any costs order as long as it is just and reasonable in the circumstances of the case, regardless of whether either party has expressly asked for costs to be awarded in its favour. As we alluded to at [17]–[18] above, a disciplinary tribunal and any subsequent supervisory court has an implied ancillary power under the MRA to order costs against the SMC if the medical practitioner is acquitted of the charges against him. There is no further requirement for the medical practitioner to have to expressly ask for costs before costs can be awarded in his favour. More importantly, it is trite that the *ultimate objective* of the court is to render a costs order that is just and reasonable (see *Lawrence Ang* at [55]; see also, s 38 of the SCJA). This duty must be discharged regardless of whether either party has asked for or submitted on costs. At the hearing, Mr Chia himself candidly accepted that there was no principle in law which states that a court cannot award costs to a litigant simply because he did not ask for it.

24 In any event, even if the DT had erred by rendering an award on costs without first affording the parties an opportunity to make submissions, this court is not precluded from looking at the totality of the DT's findings *de novo* and

issuing a fresh award on costs. Section 22(1) of the SCJA states that all appeals to the High Court in the exercise of its appellate civil jurisdiction shall be by way of rehearing. This is circumscribed only by s 55(11) of the MRA, which provides that in any appeal to the High Court against a decision of the DT, the High Court shall accept as final and conclusive any finding of the DT relating to any issue of *medical ethics or standards of professional conduct* unless such finding is unsafe, unreasonable or contrary to the evidence. It follows that we are not bound to accept the decision of the DT in relation to costs. We therefore repeatedly emphasised to Mr Chia that the crux of the appeal would be to persuade us that, notwithstanding the findings of the DT, an adverse costs order against the SMC would not be warranted.

Our decision

25 Given the findings of the DT, we were satisfied that an adverse costs order should be made against the SMC for the following reasons. First, the respondent was acquitted of the Charges that were brought against him. Secondly, the findings of the DT demonstrate that the Charges were not brought on grounds that reasonably appeared to be sound. Thirdly, there was an unexplained delay of almost two and a half years between the time that the respondent had submitted his written explanation and the time that the SMC issued its Notice of Inquiry. We elaborate on each of these reasons below.

The respondent was acquitted of the Charges

26 The fact that the respondent was acquitted of the Charges by the DT, and was therefore the "successful" party at the proceedings below, is a factor in favour of costs being ordered against the SMC. As this court had noted in *Lawrence Ang* (at [55]), while the "event" is not the *only* factor to be taken into

account in determining whether to order costs against the SMC, it is nevertheless *a* factor that should be considered.

27 The SMC argued that it was wrong for the DT to take as its starting point the principle that costs follow the event, without considering any of the other principles set out in *Lawrence Ang*. However, when properly understood, we do not think that the DT had erred in its decision or in its application of the principles set out in *Lawrence Ang*. In *Lawrence Ang*, we stated that the regulatory function of the SMC is an important and sometimes overriding factor that will be taken into account in determining whether to order costs against the SMC. However, we noted that the *degree of weight* to be placed upon the fact that the SMC has a regulatory function will depend on factors such as whether the decision to charge was brought on grounds that reasonably appeared to be sound. It follows that if a court or a Disciplinary Tribunal finds that the charges were not brought on grounds that reasonably appeared to be sound, less weight would then be placed on the fact that the SMC is performing a regulatory function. It is apparent from the DT's findings that it did not consider the Charges to be brought on grounds that reasonably appeared to be sound. It follows that the DT would place less weight on the regulatory function of the SMC. Accordingly, there would be "no reason" to depart from the principle that costs follow the event, which is what the DT decided. Therefore, we do not think that the DT had erred in this regard. We nevertheless pause to note that the actual language utilised by the DT (at [424] of the GD, reproduced at [14] above) to the effect that "there was no reason to depart from the trite principle that costs ought to follow the event" was perhaps infelicitous in so far as it suggested (when taken in *isolation*) an endorsement of this principle as a primary and freestanding one (which would, of course, have been at variance with the principles set out in *Lawrence Ang* that were in fact cited and applied by the DT itself).

The Charges were not brought on grounds that reasonably appeared to be sound

28 Based on the findings made by the DT, we are satisfied that most of the Charges against the respondent were not brought on grounds that reasonably appeared to be sound. We come to this conclusion for the following reasons: First, the SMC did not have any objective evidence to prove that the respondent had given the alleged medical presentations which were the subject of Charges 3 and 5. Secondly, the SMC's expert witness admitted that he did not have any authority for his opinion that the respondent was under a duty to (a) inform the Patient of her right to revoke her consent, and (b) obtain either explicit permission for "blanket use" of the Patient's photographs and medical information or permission for the specific and full extent of each instance of use as proximally possible. Yet, the SMC had relied entirely on this expert's evidence for its assertion that the respondent was bound by such ethical obligations and had thereby committed the infringing acts in Charges 2 to 5. Thirdly, the DT found the complaints made by the Patient to be "vexatious and baseless", and it should have been incumbent on the SMC to ascertain the veracity of these complaints before preferring the Charges.

No objective evidence that the respondent had given the alleged medical presentations that were the subject of Charges 3 and 5

29 Charges 3 and 5 essentially allege that the respondent had failed to obtain the Patient's informed consent before using unanonymised photographs of her face and her medical information, both related and unrelated to her condition of enlarged parotid glands, in at least two medical presentations in 2010 and 2013. However, as we will demonstrate below, the DT found that the SMC did not have any evidence, apart from bare assertions from the Patient, to prove that those medical presentations had even taken place.

30 We begin first with the alleged presentation in 2010. The SMC's case was that in mid-2010, the Patient discovered that the respondent had presented her case at a plastic surgery conference, and that he had done so without first obtaining her consent to use her medical information. Despite this, the SMC was unable to adduce any evidence to prove that this alleged plastic surgery conference had indeed taken place. The Patient was also unable to provide any details of this alleged conference. The DT therefore held that the SMC had failed to prove beyond a reasonable doubt that the respondent had in fact presented the Patient's case at a plastic surgery conference in 2010: GD at [246]. As for the alleged presentation in 2013, the SMC contended that the respondent had presented the Patient's case at a conference in South America in 2013. Similarly, the SMC was unable to adduce any evidence that a presentation was in fact made by the respondent in South America in 2013, and the DT found that the SMC had failed to prove its case beyond a reasonable doubt: GD at [266]–[267].

31 Indeed, when the respondent candidly testified at the proceedings below that he may have presented the Patient's case in 2008 or 2009, the SMC changed its case and sought to amend Charges 3 and 5. It argued that the respondent should be convicted on the basis that he had allegedly admitted to presenting the Patient's case in 2008 and 2009. The DT noted at [351] of the GD that at its highest, the SMC was resting its case entirely on the respondent's own recollection of the conferences that he had allegedly presented the Patient's case at. In our judgment, this was a clear indication that the SMC had no evidential basis in support of its own case.

32 From the DT's findings, it was apparent to us that the SMC did not have any objective evidence to support its allegation that the respondent had presented the Patient's case at two medical presentations in 2010 and 2013.

Accordingly, there was no reasonable basis for the SMC to have preferred Charges 3 and 5 against the respondent.

SMC's expert witness did not have any basis for his opinion in relation to the ethical duties alleged in Charges 2 to 5

33 As we alluded to at [8] above, it was undisputed that the Patient had provided the respondent with her Written Statement, which ostensibly gave him permission to use her photographs in medical/scientific publications and to describe her case. The SMC's case was that as part of the respondent's duty to obtain the Patient's informed consent, he also had an obligation to (a) inform her of her right to withdraw or modify her consent at any reasonable point in time (GD at [284(c)]), and (b) obtain explicit permission for "blanket use" of the Patient's photographs and medical information in any medical or educational publication or presentation, or obtain permission for the specific and full extent that he was using the Patient's photographs or medical information, as proximally as possible before each particular use (GD at [311]) (collectively, "the Additional Requirements"). Therefore, because he had failed to satisfy the Additional Requirements, he had failed to obtain "informed consent" from the Patient, as defined by the SMC.

34 It was therefore integral to the SMC's case for it to establish that the applicable standard of informed consent involved the Additional Requirements. The sole basis for the SMC's case that the duty to obtain informed consent also included the Additional Requirements was the evidence of its expert witness, Dr PE. However, the DT found that Dr PE did not have any tangible basis or support for his opinion. In relation to the alleged duty to inform the Patient about her right to withdraw consent, Dr PE acknowledged that the standard forms used by hospitals did not contain an express provision that a patient could revoke his or her consent. Dr PE also conceded that such a duty was not provided for in the

2002 ECEG, and that he was not aware of any evidence of any other ethical requirement for the same: GD at [293]–[294]. The DT also noted that while Dr PE had referred to a model consent form provided in an article by the American College of Medical Genetics and Genomics, that consent form was merely aspirational, and in any event did not explicitly state that the medical practitioner has to inform the patient of his right to withdraw consent.

35 As for the alleged duty of the medical practitioner to obtain explicit permission for "blanket use" or to obtain fresh permission for each particular use, Dr PE admitted that he had no personal experience taking consent from his patients for publication purposes. Neither had he been in the position of an editor or publisher who would have been able to assess the practice of the Singapore medical community as it was in 2008. He further conceded that he could not cite any authority for his views that a doctor must inform that patient of the exact forum of use, and if the forum was unknown at the time of consent-taking, that a doctor must explicitly obtain consent for use in any forum: GD at [314]. In addition, Dr PE admitted that he had never obtained consent from his patients for the use of their medical information or photographs in writing medical journals, articles, or textbook chapters. Therefore, it was apparent to us that Dr PE did not have the relevant professional experience to opine on issues relating to obtaining informed consent for the purposes of presentations or publications.

36 We agree with the respondent that the SMC should, at the very least, be expected to scrutinise (a) whether its expert has the relevant expertise so as to determine if the expert is qualified to give evidence, and (b) the basis on which the expert forms his opinion so as to determine if the opinion is a reasonable one, supported by authority or personal experience. Given the findings of the DT that we have outlined above, we do not think that the SMC had made

such efforts in the present case. The SMC preferred Charges 2 to 5 solely on the basis of Dr PE's opinion, without first verifying whether Dr PE had the relevant professional experience or authority to support his views. We are therefore satisfied that Charges 2 to 5 were not brought on grounds that reasonably appeared to be sound.

37 On a related note, we note that Mr Chia appeared to have confused the *normative* basis upon which Charges 2 to 5 were framed, with the *factual* basis for whether those charges would ultimately be made out. At the hearing before us, we highlighted to Mr Chia that the *standard of professional conduct*, which the respondent allegedly breached pursuant to Charges 2 to 5, was based entirely on Dr PE's evidence. Mr Chia however argued that the nub of Charges 2 to 5 was a factual inquiry – if the Patient's version of the events was to be preferred, then the respondent would be convicted of Charges 2 to 5. Conversely, if the respondent's version of the events was to be preferred, then he would be acquitted of those charges. With respect, we do not think this is correct. Facts cannot be considered in the abstract. In determining whether a charge has been made out, a court or a disciplinary tribunal must first identify the normative standard which a reasonable and competent medical practitioner is expected to adhere to, before turning to examine whether on the facts of each particular case the medical practitioner in question had satisfied those standards. Mr Chia argued that it was not unreasonable for each side to advance their own factual narrative, and that the conviction or acquittal of the respondent ultimately boiled down to which narrative the DT preferred. That, with respect, misses the point. What we found to be unreasonable was the fact that Dr PE's evidence, which the SMC solely relied on to establish the *normative* standard that was then basis for Charges 2 to 5, was completely lacking in support or authority.

The complaints made by the Patient were vexatious and baseless

38 The SMC founded the factual basis for its case primarily on the evidence of the Patient and her husband. It was therefore significant that the DT found the Patient's complaint to be "vexatious and baseless": GD at [427]. This finding further buttressed our conclusion that the Charges were not brought on grounds that reasonably appeared to be sound.

39 Not only did the DT find the Patient's complaints to be vexatious and baseless, it also saw fit to "express its strongest condemnation for the Patient's conduct in bringing the Complaint, and in giving her evidence against [the respondent]": GD at [417]. As we noted at the hearing, this is by no means a common finding and not one that a court or a tribunal would make lightly. Apart from the false allegations that the respondent had presented her case at medical presentations in 2010 and 2013, the DT found that the Patient and her husband had been lying in respect of these other areas:

(a) The Patient claimed that she was a "homemaker", and described herself as a "naïve" individual who unequivocally and unreservedly trusted the respondent on matters relating to her confidentiality. However, the DT found that far from being naïve, the respondent was "at all material times a sophisticated, capable, and highly educated professional with a mind of her own, who understood the concept of confidentiality and was not afraid to express her disagreements and dissatisfactions to [the respondent]": GD at [56]–[59].

(b) The Patient gave evidence that during a consultation on 4 August 2008 between 9.58 am and 10.18 am, a period of 20 minutes, she had a brief discussion with the respondent on the day's treatment, made her way to the treatment room, received Botox injections, and then left the

treatment room to make payment. The DT found it "highly unlikely" that the Patient's sequence of events would have fitted into a 20 minute time frame as the Patient alleged: GD at [197]–[199].

(c) The Patient claimed that the respondent had informed her on 19 December 2007 that Ms DNurse2, the respondent's former clinic nurse and one of the witnesses of fact, had left the clinic's employ "a long time ago". However, Ms DNurse2 was able to exhibit her Central Provident Fund statements which showed that she was employed by the respondent between December 2007 and July 2009: GD at [114].

40 Given the centrality of the Patient and her husband's evidence to the SMC's case, it should have been incumbent on the SMC to ascertain the veracity of their evidence and to ensure that there was a sound basis for the claims that they were making. Given the fact that the Patient's evidence was completely rejected by the DT, it does not appear that the SMC had satisfied itself that there was reasonable basis in the complaints that were lodged. In the circumstances, we do not think that the Patient's baseless and vexatious allegations can be regarded as reasonably sound grounds on which to base the Charges.

41 There is, however, one point of correction for us to address in relation to the DT's decision on costs. The DT seemed to suggest, at [424] of the GD, that where the Complaints Committee orders an inquiry to be held by a Disciplinary Tribunal, it would *not* be a reason to depart from the principle that costs follow the event. With respect, we do not think that this is correct in principle.

42 In *Lawrence Ang* at [54], this court noted as follows:

> It is significant that in both these cases, the proceedings had arisen as a result of a referral by the Complaints Committee and this would be a strong indicator that the charges brought were pursued upon a manifestly reasonable basis after the matter had been carefully considered by a group of experienced senior practitioners. Such circumstances would often, and perhaps even ordinarily, lead the court to the conclusion that an adverse costs order *should not* be made against the [SMC]. [emphasis added]

This court further noted at [56]:

> [I]n relation to … whether the charges were brought on grounds that reasonably appeared to be sound, the determination of the Complaints Committee may be very pertinent in deciding whether to order costs against the respondent.

43 The passages quoted above indicate that the ordering of an inquiry by the Complaints Committee should *prima facie* be regarded as a reason *against* imposing an adverse costs order on the SMC, *ie*, a reason to depart from the principle that costs follow the event. Therefore, with respect, the DT was mistaken in finding that costs should be awarded against the SMC *because* the Complaints Committee had ordered the inquiry to be held.

44 Be that as it may, we do not think that the mere fact of the proceedings being referred by the Complaints Committee *necessarily* leads to the conclusion that costs should not be awarded against the SMC. In our judgment, the SMC still has an obligation to independently verify a complaint even if the matter is referred to it by the Complaints Committee. For the reasons we have given at [29]–[40] above, we did not think that the SMC had discharged this obligation in the present case.

45 In *Lawrence Ang*, the Complaints Committee had provided detailed reasons for why no formal inquiry was required, and explained its decision to dismiss the complaint: at [6]. Despite that, disciplinary proceedings were

commenced against the appellant doctor pursuant to an "unexplained and unreasoned" order by the Minister for Health. The charges against the appellant doctor were eventually dismissed. This court held (at [56]) that if the Complaints Committee dismisses a complaint and proceedings are nevertheless brought pursuant to an unreasoned and unexplained order by the Minister upon an appeal by the complainant, the SMC would be "hard pressed to demonstrate a *reasonable basis*" [emphasis in original] for instituting the proceedings. In the present case, the Complaints Committee did not provide any reasons or explanation for referring the complaint to the DT. This was akin to instituting proceedings pursuant to an "unreasoned and unexplained order". Therefore, the mere fact that the matter was referred to the SMC by the Complaints Committee, without any justification or basis, does not lead to the inference that the Charges were brought on grounds that reasonably appeared to be sound.

46 For completeness, we note that it is not unprecedented for costs to be awarded against the SMC even when the matter is referred by the Complaints Committee. The respondent points out that in *Lam Kwok Tai Leslie v Singapore Medical Council* [2017] 5 SLR 1168, the proceedings had also arisen from a referral by the Complaints Committee. Nevertheless, this court acquitted the appellant doctor of the sole charge that the Disciplinary Tribunal had convicted him on, and after considering parties' submissions on costs, ordered the SMC to pay one-third of the appellant doctor's costs for the inquiry below, and the appellant doctor's costs of the appeal as well.

Inordinate delay in the prosecution of the respondent

Whether the amount of time that is taken for the prosecution should be a factor for costs to be ordered against the SMC

47 The respondent submitted that another reason for ordering costs against the SMC is that there was an inordinate delay in carrying out the prosecution. The respondent suggested that the principles set out in *Ang Peng Tiam v Singapore Medical Council* [2017] 5 SLR 356 ("*Ang Peng Tiam*") (at [109]–[117]), in relation to when a *sentencing discount* may be given due to an inordinate delay in prosecution, would be equally applicable to determining when costs may be ordered against the SMC if there is a delay in the prosecution of the medical practitioner.

48 We agree with the respondent that an inordinate delay in the prosecution of a medical practitioner's case should be a relevant consideration in favour of ordering costs against the SMC. As a preliminary point, we noted in *Lawrence Ang* at [55(f)] that the court will consider "any other relevant fact or circumstance" in determining whether a costs order against the SMC is just and reasonable. Therefore, the factors enumerated in *Lawrence Ang* are by no means a closed list. In *Ang Peng Tiam* at [111], we stated that "fairness is the underlying rationale that explains the court's willingness to apply a discount" where there had been an inordinate delay in the prosecution of the medical practitioner. Similarly, in determining the appropriate costs order to be imposed in medical disciplinary proceedings, the court is also concerned with making an order that is just and reasonable in the circumstances. If the medical practitioner is subjected to undue stress, anxiety and uncertainty as a result of having the spectre of disciplinary proceedings hover over him for longer than is necessary, we consider that it would only be fair for him to be compensated by way of costs if he is subsequently acquitted of the charges.

49 Further, we agree that the principles set out in *Ang Peng Tiam* provide a useful starting point for determining when the *time taken* to carry out a prosecution may be a relevant factor in awarding costs against the SMC. In *Ang Peng Tiam* at [109], this court set out a list of three cumulative conditions that have to be satisfied before a sentencing discount will be given:

(a) there has been a significant delay in prosecution;

(b) the delay has not been contributed to in any way by the offender; and

(c) the delay has resulted in real injustice or prejudice to the offender.

In our judgment, these same three cumulative requirements should be satisfied before the court can consider the time taken for the prosecution in determining whether costs should be ordered against the SMC. However, one modification we make is to replace the term "offender" with the term "medical practitioner", because an "offender", *ie*, a medical practitioner who is convicted of the charges preferred against him or her, would *not* be entitled to costs in any event.

50 In so far as the first requirement at [49(a)] above is concerned, whether or not there has been significant or inordinate delay is not measured in terms of the absolute length of time that has transpired, but must always be assessed in the *context* of the nature of investigations: see *Ang Peng Tiam* at [113]. The court should consider whether the case involved complex questions of fact which necessarily engendered meticulous and laborious inquiry over an extended period, or whether the case could be disposed of in a relatively uncomplicated manner (such as where the offender pleaded guilty): see *Chan Kum Hong Randy v Public Prosecutor* [2008] 2 SLR(R) 1019 at [36].

51 As for the third requirement at [49(c)], we consider that:

(a) the mental anguish, anxiety and distress suffered by the medical practitioner in having the charge(s) hanging over him during the period of delay;

(b) any tarnishing of the medical professional's reputation; and/or

(c) the loss of income or career opportunities suffered by the medical professional

would constitute material prejudice: see *Ang Peng Tiam* at [115]. We emphasise, once again, that this is not an exhaustive list.

Whether there was an inordinate delay in the present case

52 In the present case, we are satisfied that there was an inordinate delay in the prosecution of the respondent. To recapitulate, the Complaints Committee had issued a letter to the respondent on 9 October 2014, requesting him to provide a written explanation to the complaint that was filed against him. The respondent provided his written explanation by way of a letter dated 11 December 2014. It was only on 8 May 2017 that the SMC obtained Dr PE's initial expert report. The SMC then served the Notice of Inquiry, along with Dr PE's initial expert report, on the respondent shortly after on 25 May 2017. The hearing for the inquiry took place between 5 March 2018 and 18 May 2018 (GD at [27]), and the DT delivered its verdict on 27 August 2018. It should be noted that from the moment the respondent provided his written explanation, the SMC took 2 years and 6 months before it issued the Notice of Inquiry. As we alluded to at [50] above, this period of delay must be assessed with reference to the complexity of the case at hand. We do not think that this was a particularly complex matter, both factually and legally. Indeed, the SMC only called two

witnesses of fact, *ie*, the Patient and her husband, and one expert witness, Dr PE: GD at [27]. Further, the issues in the proceedings below related to consent-taking and the documentation of this consent, which we do not think are matters of great medical or legal complexity. In our view, this delay is further exacerbated by the DT's findings that the Patient's complaints were vexatious and baseless, and that Dr PE's evidence was completely unsupported by authority. This indicates that despite the relatively long period of time which was presumably spent on investigations, the SMC had failed to do its due diligence with regard to the evidence of its witnesses.

53 We are also satisfied that the delay was not contributed in any way by the respondent. We note that he had provided his written explanation two months after he was first issued with the notice of complaint, and from that point on there was nothing he could do except wait for the SMC to make its charging decision.

54 The respondent further emphasised that in the period after he had submitted his written explanation and when the matter was finally resolved, he was "naturally in a state of undue suffering and distress stemming from the anxiety, suspense and uncertainty", and that this amounted to prejudice. In *Ang Peng Tiam* at [123], this court stated that it was prepared to accept, "as a matter of natural inference", that the doctor had suffered anxiety and distress as a result of the delay before the Notice of Inquiry was issued to him. We consider such a holding to be equally applicable in the present case. Therefore, we are satisfied that the respondent has suffered material prejudice due to the inordinate delay in the prosecution, and that this is a factor in favour of costs being ordered against the SMC.

Financial prejudice

55 For completeness, we address a point made by the respondent in relation to financial prejudice. The respondent argued that in the present case, most of the Charges were not brought on grounds that reasonably appeared to be sound. Therefore, this caused him to incur "unnecessary" costs to defend himself against the unmeritorious prosecution.

56 We do not accept the respondent's submission. We have held at [28] above that a primary reason in favour of ordering costs against the SMC is that the Charges were not brought on grounds that reasonably appeared to be sound. It would be akin to *double counting* if we also took into account the fact that the respondent had to incur legal costs, which he deemed to be unnecessary, *because* the Charges were not reasonably brought.

57 The judgment of Stanley Burnton LJ in *R (Perinpanathan) v City of Westminster Magistrates' Court* [2010] 1 WLR 1508 at [41] (which we cited with approval at [57] of *Lawrence Ang*) should also be borne in mind:

> I think it clear that the financial prejudice necessarily involved in litigation would not normally justify an order. If that were not so, an order would be made in every case in which the successful private party incurred legal costs. Lord Bingham CJ had in mind a case in which the successful private party would suffer substantial hardship if no order for costs was made in his favour.

The only legal costs incurred by the respondent in the present case were costs ordinarily and necessarily required in litigation. Further, the respondent did not adduce any evidence to show that he would suffer *substantial* financial hardship if no award for costs was made in his favour. At the hearing before us, counsel for the respondent, Mr Melvin See, informed us that even if costs were ultimately ordered against the respondent, it would be covered by the

respondent's professional insurance. Therefore, we are satisfied that the respondent would not suffer substantial financial hardship even if costs were not awarded in his favour.

Conclusion

58 While we agree that a prosecutorial agency such as the SMC should be free to discharge its public function without the fear of costs sanctions looming over its head, we also consider that it cannot be allowed to do so with absolute impunity. Ultimately, the inquiry as to whether an adverse costs order should be made against the SMC in each case is a fact-centric one, and the court or disciplinary tribunal should ensure that it carefully scrutinises the facts and findings of the DT before making a determination.

59 For the reasons given, we upheld the DT's decision to order costs against the SMC. We ordered the costs of the appeal fixed at $20,000 (all-in) in favour of the respondent.

Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge of Appeal	Belinda Ang Saw Ean Judge

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