IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 6

Civil Appeal No 43 of 2020

Between

CBB

… *Appellant*

And

Law Society of Singapore

… *Respondent*

In the matter of Originating Summons No 1382 of 2018

Between

CBB

… *Applicant*

And

Law Society of Singapore

… *Respondent*

GROUNDS OF DECISION

[Administrative Law] — [Remedies] — [Mandatory order]
[Civil Procedure] — [Costs]

CBB
v
Law Society of Singapore

[2021] SGCA 6

Court of Appeal — Civil Appeal No 43 of 2020
Sundaresh Menon CJ, Andrew Phang Boon Leong JCA and Steven Chong JCA
1 December 2020

29 January 2021

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 The appellant complained to the respondent in respect of a lawyer ("Mr L") and, in particular, Mr L's conduct in assisting the appellant's mother to establish a trust and to carry out certain work. That work was relevant to mental capacity proceedings that culminated in our decision in *Re BKR* [2015] 4 SLR 81 ("*Re BKR*"). Because certain aspects of the appellant's complaint pertained to matters that arose more than six years prior to the date of the complaint, by virtue of s 85(4A) of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA"), the Council of the Law Society ("the Council") was required to seek the leave of court under s 85(4C)(*a*) of the LPA before it acted on the complaint. The Council decided that it would not seek such leave and provided two reasons for that decision not to seek leave, namely that (a) the complaint was made by the

appellant in his personal capacity and not as a client; and (b) the events in the complaint were time-barred.

2 Dissatisfied with the Council's decision, the appellant commenced Originating Summons No 1382 of 2018 ("OS 1382"), seeking to set aside that decision and an order directing the Council to make the necessary application to the court for leave to advance the complaint. The matter was heard by a High Court Judge ("the Judge") who held on 3 January 2020, having examined the Council's reasons, that it had acted irrationally. As to the Council's first stated reason, the fact that the complaint was made by the applicant in his personal capacity was not a relevant consideration when deciding whether leave should be sought under s 85(4C)(*a*) of the LPA. This was so because the disciplinary framework in Part VII of the LPA exists in order to maintain the high standards and good reputation of the legal profession: see *CBB v Law Society of Singapore* [2019] SGHC 293 at [84]. The material issue centred on the nature of the conduct in question rather than the precise capacity in which the complainant had acted. As to the Council's second stated reason, the fact that the time limit in question had been exceeded could not be the only relevant consideration in deciding whether to apply to the court for permission to act. That fact, after all, was what made it necessary to apply for such permission. The Judge considered that the Council had failed to take into account relevant factors in refusing to seek leave since it wholly neglected to consider the merits of the appellant's claim: at [85]. The Judge accordingly quashed the Council's decision. The Judge, however, declined to make an order requiring the Council to bring the necessary application to the court. Instead, he made an order directing the Council to reconsider its decision. Finally, the Judge made no order as to costs.

3 Before us, the appellant appealed against the latter part of the Judge's decision and sought, instead, a mandatory order compelling the Council to apply

for leave pursuant to s 85(4C)(*a*) of the LPA. Section 85(4C)(*a*) of the LPA states that "[t]he Council may, with the leave of the court … refer a complaint of the conduct of a regulated legal practitioner to the Chairman of the Inquiry Panel under subsection (1A) after the expiration of the period referred to in subsection (4A)". The appellant also appealed against the Judge's decision not to make any order as to costs. We allowed the appeal in respect of the mandatory order but dismissed it in respect of the Judge's disposal on costs. We now set out our grounds. We begin by setting out the relevant background.

Facts

4 Certain aspects of Mr L's precise involvement in setting up the trust and effecting the transfer of assets belonging to the appellant's mother can be gleaned from our judgment in *Re BKR* as well as the first instance decision in *AUR and another v AUT and others* [2012] SGDC 489. We do not propose to rehearse the details here; nor do we set out in any detail the correspondence that transpired between the appellant and the respondent following the appellant's complaint, as this has been sufficiently set out in the Judge's decision below. It may be noted that the present appeal was concerned only with the remedy that the Judge ordered after he found that the Council had acted irrationally. The latter finding was not contested before us. Relevant for our purposes was the fact that, almost eleven months after the Judge's decision, the Council did not appear to have taken steps to reconsider its initial decision.

The parties' cases

5 The appellant mounted two submissions on appeal. First, he accepted that as a general rule, where a decision is set aside, the matter should be placed before the designated decision-maker for reconsideration. As against such an order, a mandatory order requiring the decision-maker to perform its duty in a

particular manner would tend to have the effect of displacing the decision-maker altogether. However, he argued that this may nonetheless be warranted where in truth, there is only one result that is legally open to the decision-maker on the proper construction of the statute conferring the decision-making power or discretion. He asserted that in this case, the only proper decision legally open to the Council was to apply for the court's leave under s 85(4C)(*a*) of the LPA, having regard to: (a) the length of and reasons for delay in bringing the complaint; (b) the serious and egregious nature of Mr L's conduct; and (c) the meritorious nature of the appellant's complaint. Second, the appellant argued that costs should be awarded in his favour. The appellant relied on the general rule established in *Vellama d/o Marie Muthu v Attorney-General* [2013] 1 SLR 797 at [37] that costs in judicial review proceedings follow the event. He further contended against the applicability of the countervailing principle established in *Baxendale-Walker v Law Society* [2008] 1 WLR 426 ("*Baxendale-Walker*") and accepted in *Law Society of Singapore v Top Ten Entertainment Pte Ltd* [2011] 2 SLR 1279 ("*Top Ten*") at [24] that no costs should be ordered against a public body carrying out a public regulatory function. In arguing for a departure from the *Baxendale-Walker* principle, the appellant cited: (a) the respondent's ambiguous responses to the appellant's complaint; (b) the respondent's lack of candour during OS 1382 that necessitated the anticipation of an array of arguments; and (c) the public interest inherent in his own application which ultimately was directed at the protection of vulnerable and elderly clients.

6 The respondent disagreed with these submissions. Reaffirming the principle that judicial review is concerned with the decision-making process rather than the merits of a decision, the respondent argued that a mandatory order directing the Council to apply for leave would unduly fetter the

discretionary power conferred upon it by Parliament, especially since s 85(4C)(*a*) of the LPA states that "the Council *may*, with the leave of the court … refer a complaint" (emphasis added). The respondent cited a number of cases in which the court, having found the decision-making process to be defective in some way, had remedied this by making a mandatory order compelling the decision-maker to *reconsider* the relevant decision. Although the respondent accepted that factors such as the merits of the complaint were relevant to the Council's decision under s 85(4C)(*a*) of the LPA, it contended that "two reasonable persons could quite 'perfectly reasonably come to opposite conclusions on the same set of facts without forfeiting their title to be regarded as reasonable'": *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [95]. With regard to costs, the respondent argued that: (a) the appellant had failed in many of his claims and assertions and obtained only a narrow order in OS 1382; and (b) the respondent should not, under the *Baxendale-Walker* principle, be subject to an adverse costs order when such costs are incurred in the course of performing its public function.

Whether a mandatory order should be granted directing the Council to apply for leave pursuant to s 85(4C)(*a*) of the LPA

7 It is clear, and this much was not disputed, that where a court finds that the process by which a decision was reached was defective under any of the traditional grounds of judicial review, it will not generally mandate the performance of the administrator's duty in a particular manner. Otherwise, by doing so it would, in truth, be a decision of the court rather than that of the designated decision-maker and that might undermine not only the separation of powers, but also the sacrosanct principle that the court, in judicial review proceedings, reviews an administrator's decision-making process rather than the merits of the decision: *City Development Ltd v Chief Assessor* [2008] 4

SLR(R) 150 at [9] and *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 ("*Borissik*") at [42]–[43]. We affirm the wisdom of the observation set out in *R v Justices of Kingston* (1902) 86 LTD 589 ("*Justices of Kingston*") (applied in *Re San Development Co's Application* [1971-1973] SLR(R) 203 ("*Re San Development*") at [15] and *Borissik* at [21]), that:

> … it is an important matter which should be thoroughly understood, that this court does not by mandamus direct justices or any public body or anyone else upon whom a duty is cast, how and in what manner they are to perform their duty. I think also that even where the facts are all admitted, so that in the particular circumstances of the particular case – there happens to be but one way of performing that duty still the mandamus goes to perform the duty and not to perform it in a particular way.

8 The principle articulated in *Justices of Kingston* might even be said to apply with greater force in cases such as the present one where the error in the decision-making process pertains to the exercise of a discretion rather than a performance of a duty. A helpful distinction may be drawn between administrative action that is imperative and that which is optional: M.P. Jain, *Administrative Law of Malaysia and Singapore* (Lexis Nexis, 4th Ed, 2011) at p 615. Where Parliament has conferred on an administrative body certain discretionary powers, it would generally be inappropriate for the courts to mandate the exercise of those powers in a particular way. A quashing or prohibitory order would be the more suitable remedy and, if a mandatory order is to be issued at all, such an order would normally go no further than to require the decision-maker to reconsider its decision. The question posed before us, however, was a narrower one: whether the general rule that guards against a court mandating performance of a duty in a particular manner is subject to exceptions. To address this, it is helpful to review the approaches that the courts have adopted in Singapore, the UK and Australia.

The position in Singapore

9 Singapore courts have long upheld the principle in *Justices of Kingston*. In *Re San Development*, the High Court quashed the decision of the Commissioner of Appeals for the Appeals Board (Land Acquisition) dismissing an appeal on the basis that the applicants filed their appeal out of time. Section 23 of the Land Acquisition Act 1966 (Act 41 of 1966) stated that the Commissioner "may, in its discretion … permit any person to proceed with an appeal notwithstanding that the notice of appeal or petition of appeal was not lodged within the time limited therefore by this section …". Notwithstanding the grant of a quashing order, the High Court declined, on the authority of *Justices of Kingston*, to issue a mandatory order directing the Commissioner to allow the appellants to proceed with their appeal and to hear it.

10 In *Borissik*, the Urban Redevelopment Authority ("URA") rejected the applicant's application to demolish her semi-detached house and to construct in its stead a detached bungalow. She applied for a mandatory order directing the URA to approve her redevelopment plan and refund her initial processing fee. It was apparent from ss 12 and 22 of the Planning Act (Cap 232, 1998 Rev Ed) that the URA had discretion to approve and reject applications for planning permission. Citing *Justices of Kingston*, the High Court held that "the court does not by mandamus direct any public body … upon whom a duty is cast 'how and in what manner they are to perform their duty'": *Borissik* at [21]. This is in line with the approach we have accepted and followed in our decisions as recent as *Gobi a/l Avedian and another v Attorney-General and another appeal* [2020] 2 SLR 883 at [17], *Ahmad Kasim bin Adam (suing as administrator of the estate of Adam bin Haji Anwar, deceased) v Singapore Land Authority and others* [2020] 4 SLR 1447 at [90], and *Axis Law Corp v Intellectual Property Office of Singapore* at [2016] 4 SLR 554 at [43].

11 However, the cases also show that the rule is not inflexible. In *C v Comptroller of Income Tax* [1965-1967] SLR(R) 626 ("*C v Comptroller*"), the Comptroller of Income Tax ("the Comptroller") assessed the applicant's tax, a decision which the applicant appealed against but nevertheless complied with. On appeal, the Income Tax Board of Review held that the Comptroller had overcharged the applicant. The applicant requested a refund, but the Comptroller appealed against the Board's decision and imposed as a condition for refund a requirement that the applicant's solicitors retain the sum in their client's account pending the determination of the appeal. Section 93(1) of the Income Tax Ordinance (Cap 166, 1955 Rev Ed) ("ITO") stated that "[i]f it is proved to the satisfaction of the Comptroller that any person for any year of assessment has paid tax … such person shall be entitled to have the amount so paid in excess refunded", while s 93(3) of the ITO stated that "[t]he Comptroller shall certify any amount repayable under this section and shall cause repayment to be made forthwith". Buttrose J in the Federal Court held that the requirements of s 93(1) had been satisfied and that s 93(3) of the ITO was therefore engaged: at [26]. He considered that in these circumstances, the Comptroller had a statutory obligation to perform the duty to refund the overpayment and a mandamus in specific terms was the only effective and expeditious remedy open: at [38].

12 In *Re Application of Leo Boh Boey* [1985-1986] SLR(R) 434 ("*Leo Boh Boey*"), the applicant's husband had been killed in his workplace and the employer informed the Commission for Labour of this for the purpose of assessing the claim under the Workmen's Compensation Act (Act 25 of 1975) ("WCA"). The Commissioner responded that he would not proceed further because in his view, the husband's death did not arise in the course of his employment. The applicant applied for an order of mandamus. Section 24(1) of

the WCA stated that "the Commissioner shall have power to assess and make an order on the amount of compensation payable to any person on any application made by or on behalf of that person". Wee Chong Jin CJ sitting in the High Court held that s 24(1) of the WCA imposed "a duty on the Commissioner to make an assessment as to the amount of compensation payable by the employer to the injured workman or a dependent of the deceased workman": at [5]. Accordingly, Wee CJ granted, among other things, an order for mandamus "directing the Commissioner to assess and make an order on the amount of compensation payable in respect of the matter before him": at [8]. Similarly, *Re Application by Ramakrishnan Chakara Padayachi* [1981-1982] SLR(R) 238 involved the same subject matter and decision, and the High Court there granted an order of mandamus directing the Commissioner to exercise in a particular manner the power conferred on him by s 24 of the WCA.

13 Finally, *Re Lim Chor Pee, ex parte Law Society of Singapore* [1985-1986] SLR(R) 226 ("*Lim Chor Pee (HC)*") concerned the disciplinary process applicable to a lawyer. The respondent lawyer had been convicted of an income tax offence, had four other income tax offences compounded, and had been found to have tampered with a witness. Pursuant to s 86(2) of the Legal Profession Act (Cap 217, 1970 Rev Ed) (the "Act"), the Attorney-General sent information touching on the respondent's conviction and records to the president of the Law Society. An Inquiry Committee was constituted and it recommended that a Disciplinary Committee conduct a formal inquiry into the matter. Section 93(1) of the Act provided that "[a]fter hearing and investigating any matter referred to it, a Disciplinary Committee shall record its findings in relation to the facts of the case and according to those facts shall determine" whether there was sufficient cause for disciplinary action. Before the Disciplinary Committee, the Council brought six charges against the

respondent. However, the Disciplinary Committee allowed an application by the respondent to delete certain paragraphs from the Council's statement of case. The Disciplinary Committee thus amended the Council's statement of case under r 10 of the Advocates and Solicitors (Disciplinary Proceedings) Rules 1963 (GN No S 98/1963) (at [41]), with the result that three of the six charges and a major part of one other charge could not be pursued any further. Moreover, the Disciplinary Committee also intimated to the parties that "[w]e are not prepared to hear you at this stage on whether or not the order we have made is correct … we are certainly not prepared to reconsider our decision": at [43]. In seeking judicial review, the Council argued that the Disciplinary Committee had acted *ultra vires* its statutory function: at [1]. The High Court appeared to agree that it was the Disciplinary Committee's duty to hear and investigate *all* six charges in the statement of case: at [47]. Accordingly, the High Court granted an order of mandamus directing the Disciplinary Committee to reinstate, hear and investigate all six charges. On appeal, the Court of Appeal affirmed the High Court's decision: see *Re Lim Chor Pee, ex parte Law Society of Singapore* [1985-1986] SLR(R) 998 at [46] and [48].

The position in the UK

14 The position in the UK is somewhat less clear. In *R v Secretary of State for Trade and Industry, Ex parte Lonrho Plc* [1989] 1 WLR 525 ("*Lonrho*"), one company sought to acquire a majority stake in another, and the Secretary of State for Trade and Industry in 1985 declared, prior to the completion of the acquisition, that he would not refer the acquisition to the Monopolies and Mergers Commission ("MMC"). Two years later in 1987, the Secretary of State appointed inspectors under s 432(2) of the Companies Act 1985 (c 6) (UK) to investigate the affairs of the acquiror. After receiving the report compiled by the inspectors, the Secretary of State submitted the report to the Serious Fraud

Office in 1988. Pursuant to s 64(4)(*b*) of the Fair Trading Act 1973 (c 41) (UK), the Secretary of State had the power to refer the matter to the MMC in the light of new material facts. Although the Secretary of State accepted that there were new material facts disclosed in the report, he declined, on the advice of the Director General of Fair Trading, to refer the matter to the MMC. The Divisional Court issued mandamus compelling the reference to the MMC on grounds that the decision not to refer the matter was *ultra vires*. This was reversed by the Court of Appeal and that decision was then affirmed by the House of Lords. Notably, the House of Lords held that the court was not entitled to "convert [a] discretion into a duty and [ignore] the expertise of the Director of Fair Trading": at 538.

15 A more nuanced approach was adopted in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 ("*Padfield*"). There, the appellant members of a regional committee of the Milk Marketing Board ("the Board") filed a complaint against the Minister of Agriculture, Fisheries and Food contending that the Board's fixed terms and prices adversely affected producers in south east England because these did not take into account geographical divergences in the cost of bringing milk to market. The Minister declined to convene a committee to investigate the matter under a discretionary power that he undoubtedly possessed under s 19(3)(*b*) of the Agricultural Marketing Act 1958 (c 47) (UK). In written correspondence the Minister disclosed that in discharging his duty to assess the complaint, he considered that (a) he had unfettered discretion; (b) the broad issues in the complaint could be settled through arrangements already available to such producers; and (c) if the committee upheld the complaints, he would be embarrassed to make a statutory order enforcing the committee's recommendations. Quashing the Minister's decision, the House of Lords held that, in exercising his discretion, the Minister

had taken into account irrelevant matters (namely, his embarrassment) and omitted relevant matters (namely, the merits) from consideration. However, we observe that the House of Lords only directed the Minister to reconsider the appellant's complaint.

16 At the other end of the spectrum, in *R v Derby Justices, Ex parte Kooner and others* [1971] 1 QB 147 a mandatory order was issued requiring that a duty be carried out in a particular manner. There, the justices had granted legal aid in the form of representation by *solicitor* to accused persons in committal proceedings and denied them legal aid in the form of representation by *counsel*. Section 74 of the Criminal Justice Act 1967 (c 80) (UK) provided, on its face, that the justices had discretion as to whether to grant legal aid at all. The applicants sought an order of mandamus directing the justices to exercise their powers under the statute and to permit the accused persons access to representation by counsel. Granting the application for mandamus in specific terms, the Divisional Court accepted that there was a "rule of practice that legal aid should include representation by counsel": at 150. As observed by the authors of H.W.R. Wade and C.F. Forsyth, *Administrative Law* (Oxford University Press, 10th Ed, 2009) at p 528, the case may "be regarded as one of an unreasonable decision, or of a duty implied in the statute".

The position in Australia

17 We turn to two cases in Australia where the courts there have considered the question before us. First, in *Commissioner of State Revenue (Vic) v Royal Insurance Australia Ltd* (1994) 126 ALR 1 ("*Royal Insurance*"), the taxpayer, an insurance business, paid taxes between 1985 and 1989 on worker's compensation insurance premiums received after 1985. However, the taxpayer mistakenly overpaid the Commissioner of State Revenue under the Stamps Act

1958 (No 6375 of 1958) (Vic) ("Stamps Act") because of (a) certain errors of law and (b) an amending statute in 1987 that deemed premiums previously owing no longer chargeable. Although s 111 of the Stamps Act appeared to grant the Commissioner the discretion to decide whether to refund any overpayment, the High Court of Australia held that there was in fact no *discretion* to speak of on the specific facts because the law imposed a legal liability to refund the excess payments and therefore granted an order of mandamus directing the Commissioner to do so. The High Court of Australia held that "[w]hen the power exists and the circumstances call for the fulfilment of a purpose for which the power is conferred, but the repository of the power declines to exercise the power, mandamus is the appropriate remedy …": at 26.

18 In *KL Dowling & Co v Employee Relations Commission* [1998] 1 VR 251 ("*KL Dowling*"), an employee who felt aggrieved by her sudden dismissal sought remedies of compensation and re-employment. She applied to the Industrial Relations Commission (later the Employee Relations Commission) asserting that her dismissal was harsh, unjust or unreasonable under the Industrial Relations Act 1979 (No 114 of 1979) (Vic) (which was later replaced by the Employee Relations Act 1992 (No 83 of 1992) (Vic)). The Deputy Commissioner held that the dismissal was harsh and ordered a remedy of compensation and re-employment. An appeal to the Employee Relations Commission in Full Session was dismissed and the compensation was increased. The appellant applied for review under the Administrative Law Act 1978 (No 9234 of 1978) (Vic), and the Practice Court quashed the decision of the Full Commission and remitted the matter for reconsideration. On further appeal, the Victoria Court of Appeal quashed the order for re-employment and compensation and made an order directing the Commission to dismiss the ex-employee's application. In arriving at this conclusion, the court held that the

Full Commission had failed to take into account relevant considerations such as: (a) the animosity that existed between the employee and the applicant; (b) the close working relationship between them; (c) the difficulties arising from the creation of a new post; and (d) the changes that would have to be made to comply with the re-employment order: at 18. The court also observed that the Commission took into account an irrelevant and erroneous view that the respondent would not be able to receive compensation without the re-employment order: at 19. Crucially, the court chose not remit the matter to the Commission to consider whether reinstatement should be ordered because "refusal of the order would be inevitable" and "the court may itself, in an unusual case like the present, direct by its order how the discretion is to be exercised": at 20–21.

Analysis

19 Having considered the authorities, we re-affirm the primacy of the rule in *Justices of Kingston* ([7] *supra*). In this context, the court acts as a reviewing court and not as a primary decision-maker. Its concern is with the legality of the decision-making process and not with its merits. It therefore acts with restraint and will not usurp the primary decision-making power in the name of checking abuse: *Borissik* ([7] *supra*) at [42]–[43]. However, the authorities equally indicate that there are exceptional circumstances where the performance of a public duty shades into its performance in a particular way or by a particular course of action. A mandatory order to perform a public duty in those circumstances will necessarily and inevitably entail performance of a particular act. These are rare and unusual occasions where, if all the circumstances point towards the exercise of a power in a certain manner, the courts may regard the administrator as being under a duty framed in specificities: see *Royal Insurance* at 26 and Sir Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell,

5th Ed, 2015) at para 6–055. Moreover, in determining whether the performance of a public duty will result only in one reasonable outcome, the general position in *Justices of Kingston* should be presumed to apply unless the applicant can establish that the balance of the following factors operates in its favour: (a) the availability in the public domain of objective evidence particularly relevant to the merits of the decision; (b) the institutional competence of the court; (c) the decision-maker's conduct; (d) the absence of other reasons militating against the grant of a mandatory order; and (e) the absence of alternative ways of carrying out the duty, having regard to the relevant considerations that factor into the decision as may be construed from the statute. We elaborate on these factors.

20 First, the court considers whether there is available in the public domain objective evidence particularly salient to the determination of the merits of a decision. In particular, a court will be more inclined to compel a decision-maker to take certain steps where the evidence relevant to the merits of the decision have already been determined by an independent tribunal or court of law. For example, in *Lim Chor Pee (HC)* ([13] *supra*), a factor bearing on the grant of the mandamus directing the Disciplinary Committee to hear and investigate all the relevant charges was the Attorney-General's provision of information regarding the respondent's criminal conviction and records. Similarly, in *C v Comptroller* ([11] *supra*), relevant for the purpose of granting a mandamus in specific terms was the fact that the Income Tax Board had already rendered its decision regarding the Comptroller's act of overcharging. Where many of the salient and necessary facts relevant to the merits have been disclosed in the public domain, the court will be concerned not to act in disregard of what is already commonly known and worse, thereby to condone any apparent iniquity.

21 Second, the court assesses whether the policy content of the decision, if any, warrants a greater degree of deference accorded to another branch of government possessing the appropriate institutional competence. Of course, the court will not abdicate its duty to consider matters of justice and legality. As we observed in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [93], "courts and judges are not the best-equipped to scrutinise decisions which are laden with issues of policy or security or which call for polycentric political considerations". It was on this basis that the House of Lords in *Lonrho* ([14] *supra*) at 538 refused to grant mandamus to refer the matter and held that the court below was not entitled to "[ignore] the expertise of the Director of Fair Trading".

22 Third, the court may take into account the decision-maker's conduct. The court would be more disposed to mandate performance of a specific action where the decision-maker expressly manifests an intention not to reconsider its decision: see *Lim Chor Pee (HC)* at [43]. In a similar vein, undue delay will not place the decision-maker in a favourable light: *Wang v Commissioner of Inland Revenue* [1994] 1 WLR 1286 ("*Wang*"). The court will, of course, assess whether the delay is "for a considered reason and not in consequence of neglect, oversight or perversity": *Wang* at 1293. But the court will guard against leaden-footed or dilatory conduct and any indefensible oversight on the part of the decision-maker. For example, as we noted at [11] above, the Comptroller in *C v Comptroller* attempted to frustrate the Board's decision to refund overcharged sums by imposing on the applicant an additional bar to receiving the moneys. In those circumstances, Buttrose J saw fit to impose "the only effective and expeditious remedy open to the taxpayer" – a mandatory order in specific terms: at [38]. Indeed, Wee CJ further opined that "from the correspondence that passed and the other steps he took after the board's decision, I cannot but arrive

at any conclusion other than that [the Comptroller] was determined to retain the excess payment until the outcome of his appeal": at [44]. If, on the other hand, a decision-maker voluntarily reconsiders its decision and provides reasons prior to the final determination of the remedy, this would often obviate the applicant's case for a mandatory order in specific terms.

23 Fourth, the court considers whether there are any other reasons militating against the grant of a mandatory order. By this, we refer to the usual myriad of reasons for which a court may ordinarily decline to grant a mandatory order: see Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th Ed, 2016) para 26–016 and Harry Woolf et al, *De Smith's Judicial Review* (Sweet & Maxwell, 8th Ed, 2018) at paras 18–051 to 18–060 ("*De Smith's*"). A non-exhaustive list of reasons for refusing a mandatory order in general include (in no particular order of importance): (a) the need for constant supervision (*Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 at 1166); (b) the public inconvenience that would be occasioned by making such an order (see *R v Paddington Valuation Officer Ex p Peachey Property Corporation Ltd* [1966] 1 QB 380 at 402); (c) the impossibility of carrying out the duty (*Bristol and North Somerset Railway Co, Re* (1877) 3 QBD 10 at 12); (d) the limited public resources available to discharge the duty (*R v Bristol Corporation ex p Hendy* [1974] 1 WLR 498 at 503); (e) the absence of any practical effect in granting such a remedy (*De Smith's* at paras 18-055 to 18-056); and (f) the absence of prejudice (*De Smith's* at para 18-057). A mandatory order, whether general or specific, is always discretionary.

24 Fifth, and perhaps most importantly, the court determines by statutory interpretation – having regard to the construction, nature and purpose of the statute conferring power as well as the decision-maker's view – the relevant considerations that ought to factor in the administrative body's overall decision-

making calculus. Then, with the benefit of the decision-maker's view and without prejudice to the merits, the court ascertains whether there are alternative ways by which the decision-maker could carry out its duty. This was the approach adopted in *KL Dowling* ([18] *supra*) at 18 and 20, where the Victoria Court of Appeal identified the relevant considerations and accordingly determined that a refusal of the order was "inevitable". Where no alternative means exist for the decision-maker to carry out its public duty, this operates as a factor in favour of a mandatory order in specific terms.

25 In our judgment, such an approach is not inconsistent with and in fact coheres with the established principles and underlying rationales of administrative law. Although it is undoubtedly prudent to distinguish between duties and discretionary powers when ascertaining whether and to what extent a mandatory order in specific terms should be granted, too sharp a distinction may not always prove helpful because there exist duties that inhere within discretionary powers: see *eg* Mark Elliott, *Beatson, Matthews and Elliott's Administrative Law* (Oxford University Press, 4th Ed, 2011) at p 435. This was apparent in *Leo Boh Boey* ([12] *supra*). Thus, despite the fact that s 24(1) of the WCA conferred on the Commissioner "power to assess and make an order on the amount of compensation payable to any person on any application made by or on behalf of that person", Wee CJ held that s 24(1) of the WCA imposed, perhaps implicitly, "a duty on the Commissioner to make an assessment as to the amount of compensation payable by the employer to the injured workman or a dependent of the deceased workman": at [5].

26 Additionally, directing the authority to undertake specific actions may, in exceptional cases, further the purpose of sound public administration and "ensure that executive action is exercised responsibly and as Parliament intended": *R v Horseferry Road Magistrates' Court, Ex parte Bennett* [1994] 1

AC 42 at 62. We have highlighted one such instance in *C v Comptroller* ([11] *supra*), where the need for an effective and expeditious remedy undergirded the court's decision to grant a mandatory order that compelled performance of a duty in a particular manner. Permitting known errors to fester would only undermine public confidence in our institutions. And, given that a decision-maker does not normally bear a duty to furnish reasons (see *Manjit Singh s/o Kirpal Singh and another v Attorney-General* [2013] 2 SLR 844 at [85] and *Re Nalpon Zero Geraldo Mario* [2017] SGHC 301 at [28]–[29]), the court's power to issue a mandatory order in specific terms may deter a decision-maker who is unwilling to act but who seeks to insulate his non-performance of a duty by also refusing to disclose reasons. Ultimately, courts and judges will be mindful of the need for sound public administration in assessing the appropriate remedy to be granted where any of the grounds of judicial review have been established. As Sir John Donaldson MR in *R v Monopolies and Mergers Commission, Ex parte Argyll Group Plc* [1986] 1 WLR 763 at 774 observed:

> We are sitting as a public law court concerned to review an administrative decision, albeit one which has to be reached by the application of judicial or quasi-judicial principles. *We have to approach our duties with a proper awareness of the needs of public administration.* I cannot catalogue them all, but, in the present context, would draw attention to a few which are relevant.
>
> Good public administration is concerned with substance rather than form. …
>
> Good public administration is concerned with speed of decision …
>
> Good public administration requires a proper consideration of the public interest. …
>
> Good public administration requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or Juridical persons. …
>
> Lastly, good public administration requires decisiveness and finality, unless there are compelling reasons to the contrary. …

[emphasis added]

Application

27 Having considered the facts set out in the learned Judge's decision below, we were satisfied that this was an exceptional case that justified the issuance of a mandatory order requiring the Council to apply to the court for leave.

28 First, the appellant's complaint in respect of Mr L arose out of proceedings that had reached the Court of Appeal. As we noted at [4] above, facts pertaining to Mr L's involvement in setting up the trust and effecting the transfer of assets belonging to the appellant's mother were set out in *Re BKR* ([1] *supra*). There was ample basis for assessing the potential gravity of the conduct that was the subject of the complaint. It was not evident that the Council had regard to our decision in *Re BKR* when coming to its decision not to apply for leave to refer.

29 Second, the policy content of the Council's decision pursuant to s 85(4C)(*a*) of the LPA – the discipline of lawyers – is a matter of public interest entirely within the aegis and expertise of the court. Indeed, the discipline of lawyers is ultimately under the *control* of the court. Public confidence in our system of justice rests on the trust reposed in the integrity of the court's officers. The respondent undoubtedly plays an integral role in maintaining the standards of the profession, but the court exercises ultimate responsibility for the discipline of lawyers and it presides over the disciplinary process. Issues of deference to executive discretion therefore do not bear much weight in this context.

30 Third, almost eleven months after the High Court's decision below, the Council still had not reconsidered the appellant's complaint or acted upon the Judge's order. If the Council had reconsidered the matter timeously – during the period between the decision below and the present appeal – and had either decided to apply to the court or disclosed reasons addressing the heart of the appellant's complaint, then it would have foreclosed the necessity of pursuing the appeal. It did not do so, and when asked why it had not done so, counsel suggested that the respondent did not want to be seen to be caving in to the demands of a private complainant. With great respect, this was wholly without merit. The Council had a duty to act by virtue of the Judge's order and there was no basis at all for it not to have done so. In our judgment, the Council's decision not to reconsider the matter during the intervening period rendered the pursuit of this appeal necessary.

31 Fourth, no other reasons such as those enumerated at [23] above were put to us militating against the grant of a mandatory order.

32 Fifth, having regard to the proper construction, nature and purpose of s 85(4C)(*a*) of the LPA, we could not identify – and the respondent did not put to us – any other alternative way in which the Council might carry out its duty. Where Parliament confers a discretion on an authority, it is taken to do so "with the intention that it should be used to promote the policy and objects of the Act … [as] determined by construing the Act as a whole": *Padfield* ([15] *supra*) at 1030. The purpose of s 85(4C)(*a*) of the LPA is clearly to permit even complaints made well after the relevant conduct in question, to be investigated in suitable instances. When seen in context, the purpose of the provision could be said to derive from s 38(1)(*a*) of the LPA, which is "… to maintain and improve the standards of conduct … of the legal profession in Singapore".

33 While s 85(4C)(*a*) of the LPA grants the Council a measure of flexibility in determining whether such a complaint ought to be advanced, we were amply satisfied that this discretion is one that had to be exercised with due regard to certain relevant factors. The appropriate analogy may be drawn from other statutes conferring a discretion to grant extensions of time: see *Lim Hong Kheng v PP* [2006] 3 SLR(R) 358 at [27] and *Hau Khee Wee v Chua Kian Tong* [1985-1986] SLR(R) 1075 at [14]. In our judgment, the relevant factors that a decision-maker ought to take into account when deciding whether to refer a complaint to the Chairman pursuant to s 85(4C)(*a*) of the LPA are: (a) the length of the delay; (b) the prejudice occasioned by the delay; (c) the explanation put forward for the delay; and (d) the prospects of the complaint. Both the appellant and the respondent broadly agreed that these were the relevant considerations.

34 Having regard to these four factors, we were unable to see how the Council could arrive at any other decision apart from bringing the relevant application for permission to move the complaint forward. While we accepted that most of Mr L's impugned conduct had taken place approximately seven years before the complaint was filed, no prejudice was occasioned by the delay. It was not suggested that any particular difficulties of obtaining evidence would arise; nor could we see how such difficulties could arise given the litigation that has already taken place.

35 In relation to the reasons for delay, the appellant contended that there were unusual circumstances, some of which were attributable to Mr L's conduct, which impeded the appellant making the complaint before the expiry of the six-year period. Mr L's conduct only came to light during the course of the protracted proceedings in *Re BKR* ([1] *supra*). Before the disposal of those proceedings on 19 May 2015, it would have been premature for the appellant to have lodged the complaint because the outcome of the judgment would affect

the substance of the complaint. The deputies acting on behalf of the appellant's mother were appointed on 18 December 2015 and, according to the appellant, they prioritised recovering her assets in various jurisdictions rather than commencing disciplinary proceedings against Mr L. Only in 2016 were the deputies able to commence proceedings in the British Virgin Islands ("the BVI proceedings") to set aside the trust and recover some $48m held by the trustee. Counsel for the appellant noted that the deputies had even requested, by way of an email dated 11 October 2017, that the appellant defer his complaints against Mr L as they were concerned that such action could "precipitate a reaction that may complicate the BVI proceedings". Subsequently, the appellant learned on 30 January 2018 that the BVI proceedings had concluded by a consent order. In addition, the appellant only received from Tan Kok Quan Partnership (who had been acting as the independent counsel to the deputies of the appellant's mother) Mr L's professional fees invoices on 22 March 2018 following a request that was dated 11 October 2017. A similar request by the appellant's lawyers to Mr L had been refused in January 2013. Having considered the appellant's reasons, we were satisfied that there were good reasons behind the seeming delay in filing the complaint.

36 With respect to the prospects of the complaint, the appellant argued that Mr L's impugned conduct was of a serious and egregious nature. The appellant asserted that, while advising the appellant's mother to set up the trust, Mr L did not disclose that he was a director of the corporate trustee's holding company responsible for setting up the trust. The appellant also relied on our judgment in *Re BKR*, where we had held that the appellant's mother lacked the mental capacity at the material time and acted in a manner that "would cause an objective and reasonable observer to ask whether she might lack decision making capacity": at *Re BKR* at [6]. According to the appellant, it is evident

from the judgment that Mr L: (a) was present when the appellant's mother signed a power of attorney in her youngest daughter's favour; (b) was present when the appellant's mother gave the bank a nonsensical instruction to purchase more renminbi products; (c) spoke on her behalf during meetings with banks; and (d) drafted a letter that was inconsistent with her true intentions as subsequently communicated to the bank in person. Receipts relevant to claims of overcharging were also disclosed in an affidavit filed by the appellant. Although this was not the appropriate point to examine the merits of the case, we were amply satisfied that the appellant's complaint is not bound to fail and that it warrants further inquiry.

37 In these circumstances, we were satisfied that this was an exceptional case where we could see no other way in which the Council's discretion could properly be exercised. We therefore allowed the appeal and directed the Council to make the requisite application pursuant to s 85(4C)(*a*) of the LPA seeking the leave of the court to refer the matter notwithstanding the delay.

Whether the learned Judge's exercise of discretion for costs should be disturbed and costs awarded against the respondent

38 We turn to the second issue, which concerned the order for costs that was made below. The *Baxendale-Walker* ([5] *supra*) principle establishes that the court does not generally make adverse costs orders against public bodies performing a public regulatory function except in cases where the public body has demonstrated "bad faith or … gross dereliction": *Top Ten* ([5] *supra*) at [24]. The appellant contended that the *Baxendale-Walker* principle does not apply in the present case because the respondent had failed to perform its duty as a regulator. In our judgment, the distinction between an omission to perform a duty and an improper exercise of that duty is an unduly fine one in the present

context. Lapses in decision-making do not mean that the decision-maker is not performing a regulatory or public function. Such a body may have erred in the course of performing its public function. None of the aspects of the respondent's conduct, that was highlighted by the appellant and summarised at [5] above, was shown to be the result of a *gross* dereliction of duty or to have been motivated by bad faith. We were therefore not satisfied that the respondent should be subject to an adverse costs order because it had erred in its decision.

39 In coming to his decision on costs below, the learned Judge considered both the general approach to costs under O 59 r 3(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) and the *Baxendale-Walker* principle as synthesised in the costs framework set out in *Ang Pek San Lawrence v Singapore Medical Council* [2015] 2 SLR 1179 at [55]. On either of those approaches, he noted that the appellant had not succeeded in many of his arguments. The Judge accordingly left the parties to bear their own costs. The issue of costs is a fact-sensitive inquiry and we saw no reason to disturb the Judge's exercise of discretion in this regard. The Judge had set out his reasons and the appellant did not show that the Judge misunderstood the law or the facts or that his decision was one that no reasonable judge could have reached.

Conclusion

40 In all the circumstances, we allowed the appeal against that part of the Judge's decision declining to grant a mandatory order in the terms sought and dismissed the appeal against his decision on costs in OS 1382. However, we did not think that the same argument on costs in OS 1382 could apply to costs in the present appeal because, as we observed, it was wrong of the Council not to have acted at all, following the Judge's order. That order was not being challenged, and yet it had not been acted on throughout the intervening period

of almost a year. By its inaction, the respondent made the pursuit of the appeal necessary. Accordingly, we awarded the costs of the appeal to the appellant, but we fixed those costs in the aggregate sum of $10,000. The usual consequential orders followed.

Sundaresh Menon
Chief Justice

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

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