IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 75

C3J/Originating Summons No 9 of 2016
(C3J/Summons No 3 of 2016)

Between

SINGAPORE MEDICAL COUNCIL

… *Applicant*

And

ANG PENG TIAM

… *Respondent*

GROUNDS OF DECISION

[Civil procedure] – [Affidavits] - [Appeals to High Court from court, tribunal or person] – [Leave to file affidavit] – [Paragraph 84(3) of the Supreme Court Practice Directions]

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Introduction

1 Paragraph 84(3) of the Supreme Court Practice Directions ("the Practice Directions") provides that no affidavits shall be filed without the leave of court in appeals brought under Order 55 of the Rules of Court (Cap 332, R 5, 2014 Rev Ed) ("the ROC"). Order 55 applies to appeals to the High Court from "any court, tribunal or person". The issue in the present application is when leave should be granted for affidavits to be filed in such appeals.

2 By way of the Court of Three Judges Originating Summons No. 9 of 2016 ("the Originating Summons"), the Singapore Medical Council ("SMC")

initiated an appeal ("the Appeal") against the sentence imposed by the Disciplinary Tribunal ("DT") on Dr Ang Peng Tiam ("the Respondent"). In keeping with SMC's usual practice when appealing DT decisions, SMC filed an affidavit in support of the Originating Summons ("the Supporting Affidavit"). After the Respondent highlighted para 84(3) of the Practice Directions, SMC made the present application for leave to file the Supporting Affidavit.

3 In dismissing the application, I provided brief oral grounds to the effect that (a) the Supporting Affidavit is unnecessary, (b) the ostensible purpose of the Supporting Affidavit could be achieved in written submissions, and (c) granting leave would only add to litigation costs without corresponding benefit to the fair and efficient disposal of the case.

4 Even though there was no appeal against my decision, I decided to issue these written grounds of decision as the present application raised a point of general significance for appeals brought under O 55 of the ROC. It would appear from the submissions made before me that some practitioners may not be familiar with para 84(3) of the Practice Directions even though it has been in effect since 1 January 2013. Since this case concerns disciplinary complaints against a professional person, I decided that these written grounds should be released only after the Appeal has been argued in open court before the Court of Three Judges. The Appeal has since been heard on 13 February 2017, after which the Court of Three Judges reserved judgment.

Background

5 Following the receipt of a complaint against the Respondent on 15 December 2010, SMC commenced the inquiry process which culminated in

the issuance of the notice of inquiry more than 4 years later, on 22 April 2015. After 10 days of hearings between November 2015 and February 2016, the DT delivered its decision on 12 July 2016. In finding the Respondent guilty of 2 out of the 4 charges brought under section 53(1)(*d*) of the Medical Registration Act (Cap 174, 2004 Rev Ed), the DT sentenced the Respondent to a fine, citing the long delay in the inquiry process as a reason for not imposing any period of suspension.

6 On 22 August 2016, SMC filed the Originating Summons to appeal against the DT's decision on sentence. Of the seven grounds of appeal listed in the Originating Summons, ground (e) alleged that the DT erred in placing undue weight on the alleged delay in the disciplinary proceedings while ground (f) alleged that the DT erred in finding that the alleged delay had caused the Respondent tremendous suffering over the years.

7 On 31 August 2016, SMC filed the Supporting Affidavit. The Supporting Affidavit is a 271-page tome, with its main text spanning 23 pages, accompanied by 248 pages of exhibits. The main text of the Supporting Affidavit devoted eight pages to setting out the chronology and another seven pages to arguments justifying the delay in the commencement of disciplinary proceedings. Three pages were spent regurgitating the 19 paras and sub-paras of non-delay related grounds of appeal already set out in the Originating Summons. The 248 pages of exhibits comprise evidence from medical experts previously tendered at the DT, the 66-page decision of the DT and 180 pages of transcripts of the proceedings before the DT.

8 I pause here to note that, with or without the Supporting Affidavit, all of these exhibits would have to be filed eventually (and were indeed filed

subsequently) as part of the record of proceedings for the Appeal ("Record of Proceedings").

9 At the case management conference on 2 September 2016, the Respondent's counsel objected to the Supporting Affidavit, citing para 84(3) of the Practice Directions. Paragraph 84 of the Practice Directions, in full, reads:

> **84. Civil appeals before the High Court from tribunal or person under Order 55 of the Rules of Court**
>
> (1) Order 55, Rule 6(4) of the Rules of Court states that it is the appellant's duty to apply to the Judge or other person presiding at the proceedings in which the decision appealed against was given, for the signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court. For the avoidance of doubt, the onus is on the appellant to file a record of proceedings, comprising the signed copy of the notes of proceedings, and any further grounds of decision, in the High Court.
>
> (2) The appellant and the respondent are to tender one hard copy of the notes of proceedings, grounds of decision and any skeletal arguments or bundles of authorities to be relied upon to the Legal Registry of the Supreme Court not less than 5 working days before the hearing of the appeal, to assist the Judge of the High Court.
>
> (3) *No affidavits shall be filed in respect of the appeal without the leave of court.*
>
> [emphasis added]

10 In the light of the Respondent's counsel's objections, the learned assistant registrar presiding at the case management conference asked parties to confer and consider if they could reach agreement on whether the Supporting Affidavit should be filed. As no agreement was reached, SMC made the present application for leave to file the Supporting Affidavit.

Summary of the parties' arguments

11 Before me, the counsel for SMC accepted that para 84(3) of the Practice Directions was applicable and that the Supporting Affidavit should not have been filed without the leave of court. In seeking leave to file the Supporting Affidavit, SMC gave two main reasons:

(a) the Supporting Affidavit would help to provide a "snapshot" of the background of disciplinary proceedings and highlight and crystallise the relevant issues to be determined on appeal, especially since there were no pleadings or equivalent in the DT proceedings; and

(b) in the light of the weight given by the DT to the alleged delay, SMC felt that it was important and necessary to consolidate and clarify the various timelines and events in order to assist the Court of Three Judges in determining the Appeal.

12 On the other hand, the Respondent pointed out that:

(a) the Supporting Affidavit introduced new evidence; and

(b) SMC's affidavit in support of the present leave application provided no explanation as to why new evidence ought to be allowed at the appellate stage.

13 SMC responded that the contents of the Supporting Affidavit had been placed before the DT and there was no new evidence in the Supporting Affidavit.

14 The Respondent countered that, even accepting SMC's own position that the Supporting Affidavit contained only matters which were already put

before the DT, leave should not be granted as there was simply no reason to admit the Supporting Affidavit just to rehash matters which would already form part of the Record of Proceedings.

15 After hearing the parties and having examined the Supporting Affidavit, I found that it did indeed contain new evidence. To give just one example, the Supporting Affidavit at p 6 states that, between August 2012 and May 2013, SMC's counsel approached 11 senior doctors to act as experts for SMC, all of whom declined. Neither the figure of 11 senior doctors nor the time period of August 2012 to May 2013 appeared anywhere in the written materials or submissions before the DT. When this was pointed out to SMC's counsel during the hearing, the response given by SMC's counsel to me was that, while some of these numbers were new, the "facts underlying those numbers" were placed before the DT and so "*in substance*" there was no new evidence in the Supporting Affidavit.

This court's approach to the issues arising out of the application

16 I thus had before me, on the one hand, a Supporting Affidavit which contained new evidence and, on the other, a leave application which did not attempt to justify the introduction of such new evidence. Instead, the application was made on the basis that the Supporting Affidavit contained no new evidence and merely highlighted and crystallised the relevant issues for the appeal. In the circumstances, I decided to approach the application in two stages as follows:

(a) At the first stage, I would take SMC's submission at face value and evaluate SMC's application on the basis that the Supporting Affidavit contained no new evidence. If I were to decide that such an

affidavit should not be allowed for whatever reason (*eg*, because it would only add to the costs of proceedings without adequate countervailing benefits), I could then dismiss the application without inquiring formally into the extent to which the Supporting Affidavit contained new evidence.

(b) However, if I were to grant leave to file the affidavit on the basis put forth by SMC, I should then, in the second stage, determine which portions of the Supporting Affidavit contained new evidence and should thus be struck out before the affidavit is accepted for filing. It is a matter of simple logic that if I were to allow an affidavit to be filed on the basis put forth by SMC, the affidavit should be truly shorn of all new evidence. (This would of course be without prejudice to SMC making a subsequent application for leave specifically to admit the new evidence so omitted. At that point, SMC would need to provide the necessary justifications for admitting such new evidence at the appellate stage.)

Analysis

17 O 55 r 2(1) of the ROC provides that an appeal to which O 55 applies must be brought by originating summons. O 55 r 2(2) provides that every originating summons by which such an appeal is brought must state the grounds of the appeal. There is no mention anywhere in O 55 of supporting affidavits being filed for originating summonses issued pursuant to O 55 r 2. Instead, the only references to affidavits in O 55 are found in O 55 rr 6(2) and (4). Order 55 r 6(2) concerns the power of the court hearing the appeal to require further evidence on questions of fact, while O 55 r 6(4) allows evidence to be given of details of the proceedings below if the tribunal below

fails to produce a note of the proceedings or if such a note is incomplete. The overall structure of O 55 of the ROC is such that supporting affidavits are not to be filed for originating summons initiating appeals under O 55 of the ROC.

18 In this regard, an analogy may be drawn between an appeal from the State Courts to the High Court under O 55D of the ROC and an appeal from any "court, tribunal or person" to the High Court under O 55 of the ROC. Both types of appeals are dealt with by way of rehearing (see O 55 r 2(1) and O 55D r 3(1)), both rely on the record of proceedings below (see O 55 r 6(4) and O 55D r 5), and both bar the adduction of new evidence except with the approval of the Court (see O 55 r 6(2) and O 55D r 11(1)). Given these similarities, it would appear logical that, just as there is no room for the filing of an affidavit in support of a notice of appeal under O 55D, there should similarly be no room for the filing of an affidavit in support of an originating summons initiating an appeal under O 55.

O 28 r 3(1) does not confer a right to file affidavits in an appeal under O 55

19 I am aware that O 28 r 3(1) of the ROC provides as follows:

> Unless otherwise provided in any written law, *where the plaintiff intends to adduce evidence in support of an originating summons, he must do so by affidavit* and must file the affidavit or affidavits and serve a copy thereof on every defendant not later than 7 days after the service of the originating summons.
>
> [emphasis added]

In my view, this provision merely regulates the form by which evidence in support of an originating summons is to be adduced. It does not confer a right to file supporting affidavits or adduce evidence. The admissibility of evidence and affidavits is to be found in other parts of the law and is not governed by

O 28 r 3(1). All that O 28 r 3(1) indicates is that *if* any evidence is to be adduced, it has to be in the form of an affidavit.

20 If there was ever any ambiguity or doubt on the point, it was put to rest by para 84(3) of the Practice Directions, which provides that "*[n]o affidavits shall be filed in respect of the appeal without the leave of court*". The fact that leave is required presupposes that there is no right to file affidavits in support of originating summonses initiating appeals under O 55 of the ROC.

Considerations for granting of leave under para 84(3) of the Practice Directions

21 Order 55 r 1 of the ROC states:

> (1) Subject to paragraphs (2) and (4), *this Order shall apply to every appeal which under any written law lies to the High Court from any court, tribunal or person.*
>
> (2) This Order shall not apply to an appeal from a State Court constituted under the State Courts Act (Cap. 321) or any application by case stated.
>
> (3) Rules 2 to 7 shall, in relation to an appeal to which the Order applies, have effect subject to any provision made in relation to that appeal by any other provision of these Rules or under any written law.
>
> (4) In this Order, references to *a tribunal shall be construed as references to any tribunal constituted under any written law other than any of the ordinary courts of law.*
>
> [emphasis added]

22 It is apparent from the italicised text in the foregoing quotation that the scope of O 55 of the ROC is very wide. It covers "every appeal which under any written law lies to the High Court from any court, tribunal or person". These would include:

(a) at one extreme, appeals from proceedings similar to those which took place before the DT in the present case – where there is a full trial of the matter over several days, where both sides are represented, where the tribunal is chaired by a former judge, where there is a complete verbatim transcription of the proceedings and where the tribunal issues a fully reasoned decision – *ie*, a process that is almost identical to that of a full trial in a court of law;

(b) at the other extreme, appeals from purely administrative decisions not involving any trial-like or adjudicatory process, *eg*, s 39 of the Environmental Protection and Management Act (Cap 94A, 2002 Rev Ed) concerning work prohibition orders issued by the National Environmental Agency, and s 344E of the Companies Act (Cap 50, 2006 Rev Ed), concerning refusals by the Registrar of Companies to restore the names of companies which have been struck off the companies register; and

(c) cases that fall between the two extremes above, such as appeals from tribunals where, even though hearings are held, the procedures involved are relatively informal.

23 The first guiding principle, therefore, is that the criteria for granting of leave under para 84(3) of the Practice Directions should be flexible enough to cater to the very wide range of appeals coming within the scope of O 55 of the ROC.

24 The second guiding principle is that para 84(3) of the Practice Directions should be applied with the understanding that for the majority of appeals under O 55 of the ROC, no affidavits would be necessary. It is only on

this premise that the introduction of a filter mechanism such as para 84(3) makes sense. If the expectation were otherwise, and if affidavits were to be allowed routinely in appeals under O 55 of the ROC, para 84(3) of the Practice Directions would in effect be interposing an unnecessary step that serves only to inconvenience parties, drain judicial resources and increase costs. Such a result could not have been the intended outcome of para 84(3) of the Practice Directions.

Leave should not be granted where the proposed affidavit merely serves a function which may be served by written submissions

25 I am of the view that in an appeal from proceedings similar to that which occurred in the present case, *ie,* proceedings which are almost identical to a full trial in a court of law, there can be no room for the filing of an affidavit merely for the purpose of "crystallising the issues" or "marshalling the facts" for the court hearing the appeal. It is the function of written submissions to crystallise the issues and marshal the facts and to organise complex timelines or facts in a form which best assists the court hearing the appeal.

26 An affidavit which seeks to do the job which should rightfully be done by written submissions is not only otiose, it also generates unnecessary costs for the parties and results in unnecessary duplication of effort. Furthermore, judicial resources would also be wasted as judges would have to expend time reading two separate documents covering practically the same ground instead of one.

27 To complete the analysis, it is necessary to also consider when leave might be granted under para 84(3) of the Practice Directions. Given the

structure of O 55 of the ROC, it appears that there are at least two situations in which the granting of leave may be justified.

Leave may be granted for evidence to be given pursuant to O 55 r 6(4) to supplement, or point out inaccuracies in, the record of proceedings below

28 The first situation relates to the application of O 55 r 6(4), which reads:

> It shall be the duty of the appellant to apply to the Judge or other person presiding at the proceedings in which the decision appealed against was given for a signed copy of any note made by him of the proceedings and to furnish that copy for the use of the Court; *and in default of production of such a note, or, if such a note is incomplete*, in addition to that note, the Court may hear and determine the appeal on any other evidence or statement of what occurred in those proceedings as appears to the Court to be sufficient.
>
> Except where the Court otherwise directs, an affidavit or note by a person present at the proceedings shall not be used in evidence under this paragraph unless it was previously submitted to the person presiding at the proceedings for his comments.
>
> [emphasis added]

O 55 r 6(4) envisages that the appellant would obtain the record of proceedings from the tribunal below for the use of the court hearing the appeal. Therefore, where the tribunal below fails to provide its record of the proceedings, leave should be granted for affidavits to be filed to apprise the court hearing the appeal of what occurred before the tribunal below. Further, where the recording of proceedings provided by the tribunal below is incomplete, leave may be granted for affidavits to be filed to supplement the tribunal's record. In addition, although this is not explicitly stated in O 55 r 6(4), I am of the view that leave may also be granted where either party wishes to point out relevant inaccuracies in the record of proceedings.

Leave may be granted for adduction of further evidence pursuant to O 55 r 6(2) if conditions for adduction of further evidence are met

29 The second situation where leave may be granted would be for the adduction of further evidence. In this regard, O 55 r 6(2) of the ROC provides that:

> The Court shall have power to require further evidence on questions of fact, and the evidence may be given in such manner as the Court may direct either by oral examination in Court, by affidavit, by deposition taken before an examiner or in some other manner.

30 Counsel for the Respondent submitted that leave for adduction of further evidence should only be given if the three conditions laid down in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") were satisfied - namely, the further evidence sought to be adduced:

> (a) must not have been obtainable with reasonable diligence for use at the trial;
>
> (b) must be such that, if given, would probably have an important influence on the result of the case, although it need not be decisive; and
>
> (c) must be apparently credible, although it need not be incontrovertible.

31 I do not accept this submission as I do not think that the *Ladd v Marshall* conditions should be applied strictly to an appeal under O 55 of the ROC. In *Martek Biosciences Corp v Cargill International Trading Pte Ltd* [2011] 1 SLR 1287 ("*Martek*"), an appeal under O 87A of the ROC against a decision of Registrar of Patents revoking a patent, the Court of Appeal held that:

(a) the 3 conditions in *Ladd v Marshall* give effect to the term "special grounds" in O 57 r 13(2) of the ROC (at [12]); and

(b) having regard to the fact that the term "special grounds" is not found in O 87A r 13(2) of the ROC and having regard to the nature of proceedings for revocation of patents (which affects the public's interest in a way not found in private litigation between two parties), the *Ladd v Marshall* test should not be prescribed as a strict test for the purposes of an application to adduce further evidence under O 87A r 13(2) of the ROC (at [35]);

32 In relation to O 55 r 6(2), the Court of Appeal observed at [8] that:

> … *the prescribed regime for adducing further evidence under O 55 r 6(2) seems more liberal than the corresponding regime under O 87A r 13(2)* as the former provides that "[t]he Court shall have power to require further evidence on questions of fact, and the evidence may be given in such manner as the Court may direct" while the latter provides that "the evidence used on appeal shall be the same as that used before the [Patents] Registrar and, except with the leave of the Court, no further evidence shall be given".
>
> [emphasis added]

33 It stands to reason from the Court of Appeal's observation and holdings in *Martek* that a court hearing an appeal under O 55 of the ROC is also not bound to apply *Ladd v Marshall,* since O 55 r 6(2) of the ROC gives the court a wider discretion to allow further evidence than under either O 87A r 13(2) or O 57 r 13(2). Having regard to the principles discussed in *Martek*, the court needs to be flexible in the application of O 55 r 6(2) to cater to the different types of proceedings giving rise to appeals under O 55. Factors to be taken into account would likely include how closely the proceedings below resembles a trial in a court of law and whether the issues at stake would affect

the public's interest or are more in the nature of issues arising in private litigation between parties.

The appropriate juncture to apply for leave to file affidavits in appeals under O 55 of the ROC

34 Given the preceding discussion, I am of the view that:

(a) when an appeal is filed under O 55 of the ROC, the appellant should not attempt to file a supporting affidavit pursuant to O 28 r 3;

(b) instead, the appellant should, pursuant to O 55 r 2(2), state the grounds of appeal (in detail if necessary) in the originating summons initiating the appeal, and thereafter apply to the tribunal below for its record of proceedings pursuant to O 55 r 6(4);

(c) it is only after O 55 r 6(4) has been complied with that consideration may be given to seeking leave under para 84(3) of the Practice Directions for the filing of affidavit(s).

35 The foregoing is subject to the caveat that there could be cases where it would not be reasonable to expect the appellant to proceed in accordance with O 55 r 6(4). In such cases, the burden would be on the party applying for leave under para 84(3) of the Practice Directions to provide reasons for seeking leave before complying with O 55 r 6(4).

Decision

36 For the reasons discussed at [24]-[26] above, I dismissed SMC's application for leave to file the Supporting Affidavit on the ground that an affidavit which purports to do no more than "crystallising the issues" or

"marshalling the facts" (a function rightfully belonging to written submissions) should not be allowed in appeals under O 55 of the ROC. Consequently, there was no need for me to proceed to the second stage of the analysis set out at [16(b)] above. I also indicated that the dismissal of SMC's application on this ground would not preclude SMC from subsequently making an application to adduce further evidence pursuant to O 55 r 6(2), at which point SMC would need to provide justifications for adducing the further evidence.

37 As a substantial amount of work was done by the Respondent to comb through the Supporting Affidavit to identify items of new evidence, I awarded costs of this application to the Respondent, fixed at $10,000 excluding disbursements.

Pang Khang Chau
Judicial Commissioner

Chang Man Phing, Cheronne Lim and Lim Ying Min
(WongPartnership LLP) for the applicant;
Edwin Tong SC, Kristy Tan and Rachel Ong (Allen & Gledhill LLP)
for the respondent.
