Chai Chwan v Singapore Medical Council
[2009] SGHC 115

Case Number : OS 1756/2007

Decision Date : 13 May 2009

Tribunal/Court : High Court

Coram : Belinda Ang Saw Ean J

Counsel Name(s) : Rebecca Chew, Kelvin Poon, Mark Cheng and Loke Pei Shan (Rajah & Tann LLP) for the applicant; Harry Elias S.C., Melanie Ho, Chang Man Phing, Doris Chia and Kylee Kwek (Harry Elias Partnership) for the defendant

Parties : Chai Chwan — Singapore Medical Council

Administrative Law

13 May 2009

Belinda Ang Saw Ean J:

1 This application was brought by Dr Chai Chwan for leave to apply for judicial review under O 53 r 1(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"). The respondent is the Singapore Medical Council ("SMC"). Order 53 r 1(3) directs that the application be served on the Attorney-General. As the subject matter of the application did not concern the Government, the attendance of the Attorney-General at the hearing was dispensed with. In the present case, the Attorney-General was incorrectly named as a respondent. Counsel for Dr Chai, Ms Rebecca Chew, quite rightly undertook to correct the procedural error by deleting the name of the Attorney-General from the proceedings. Leave to amend the application was duly granted on 15 April 2008.

Background facts leading to the application for leave under O 53 r 1(2)

2 Dr Chai is a registered medical practitioner under the Medical Registration Act (Cap 174, 2004 Rev Ed) ("the Act"). He is the licensee of the Little Cross Family Clinic Pte Ltd. The clinic is located at Blk 929, Tampines Street, #01-445, Singapore 520929. The SMC is a statutory board under the Ministry of Health ("MOH") tasked with governing and regulating the professional conduct and ethics of registered medical practitioners in Singapore. Disciplinary proceedings have been brought against Dr Chai in respect of his prescribing practice of Subutex.

3 By way of introduction, Subutex is often used in the management of opioid dependence. It acts as an opiate substitute to help wean drug addicts off their dependence on drugs. In 2003, the authorities learnt that drug addicts misused Subutex by mixing it with sleeping pills to form a particularly potent drug mixture. Progressive measures were therefore introduced to control the dispensation of Subutex. Since then MOH moved to introduce the "Clinical Practice Guidelines" on "Treatment of Opiate Dependence" in November 2005, setting out good clinical practices and administrative controls to ensure the appropriate prescription of Subutex. Further, MOH also set up the Central Addiction Registry for Drugs which monitors the prescription of Subutex by doctors and enables them to identify patients who obtain additional supplies from different doctors. In August 2006, it became a controlled drug.

4 The two complaints lodged by the MOH against Dr Chai were as follows:

(a) 1 September 2003 ("2003 Complaint"): this raised concerns over the "prescribing practice" of Dr Chai with respect to Subutex. More than 490 patients were allegedly involved and the Complaints Committee of the SMC ("1st Complaints Committee") carried out its preliminary inquiry into the 2003 Complaint. Thereafter, the 1st Complaints Committee decided on 27 October2004 to refer the 2003 Complaint to a disciplinary committee for a formal inquiry to be held. Dr Chai was informed of the decision in a letter dated 27 October2004. Dr Chai faces 444 charges in respect of the 2003 Complaint; and

(b) 28 September 2004 ("2004 Complaint"): this raised concerns once again over Dr Chai's "prescribing practice" with respect to Subutex, Dormicum and Stilnox. A total of 24 patients were allegedly involved and the Complaints Committee of the SMC ("2nd Complaints Committee") carried out its preliminary inquiry into the 2004 Complaint. It decided on 21 April 2005 to refer the 2004 Complaint to a disciplinary committee for a formal inquiry to be held. Dr Chai was informed of the decision in a letter dated 21 April 2005. Dr Chai faces ten charges in respect of the 2004 Complaint.

5 On 28 November 2007, Dr Chai applied by way of *ex parte* Originating Summons No. 1756 of 2007 ("OS 1756") for leave to apply for judicial review to seek the following relief:

a. A *Quashing order* for the decision of the 1st Complaints Committee of the SMC dated 27 October2004 to refer the 2003 Complaint to a disciplinary committee to be quashed;

b. A *Quashing order* for the decision of the 2nd Complaints Committee of the SMC dated 21 April 2005 to refer the 2004 Complaint to a disciplinary committee to be quashed;

c. A *Quashing order* for the decisions of the Chairman of the Complaints Panel of the SMC to extend time pursuant to s 40(2) of the Act to be quashed;

d. A *Prohibitory order* to restrain the SMC from holding an inquiry into the 454 charges against Dr Chai; and

e. For the costs of and incidental to the proceedings to be provided for.

6 At the conclusion of the hearing, I was minded to hold that Dr Chai had accounted for the delay in filing OS 1756 but the matter did not stop there. I went on to hear the grounds of the leave to apply for judicial review which was dismissed for the reasons explained in this decision. Dr Chai has appealed against the dismissal of OS 1756.

Delay in filing OS 1756

7 OS 1756 was served on the SMC's lawyers, Harry Elias Partnership ("HEP"), on 28 November 2007. The SMC took advantage of service on it to attend the *ex parte* hearing of the leave application and to argue, among other things, that OS 1756 could not be filed without first obtaining time extension to file the leave application. Counsel for the SMC, Mr Harry Elias SC, argued that OS 1756 was filed out of time: the delay was three years in the case of the 2003 Complaint, and for

the 2004 Complaint, the delay was two and a half years.

8 It is clear from a reading of O 53 r 1(6) of the ROC that the applicant is not required to separately obtain an order to extend time under O 3 r 4 of the ROC *before* the applicant is permitted to file the application for leave to issue proceedings for a quashing order outside of the three-month time limit prescribed in O 53 r 1(6). This is because the application for leave is susceptible to refusal on grounds of delay unless the delay is accounted for to the satisfaction of the court. Where the delay is held to be excusable thereby earning an extension of time, the court then moves on to consider whether or not the grounds for leave to apply are made out based on the standard of proof enunciated by the Court of Appeal in *Chan Hiang Leng Colin & Ors v Minister for Information and the Arts* [1996] 1 SLR 609 ("*Colin Chan*"). This second part of the case will be discussed later.

9 On the first issue of delay, the operative provision is O 53 r 1(6). It is helpful to set out Order 53 r 1 in its entirety. It reads:

> No application for order of mandamus, etc., without leave (O.53.r.1)
>
> 1. (1) No application for a Mandatory Order, Prohibiting Order or Quashing Order shall be made unless leave to make such an application has been granted in accordance with this Rule.
>
> (2) An application for such leave must be made by ex parte originating summons and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by an affidavit, to be filed when the application is made, verifying the facts relied on.
>
> (3) The applicant must serve the ex parte originating summons, the statement and the supporting affidavit not later than the preceding day on the Attorney-General's Chambers.
>
> (4) The Judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit.
>
> (5) The grant of leave under this Rule to apply for a Prohibiting Order or a Quashing Order shall, if the Judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the Judge otherwise orders.
>
> (6) Notwithstanding the foregoing, leave shall not be granted to apply for a Quashing Order to remove any judgment, order, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made within 3 months after the date of the proceeding or such other period (if any) as may be prescribed by any written law or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Judge to whom the application for leave is made; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

10 Ms Chew rightly pointed out that the time limit in r 1(6) applies where the relief sought is a quashing order. No time limit is prescribed in the rules where the relief sought is a prohibition or mandatory order. The reason is fairly obvious as *Mallal's Supreme Court Practice*, Vol 1, 2nd Ed, 1983 at para 53/1A/1 explains:

> **Time**: No time limit has been set for mandamus [*ie* mandatory order], or prohibition because it is expected that any applicant who requires a particular duty to be performed or not to be

performed can be expected to apply for the order for the performance of that duty or the prohibition of that duty at an early stage. Since *certiorari* [*ie* quashing order] can only be applied for at the conclusion of the proceedings, it will make for an early determination of the proceedings if a time limit is set for the application.

…

11 In relation to the first issue, Dr Chai's explanation for the delay is found in para 115(a) of his Statement. He said

> … he was never advised on when the [2003] and/or the [2004] complaints [were] laid before the [Complaints Committee], and it was only from the exchange of the recent correspondence between the Council's lawyers from Harry Elias Partnership ("HEP") and the Applicant's lawyers from Rajah & Tann ("R&T") that he realised that the [Complaints Committees] had failed to comply with sections 40(1) and 40(2) of [the Act].

For convenience, the tables setting out the chronology of the key events in respect of the 2003 and the 2004 Complaints are found in Appendix 1 to this Grounds of Decision.

12 Dr Chai complained that it was only after OS 1756 was filed that the SMC disclosed the documents sought by R&T. They included written applications for time extension to complete the preliminary inquiry and the approvals granted by the Chairman of the Complaints Panel. Ms Chew's arguments were as follows: The preliminary inquiry was not completed within three months as prescribed by s 40(1) of the Act. The written applications disclosed by the SMC showed that it was the Secretariat of the SMC and not the 1st Complaints Committee who made the purported applications for time extension under s 40(2). Furthermore, contrary to s 40(2), none of the written application, on its face, contained any information used by the 1st Complaints Committee in the course of its deliberations to seek a time extension. In short, the written application inadequately explained why time extension was sought. There was also objection that the Chairman of the Complaints Panel did not properly exercise his discretion when he approved the written applications. Separately, the time extension for the 2004 Complaint was made after expiry of the requisite three-month period. All said the written applications and approvals were defective. Dr Chai's excuse for the delay was that he only realised that the Complaints Committees had failed to comply with ss 40(1) and 40(2) after R&T was appointed. Furthermore, the charges were brought to his attention in August 2007 (for the 2003 Complaint) and September 2007 (for the 2004 Complaint). It was then that he realised that he had been presented with a different case to that originally set out in the 2003 and 2004 Complaints. Dr Chai's grievance was that the 454 charges dealt with extraneous matters. The Complaints Committees were wrong to refer for formal inquiry matters extraneous to what was contained in the 2003 and 2004 Complaints. As such, the Disciplinary Committee has no jurisdiction to inquire into them. Furthermore, there was a breach of natural justice as Dr Chai was not given an opportunity to respond to the extraneous matters before being presented with the 454 charges.

13 To understand Dr Chai's case, it is best to reproduce s 40 of the Act which read as follows:

> 40.–(1) A Complaints Committee shall inquire into any complaint or information, or any evidence referred to in subsection (9), and complete its preliminary inquiry not later than 3 months from –
>
> (a) the date the complaint or information is laid before the Complaints Committee; or
>
> (b) the date the information or evidence referred to in subsection (9) is received by the Complaints Committee,

as the case may be.

(2) Where a Complaints Committee is of the opinion that it will not be able to complete its preliminary inquiry within the period specified in subsection(1) due to the complexity of the matter or serious difficulties encountered by the Complaints Committee in conducting its preliminary inquiry, the Complaints Committee may apply in writing to the Chairman of the Complaints Panel for an extension of time to complete its inquiry and the Chairman may grant such extension of time to the Complaints Committee as he thinks fit.

…

(5) All information, including such book, document, paper or other record used by the Complaints Committee in the course of its deliberations, shall be confidential and shall not be disclosed to any person including the registered medical practitioner unless the Complaints Committee in its discretion thinks otherwise.

…

(9) Where, in the course of its inquiry, a Complaints Committee receives information touching on or evidence of the conduct or physical or mental fitness of the registered medical practitioner concerned which may give rise to proceedings under this Part, the Complaints Committee may, after giving notice to him, decide on its own motion to inquire into that matter.

14 The starting point is that whenever there is a failure to act within the period of three months prescribed in O 53 r 1(6) of the ROC, there is a delay. The question of whether the period of the delay can be categorised as unduly excessive on the basis of being inexcusable is a question of fact for the court. Each case is infinitely varied and distinctly fact-sensitive. Consequently, there is no set formula to use in deciding whether a satisfactory account of the delay has been given. The judge hearing the application will be able to assess objectively the grounds of delay at the leave stage. The lapse of time must be explained fully by the applicant so that the court is able to satisfy itself that the delay has been adequately accounted for. In other words, notwithstanding the lateness of the application, the court could entertain the application for leave to apply for judicial review by extending the time where it thought that there was valid reason to exercise the power.

15 Mr Elias contended on behalf of the SMC that Dr Chai's explanation in his Statement failed to show "good reason" or a "strong case" to excuse the undue delay. Specifically, the excuse was that Dr Chai did not know of the alleged breach of ss 40(1) and (2), or that he did not have sufficient evidence to make the leave application at an earlier date. Mr Elias argued that the allegation of insufficient knowledge or evidence was not an acceptable reason to excuse the delay. He had two points. First, he referred the court to *R v Secretary of State for Transport ex p. Presvac Engineering Ltd* (unreported, The Times 10 July 1991) ("*Presvac Engineering*"). In that case, the English Court of Appeal rejected the excuse as a good one where the delay was due to the applicant's desire to wait for better evidence upon which he could make the application to court. That excuse was held to be not a good reason for extending time. Therefore, following *Presvac Engineering*, Mr Elias submitted that Dr Chai's excuse that he did not have sufficient information or evidence to take out the application earlier was plainly unacceptable.

16 Second, Dr Chai had the interest, knowledge and means to obtain information from the SMC, but he instead sat back and did nothing for over three years in the case of the 2003 Complaint. The same point was being made for the 2004 Complaint. In that case Dr Chai did nothing for two and a

half years. In *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR 568 ("*Teng Fuh (CA)"*), the applicant filed the leave application to commence judicial review after a lapse of 22 years from the date of the declaration issued by the Collector of Land Revenue to acquire the applicant's land for public purpose. In that case, the applicant knew that the land was not redeveloped and that it was rezoned. The applicant knew of those facts in 1983 and 1993 respectively. What was evident from the decision was that the applicant had sat back and did nothing for more than 22 years. It had no excuse to sit back having regard to the fact that the applicant was someone with an interest in the matter. The applicant remained on the land as licensee and was fully aware that the land was not redeveloped over the years after the acquisition. In addition, information that the land had been rezoned was in the public domain, and, hence, was available to anyone who wanted it. Above all, the applicant was actively engaged in property development through its related companies and was aware that change in land usage was dependent on land usage needs and planning policies. Given its position, the applicant was held to have the knowledge and the means to acquire the necessary information to make the application early. Likewise, so the argument developed, it was evident to Dr Chai way back in 2004 and 2005 that time extensions were granted under s 40(2) of the Act. It was said that the 1st Complaints Committee's decision of 27 October2004 was made more than one year after the date of the 2003 Complaint on 1 September 2003. The 2004 Complaint was dated 28 September 2004. Dr Chai was notified of the 2nd Complaints Committee's decision to refer the matter for a formal inquiry on 21 April 2005. That decision was seven months after the date of the 2004 Complaint. Therefore, from the dates alone, the applicant knew or ought to have known in 2004 and 2005 that the Chairman of the Complaints Panel had granted time extensions. Mr Elias concluded that in 2004 and 2005, Dr Chai would have had all the necessary information to challenge the decisions (*i.e*. of 27 October2004 and 21 April 2005) to refer the matters for a formal inquiry. Dr Chai could and should have but did not raise objections at the material times, *i.e*. in 2004 and 2005. He also did not make any enquiries even though he had the "interest, the knowledge and the means to have acquired the information" to make the application early. For those reasons, the SMC rejected Dr Chai's assertions that it was only from the exchange of the recent exchanges of correspondence between the lawyers that he realised that there had been non-compliance with ss 40(1) and (2) of the Act.

17 The facts of this case are unusual given the very large number of charges that have been brought before the Disciplinary Committee. The totality of Dr Chai's delay was said to be between October 2004 and April 2005 to November 2007. It was highly relevant that the delay over the same period of time was also largely in part on the side of the SMC due to the difficulties it faced with the exceedingly large number of patients to investigate and the ensuing charges. The large number of patients of itself could be indicative or were physical signs of illicit use of Subutex. Thus, detail records of prescription to indicate dosage, duration of use and reasons for use were important and had to be thoroughly investigated and reviewed carefully.

18 The SMC explained that the repetitive nature of the prescriptions of Subutex to patients over a long period of time required thorough investigations. The total number of prescriptions involved for the first batch of 444 patients came up to 9848 prescriptions. It was said that some of those patients were prescribed Subutex by Dr Chai on more than 100 occasions. In January 2005, the SMC was in communication with Dr Chai on the 2004 Complaint. On 25 April 2005, the 2nd Complaints Committee informed Dr Chai that a formal inquiry would be held. In December 2005, the SMC requested the handwritten patients' case notes to be typed. Typed transcripts of Dr Chai's handwritten case notes were furnished in March 2006. Thereafter, the SMC was quiet for a long time. Given the state of affairs and nature of the complaints, it was not unreasonable for Dr Chai to let sleeping dogs lie whilst he continued with his practice. The case became "alive" again in August 2007. In a case like this, there was no reason why (if the SMC was not ready at the different stages) the SMC could not have told Dr Chai so. It was only in February 2008 that the SMC took the opportunity to explain in

affidavits what the Complaints Committees, the expert and prosecuting counsel had to do between 2004 and 2007 to bring the complaints before a disciplinary committee. Professor Lee Eng Hin ("Professor Lee"), Chairman of the 1st Complaints Committee whose decision on 27 October2004 is being challenged by Dr Chai described the case as unique. He remarked in his affidavit dated 1 February 2008 that "he had not encountered a case which involves *(sic)* over 400 charges". The 2003 Complaint was described as a "Herculean task for any CC [Complaints Committee], the expert and prosecuting counsel." The other affidavit was sworn by Professor Adrian Leong Peng Kheong ("Professor Leong") as the Chairman of the 2nd Complaints Committee whose decision on 21 April 2005 is being challenged by Dr Chai.

19 Given the circumstances of this case, I was not persuaded by the SMC's argument that Dr Chai could have but did not take out the leave application early as he knew or could have found out about the extensions. The particular position of Dr Chai was quite different from the applicant in *Teng Fuh (CA)*. Furthermore, it must be remembered that the SMC had refused in 2007 to disclose the written applications for extensions citing confidentiality under s 40(5) of the Act as a reason and there was nothing to indicate that its position would have been different in 2004 and 2005. I noted that it was only after OS 1756 was filed that the SMC decided to disclose the written applications for time extension to complete the preliminary inquiry in the two affidavits filed on behalf of the SMC.

20 It was after Dr Chai was notified of the charges in November 2007 that he formed a view that he was charged with a different case to that originally made against him. The subject matter of the extensions under s 40(2) first arose after his lawyers who were appointed for the disciplinary hearing started to make inquiries. It was at that time that Dr Chai (in all probability found himself nursing a grievance about the undisclosed written applications) was in a position to act.

21 For these reasons, I did not refuse leave on the basis of delay. I was disposed to hear the grounds for leave to apply for judicial review. In the end, I refused leave to apply.

22 Before I leave the first issue of delay, I intend to briefly touch on Ms Chew's submissions that leave should be granted for the reason that Dr Chai's application for leave to apply for judicial review would not be detrimental to good administration, or cause substantial prejudice to the SMC. On the question of detriment to good administration, Ms Chew relied on *R (on the application of the British Waterways Board) v First Secretary of State* [2006] EWHC 1019. I did not find the decision helpful. The application of the proposition as a matter of Singapore law is unclear. Besides *R (on the application of the British Waterways Board) v First Secretary of State*, the English authorities mentioned in *Singapore Civil Procedure 2007*, para 53/8/24 at 787 are all decisions under s 31(6) of the Supreme Court Act 1981 (c54) (UK). It is a different statutory provision which confers upon the English High Court an overriding power to refuse to grant leave (even though the court is satisfied that there is good reason for the late application) if it considers that the granting of the relief sought will likely cause substantial hardship to, or substantially prejudice the rights of any person or will be detrimental to good administration.

23 Section 31 of the Supreme Court Act provides:

> …
>
> (6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant –
>
> (a) leave for the making of the application; or

(b) any relief sought on the application,

if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.

(7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made.

24 The statutory issue of good administration, substantial hardship or substantial prejudice arises under s 31(6), and there is no equivalent statutory provision in Singapore. Paragraph 1 of the First Schedule to the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) is very differently worded. It reads:

1. Power to issue to any person or authority any direction, order or writ for the enforcement of any right conferred by any written law or for any other purpose, including the following prerogative orders:

(a) a Mandatory Order (formerly known as *mandamus*);

(b) a Prohibiting order (formerly known as a prohibition);

(c) a Quashing Order (formerly known as *certiorari*); and

(d) an Order for Review of Detention (formerly known as a writ of *habeas corpus*).

25 The grounds spelled out in s 31(6) are nowhere to be found in para 1 of the First Schedule or O 53 of the ROC. Generally speaking, the court has powers under O 53 r 1(6) of the ROC to disallow a late application for leave where there has been a long period of delay which is inexcusable. As stated, the discretion in s 31(6) is different. Even though the judge may be satisfied that there is good reason for the late application, the judge still retains the discretion under s 31(6) to refuse to grant leave for the making of the application on grounds of undue delay if the judge considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration. In exercise of its statutory discretion, the court considers the interests of the public and not just the immediate parties to the dispute (see *Reg v Stratford-on-Avon District Council & Another, Ex p Jackson* [1985] 1 WLR 1319 at 1325).

The application for leave to apply for judicial review

26 It is helpful to first look at the legal principles for granting leave to apply for judicial review before dealing with the issues raised by the parties. The grounds for judicial review are illegality, "irrationality," (*i.e. Wednesbury* unreasonableness: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223) or procedural impropriety: see *Council of Civil Services Unions v Minister for the Civil Service* [1985] AC 374 at 410 ("the GCHQ case")). Proportionality has been canvassed as a possible fourth category. The fourth of this has been rejected by the Singapore Court of Appeal in *Chng Suan Tze v Minister of Home Affairs and Ors* [1988] SLR 132 where the court was of the view that proportionality would be subsumed under "irrationality" (*i.e*. if a decision on the evidence is so disproportionate as to breach this principle, such a decision could be said to be irrational in that no reasonable authority could have come to such a decision)(at 164). I now turn to the standard of proof an applicant has to satisfy the court if he wants to obtain leave to apply for

judicial review upon any of the three grounds.

The law: the standard of proof for leave

27 In IRC v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 at 643, Lord Diplock held that:

> My Lords, at the threshold stage, for the federation to make out a prima facie case of reasonable suspicion that the board in showing a discriminatory leniency to a substantial class of taxpayers had done so for ulterior reasons extraneous to good management, and thereby deprived the national exchequer of considerable sums of money, constituted what was in my view reason enough for the Divisional Court to consider that the federation, or, for that matter, any taxpayer, had sufficient interest to apply to have the question whether the Board were acting ultra vires reviewed by the court. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. *If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application*.
>
> [Emphasis added]

28 This approach was affirmed by the Court of Appeal in *Colin Chan*, where the Court of Appeal emphasised (at [22]) that:

> This passage appears susceptible to two slightly different interpretations. One is that the court should quickly peruse the material put before it and consider whether such material discloses 'what might on further consideration turn out to be an arguable case'. The other is that the applicant had to make out a 'prima facie case of reasonable suspicion'. In our view, both tests present a very low threshold and it is questionable whether there is really any difference in substance between the two interpretations.

29 In *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR 644, the Court of Appeal at [22] endorsed the judge's formulation of the test in *Colin Chan, viz* "whether [the material before it] disclosed an arguable and a prima facie case of reasonable suspicion" (at [20]). What this formulation envisages is that the applicant must at least show that the grounds for judicial review are real as opposed to a theoretical possibility. If a real possibility is shown, the applicant has an arguable case for leave to apply (see *Regina v Secretary of State for Home Department, ex p Swati* [1986] 1 WLR 477 at 485).

30 An application for leave to apply for judicial review being an *ex parte* application is usually considered on the papers by the judge who determines the *ex parte* application on "a quick perusal of the material" and concludes that the material discloses "what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed." In other words, on the face of the documents, the applicant must show some shred of an arguable case for judicial review upon the grounds of illegality, *Wednesbury* unreasonableness or procedural impropriety if he is to be granted leave. Equally, if there is *prima facie* clearly no arguable case, an opposite conclusion on consideration of the papers may be reached *ex parte*. A third category of case may present itself where the judge on considering the papers comes to the conclusion that attendance of the putative

respondent is necessary to make representations as to whether or not leave should be granted. Even though the application is *ex parte*, the court has the power to direct the putative respondent to appear (see *R v Secretary of State for the Home Department, ex parte Rukshanda Begum* [1990] Crown Office Digest 109 referred to in *Jeffrey Pinsler, Civil Practice in Singapore and Malaysia*, Vol 3, Issue 18, Cap XXXVII at p 5 [53]).

31 It must be remembered that OS 1756 (filed as an *ex parte* application) was served on the SMC's lawyers on 28 November 2007. As stated, the SMC took advantage of the notice of the *ex parte* application to appear at the hearing (see [7]). The SMC also filed two affidavits opposing the leave application. In a contested *ex parte* hearing (or a consent *inter partes* hearing as was the case here[note: 1]), questions, whether obvious or asked, need to be answered before it is possible to say whether or not the applicant, on the evidence before the court, meets the threshold test. Dr Chai filed his Statement and two affidavits. The SMC filed two affidavits. As Andrew Phang J (as he then was) in *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2006] 3 SLR 507 at [24]) ("*Teng Fuh (HC)*") said that it is *at that point* after hearing the "fullest evidence and strongest argument" that "the plaintiff must establish "what might on further consideration turn out to be an arguable case" or a "*prima facie* case of reasonable suspicion". I have to say that after the court has heard full arguments and seen information from both sides it is hard to see what else "might on further consideration turn out to be an arguable case." But the *Colin Chan* test is the law and I am bound by it. The recent guidance of the Court of Appeal in *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR 648 at [56] is welcome for the approach suggested removes the artificiality of applying the test in *Colin Chan* following a lengthy contested hearing for leave to apply involving full arguments and information by both sides. Chan Sek Keong CJ (delivering the judgment of the court) said (at [56]):

> We should like to add by way of guidance to judges who hear *ex parte* applications for leave for judicial review that the purpose of requiring leave is to enable the court to sieve out frivolous applications. A case such as the present which clearly raises issues which require more than a cursory examination of the merits should have been heard as a substantive application. There is no reason why an *ex parte* application such as Pang's could not have been heard *inter partes* and disposed of on the merits as a substantive application.

32 I am mindful that any in-depth examination is inappropriate for the hearing at the leave stage is different from the substantive hearing. Neither is the court at the leave stage permitted to resolve conflicting factual evidence and arguments in order to decide whether to grant or refuse leave. If the applicant wants to obtain leave, he has at least to satisfy the court that he has an arguable case for judicial review upon the grounds of illegality, *Wednesbury* unreasonableness or procedural impropriety. The applicable standard of proof is that at the leave stage, the applicant is not required to show a *prima facie* case that such grounds do in fact exist; he must at least show that it is not a theoretical possibility. The approach outlined by Phang J in *Teng Fuh (HC)* following a contested hearing is analogous to the court's approach in an application for leave to appeal against an arbitrator's award as the English Court of Appeal in *R v Secretary of State for the Home Department, ex parte Rukshanda Begum* ([30] *supra*) observed:

> … if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

In other words, the applicant must have an arguable case of illegality, *Wednesbury* unreasonableness or procedural impropriety before leave to apply is granted.

Grounds for the leave application

33 With these principles in mind, I now come to Dr Chai's grounds for the leave application. They relate to the following matters:

(a) Breach of s 40(1) of the Act in that the respective Complaints Committees failed to complete the preliminary inquiry within three months from the date the complaints were laid before them. Furthermore, the decisions of the Chairman of the Complaints Panel to extend time were in breach of s 40(2) of the Act.

(b) The charges against Dr Chai are *ultra vires* the complaints as they include extraneous matters; and

(c) The late appointment of a disciplinary committee was contrary to s 41(3) of the Act and the delay was allegedly prejudicial to Dr Chai.

34 In considering whether or not to grant leave to apply for judicial review, besides the three grounds for judicial review, the court is entitled to have regard to a variety of factors relevant to the purpose of O 53 r 1. They include whether the application would serve any useful purpose. The court may also consider whether the application for leave was premature (see *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 ("*Rayney Wong*"). Another factor is the availability of an alternative remedy such as administrative review or appeal on the merits (see generally *R v Secretary of State for Home Department, ex p Swati* (*supra* [29]).

Ground (a): Section 40(1) point and extension of time by Chairman of the Complaints Panel under s 40(2)

35 This aspect of the discussions involved repetition of arguments on delay considered earlier.

36 It is worth reiterating the three stages in all disciplinary proceedings against medical practitioners under the Act:

(1) A complaint is made to the SMC which shall refer the complaint to Chairman of the Complaints Panel;

(2) The complaint is laid before a Complaints Committee by the Chairman of the Complaints Panel for its preliminary inquiry;

(3) Upon the Complaints Committee considering that a formal inquiry is necessary, an inquiry would be held by the Disciplinary Committee into the complaint.

Subsections (1) and (2) of s 40 have prescribed time stipulations and they are set out in [13] above. The text of s 41(3) is reproduced below at [62].

37 Dr Chai first alleges that the 1st Complaints Committee failed to complete its preliminary inquiry within three months from the date the complaints were laid before it and the various decisions of the Chairman of the Complaints Panel to extend time contravened s 40(2) of the Act. The short point that arose at the hearing concerned the written applications made by the Secretariat to the Chairman of the Complaints Panel. An objection was raised on behalf of Dr Chai that it was the Secretariat, and not the 1st Complaints Committee, that made the written applications. Furthermore, the written applications had merely stated that the preliminary inquiry was "pending for expert report". In the

case of the 2nd Complaints Committee, the reason for extension as stated in the written application was that the date of the scheduled meeting of the 2nd Complaints Committee was outside the three-month period. Nothing was said in the written applications about the complexity or serious difficulties that were encountered by either of the Complaints Committees. Dr Chai submitted that the scantiness of the written applications for extensions of time was matched by the approvals allegedly granted by the Chairman of the Complaints Panel. It was said that there was no evidence that the Chairman of the Complaints Panel had applied his mind as to whether the matter was truly complex or difficult and that amounted to an unreasonable exercise of his discretion in the *Wednesbury* sense. On that basis, Dr Chai argued that a quashing order should be granted against the decisions of the Chairman to grant the extensions under s 40(2) of the Act. In addition, Dr Chai argued that the application for extension of time was made after the requisite three-month period in the case of the 2004 Complaint.

38 In response, the SMC clarified it was the respective Complaints Committees that instructed the Secretariat of the SMC to seek time extension from the Chairman of the Complaints Panel. Next, the SMC argued that the time extension granted from time to time by the Chairman of the Complaints Panel was not an irrational (*i.e*. *Wednesbury unreasonable*) exercise of his discretion given the complexity of the complaints or serious difficulties encountered by the 1st Complaints Committee which warranted a report for the expert, Professor R Munidasa Winslow ("Professor Winslow"). Professor Winslow is the Chief of Community Addictions Management Programmes, Addiction Medicine, Institute of Mental Health. The 1st Complaints Committee had to wait for Professor Winslow's expert report before completing its preliminary inquiry. Furthermore, going by past precedents, extensions of time were not unusual. Professor Lee and Professor Leong each filed an affidavit to explain the reasons for the time extensions sought by the respective Complaints Committees in relation to the October 2004 and April 2005 decisions. I have considered the explanation and accepted that the length of time taken by the respective Complaints Committees to complete the preliminary inquiry was no longer than was absolutely necessary in fairness to Dr Chai as the person affected by the decision. The 2003 Complaint involved more that 490 individual patients. In the total number of prescriptions were over 9848 instances. The 1st Complaints Committee took one year (*ie* between 28 October 2003 and 27 October2004) to carry out its preliminary inquiry into the 2003 Complaint and Dr Chai was notified of its decision on 24 October 2004. As Professor Lee deposed, the first couple of months were spent awaiting Dr Chai's explanation on the 2003 Complaint which was provided in his letter dated 5 November 2003. The next ten months were used to investigate into the 2003 Complaint such as reviewing Dr Chai's explanation, appoint an expert for a preliminary report and considering the expert's report when it was ready and thereafter deliberate on the 2003 Complaint. Professor Lee explained that the two main issues which the 1st Complaints Committee investigated during the preliminary inquiry were in respect of matters raised in the 2003 Complaint. In the course of the year, three extensions of three months each were sought and approved by the Chairman of the Complaints Panel. The reason for the extension was stated as "pending for expert opinion". Indeed, Professor Winslow who was appointed on 13 April 2004 furnished his expert report to the 1st Complaints Committee on 16 September 2004. Thereafter, his expert report was circulated to the members of the 1st Complaints Committee. On 27 September 2004, the 1st Complaints Committee convened the second meeting. A decision was made to refer the 2003 Complaint for a formal inquiry.

39 As for the 2004 Complaint, Professor Leong explained that the 2nd Complaints Committee was appointed on 13 December 2004 to investigate the 2004 Complaint. The 2004 Complaint involved 24 individual patients. Each of the 24 individual patients had been treated and prescribed Subutex, Dormicum and/or Stilnox by Dr Chai. Between 13 December 2004 and 21 April 2005, the 2nd Complaints Committee carried out its preliminary inquiry into the 2004 Complaint. In that time, Dr Chai

responded to the 2004 Complaint on 14 February 2005. As the first meeting of the 2nd Complaints Committee was scheduled on 21 March 2005, eight days after the three-month expiry date, the 2nd Complaints Committee sought and was granted a three-month time extension by the Chairman of the Complaints Panel for the completion of the preliminary inquiry. As stated, the 2nd Complaints Committee convened its first meeting on 21 March 2005. Dr Chai's explanation and his case notes were reviewed. Thereafter, a decision was made to refer the 2004 Complaint to the Disciplinary Committee on 21 April 2005. On the same day, Dr Chai was informed of the decision to refer the 2004 Complaint to a disciplinary committee for a formal inquiry. Professor Leong confirmed that the issues the 2nd Complaints Committee had investigated during the preliminary inquiry were the same issues raised in the 2004 Complaint that were referred for formal inquiry by a disciplinary committee. The expert's report supported only ten out of 13 cases investigated. Accordingly, Dr Chai faces a total of ten charges.

40 There was no indication to suggest, even taking Dr Chai's case at its best, that the Chairman of the Complaints Panel in extending time was exceeding his jurisdiction; acting unfairly, acting unreasonably or failing to have regard to a material consideration. The reason for each extension sought was stated in the relevant written application. Section 40(2) confers upon the Chairman of the Complaints Panel a discretion which is matter of judgment. The discretion was not based on any conditions that must be satisfied before the Chairman of the Complaints Panel could exercise his discretion. The wording of s 40(2) shows that the "Chairman may grant such extension of time to the Complaints Committee as he thinks fit". The language is in plain and unfettered terms and the power is exercisable at any time. The Chairman of the Complaints Panel was performing a statutory function which was *intra vires* and arrived at a conclusion in which Dr Chai could not complain. In my judgment it was quite hopeless for it to be argued that there were other considerations which might make the extensions questionable.

41 Ms Chew cited the authority of *Tan Eng Chye v Director of Prisons* [2004] 2 SLR 640 ("*Tan Eng Chye*"), but the decision did not assist Dr Chai. In *Tan Eng Chye*, the applicant pleaded guilty to a charge of robbery under s 392 of the Penal Code (Cap 224, 1985 Rev Ed). The trial judge was concerned with whether caning should be ordered as he had been informed that the applicant suffered from a congenital condition affecting the heart, eyes and other parts of the body. The medical report stated that he was fit for caning but no indication was given as to whether the doctor had addressed his mind to the applicant's condition or referred to the applicant's previous medical records. The applicant applied for leave to apply for an order of *certiorari* that the medical assessment conducted was not sufficiently thorough. As Kan Ting Chiu J noted at [37], the concept of *Wednesbury* unreasonableness (*per* Lord Greene MR in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* at 228) centres on:

> The exercise of such a discretion must be a real exercise of the discretion. *If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters*. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.
>
> [Emphasis in original]

42 Kan J held that the omission to consider the medical history and condition of the applicant in the medical assessment amounted to *Wednesbury* unreasonableness. Unlike the situation in *Tan Eng Chye*, where the issue was one of the scope of the medical report and whether the medical history of

the applicant had been comprehensively reviewed (a matter particularly critical given the sentence of the applicant), the issue in the present case is distinguishable. As Lord Greene noted, nowhere in the Act does it mention the *matters* (expressly or by implication) which the Chairman of the Complaints Panel should have regard to, when exercising his discretion to extend time.

43 Was the decision to extend time "so absurd that no reasonable or sensible person could have come to that decision"? In the GCHQ case ([26] *supra*) Lord Diplock explained the concept as follows at 410:

> By "irrationality" I mean what can by now be succinctly referred to as "*Wednesbury* unreasonableness"… It applies to a decision which is so *outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it*. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. [Emphasis added]

44 Although s 40(1) of the Act states that the Complaints Committee is to complete the preliminary inquiry within the three-month time frame, it cannot be said that the granting of an extension of time was an irrational exercise of the Chairman's discretion (see [41] above). Further, as the SMC correctly pointed out, the 2nd Complaints Committee's application for extension of time was made on 16 March 2005, with the extension obtained 2 days later on 18 March 2005. The three-month period would have lapsed on 13 March 2005. Therefore, the delay was only five days and it could not be said that the decision was so absurd that no reasonable person could have come to that decision which was to cover the meeting scheduled on 21 March 2005. Notably, s 40(2) does say when the application for extension must be made. The wording of s 40(2) allows for the application for time extension to be made at any time before or even after the three-month expiry date.

Ground (b): Whether the charges are ultra vires the complaints in both cases

45 Dr Chai argued that s 40(1) of the Act limited the power of the Complaints Committee to inquire into the complaints and if it referred to matters extraneous to that contained in the 2003 and 2004 Complaints, the Complaints Committee would be acting in excess of powers under the Act. He argued that the charges did not only concern his "prescribing practice" but had been extended into looking at the "management" of his patients. Consequently, the charges far exceeded the scope of 2003 and 2004 Complaints. In respect of the extraneous matters, Dr Chai contended that he was not given the opportunity to explain them and he consequently raised breach of natural justice as a ground for the leave application.

46 In response, the SMC pointed out that the issues investigated and referred to the Disciplinary Committee for a formal inquiry, and the charges in the Notice of Inquiry, were entirely consonant with and corresponded to the subject matter and scope of the 2003 and 2004 Complaints. It is worth mentioning that both Professor Lee and Professor Leong have the same understanding of the meaning of "prescribing practice" of a doctor. An examination of the prescribing practice calls into inquiry the following matters with reference to the SMC Ethical Code and Ethical Guidelines ("the SMC Ethical Code"):

(a) Whether the doctor has prescribed medication on clear medical grounds;

(b) Whether the prescriptions were made in reasonable quantities and appropriate to the patients' needs;

(c) Whether the patient was appropriately informed about the purpose of the medication and its side effects;

(d) Whether the patient was informed about the contraindications of the prescribed medication;

(e) Whether necessary safeguards were put in place especially with a medication that has potential for abuse; and

(f) Whether such a practice is borne out in the clinical case notes.

47 It was explained that the particulars of the charges (samples of which are shown below), relate directly to the prescribing practice of Dr Chai. They form part of MOH's complaint on whether Dr Chai had properly managed the treatment of his patients in the prescription of Subutex for heroin addiction. Professor Lee confirmed that the charges were entirely consistent with the subject matter and scope of the 2003 Complaint. Likewise as regards the 2004 Complaint, Professor Leong also gave the same confirmation in his affidavit.

48 In *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 2 SLR 274 ("*Jerry Tan*"), the appellant ("Dr Tan") was an ophthalmologist who had a financial interest in an optical shop and an eye clinic, both located beside one another. The optical shop was featured in a newspaper article and it alluded to having a 'licensed eye clinic under the same roof'. A letter of complaint was sent to the respondent, raising the possibility of a potential conflict of interest due to Dr Tan's status as a medical practitioner and his financial interest in the optical businesses. Dr Tan submitted an explanation to the Complaints Committee who informed him subsequently that it decided to place the matter before the Disciplinary Committee. He was charged with advertising and promoting the optical businesses. Dr Tan unsuccessfully applied for an order of *certiorari* to quash the decision of the Complaints Committee that a formal inquiry be held by the Disciplinary Committee, and an order prohibiting the Disciplinary Committee from holding an inquiry. On appeal, he tried to argue *inter alia*, that the charges were different from the complaint and he was therefore prejudiced by the lack of opportunity to be heard on them. Emphasising the "possible adverse impressions that might arise as a result of the article in *The Business Times*", the High Court was of the view that the Complaints Committee could not take into account matters that were extraneous and irrelevant to the complaint but it could take a "broad and sensible view" of the nature of the complaint and was entitled to conclude that the issue of advertising was also in issue.

49 On appeal, the Court of Appeal opined that while the cause of the complaint was the relationship between the eye clinic and the optical shop, the Complaints Committee did not have to inquire whether any Ethical Code had been breached as a result of the "possible adverse impressions" arising from the article. Instead, what the Complaints Committee must determine is the content of the complaint, and having done that, the Complaints Committee must investigate only such breach or breaches of the provisions of the Ethical Code as relate to that complaint. The Court of Appeal emphasised that the complaint clearly focused on the shareholding of Dr Tan in the optical shop and the potential conflict of interest. As the Court of Appeal held at [17]:

> The question of whether the Complaints Committee had acted *ultra vires* its powers of inquiry under s 40(14) of the MRA does not really depend on what Dr Tan said in his response. The crux of the issue is *what Dr Cheong complained and not what Dr Tan said in his response*. [Emphasis added]

50 Next, the Court of Appeal also emphasised that the question as to which part of the Ethical Code has been breached must bear some relevance to the complaint. So, for instance, in *Jerry Tan*,

the complainant was very familiar with the Ethical Code and only referred to the sections dealing with the conflicts of interests between doctor and patient, conduct discreditable to the profession through carrying on a trade or business incompatible with the medical profession and improper attempts to profit by canvassing or touting for patients. He did not refer to the provision dealing with the issue of advertising, arguably something separate from the issue of canvassing or touting. On this basis, the Court of Appeal made an order of *certiorari* quashing the decision of the Complaints Committee, concluding that the matters raised in the two charges were not the subject of the complaint and the Complaints Committee had acted outside its powers in its determination. Dr Tan had not received prior notice of the charges and was not afforded an opportunity to be heard on those charges.

51 More recently, in *Ho Paul v Singapore Medical Council* [2008] 2 SLR 780, the appellant prescribed Subutex to his patients from 2002 to 2005. His patient records were reviewed and he was eventually brought before the Disciplinary Committee of the SMC. Following the disciplinary hearing, the appellant was charged with and found guilty of 19 identical counts of professional misconduct under s 45(1)(d) of the Act for first, failing to formulate and/or adhere to any management plan for the treatment of patients with Subutex; and second, failing to record or document details of his diagnosis, the patients' symptoms or conditions, and/or any management plan to enable proper assessment of the patients' condition over the period of the treatment. The appellant averred that the Disciplinary Committee had operated under misdirection because instead of inquiring whether the applicant had put in place *any* management plan, it had focused on whether there was an *adequate or proper* management plan. The charges on the other hand, focused on whether there was a management plan only. Looking at the charges, the Court of Appeal concluded that the wording of the charges contradicted the appellant's claim that the inquiry was confined to the question of whether a management plan existed and therefore saw no basis to interfere with the findings of the Disciplinary Committee.

52 Turning to the facts of the present application, the 2003 and 2004 Complaints and the sample charges bear quoting *in extenso*:

(1) <u>The 2003 Complaint</u>

[Below is the letter from MOH to the President, SMC dated 1 September 2003]

COMPLAINT AGAINST DR CHAI CHWAN OF LITTLE CROSS FAMILY CLINIC

It has come to the Ministry's attention that Dr Chai Chwan, licensee of Little Cross Family Clinic, *has been treating a large number of patients (more than 490) for heroin withdrawal*.

2. The Centre for Pharmaceutical Administration has inspected the clinic and found that Dr Chai Chwan had been treating a large number of patients with Subutex (buprenorphine hydrochloride) 2 mg tablet, which is a medication that has the potential for abuse.

3. The *Ministry is concerned about the prescribing practice of Dr Chai Chwan*. The matter is referred to the Singapore Medical Council (SMC) for its attention.

The SMC may wish to take whatever action it considers appropriate against Dr Chai Chwan.

[Emphasis added]

(1.1) <u>Particulars of sample (1) charge</u>

a. You did not formulate and/or adhere to any management plan for the treatment of the said patient's medical condition by the prescription of Subutex; and

b. You did not record or document in the said patient's Patient Medical Records details or sufficient details of the patient's diagnosis, symptoms and/or condition and/or any management plan such as to enable you to properly assess the medical condition of the patient over the period of treatment.

(1.2) Particulars of sample (2) charge

a. You did not formulate and/or adhere to any management plan for the treatment of the said patient's medical condition by the prescription of Subutex;

b. You did not record or document in the said patient's Patient Medical Records details or sufficient details of the patient's diagnosis, symptoms and/or condition and/or any management plan such as to enable you to properly assess the medical condition of the patient over the period of treatment; and

c. You inappropriately prescribed Subutex in combination with Morphine and Apo-zopiclone to your patient, particulars of such prescription by you are set out in Schedule 1 annexed hereto.

(2) The 2004 Complaint

[Below is the letter from MOH to the President, SMC dated 28 September 2004]

COMPLAINT AGAINST DR CHAI CHWAN OF LITTLE CROSS FAMILY CLINIC

Please refer to the Ministry's minute dated 1 Sept 2003 on the above matter, where a *complaint has been lodged against the Subutex prescribing pattern for Dr Chai Chwan*.

2. Officers from the Clinical Quality (CQ) Branch had inspected Little Cross Family Clinic on 14 July 04 after receiving a public feedback. The Ministry had retained and photocopied 24 patient medical records after the clinic inspection.

3. *Based on a review of these 24 patient medical records, the Ministry is again particularly concerned about the prescribing practice of Dr Chai Chwan with regards to Subutex, Dormicum and Stilnox*.

4. The matter is referred to the Singapore Medical Council (SMC) for its attention. We would appreciate it if the SMC could keep the Ministry informed about the progress of its investigation into the matter.

[Emphasis added]

(2.1) Particulars of sample (1) charge

a. You inappropriately prescribed Subutex to your patient, particulars of such prescription by you are set out in Schedule 1 annexed hereto;

b. You did not formulate and/or adhere to any management plan for the treatment of the said patient's medical condition by the prescription of Subutex; and

c. You did not record or document in the said patient's Patient Medical Records details or sufficient details of the patient's diagnosis, symptoms and/or condition and/or any management plan such as to enable you to properly assess the medical condition of the patient over the period of treatment.

(2.2) Particulars of sample (2) charge

a. You inappropriately prescribed hypnotic medication, namely Stilnox, Apo-Zopicione, Aop-Alpraz to your patient, particulars of such prescription are set out in Schedule 10 annexed herein.

b. You failed to provide counselling of the said patient and/or refer the said patient to a medical specialist for further management.

c. You did not record or document in the said patient's Patient Medical Records details or sufficient details of the patient's diagnosis, symptoms and/or condition and/or any management plan such as to enable you to properly assess the medical condition of the patient over the period of treatment.

53 As mentioned previously (see [50] above), the question as to which part of the Ethical Code has been breached must bear *some relevance to the complaint*. In *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR 612, the court observed at ([37]) that the SMC Ethical Code served a crucial role in "providing an ethical "compass" to guide doctors on what the acceptable standards [were] from which a departure [might] constitute professional misconduct". The court categorised professional misconduct into two situations: first, where there is an intentional, deliberate departure from standards observed or approved by members of the profession of good repute and competency; and second, where there has been such serious negligence that it objectively portrays an abuse of the privileges which accompany registration as a medical practitioner.

54 Looking at the SMC Ethical Code,[note: 2] the SMC's argument that the particulars listed out in each charge correspond to the doctor's duties set out under the SMC Ethical Code cannot be denied. But Ms Chew's argument goes further: that the content of the complaint is entirely *different* from the charge.

55 At first blush, this seems to be the case – while the content of the complaint mentions MOH's concerns about "the large number of patients" and the "prescribing practice" of the applicant with regards to Subutex (and other drugs in the 2004 Complaint), the charge mentions the lack of a "management plan". On closer inspection however, the distinction is unfounded. The reasons are as follows.

56 First, the facts of the present application are plainly distinguishable from *Jerry Tan*: the emphasis there was on the potential conflict of interest that might result from Dr Tan's financial involvement in both the eye clinic and the optical shop *not* the advertising or promotion of the business. They were *not* one and the same thing. In the present application, the "prescribing practice" of the applicant is an aspect of the "management plan" for his patients. Under the SMC Ethical Code, there is a clear linkage between prescribing practice of medical practitioners and also providing for a plan for each prescription made.

57 Second, Dr Chai's contention that no notice of extraneous factors was given to him as required under s 40(9) of the Act is unfounded. Unlike in *Jerry Tan* where Dr Tan was not notified of the allegations of advertising and promotion in the charges and he did not explain, Dr Chai was aware of the nature and extent of the 2003 and 2004 Complaints. This was borne out by his written replies

which were not confined to simply describing the "prescribing practice" in his clinic in both his replies to the Complaints Committee dated 3 December 2003 [note: 3] and 14 December 2004 [note: 4]. For instance, in his first letter dated 3 December 2003, he addressed the 2003 Complaint by dividing the issues into two categories: the first being the large number of patients and the second being steps to control potential abuse. The details of the letter revealed that he was well aware of the *nature* of the complaint:

> 3. METICULOUS RECORD
>
> Of dispensing was kept.
>
> To play safe, the record was kept as carefully as, almost like that of the controlled drug when I started using the medication.
>
> …
>
> 5) Regular dose.
>
> Mostly 4-8 mg per day, far below the maximum dose of 32 mg per day approved for Singapore …
>
> …
>
> 6) Regular Monitoring.
>
> Spot check on injection sites to prevent misuse.
>
> -Urine test for opiate
>
> - Eat in front of me. (Those that claim that they are on high dose but very reluctant to eat in front of you may have no need for it)
>
> 7) Collaboration with Half Way Houses
>
> Some may like to stay in a controlled environment for awhile.

58 It was also clear from the contents of Dr Chai's reply that in arguing that the charge should be confined purely to the express wording of the 2003 Complaint, Dr Chai was evidently cognizant of the scope of the complaint and envisioned the need to address *all aspects* of his management plan, not just the prescribing practice. This extended into a discussion of aspects of his management plan for the patients; considerable detail on how patients were prescribed, how they were subsequently monitored, how Dr Chai worked with the Central Narcotics Bureau ("CNB") and SANA Counsellors – all issues that go beyond the parameters of a strict literal interpretation of the phrase "prescribing practice". He also wrote about his treatment plan by reference to "Guidelines on Principles of Drug Addiction Treatment" from the National Institute of Health, and "Subutex Detoxification vs Maintenance Treatment". He also referred to his attendance of workshops conducted by Subutex manufacturer on the use of Subutex in the management and treatment of heroin addicts.

59 Third, by arguing that the contents of the complaint only mentioned "prescribing practice" and not "management plan", the applicant clearly seeks to engage in semantics. The drafting of the contents of the complaint clearly envisaged a *broad-based* concept of examining the practice of prescribing Subutex and the other substances, and this must necessarily extend into looking at the

practices *after* he had prescribed the substances. As stated, I was mindful that the large number of patients could be indicative or were physical signs of illicit use of Subutex. It would be incomplete, and hence misleading and unfair to Dr Chai, for the Disciplinary Committee to simply look at the dispensing pattern without considering what steps were taken to manage the usage of the drug.

60 Fourth, even if for argument's sake, one agreed with Dr Chai that the Complaints Committees had considered extraneous matters not contained in the complaints, the proper forum to consider this at the disciplinary hearing. In my judgment, the leave application was premature (see generally [70] to [74] below). The objection to the charges involves a point of law which is to be taken at the inquiry for determination by the Disciplinary Committee under regulation 23(4)(b) of the Medical Registration Regulations (Cap 174, Rg 1 2000 Ed)("MRR"). If accepted, there will be no further proceedings on the charges. This premature point would take care of the argument that Dr Chai was not given an opportunity to respond to the use of other drugs in combination with Subutex.

61 In addition, there is recourse to a court of three judges under s 46(7) of the Act to appeal against an order of the Disciplinary Committee. In that regard, the application for leave to apply was improper since an alternative remedy was available and had not been exhausted. The matters in [60] and [61] are added factors against the grant of leave.

Ground (c): Time lag in appointing the Disciplinary Committee

62 Section 41(3) of the Act reads as follows:

> (3) Where a Complaints Committee has made an order for a formal inquiry to be held by a Disciplinary Committee, the Medical Council shall immediately appoint a Disciplinary Committee which shall hear and investigate the complaint or matter.

63 Ms Chew submitted that under s 41(3), the SMC must "immediately" appoint a disciplinary committee to hear and investigate the complaint upon a Complaints Committee making an order for a formal inquiry to be held by a disciplinary committee. Regulation 18 of the MRR further provides that after a disciplinary committee is appointed, the SMC's lawyers will serve a Notice of Inquiry containing the charges on the medical practitioner. Here, the Notices of Inquiry were respectively served in August 2007 and in September 2007. Dr Chai claimed that this is more than two years after the respective Complaints Committees had decided to refer the matter to a disciplinary committee.

64 The SMC submitted that s 41(3) of the Act is merely *directory* and not *mandatory*, citing *Jerry Tan* as authority for this proposition. In addition, Dr Chai was not prejudiced by the irregularity. The SMC's explanation and reasons as to why the Disciplinary Committee was appointed only much later are covered in the respective affidavits of Professor Lee and Professor Leong.[note: 5]

65 In *Jerry Tan*, the appellant submitted *inter alia*, that the Complaints Committee and the SMC had failed to comply with certain time frames. As at the date of *Jerry Tan*, s 41(3) (1998 Ed) read as follows:

> (3) Where a Complaints Committee has made an order for a formal inquiry to be held by a Disciplinary Committee, the Medical Council shall *forthwith appoint* a Disciplinary Committee which shall hear and investigate the complaint or matter. [Emphasis added]

66 The word "forthwith" has since been replaced with "immediately" in the current version of the Act. As the appellate court noted, while there was a *nine*-month delay from the time the Complaints Committee completed its findings to when the Notice of Inquiry was served on the appellant, no

provision in the Act or regulations invalidates the disciplinary process simply by virtue of the delay. Admittedly, there was non-compliance with s 41(3) of the 1998 Ed of the Act on the part of the SMC since the Disciplinary Committee was not "appointed forthwith", amounting to "an inordinate delay on the part of SMC in appointing" the Disciplinary Committee (at [44]). However, LP Thean JA (delivering the judgment of the court) was of the view that "the question is whether this breach is a mere irregularity or has the effect of nullifying the disciplinary process" (*per* LP Thean JA, at [47]). Referring to an English case of *Coney v Choyce & Ors* [1975] 1 All ER 979, the Court cited at [47] the test set out in *de Smith's Judicial Review of Administrative Action* (3rd Ed, 1973), p 123:

> The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be 'substantial compliance' with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess 'the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act'. Furthermore, much may depend upon the particular circumstances of the case in hand. Although 'nullification is the natural and usual consequence of disobedience'*, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned*.
>
> [Emphasis added]

67 The italicised portion of the judgment accepts the need to maintain a balance between the legitimate expectations of the complainant that a complaint will be fully investigated (since it is in the public interest to maintain and sustain the reputation of, and public confidence in, the medical profession) and a need for legitimate safeguards for the practitioner. The Court of Appeal went on to state that in spite of the delay, Parliament did not intend a strict adherence to the letter of the Act and that s 41(3) is directory not mandatory. No evidence was adduced that the appellant had suffered any substantial prejudice as a result of the delay of the SMC in appointing the Disciplinary Committee. The appellate court referred to cases such as *R v Chief Constable of Merseyside Police, ex p Calveley* [1986] QB 424 ("*Merseyside* case"), where a protracted delay was held to nullify the decision of a disciplinary tribunal. Complaints were made against five police officers, but the officers were not given formal notice of the complaints under the regulations until two and a half years later and the disciplinary hearing was held only nine months afterward. What tipped the scales in favour of the officers in the *Merseyside* case was that during the period of delay, abuse could be shown as documents pertinent to the complaints would have been routinely destroyed and the officers could not get the names of witnesses they wished to call. As a result, they suffered considerable prejudice arising from the delay.

68 Adopting the reasoning in *Jerry Tan*, the current version of s 41(3) is merely *directory* and *not mandatory*. The late appointment of the Disciplinary Committee being an irregularity did not nullify the appointment. There was no demonstrable prejudice of a substantial nature caused to Dr Chai by the irregularity. I was not persuaded that the two-year delay had resulted in Dr Chai being unable to garner evidence from his former patients. Furthermore, the *ultra vires* argument and the issue of substantial prejudice are interrelated. Reliance on the "fact" that the majority of his patients are no

longer contactable is irrelevant and will remain so until the Disciplinary Committee hears and decides on the *ultra vires* argument one way or other.

69 Dr Chai was aware from the outset that the complaints concerned the indiscriminate prescription of Subutex to ex-drug addicts who used it as a replacement drug for opiates. Unlike the *Merseyside* case, no evidence of the potential destruction of the evidence was adduced by Dr Chai. His case notes have been typed and available at the disciplinary inquiry. Where delay has occurred, the consequent prejudice to the applicant in practical terms must be shown. Dr Chai had not shown that he had been affected by the potential or actual effects of the passage of time on him. It seemed to me that the claim of substantial prejudice was a circular argument stemming from the very complaints that he freely prescribed Subutex to patients. To illustrate, the SMC's expert opined in his report that "[t]he general lack of recorded clinical history, physical examinations or mental state assessments throughout Dr Chai's clinical notes makes it difficult to make conclusions about his plans for the treatment of his patients."

Application was premature

70 This is a factor that the court is entitled to take into account in the leave to apply stage. The leave application was doomed to fail because the application was premature. Nothing in evidence indicated that Dr Chai could avail himself of any of the four exceptions to the concept of prematurity raised in *Rayney Wong* ([34] *supra*). To recap, they are as follows:

> (a) where the decision is not about individual items of evidence but whole areas which could fundamentally affect the *conduct* and *utility* of the procedure;
>
> (b) where there is a *real risk of irreparable damage* as a result of the interlocutory decision and therefore, no real opportunity to challenge it at a later stage;
>
> (c) where there is a real danger supported by evidence that there would be a breach of natural justice at the hearing; and
>
> (d) where there is a saving in costs or a question of law.

71 In *Rayney Wong*, the applicant was an advocate and solicitor who had a complaint lodged against him. The Law Society brought a case against the applicant in proceedings before a Disciplinary Committee and at the conclusion of the Law Society's case the applicant there submitted that there was no case to answer. The Disciplinary Committee refused to exclude the complainant's evidence and found a *prima facie* case against the applicant, calling upon him to enter his defence. Dissatisfied, the applicant brought an application for leave to seek judicial review of the Disciplinary Committee's findings, in addition to various other orders. One of the issues that arose for consideration before the High Court was the premature application. V K Rajah J (as he then was) said that "a premature application for leave to seek judicial review in essence [is] one made before the actual decision-making process of the tribunal at first instance is completed" (at [14]). Jack Beatson in "*Prematurity and Ripeness for Review*" in *The Golden Metwand and The Crooked Cord, Essays on Public Law in Honour of Sir William Wade QC* (Christopher Forsyth & Ivan Hare eds) (Clarendon Press, 1998) contends (at p 251) (and cited with approval in *Rayney Wong* (at [14]):

> … *an application is in danger of being premature if it will deprive a relevant administrative body of the opportunity of applying its expertise to the question at hand*, whether that question requires fact-finding, the exercise of discretion or even, although this is more controversial, a conclusion of law. It is also submitted that the occasions on which it will be possible to state the

issue before the court is solely a 'clean' or 'clear' question of law will be very rare indeed.

[Emphasis added]

72 As noted by Rajah J, the approach of the courts in respect of challenges made *before a final determination by the tribunal of first instance* was to view them as premature and decline judicial review (*Reg v Association of Futures Brokers and Dealers Ltd, ex parte Mordens Ltd* (1991) 3 Admin LR 254 ("*Mordens*")). In *R v Chief Constable of Merseyside Police, ex parte Merrill* [1989] 1 WLR 1077, the English Court of Appeal held that the normative rule is that an aggrieved party should await the *final* outcome of a disciplinary hearing prior to seeking judicial review. As McCullough J explained in *Mordens*, (and noted by Rajah J in *Rayney Wong* (at [17])), three main policy considerations underpinned this concept of prematurity: *first*, the process before the tribunal of first instance could become more protracted with adjournments to seek recourse to the avenue of judicial review. *Secondly*, the relationship between the applicant and body making the decision under attack could become more strained and awkward, where after the proceedings in the reviewing court are over, the hearing before the tribunal of first instance must resume "with the tribunal once more above and between the parties, rather than alongside one and against the other". *Thirdly*, it is unnecessary to come to the reviewing court on a preliminary or interlocutory decision. This is because the applicant may ultimately be satisfied by the final outcome. The court conceded that it would be remiss to deny the applicant leave for judicial review if *exceptional* circumstances exist.

72 At this juncture, it is important to note the concluding comments by Rajah J in *Rayney Wong*, particularly relevant to the present application (at [79]):

At the formal level, the reviewing court cannot substitute its decision for that of the administrative body under review. This is because the task of determining the rights of the parties has been statutorily conferred on the administrative body, not the court. The reviewing court may declare that the task has been performed badly in law but it cannot take the further step of actually performing the task itself. This dichotomy also explains why this application to, *inter alia*, move the proceedings before the DC to the High Court is entirely without basis. At the substantive level, a reviewing court should be acutely conscious that the task was entrusted to the DC for good reason, not least of which is the admirable statutory policy that an advocate and solicitor should first be judged by a panel of his own peers, and accord it the necessary deference. In my view, these are cogent reasons why in a judicial review, the court should not examine the *merits* of the decisions reached by such an administrative or statutory body.

[Emphasis in original]

73 The formal inquiry before the Disciplinary Committee has not yet been held. It was at the doorstep of the disciplinary hearing that Dr Chai put a stop to it by filing OS 1756. None of the grounds raised by Dr Chai constituted errors that could fundamentally affect the *conduct* and *utility* of the procedure. There was also neither irreparable damage nor a possible breach of natural justice. It was premature for leave to be granted as he had not appeared at the formal inquiry before the Disciplinary Committee, a panel constituted of his peers. At the inquiry, he is allowed to object to the charges on a point of law. What happens if hypothetically, he is cleared of the charges before the Disciplinary Committee? This would render the substantive application futile and waste costs.

Conclusions and Result

74 To summarise the conclusions stated above are as follows.

(a) OS 1756 was filed out of time. Notwithstanding the late application, it was allowed to stand by the grant of time extension since the court was satisfied that the delay was excusable.

(b) The application for leave for judicial review was refused for the following reasons:

(i) The challenge against the decisions of the Chairman of the Complaints Panel to extend time under s 40(2) of the Act was hopeless. Section 40(2) confers upon the Chairman a discretion which is matter of judgment. The power to extend time is in unfettered terms and is exercisable at any time. There was nothing irrational in the decisions to extend time.

(ii) The "*ultra vires*" argument was unarguable. No question of breach of natural justice arose for consideration. Separately, the application was premature because the objection to the charges was on a point of law to be raised at the inquiry for determination by the Disciplinary Committee under regulation 23(4)(b) of the MRR. An appeal against the decision of the Disciplinary Committee is available. In that regard, the application for leave was improper.

(iii) The late appointment of the Disciplinary Committee was an irregularity which did not nullify the appointment nor gave rise to a substantial prejudice.

(c) Dr Chai was ordered to pay the SMC costs fixed at $25,000 plus reasonable disbursements.

Appendix 1

(1) The chronology of key events for the 2003 Complaint is as follows:

Date	Event
1 September 2003	MOH's complaint against Dr Chai ("2003 Complaint")
6 October 2003	1st Complaints Committee appointed.
9 October 2003	The Secretariat, on behalf of the Chairman of the Complaints Committee, wrote to MOH to enquire how it came to know about Dr Chai's prescribing practice.
15 October 2003	MOH replied to 1st Complaints Committee. MOH advised that Dr Chai had sent the Director of Medical Services a copy of his letter to the Central Narcotics Bureau in which he said he had been treating a large number of patients for heroin withdrawal. The Centre for Pharmaceutical Administration also notified MOH that Dr Chai was treating a large number of patients with Subutex.

28 October 2003	MOH's letter of complaint laid before the 1st Complaints Committee.
5 -14 November 2003	1st Complaints Committee wrote to Dr Chai to ask him to submit his written explanation. Dr Chai asked for an extension of time.
3 December 2003	Dr Chai gave explanation letter to 1st Complaints Committee.
27 January 2004	First meeting of 1st Complaints Committee. Expert opinion was to be obtained from Professor Kua Ee Heok or Dr Winslow.
28 January 2004- 13 April 2004	1st Complaints Committee applied for the first time extension to complete its preliminary inquiry. The Chairman of the Complaints Panel gave approval for the time extension sometime on or about 28 January 2004. The period of extension was from 28 January 2004 to 28 April 2004.
13 April 2004	1st Complaints Committee applied for the second time extension to complete its preliminary inquiry. The Chairman of the Complaints Panel approved the time extension on 15 April 2004. The period of extension was from 28 April 2004 to 28 July 2004.
April – September 2004	Dr Winslow prepared his expert report.
12 July 2004	1st Complaints Committee applied for the third time extension to complete its preliminary inquiry. The Chairman of the Complaints Panel gave approval on 15 July 2004. The period was extension was from 28 July 2004 to 28 October 2004.
16 September 2004	Expert report by Dr Winslow dated 8 July was given to the 1st Complaints Committee.

27 September 2004	Second meeting of 1st Complaints Committee where it decided to refer the complaint against Dr Chai to a disciplinary committee for: (i) Lack of adequate record keeping, revealing the lack of management plan for his large number of patients; and (ii) Inappropriate use of Subutex and combination of drugs in the management of his patients.
27 October2004	1st Complaints Committee submitted its report to the Singapore Medical Council on referral of Dr Chai's matter. 1st Complaints Committee also informed Dr Chai on the same day that a formal inquiry would be held by a disciplinary committee into the 2003 Complaint.
November-December 2004	Secretariat prepared case file for Dr Chai's case.
17 January 2005 – December 2005	The SMC referred Dr Chai's matter to the SMC's lawyers HEP to work on Dr Chai's case.
21 December 2005	The SMC asked Dr Chai to transcribe his patient case notes.
16 January 2006	Dr Chai asked for first extension to submit typewritten patient case notes.
22 February 2006	Dr Chai asked for second extension.
24 March 2006	Dr Chai asked for third extension.
29 March 2006	Dr Chai sent typewritten case notes to the SMC.
5 June 2007	Disciplinary Committee was appointed on 5 June 2007. The constitution of the Disciplinary Committee was revised due to unavailability of two of its members.

15 August 2007	Notice of Inquiry served on Dr Chai. Inquiry fixed for 24-28 September 2007 but Messrs Rajah &Tann ("R&T") for Dr Chai asked for adjournment of inquiry dates.
October- November 2007	Exchanges of correspondence between HEP and R&T
28 November 2007	Dr Chai filed OS 1756. The SMC served with OS 1756 on the next day.

(2) The chronology of key events for the 2004 Complaint is as follows:

Date	Event
28 September 2004	MOH's complaint against Dr Chai ("2004 Complaint")
13 December 2004	2nd Complaints Committee appointed
12 January 2005	2nd Complaints Committee wrote to Dr Chai to ask for his written explanation. At Dr Chai's request, he was given until 16 February 2005 to reply.
14 February 2005	Dr Chai furnished his written explanation to 2nd Complaints Committee.
21 April 2005	2nd Complaints Committee informed Dr Chai that a formal inquiry would be held by a disciplinary committee into the 2004 Complaint.
27 September 2007	Notice of Inquiry served on Dr Chai containing 10 charges for formal inquiry fixed on 3-7 December 2007
9 October 2007	R&T wrote to HEP alleging that Complaints Committees were acting *ultra vires* the complaints and therefore the Disciplinary Committee would be acting *ultra vires* if it were to inquire into the charges
October- November 2007	Exchanges of correspondence between HEP and R&T

28 November 2007	Dr Chai filed OS 1756. The SMC served with OS 1756 on the next day.

[note: 1]Notes of Arguments dated 27/2/08

[note: 2]Professor Lee's affidavit exhibit marked "LPK-10", at p 212.

[note: 3]Applicant 's Core Bundle of Documents, at p 35.

[note: 4]*ibid*. p 31.

[note: 5]Professor Lee's affidavit paras [68] to [81]; Professor Leong's affidavit paras [66] to [77].