Lim Mey Lee Susan *v* Singapore Medical Council
[2011] SGHC 133

Case Number : Originating Summons No 1252 of 2010

Decision Date : 26 May 2011

Tribunal/Court : High Court

Coram : Philip Pillai J

Counsel Name(s) : Lee Eng Beng SC, Tammy Low, Christine Huang and Elizabeth Wu (Rajah & Tann LLP) and Bernice Loo (Allen & Gledhill LLP) for the plaintiff; Alvin Yeo SC, Melanie Ho, Lim Wei Lee, Sugene Ang and Jolyn de Koza (Wong Partnership LLP) for the defendant; Chong Chin Chin and Sharon Lim for the Attorney General's Chambers.

Parties : Lim Mey Lee Susan — Singapore Medical Council

Administrative law – Judicial review

Professions – Medical profession and practice – Professional conduct

26 May 2011 Judgment reserved.

Philip Pillai J:

1 The Applicant seeks judicial review of the decision of the Singapore Medical Council ("SMC") to appoint a second disciplinary committee ("2nd DC") to hear and investigate a complaint following the recusal of the entire disciplinary committee ("1st DC") originally appointed to hear and investigate the same complaint.

2 The judicial remedies sought by the Applicant are that of a Quashing Order against the SMC's decision to appoint the 2nd DC to hear and investigate the complaint and a Prohibiting Order against the SMC taking any steps to bring disciplinary proceedings against the Applicant on the same subject matter covered in the charges set out in the Notice of Inquiry by the 1st DC dated 20 July 2009. Finally, the Applicant seeks a Declaration that the Medical Registration (Amendment) Regulations 2010 (S 528/2010) ("the S 528/2010 Amendment Regulations") are void.

Preliminary Observations

(i) Professional medical ethics and the market

3 At this hearing, many important issues relating to the private sector medical profession were raised. Public and private sector medical services are provided through a variety of forms and practice models. Whilst the traditional paradigm has been the solo general practitioner, the provision of private medical services today reflects a variety of practice models. These private sector models include group general practices, stand-alone specialist consultancies and consultancies operating with private hospitals and non-medical service providers. Whatever the forms and practice models, is the private medical sector a free market, subject only to contract, or is it concurrently subject to an underlying bedrock of medical professional ethical standards? What are these ethical standards and how do they impact a one-stop-shop practice model, which provides medical and non-medical services, directly and indirectly, through outsourced third party service providers? Are the SMC's Ethical Code and

Ethical Guidelines an exhaustive statement of all operative medical ethical standards or are there, concurrently applicable underlying ethical principles and norms as well?

4 As important as these issues may be, these are not, however, issues properly to be determined by the court. Parliament has under s 5(f) of the Medical Registration Act (Cap 174 2004 Rev Ed) ("MRA") placed the duty "to determine and regulate the conduct and ethics" of medical practitioners on the SMC. Parliament has prescribed a statutory process of professional ethical standards and disciplinary accountability for medical practitioners. The *raison d'etre* for such a regulatory approach is explained by a variety of factors including the total dependence and trust in life and death decisions, which a patient is obliged to repose in his physician. Other factors include the following (see Margaret Stacey, *Regulating British Medicine: The General Medical Council* (John Wiley & Sons, 1992) at p 246):

> … The particular nature of the doctor-patient relationship, its intimacy and the associated potential for exploitation is one reason; the irremediable and serious nature of mistakes that can be made is another. 'Buyer beware' is little help to the irreparably damaged or dead person–the ultimate risk of falling into the wrong hands in the medical market. …

5 Because of the complex and special nature of medical services, Parliament has placed the responsibility upon the medical profession itself (not the courts and not other agencies including the Ministry of Health, Singapore ("MOHS")) to establish the appropriate standards of conduct and ethics and to investigate, find and sanction breaches. The sanctions for breaches range from censure, restrictions, suspension, fines and the loss of a licence to practice. Because such sanctions may seriously affect the career and reputation of the medical practitioner, an elaborate structure of procedural safeguards has been inscribed in the MRA to strike a balance between the public interest and the protection of the medical practitioner. I note the principles in *Christine Woods v The General Medical Council* [2002] EWHC 1484 *per* Burton J at [9]:

> The principles which underline these provisions [*ie*, the General Medical Council Preliminary Proceedings Committee and Professional Conduct Committee (Procedure) Rules 1988] have been explained (by reference to the pre-August 2000 Rules) in the three cases to which I have referred and can be summarised as follows:
>
> (i) They constitute a fine balance between three competing desirables:
>
> (a) The protection of the public from the risk of practice by practitioners who for any reason (whether competence, integrity or health) are incompetent or unfit to practice, and the maintenance of standards.
>
> (b) The maintenance of the reputation of, and public confidence in, the medical profession, and the legitimate expectation of the public, and of complainants in particular, that complaints of serious professional misconduct will be fully and fairly investigated.
>
> (c) The need for legitimate safeguards for the practitioner, who as a professional person may be considered particularly vulnerable to, and damaged by, unwarranted charges against him.
>
> …

In short, Parliament has provided in the MRA that the SMC is to set the ethical standards. Parliament has also provided that the investigation, findings and sanctions for breaches of these standards are

to be made, not by the SMC, but by the relevant complaints committees and the disciplinary committees to be appointed by the Chairman of the Complaints Panel and the SMC respectively.

(ii) The nature of judicial review court proceedings

6 It should be noted that these proceedings in court are not proceedings in the nature of an appeal to court. The key differences between an appeal and judicial review bear restating. It is worth noting the following observation by Andrew Ang J in *ACC v CIT*[2010] 1 SLR 273 at [21]:

> It is well established that in judicial review, the court is concerned not with the merits of the decision but the process by which the decision has been made. ... This is because judicial review is not an appeal from a decision and the court cannot substitute its discretion for that of the public body nor can it quash a decision on the basis that the court would not have arrived at that decision or that some other decision would have been a better one.

The merits of the SMC's decision, as indeed the merits of the decisions of the disciplinary committees, are not within the remit of the court, save to the limited extent of appeals to a court of three judges provided by s 46(7) of the MRA. In this judicial review hearing, the court will review and determine only the legality of the process leading to the SMC's decision to refer the complaint to the 2nd DC.

7 The second caveat about judicial review proceedings is that they succeed or fail entirely on the record. In other words, whether the legal grounds have been made out in court will be determined entirely on the record. No evidence apart from the record is adduced in court save as a court may exceptionally permit in an appropriate case. The Applicant in the middle of the hearing sought leave pursuant to O 53 r 3 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to introduce five affidavits from independent doctors who wished to clarify their roles which had been referred to by the Respondent in court and extensively covered in the media. These affidavits have no relevance to this judicial review proceeding and I do not grant leave. For the purposes of this judicial review proceeding, the record comprises the statement filed by the Applicant in support of these applications, the Respondent's affidavit in reply to that statement, affidavits filed by the Applicant in response, and all annexures thereto.

(iii) The version of the MRA applicable to these proceedings

8 A final preliminary point should be noted. The MRA relevant to these proceedings excludes, for the most part, the amendments made under the Medical Registration (Amendment) Act 2010 (Act No 1 of 2010) ("the Amendment Act") in which amendments to the MRA were brought into effect on 10 August 2010 and 1 December 2010 (see s 41(3) of the Amendment Act and the relevant gazette notifications). Save as otherwise expressly stated, all references in this judgment to the MRA refers to the relevant version of the MRA excluding these amendments.

The Chronology of Events

The Complaint of 3 December 2007

9 Dato Serbini Ali, the Permanent Secretary of the Ministry of Health, Brunei ("MOHB") wrote to Ms Yong Ying-I, the Permanent Secretary of the MOHS on 27 August 2007 expressing concerns relating to the Applicant's invoices for the treatment of a Brunei patient ("the Patient") as being "unacceptable and extremely high" and seeking MOHS's intervention. In October 2007, searches were conducted under s 12 of the Private Hospitals and Medical Clinics Act (Cap 248, 1999 Rev Ed) at the Applicant's private clinics. The Applicant was required to produce papers and records relating first to

the Patient and later for other patients.

10 On 3 December 2007, Dr Tan Chor Hiang, who signed off as the "Senior Director (Health Regulation Division), for Permanent Secretary, (Health)" filed a complaint against the Applicant ("the Complaint"). The Complaint recounted that MOHS had conducted an investigation after reviewing the information set out in the two letters enclosed with the MOHB's letter and had become "concerned that [the Applicant] may have taken unfair advantage of her position as the principal physician to the Patient, and of the trust and confidence which had been reposed in her" and that "[o]vercharging on such a magnitude could also bring disrepute to the medical professional in Singapore." Noting that what it had presented in the Complaint was necessarily based on a preliminary review of the documents it had obtained and seen, MOHS identified the following instances which raised its concerns as to the propriety of the Applicant's services and practices:

(a) whether the invoices issued showed a pattern of overcharging and/or improper billing;

(b) whether some charges were inappropriate charges for professional services which the Applicant did not render or which were carried out with the assistance of other doctors; and

(c) whether there were conflicts of interest relating to invoices issued by several clinics, all of which the Applicant managed.

The Complaint concluded that the MOHS was referring the matter to the SMC "for a thorough investigation as to whether [the Applicant's] general conduct in relation to the Patient amounts to professional misconduct".

The Complaints Committee Order of 17 November 2008

11 The Complaints Committee on 18 December 2007 invited the Applicant to provide a written explanation, which she did by a letter of 4 February 2008. The Applicant was informed by a letter of 17 November 2008 that the Complaints Committee, having carefully reviewed the circumstances of the Complaint and the information submitted, had ordered that a formal inquiry be held by a disciplinary committee.

The 1st DC hearing and the 1st DC's recusal on 29 July 2009

12 The 1st DC gave the Applicant notice of the 94 charges in relation to which it would inquire by a letter dated 20 July 2009. The 1st DC commenced its hearing and resumed on 29 July 2010 for a three day hearing on the Applicant's submission of no case to answer. The selected relevant extracts from the transcript (not in immediate sequence) discloses the following:

> Chairman: On behalf of the DC, I would like to thank both counsels very much for the well-written and thorough submissions on no case to answer. We have read the written submissions and I understand from my colleagues and the panel that we have no further questions to raise. Does either party have anything else to add or submit before we deliver our decision at this stage?
>
> ...

Applicant's counsel: ... Mr Chairman, I have taken instructions and I have reviewed the transcript with my client. On the basis of all that is on the record, we do not consider it would be appropriate for this tribunal to continue, and I'm therefore applying to yourselves to recuse yourselves.

…

Respondent's counsel: ... I would like to confirm that the prosecution's position is that we are not objecting to the respondent's application for this tribunal to recuse itself; I do want to explain that, while we don't ourselves consider that the tribunal has behaved in any way improperly or in any objectionable manner, and we are reassured by the assurance that the tribunal will keep an open mind up to the time of hearing all submissions, oral and written. ...

…

Chairman: Thank you for waiting. After some discussion, I think the DC is inclined to recuse itself since the prosecution has no objection to the respondent's application. ….

The SMC's 7 September 2010 decision to revoke the appointment of the 1st DC

13 On 3 September 2010, Ms Serene Wong, the Senior Manager, Professional Conduct and Professional Standards Division, SMC, sent an email to all SMC members, the material terms of which read as follows:

…

2. At the hearing on 29 Jul 2010, the Defence Counsel made a procedural application for the Disciplinary Committee (DC) to recuse itself. Details of this case can be given only at the conclusion of the inquiry and until then, we seek your kind understanding and patience of this matter.

3. As the result of the DC having recused itself, it is now necessary for the Singapore Medical Council to revoke the appointment of the current DC hearing this inquiry and *appoint a new DC pursuant to Section 42(5) of the Medical Registration Act*, i.e.,:

> The Medical Council may at any time revoke the appointment of any Disciplinary Committee or may remove any member of a Disciplinary Committee or fill any vacancy in a Disciplinary Committee.

4. The new DC will be appointed in due course and a separate email will be sent to you shortly.

5. Council's approval is sought on this administrative matter to revoke the current DC to allow SMC to move forward on this matter.

6. We will take it that members have no objections if we do not hear from you by Tuesday, 7 September 2010.

…

[original emphasis omitted; emphasis added in italics]

No objections were received by the due date and the SMC's decision was made on 7 September 2010 to revoke the appointment of the 1st DC. For completeness, I should add that one SMC member did express his objection to the revocation on 16 September 2010, sometime after the return date (see [66] below).

The SMC's 14 September 2010 decision to appoint the 2nd DC

14 The SMC email of 13 September 2010 proposed the composition of the 2nd DC in the following terms:

> 1. I refer to my email below where a new Disciplinary Committee (DC) has to be appointed for the inquiry for Dr Lim Mey Lee Susan.
>
> 2. The DC proposed to hear the case [is] as follows:
>
> **Proposed Members for DC – Dr Lim Mey Lee Susan :-**
>
> Prof Tan Ser Kiat (Chairman)
>
> Prof C Rajasoorya
>
> Dr Abraham Kochitty
>
> A/Prof Koh Ming Choo Pearlie (Layperson)
>
> Mr Vinodh Coomaraswamy SC (Legal Assessor)
>
> 3. All proposed DC members have declared that they have no conflict of interests and are agreeable to the appointment. In the meantime, we would be grateful that members do not discuss or mention this case (despite of [*sic*] what has been reported in the papers) so that the DC inquiry is not compromised.
>
> 4. Members' approval is sought for the appointment of the above DC. We will assume that members have no objections if we do not hear from you by **5pm** , **Tuesday 14 Sep 2010** .
>
> …
>
> [emphasis in original]

The SMC accordingly appointed the 2nd DC on 14 September 2010. The Applicant's lawyers were informed of the appointment of the 2nd DC on 16 September 2010.

Singapore Law on Judicial Review

15 The law relating to judicial review of administrative decisions is expressed in two overarching core common law principles. First, no legal power is beyond the reach of the supervisory jurisdiction of the court if it is exercised beyond its legal limits (*ie*, illegality / *ultra vires* the enabling law, bad faith or if the exercise of the power is *Wednesbury* irrational (see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223)). Second, the procedural fairness / natural justice rule which comprises: (a) the *nemo iudex in sua causa* rule / the rule that no one shall be a judge in his own cause, which is the rule against bias; and (b) the *audi alteram partem* rule / the "hear the other

side" rule, which is the fair hearing rule (see *Yong Vui Kong v Attorney-General* [2011] SGCA 9 at [88]).

16 By way of parenthesis I should add that, whilst Singapore law on judicial review has English common law foundations, the more recent English cases and treatises are of little relevance where they embody or have been shaped by European Union treaty and legislative obligations which have no application to Singapore. For this reason, it is not unusual to find Singapore courts referring to the 1973 3rd edition of *De Smith's Judicial Review* rather than the most recent 2007 6th edition of the same work. There does not currently exist a definitive modern text on Singapore administrative law, in the absence of which I have found some assistance in delineating the contours and boundaries of Singapore administrative law from a soon to be published paper delivered by Professor Thio Li-ann at the recent Singapore Academy of Law conference on developments in Singapore law from 2006 to 2010: Thio Li-ann*, The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives* (2011) (unpublished).

The Legal Grounds for Judicial Review

17 I next proceed to examine the particular legal grounds on which these applications have been launched:

(a) The Quashing Order application to quash the SMC's decision to appoint the 2nd DC on the grounds of: (i) illegality under the MRA; and (ii) actual or apprehension of bias on the part of the SMC.

(b) The Prohibiting Order to prohibit the SMC from further initiating or pursuing any disciplinary action on the same complaint against the Applicant is made on the ground of *Wednesbury* irrationality and on considerations of "unfairness, prejudice and oppression".

(c) The Declaration application for the S 528/2010 Amendment Regulations to be declared void is made on the ground that the S 528/2010 Amendment Regulations in their entirety are contrary to natural justice.

18 The Applicant is not seeking to quash the 1st DC's hearing or its recusal. Neither is the Applicant seeking to quash the hearing of the 2nd DC which has commenced but has not proceeded further because of these court applications. In passing, it should be noted that the Applicant's legal rights to seek judicial review of the findings and decision of the 2nd DC are preserved and remain unaffected by these court applications. In short, what is unusual in these court applications is that no challenge is being mounted against any finding or decision of any disciplinary committee.

19 What is novel here is that, instead, the challenge is mounted against the SMC's decision to refer the Complaint to the 2nd DC following the recusal of the 1st DC. What accounts for this approach?

20 The Applicant has chosen to attack the SMC which is placed at the critical junction of the MRA's disciplinary process. Under the MRA, generally no complaint may move without a prior SMC decision to refer it to the Chairman of the Complaints Panel who appoints the complaints committee to inquire into the complaint or, where a complaints committee has ordered a formal inquiry, to a disciplinary committee to hear and investigate the complaint. However, a quashing of the SMC's

decision to appoint the 2nd DC would not be sufficient to end the matter. The Quashing Order does not operate as a bar to a fresh SMC decision being taken on the same matter. Such a fresh SMC decision, if made without any legally defective processes, will stand in law. However, if the SMC decision could be quashed *and prohibited*, this would achieve the result that no future complaints committees or disciplinary committees may be appointed to inquire into the same Complaint against the Applicant.

21 The Applicant thus seeks both a Quashing Order against the SMC's decision to refer the Complaint to the 2nd DC on grounds of illegality and bias, coupled with a Prohibiting Order against the SMC proceeding to appoint any further disciplinary committee on the ground of *Wednesbury* irrationality and "unfairness, prejudice and oppression" considerations.

22 The Applicant's case will thus depend entirely on whether the relevant legal grounds upon which these judicial review remedies against the SMC are contingent, are established on the record.

Is judicial review limited to exercises of discretion only or also to administrative decisions?

23 There was a preliminary question as to whether judicial review is available only with respect to the exercise of discretion but not with respect to decisions which carry no discretion. The Respondent submitted that the SMC's decision, whether under s 41(3) or s 42(5) of the MRA, being decisions in which the SMC did not have any discretion, were not susceptible to judicial review. This submission I find to be flawed for the reasons that follow. In the first place, if hypothetically, the SMC were to decide in any case not to refer a complaint to the Chairman of the Complaints Panel, the SMC could find itself being subject to a mandatory order (which is a judicial review remedy) application for it to do so.

24 The courts in judicial review will subject administrative decisions to the legality tests as well as the duty to act fairly. With respect to the duty to act fairly, Lord Bridge of Harwich stated in *Lloyd and others v McMahon* [1987] AC 625 at 702–703:

> My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the court will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness. …

25 What is clear from the foregoing is that administrative decisions are susceptible to judicial review for legality and for fairness, whether or not they involve a discretion. With respect to fairness, the content of the duty to act fairly will vary depending on the nature and statutory context of the relevant decision. Where the relevant statute prescribes a hearing, the duty to act fairly will encompass the whole gamut of natural justice prescriptions. Where the relevant statute prescribes a narrow decision to be made, the duty to act fairly carries a narrower scope.

26 This is well set out in para 10.049 of *Halsbury's Laws of Singapore*, vol 1 (LexisNexis, 2009 Reissue) which states:

> A general duty to act fairly applies to almost all decision-making in the field of public law, but its

content varies from those cases where all the traditional rules of natural justice apply to those where fairness requires very little of the decision-maker. ...

...

Where a discretionary power to encroach upon individual rights is exercised, factors to be taken into account in deciding what fairness requires in exercise of the power, include the nature of the interests affected, the circumstances in which the power falls for exercise and the nature of the sanctions, if any, involved.

The Quashing Order Application

Illegality Ground

27 The Applicant first challenges the SMC's appointment of the 2nd DC as being illegal under the MRA on the ground that the SMC may only appoint a disciplinary committee immediately after the Complaints Committee had made its order for a formal inquiry under s 41(3) of the MRA. The SMC's decision to appoint the 2nd DC on 14 September 2010 in the light of the Complaints Committee order of 17 November 2008, the Applicant submits, could not be said to have been done immediately. The second string in the Applicant's case of illegality is that if the SMC had appointed the 2nd DC under s 42(5) of the MRA, the word "may" in s 42(5) MRA conferred a discretion on the SMC. The SMC, by taking the position that it had no discretion in appointing the 2nd DC, had thereby unlawfully fettered its statutory discretion. It is well established that an administrative agency must not fetter its discretion: see *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340 at [31]:

The general principle that an administrative agency *must not fetter its own power* or abrogate it to another administrative agency *is unexceptional* as a violation of this principle *would amount to a failure by the former to exercise the power vested in it*. …

[emphasis added]

28 I should first set out these provisions. Section 41(3) of the MRA reads:

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.

Section 42(5) of the MRA reads:

The Medical Council may at any time revoke the appointment of any Disciplinary Committee or may remove any member of the Disciplinary Committee or fill any vacancy in a Disciplinary Committee.

29 Section 41(3) of the MRA provides that the SMC shall appoint a disciplinary committee where a complaints committee has made an order for a formal inquiry. As the statute is unambiguous, the SMC is then obliged to refer such complaints to a disciplinary committee which shall hear and investigate the complaint. Where the SMC has referred a complaint to the Chairman of the Complaints Panel and a complaints committee is of the view that a formal inquiry is not necessary, the complaints committee has to decide whether to dismiss the complaint, issue a letter of advice or warning, or make such other order. Where the complaints committee has ordered a formal inquiry, the SMC is obliged under s 41(3) of the MRA to immediately appoint a disciplinary committee.

30 Turning to s 42(5) of the MRA, s 42(5) of the MRA, as a matter of plain construction, contemplates the revocation of the appointment of the entire disciplinary committee, the removal of any member(s) thereof, as well as the filling of any vacancy(s). The plain meaning of "vacancy" in this context is that of "the fact or condition of an office or post being, becoming, or falling vacant [or] an occasion or occurrence of this" (see J A Simpson and E S C Weiner, *The Oxford English Dictionary* (Clarendon Press, 2nd Ed, 1989)). A vacancy in a disciplinary committee may arise from any number of reasons including death, disability, resignation, recusal or removal of its members. In any of these instances, the SMC is statutorily empowered by s 42(5) of the MRA to fill any vacancy(s).

31 When however the SMC revokes the appointment of an entire disciplinary committee, it cannot be said that the SMC had removed *each* one of its members. Neither can the SMC in revoking the appointment of the entire 1st DC be regarded thereby to have created four vacancies which it may thereafter fill.

32 Once the SMC revokes the appointment of the entire disciplinary committee, there no longer exists a disciplinary committee for which any vacancy remains to be filled. The SMC will after such revocation have to locate a statutory power, quite apart from s 42(5) of the MRA, to appoint another disciplinary committee to inquire into the same complaint. It would however palpably be unlawful for the SMC to appoint a new disciplinary committee to conduct a formal inquiry on the same complaint were it to revoke the appointment of a disciplinary committee after it had issued its findings and decision. *Autrefois convict* (one who has been convicted cannot be prosecuted again for the same offence) and *autrefois acquit* (no man is to be brought into jeopardy more than once for the same offence), are legal principles applicable to disciplinary proceedings (see *Wee Harry Lee v Law Society of Singapore* [1983-1984] SLR(R) 768 at [23] and *Law Society of Singapore v Nathan Edmund* [1998] 2 SLR(R) 905 at [11]). Short of this, and barring any other legal obstacles, the SMC remains empowered to appoint disciplinary committees provided the conditions of s 41(3) of the MRA (being the only relevant statutory provision empowering the SMC to appoint a disciplinary committee) are satisfied.

33 Having determined the language and meaning of the relevant MRA provisions, I next turn to consider what the SMC did on the facts of this case. The record reveals the following facts: (a) the 1st DC recused itself on 29 July 2010; (b) the SMC revoked the appointment of the entire 1st DC on 7 September 2010; and (c) the SMC appointed the 2nd DC to hear the Complaint on 14 September 2010.

34 The substance of what exactly the SMC decided on two separate occasions first with respect to the revocation of the 1st DC and thereafter to the appointment of the 2nd DC are to be found in two separate emails, in particular paras 3 and 4 of the email of 3 September 2010 to SMC members (see [13] above) and paras 1 and 2 of the second email of 13 September 2010 (see [14] above).

35 The 7 September 2010 SMC decision was expressed in the terms of the 3 September 2010 email which discloses that the SMC, in substance, decided to revoke the appointment of the entire 1st DC. Further, the 14 September 2010 SMC decision was expressed in the terms of the 13 September 2007 email which discloses that the SMC decided to appoint the 2nd DC to hear and investigate the Complaint.

36 The emphasised words in para 3 of the 3 September 2010 email to SMC members (see [13] above) are erroneous insofar as they suggest that the subsequent appointment of a new disciplinary committee would be pursuant to s 42(5) of the MRA. Nothing however turns on this error as the SMC did not decide to appoint the 2nd DC in the terms of the 3 September 2010 email. The SMC's decision

to appoint the 2nd DC was made on the quite separate 13 September 2010 email. Whilst this second email is silent on the statutory basis of the appointment of the 2nd DC, this appointment must necessarily be founded on s 41(3) of the MRA which is the only relevant provision in the MRA which confers a power on the SMC to appoint disciplinary committees to hear and investigate complaints. Having so concluded, it is not necessary for me to deal with the Applicant's second string argument that s 42(5) of the MRA grants the SMC a discretion which it had unlawfully fettered by having taken the position that it had no discretion.

37 I turn next to considering the question of s 41(3) of the MRA requiring an immediate appointment. I should begin by considering when exactly the decision to appoint a disciplinary committee arose in this case. The Complaints Committee ordered a formal inquiry by a disciplinary committee on 17 November 2008. The 1st DC commenced its hearing on 28 January 2010 and recused itself on 20 July 2010. No objection has been made in court that the appointment of the 1st DC in 2009 was not in compliance with s 41(3). The 2nd DC was appointed on 14 September 2010. It is clear that, whilst the 2nd DC is termed as the "2nd" in this judgment for ease of reference, this is a 2nd DC only in chronology and not to suggest that it was hearing and investigating the same complaint on which any earlier disciplinary committee had issued its findings and decision.

38 The disciplinary structure in the MRA contemplates that every formal inquiry ordered by a complaints committee be heard by a disciplinary committee which concludes the process by issuing the disciplinary committee's findings and decision. Until the issue of a disciplinary committee's findings and decision, the Complaints Committee order still stands on the record and remains unspent. Since the 1st DC had not issued any findings and decision within the meaning of s 45 of the MRA, the power to appoint a disciplinary committee under s 41(3) is not spent.

39 Having in mind this statutory structure and its purposes, how the court regards the significance of the prescribed timing of the appointment of any disciplinary committee within the context of s 41(3) of the MRA falls to be determined on the facts in each case. There are three possible scenarios. Firstly, a disciplinary committee may ordinarily be appointed by the SMC either after a complaints committee has issued its order for a formal inquiry or directly pursuant to s 39(3) of the MRA. Secondly, as has occurred here, where the SMC has revoked the appointment of an entire disciplinary committee prior to it issuing any findings or decision, it may appoint another disciplinary committee to hear and investigate the complaint, as its power to appoint a disciplinary committee has not been spent. In such a scenario, time must necessarily run from the SMC's decision to revoke the entire disciplinary committee's appointment. This is because the SMC would have no power to appoint any disciplinary committee to hear and investigate into a complaint whilst there is subsisting a disciplinary committee hearing and investigating the same complaint. There remains a third scenario. Where an entire disciplinary committee has recused itself prior to issuing its findings and decision, the SMC could proceed to appoint a fresh disciplinary committee to hear and investigate the same complaint without any prior need to revoke the appointment of the entire recused disciplinary committee.

40 Given that the SMC had the statutory power under s 42(5) of the MRA to revoke the appointment of the 1st DC, and my conclusion that it thereupon continued to have the power to appoint the 2nd DC, it would follow that the relevant time frames for consideration would be 7 September 2010 (the date of the SMC's revocation decision) and 14 September 2010 (the date of the SMC's decision to appoint the 2nd DC). In the light of this, the duration taken to appoint the 2nd DC is incontrovertibly in compliance with s 41(3) of the MRA. Even if consideration needs to be given to the earlier date of recusal as the relevant date from which time should run, there is no serious argument that the appointment of the 2nd DC would not clearly comport with s 41(3) of the MRA.

41 It is only because the Applicant seeks to challenge the SMC's decision to appoint the 2nd DC that she is obliged to establish illegality and thus run the argument that the material date from which time runs must be the date of the Complaints Committee's order of 17 November 2008. By these means, the Applicant seeks to challenge the SMC's appointment of the 2nd DC on 14 September 2010 as not being "immediately" under s 41(3) of the MRA.

42 In the light of what I have concluded, it is not strictly necessary for me to deal with this submission, but I shall nevertheless deal with it. Where Parliament has not stated in the legislation what would be the consequence of a failure to observe matters like a time prescription, the courts have formulated criteria to determine whether such a failure is fatal or not. If the court determines that the prescription is mandatory then any non-observance is fatal and, conversely, if directory then any non-observance is not fatal.

43 The Court of Appeal in *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 1 SLR(R) 553 ("*Tan Tiang Hin Jerry*") adopted (at [47]) the following approach in determining whether a statutory requirement is to be regarded as mandatory or directory (citing S A de Smith, *Judicial Review of Administrative Action* (Stevens & Sons Limited, 3rd Ed, 1973) at 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 decisions that is impugned.

It should also be noted that the High Court in *Chai Chwan v Singapore Medical Council* [2009] SGHC 115 also took the view (at [68]) that the requirement of an immediate appointment under s 41(3) of the MRA was directory and not mandatory. I note in passing the following commentary in Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) at para 5-053 ("*De Smith's Judicial Review*") which was made with reference to Lord Hailsham's speech in *London and Clydeside Estates v Aberdeen District Council*[1980] 1 WLR 182 at 189–190 in which he expressed his preference to abandon the dichotomy of mandatory / directory requirements in favour of characterising the approach as being within a spectrum in which the courts decide in each case when they would nullify a non-compliance with a statutory prescription:

> ... At one end are cases 'where a fundamental obligation may have been so outrageously and flagrantly ignored or defied that the subject may safely ignore what has been done and treat it as having no legal consequence'. At the other end of the spectrum the defect may be 'so nugatory or trivial' that the authority can proceed on the assumption that 'if the subject is so misguided as to rely on the fault, the courts will decline to listen to his complaint'. ...

44 The MRA does not specify the consequences of a failure to observe the prescription of an immediate appointment in s 41(3) of the MRA. Looking at the objects of the MRA, the unusual recusal and revocation of the appointment of the 1st DC and the absence of any evidence of substantial prejudice, I would regard this time requirement to be directory or, to use Lord Hailsham's characterisation, as being at the other end of the spectrum, such that a court will decline to listen to such complaints.

45 The Applicant does not dispute that a second disciplinary committee may well be appointed as the 1st DC had not issued any findings or decision. In order to sustain her challenge of the SMC decision which is pivotal to her case, the Applicant proffers the argument that the SMC should have first referred the Complaint to a fresh complaints committee. Only if such a complaints committee orders a formal inquiry by a disciplinary committee could the SMC then order a disciplinary committee immediately in accordance with s 41(3) of the MRA. This is a strained argument which neither stands legal scrutiny nor comports with the structure and objectives contemplated by the disciplinary processes set out in the MRA. As there already is the Complaints Committee order on record, no practical purpose is served by sending the same Complaint to another complaints committee. I should add that the Applicant, quite sensibly, did not take the extreme and untenable position that following the 1st DC's recusal, the complainant ought to have been required to file a fresh Complaint.

46 The Applicant's next illegality submission is based on s 12 of the MRA which, she submits, requires that the SMC meet physically. The record reveals that the SMC decision to appoint the 2nd DC is evidenced in an email. This perfunctory submission fails *in limine* in light of s 12(5) of the MRA which expressly empowers the SMC to make rules for the conduct of its business. The SMC is statutorily empowered to determine how it will conduct its business. This means it may conduct its business with or without physical meetings. The burden of establishing that the unanimous agreement of all SMC members to a decision evidenced in an email is defective under s 12 of the MRA lies on the Applicant. Other than making the bald assertion that a decision made pursuant to an email is not a physical meeting, the Applicant has nothing more to say.

47 It was next argued that the Amendment Act came into force by September 2010 before the 2nd DC had been appointed. The amended s 4 of the MRA enlarged the SMC to now comprise two members from each of the two prescribed medical schools, three additional elected members and one additional nominated member. The Applicant argued that the SMC which appointed the 2nd DC had not been fully constituted because on 14 September 2010, it was short of two members from a prescribed medical school and one elected member. It was argued that the power to fill SMC vacancies in s 9(1) of the MRA provides a closed list of vacancies which can be filled and this list does not provide that vacancies may be filled if the vacancies arose because of the enlargement of its membership. Thus, it was argued the SMC could not make decisions until all these vacant positions had been filled, a proposition tantamount to saying that the SMC has to suspend all business once the Amendment Act came into force until all these appointments and elections were completed and positions filled. This remarkable argument would not have been run had the Applicant taken the trouble to refer to s 33 of the Interpretation Act (Cap 1, 2002 Rev Ed) ("the Interpretation Act") instead of s 9 of the MRA. Section 33 of the Interpretation Act expressly provides that the powers of such board, commission, committee or similar body shall not be affected by any vacancy in the membership thereof. I should add that no argument was made that the SMC decision of 14 September 2010 was anything other than unanimous.

Fairness: Actual Bias

48 The nature and scope of this rule against actual and appearance of bias is succinctly stated in *De Smith's Judicial Review* at para 10-006 as follows:

> The principle expressed in the maxim *nemo iudex in sua causa* (no one should be a judge in his own cause) refers not only to the fact that no one shall adjudicate his own case; it also refers to the fact that no one should adjudicate a matter in which he has a conflicting interest. In order to give effect to those two aspects of the principle, the concern is not only to prevent the distorting influence of *actual bias*, but also to protect the integrity of the decision-making process by ensuring that, however disinterested the decision-maker is in fact, the circumstances should not give rise to the *appearance of bias*. As has been famously said: "justice should not only be done, but should manifestly and undoubtedly be seen to be done".
>
> [emphasis in original]

The principal consideration of public confidence in a fact-finding tribunal is graphically expressed by Lord Denning in *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599:

> ... There must be circumstances from which a reasonable man would think it likely or probable that justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The court will not inquire whether he did, in fact, favour one side unfairly. *Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: "The judge was biased."*
>
> [emphasis added]

49 The Applicant argues that the SMC decision to refer the Complaint to the 2nd DC ought to be quashed by reason that it was tainted by actual bias. What is striking is that the Applicant does not allege actual bias on the part of any single official, person, event or conduct. What is even more striking is that the Applicant has made no allegation, and there is nothing on the record, of any personal bias, animus or interest on the part of the incumbent DMS, Professor Satku. No allegation is made and there is nothing on the record which reveals that the DMS, in any way, abused his position as DMS to cause the MOHS to conduct its investigations, to conduct the searches and to file the Complaint. The Applicant does not allege, and there is nothing on the record, that any, a majority, or all the SMC members harboured any animus or had any conflict of interest that evinces actual bias against her.

50 That being the case, the puzzle remains why at all is the Applicant's case founded on actual bias? The Applicant feebly invited the court to infer actual bias by reason only of the totality of the circumstances raised below (see [57] below). The Applicant offered no direct evidence apart from these aggregated circumstances, upon which the court was invited to draw an inference of actual bias. It would be startling for a court of law to draw inferences of actual bias other than from direct evidence. Absent any evidence on the record, I must decline to do so. The Applicant's case on actual bias on the part of the SMC in deciding to refer the Complaint to the 2nd DC, being totally unsupported on the record, must necessarily fail.

Fairness: Reasonable Apprehension of Bias

51 The Applicant's fall-back argument is then a reasonable apprehension of bias, again, based not on an apprehension arising by reason of the animus, conduct or conflicting interest of any, a majority or the entire SMC. It is instead based on the aggregation of the same circumstances which I will examine below at [57].

52 The legal test for reasonable apprehension of bias is not the subjective sensitivity, fears or

suspicions of the person affected. The legal test is an objective one: whether there are circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with knowledge of the relevant facts that the tribunal was biased (see *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [91]). The circumstances must objectively be well founded and of sufficient gravity. The standard varies depending on whether the decision is an administrative decision and whether the decision is the result of a fact-finding process (see [25]–[26] above and [53] below).

53 The court will have regard to the context in which bias is raised (see *Lionel James De Souza v Attorney-General* [1992] 3 SLR(R) 552 at [31]):

> … As the circumstances require, in the context in which the question of bias arises, whether it be because the tribunal has functions which are more administrative than adjudicative or whether it be because the tribunal is a domestic tribunal or whether it be because the tribunal is one the parties have contractually agreed to, the standard of proof of suspicion of bias may vary. Applied in this way, "reasonable suspicion of bias" means suspicion of bias that is well founded and that is of sufficient gravity in the circumstances of the case.

54 The approach of the court with respect to the common law principles is succinctly set out by Silber J at first instance and fully quoted with approval by Lord Phillips MR in the Court of Appeal in *R v West Midlands and North West Mental Health Review Tribunal* [2004] EWCA Civ 311 at [6] as follows:

> Silber J summarised the relevant principles to be deduced from recent authorities as follows:
>
> > "(a) in order to determine whether there was bias in a case where actual bias is not alleged 'the question is whether the fair-minded and informed observer, having considered the facts would conclude that there was a real possibility that the Tribunal was biased.' … It follows that this exercise entails consideration of all the relevant facts as 'the court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased'…
> >
> > (b) Public perception of a possibility of unconscious bias is the key. It is unnecessary to delve into the characteristics to be attributed to the fair-minded and informed observer. What can confidently be said is that one is entitled to conclude that such an observer will adopt a balanced approach. This idea was succinctly expressed in *Johnson v Johnson* [2000] 200 CLR 488, 509 at paragraph 53 by Kirby J when he stated that 'a ***reasonable member of the public is neither complacent nor unduly sensitive or suspicious*** ' (per Lord Steyn in *Lawal v Northern Spirit Limited* [2003] ICR 856,862 [14]).
> >
> > (c) in ascertaining whether there is a case of unconscious bias, the courts must look at the matter by examining other similar analogous situation. 'One does not come to the issue with a clean slate; on the contrary, the issue of unconscious bias has cropped up in various contexts which may arguably throw light on the problem' (Lord Steyn in *Lawal v Northern Spirit Limited* (supra) 862 [15]).
> >
> > (d) the approach of the court is that 'one starts by identifying the circumstances which are said to give rise to bias … [a court] must concentrate on a systematic challenge and apply a principled approach to the facts on which it is called to rule' (per Lord Steyn in *Lawal v Northern Spirit Limited* (supra) 864-5 [20])

(e) the need for a Tribunal to be impartial and independent means that 'it must also be impartial for an objective viewpoint, that is it must offer sufficient guarantees to exclude any legitimate doubt in this respect' (*Findlay v United Kingdom* (1997) 24 EHRR 221 at 224-245 and quoted with approval by Lord Bingham of Cornhill in *R v Spear* [2003] 1 AC 734 [8])."

[original emphasis omitted; emphasis added in bold italics]

55 The starting point of the analysis of whether the SMC decision was fairly made is the context of the statutory framework and the consequences of the SMC's decision under s 41(3) of the MRA. The SMC is not the fact-finding or decision-making body with respect to the substance or merits of the Complaint. The statutory framework and process require referral first to the Chairman of the Complaints Panel who shall lay it before a complaints committee which is the body to determine whether a formal inquiry is necessary and, only where it so decides, issue an order for a formal inquiry. The SMC is then consequentially obliged under s 41(3) of the MRA, to appoint a disciplinary committee to hear and investigate the complaint. The SMC has not been statutorily conferred with any discretion to decide whether or not to refer the complaint in light of the Complaints Committee order to a disciplinary committee. The establishment of a pool of eligible medical practitioners from whom the Chairman, Complaints Panel and the SMC respectively appoint each complaints committee and each disciplinary committee is a separate process.

56 To restate the question before me in simple terms: was the SMC decision, unanimously made by all members, to refer the Complaint to the 2nd DC, taken under s 41(3) of the MRA, made in such circumstances as might cause a reasonable member of the public, who is neither complacent nor unduly sensitive or suspicious, to have a reasonable apprehension of bias on the part of the SMC?

57 I now proceed to examine each of the circumstances raised by the Applicant. The Applicant points to the following general circumstances for purposes of making her case of actual bias or reasonable apprehension thereof : (a) the role of the incumbent DMS Professor Satku, whose meeting with the MOHB led him to invite it to write in to the MOHS, followed by the MOHS's investigation and the separate search, all of which culminated in the MOHS's filing of the Complaint against the Applicant ; (b) the composition and recusal of the 1st DC and the alleged remarks and the presence of the SMC's in-house counsel at one of the 1st DC's recesses; and (c) the SMC's decision-making process in appointing the 2nd DC. The Applicant caps her case with a high abstraction of "systemic bias" on the part of the SMC by reason of the SMC's failure to: (i) inquire into the deficiencies in the disciplinary process; (ii) take remedial steps to ensure that the Applicant will not have to endure the process again; and (iii) provide documents requested by the Applicant, for which she has made a discovery application in court (see *Lim Mey Lee Susan v Singapore Medical Council* [2011] SGHC 132 (judgment for the discovery application)).

The multiple roles of the incumbent DMS and the fact that the 1st DC members and an expert witness were SMC members

58 The Applicant suggests only that the DMS had a conflict of interest in his position as an SMC member, arising from his multiple earlier roles. The DMS as DMS MOHS first met the Permanent Secretary, MOHB from whom he learnt of MOHB's concerns relating to the Applicant's invoices for services rendered to the Patient. The DMS then invited the MOHB to write in to the MOHS. Following the letter from the MOHB to the MOHS, the MOHS conducted a preliminary investigation. Searches were then conducted of the Applicant's clinics. Finally, the MOHS filed the Complaint against the Applicant.

59 It is not doubted that the DMS MOHS is in a position of importance and influence within the

MOHS. The administrative machinery of the MOHS came into play to conduct a preliminary investigation and conduct searches before filing the Complaint. This is an expectedly routine administrative process. There can be no legal objection and certainly no inherent conflict of interest arising only from the DMS's statutory multiple roles including that of being the Registrar and member of the SMC provided that he was not a member of any complaints committee or disciplinary committee hearing and investigating the same complaint.

60 The crux of the challenge is that the SMC decision of 14 September 2010 gives rise to a reasonable apprehension of bias on the part of the SMC because this same DMS was a statutory member and Registrar of the SMC. Added to this mix were also two members and an expert witness in the 1st DC who were members of the same SMC which made the 14 September 2010 decision. The Applicant submits that this must lead to the conclusion of reasonable apprehension of bias on the part of the whole SMC, including all the other independent SMC members. The question is how so? I proceed to examine the record.

61 The record reveals that all SMC members received the 13 September 2010 email appointing the 2nd DC, and no responses were received from any SMC member prior to the return date and accordingly the SMC decision on 14 September 2010 to appoint a 2nd DC was made unanimously. There is nothing in the record that the DMS or the members and witness of the 1st DC personally lobbied, persuaded or procured the other SMC members to decide to refer the matter to the 2nd DC. Even so, had the SMC been in a fact-finding role, given the previous roles of the DMS or the 1st DC members and witness, their inclusion in such a fact-finding decision could in principle infringe the fairness / natural justice standards (see *Hannam v Bradford City Council* [1970] 1 WLR 937 and *Re Chuang Wei Ping* [1993] 3 SLR(R) 357). However, the SMC's decision under s 41(3) of the MRA is not a fact-finding decision.

62 Having in view the nature of the SMC's non-fact-finding decision, the unanimous decision and the absence of any responses by any SMC member to the email by the return date, that the DMS, the 1st DC members and a witness received the email in their capacity as SMC members *per se* provides nothing on which a reasonable person could begin to form a reasonable apprehension of bias on the part of the whole SMC. In fact, countervailing factual evidence to the contrary appears on the record which reveals that the SMC approved the composition of the 2nd DC to include two newly elected members who were not previously SMC members when the 1st DC was appointed, with one being a private sector medical practitioner.

The composition and recusal of the 1st DC and the presence of the SMC's in-house counsel at one of the 1st DC's recesses

63 The second circumstance raised by the Applicant is that of the composition and recusal of the 1st DC and the conduct of the SMC's in-house legal counsel. The 1st DC comprised Associate Professor Chin Jing Jih, Associate Professor Ong Biauw Chi, Dr Wong Yue Sie (his death creating a vacancy, which was filled by the SMC's appointment of Associate Professor Annette Jacobsen) , Ms Serene Wee (lay person) and Mr Giam Chin Toon SC (legal assessor). The Applicant complains that the 1st DC members did not disclose to her that they were doctors employed by the Ministry of Health Holdings Pte Ltd. The legal basis of any obligation to make such disclosure is obscure and the employment status of these doctors is readily available from Google searches and other sources of public information. If any of them had a conflict of interest this could have been challenged before the 1st DC and in any subsequent judicial review challenge of the 1st DC's decisions. Insofar as the Applicant challenges the employment status of the 1st DC's members as providing grounds for reasonable apprehension of bias, this was statutorily met by s 40(11) of the MRA which provides that no SMC member who is employed by the MOHS shall be disqualified from being a member of a

complaints committee or disciplinary committee by reason only that he or the complainant is so employed. If it is statutorily not a disqualification for a MOHS employee, on that ground alone, to be appointed a member of a complaints committee or disciplinary committee *a fortiori* it would not be a disqualification for any such persons only on the ground of their being employees of the restructured corporate hospitals whose shares are held by the Ministry of Health Holdings Pte Ltd. *A fortiori* with respect to the more remote membership of the non-fact-finding SMC whose decision it was to appoint any disciplinary committee. Accordingly, there is no legal basis to challenge the constitution of the 1st DC by reason only that it comprised employees of the public sector corporatized hospitals. Further, the Applicant was not able to establish on the record how the composition of the 1st DC is linked to all the other SMC members such as to infect their unanimous decision to appoint the 2nd DC.

64 Turning next to the recusal of the 1st DC, the independent decision of the 1st DC, with the availability of the legal assessor, to recuse itself after hearing the submissions of the Applicant's legal counsel is something the 1st DC was properly entitled to decide on its own. On its face, the independent decision of the 1st DC to recuse itself in the light of a prejudgment challenge, carries no necessary connection to all the other SMC members who decided on 14 September 2010 to appoint the 2nd DC.

65 The Applicant further postulates that the SMC ought to have first conducted an inquiry into the recusal before proceeding to appoint the 2nd DC and that its failure to have done so creates a reasonable apprehension of bias. This has no foundation because there is no statutory obligation on the SMC to conduct any inquiry into a recusal nor is this a statutory precondition to the appointment of the 2nd DC.

66 The Applicant next raises the circumstances relating to the role of, and remarks attributed to, the SMC's in-house counsel. First, the SMC's in-house counsel had been present in the private room of the 1st DC when it, together with its legal assessor, retired for a hearing break. There was a dispute in court on the number of such occasions but nothing on the record revealed whether there was more than one occasion. Second, remarks were attributed to the in-house counsel by one SMC member in his letter dated 16 September 2010 which reads as follows:

> …
>
> I refer to my conversation with you [Ms Serene Wong, the Senior Manager of the Professional Conduct and Professional Standards Division of the SMC] on Tuesday 14 September, followed by a discussion with Ms Kalyani, our legal counsel, regarding the need to revoke the appointment of the members of the Disciplinary Committee who have been hearing Dr Susan Lim Mey Lee's case.
>
> In your Email dated 3 September 2010 you state that the members hearing the case had recused themselves. One dictionary meaning of recuse states, "to withdraw from a position of judging so as to avoid any semblance of partiality or bias".
>
> It therefore follows that in effect all the members have stepped down from their appointed positions as members of the erstwhile Disciplinary Committee. To seek approval at this stage to revoke the appointment of the erstwhile members of the Disciplinary Committee could be misconstrued by these members as an attempt to reprimand them.
>
> Despite Ms Kalyani's belief that they will not sue us (ie the SMC and its members) "*because they are on our side*" the possibility remains that being medical professionals of substance in their own respective spheres of work they may feel that any blemish on their professional or personal reputation if left unchallenged may embarrass them in the future. For these reasons I regret that

I am unable to give my approval to revoke their appointment, in which case the approval to appoint a list of members to a new Disciplinary Committee will have to be taken up later as a separate issue and not as a consequence.

…

[emphasis added]

67 The record reveals only that the in-house counsel was present with the 1st DC and its legal assessors, in the absence of the concurrent presence of the defence counsel, for the purpose of assisting with logistical/administrative arrangements on the first day of the inquiry and that the in-house counsel did not communicate with the 1st DC on any other matter. The presence of the in-house counsel even if for logistical/administrative purposes in the absence of the concurrent presence of the defence counsel, was ill-judged. Had the 1st DC proceeded to issue its findings and decision, such circumstances on the record could provide a legal ground upon which a court might quash its findings and decision (see *R v Barnsley Metropolitan Borough Council, ex p Hook* [1976] 1 WLR 1052). I come next to the letter in which remarks were attributed to the in-house counsel. Read in the context of the entire letter, the Applicant's reading of the alleged remarks taken out of context does not stand scrutiny. The context of the alleged remark is the possibility of a lawsuit against the SMC by reason of its decision to recuse the entire 1st DC. In this context, the alleged remark by the in-house legal counsel was that she believed that the members of the 1st DC would not file a lawsuit against the SMC as they are themselves members of the SMC.

68 The Applicant's target however remains the SMC, not the 1st DC. The Applicant makes no allegation and there is nothing on the record that the in-house counsel advised the SMC to appoint the 2nd DC. In any case, the Applicant was unable to show how the conduct and alleged remark of the in-house counsel are linked to all the SMC members as to infect their unanimous decision on 14 September 2010 to appoint the 2nd DC.

The SMC's decision making process in appointing the 2nd DC

69 The Applicant next complains that the 3 September 2010 SMC email misrepresented the nature and significance of the recusal of the 1st DC inasmuch as it did not mention that the recusal of the 1st DC was on the grounds of prejudgment and that its significance was understated by it being characterised as a procedural matter.

70 The critical minimum content of the email, given the decision that the SMC was to take, comprises: (a) what decision the SMC was to take; and (b) why it was necessary for this decision to be taken. Brevity, clarity and comprehensiveness in email decisions are to be commended and not faulted. In any event, it remained at all times open to the SMC members to request more details which they do not on the record appear to have required. The email does in fact explain its brevity in the following cautionary terms:

At the hearing on 29 Jul 2010, the Defence Counsel made a procedural application for the Disciplinary Committee (DC) to recuse itself. Details of this case can be given only at the conclusion of the inquiry and until then we seek your kind understanding and patience on this matter.

[emphasis in original]

71 The Applicant then submits that there is no reason why the SMC members could not have been

given details of the recusal until the conclusion of the inquiry. The precaution of non-disclosure of the deliberations or reasons of the 1st DC must surely be obvious. The brevity protects the integrity of the disciplinary process and preserves the confidentiality of the deliberations of the 1st DC given the context that the 2nd DC is to be appointed by the SMC to hear the very same Complaint. Any further selective disclosure, short of releasing the entire transcript of the hearing, carries the above risks. The release of the entire transcript of the hearing would prejudice the Applicant given that the SMC's decision was to refer the matter for a formal inquiry by the 2nd DC, at least two of whom would, under s 42(1)(a) of the MRA, include SMC members. The Applicant further complains that the recusal of the 1st DC was neither a procedural matter nor an administrative matter. There can be no real objection to this choice of words. In these circumstances, the defence counsel had indeed made a procedural application to the 1st DC. It is indeed an administrative matter for the SMC to first revoke the appointment of the 1st DC prior to "mov[ing] forward on this matter".

Conclusion on reasonable apprehension of bias

72 Each of the circumstances raised by the Applicant, when examined closely, is not, and all of them, when aggregated, are not well founded or of sufficient gravity to cause any reasonable person who is neither complacent nor unduly sensitive or suspicious with knowledge of all the relevant facts to have a reasonable apprehension that the entire SMC was biased when it decided, without making any finding of fact, to appoint the 2nd DC to hear and investigate the Complaint. They are weightless and insubstantial spins, which do not bear scrutiny in court.

Wednesbury Irrationality

73 The *Wednesbury* case and the test it laid out are well known. A decision will only be considered irrational if the administrative body in question took into consideration matters that it should not have taken into account, failed to take into consideration matters which it was bound to consider or if the decision was so absurd that no reasonable body could have made such a decision (see *Wednesbury* at 229).

74 The Applicant submits that the SMC decision to appoint a 2nd DC, and any fresh complaints committee or disciplinary committee order or decision, on the Complaint would be *Wednesbury* irrational. The Applicant submits on *Wednesbury* irrationality on the basis of: (a) the evidence adduced by the prosecution before the 1st DC; (b) the absence of any rule regulating the quantum of fees that a doctor may charge a patient; (c) the absence of any abuse of the doctor-patient relationship; and (d) the other reasons detailed in the written no case to answer submissions before the 1st DC.

75 To recap, the only decision the SMC is to make under s 41(3) of the MRA is to appoint a disciplinary committee once a complaints committee has issued an order for a formal inquiry. The function of the complaints committee under s 41 of the MRA is only to decide after due inquiry whether or not a formal inquiry by a disciplinary committee is necessary (see *Regina v General Medical Council ex p Toth* [2000] 1 WLR 2209 at [14(5)]). It is the disciplinary committee which is to hear and investigate the Complaint following which, if established, the disciplinary committee may impose any of the sanctions set out in s 45(2) MRA. If the Complaint is not established, s 46(16) MRA provides that the disciplinary committee shall dismiss the Complaint. The SMC quite properly was not provided with, nor should it have had, the transcript of the 1st DC hearing in making its decision of 14 September 2010 to refer the Complaint for a hearing and investigation by a 2nd DC. The question of whether a patient agreement on fees extinguishes any professional misconduct because there is no rule against such agreements, and the absence of patient abuse or because of other matters raised before the 1st DC are all not questions to be determined by the SMC under s 41(3) of the MRA, nor

are they questions to be determined by the complaints committee under s 41 of the MRA, given their respective functions. These questions are to be determined only by the disciplinary committee after a hearing and investigation.

76 The SMC decision in this case was not a decision that touched on the substance or merits or otherwise of the Complaint. The SMC did not consider matters it should not have considered nor did it fail to consider any matter it was bound to consider. For the SMC to refer the Complaint, as it is required to do by s 41(3) of the MRA, cannot be characterised as being one which no reasonable body could have made. As I have rejected the Applicant's argument that the SMC was obliged to first refer the Complaint back to a fresh complaints committee, I do not need to consider the *Wednesbury* irrationality argument with respect to such a fresh complaints committee. With respect to the argument that any disciplinary committee decision against the Applicant would be *Wednesbury* irrational, this is hypothetical and premature.

77 In summary, the Applicant has been unable to establish that the SMC's decision to refer the matter to the 2nd DC is *Wednesbury* irrational. I make no conclusion on her argument that any complaints committee order would be *Wednesbury* irrational because it is unnecessary for me to address that argument given my conclusion that a referral to a fresh complaints committee is not necessary under the MRA. Neither do I make any conclusion on whether any disciplinary committee decision would be *Wednesbury* irrational because that argument is hypothetical and premature.

78 The Applicant relying, *inter alia*, on *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR(R) 612 at [89], also raised considerations of unfairness, prejudice and oppression in support of her application for a Prohibiting Order, to *wit*, that it would be unfair to her by reason of the delays in hearing and investigating the Complaint, that her defence is known to the prosecution and that she would have to bear the financial costs of a resumed disciplinary committee hearing and investigation. These considerations, taken out of context, do not themselves independently support a Prohibiting Order. In any event, none of these arise from the inaction or delays on the part of the SMC or the 1st DC. These are unavoidable consequences of the recusal of the 1st DC.

Duty to provide fair regulatory system under s 5of the MRA

79 It remains for me to examine the Applicant's high level abstraction that by reason of s 5(f) of the MRA, which vests the responsibility to prescribe and regulate the ethical conduct of medical practitioners in the SMC, the SMC has a legal obligation to ensure a fair disciplinary process and was obliged to review the unusual circumstances resulting in the recusal of the entire 1st DC before deciding to appoint the 2nd DC.

80 The Applicant first submits that because the SMC is constituted under the MRA to establish and operate the disciplinary processes and has assumed the responsibility for the prosecution of complaints before disciplinary committees, the SMC has created the risk of actual or apparent bias at the core of its regulatory function. In short, it is argued that as the SMC is both regulator and prosecutor, Professor Satku's role as complainant ought to have been completely excluded from the SMC decision to refer the Complaint to a 2nd DC, by reason of his role as regulator. It is submitted that it is incumbent on the SMC to ensure that the processes wherein the complaints committees and disciplinary committees are selected and operated are fair, transparent and conducted in accordance with natural justice principles. It is averred that the SMC failed to do this by not excluding Professor Satku from the SMC when it made the decision to refer the Complaint to a 2nd DC, given that he had a prior role as regulator in the origin of the Complaint.

81 Section 5 of the MRA indeed empowers the SMC to regulate the ethical standards of medical

practitioners. However, the structure of a fair disciplinary process is not set by the SMC. It is set by Parliament in enacting the MRA (see [5] above). In the operation of this statutory disciplinary process, fairness is ensured by the supervision of the court to ensure fair processes are followed in every case. Nothing has been made out in court that the SMC's decision to refer the Complaint to a 2nd DC is in breach of the applicable legality or fairness / natural justice requirements. The fact alone that the MRA provides that the DMS is *statutorily* the Registrar and member of the SMC does not in any way denigrate from the statutory disciplinary structure being a fair one. The Applicant's high level abstraction reliant on s 5 of the MRA does not cohere nor is it supportable with the structure and provisions of the MRA.

Conclusion on the Quashing Order and Prohibiting Order Applications relating to the SMC's Decision

82 The application for a Quashing Order of the SMC's decision to appoint a 2nd DC, in the above premises, must necessarily fail, as must the application for a Prohibiting Order.

Declaration that the S 528/2010 Amendment Regulations are illegal

83 The Applicant has further applied for a declaration that the enactment of the entire S 528/2010 Amendment Regulations is void because they are contrary to natural justice.

84 This application is misconceived. The power to make regulations of general application is lawfully that of the SMC under s 70 of the MRA. No authority was cited for the proposition that the courts would declare the mere enactment of regulations to be illegal generally. The courts will determine the legality of enactments only in a real controversy where the provision has been applied. It is quite clear that the courts decide real controversies and do not entertain theoretical or hypothetical issues. See Carleton Kemp Allen, *Law and Orders: An Inquiry into the Nature and Scope of Delegated Legislation and Executive Powers in English Law* (Stevens & Sons Limited, 2nd ed, 1956) at p 266–267:

> … It is a principle of our jurisprudence – and, it is to be supposed, of most systems of law – that courts will not entertain purely hypothetical questions. They will not pronounce upon legal situations which *may* arise, but generally upon those which have arisen. If, however, there is an *existing* basis of right or obligation, it is sometimes of great advantage to an interested party to establish his position before it is put to the test of a joinder of issue. To take a simple illustration: nobody can come to the court to ascertain what his position *will* be *if* his rich uncle makes a promised disposition by will in his favour. This is, in legal terminology, a mere *spes*, and one which experience teaches is often frustrated. If, on the other hand, an intestate estate has fallen to be administered, and the administrator makes it known that he wrongfully claims, as part of the estate, property which clearly belongs to X, X, being in jeopardy of merely vexatious litigation, is entitled to come to the Court for a declaration that the administrator has no right or title to X's property.
>
> [emphasis in original]

In *Draper v British Optical Association* [1938] 1 All ER 115, which involved an application for a declaration and an injunction, Farwell J observed:

> … It may be that, if and when the defendants hold their meeting, they may think it right to seek to enforce against the [claimant] this code of ethics, and, if they do, it may be that they will be acting *ultra vires*. But, until they have sought to enforce that code upon the [claimant], I myself

> do not consider that it is for me to determine this question in the abstract. It is quite true that, in a proper case, the court will determine matters of this kind in a *quia time*t action, but there must be before the court, before it will entertain a *quia timet* action, satisfactory evidence that the defendant is threatening or intending to do that which it is said he is not entitled to do, or that which, it is said, will lead to serious damage to the plaintiff.

In short, whether the S 528/2010 Amendment Regulations are contrary to natural justice is a question that the court will determine when the question is raised as a real controversy and not when it is raised hypothetically.

85 The 2nd DC has not actually applied reg 42 because the 2nd DC's inquiry has not proceeded further by reason of these applications. However, the record shows that during the 2nd DC's pre-inquiry conference meeting, the 2nd DC's legal assessor mentioned that he had advised the 2nd DC that reg 42, as amended by the S 528/2010 Amendment Regulations, was applicable to the 2nd DC's proceedings. It might therefore be argued that there is a "threatened" application of reg 42 as amended by the S 528/2010 Amendment Regulations. On that view, it might be argued that this application is not hypothetical.

86 I am of the view, however, that this application remains hypothetical because, contrary to the 2nd DC's legal assessor's advice to the 2nd DC, reg 42, as amended by the S 528/2010 Amendment Regulations, is not applicable to the 2nd DC's proceedings.

87 In the first place, the S 528/2010 Amendment Regulations cover a whole range of matters of general purposes including the following: accreditation of specialists, pre-inquiry conferences of disciplinary committees, representation procedures prior to the issue of disciplinary charges, alteration of charges and consolidation of charges in relation to those arising from the same transaction, and the holding of joint and separate inquiries. The Applicant made no submission on how any of these amendments in the S 528/2010 Amendment Regulations have any bearing on or have been applied in the 2nd DC hearing.

88 The Applicant's primary complaint relates to one reg 42. The position prior to the S 528/2010 Amendment Regulations was that where the disciplinary committee considers it prejudicial to the discharge of its duties for the advice of the legal assessor to be tendered in the presence of the parties or their representatives, the question may be tendered in their absence but such advice shall be subsequently put in writing and given to every party or representative. Under the S 528/2010 amendment of reg 42, there is no longer any need to put the legal assessor's advice in writing and make it available to the parties or their representatives where such advice was tendered in their absence.

89 However, even reg 42, as amended by the S 528/2010 Amendment Regulations, has no application to the Applicant. The Attorney's counsel early in these proceedings had submitted that reg 42, as amended by the S 528/2010 Amendment Regulations, did apply to the 2nd DC's proceedings because the S 528/2010 Amendment Regulations provided that they would come into effect on 20 September 2010. The Attorney's counsel was closely questioned by the court on whether the accrued substantive right of a defendant in ongoing disciplinary proceedings could be changed midstream to the detriment of such defendant. The Attorney's counsel reconsidered and subsequently reversed the submission made earlier in court. As reg 42 relates to substantive rights, s 16(1)(c) of the Interpretation Act provides, *inter alia*, that the repeal in whole or in part of any written law (including subsidiary legislation) shall not affect any right acquired or accrued under any such repealed written law unless a contrary intention appears. No contrary intention appears because there were no transitional provisions in the S 528/2010 Amendment Regulations.

90 Since the S 528/2010 Amendment Regulations, and reg 42 as amended thereunder, are not applicable to the 2nd DC's proceedings, the question of whether reg 42, as amended, and the S 528/2010 Amendment Regulations are contrary to natural justice is hypothetical to the Applicant in this judicial review proceeding.

91 The Applicant also raises a further submission that the enactment of the S 528/2010 Amendment Regulations on 16 September 2010, which were brought into force on 20 September 2010, was directed at the Applicant's 2nd DC hearing. Apart from the timing of their enactment, however, the Applicant has not explained in court as to how they are directed at her. As shown above, the contents of the Amendment Regulations are mostly of general application and neutral (see [87] above).

92 It should be noted that this submission has no bearing on the question of whether the S 528/2010 Amendment Regulations are *substantively* contrary to natural justice. I have already observed that that question is hypothetical (see [90] above). This argument was raised in support of the Applicant's submissions that the SMC decision to appoint the 2nd DC and shortly thereafter enact amendments to reg 42 in the S 528/2010 Amendment Regulations, gave rise to a reasonable apprehension of bias.

93 A close analysis of the content and chronology of the S 528/2010 Amendment Regulations reveals that this submission has no merit. The S 528/2010 Amendment Regulations introduced these new procedures relating to disciplinary committees pursuant to s 70 of the MRA. In December 2010, the Medical Registration Regulations 2010 (S 733/2010) ("the S 733/2010 MRR") were enacted to consolidate the S 528/2010 Amendment Regulations with all preceding unrevoked regulations.

94 The S 733/2010 MRR also contains further refinements to the S 528/2010 Amendment Regulations, which the Applicant complains, indicates that the S 528/2010 Amendment Regulations were rushed to enactment and directed at the 2nd DC hearing. The new refinements under the S 733/2010 MRR are primarily to rename the "Disciplinary Committee" as the "Disciplinary Tribunal". This change could only be introduced in the regulations after the coming into effect of the Amendment Act on 1 December 2010 by r 2 of Gazette Notification 732/2010. The SMC could not as a matter of law have enacted this change earlier in September 2010 in the S 528/2010 Amendment Regulations as these particular MRA amendments had not been brought into effect then.

95 The other material amendment in the S 733/2010 MRR is the further refinement to reg 42 (which is now renumbered as reg 67 in the S 733/2010 MRR) which *inter alia* provides that any advice tendered during the Disciplinary Tribunal's deliberations need not be provided to the parties or representatives. However, reg 72(c) of the S 733/2010 MRR provides a transitional provision that notwithstanding the revocation of all the previous Medical Registration Regulations, including the S 528/2010 Amendment Regulations, these revoked regulations shall continue to apply to any committee appointed before 1 December 2010, as if they had not been revoked. This means that reg 42 as refined by the S 733/2010 MRR (*ie*, reg 67 of the S 733/2010 MRR), does not have retrospective effect to extend to any ongoing disciplinary committees to which reg 42, as amended by the S 528/2010 Amendment Regulations, is applicable. This also means that reg 42, as refined by the S 733/2010 MRR, is not applicable to any ongoing disciplinary proceedings to which reg 42 as amended by S 528/2010 Amendment Regulations, is itself not applicable. Put simply, neither the refinements in S 733/2010 MRR nor the amendment in the S 528/2010 Amendment Regulations made with respect to reg 42 are applicable to the 2nd DC proceedings. The original reg 42 in force on 14 September 2010 (being the date of appointment of the 2nd DC) would remain operative. Given this exact chronology and effect of the various amendments, the Applicant has no basis to harbour any reasonable suspicion that the S 528/2010 Amendment Regulations were rushed and directed at the

2nd DC's hearing.

96 If the 2nd DC applies reg 42, as amended by the S 528/2010 Amendment Regulations, or reg 67 of the S 733/2010 MRR (*ie*, the refined reg 42), notwithstanding the transitional provisions of reg 71 of the S 733/2010 MRR, and those provisions either infringe natural justice or are illegal on other grounds, she remains at liberty to seek judicial review in court of the 2nd DC findings and decision and make her case.

Distillation of Applicant's case

97 Having analysed and evaluated the Applicant's case in detail, I will now distil the essence of her case.

98 The Applicant seeks to quash the SMC's decision to refer the Complaint to the 2nd DC for a hearing and investigation and to prohibit the SMC from any further referral of the same Complaint to any disciplinary committee in future. In order to achieve this, it is necessary in law for the Applicant to establish that the SMC decision to refer the Complaint to the 2nd DC was illegal or biased as alleged. Illegality means that the Applicant had to show that the reference was illegal under the MRA. The MRA does however empower the SMC to appoint the 2nd DC upon the revocation of the entire 1st DC's appointment. The SMC is also entitled under s 12 of the MRA to determine its own procedures for the conduct of its business whether in physical meetings or otherwise and accordingly its unanimous decision upon an email is in order. That the SMC had several unfilled vacancies created by the Amendment Act when it decided to refer the matter to the 2nd DC is validated by s 33 of the Interpretation Act.

99 As for bias, it is necessary for the Applicant to establish actual bias on the part of the SMC. The Applicant makes no allegation and there is nothing on the record to show personal bias or animus or abuse of position on the part of any SMC member. The Applicant invites the court to infer actual bias from no facts. The Applicant's case for reasonable apprehension of bias is based again not on any specific person or conduct but on an aggregation of circumstances. First, as to any conflict of interest on the part of the DMS, that the DMS has multiple statutory roles, which are roles Parliament has accorded the office of a DMS, cannot in and of itself be evidence of any bias on the part of the SMC to refer the Complaint for a hearing and investigation by a disciplinary committee. Second, the recusal of the 1st DC on a challenge of prejudgment is something the 1st DC was entitled to do and there is nothing on the record that can be imputed to the entire SMC such as to legally infect its decision to refer the Complaint to a hearing and investigation by the 2nd DC. The alleged conduct of the SMC's in-house counsel in the 1st DC hearing is not before this court as the Applicant is not seeking to quash the appointment or recusal of the 1st DC. The conduct of the SMC in-house counsel and her alleged remark which is on the record and taken out of context, in any event, cannot be imputed to the entire SMC such as to legally infect all the SMC members who decided to refer the Complaint to a hearing and investigation by a 2nd DC. Finally, the Applicant submits a high level abstraction based on s 5 of the MRA to construct a legal obligation on the SMC to create and maintain a fair system. This, the Applicant submits, the SMC has failed to do. Section 5 of the MRA does not however confer the obligation to create a fair system on the SMC. It is the MRA itself which creates the fair system. The SMC's obligation to maintain or operate this system is subject to the legal grounds of judicial review. The Applicant has not, on the record, been able to establish any of these grounds in court.

100 To prevent the SMC from convening any future disciplinary committees to inquire into the same Complaint, the Applicant's case for a Prohibiting Order is that it would be *Wednesbury* irrational for the SMC, any complaints committee or any disciplinary committee to do so. The transcript of the 1st DC

proceedings having properly not been made available to the SMC, there is nothing on the record to show that the SMC had not considered any matter it should have considered, nor that it omitted considering anything it should not have omitted considering. Given that the SMC is not the fact-finding body, but is to refer the Complaint for a hearing and investigation by a disciplinary committee, the referral cannot be one which no reasonable body could have made. As I have rejected the Applicant's argument that the SMC was obliged to first refer the Complaint back to a fresh complaints committee, I do not need to consider the *Wednesbury* irrationality argument with respect to such a fresh complaints committee. As there is no disciplinary committee decision to date, any argument of *Wednesbury* irrationality on the part of any disciplinary committee is, for now, hypothetical and premature. As for considerations of "unfairness, prejudice and oppression", these are not independent legal grounds but considerations. In this case, the delays and costs did not arise by inaction of the SMC or the 1st DC. These are the unavoidable consequences of the recusal of the 1st DC.

101 As for the Declaration application, the application to declare that the entire S 528/2010 Amendment Regulations is illegal is overstated as they cover a multiplicity of matters which have no obvious bearing on the 2nd DC hearing. The application that the amended reg 42 is in breach of natural justice is hypothetical as it has no application the 2nd DC hearing.

102 The Applicant will have another day in court (apart from any appeal from my judgment) should she seek judicial review of the 2nd DC findings and decision.

Conclusion

103 For all these reasons, the applications are dismissed.

104 I will hear the parties on costs.