Wee Soon Kim Anthony v UBS AG and Others
[2005] SGCA 3

Case Number	: CA 68/2004, NM 108/2004
Decision Date	: 17 January 2005
Tribunal/Court	: Court of Appeal
Coram	: Belinda Ang Saw Ean J; Lai Kew Chai J; Woo Bih Li J
Counsel Name(s)	: Appellant in person; Hri Kumar and Gary Low (Drew and Napier LLC) for first respondent; Wilson Hue (Attorney-General's Chambers) for second respondent; Laurence Goh Eng Yau (Laurence Goh Eng Yau and Co) for third respondent
Parties	: Wee Soon Kim Anthony — UBS AG; Attorney-General; The Law Society of Singapore

Civil Procedure – Appeals – Time to file appeal – Request for further arguments refused – Whether time to file appeal ran from date of decision appealed against or from date judge certified no further argument required.

Civil Procedure – Extension of time – Extension of time to file appeal – Whether appellant should be granted extension of time.

Civil Procedure – Judgments and orders – Appeal dismissed – Meaning of "usual consequential orders".

Civil Procedure – Judgments and orders – Bona fide ambiguity as to court order – Whether court functus officio when clarifying order after hearing.

Civil Procedure – Striking out – Appeal – Appeal filed out of time – Respondent's case filed before application to strike out – Whether application to strike out should be allowed – Whether application to strike out estopped – Whether application to strike out made in bad faith.

Civil Procedure – Striking out – Appeal – Whether application to strike out should be filed with High Court or Court of Appeal.

Legal Profession – Admission – Ad hoc – Application to admit Queen's Counsel – Party seeking admission of Queen's Counsel substantive applicant.

17 January 2005

Woo Bih Li J (delivering the judgment of the court):

Introduction

1 The appellant, Anthony Wee Soon Kim, appealed against a decision of V K Rajah JC (as he then was) made on 30 June 2004. Mr Wee's appeal was filed on 12 August 2004. The first respondent, UBS AG ("UBS"), then filed an application on 2 November 2004 to strike out Mr Wee's appeal on the ground that it was filed out of time. After hearing submissions, we granted the application and struck out Mr Wee's appeal. Before we set out our reasons, it is necessary to first set out the background facts.

Background

2 In Originating Motion No 22 of 2002, Mr Wee had applied to admit Gerald Godfrey, Queen's Counsel ("Mr Godfrey") to represent Mr Wee in Suit No 834 of 2001 ("Suit 834") which was an action by Mr Wee against UBS. The application was dismissed on 15 October 2002 by Tay Yong Kwang JC

(as he then was) who also ordered Mr Wee to pay the costs of the application fixed at $5,000 to UBS. The application had also been served on the Attorney-General and the Law Society of Singapore as required under s 21 of the Legal Profession Act (Cap 161, 2001 Rev Ed).

3 Mr Wee then appealed against Tay JC's order. This was Civil Appeal No 114 of 2002 ("the First Appeal"). The First Appeal was heard by the Court of Appeal on 17 March 2003. It was filed by M/s Goh Aik Leng & Partners who were Mr Wee's solicitors at the time his appeal was filed. However, at the hearing of the First Appeal, Mr Goh Aik Leng applied to discharge himself from acting for Mr Wee in Suit 834 and related matters including the First Appeal. Mr Goh informed the Court of Appeal that Mr Wee would argue the appeal "in person". The Court of Appeal granted Mr Goh's application (see *Godfrey Gerald, Queen's Counsel v UBS AG* [2003] 2 SLR 306 at [10]). Mr Wee then proceeded to argue his appeal. At the conclusion of the hearing, the Court of Appeal dismissed his appeal with costs.

4 Following the dismissal of the First Appeal, UBS's solicitors, M/s Drew & Napier, drafted the order of the Court of Appeal ("the CA order") and proceeded to extract the CA order. They did not send the draft to Mr Wee as they believed that it was not necessary to do so under the Rules of Court (Cap 322, R 5, 1997 Rev Ed). The CA order was eventually extracted. Drew & Napier also proceeded to prepare a bill of costs ("the Bill") for taxation. They say the Bill was served on Mr Wee on 21 April 2003 by leaving a copy of it in the mailbox of Mr Wee's address at 81 Trevose Crescent Singapore 298093. Mr Wee did not attend the taxation hearing on 6 May 2003, which was the appointed date for taxation and a registrar proceeded to tax the Bill. On 6 May 2003, Mr Wee appointed M/s Chor Pee & Partners as his solicitors. The Notice of Appointment of Solicitor was served on Drew & Napier on 9 May 2003. On 13 May 2003, Drew & Napier sent Chor Pee & Partners a copy of the Registrar's Certificate in respect of the Bill and demanded payment of the aggregate of the amounts reflected in the certificate. Neither Mr Wee nor Chor Pee & Partners alleged at the time that Mr Wee was not liable to pay the taxed costs of UBS. Although Mr Wee disputed that he had been served with a copy of the Bill, he did not dispute that a copy of the Registrar's Certificate was sent to Chor Pee & Partners or that they and he had not objected to his personal liability for costs to UBS.

5 Instead, in the meantime, Mr Wee had received a letter from the Attorney-General's Chambers ("AGC") proposing a sum of $5,000 plus disbursements as being the party and party costs (between the Attorney-General and Mr Wee) ordered by the Court of Appeal in the First Appeal. Mr Wee said he received this letter on 22 April 2003. By a letter dated 2 May 2003, the AGC sent another letter to Mr Wee which enclosed a copy of the CA order.

6 Mr Wee replied by letter dated 23 May 2003 to raise three points. First, he said he did not recall having been sent a draft of the CA order before it was extracted. Second, he did not recall the Chief Justice having made the order in terms of para 3 of the extracted order. Third, he did not recall Mr Wilson Hue of the AGC having stood up before the Court of Appeal to ask for costs of the First Appeal.

7 It is appropriate at this juncture to set out the material part of the extracted order which states:

> 1. Messrs Goh Aik Leng & Partners be granted leave to discharge as Solicitors for the Appellant.
>
> AND IT IS FURTHER ORDERED THAT:
>
> 2. The Appeal be dismissed with costs to the 1st, 2nd and 3rd Respondents to be paid by

Anthony Wee Soon Kim, the Plaintiff in Suit No 834 of 2001.

3. The sum of $10,000.00 (with interest, if any) deposited by the Appellant as security for the Respondents' costs be paid out in three equal proportions to:-

(a) Drew & Napier LLC, Solicitors for the 1st Respondent;

(b) The Attorney-General, the 2nd Respondent; and

(c) The Law Society of Singapore, the 3rd Respondent,

to account of their costs.

8 As can be seen, there was no dispute in Mr Wee's letter dated 23 May 2003 that he had been ordered personally to pay costs to UBS. Aside from the issue about his not having been sent a draft of the CA order before it was extracted, the two other issues Mr Wee was raising were that (a) there was no order that the $10,000 security deposit was to be paid to the three respondents in equal proportions and (b) he was not liable to pay costs to the Attorney-General.

9 However, as developments showed, Mr Wee was also taking the point that he was not liable personally for any costs as Mr Godfrey was the applicant and not Mr Wee. Consequently, clarification was sought from the Registrar as to whether the Court of Appeal did order Mr Wee to pay the costs of the First Appeal personally. After receiving correspondence from all the parties, the Registrar responded in a letter dated 6 May 2004 as follows:

I write with reference to the correspondence from all parties regarding the costs order for Civil Appeal No 114 of 2002 made at the hearing before the Court of Appeal on 17 March 2003.

2. I am directed to inform all parties that the order the Court made that day was that Mr Anthony Wee was to pay the costs of the appeal personally.

10 On 18 June 2004, Mr Wee applied to set aside the extracted order. In his supporting affidavit, he raised the following grounds:

(a) The draft of the CA order was not served on him or Mr Godfrey.[1]

(b) The Court of Appeal did not order him to pay costs personally. In so far as the Registrar's letter dated 6 May 2004 had stated that the Registrar was directed to inform all parties that such an order had been made, Mr Wee's position was that the Court of Appeal could not make that direction as it was *functus officio*.[2]

(c) Paragraph 3 of the extracted order was not pursuant to the order made by the Court of Appeal that day, *ie* 17 March 2003.[3]

11 Mr Wee's application was heard and dismissed on 30 June 2004 by Rajah JC as we have mentioned. Mr Wee was represented by Mr Lim Chor Pee of Chor Pee & Partners at this hearing.

12 On 6 July 2004, Chor Pee & Partners wrote to request further arguments. On 7 July 2004, Mr Wee filed a Notice of Intention to Act in Person. On 20 July 2004, the Registrar replied to say that Rajah JC did not wish to hear further arguments. On 12 August 2004, Mr Wee filed his appeal No 68 of 2004 ("the Second Appeal") against the decision of Rajah JC. Mr Wee subsequently filed the Record of Appeal, his Appellant's Case and Core Bundle.

13 On 29 October 2004, the Respondent's Case for UBS was filed by Drew & Napier. On 2 November 2004, UBS applied to strike out the Second Appeal on the ground that it was filed out of time.

14 On 24 November 2004, UBS's application and the Second Appeal came up for hearing before us. After hearing arguments on UBS's application as well as an oral application made by Mr Wee to extend the time for filing the Second Appeal, we decided that the Second Appeal was filed out of time and declined to extend the time to file the Second Appeal. Consequently, we ordered that the Second Appeal be struck out, with costs payable to all the three respondents to be taxed and the security deposit of $10,000 to be released to the respondents equally.

Reasons

15 Before we set out our reasons, we would mention that Mr Wee is a very senior member of the Bar although he is no longer in practice.

Was the Second Appeal filed out of time?

16 The first question before us was whether the Second Appeal was filed out of time. Drew & Napier argued that since Rajah JC's order was made on 30 June 2004, the one-month deadline to file an appeal against this order ran from 30 June 2004 and not from 20 July 2004, which was the date when the Registrar replied to say that Rajah JC did not wish to hear further arguments.

17 Mr Wee's position was that the one-month deadline did not run from 30 June 2004 but from 20 July 2004.

18 It is appropriate at this stage to set out O 57 r 4 of the Rules of Court (Cap 322, R 5, 2004 Rev Ed) which states:

> **Time for appealing (O 57, r 4)**
>
> 4. Subject to this Rule, every notice of appeal must be filed and served under Rule 3(6) within one month —
>
> (a) in the case of an appeal from an order in Chambers, from the date when the order was pronounced or when the appellant first had notice thereof;
>
> (b) in the case of an appeal against the refusal of an application, from the date of the refusal; and
>
> (c) in all other cases, from the date on which the judgment or order appealed against was pronounced.

19 Although Drew & Napier argued that O 57 r 4(a) applied, Mr Wee submitted that O 57 r 4(b) was the applicable provision. He said that this provision "expressly provides that the time for such an appeal starts upon the refusal of an application for further hearing".[4]

20 It is our view that O 57 r 4(b) makes no reference to an application for further arguments or further hearing as Mr Wee put it. Order 57 r 4(b) refers to an appeal from the substantive decision to refuse an application and not an appeal against the refusal to hear further arguments. Indeed, the

Second Appeal itself states that it is against Rajah JC's order made on 30 June 2004. Significantly, it does not state that it is against his refusal to hear further arguments.

21 Accordingly, whether O 57 r 4(a) or (b) was applicable, the one-month deadline would still run from 30 June 2004 and the Second Appeal was filed out of time.

22 We would mention one other point on this issue. Drew & Napier had relied on the case of *Aberdeen Asset Management Asia Ltd v Fraser & Neave Ltd* [2001] 4 SLR 441 ("*Aberdeen*") for the proposition that the time to file an appeal runs from the date of the substantive decision and not from the date of refusal to hear further arguments or the date the judge below is deemed to have decided not to hear further arguments. Mr Wee submitted that that case applied to an interlocutory order and not to a final order. He went on to submit that the order of Rajah JC was a final one.

23 However, even if the order of Rajah JC were a final one, this did not help Mr Wee because an appellant may file an appeal against a final order without first obtaining the judge's certification that he does not wish to hear further arguments. This is unlike the case of an appeal against an interlocutory order where the appellant has no right of appeal unless the judge has so certified or is deemed to have so certified. Therefore, while an appellant who wishes to appeal against a final order may nevertheless wish to request further arguments, he is not entitled to justify his late filing of his appeal on the ground that he was waiting for the judge's certification or deemed certification.

Other contentions

24 We now turn to Mr Wee's other contentions. First, he relied on O 2 r 2(1) of the Rules of Court. In order to appreciate his argument on this provision better, it is necessary to consider O 2 r 1(1) as well. Order 2 rr 1(1) and 2(1) state:

> **Non-compliance with Rules (O 2, r 1)**
>
> 1.—(1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.
>
> **Application to set aside for irregularity (O 2, r 2)**
>
> 2.—(1) An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

25 Mr Wee submitted that the failure to file the Second Appeal in time was an irregularity and there was evidence that Drew & Napier were aware of this irregularity before the Respondent's Case was filed. The application to strike out the Second Appeal was not filed within a reasonable time and before the Respondent's Case was filed. The filing of the Respondent's Case was a fresh step taken by UBS after it was aware of the irregularity.

26 It was not disputed that Drew & Napier were aware that the Second Appeal was filed out of time before the Respondent's Case was filed. However, Mr Hri Kumar, counsel for UBS, said that as

there was a deadline to file the Respondent's Case, it had to be filed first as it was not for his firm to grant itself an extension of time to do so. He submitted that the default by Mr Wee was a nullity and not an irregularity.

27 In *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] SLR 122, L P Thean JA made the following observations about O 2 r 1. He said at 131, [20] – [21]:

> This rule is identical with O 2 r 1 of the Rules of Supreme Court in England, and in *Harkness v Bell's Asbestos and Engineering Ltd* [1967] 2 QB 729 at pp 735–736; [1966] 3 All ER 843 at p 845, Lord Denning MR had this to say with regard to this rule:
>
> > This new rule does away with the old distinction between nullities and irregularities. Every omission or mistake in practice or procedure is henceforward to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice.
>
> That may be the true effect of O 2 r 1. Notwithstanding the very wide powers given to court to remedy non-compliance with the Rules of Supreme Court 1970 there may be failure or non-compliance with the Rules which is so fundamental or serious that the court ought not to exercise its discretion under r 1 to remedy it: see *Bernstein & Anor v Jackson & Ors* [1982] 2 All ER 806.

28 Admittedly, the above observation was not in respect of O 2 r 2(1) which appeared to disallow an opponent from applying to set aside a step taken if he had in effect waived the default in question. However, the importance of filing an appeal on time is special. Indeed, O 3 rr 4(3) and 4(5) state:

> (3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.
>
> (5) Paragraph (3) shall not apply to the period within which any action or matter is required to be set down for trial or hearing *or within which any notice of appeal is required to be filed*.
>
> [emphasis added]

29 As can be seen, Drew & Napier could not agree to extend time for the Second Appeal to be filed even if they had wanted to. Had they agreed to an extension, that agreement would have been ineffective. In our view, Drew & Napier could not waive what they could not expressly agree to in the first place and O 2 r 2(2) must be read subject to O 3 r 4(3) and (5). Accordingly, a failure to file an appeal in time must be resolved by an extension of time granted by the court, failing which it is at the risk of being struck out.

30 Mr Wee's second contention was that the application to strike out should have been made to the High Court and not to the Court of Appeal. He relied on s 35 of the Supreme Court of Judicature Act (Cap 322, 1999 Rev Ed) ("SCJA") and O 57 r 16(4) of the Rules of Court.

31 Section 35 SCJA states:

> **Applications**
>
> 35. Wherever application may be made either to the High Court or to the Court of Appeal, it shall be made in the first instance to the High Court.

32 Order 57 r 16(4) states:

> Whenever under these Rules an application may be made either to the Court below or to the Court of Appeal, it shall not be made in the first instance to the Court of Appeal, except where there are special circumstances which make it impossible or impracticable to apply to the Court below.

33 Mr Wee had simply assumed that the High Court has jurisdiction to entertain an application to strike out the Second Appeal in the first place. He did not advance any argument to establish that the High Court has such a jurisdiction.

34 Order 57 r 17 provides the High Court with jurisdiction to hear an application to extend the time for filing an appeal to the Court of Appeal pursuant to O 57 r 4 but this is only when the application for an extension of time is made before the deadline under r 4. If the application for extension is made after the expiry of the deadline, the High Court has no jurisdiction. This was also the decision of Chao Hick Tin J (as he then was) in *Chen Chien Wen Edwin v Pearson* [1991] SLR 578 when he was considering O 57 r 17 of the 1970 Rules of the Supreme Court (Cap 15) which was similar to, although not identical with, the present O 57 r 17.

35 Although O 57 r 17 does not expressly deal with an application to strike out, it seems to us that it would be incongruous if the High Court were to have jurisdiction to hear an application to strike out made after the expiry of the deadline for filing but no jurisdiction to hear an application to extend time where that application is also made after the deadline for filing.

36 It also seems to us incongruous if the High Court were to have jurisdiction to hear an application to strike out (irrespective of when it is made) when a single judge sitting as the Court of Appeal pursuant to s 36(1) of the SCJA has no such jurisdiction, as was decided by the Court of Appeal in *Tan Chiang Brother's Marble (S) Pte Ltd v Permasteelisa Pacific Holdings Ltd* [2002] 2 SLR 225.

37 Mr Wee also argued that there was an estoppel since the Registrar accepted the Second Appeal when it was filed and consequently advised all parties that the Second Appeal had been set down for hearing on 22 November 2004. He also submitted that the estoppel arose from the filing of the Respondent's Case without objection to the Second Appeal.

38 We are of the view that the Registrar was not exercising a judicial function in accepting the filing of the Second Appeal. In any event, the Registrar's action cannot give rise to an estoppel against UBS.

39 As for an estoppel against UBS, Mr Wee did not elaborate how the mere filing of the Respondent's Case could amount to an estoppel, as opposed to a waiver, when the application to strike out was filed soon thereafter. In any event, since UBS could not have agreed to an extension of time to file the Second Appeal, there could not be an estoppel against it.

40 Lastly, Mr Wee submitted that as the application to strike out was not made within a reasonable time before the filing of the Respondent's Case, the application was made in bad faith. His argument, we noted, was made in the context of O 2 r 2(1) which we have ruled to be inapplicable to the case at hand.

41 As an aside, we are mindful that an appropriate share of the court's resources is allotted for the substantive appeal to be disposed of as swiftly as justice allows. Certainly, it is in the interest of

the administration of justice that applications that will affect the outcome of the substantive appeal are taken out with due diligence and expedition. There will be a useful saving of time and costs for such applications to be heard at an early stage and at the same time it will obviate the need to unduly push back other cases on appeal.

Extension of time

42 Mr Wee did not apply for an extension of time to file the Second Appeal until the hearing before us on 24 November 2004.

43 In his affidavit and in his submission filed before 24 November 2004, Mr Wee relied on *Costellow v Somerset County Council* [1993] 1 WLR 256 ("*Costellow*") to submit that a litigant should not be deprived of his opportunity to dispute the other party's claims as a punishment for a breach of the rules of court. He also relied on *The Tokai Maru* [1998] 3 SLR 105 for the proposition that unless a delay can be characterised as an abuse of process, the court should not exercise its jurisdiction to strike out proceedings.

44 However the cases of *Costellow* and *The Tokai Maru* did not involve applications to appeal out of time. In *Costellow*, the plaintiff failed to serve his statement of claim within the prescribed time. In *The Tokai Maru*, the defendants had failed to file their affidavits of evidence-in-chief by a deadline stipulated by a court order. The Court of Appeal in *The Tokai Maru* had said that a more stringent approach is adopted with respect to applications to appeal out of time as compared to other applications to extend time. In an application to appeal out of time the applicant has already had the benefit of a hearing on the substantive issues and has lost.

45 Quite clearly, the facts in *Costellow* and *The Tokai Maru* were different from those before us and hence the principles therein did not apply.

46 The applicable factors for an extension of time to appeal have been enumerated in various cases such as *Hau Khee Wee v Chua Kian Tong* [1986] SLR 484 ("*Hau Khee Wee*"), *Pearson v Chen Chien Wen Edwin* [1991] SLR 212 ("*Pearson*"), *Vettath v Vettath* [1992] 1 SLR 1, *Nomura Regionalisation Venture Fund Ltd v Ethical Investments Ltd* [2000] 4 SLR 46 and *Aberdeen*. The factors are:

(a) the length of the delay,

(b) the reason for the delay,

(c) the merits of the appeal, and

(d) the degree of prejudice.

The length of the delay

47 As Rajah JC's order was made on 30 June 2004, the Second Appeal should have been filed by 31 July 2004. It was filed on 12 August 2004, *ie* 12 days late.

48 In *Aberdeen*, the Court of Appeal was of the view that a delay of 18 days was not fatal but that was because that case involved the interpretation of certain provisions of the Rules of Court which had not been interpreted by the court before. The provisions were not so patently clear as to leave no room for argument. Naturally, once the court has given its interpretation of those provisions,

it is not open to a litigant to say that the interpretation of the provisions remains unclear unless the court's interpretation is itself unclear.

The reason for the delay

49 As can be seen from *Aberdeen*, the length of the delay should be considered in the context of the reasons for the delay. In para 3 of Mr Wee's reply affidavit for the application to strike out, he said that he had been advised and he believed that the applicable provision was O 57 r 4(b) which "expressly provides that the time for such an appeal starts upon the refusal of an application for further hearing". In short, the reason for the delay was Mr Wee's view that O 57 r 4(b) was the applicable provision and his interpretation thereof. That view and interpretation was taken with the benefit of advice although he did not elaborate as to whom he had received the advice from.

50 Even if O 57 r 4(b) were the applicable provision, it is clear to us, as we have said earlier, that Mr Wee was appealing not against Rajah JC's refusal to hear further argument but against Rajah JC's refusal on 30 June 2004 to grant Mr Wee the relief he had sought in his application when Rajah JC dismissed his application. This was reflected in his Second Appeal. There was nothing complex or ambiguous about this.

The question of prejudice

51 We will deal with the question of prejudice before we come to the question about the merits of the Second Appeal.

52 Mr Wee argued that there was no prejudice to the respondents if an extension of time were granted whereas there would be prejudice to him if it were not granted as he would then be deprived of his basic right of appeal.

53 We would say at the outset that the prejudice referred to in the four factors is the prejudice to the would-be respondent if an extension of time were granted and not the prejudice to the would-be appellant if the extension were not granted. This is clear from *Hau Khee Wee* and *Pearson*. After all, the application for an extension of time arises out of the would-be appellant's default and not the default of the would-be respondent.

54 Furthermore, the prejudice cannot possibly refer to the fact that the would-be appellant would be deprived of his right of appeal if the extension were not granted. Otherwise, it would mean that in every case where an extension of time is sought by a would-be appellant, there would inevitably be prejudice to him.

55 Likewise, the prejudice to the would-be respondent cannot possibly refer to the mere fact that the appeal would be constituted, if an extension were to be granted. Otherwise that would mean that inevitably there would be prejudice to the would-be respondent. As stated in *Aberdeen*, the prejudice must refer to some other factor, *eg* change of position on the part of the respondent pursuant to the order below. As the respondents before us did not contend that there was such a prejudice, the question of prejudice, for the purpose of granting an extension of time to appeal, was a non-issue.

The merits of the Second Appeal

56 Mr Wee did not make any submission on the merits of the Second Appeal for his application to extend time. However, we took into account his Appellant's Case for the Second Appeal and related

documents. Mr Wee had raised the following issues in the Second Appeal:

(a) Whether the draft of the CA order should have been sent to Mr Goh Aik Leng or to Mr Wee or to Mr Godfrey for approval before it was submitted to the Registrar;

(b) Did the extracted order correctly embody the CA order? This issue encompassed two sub-issues:

(i) whether the Court of Appeal did order Mr Wee to pay the costs of the First Appeal personally, and

(ii) whether the Court of Appeal did order the security deposit in the First Appeal to be apportioned equally to each of the three respondents to account of costs.

57 On the first issue, O 42 rr 8(1) and 8(5) state:

Preparation of judgment or order (O 42, r 8)

8.—(1) Where the party in whose favour a judgment or order is given or made is represented by a solicitor, a copy of the draft shall be submitted for approval to the solicitor (if any) of the other party who shall within 2 days of the receipt thereof, or within such further time as may in any case be allowed by the Registrar, return such copy with his signed consent or any required amendments thereto.

…

(5) Where the other party has no solicitor, the draft shall be submitted to the Registrar.

58 Mr Wee's point was that Mr Goh had discharged himself only as counsel but not as solicitor. However, we agreed with Rajah JC that this suggestion was untenable. It was clear that Mr Goh was no longer representing Mr Wee whether as counsel or as solicitor. If it were otherwise, Mr Goh would have made this clear at the time he applied for his discharge. Furthermore, it is significant that subsequent to Mr Goh's discharge, he had not said that he had discharged himself only as counsel.

59 Mr Wee also took the position that Mr Godfrey was the substantive applicant because the application for Mr Godfrey's admission was made in Mr Godfrey's name. If this suggestion were correct, it would mean that after Mr Goh's discharge, Mr Wee was then acting as counsel for Mr Godfrey. Indeed that was what Mr Wee was asserting in the Appellant's Case for the Second Appeal. Yet Mr Wee was no longer in practice and presumably had not applied for the requisite practising certificate. Ironically, if Mr Wee were acting for Mr Godfrey, Mr Wee would have been in breach of the Legal Profession Act.

60 As Rajah JC had observed, in an application to admit Queen's Counsel, the applicant is nominally the Queen's Counsel. The substantive applicant is the party for whom it is sought to admit Queen's Counsel. On the facts before us, that party was Mr Wee. When Mr Goh Aik Leng appeared initially before the Court of Appeal in respect of the First Appeal, he was, in substance, acting for Mr Wee. When he sought his discharge, it was, in substance, to discharge himself from acting for Mr Wee.

61 Once there was no solicitor on record acting for Mr Wee, O 42 r 8(5) kicked in and the draft order need only be submitted to the Registrar. The fact that Mr Wee himself is an advocate and

solicitor is irrelevant. As Rajah JC said, it is the fact of being legally represented that is the criteria.

62 Mr Wee sought to argue that there was no scintilla of evidence that the Registrar had checked the draft against the minutes of the Court of Appeal to see that the draft was an accurate reflection of what was ordered. In our view, this was not the point. The issue was whether Drew & Napier were obliged to send the draft to Mr Wee for his approval. As they did not have such an obligation in the circumstances, it was irrelevant whether the Registrar had subsequently checked the draft or not. If it should turn out that the extracted order did not accurately reflect what was ordered, then an application might be made to amend the extracted order but, again, that will not mean that Drew & Napier were obliged to send the draft to Mr Wee in the first place.

63 As for Mr Godfrey, he was not the solicitor representing Mr Wee. Accordingly, the suggestion that the draft should have been served on him was a red herring.

64 Accordingly, we are of the view that it is obvious that Drew & Napier were not required to serve the draft on Mr Goh, Mr Wee or for that matter on Mr Godfrey.

65 We now come to the sub-issue whether the Court of Appeal did order Mr Wee to pay the costs of the First Appeal personally.

66 We should first say that the minutes made by any court do not pretend to be a verbatim record of all that was said in court. For example, take a situation where a court says that a claim against three defendants is dismissed with costs. Counsel then asks whether this means that all three defendants are entitled to costs and the court remarks that that must be so. Suppose the exchange is not recorded in the minutes, does it mean that the exchange did not take place? Surely not. The absence of the exchange being recorded is a non-issue if both sides accept that that is what took place. If there is a *bona fide* disagreement as to whether the exchange took place, then it is for the court before whom the alleged exchange took place to say whether it did or did not take place.

67 However, it will be dishonest for any party or counsel to suggest that something was not said in court merely because it is not reflected in the court's minutes if that party or counsel is aware of the truth. Whether one can prove such dishonesty is a separate matter.

68 Secondly, a court order may be implicitly clear from its minutes even if the minutes do not contain all the verbiage that one may find in formal legal documents drafted over a period of time. For example, if the minutes record that a claim is dismissed with costs, can there be any doubt that it is for the plaintiff to pay the costs of the action to the defendant? Can it be validly suggested that because the minutes do not expressly say that it is the plaintiff who must pay the costs to the defendant that therefore there is no liability on the plaintiff to pay the costs and no entitlement on the party of the defendant to receive costs?

69 However, we accept that there may be situations where there is a *bona fide* ambiguity as to what the court has ordered. In such situations, clarification should be sought through the Registrar. It is absurd to suggest that when clarification is given, the court is *functus officio,* which was the stand taken by Mr Wee. In giving the clarification, the court is not making a new or additional order but merely clarifying what was already ordered. It is in the inherent jurisdiction of the court to do so and this jurisdiction has been exercised from time to time. This jurisdiction is consistent with logic and justice.

70 We are also of the view that even where a court omits to make a consequential order, for example, in respect of costs, when it gives its main order, it has the inherent jurisdiction to make the

costs order subsequent to its main order. This inherent jurisdiction is reiterated in O 92 r 5. For completeness, we set out below both O 92 rr 4 and 5:

> **Inherent powers of Court (O 92, r 4)**
>
> 4. For the removal of doubt it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.
>
> **Further orders or directions (O 92, r 5)**
>
> 5. Without prejudice to Rule 4, the Court may make or give such further orders or directions incidental or consequential to any judgment or order as may be necessary in any case.

71 Ironically, when Mr Wee subsequently made a request for further arguments to be heard by us, a request which we did not accede to, he referred to *Oley and Moffatt v Fredericton*, *City of* (1983) 50 NBR (2d) 196 and quoted the following passage, which the lower court judge had cited from I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 23 at 39:

> Again, under its inherent jurisdiction, the court can at any stage of the proceedings, even after judgment, vary, modify or extend its own order so as to express correctly its intention and meaning and thereby to ensure that the purposes of justice are not defeated.

Yet Mr Wee was content to argue that the court was *functus officio* when the Registrar gave his reply dated 6 May 2004.

72 The minutes of the Court of Appeal in respect of the First Appeal state:

> 17 March 2003 – CA NO 114 OF 2002/V
>
> CORAM: CJ
> CHAO HICK TIN
> TAN LEE MENG
>
> Goh Aik Leng – Counsel for Appellant – ASK Wee
>
> Mr D Singh Hri Kumar/Gary Low – 1st Respondent
>
> Wilson Hue Kuan Chen – 2nd Respondent
>
> Laurence Goh – 3rd Respondent
>
> 10.10am Counsel for Appellant addresses the Court
>
> 10.23 ASK Wee addresses the Court
>
> 10.30 Court adjourned until 2.15 pm
>
> ASK Wee in Person
>
> Mr D Singh Hri Kumar/Gary Low – 1st Respondent

Wilson Hue Kuan Chen – 2nd Respondent

Laurence Goh – 3rd Respondent

14.27 ASK Wee addresses the Court

14.46 Appeal dismiss with costs. Usual consequential orders.

14.47 D Singh addresses the Court

14.48 Tay JC's decision as to costs upheld

GROUNDS OF DECISION DATED 15TH APRIL 2003.

Conclusion:-

For the foregoing reasons, we dismissed the appeal with costs to all 3 Respondents. The usual consequential orders follow.

Coram: CJ, Chao Hick Tin, Tan Lee Meng

73 It is true that the minutes do not expressly say that Mr Wee was to pay the costs of the First Appeal but neither do the minutes say that Mr Goh Aik Leng had applied for his discharge and his application was granted. Yet there is no dispute that such an application was made and granted.

74 Arising from what we have said and the illustration given above in respect of Mr Goh, the fact that the minutes do not expressly say that Mr Wee was to pay the costs of the First Appeal does not necessarily mean that no such order was made. We note that the minutes say that, "D Singh addresses the Court" and "Tay JC's decision as to costs upheld". Paragraph 4 of Drew & Napier's fax dated 28 April 2004 to the Registrar stated that, "At the close of the hearing of the appeal, Mr Davinder Singh SC specifically asked for an order that Mr Wee pay the costs of the appeal personally. That application was allowed." They then cited part of the above record of the minutes. Mr Wee's response dated 30 April 2004 to the Registrar was that the said para 4 was not corroborated by the minutes. It is obvious to us that Mr Wee was relying on the literal record. Significantly, Mr Wee did not expressly say that Drew & Napier's version of what had transpired before the Court of Appeal was untrue. Even if it could be said that that was Mr Wee's implied position, it was for the Court of Appeal, which had heard the First Appeal, to clarify what it did or did not order. When that clarification was given through the Registrar's letter dated 6 May 2004, that was and should have been the end of that sub-issue. In the circumstances before us, it was not for any other court to say that the Court of Appeal did not make that order when it says it did.

75 Even if the Court of Appeal had not made an order on 17 March 2003 that Mr Wee was to pay the costs of the First Appeal, it would have been within its jurisdiction to make that order subsequently for the reasons we have given.

76 We would add that Mr Wee has not suggested that it is unusual for the substantive applicant to be ordered to pay the costs for an unsuccessful application to admit Queen's Counsel. Indeed, it is common for the substantive applicant to be ordered to pay such costs. In any event, as we have said, the Court of Appeal has clarified that it did order Mr Wee to pay the costs personally.

77 As regards the sub-issue whether the Court of Appeal did order the security deposit in the First Appeal to be apportioned equally to each of the three respondents to account of costs, we would have thought that this was implicit in its minutes which stated that the appeal was dismissed with costs with the usual consequential orders.

78 Mr Wee, however, referred to two letters written by Mr Laurence Goh for the Law Society of Singapore to the Registrar. The material part of Mr Laurence Goh's letter dated 22 April 2004 states:

> We have checked our file records on the outcome of the hearing which indicate that:-
>
> 1. The appeal be dismissed with costs to the 1st, 2nd and 3rd Respondent;
>
> 2. The costs are to be paid by Mr. Anthony Wee Soon Kim, the Plaintiff.
>
> 3. The sum of $10,000 deposited as security for the Respondents' costs be paid out in three (3) equal proportions to:-
>
> (i) Drew & Napier LLC, Solicitors for the 1st Respondent;
>
> (ii) The Attorney-General, the 2nd Respondent; and
>
> (iii) The Law Society of Singapore
>
> to account towards their costs.

79 The material part of Mr Laurence Goh's letter dated 28 April 2004 states:

> We refer to our letter dated 22 April 2004.
>
> We would like to clarify that our notes indicated that:-
>
> 1. The appeal be dismissed with costs to the 1st, 2nd and 3rd Respondents;
>
> 2. The costs are to be paid by Mr. Anthony Wee Soon Kim, the Plaintiff.
>
> On the issue of the three way division of the deposit of $10,000, this was a presumption on our part that as there are three Respondents, the deposit would likely to be divided into three parts towards the costs. This is not part of the order made by the Court of Appeal. We extend our sincere apology for this error.

80 Relying on the penultimate sentence of the letter dated 28 April 2004, Mr Wee's position was that Mr Laurence Goh had accepted that the Court of Appeal had not made the order about the apportionment of the security deposit among the three respondents. It is our view that what Mr Goh meant was that there was no express order made about the apportionment of the security deposit. Mr Laurence Goh's notes also omitted to record what was reflected in the minutes of the Court of Appeal, *ie* the reference to the usual consequential orders. The usual consequential order in an unsuccessful appeal is that the security deposit is to be released to the respondent to account of costs. Where there is more than one respondent, it is implicit that the security deposit is to be apportioned equally among them unless the Court of Appeal states otherwise. We do not agree with Mr Wee's interpretation that the usual consequential orders could only mean that if the parties cannot

agree on the costs, then the costs would be taxed.

81 Mr Wee also sought to argue that the basic fact of the case was that the security deposit was provided by Mr Godfrey and consequently the security deposit could not be part of the usual consequential order. We find this argument astonishing. First, there was no evidence that the security deposit was provided by Mr Godfrey. This allegation was not even mentioned in Mr Wee's supporting affidavit for his application which was heard by Rajah JC. Second, as a general rule, the source of the security deposit is irrelevant as it is meant to secure the costs of the respondents. As we have said, the security deposit would be part of the usual consequential order. If Mr Wee did not want the security deposit to be paid out to the respondents, then it was incumbent upon him to apply to the Court of Appeal accordingly after it had dismissed the First Appeal and before it rose. He did not do so.

82 We were aware that the Registrar's letter dated 6 May 2004 did not deal with the apportionment of the security deposit. However, if there was still a *bona fide* disagreement over this aspect of the extracted order, the correct approach would have been to follow up on that letter and ask for clarification specifically on this aspect. Instead, Mr Wee chose to make his application to set aside the extracted order. In the circumstances, there was no reason why the implication under the usual consequential order should not stand.

83 Accordingly, we are of the view that the extracted order correctly embodies the CA order.

84 In summary, the Second Appeal was devoid of any merit. It was hopeless. The initial application heard by Rajah JC should never have been made at all.

85 In the circumstances, there was no valid reason for us to grant an extension of time to Mr Wee to file the Second Appeal out of time. The striking-out application was granted with costs to all three respondents with the security deposit for the Second Appeal to be paid equally to the respondents to account of their costs.

Appeal struck out.

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[1]See paras 5, 24 and 26 of his affidavit sworn on 17 June 2004

[2]See para 19 of his affidavit sworn on 17 June 2004

[3]See paras 14, 15 and 25 of his affidavit sworn on 17 June 2004

[4]See para 3 of his affidavit sworn on 12 November 2004

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