LITIGATION IN APPELLATE COURTS

Some Personal Reflections and Observations

This article draws on the author's experience as an appellate judge over the course of almost 17 years. However, it consists of *personal* reflections and observations only. It is nevertheless hoped that some of the reflections will be of interest to the reader and that a few of the observations might assist the budding litigator in working through as well as honing his or her craft in the context of litigation in appellate courts.

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I. Introduction

1 It is important to note right at the outset that this article[1] views litigation not only from an appellate perspective but also from the particular perspective of the Bench. However, as judges differ so much from each other (which is no bad thing[2]), the present article also does not purport to lay down any general guides or proffer any universal advice.[3] Indeed, even at the best of times, the nature of litigation is such that there is often no certainty as to what course proceedings will take in

1 All views expressed in this article are personal views only and do not reflect the views of the Supreme Court of Singapore, the Singapore Management University, the National University of Singapore or the University of Reading. I would also like to express my gratitude to The Honourable the Chief Justice Sundaresh Menon for his advice and encouragement. However, all errors remain mine alone.

2 Although this will impact one of the points that I make later in this article – that one must be able to "read" the court concerned.

3 Hence, the word "personal" in the title of this article. See also The Honourable Justice Chao Hick Tin, "The Closing Chapter" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 14, at pp 383–384, where the learned author observes that "there is no single exhaustive set of rules that can inform a budding lawyer how to make a lasting impression on the Bench and achieve great professional satisfaction from a job done well" and that "[t]he circumstances which may arise in a courtroom are infinite".

court. Nevertheless, it is hoped that some of the reflections here will be of interest to the reader and that a few of the observations might assist the budding litigator in working through as well as honing his or her craft in the context of litigation in appellate courts. In so far as the latter is concerned, I am all too aware that there already exists excellent articles in the local context,[4] and my hope is that I would nevertheless be able to add incrementally to what they say.

II. Some preliminary observations

2 It is important to emphasise at the outset that this article is not (at least primarily[5]) a theoretical one. This is not to state that theory is unimportant; quite the contrary. Indeed, my own view is that, to receive a complete and holistic education in the law, history (which looks to the past), doctrine (which relates to the present) and theory (which is timeless and universal[6]) are all necessary. Indeed, one of my post-retirement projects explores the relationship between theories of adjudication on the one hand and the actual practice of adjudication on the other. Such a project is an extremely complex undertaking at best and perhaps an impossible one at worst. This is due in large part to the fact that there are so many theories of adjudication (even considering only those that obtain in the common law context) and the more famous ones[7] have had hundreds (even thousands) of articles and many books published critiquing them. It is, even at this early stage, a fascinating project in so far as I am concerned.[8]

3 However, the actual practice of (here, appellate) litigation requires, in my view (and for the time being at least), a more straightforward approach that is of practical use to lawyers and judges. Hence, my approach in the present article will be more practical in nature, although it is hoped that, whilst simple, it will not be perceived as being simplistic. It is also important to reiterate that my approach is a personal one and lays no claim to universal application. It will suffice for the more modest

4 See, *eg*, L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15. Needless to say, the legal literature generally is vast – hence, the attempt to keep the present article within a narrow (*ie*, personal) compass (see also n 3 above).

5 Although one can never fully avoid the theoretical implications of one's views.

6 And especially important when one is faced with a novel point of law.

7 *Eg*, by Prof H L A Hart, Prof Ronald Dworkin, as well as contrasting (and more general) theories such as those in relation to natural law, as well as American Realism and critical legal studies.

8 Since an initial draft of this article was written, this project has now been confirmed as a book project.

purpose of this article if it provides some useful legal food for thought for the interested reader.

III. General experience as judge

4 It might be apposite to begin by saying a little about my own experience, particularly when commencing my judicial career. I can do no better than to repeat what I had said elsewhere (now approximately three years ago); as many readers might know, I was a legal academic for almost 23 years, and this was my response when I was asked to join the Bench:[9]

> It therefore came as a bolt from the blue when I was asked to join the Bench. I had only appeared in court (as an *amicus curiae*) once. Indeed, after joining the Bench, I recall being in Hong Kong to deliver a public lecture. One of the first questions I was asked was what it was like to be a judge after having been a legal academic for such a long time (close to a quarter of a century in point of fact). I still recall my response vividly. It was unscripted and instinctive but quite picturesque. I likened the initial transition as follows: being a legal academic was like wearing a glove that was crafted by its maker who knew not only the size of my hand but also the material that fit so well that it felt like it was a part of me, whereas being a judge was like climbing up a wall with a near perpendicular gradient and with no safety harness! I am grateful that after almost a decade and a half on the Bench, the experience generates much less apprehension.

5 Indeed, it was a steep learning curve, particularly acclimatising myself to trial work which, as the reader knows, can take a myriad of forms. During my first couple of weeks on the Bench, there was a mixture of both chambers and open court hearings. What stood me in good stead were at least seven qualities which I drew upon – all seven of which operated in an integrated and holistic manner to my great edification. The first was *humility*. Unlike legal academia, I had to hear all manner of cases covering all manner of subject matter – the vast majority of which was clearly beyond my much narrower areas of expertise that I had hitherto developed as a legal academic. What I did learn – and this is equally applicable, in my view, to the litigator as well – is that a willingness to learn accompanied by a lot of hard work could surmount the lack or absence of expertise. Indeed, if one views the entire *corpus* of law as being one extremely gigantic jigsaw puzzle, the effort expended in relation to understanding the relevant law in a given case is like locating an appropriate piece of that jigsaw puzzle. Admittedly, that would be merely one seemingly insignificant piece. However, as time went on,

9 Andrew Phang, Goh Yihan & Jerrold Soh, "The Development of Singapore Law: A Bicentennial Retrospective" (2020) 32 SAcLJ 804 at 876.

I found that I was learning more and more in diverse areas of the law. I used to joke, by the time I was about to retire from the Bench, that I could – quite decently – tutor in virtually all areas of the law at university (save, of course, with regard, for obvious reasons, to foreign law!).

6 At this particular juncture, I have, in fact, already referred to the second quality (hence, my observation that these various qualities operate in an integrated and holistic fashion) – *diligence* (or hard work). Indeed, without diligence, even the brightest mind would be of no avail. This is due, in part at least, to the fact that one is not theorising about law in the abstract; there are real parties to whom the case matters vitally. Put simply, every case is important to the parties concerned and the judge's duty is to try his or her level best to apply the relevant law to the relevant facts *in order to arrive at a just and fair result or outcome*. Such a duty cannot be fulfilled without hard (often back (or should I say mind) breaking) effort on the part of the judge concerned (always bearing in mind, of course, that parties should always be given an opportunity to submit on points and/or critical case law that they had not originally thought of but which the court feels might be relevant and which it feels the parties should consider).

7 I also found that a third quality was also extremely important – *patience*; put simply, the judge must display judicial *temperament*, *not temper*, at all times. Patience is, in fact, a quality that is necessary, regardless of one's vocation. In the context of court hearings, patience is useful in a number of ways. First, unlike law school hypotheticals, the facts at trial need to be painstakingly elicited by counsel and then sifted as well as assessed by the judge. There are no shortcuts. One also needs to provide both counsel with the requisite time to present their submissions on the law and/or the facts. In short, the decision of the court must, in the final analysis, be a *considered* one which (once again) would *arrive at a just and fair result or outcome*.

8 In a related vein, I also found an *attitude of objectivity* vital. This fourth quality entails, in the first instance, a belief that there is, in fact, objectivity in the law. From a *logical* perspective, *objectivity* in the law is *necessary and even inevitable*.[10] Indeed, any rule or principle of law is *necessarily a truth-claim and is, to that extent, universal in nature*. More importantly, *even* the (contrary) claim from *relativity* (*ie*, that everything is subjective and that there is no objectivity in the law)

10 Reference may also be made to, *eg*, Ronald Dworkin, "Law, Philosophy and Interpretation" (1994) 80 *Archiv Für Rechts-und Sozialphilosophie* 463 and, by the same author, "Objectivity and Truth: You'd Better Believe It" (1996) 25 *Philosophy and Public Affairs* 87.

is *itself* a *truth-claim*. Unfortunately, though, such a claim would be *self-contradictory* in nature since there can be *no claim whatsoever to any truth* based on the very *premises* of the concept of relativity itself. It is also needlessly dispiriting to adopt a claim from relativity; as I have observed elsewhere:[11]

> [W]hen I hear the corrosive – and disorientating and dispiriting – sounds of scepticism and cynicism, I am reminded that, often, what is unseen is more important than what is seen. In particular, I am reminded of the values that are embodied in the law – in particular, the nobility of the quest for justice and the weighty responsibility that we bear … to pursue this noble aim. These cannot be seen but nevertheless constitute the ideals that are the foundation of the enterprise of the law itself. I am also reminded that, on a deeper level, nobility and goodness in general is not something that we should take lightly. On the contrary, these are qualities which we should treasure. They are the true 'anchors' that will prevent us from being cast adrift in troubled (and troubling) times …

9 If, indeed, a judge does not believe in objectivity in the law, this has profoundly disturbing practical consequences as well. It would mean that the judge concerned can – theoretically at least – arrive at any *subjective* decision that he or she *feels* is correct. Such an approach would clearly erode the legitimacy of the law and the legal system from the perspective not only of the parties but also the public.

10 On a more specific level, one illustration that I have mentioned to younger colleagues on occasion is the party or witness who is hugely unlikeable. On occasions such as these, I spend an extra effort to ensure that I am not even subconsciously biased. To take a hypothetical example, a party who is proven to have been defrauded by another party clearly has the legal right to win despite the fact that the former may be a thoroughly unpleasant person who may even have treated the latter with contempt, and who comes across as such on the witness stand. However, the latter point is not *legally* relevant. Such an approach by the court is wholly consistent with the need to adopt an objective approach in spite of one's subjective (and irrelevant[12]) feelings.

11 Another illustration is one which I have already referred to – that parties should always be given an opportunity to submit on points and/or critical case law that they had not originally thought of but which the court feels might be relevant and which it feels the parties should

11 Andrew Phang, "Doctrine and Fairness in the Law of Contract" (2009) 29 LS 534 at 537.

12 This is an important point inasmuch as the objective approach could be entirely *consistent* with one's (legitimate) subjective view of the case concerned – everything depends, in the final analysis, on the precise facts as well as context.

consider. As the system we have is an adversarial one and all parties must be accorded the right to be heard, at no point must there even be a perception of bias on the part of the judge and/or should the judge be perceived as having descended into the arena.[13] This, in fact, brings me to the next (and fifth) quality that is closely related to the present quality.

12 However, before proceeding to do so, the reader might have noticed that all I have said is, in fact, part of the Judge's Oath of Office (in particular, the requirements of independence, impartiality, integrity and propriety). Indeed, this Oath of Office is one which every Judge or Judicial Commissioner or Senior Judge of the Supreme Court of Singapore must take pursuant to Art 97(1) of the Constitution of the Republic of Singapore,[14] and which is to be found in the First Schedule of the same, as follows:

> 6. *Oath of Office of Chief Justice, a Judge of the Supreme Court and a Judicial Commissioner and a Senior Judge of the Supreme Court*
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> I,……, having been appointed to the office of……., do solemnly swear (or affirm) that I will faithfully discharge my judicial duties, and I will do right to all manner of people after the laws and usages of the Republic of Singapore without fear or favour, affection or ill-will to the best of my ability, and will preserve, protect and defend the Constitution of the Republic of Singapore.

13 Another (and fifth) quality is closely related to the fourth – the judge *must* apply the appropriate legal principles to the relevant facts in a ***principled*** *manner*. In this regard, the law should never be distorted or stretched beyond what is reasonable – and the *same* approach should be adopted with the facts. This is entirely consistent with the objective approach embodied within the fourth quality which we have just considered. In so far as the applicable law is concerned, this has indeed been my experience inasmuch as the genius of the common law (and the accompanying principles of equity) are such as to almost always provide the court concerned with the legal wherewithal to arrive at a fair and just decision in a *principled* manner in the case at hand. As I have observed elsewhere:[15]

> [I]t is not inappropriate to note, on a broader canvass, the inherent genius of the common law (as well as the allied principles of equity) – a system only

13 See, *eg*, the Singapore Court of Appeal decisions of *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 and *BOI v BOJ* [2018] 2 SLR 1156.

14 1985 Rev Ed. See now the First Schedule of the Constitution of the Republic of Singapore (2020 Rev Ed).

15 See the Singapore Court of Appeal decision of *Kickapoo (Malaysia) Sdn Bhd v The Monarch Beverage Co (Europe) Ltd* [2010] 1 SLR 1212 at [57].

> *apparently* cumbersome and haphazard but which, in *substance and reality*, constitutes an *organic, coherent as well as holistic* system *out of which justice and fairness flow*. That is why Prof S F C Milsom perceptively observed that the common law system developed in a strikingly systematic fashion, notwithstanding the apparent absence of a clear blueprint as such (see generally S F C Milsom, 'Reason in the Development of the Common Law' (1965) 81 LQR 496). [emphasis in original]

14 A sixth quality which I found useful not only as a trial judge but also (subsequently) as an appellate judge as well was *wisdom* (including *common sense*). I was always amused at the seemingly flippant observation by many that "Common sense is no longer common." However, I soon found that that wisdom (including common sense) is an integral part of the adjudicative process. For example, a legalistic or mechanistic application of the law to the facts will tend to lead the judge concerned *away* from the just and fair result or outcome. Indeed, wisdom consists of more than just a comprehensive knowledge of the law – it entails the ability to apply the law appropriately to the relevant facts. For example, on occasion at least, what looks like a logical conclusion may not sit well with the judge concerned and/or might even appear a strange result from the perspective of the reasonable person. That is a clear signal, in my view, that that judge ought to look more closely at the facts of the case once again to ascertain whether he or she has missed any crucial fact and/or has not had full regard to the context of the case itself. Indeed (and as already alluded to above[16]), this particular quality is closely related to the previous one inasmuch as a decision lacking in wisdom or common sense also cannot be said to be a principled one.

15 Finally, there is a (seventh) quality that permeates the entire judicial process and, indeed, all the preceding qualities and is an ***umbrella principle*** of sorts. Indeed, I have had occasion to refer to it more than once simply because it is the *ultimate goal* of *each and every* court hearing – *achieving a just and fair result or outcome*. However, this goal can only be attained by a humble, diligent, patient as well as wise establishment of the relevant facts, accompanied by the application of the relevant law to those facts in as objective as well as principled a manner as possible, in order to achieve a just and fair result or outcome in the case at hand.

16 I would add that, as a *trial* judge, there was one other approach that I adopted that, as the reader shall see shortly, is not applicable in the appellate context. It is also not related (directly at least) to the actual adjudicative (here, trial) process. And it is this: I never worried about what would happen to my decision on appeal. All that a trial judge

16 That all the qualities operate in an integrated and holistic manner.

can do, in my view, is encapsulated within the approach which I have outlined briefly above. Once that judge has done his or her level best, it is up to the appellate court to decide whether his or her decision at trial (or at first instance, if it is a chambers hearing) should be upheld, reversed or even remitted for further hearing (the last-mentioned being, in fact, a very rare occurrence). Indeed, as a general rule in life, there is no point looking back in regret – even in the physical realm, if we look backwards even as we are moving forward, we are likely to injure ourselves! This may be easier said than done in practice, but it has been my experience that once one's vanity and ego are put to one side,[17] it is easy to simply move forward with commitment and equanimity.

17 So much by way of a brief account of my perspective of the adjudication process. I thought that it would nevertheless be useful to set out my perspective first before proceeding to the focus of the present article – which is what I would advise *the lawyer's* perspective should be, principally in the context of *appellate* litigation, although it will become obvious that much of what I have to say may (potentially at least) be equally applicable in the context of a first instance hearing as well. Before setting out some suggestions for counsel in relation to appellate litigation,[18] it is useful, in my view, to remind ourselves about what (in most general, albeit vital, terms) appellate advocacy is all about. In the apt words of the Honourable Mr Justice A F Mason: "I would say that too often appellate counsel forget that advocacy is an exercise in *persuasion* rather than a

17 Compare, Andrew Phang, Goh Yihan & Jerrold Soh, "The Development of Singapore Law: A Bicentennial Retrospective" (2020) 32 SAcLJ 804 at 878.

18 Bearing in mind that they are non-exhaustive in nature; see, *eg*, The Honourable Justice Michael Kirby, "Appellate Advocacy – New Challenges" (2006) 18 Denning LJ 51 at 54–55, where the learned author (referring to his earlier article, "Ten Rules of Appellate Advocacy" (1995) 69 ALJ 964) repeats his ten "rules" of appellate advocacy, as follows (not surprisingly, perhaps, it will be seen that there are many overlaps between these rules and my own suggestions that follow):

(a) Know the court or tribunal that you are appearing in.

(b) Know the law, including the substantive law relating to your case and the basic procedural rules that govern the body you are appearing before.

(c) Use the opening of your oral submissions to make an immediate impression on the minds of the decision-maker and to define the issues.

(d) Conceptualise the case and focus the attention of the court directly on the heart of the matter viewed from the interest you are propounding.

(e) Watch the Bench and respond to them.

(f) Give priority to substance over attempted elegance.

(g) Cite authority with discernment.

(h) Be honest with the court at all times.

(i) Demonstrate courage and persistence under fire. You will generally be respected for it. In any case it is your duty.

(j) Address any legal policy and legal principles involved in the case and show how they relate to the case.

defence or a statement of a position. Persuasion calls not only for mastery of the materials but also for an element of constructive imagination and boldness of approach."[19] [emphasis added]

IV. Some suggestions for counsel

A. Diligence

18 The reader would have realised by now how vital the quality of diligence is, not least because this was also an attribute which I referred to from *the judge's* perspective as well. Indeed, this was the *very first* quality of a good advocate which Justice Chao Hick Tin identified in his illuminating article on advocacy.[20]

19 Indeed, having a brilliant legal mind is not sufficient in and of itself. Diligence in application is absolutely essential. As it has been said, "Genius is 1% inspiration and 99% perspiration."[21]

B. Clarity of one's case and its accompanying arguments

20 The first – and, arguably, most important – thing that I look for in every appeal before me is the thrust (sometimes termed the "case theory"[22]) of the parties' respective cases (and, of course, the

19 Speaking then in his capacity as Justice of the High Court of Australia, and later to be appointed Chief Justice of that same court. See The Honourable Mr Justice A F Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 ALJ 537 at 538. And see, to like effect, The Right Honourable Sir Harry Gibbs, "Appellate Advocacy" (1986) 60 ALJ 496, especially at 496; the learned Chief Justice also observed (at 500) that "the governing principle of advocacy" is "to say what can be usefully said in support of one's client's position and to say it well". Reference may also be made to The Honourable Justice Michael Kirby, "Appellate Advocacy – New Challenges" (2006) 18 Denning LJ 51 at 54.

20 See The Honourable Justice Chao Hick Tin, "The Closing Chapter" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 14, at pp 384–386.

21 I recall seeing this statement on a huge billboard whilst trudging back under light snow with a whole cart of groceries whilst on sabbatical leave at Harvard Law School close to three decades ago. I also recall the statement being attributed to Thomas Edison. Some have argued that the American author, teacher and lecturer, Kate Sanborn, had, in her lecture on genius, said something similar earlier on (albeit without, apparently, stipulating any proportions as such).

22 See also K Shanmugam & Ang Cheng Hock, "Case Theory" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 2.

accompanying arguments).[23] Indeed (and on occasion), I have analogised such an approach as being akin (in the context of the academic sphere) to having a clear thesis in relation to a doctoral dissertation (which thesis can, and ought to, be summarised within a short paragraph).

21 Such clarity is, in my view, required not only with regard to written submissions[24] but also oral submissions. Indeed, it seems to me that both operate with each other in an interactive way – and often in tandem with each other. Whether one's case will *persuade*[25] the appellate court to find in its favour depends on the persuasiveness of the *content* of the case itself. However, it is only logical and commonsensical that a case that is presented in a muddled or less than clear way is less likely to persuade the court compared to a case that is clearly presented. If it is in fact the position that counsel concerned find that a case which is clearly presented (whether in written form and/or orally) is weak and/or unlikely to persuade the court, then it might well be the case that an appeal should not be filed in the first place.[26] Looked at in this light, the quality of clarity could in fact operate – in part at least – as a sifting device in deciding whether to file an appeal in the first instance.

22 The following appears to be an obvious point. However, it is important to note that it is more difficult to *practise* it than to merely state it. A total understanding of one's case and a clear effort at stating it as

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23 And see generally L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at pp 324–333.

24 Although written submissions are important inasmuch as they are the first port of call for the appellate judges. As Justice L P Thean has observed (see L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 330), "[t]he appellant's case and the respondent's case together with the judgment or the grounds of judgment under appeal are the first documents the appellate judges read in considering an appeal"; and as he proceeds to observe (at p 330):

> It is only natural that having read the judgment or grounds of judgment, the appellant's case and the respondent's case, they would have formed some preliminary views of the appeal before they hear the appeal in court. Counsel engaged in an appeal, whether acting for the appellant or respondent, should therefore take great care in preparing the respective cases, as the success of the appeal or of resisting the appeal, as the case may be, depends very much on the cases they have prepared and submitted.

25 On the aim of advocacy as *persuading* the court, see L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 321 (together with the legal literature cited). See also n 19 above.

26 See also L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at pp 322–323 (on the decision to appeal).

precisely as possible requires time, as well as diligence and commitment. At this juncture, I should also observe that more is not necessarily better – what I have in mind, in particular, is the 50-page limit for written cases that are submitted to the Court of Appeal.[27] I have found that many parties invariably submit a 50-page written case even though the appeal itself might have been more succinctly (and, more importantly, *effectively*) dealt with in *fewer* pages. In such situations, the saying that "less is more" never held truer.[28] The same principle applies to skeletal submissions (which have a 20-page limit).[29] It also conduces towards clarity if counsel uses as many *headings* as are appropriate.[30]

23 All this harks back to the central point of this Part of the article – that the clarity of one's case is of the first importance, and that verbiage might even render that case less effective than it might otherwise be. Indeed, wherever possible, a clear executive summary of one's case at the beginning of one's written case and/or an equally clear summary at its end[31] might be more helpful to the court. By analogy, such an approach could be applied to *oral* submissions as well.

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27 Exceptions are made where the appeal is complex and there is a request for a reasonable extension of this page limit. However, in the nature of things, such exceptions will rarely be made.

28 See also L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 331.

29 It should be noted, though, that "for the appellant, skeletal arguments also afford an opportunity for responding to the points raised in the respondent's case" and that "counsel for the appellant should [therefore] make full use of this opportunity in responding briefly to the points raised in the respondent's case": see L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 332.

30 See L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 325 as well as The Honourable Justice Chao Hick Tin, "The Closing Chapter" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 14, at p 397. See also Bryan A Garner, "The Future of Appellate Advocacy" (2016) 54 Duquesne Law Rev 311 at 344, where the learned author states:

> After the issue statements at the beginning of a brief, the most important thing in a brief is the point headings. They are prominent throughout the middle part of the writing.
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> …
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> Many judges have told me that the most shocking thing is how difficult it is to decipher or excavate the arguments of counsel. The argument shouldn't require any excavation at all. The lawyer should be putting it in high relief right here.

31 Preferably, in my view, *both*.

C. Focus on one's major arguments and be flexible

24 A closely related point also appears to be an obvious one as well: Focus on one's major arguments. It is true that apparently "minor" arguments could become major ones but there is a sense in which one should not (as the saying goes) "major on 'minors'". And Justice Chao put it succinctly in the following way – "the golden rule of always focusing on what is essential to prove your client's case is so critical" and "[d]o not get sidetracked by what is irrelevant or peripheral".[32] In a similar vein, Justice L P Thean has also observed thus (in the context of the written case):[33]

> [I]f practicable, and without unnecessarily upsetting the sequence of the contentions, counsel should put forward, and at the forefront, the strongest contention with the weaker or less convincing ones to follow. The purpose of this strategy is to capture the attention of the readers and drive home the arguments first before the readers are immersed in the details of other arguments – remember always that the readers are the appellate judges, who will be deciding the appeal.

25 And the learned judge also furnished the same advice in the context of the oral hearing itself before the Court of Appeal, as follows:[34]

> Counsel has complete freedom as to the manner he presents his arguments and the sequence of his arguments. Unless the court directs otherwise, counsel may present his arguments in any sequence as he deems fit and is not restricted by the sequence as set forth in the case. In these circumstances, *counsel should put forward first and at the forefront, what he considers his strongest arguments and, particularly, the crucial argument which, if he succeeds, would carry the appeal.* … Do not be too finicky as an advocate by first taking care of all the

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32 See The Honourable Justice Chao Hick Tin, "The Closing Chapter" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 14, at p 385. These words, stated in the context of a trial, are equally applicable to an appeal.

33 See L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 326.

34 See L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds (Academy Publishing, 2008)) ch 15, at p 334. See also The Right Honourable Sir Harry Gibbs, "Appellate Advocacy" (1986) 60 ALJ 496 at 497–498, where the learned Chief Justice observes thus:

> Fundamental to success in appellate advocacy is the ability to perceive the point or points on which the resolution of the appeal will depend and to cut a path directly to those points, without meandering to explore side issues, however interesting, or worse still, entangling the court in a thicket of irrelevancies of fact or law. The skill lies in discerning what are the critical issues and in distinguishing between what is and what is not necessary to be presented to enable the argument directed to those issues to be properly understood.

> minute and minuscule details and proceeding in a sequential manner, starting with inconsequential and small arguments and gradually ascending to a crescendo of important arguments, because the attention of the judges may have receded by the time counsel reaches the crescendo.
>
> …
>
> Counsel should be very focused on the issues and direct his arguments to the issues before the court. *He cannot afford to spend time labouring minor and inconsequential points, which have no effect or impact on the appeal. Go straight to the substance of the complaint of the judgment below. Do not spend time on elementary propositions of law*.
>
> [emphasis added]

26 It is equally true that litigation is a *dynamic* process and this is especially so in relation to oral arguments. Hence, the lawyer concerned has to be sensitive – in the context of the oral hearing – to the questions which come from the Bench and/or the shape that argument(s) are taking. It is important that the lawyer be flexible and be able to adapt to the context of and/or direction of particular argument(s), consistently with the dynamic process that has just been alluded to.[35] All this admittedly sounds rather abstract and can only be fully understood and appreciated with the necessary experience in court itself. This particular point should also be considered and applied in conjunction with other points (*eg*, "reading the court" (which is, in fact, one of the points made below)).

D. Appealing against findings of fact

27 In deciding whether to appeal against findings of fact, counsel concerned could do no better than to heed the following advice by Justice L P Thean:[36]

> I should say a word on the daunting task of appealing against a finding of fact made by a trial judge. An appeal against such a finding of fact is always an uphill task. Nonetheless, a counsel should not be deterred from taking on such a task, if he finds that the finding of fact made by the judge below is plainly wrong and unsustainable. In carrying out this exercise, he needs to examine very carefully and closely the judgment or grounds of judgment below.

28 On a related note, it is wise, in my view, for counsel to note that they should never quote extracts from the notes of evidence out of context.

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35 See also the Honourable Mr Justice A F Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 ALJ 537 at 541.

36 See L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 326.

Appellate judges will examine such extracts in context for themselves in any event.

E. Importance of ensuring all relevant documents and authorities are brought to the attention of the court

29 The importance of ensuring that all relevant documents and authorities are brought to the attention of the court may appear to be an obvious point but there are occasional lapses by counsel. In so far, *eg*, as the former (material documents) is concerned, Justice Thean has observed, pertinently, thus:[37]

> The importance of the core bundle cannot be over-emphasised. Counsel must appreciate that if a material document is not included in it, he runs the risk of that document not being considered by the Court of Appeal in the appeal, and he may not have a second chance of bringing it to the attention of the court. Do not treat a core bundle as an agreed bundle before a court of first instance. It is much more important than that.

30 In so far as relevant case authorities are concerned, as is the case with documents, counsel should never quote extracts from decided cases out of context.[38] Appellate judges will examine such extracts in context for themselves in any event. Indeed, they would often have a large reservoir of legal knowledge that would also enable them to ascertain whether a case law authority is in fact being cited appropriately and in context.

F. Questions during oral hearings are not necessarily a bad thing

31 In the distant past, the legal culture was such that not as many questions were generally asked during oral hearings before the Court of Appeal. However, that has certainly not been the case during the past couple of decades.

32 Whilst it is understandable why counsel would prefer not to be asked questions (especially difficult ones) during oral argument, such questions are not, in fact, necessarily a bad thing. The court would probably be testing the coherence of the party's case. And it is not necessarily the case that having to respond to more questions means that the case being put forward by the party concerned is weaker. On

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37 See L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 327.

38 See also L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 331.

the contrary, the court might well be confirming that the party's case is indeed a strong one by exploring every possible weakness in its case. In this regard, context is all-important simply because the context will – more often than not – demonstrate which way the court concerned is leaning when questioning counsel for a particular party. In this regard, the following observations by Chief Justice Harry Gibbs may be usefully noted: "[I]n oral argument counsel can, as the argument progresses, perceive and immediately correct any misunderstanding that may arise and dispel doubts that would otherwise remain unresolved."[39]

G. Always address the court's concerns

33 An appellate court's main purpose is to understand fully the respective parties' cases and to arrive at a just and fair decision. In this regard, oral argument is the occasion at which the court concerned has the opportunity to clarify and/or investigate more fully issues and/or points raised in the parties' written cases. Put simply, the court does not ask questions for their own sake. When, therefore, questions are raised by the court, counsel must attempt their level best to address the court's concerns – and, consistently with the first main point raised earlier, in as clearly a manner as possible.

34 In this particular regard, attempting to fudge or avoid the question(s) is counterproductive. If counsel cannot really address a particular concern raised by the court, he or she should simply admit this in a straightforward manner.

H. Learn to "read" the court

35 A closely related point, albeit one that is nevertheless easy to forget, is that it is extremely helpful to learn to "read" the court.[40] There is, in fact, no magic in relation to this particular point. Indeed, it is entirely consistent with common sense. Put simply, what it means is that counsel should be sensitive to what concerns the court, especially if a particular point is clearly troubling it. Not surprisingly, there is no "magic formula" as such and much would depend on the precise issue as well

39 See The Right Honourable Sir Harry Gibbs, "Appellate Advocacy" (1986) 60 ALJ 496 at 497. However, to the extent that the learned Chief Justice is of the view that written submissions are not as effective as oral argument, I would respectfully beg to differ to some extent at least.

40 And on the importance of eye contact during the oral hearing, see L P Thean, "Appellate Advocacy" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 15, at p 334.

as the accompanying context. From my own experience, the court itself would usually raise or flag issues that are troubling it in any event. And this segues back into the previous point, which is that counsel should then endeavour to attempt their level best to address the court's concerns directly and as clearly as possible.

36 However, there is a specific situation that can be dealt with quite easily by counsel when it does in fact arise. This relates to situations where the court is quite clearly not persuaded by the point or arguments that counsel is making. The court will usually signal – and quite clearly at that – that it would like the counsel concerned to proceed to his or her next point. The difficulty that the court faces occasionally is that some counsel will persist in making the same point. For the avoidance of doubt, it should be noted that there is nothing wrong with counsel pressing a particular point before the court. However, it is a fine balance and when it is amply clear that the court *does* indeed desire to move on to the next point, it does the counsel concerned no good at all in persisting with the same point. It is true that it is all a question of discretion and judgment based on the precise facts and circumstances at hand, but it seems to me important that counsel take note of this specific issue and not persist with a particular argument when it is no longer useful to do so.

37 There is yet another – and somewhat contrasting – situation which perhaps bears brief mention. In the course of exploring and considering counsel's arguments, the court occasionally canvasses related – yet potentially effective – points that are actually helpful to that party's case. I have noticed that the best advocates are quick and astute to spot such opportunities and develop the point(s) relatively quickly and often to great effect. This is yet another illustration of the benefits of being able to "read" the court.

I. Develop a positive reputation

38 Turning to the next point, it does counsel's reputation little or no good if he or she is evasive or – worse still – engages in arguments and/or tactics that are wholly unmeritorious and which may even be an abuse of the process of the court.[41] Indeed, all counsel should strive – and this is a point which applies to trials as well – to be as candid with

41 This also harks back to an earlier point that counsel should always endeavour to address the court's concerns and not fudge or avoid the question(s) from it. Reference may also be made to Justice Chao's emphasis on the importance of integrity: see The Honourable Justice Chao Hick Tin, "The Closing Chapter" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 14, at pp 389–390.

the court as possible. This aids in the development of one's reputation before the court. It is important to note at this particular juncture that just because counsel has been less than candid with the court, the court would not hold that (even subconsciously) against that particular counsel in future cases (although there might, of course, be adverse consequences for his or her client and/or even the lawyer himself or herself if, in fact, a disciplinary offence has been committed). This would be patently inconsistent with the attitude of objectivity that I have already considered earlier in this article (in particular, the independence and impartiality as well as integrity and propriety referred to earlier as well and which are the hallmarks of the judicial function). One must always provide the benefit of the doubt to counsel (who might, *eg*, have had an "off day", and whose lack of candour in a particular case might therefore not have been typical conduct).

39 It is important, though, to emphasise the more *positive* aspect which has just been alluded to above – that counsel who have a clear track record of being candid with the court and/or of being even helpful to opposing counsel and/or the court not only develop their reputation before the court in a theoretical sense only. I recall one particular hearing when the entire *coram* could not understand why a particular counsel who had a sterling reputation before the court was so insistent on advancing what appeared to be a hopeless appeal. However, because of his reputation before us, the court did provide him with more time to elaborate on his case and found in the end that there was, in fact, a point that was valid (even though it was not that obvious) and, if my memory serves me correctly, we allowed the appeal in part.

J. Always be courteous[42]

40 It seems strange to put down this point in writing simply because I had always assumed that courtesy should be second nature – not only in court but in our lives too. That having been said, I am also reminded of the National Courtesy Campaign that was launched in Singapore in the late 1970s, so perhaps the quality of courtesy cannot be taken for granted after all. It is nevertheless expected in the context of litigation.

41 Courtesy should be extended at all times by all concerned. Judges, too, need to be courteous and this brings me back to a point made earlier – that the judge must display judicial *temperament*, *not temper*, at all times. It is true, though, that in the "heat" of legal battle, temperatures

42 See The Honourable Justice Chao Hick Tin, "The Closing Chapter" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 14, at pp 386–388.

may rise and tempers may become frayed. That having been said, there is never an excuse for losing one's temper and, although we are all only human, we should try our level best not only not to lose our tempers but also (and on the contrary) endeavour to be courteous to everyone. As Justice Chao observed: "Lose your cool and your sense of objectivity goes with it. You will also compromise your client's interests."[43]

42 In a related vein, as the Singapore Court of Appeal observed in *BOI v BOJ*:[44]

> [C]ounsel are not the mere 'mouthpieces' of their clients. They are not mere automatons, executing every instruction of the client, especially where the client wants each and every point to be taken in order to inflict maximum 'damage' on the other party, and where the taking of such points is – in a word – pointless and would not only engender a wastage of the other party's, but also the court's, time and resources. There is a reason why lawyers are also known as 'counsel' – in such situations, lawyers must *counsel* their clients and apprise them of what is permissible and what is not. We operate within an adversarial system. However, as the learned Lord Chief Justice Cockburn observed in an extra-judicial address (see George P Costigan Jr, 'The Full Remarks on Advocacy of Lord Brougham and Lord Chief Justice Cockburn at the Dinner to M Berryer on November 8, 1864' (1931) 19 Cal L Rev 521 at p 523), which our courts have endorsed and recapitulated on several occasions (most recently by this Court in *Goh Seng Heng v Liberty Sky Investments Ltd and another* [2017] 2 SLR 1113 at [62]):
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> > My noble and learned friend, Lord Brougham… said that an advocate should be fearless in carrying out the interests of his client; but I couple that with this qualification and this restriction—that *the arms which he wields are to be the arms of the warrior and not of the assassin*. It is his duty to strive to accomplish the interests of his clients *per fas*, but not *per nefas*; it is his duty, to the utmost of his power, to seek to reconcile the interests he is bound to maintain, and the duty it is incumbent upon him to discharge, with the eternal and immutable interests of truth and justice.
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> [emphasis in original]

K. Possible uses of comparative material

43 As I have observed elsewhere, in developing the common law in a particular area, the courts in a particular jurisdiction ought to have regard to developments in the corresponding area of law in other

43 See The Honourable Justice Chao Hick Tin, "The Closing Chapter" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 14, at p 388.

44 [2018] 2 SLR 1156 at [3]. See also at [139].

jurisdictions as well.[45] This has, in fact, been the approach adopted in the Singapore context. Indeed, such an approach is especially helpful when the court concerned is faced with a novel or controversial point of law.[46]

44 Likewise, counsel may also want to consider the possible uses of comparative material, particularly when faced with a novel or controversial point of law. However, it is important to emphasise that wisdom is required in adopting such an approach. For example, cases from other jurisdictions should not be cited simply for effect but must embody *principle(s)* that are applicable to the resolution of the case at hand. Indeed, with the advent of technology in general and the many legal databases in particular, there is the ever-present danger to citing *too much* material (even with respect to local legal materials as well).

L. Always remain positive

45 Excellent advocacy does not guarantee the decision in favour of one's client. One can only attempt one's level best. The final decision remains with the court. In this regard, one should always remain positive, regardless of the result. Justice Chao put it well when he observed as follows:[47]

> [N]ever get discouraged in practice just because you have had a bad day in court, or because the outcome of the case was not what you had hoped for. There are two things to remember in this regard. First, never show your disappointment or displeasure in court. Always bear in mind that in deciding a case, the court is not seeking to please either party, but is instead seeking to ensure that justice is done in accordance with the law. Secondly, even after the court has ruled against you, display the same courtesy as you have done up until then, for example, by saying, 'as the court pleases'. Showing unhappiness only marks you out as an immature advocate and a bad loser.
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> In the nature of things, litigation will in almost all cases produce a winning party and a losing party. Both parties' counsel may feel strongly about their respective clients' cases. But, realistically, you cannot expect to triumph in every case.

45 See Andrew Phang, "The Importance of Comparative Common Law: A View from Singapore" [2023] JBL 538.

46 See, *eg*, the Singapore Court of Appeal decision of *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918. Reference may also be made to Andrew Phang, "The Importance of Comparative Common Law: A View from Singapore" [2023] JBL 538 at 552–563 (and the accompanying literature cited therein).

47 See The Honourable Justice Chao Hick Tin, "The Closing Chapter" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 14, at p 401.

V. Conclusion

46 Much of what I have said in the present article[48] might appear self-evident and commonsensical and, indeed, a strong case can be made out for this particular view. However, it is also true that the most self-evident qualities are often much easier to state than to practise. It is hoped that this article would have served to remind all of us of the need to not only hone our litigation skills but also to practise them with diligence, wisdom, integrity, courtesy and grace.

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48 And at least a few of which could (with the necessary modifications) be applied in the *trial* context as well. The trial process is, of course, quite different and involves somewhat different principles: see, *eg* (and referring only to essays from judges), The Honourable Justice Woo Bih Li, "The Good Advocate – Some Uncommon Pointers" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 19; The Honourable Justice Choo Han Teck, "Overview from the Bench" in *Modern Advocacy: Perspectives from Singapore* (Eleanor Wong, Lok Vi Ming SC & Vinodh Coomaraswamy SC gen eds) (Academy Publishing, 2008) ch 20; and Chan Sek Keong, "Lessons from a Lacklustre Litigation Practice" in *Modern Advocacy: More Perspectives from Singapore* (Vinodh Coomaraswamy, Eleanor Wong & Lok Vi Ming SC gen eds) (Academy Publishing, 2019) ch 1.