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Case Note

THE NEW SYSTEM OF CIVIL APPEALS

What "Constitutional or Administrative Law" Is; Whether to Appeal to the Appellate Division or the Court of Appeal; and Proposals for Broader Reform

***Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7**

An application was made under s 95 of the Legal Profession Act to set aside a penalty imposed by the Council of the Law Society. The Court of Appeal held that an appeal lay to the Appellate Division of the High Court, and not the Court of Appeal, because this was not a "case relating to constitutional or administrative law". The reasoning is problematic: it relied on an overly narrow conception of "public powers", conflated judicial review with administrative law more broadly, erroneously considered the merits of the application as relevant to the "which court" question, and overlooked the similarities between the present application and a typical application for judicial review. This note proposes a more detailed definition of "constitutional or administrative law", and presents further, more fundamental proposals for reform to prevent excessive satellite litigation and allocate appeals more efficiently.

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I. Introduction

1 Suppose one wishes to appeal against a decision of the General Division of the High Court ("GD") in a civil case. In the situations listed in the Sixth Schedule to the Supreme Court of Judicature Act 1969[2]

1 The author is grateful to the anonymous referee for helpful comments on an earlier draft of this case note. All errors and omissions remain the author's own.
2 2020 Rev Ed.

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("SCJA"), one must appeal to the Court of Appeal ("CA"); otherwise, one must instead appeal to the Appellate Division of the High Court ("AD").[3] One of the situations mentioned in the Sixth Schedule is when "the appeal arises from a case relating to constitutional or administrative law". What does this phrase mean?

2 A case involving judicial review of executive action, or of legislation (for unconstitutionality), is certainly a "case relating to constitutional or administrative law". The situation in *Tan Beng Hui Carolyn v Law Society of Singapore*[4] ("*Tan*") was less clear. The Council of the Law Society had decided to impose a penalty on Carolyn Tan, a regulated legal practitioner, for breaching the Legal Profession (Professional Conduct) Rules 2015.[5] Tan exercised her right under s 95(1) of the Legal Profession Act 1966[6] ("LPA") to "apply to a Judge to set aside the order" (s 2(1), in turn, defines "Judge" as "a Judge sitting in chambers in the General Division of the High Court"). The Judge declined to set aside the order. The CA held that Tan's right of appeal[7] was to the AD, not the CA. In other words, this was not a "case relating to constitutional or administrative law".

3 This note will question the CA's reasons for this conclusion. The CA suggested that the case was "unrelated to the regulation of the exercise of public powers by public authorities",[8] but this is not a complete statement of the province of administrative law. Neither should it have mattered that Tan's case did not involve "judicial review". Further, it appears from the structure of the CA's judgment that the CA thought it relevant that Tan's appeal was unmeritorious; this should not have made a difference to which court Tan had to appeal to. What the CA should have focused on was the *nature* of Tan's arguments, which indeed resembled arguments made in judicial review actions.

4 It is hoped that this note will raise for further discussion the problem of how "constitutional and administrative law" in the Sixth Schedule can be better defined. But this note will go further, and argue that it is worth considering even more radical reform to the process by which appeals from the GD are allocated to the CA or the AD. That will prevent satellite litigation – such as that in *Tan* itself – about what the

3 Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 29C read with Sixth Schedule, para 1(*a*).
4 2020 Rev Ed.
5 S 706/2015.
6 2020 Rev Ed.
7 For an explanation of why the Judge's decision is appealable at all, see *Iskandar bin Rahmat v Law Society of Singapore* [2021] 1 SLR 874 at [69]–[70].
8 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [28].

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correct appellate court is, which is not the most productive use of judicial resources or efficient use of time.

II. The "regulation of the exercise of public powers by public authorities": Not a conclusive test

5 The CA's starting point was *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd*[9] ("*Dongah*"), which involved an adjudication determination under the Building and Construction Industry Security of Payment Act 2004[10] ("SOPA"). A sub-contractor applied to the GD to set aside the adjudication determination ordering it to pay the main contractor (and stay enforcement thereof). The CA held that the sub-contractor's right of appeal was to the AD, not the CA. According to the CA in *Tan*, this was because "[a] review of a SOPA adjudication determination is unrelated to the regulation of the exercise of public powers by public authorities".[11] After discussing *Dongah*, the CA in *Tan* held that Tan's attempt to distinguish *Dongah* was unsuccessful. In other words, at first glance, it appears to be the *ratio* of the CA's decision that the case did not concern "the regulation of the exercise of public powers by public authorities".

6 It would, in this author's respectful view, be wrong for that phrase to be taken as the *ratio* of the CA's decision. By the definition in that phrase, *Tan did* concern "administrative law". Further, that phrase is not a complete statement of the province of administrative law.

7 Arguably, the Law Society was exercising "public powers" and/or was a "public authorit[y]". After all, in *CBB v Law Society of Singapore*,[12] the CA said that the Council's decision to dismiss a complaint was amenable to judicial review because the Council was performing a "public duty";[13] that the case involved concerns of "sound public administration";[14] and that "the discipline of lawyers … is a matter of public interest".[15] Indeed, the CA considered whether it should invoke a rule allowing it to make an adverse costs order against "public bodies performing a public regulatory function" in certain cases.[16] While the CA ultimately declined to make

9 *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2022] 1 SLR 1134.
10 2020 Rev Ed.
11 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [28].
12 [2021] 1 SLR 977 at [19].
13 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [19].
14 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [26].
15 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [29].
16 *CBB v Law Society of Singapore* [2021] 1 SLR 977 at [38], citing *Baxendale-Walker v Law Society* [2008] 1 WLR 426.

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such an order, it did not dispute that the Council was a "public bod[y]" that was "performing a regulatory or public function".

8 One may argue that the Law Society is not a "public authorit[y]" because it is not part of the Executive arm of the State, and is therefore not exercising "public powers". But even assuming that it is not part of the Executive, it could still be exercising "public powers", such that the GD's decision on its exercise of those powers is within the ambit of administrative law.

9 We see this from *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd*[17] ("*Yeap Wai Kong*"). The High Court, citing English case law,[18] noted the "changing public governance landscape"[19] in which:[20]

> … public policy is increasingly effected not only by government and statutory bodies but also through self-regulating entities in sectors where the domain nature and complexity of the sector requires front-line expertise coupled with back-line regulators to regulate the relevant sector.

Therefore, given:[21]

> … the legislative and regulatory matrix of the Singapore securities market, the statutory underpinning of the reprimand power and the nature of the reprimand function, the [Singapore Exchange Securities Trading Ltd's, or SGX-ST's] reprimand power would … properly be characterised as a public function.

10 Similarly, the Law Society exercises public functions. Its decisions can have significant reputational consequences for lawyers, just as the SGX-ST's decisions can cause "adverse business reputational implications".[22] Moreover, the whole point of the disciplinary framework for lawyers (if not the legal profession itself) is to serve the public.[23] This being so, as *Yeap Wai Kong* teaches us, it should not matter even if the Law Society is not strictly a government body. If the SGX-ST's decisions are amenable to judicial review, and hence within the province

17 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565.
18 Chiefly, *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815.
19 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [6].
20 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [9].
21 See also *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815, which involved a non-governmental body which nonetheless had a "public law task" and "perform[ed] a public duty", with possible "public law consequences" for companies (at 851).
22 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [27]. Indeed, a failure to pay a penalty can render a solicitor ineligible to have his or her practising certificate renewed: Legal Profession Act 1966 (2020 Rev Ed) s 25AA.
23 This explains why any member of the public has standing to make a complaint against a lawyer: *Deepak Sharma v Law Society of Singapore* [2016] 4 SLR 192 at [61] and *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [35].

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of administrative law, the decisions of the Council of the Law Society are all the more so as those decisions do have a statutory underpinning.

11 Such cases, which involve judicial review of public power, must come within the province of administrative law. After all, judicial review is simply the process by which administrative law operates through the courts.

12 It does not matter that the CA has described applications for judicial review of the Law Society's decisions as involving "private judicial review". That phrase is simply shorthand for "judicial review that does not involve the Government and/or does not seek to challenge any governmental action or decision".[24] That does not change the fact that the case involves judicial review in the first place; and it does so precisely because the powers in question are public in nature.

13 In short, it would be incorrect to say that a case pertains to "administrative law", and hence the appeal should be to the CA and not the AD, *only if* the case involves "the regulation of the exercise of public powers by public authorities". To be fair, the CA did not explicitly say so. But to the extent that it suggested so, that would be incorrect. Administrative law encompasses the regulation of bodies other than "public authorities"; and, in any event, it is at least arguable that the Law Society should count as a "public authorit[y]" exercising "public powers".

III. Whether the case involves "judicial review": Not a conclusive test

14 This author's argument is *not* that *only* cases involving judicial review of an exercise of public powers should count as involving "administrative law". The ambit of constitutional and administrative law goes beyond judicial review. For example, *Attorney-General v Aljunied-Hougang-Punggol East Town Council*[25] involved constitutional and administrative law as it raised issues relating to the scope of a Minister's executive powers,[26] the duties of town councils (which are "public bodies")[27] and the oversight powers of the Housing and Development

24 *Deepak Sharma v Law Society of Singapore* [2017] 2 SLR 672 at [2].
25 [2016] 1 SLR 915.
26 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [76]–[84] and [121]–[130].
27 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [9].

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Board (a statutory board)[28] – although there was no application for judicial review. Alternatively, consider private law claims for the *tort* of misfeasance in public office, which involve allegations that a public body has acted "maliciously or with the knowledge that it is *ultra vires*".[29] The issue of what counts as an *ultra vires* action is quintessentially an administrative law issue.

15 Therefore, the CA should not be taken to have suggested that administrative law is not only about judicial review. With respect, the following remark by the CA can muddy the waters:[30]

> The reliefs sought by [Tan] … were to review and set aside the decision of the Council, which were not the reliefs provided by judicial review (*ie*, mandatory order, prohibiting order, and quashing order).

On its face, this remark suggests that "administrative law" is co-extensive with judicial review remedies, which it is not. Indeed, that would be a category mistake because it would conflate substantive rules, procedure and remedies. The label "administrative law" describes the *subject-matter* of a body of legal rules and principles, whereas "judicial review" is one process by which one may ask a court to invoke those rules and principles, and "mandatory order[s], prohibiting order[s], and quashing order[s]" are the remedies which a court may grant following that process. More simply, one may ask: is "set[ting] aside" a decision not a quashing order by another name?

16 Further, the fact that the Judge's power to review the Council's order was "statutory and not found in administrative law judicial review powers" should not be relevant. The word "statutory" describes only the source of law setting out the Judge's power, and says nothing about the nature of that power. The phrase "administrative law judicial review powers", meanwhile, cannot function as a test for whether a case relates to "administrative law": that would simply be circular.

28 *Attorney-General v Aljunied-Hougang-Punggol East Town Council* [2016] 1 SLR 915 at [84].

29 *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 1 SLR(R) 52 at [138(a)], citing Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 1993) at pp 59–64.

30 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [33].

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IV. Whether the case involves "legality" or "merits": A more promising, but still problematic, test

17 What makes matters much clearer is the CA's remark that "the inquiry also differs from that in judicial review".[31] The CA noted that "the grounds of the Appellant's application … pertained to the merits of the Council's determination, rather than the legality of it"[32] – for example, it involved a "challenge [to] the appropriateness of the penalty".[33] In other words, the real reason why the case was not one relating to "administrative law" is that Tan was arguing that the Council had decided *wrongly*, not *unlawfully*.

18 However, there are two problems with this proposition. First, the CA reasoned that Tan was wrong to say that the Council had acted illegally, but that was irrelevant: the CA should instead have considered what Tan *claimed*, not whether Tan was *correct*. Second, several of Tan's arguments *were* about the "legality" of the Council's decision, not its "merits". These problems will now be examined in turn.

A. The Court of Appeal erred in considering that the correctness of Tan's arguments was relevant to the question of "which court this appeal ought to have been made to"

19 To illustrate the first problem, it will be helpful to describe the structure of the CA's judgment. The CA identified two issues, which it discussed in separate sections of its judgment:[34]

(a) The "jurisdictional point", dealt with in a section of the judgment titled "The court to which the appeal should have been made".[35] That section was dedicated to the question of whether Tan's application was a "case relating to administrative law".[36]

(b) The question of whether the appeals had merit, dealt with in a section of the judgment titled "The appeal has no merit".[37] That section began: "Besides the preliminary issue, we considered the other arguments raised by the Appellant that the Judge had erred. We did not consider any of them to be

31 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [35].
32 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [34].
33 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [35].
34 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [24].
35 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [24].
36 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [27].
37 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [42].

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> meritorious. The Judge was right not to vary the penalty or to set aside the Council's decision."[38]

20 This author submits that it is the nature of what is being argued – and not whether those arguments are meritorious (*ie*, correct) – that defines whether a case relates to administrative law. If one files a case and makes unmeritorious arguments relating to administrative law, the application may fail on the merits, but the fact remains that the case related to administrative law. To think otherwise would put the cart before the horse because the court would have to consider the merits of the appeal before considering whether it is the correct court to do so in the first place.

21 One would think, therefore, that:

(a) the first issue concerned *the nature of what Tan was arguing* – namely, whether she was challenging the "merits" and not the "legality" of the council's discussion; and

(b) the second issue concerned *the substance of what Tan was arguing* – in other words, whether her challenge lacked substance.

22 The problem is that in the section of the judgment purportedly relating to the first issue, the CA did not stop at discussing the *nature* of Tan's arguments. It *evaluated* those arguments. Then, because those arguments *failed*, the CA concluded: "For the reasons stated, the appeal should have been made to the Appellate Division. The appeal was made to the wrong court."[39]

23 Take, for example, the following passage:[40]

> Before us, the Appellant raised several contentions, including the contention that the Council acted *ultra vires* and/or outside of its jurisdiction by disciplining the Appellant for making a police report in relation to a criminal offence. This would therefore be an administrative law issue as it pertained to the illegality of the Council's determination.

24 After the CA acknowledged that Tan had made this argument, it went on – in the same section of the judgment – to *evaluate and reject* that argument:[41]

> We agreed with the Judge that the Council did not sanction the Appellant for the very act of making a police report. […] The argument that she was being

38 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [42].
39 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [36].
40 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [41].
41 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [37].

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penalised for making a police report was a mischaracterisation of the nature of the charge against her. The upshot is that there was no issue of illegality in the Council's exercise of jurisdiction.

25 The problem is that, when the CA said that "there was no issue of illegality", what it meant was that the Council *had not acted illegally*. It does not follow that the case did not raise an "issue of illegality", in the sense of *alleged* illegality. After all, at the stage of deciding what court should be appealed to, what matters is the nature of the arguments, not the merits of those arguments. Above all, one defining characteristic of administrative law is that it involves questions of whether decision-makers have acted illegally.

26 One might retort that the case did not relate to the "exercise of public powers by public authorities". If that is so, then, as argued above, the CA should have considered specifically whether it cannot be said that the Council's powers are "public" in nature.

27 There is another part of the judgment pertaining to the first issue where the CA discussed the *correctness* and not merely the *nature* of Tan's argument: it considered (and rejected) Tan's attempt to argue that the conduct complained of was justified.[42]

28 In short, it appears that the CA thought that the *meritoriousness* of the appeal explained why it did not relate to administrative law. If the CA thought this, then, with respect, it put the cart before the horse. However, if the CA had not thought this, then, given the arguments made in this note so far, it should have held that the case did relate to administrative law, because it did involve an allegation that a body exercising public powers had acted beyond the legal limits to those powers.

B. Several arguments which the Court of Appeal said go to "merits", but in fact go to "legality"

29 The second problem is this: the CA said that "the grounds of the Appellant's application … pertained to the merits of the Council's determination, rather than the legality of it".[43] However, several of the arguments in *Tan* are the sort which courts have considered in judicial review proceedings, and therefore they should be considered as

42 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [38]. For background, see the Disciplinary Tribunal's report in full: *Law Society of Singapore v Carolyn Tan Beng Hui and Au Thye Chuen* [2020] SGDT 10.

43 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [34].

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pertaining to the "legality" of the decision.[44] This is the very hallmark of "administrative law". Such arguments include:

(a) Tan argued that "the Council acted *ultra vires* and/or outside of its jurisdiction".[45] This is a typical argument made in judicial review applications, under the label "illegality".[46]

(b) Tan argued that, in the court's words, "the Council 'reversed the Burden of Proof' in finding that the Appellant had made a false allegation against Mr Kong".[47] The courts have, in judicial review applications, entertained arguments that a decision-maker committed an error of law, in the form of a mistaken understanding or application of the law relating to fact-finding;[48] and have endorsed a statement (albeit in a different context) that "misdirecting oneself as to the burden of proof" is a type of error of law.[49]

30 In addition, the CA stated that it could set aside the Council's decision if the Council "t[ook] extraneous matters into consideration"[50] – a well-established ground of judicial review in administrative law.[51]

31 If courts can consider such arguments in judicial review proceedings (which are unquestionably part of administrative law), and such arguments are also relevant in an application to set aside the council's decision under s 95 of the LPA, then it is surely worth reconsidering whether such an application should not count as relating to administrative law.

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44 For criticism of the decision between "merits" and "legality", see Benjamin Joshua Ong, "The Unmeritorious 'Legality'/'Merits' Distinction in Singapore Administrative Law" (2021) 16 *Asian Journal of Comparative Law* 1; Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Academy Publishing, 2011) at para 56; and Swati Jhaveri, "Revisiting Taxonomies and Truisms in Administrative Law in Singapore" [2019] SJLS 351 at 352.

45 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [36].

46 See, for just one example, *Tan Lip Tiong Rodney v Commissioner of Labour* [2015] 3 SLR 604 at [46].

47 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [34].

48 See, *eg*, *Re Fong Thin Choo* [1991] 1 SLR(R) 774 especially at [57].

49 See, *eg*, *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 at [90].

50 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [43].

51 See, for example, *CBB v Law Society of Singapore* [2019] SGHC 293 at [79]. Note that it is more orthodox to say that taking into account extraneous matters is a form of "illegality", not, as the High Court said, "irrationality": see *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [80].

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32 The CA also noted that "the Appellant also sought to challenge the appropriateness of the penalty. This would evidently entail a substantive review of the merits of the Council's determination, as the court could potentially substitute the penalty imposed".[52] However, this conflates the *nature of the review* with *what the court could order* following the review. It is perfectly possible for the courts to perform "substantive review" of a decision without going on to substitute their decision for the primary decision-maker's: this is nothing more than judicial review on the ground of irrationality.[53] What is limited in judicial review is the *extent* of substantive review – but the same can be said of the proceedings in *Tan*: "the court is not to engage in a full merits review under s 95 of the LPA, in so far as it would not be conducting a re-hearing of the dispute".[54]

V. "Private law obligations" *versus* "wider public considerations": Not a conclusive test

33 It is worth considering one more possible test, based on the following statement from *Dongah*:[55]

> [T]he adjudicator is not exercising any public power when making an adjudication determination. The adjudicator's role is to hold parties to their private law obligations under contract and the matters that the adjudicator can have regard to do not involve wider public considerations …

34 It is true that an adjudicator deals with private relations between parties, but so does, say, the Commissioner for Labour in dealing with claims for compensation under the Work Injury Compensation Act 2019[56] ("WICA"). The Commissioner's decisions involve administrative law.[57] If one retorts that there is a "wider public consideratio[n]" involved, namely, workplace safety, one could just as well say that ensuring that contractors are paid on time is also a "wider public consideratio[n]".

35 Perhaps *Dongah* is justified on the basis that construction adjudication is similar to arbitration, and the Sixth Schedule includes

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52 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [35].

53 The CA has described the irrationality review as a "substantive enquiry": *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [80]; see more generally Paul P Craig, "The Nature of Reasonableness Review" (2013) *Current Legal Problems* 1. Besides, in certain cases, the court *can* make an order directing the respondent to exercise its discretion in a certain manner: *CBB v Law Society of Singapore* [2021] 1 SLR 977 especially at [19]–[26].

54 *Tan Beng Hui Carolyn v Law Society of Singapore* [2023] SGCA 7 at [43].

55 *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2022] 1 SLR 1134 at [14].

56 2020 Rev Ed.

57 See, *eg*, *Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR(R) 648.

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appeals arising "from a case relating to the law of arbitration". Yet, one may ask, can the same not be said of the Commissioner for Labour?

36 So, in this author's view, the best way to make sense of *Dongah* is that a case involves "administrative law" if it involves a court reviewing a decision that would be amenable to judicial review (even if the case itself does not involve judicial review). That, in turn, considers *both* the source of the power being reviewed as well as its nature.[58] For example, the Commissioner for Labour is an executive officer, whereas the link between the executive government and a SOPA adjudicator is far more indirect.[59]

37 Even then, this analysis cloaks the more important question of principle: *why* does the source matter? In the cases of both SOPA adjudication and WICA claims, a right to receive payment accrues automatically when certain facts occur;[60] the adjudicator's (or Commissioner's) task is to determine whether those facts have occurred, and, if so, what sum is payable. In both cases, the applicant has no say in who the decision-maker is. In both cases, the applicant may have an alternative course of action – to mount a contractual or tortious claim – but this will often be less convenient and more costly, which is why the Legislature has intervened. Why should it make a difference that the Commissioner is appointed directly by the Minister,[61] whereas the adjudicator is appointed by someone (the "authorised nominating body") who is in turn appointed by the Minister?[62]

38 Perhaps this author is speculating. Perhaps, in a future case, the courts will hold that a case involving judicial review of a WICA claim does not relate to "constitutional or administrative law". The point, for present

58 See *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 at [48]–[50]; *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [6]–[17].

59 *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2022] 1 SLR 1134 at [13].

60 "Any person who has carried out any construction work, or supplied any goods or services, under a contract is entitled to a progress payment": Building and Construction Industry Security of Payment Act 2004 (2020 Rev Ed) s 5. Similarly, "Where personal injury is caused to an employee by an accident arising out of and in the course of the employee's employment with an employer, that employer is liable to pay compensation under this Act": Work Injury Compensation Act 2019 (2020 Rev Ed) s 7(1).

61 Employment Act 1968 (2020 Rev Ed) s 3(1) read with Work Injury Compensation Act 2019 (2020 Rev Ed) s 2.

62 *Dongah Geological Engineering Co Ltd v Jungwoo E&C Pte Ltd* [2022] 1 SLR 1134 at [13].

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purposes, is simply that the category, "constitutional or administrative law", needs further refinement.

VI. A proposed definition of "case relating to constitutional or administrative law"

39 In considering what form such refinement may take, a useful starting point is to ask: what is the difference between the AD and the CA? What makes one of those courts more suitable than the other to hear an appeal?

40 Let us begin by asking why the AD exists at all. In introducing the Bills that created the AD, the Senior Minister of State for Law, Mr Edwin Tong, noted that the CA's caseload was growing and the cases were "becoming increasingly complex". Therefore, the solution was not merely to appoint *more* judges, but also to create the AD to allow the CA to "focus its resources as appropriate". The Judiciary itself has commented to similar effect: according to the Chief Justice, writing in 2021, the purpose of the AD is to "allow us to utilise our appellate judicial resources more optimally and thereby help us better manage our appellate caseload".[63] In other words, the distinction between the AD and the CA is meant to create a functional separation, and possibly a development of specialisation,[64] in terms of hearing different *types* of appeals. In other words, AD appeals are *qualitatively* different from CA appeals.[65]

41 Therefore, the AD's role does not generally encompass difficult questions of law which ought to be decided by the highest court. According to the CA: "the AD serves the purpose of … permitting the [Court of Appeal] to focus its resources on matters which would benefit from *its expertise as the apex court of the land*"[66] [emphasis in original

63 *Singapore Courts: 2020 Annual Report* (Supreme Court, State Courts & Family Justice Courts, 2020) <https://www.judiciary.gov.sg/docs/default-source/publication-docs/one-judiciary-annual-report-2020.pdf?sfvrsn=c92468bc_0> (accessed 18 May 2023) at p 1.

64 Lest one think that this is speculative, it is worth pointing out that the Supreme Court clearly acknowledges that different judges can specialise in different areas. This is evident from the existence of specialised lists of judges in the GD, divided by subject-matter: "Role and Structure of the Supreme Court" *SG Courts* <https://www.judiciary.gov.sg/who-we-are/role-structure-supreme-court> (accessed 18 May 2023), under the heading "Specialised lists in the General Division of the High Court".

65 See *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd* [2021] 2 SLR 440 at [4].

66 *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd* [2021] 2 SLR 440 at [5].

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removed; emphasis added in italics] – for example, appeals that "will raise a point of law of public importance".[67]

42 The difficulty is that it is impossible to tell at the outset whether a case ought to be heard by the *highest* court in the land (the CA), or whether it is enough that there is an appeal to a *higher* court (the AD). There are various factors to be weighed[68] in a fact-sensitive analysis. For example, one factor is "whether the proceedings relate to a matter of national or public importance".[69] Even if constitutional and administrative law, by definition, are of public importance, that does not mean that all appeals concerning public law must be heard by the CA. For example, an appeal can be transferred from the CA to the AD if "all of the legal issues raised … relate to issues of settled law";[70] (it is submitted) even if the law is not settled, all it takes is an "extension" of settled law;[71] or (it is submitted) if the novel questions of law at stake are not so "difficult or contentious" that they must be handled by the CA.[72]

43 Because the inquiry is multi-factorial and fact-sensitive, the Sixth Schedule takes the approach of creating default starting points.[73] It identifies certain categories of appeal as being *more likely* to merit being heard by the CA. In such cases, one must by default appeal to the CA and not to the AD – without prejudice to the possibility of *subsequently* transferring the appeal to the AD.[74]

44 So the question of principle is: Can it be said that decisions of the Review Committee will, more often than not, warrant attention by the highest court of Singapore? If the answer is no, then the outcome in *Tan* is correct.

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67 Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 47(2). For details, see *UJM v UJL* [2022] 1 SLR 967 and *Tan Hock Keng v Malaysian Trustees Berhad* [2022] 2 SLR 806.

68 See Singapore Parl Debates; Vol 94 [5 November 2019], quoted in *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd* [2021] 2 SLR 440 at [35] and Rules of Court 2021 (2020 Rev Ed) O 56A r 12(2).

69 Rules of Court 2021 (2020 Rev Ed) O 19 r 39(5)(*a*).

70 Rules of Court 2021 (2020 Rev Ed) O 19 r 49(1)(*c*). For commentary from the CA, see *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd* [2021] 2 SLR 440 at [39]–[81].

71 See, by analogy, *Abdul Salam bin Mohamed Salleh v Public Prosecutor* [1990] 1 SLR(R) 198 at [28], cited in *Bachoo Mohan Singh v Public Prosecutor* [2010] 1 SLR 966 at [30].

72 See, by analogy, *Mah Kiat Seng v Public Prosecutor* [2011] 3 SLR 859 at [20].

73 *Noor Azlin bte Abdul Rahman v Changi General Hospital Pte Ltd* [2021] 2 SLR 440 at [39].

74 Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 29E.

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45 On balance, it made sense for Tan's appeal to be heard in the AD. While it certainly did have "substantial consequences" for (if nobody else) Tan herself, it did not involve "novel questions of law" or "questions of law of public interest". Rather, it involved an evaluation of the evidence before the Council and an application of settled principles of law.

46 More generally, if this author had to propose a definition of "a case relating to constitutional or administrative law" for the purpose of the Sixth Schedule, it would be this:

(a) A case is one "relating to constitutional or administrative law" if it:

(i) involves the "interpretation or effect of any provision of the Constitution";[75]

(ii) involves the interpretation or effect of any unwritten principle of a constitutional nature;[76] or

(iii) involves questions of law relating to the scope of, or legal limits to, a power whose exercise is amenable to judicial review, including the procedures by which such powers are to be exercised (even if the case itself does not involve judicial review).

(b) However, a case does not relate to constitutional or administrative law merely because:

(i) it relates to the substance of a decision made in the exercise of a power whose exercise is amenable to judicial review; or

(ii) it relates to questions of fact decided by a lower executive or judicial tribunal.

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75 This phrase has been taken from s 395(2)(*a*) of the Criminal Procedure Code 2010 (2020 Rev Ed), which allows a trial court to state a case to a higher court on certain questions of law.

76 Unwritten principles may include the separation of powers (*Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947) and the rule of law (*Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86]; see also Kenny Chng, "The Theoretical Foundations of Judicial Review in Singapore" [2019] SJLS 294 at 311–313), as well as the unwritten constitutional right to vote (*De Costa Daniel Augustin v Attorney-General* [2020] 2 SLR 621; see also Joel Fun Wei Xuan, "Elections during COVID-19: Welcome Clarifications, Unanswered Questions" (2021) 1 *Singapore Law Journal (Lexicon)* 36). See generally, Jaclyn L Neo, "Unwritten Constitutional Norms: Finding the Singapore Constitution" *Law Gazette* (May 2019) <https://lawgazette.com.sg/feature/unwritten-constitutional-norms-finding-the-singapore-constitution/> (accessed 18 May 2023).

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47 This proposed definition attempts to incorporate elements from *Tan*, with appropriate modifications and additions. Even then, though, there are two fundamental problems with this definition – or, indeed, any definition. First, it is not clear why *every* case with the characteristics above should be appealed to the CA. Second and more importantly, no matter what the definition is, the benefits of the AD could be undercut if there is a proliferation of satellite litigation about whether a case falls within the Sixth Schedule.[77] Taking the proposed definition as an example, one could imagine parties skirmishing over what powers' exercise is "amenable to judicial review", what "merits" means, what legal principles are "of a constitutional nature", *etc*.

VII. More fundamental proposals to enhance efficiency

48 This author would not be so cynical as to suggest that every procedural rule invites satellite litigation, such that statutory attempts at time-saving through procedural rules are doomed to failure. Yet, an especial problem arises in the case of procedural rules that embody an attempt to strike a balance between different factors, such as those relating to the allocation of appeals from the GD between the AD and the CA. Can there be a broader solution?

49 Part of the problem may be one of tone. It is for the appellant to specify which court they are appealing to. If the court disagrees, it thereby labels the appellant as having been wrong, with possible costs consequences. This writer can envisage a different, less adversarial way of approaching the issue. It is hoped that these proposals will spark a conversation on how the question of allocation of appeals may be approached more efficiently.

50 First, the law could be changed such that appeals against the GD are directed, in the first instance, to the Registry of the Supreme Court. The Registry, following a perusal of the parties' Cases, would decide whether the appeal is to be heard by the AD or by the CA. Neither party will be required to take a position on which court will be the correct court; at most, each can be made to answer a questionnaire setting out (for example) whether they are of the view that any novel and difficult issues of law will be involved. This way, parties will not see themselves as engaged in a battle over which is the correct appellate court, motivated by perceived tactical advantage. Instead of the appellant deciding which court to appeal to and the court sitting in judgment over that decision,

77 For relevant observations in a similar vein, see *Milaha Explorer Pte Ltd v Pengrui Leasing (Tianjin) Co Ltd* [2022] 1 SLR 1147, especially at [1].

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the decision as to the proper appellate court will be one made by the court alone.

51 An alternative proposal is this: the law could be changed such that the judge in the GD who heard the case decides which court one may appeal to. This would be somewhat similar to the system of "leapfrog" appeals in England and Wales and Northern Ireland. Ordinarily, if an appeal lies against a decision of the High Court of England and Wales or the High Court of Northern Ireland, it is to (respectively) the Court of Appeal of England and Wales or the Court of Appeal of Northern Ireland. However, one may make a "leapfrog" appeal to the Supreme Court, bypassing the Court of Appeal, if several requirements are met.[78] However, because the analysis is a fact-sensitive one, it is the High Court judge[79] who decides whether the (would-be) appellant can appeal to the Supreme Court. One can only appeal to the Supreme Court with a certificate from the High Court judge. Further, "[n]o appeal shall lie against the grant or refusal of a certificate".[80]

52 The justification for both proposals is this: the point of the distinction between the AD and the CA is to better allocate the resources of the Supreme Court. Surely, it is the Supreme Court itself that would have the best sense of how those resources are to be allocated. This proposal is similar to how specialised lists of judges operate: the Supreme Court, through the Registry, peruses the papers and selects the judge best suited to hear a case. Why not have a system in which the Supreme Court, through the Registry or the GD judge, peruses the papers and selects the court best suited to hear an appeal?

VIII. Conclusion

53 The courts have an instinctive sense as to what kind of appeals ought to be heard by the highest court of the land, and which need not be. But it can be difficult to translate this into a legal test, and more difficult yet to reconcile that test with the statutory language in the Sixth Schedule. Moreover, the rules in the Sixth Schedule on what kind of appeals ought to be heard by the CA are only starting points, and hence more akin to guidelines.

54 As disputes about the allocation of appeals, like *Dongah* and *Tan*, continue to come before the courts and definitions are laid down,

78 Administration of Justice Act 1969 (c 58) (UK) ss 12(3)–12(3A).
79 Or judges, in the case of a Divisional Court consisting of two or more High Court judges: Administration of Justice Act 1969 (c 58) (UK) s 12(8).
80 Administration of Justice Act 1969 (c 58) (UK) s 12(5).

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refined, and further refined, one may ask: is it really in keeping with the spirit of the AD/CA distinction if questions relating to the allocation of appeals end up with the CA? Is that the best use of the CA's resources? Perhaps it is time for the Minister to exercise his power to amend the Sixth Schedule to reduce satellite litigation over whether a case falls within the Sixth Schedule.[81] This author would respectfully suggest, at a minimum, that the definition of "constitutional or administrative law" be clarified, say, with the use of illustrations or explicit exceptions. At the same time, perhaps the cases show us that it may be worth considering statutory reform of a more radical nature.

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81 Supreme Court of Judicature Act 1969 (2020 Rev Ed) s 83(1).

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