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by Paul Tan and Lau Kwan Ho

Singapore will have a new appellate division in the High Court. This is a historic development. Its rationale has largely been put on the basis that it has become necessary to address the rising number of cases reaching the Court of Appeal. In the last five years, the number of matters heard by the Court of Appeal has increased by over 56%.[1]

*The true potential of the reform goes beyond that. Taken together with some other equally significant amendments being made to the Supreme Court of Judicature Act (**SCJA**), one likely effect of the measures will, in our view, be to increase the volume of appellate work. However, the sophistication at work here is that this increased volume will be allocated between two appellate bodies, based on the complexity and importance of the cases. This should allow a focused use of judicial resources that previously might not have been entirely possible. We believe that this will significantly advance the development of Singapore law. The restructuring does raise an interesting question of stare decisis, which we also discuss below.*

The New Structure

The structure being newly introduced is broadly as follows:

a. The High Court will comprise two divisions: the General Division and the Appellate Division.
b. The General Division will include the Singapore International Commercial Court and the Family Division. It will hear cases that were previously allocated to the High Court, including Magistrate's Appeals from the State Courts.
c. Any appeal from decisions of the General Division will be heard by either the Appellate Division or the Court of Appeal, or both, depending on the nature of the case.
d. The jurisdiction of the Appellate Division will include appeals against decisions made by the General Division in the exercise of its civil jurisdiction.

It is, however, envisaged that certain categories of appeals will be specifically allocated for direct hearing by the Court of Appeal. The Appellate Division will not have criminal jurisdiction.

e. In turn, the appeals specifically allocated for direct hearing by the Court of Appeal include cases in the following categories:

a. Constitutional or administrative law cases.
b. Criminal law cases.
c. Cases relating to the insolvency, restructuring or dissolution of a corporation, limited liability partnership or sub-fund of a variable capital company.
d. Appeals against decisions of the Singapore International Commercial Court.
e. Cases arising from specified provisions in legislation including:

- the Administration of Justice (Protection) Act 2016;
- the Arbitration Act and the International Arbitration Act;
- the Competition Act;
- the Maintenance of Parents Act;
- the Patents Act;
- the Parliamentary Elections Act;
- the Personal Data Protection Act 2012;
- the Presidential Elections Act; and
- the Protection from Online Falsehoods and Manipulation Act 2019.

f. The above categories of cases are not closed. The Minister for Law (after consulting the Chief Justice) has power to amend the categories. In addition, the Court of Appeal may also hear any appeals where so provided by written law, thus effectively allowing Parliament to decide which of the two appellate courts is to hear disputes arising under specific legislation. Finally, the Court of Appeal will have power to transfer a civil appeal ordinarily allocated to itself to the Appellate Division, and *vice versa*.
g. It appears to be the intention that if an appeal from the General Division involves or contains issues, some of which fall within the categories for which an appeal should be made directly to the Court of Appeal, and some of which do not, then the appeal should be filed to the Court of Appeal.[2] Presumably, the transfer powers of the Court of Appeal may be exercised here where appropriate as well to ensure the proper allocation of resources.
h. The Court of Appeal may, with leave, also hear appeals against decisions of the Appellate Division. Leave may be granted if the appeal raises a point of law of public importance. The circumstances in which leave may be granted are intended to be narrow, and will include a discretion on the part of the Court of Appeal to consider other factors such as whether the decision will affect the administration of justice or where there is conflicting authority.[3] Presumably, leave applications may (as is currently the case) be decided either on paper or after a hearing.
i. Of note is the fact that the Appellate Division may, with leave, hear appeals of certain interlocutory matters where currently no appeal would be

permissible. These matters are those currently specified at paragraphs 1(c) to (g) of the existing Fourth Schedule to the SCJA:

a. An order giving unconditional leave to defend.
b. An order giving leave to defend on condition of security being put up for the sum claimed.
c. An order setting aside unconditionally a default judgment.
d. An order setting aside a default judgment on condition of security being put up for the sum claimed.
e. An order refusing to strike out an action, matter, pleading or any part thereof.
j. Both appellate courts will have power to decide certain categories of cases without oral arguments if parties consent. The Appellate Division may also sit with two judges (instead of three) if the parties agree and the court considers it appropriate to so sit.

Efficiency and Flexibility

At one level, these changes to the appellate structure are plainly geared towards improving the efficiency of the disposal of appeals. As mentioned, one obvious effect of the reform is to split the Court of Appeal's present workload with a new appellate body.

There are also other procedural innovations to further efficiency and flexibility, such as the introduction of hearings on paper or by a two-judge court in the Appellate Division. Any concern that a litigant might not have a "full hearing" is balanced by (i) allowing the dispensation of oral arguments only in certain categories of cases, and (ii) ensuring that the consent of the parties and the court is obtained before a two-judge panel is constituted for substantive hearings.

Also generating greater efficiency is that leave applications will be heard by the appellate body to which the appeal is being made. It has always been slightly awkward to seek leave from the same court that decided the matter at first instance. This particular reform is not only procedurally more efficient, but entirely sensible. Such leave applications could be dealt with on paper as well, further promoting the efficient allocation of judicial resources.

More Appellate Resources and the Development of the Law

Another effect of the reforms is that more judicial resources will be devoted to appellate work, potentially leading to more extensive development of the

content of Singapore law, which has already grown significantly since independence.[4] This may be seen in a few ways.

First, and most obviously, the introduction of new Appellate Division judges means that there will be two benches of permanent appellate judges. There are indications that at least three Judges from the current High Court will be appointed as Judges of the Appellate Division.[5] Presently, of course, the Court of Appeal has been coping with the increase in case load by requesting High Court Judges to sit from time to time.[6] Such *ad hoc* enlistments will continue to be permitted after the latest amendments, both in the Court of Appeal and the Appellate Division,[7] but the creation of an additional, permanent slate of appellate judges should allow for more judicial time to be devoted to appellate work within the Supreme Court. This is perhaps similar to how the establishment of a list of permanent Court of Appeal judges in 1993 may have contributed to increased judicial output.[8] We might thus expect to see the case law in Singapore grow and develop quicker than before. Not only should more cases be disposed of within a given period of time, expertise will be gained by the panels of judges on those subjects that more routinely come before them.

Second, there will be more avenues for appeals, potentially generating more reasoned appellate judgments. As mentioned, certain interlocutory matters may also now be appealed from the General Division to the Appellate Division with leave. This seeks to "*refine the balance between procedural efficiency and also fairness to the parties*".[9]

We have already discussed a new category of cases raising points of law of public importance, in respect of which there may be as many as three levels of hearings. One might even foresee five-judge panels of the Court of Appeal to be regularly assembled in cases emanating from a three-judge panel in the Appellate Division. That has not happened frequently so far.[10] It could change if the Court of Appeal continues to customarily retain a permanent membership of five judges, making it even more practicable in appropriate cases for a five-judge panel to be assembled. Indeed, the combined expertise of a greater number of appellate judges being brought to bear on complex appeals will be conducive to the development of Singapore law.

Finally, with the workload shared between two appellate bodies, each will have more time and resources to devote to cases raising complex and novel legal issues. The categories of appeals that may be filed directly with the Court of Appeal were also curated on the basis that some of them would raise novel issues of law or "*relate to strategic areas that would benefit from the stature of the apex court, such as [those seeking] to bolster Singapore's status as a dispute resolution hub or debt restructuring hub*".[11] This clearly signals a serious intention to develop Singapore law in these key areas.

Stare Decisis

The development of the law is also measured in part by its certainty. In this regard, an interesting question arises as to the application of the rules of precedent to the Appellate Division as well as the Court of Appeal.

When the Appellate Division comes into operation, one possible starting point could be as follows:

a. the Court of Appeal strictly binds the Appellate Division (***Proposition 1***);
b. the Appellate Division is not strictly bound by its own decisions (***Proposition 2***); and
c. the General Division, if faced with a conflict between Court of Appeal and Appellate Division authority, is bound to follow that of the Court of Appeal (***Proposition 3***).

But for one factor, Proposition 1 appears to be beyond question. The possible qualification is that a significant part of the Appellate Division's jurisdiction is explicitly carved out from the Court of Appeal's existing jurisdiction. In certain categories of cases, a matter that would previously have been appealed to the Court of Appeal would now proceed to the Appellate Division. This is likely to comprise a majority of civil appeals. In such cases, should then the Appellate Division be strictly bound by covering decisions of the Court of Appeal handed down ***before*** the Appellate Division came into operation?

A somewhat analogous situation presented itself in England and Wales when the Upper Tribunal was created in 2007 to assume part of the High Court's jurisdiction. Since then it has been held that the Upper Tribunal is not bound by older decisions of the High Court when exercising the transferred jurisdiction.[12] That may not be illuminative of the position in Singapore. The respective legislation creating the Appellate Division and the Upper Tribunal is unmistakably different; another obvious difference is that appeals from the Upper Tribunal typically proceed to the Court of Appeal (and not the High Court) in England and Wales, whereas in Singapore a matter in the Appellate Division would proceed, if at all, only to the Court of Appeal. From the viewpoint of consistency of application of the law, it would be desirable for the Appellate Division to strictly follow all covering decisions of the Court of Appeal, whether those decisions were handed down before or after the Appellate Division came into operation.[13] Having more rigidity here may also assist in avoiding difficult and recurrent struggles with the issue, especially since the types of cases falling respectively within the jurisdiction of the Court of Appeal and of the Appellate Division may be subject to alteration from time to time.

Proposition 2, which says that the Appellate Division is not strictly bound to follow its own decisions, is certainly one plausible way to extend the existing rules governing the treatment of co-ordinate authorities. However, the unique position of that court could give rise to an exception. This may be informed by the practice in civil cases of the Court of Appeal of England and Wales, which sits as an intermediate appellate court between the High Court and the UK Supreme Court.

In civil cases, decisions made by the Court of Appeal of England and Wales are binding on itself save in exceptional cases. The best known of the exceptions are those contained in *Young v Bristol Aeroplane Co Ltd*:[14] (i) the court is bound to decide which of two conflicting decisions of its own it will follow; (ii) the court is bound to refuse to follow a decision of its own which, although not expressly overruled, cannot in its opinion stand with a decision of the House of Lords or the Supreme Court; and (iii) the court is not bound to follow a decision of its own if it is satisfied that the decision was given *per incuriam*.
However, as Master of the Rolls, Lord Denning tried to loosen those fetters, urging on multiple occasions that it was necessary in the interests of justice for the Court of Appeal not to have to follow a previous decision of its own.[15] Those attempts were rebuffed, with Lord Diplock stating in *Davis v Johnson* that:[16]
"*In an appellate court of last resort a balance must be struck between the need on the one side for the legal certainty resulting from the binding effect of previous decisions, and, on the other side the avoidance of undue restriction on the proper development of the law.* ***In the case of an intermediate appellate court, however, the second desideratum can be taken care of by appeal to a superior appellate court, if reasonable means of access to it are available; while the risk to the first desideratum, legal certainty, if the court is not bound by its own previous decisions grows ever greater with increasing membership****…"*
Lord Diplock further elaborated by quoting Scarman LJ's earlier words in *Tiverton Estates Ltd v Wearwell Ltd*:[17] there would be a risk of doubt and confusion arising (where there should be certainty and consistency) if one division of the court refused to follow another because it believed the other's decision to be wrong, in circumstances other than those falling within the exceptions stated in *Young v Bristol Aeroplane Co Ltd*. The appropriate forum for the correction of the Court of Appeal's errors was the House of Lords; an intermediate appellate court needed no power of review over its own decisions.

In the light of these considerations, particularly the goal of realising the advantages of legal certainty and consistency, one might conclude that the

Appellate Division should generally be bound to follow its own decisions, save in limited exceptions similar perhaps to some of those operating in respect of the Court of Appeal in England and Wales, Civil Division. This seems all the more so because, in Singapore, there remains an avenue to obtain leave for further appeal to the Court of Appeal, in cases where the apex court's intervention is needed to resolve a point of law of public importance, or where the interests of the administration of justice so require.

Proposition 3 – that the General Division, if faced with a conflict between Court of Appeal and Appellate Division authority, must follow that of the Court of Appeal – again seems unremarkable, subject to one possible qualification. In certain categories of cases, the appeal must, by default, proceed from the General Division to the Appellate Division, ***not*** the Court of Appeal. An argument might be made that, in such cases, it is the Appellate Division's word that counts. However, that contention becomes unattractive once it is realised that the default route of appeal is ***not*** an absolute one (because there exist avenues for appeals to be transferred between the Appellate Division and the Court of Appeal), and particularly also if, as has been suggested above, the Appellate Division itself is strictly bound to follow all covering decisions of the Court of Appeal, regardless of when they were handed down.

In summary, it is respectfully suggested that the following approach to the operation of *stare decisis* commends itself, balancing as it does the requirements of fairness, justice and certainty, in conjunction with the development of the law:

a. the Appellate Division is bound to follow all covering decisions of the Court of Appeal, whether those decisions were handed down before or after the Appellate Division came into operation;
b. the Appellate Division is bound to follow its own decisions, unless one of the established exceptions (similar to those relevantly operating in respect of the Court of Appeal of England and Wales, Civil Division) applies; and
c. the General Division, if faced with a conflict between Court of Appeal and Appellate Division authority, is bound to follow that of the Court of Appeal.

Conclusion

The recent reforms to the appellate structure will achieve much more than assist in easing the workload of the Court of Appeal. Its likely effect is also to enlarge the volume of potential appeals, in combination with an expansion of the number of judges who will perform an appellate adjudicatory function on a permanent basis. Over time, this should lead to a more focused and efficient allocation of judicial resources commensurate with the complexity and importance of cases brought before the courts. Inasmuch as more judicial resources are being dedicated to the disposal of appeals, the reforms

may also create the need for specialism in appellate work at the Bar. This is particularly so in matters before the Court of Appeal in terms of being able to present the client's case as one deserving of leave, and to assist that court in coming to decisions on complex and important matters. Our prediction is that the reforms will, collectively, enhance the development of Singapore law, and are therefore to be welcomed.

The authors are grateful for the views of Professor of Law Goh Yihan, Dean, Singapore Management University

Endnotes

1. ↑ Second Reading of the Supreme Court of Judicature (Amendment) Bill (5 November 2019) (Mr Edwin Tong Chun Fai, Senior Minister of State for Law and Health); available at https://sprs.parl.gov.sg/search.
2. ↑ *Ibid*.
3. ↑ *Ibid*.
4. ↑ See generally Goh Yihan and Paul Tan (eds), *Singapore Law: 50 Years in the Making* (Academy Publishing, 2015).
5. ↑ Second Reading, *supra* n 1.
6. ↑ Sundaresh Menon, "Response by Chief Justice Sundaresh Menon" (Opening of Legal Year 2018) (8 January 2018) para 7; "Response by Chief Justice Sundaresh Menon" (Opening of Legal Year 2019) (7 January 2019) para 18.
7. ↑ Constitution of the Republic of Singapore (Amendment) Act 2019, s 6 (amending Constitution of the Republic of Singapore, art 94).
8. ↑ Goh Yihan and Paul Tan, "The Development of Local Jurisprudence", in *Singapore Law*, *supra* n 4, para 3.17.
9. ↑ Second Reading, *supra* n 1.
10. ↑ See, for one example under the present appellate structure, *Public Prosecutor v Lam Leng Hung* (2018) 1 SLR 659. For a general discussion of five-judge panels in the Court of Appeal, see Lau Kwan Ho, "Enlarged Panels in the Court of Appeal of Singapore" (2019) 31 SAcLJ 907.
11. ↑ Second Reading, *supra* n 1.
12. ↑ *Secretary of State for Justice v RB* (2011) MHLR 37 at (40)–(47); *Gilchrist v Revenue and Customs Commissioners* (2015) Ch 183 at (85)–(89).
13. ↑ In related vein, note also the government's stated view (probably not immediately binding upon the courts) that a Court of Appeal decision would have precedence over decisions of the Appellate Division, regardless of whether the decision in question was issued before or after the establishment of the Appellate Division; see Second Reading, *supra* n 1.
14. ↑ *Young v Bristol Aeroplane Co Ltd* (1944) KB 718 at 729–730. Other limited exceptions have also been established since 1944 (see *Actavis UK Ltd v Merck & Co Inc* (2009) 1 WLR 1186 at (85)–(107); *Symbian Ltd v Comptroller General of Patents, Designs and Trade Marks* (2009) Bus LR 607 at (33)–(36); *Patel v Secretary of State for the Home Department* (2013) 1 WLR 63 at (59); *R (DN (Rwanda)) v Secretary of State for the Home Department* (2018) 3 WLR 490 at (40)–(41)).
15. ↑ See generally the discussion in Hazel Carty, "Precedent and the Court of Appeal: Lord Denning's Views Explored" (1981) 1 *Legal Studies* 68. Reference may be made also to CEF Rickett, "Precedent in the Court of Appeal" (1980) 43 *Modern Law Review* 136; Peter Aldridge, "Precedent in the Court of Appeal – Another View" (1984) 47 *Modern Law Review* 187.
16. ↑ *Davis v Johnson* (1979) AC 264 at 326 (emphasis added).
17. ↑ *Tiverton Estates Ltd v Wearwell Ltd* (1975) Ch 146 at 172–173.