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Revisiting remedies and the legality-merits distinction in Singapore administrative law: *CBB v Law Society of Singapore* [2021] SGCA 6

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Abstract:

It is a general principle of administrative law that the courts will not compel a decision-maker to perform a public duty in a particular manner by way of a mandatory order. However, in *CBB v Law Society of Singapore* [2021] SGCA 6, the Singapore Court of Appeal notably accepted that an exception could be made to this general principle where there was only one reasonable way to perform the public duty in question. Beyond the decision's obvious ramifications for the law relating to public law remedies in Singapore, this note argues that the Court of Appeal's reasoning has significant implications for administrative law in Singapore more broadly. Indeed, the Court's ruling is indicative of a shift in attitude towards the legality-merits distinction, a foundational principle of administrative law in Singapore.

Keywords: Legality-merits distinction, mandatory order, public law remedies, judicial review, grounds of review, administrative law

Introduction

It is widely understood that judicial review of an administrative decision is directed against the legality of the decision-making process and not the merits of the decision proper.¹ However, in *CBB v Law Society of Singapore* (*CBB*),² the Singapore Court of Appeal accepted that the court could, in exceptional circumstances, order a decision-maker to perform its public duty in a particular manner where there is only one reasonable means of performing the duty. This note will argue that the Court of Appeal's analysis in *CBB* has significant implications, not just for the law relating to public law remedies, but also for administrative law in Singapore more broadly. Indeed, the Court's reasoning has important ramifications for the legality-merits distinction in administrative law—a fundamental principle in the law of judicial review in Singapore.

Facts and decision

In *CBB*, the appellant filed a complaint against a lawyer with the respondent, the Law Society of Singapore, in relation to the lawyer's assistance of the appellant's mother with certain legal work. However, some parts of the appellant's complaint involved matters that had occurred more than six years before the date of the complaint. This meant that the Council of the Law Society of Singapore (the Council) was required to seek leave of court under s 85(4C)(a) of the Legal Profession Act 2009 (LPA) before it could refer the lawyer's conduct to the Chairman of the Inquiry Panel.³ The Council declined to seek leave of court on the basis that the complaint was made by the appellant in his personal capacity rather than as a client, and also because the events in the complaint were time-barred.

The appellant subsequently commenced judicial review proceedings in the Singapore High Court to set aside the Council's decision and obtain a mandatory order for the Council to apply for leave of court.⁴ While curiously invoking the *Wednesbury* unreasonableness ground of review, the High Court's decision was in substance premised on the relevant considerations ground of review.⁵ Indeed, the High Court held that the Council's decision was unreasonable in the *Wednesbury* sense because it was irrelevant to the disciplinary process that the complaint was filed by someone other than the lawyer's client.⁶ The High Court also found that the Council had focused entirely on the applicant's failure to bring the complaint sooner, while neglecting the merits of the complaint.⁷ Accordingly, the High Court granted a quashing order against the Council's decision and issued a mandatory order directing the Council to reconsider its decision.⁸ In doing so, the High Court reaffirmed the traditional legality-merits distinction in administrative law, as well as the principle that the court cannot substitute its own views for those of the decision-maker.⁹

Unsatisfied, the appellant appealed the High Court's decision and sought a mandatory order compelling the Council to apply for leave of court pursuant to s 85(4C)(a) of the LPA. In its judgment, the Court of Appeal first emphasised the principle pronounced in *R v Justices of Kingston ex p Davey (Justices of Kingston)*¹⁰ that the court may direct the decision-maker to perform its duty, but not to perform it in a particular way.¹¹ In reaffirming this principle, the Court of Appeal stressed that the court's concern lies with the legality of the decision-making process and not with its merits, and that a substitution of a decision-maker's decision with the court's would undermine the doctrine of separation of powers.¹² This is a well-established principle of Singapore administrative law that has been reaffirmed on several occasions.¹³ The Court of Appeal also acknowledged that the *Justices of Kingston* principle would apply with greater force in the present case where the error pertained to the decision-maker's exercise of discretion, and noted that in such cases a quashing or prohibitory order would generally be a more suitable remedy.¹⁴

Nevertheless, after a careful examination of case law from Singapore, the United Kingdom, and Australia, the Court of Appeal accepted that an exception to the *Justices of Kingston* principle could be made under certain limited circumstances.¹⁵ Specifically, the Court held that it could grant a mandatory order for a public duty to be performed in a particular manner in situations where there was only one reasonable way to perform the public duty, even where a discretionary power was concerned.¹⁶ The Court of Appeal permitted this exception in recognition of the fact that there are some duties inherent within discretionary powers such that a sharp distinction cannot be drawn between duties and discretionary powers.¹⁷ Indeed, a decision-maker effectively has a duty to perform a particular action if that action is the only reasonable way the decision-maker may exercise its discretion.¹⁸ The Court of Appeal considered that such an exception might further the purpose of sound public administration, for instance, by deterring decision-makers from seeking to conceal their non-performance of a public duty behind a refusal to disclose reasons.¹⁹

The Court articulated the following factors that should be taken into account in assessing whether the performance of a public duty must be performed in a certain manner: (i) the availability of objective evidence relevant to the merits of the decision; (ii) the court's institutional competence; (iii) the decision-maker's conduct; (iv) the absence of other reasons militating against the grant of a mandatory order; and (v) the absence of alternative ways of carrying out the duty.²⁰

Applying these factors to the facts, the Court of Appeal held that *CBB* fell within the scope of the exception. First, there was ample basis for assessing the conduct complained of as the appellant's complaint arose out of proceedings that had reached the Court of Appeal.²¹ Second, the discipline of lawyers was ultimately under the control of the court, so the court possessed ample institutional competence in relation to the subject matter at hand.²² Third, the Council appeared to have taken no steps to reconsider its decision eleven months after the High Court decision.²³ Fourth, there were no reasons militating against the grant of a mandatory order.²⁴ Fifth, the Council could not arrive at any other decision apart from seeking leave of court. Specifically, upon an analysis of s 85(4C)(a) of the LPA, the Court of Appeal held that the relevant

factors the Council ought to have considered in deciding whether to seek leave of court were the length of the delay, the prejudice occasioned by the delay, the explanation put forward for the delay, and the prospects of the complaint.²⁵ Based on these four factors, the Court of Appeal held that the only reasonable way for the Council to exercise its discretion was to apply for leave of court.²⁶ Accordingly, the Court of Appeal issued a mandatory order requiring the Council to do so.

Comment

The Court of Appeal's decision to grant a mandatory order in such terms and in such circumstances is quite remarkable. Ordinarily, in situations such as those in *CBB*, the Singapore courts refrain from compelling the exercise of a discretionary power in a specific manner to avoid contravening the principle of separation of powers and overstepping their constitutionally-prescribed boundaries.²⁷ Generally, the preferred remedy in such cases is a mandatory order directing the decision-maker to reconsider its decision. Indeed, the terms of the Council's statutorily-granted power clearly indicate that the Council was vested with the *discretion* to apply for leave of court to refer a complaint to the Chairman of the Inquiry Panel where the complaint was made out of time (s 85(4C) of the LPA begins with the words '[t]he Council *may*, with the leave of the court' (emphasis added)). *CBB* therefore presented a prime example of a case in which the court would ordinarily refrain from compelling a decision-maker to exercise its discretion in a particular manner.

As noted above, the Court of Appeal acknowledged the distinction between compelling the performance of a statutorily-required duty and the exercise of a discretionary power. It also recognised that the situation at hand involved the exercise of a discretionary power.²⁸ Nevertheless, the Court considered that the circumstances in this case warranted an exception to the general rule that a court would not compel a decision-maker to exercise its power in a specific manner.

The Court of Appeal's willingness to make an exception in these circumstances is noteworthy. On the facts of the case, the Court could simply have directed the Council to reconsider *and* provide reasons for its decision. The Court itself noted that had the Council done so, this could have obviated the need for a mandatory order in specific terms.²⁹ Therefore, had the Court framed the remedy in this way, such a remedy would have addressed in large part what the Court found objectionable about the Council's behaviour—that is, the Council's inaction and silence. Crucially, such a remedy would have also kept the Court well and clearly within the established boundaries of judicial review orthodoxy in Singapore.

The Court of Appeal's line of reasoning does find support in English case law. Specifically, the courts in the United Kingdom have recognised the principle that a mandatory order may be granted in circumstances where there is only one reasonable outcome.³⁰ However, it should be observed that the English courts have demonstrated considerable reluctance to grant such mandatory orders. For example, in *R (on the application of A) v Ealing London Borough Council*,³¹ the claimant sought a mandatory order that they be entered on the Ealing London Borough Council's Housing Register, arguing that the problems with the defendant's housing allocations policy meant that this was the only reasonable outcome open to the defendant. Although the High Court recognised the force in the claimant's arguments—that the defendant's housing allocation policy was discriminatory and in breach of Article 14 of the European Convention on Human Rights—the Court refrained from making a mandatory order. The Court held that while the claimant's arguments were 'highly material factors to be taken into account in a decision making process', whether these factors were decisive was up to 'the decision maker balancing all of the relevant factors at the time of its decision making reconsideration process'.³²

The Court of Appeal's decision to grant a mandatory order compelling the exercise of a discretionary power in *CBB* is certainly not without justification. One might note that the circumstances at hand related to the discipline of lawyers, a subject matter that falls squarely within the institutional competence of the court

(unlike the allocation of housing). This justifies the Court's willingness to be more interventionist here. Further, the issue before the Court of Appeal was whether a mandatory order should be granted to direct the Council to make an *application for leave of court*—a mandatory order that is surely different in substance from one compelling a municipal authority to place a person on the housing register. While the latter confers a final substantive remedy, the former merely moves the decision-making process a step forward.

Nevertheless, the Court of Appeal's willingness to recognise that exceptional situations may justify the grant of a mandatory order to compel an exercise of discretionary power has interesting broader implications for Singapore administrative law. Indeed, this decision may portend a revised perspective towards the legality-merits distinction in administrative law. In particular, the Court of Appeal's decision may indicate that the Singapore courts are becoming less inclined to view the legality-merits distinction as a strict formal rule which provides an independent justification for rejecting judicial review applications³³ or refusing to expand the grounds of review.³⁴ Instead, *CBB* demonstrates that the courts are increasingly willing to adopt more *substantive* reasoning in relation to the legality-merits distinction—reasoning concerned with whether the rationale behind the distinction holds in the circumstances, and whether an exception ought to be made to the distinction on the facts. Accordingly, the nature of the Court of Appeal's reasoning in *CBB* suggests that the legality-merits distinction may be more elastic than was once thought in Singapore administrative law.

This elasticity as to the legality-merits distinction can have important implications for the Singapore courts' acceptance of various grounds of review. Grounds of review that have been accepted in other common law jurisdictions have yet to be accepted by the Singapore courts on the basis of the distinction. For instance, while the Court of Appeal has yet to firmly land on whether the doctrine of substantive legitimate expectations is a feature of Singapore administrative law, the Court in *SGB Starkstrom Pte Ltd v Commissioner for Labour*³⁵ expressed concern as to whether an acceptance of the doctrine would contravene the legality-merits distinction. The doctrine of proportionality has also been rejected as a ground of review in Singapore law on similar grounds.³⁶ In the wake of *CBB*, one might wonder whether a rejection of these grounds of review as part of Singapore law is still a foregone conclusion.

In response, it might be argued that *CBB* concerned the proper remedy to be awarded, not the applicability of grounds of review, and that one would therefore be reading too much into the case by suggesting that the decision could also have implications for grounds of review. It is suggested, however, that reasoning relating to remedies in public law can bear implications for grounds of review. For example, while *CBB* was indeed primarily concerned with the proper public law remedy that should be awarded, the Court of Appeal's reasoning drew upon principles relevant also to the grounds of review. The Court's reasoning relating to the fifth factor it identified as a guide for determining if a mandatory order ought to be granted is particularly instructive. This factor was concerned with whether there was an alternative means by which the decision-maker could have performed its duty.³⁷ In *CBB*, the Court of Appeal discerned the relevant considerations that the Council ought to have taken into account in deciding whether to make an application for leave of court under s 85(4C)(a) of the LPA as the length of delay, any prejudice occasioned by the delay, the explanation for the delay, and the prospects of the complaint.³⁸ Crucially, the Court found that '[h]aving regard to these four factors, we were unable to see how the Council could arrive at any other decision apart from bringing the relevant application for permission to move the complaint forward'.³⁹ This conclusion is quite striking. The Court of Appeal's analysis echoes the reasoning required by the relevant considerations doctrine in judicial review. This doctrine is traditionally limited to prescribing the relevant considerations that decision-makers ought to take into account in decision-making, leaving it to the decision-maker in question to decide the proper weight to be accorded to each consideration.⁴⁰ Yet, while drawing upon the principles of the relevant considerations doctrine, the Court of Appeal goes further than the doctrine would usually require by prescribing the single reasonable outcome of a decision-making process after taking these considerations into account. The point to be emphasised for present purposes is that reasoning relating to public law remedies—as the context was in this case—can bear implications

for grounds of review as well. Indeed, the reasoning adopted by the Court of Appeal in this regard is directly transplantable to the context of determining whether the relevant considerations ground of review is successfully made out on the facts—the very ground of review which the High Court had in substance relied upon in granting the judicial review application in the same case.⁴¹

In sum, *CBB* promises to be a landmark decision in Singapore administrative law, and it will be interesting to observe how the Singapore courts will develop the ideas contained within it in subsequent cases.

Disclosure statement

No potential conflict of interest was reported by the authors.

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Notes

1 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] SGCA 27 (Singapore Court of Appeal (SCA)) [56].

2 [2021] SGCA 6 (SCA).

3 Legal Profession Act (Cap 161, 2009 Rev Ed) (Singapore), s 85(4C)(a).

4 *CBB v Law Society of Singapore* [2019] SGHC 293 (Singapore High Court (SHC)).

5 *ibid* [84]–[86].

6 *ibid* [84], [86].

7 *ibid* [85]–[86].

8 *ibid* [92].

9 *ibid* [65], [86].

10 (1902) 86 LT 589 (England and Wales High Court (EWHC)).

11 *CBB* (n 2) [7]–[8].

12 *ibid* [7], [19].

13 *Re San Development Co's Application* [1971–1973] SLR(R) 203 (SHC) [15]; *Borissik Svetlana v Urban Redevelopment Authority* [2009] SGHC 154 (SHC) [21]; *Axis Law Corp v Intellectual Property Office of Singapore* [2016] SGHC 127 (SHC) [56].

14 *CBB* (n 2) [8].

15 *ibid* [9]–[19].

16 *ibid* [19].

17 *ibid* [25].

18 *ibid* [19].

19 *ibid* [26].

20 *ibid* [19].

21 *ibid* [20], [28].

22 *ibid* [21], [29].

23 *ibid* [22], [30].

24 *ibid* [23], [31].

25 *ibid* [33].

26 *ibid* [24], [32]–[37].

27 *ibid* [7]–[8].

28 *ibid* [7]–[19].

29 *ibid* [30].

30 See, eg, *R v Ealing London BC, ex p Parkinson* (1995) 29 HLR 179 (EWHC).

31 [2015] EWHC 4108 (Admin) (EWHC).

32 *ibid* [57].

33 *Wong Keng Leong Rayney v Law Society of Singapore* [2006] SGHC 179 (SHC) [79].

34 *SGB Starkstrom* (n 1) [59]–[62]; *Chee Siok Chin v Minister for Home Affairs* [2005] SGHC 216 (SHC) [87]; *Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135 (SHC) [58]–[60]. See also Kenny Chng, ‘Form and Substance in Singapore Constitutional and Administrative Law’ (2020) 15 *Asian Journal of Comparative Law* 363.

35 *SGB Starkstrom* (n 1) [59]–[62].

36 *Chee Siok Chin* (n 34) [87].

37 *CBB* (n 2) [24].

38 *ibid* [33].

39 *ibid* [34].

40 See, for example, the statement of the doctrine in *R v Somerset County Council, ex p Fewings* [1995] 1 WLR 1037 (England and Wales Court of Appeal) 1049–1050.

41 *CBB* (n 4) [78]–[85].