Tan Tiang Hin Jerry v Singapore Medical Council
[2000] SGCA 17

Case Number : CA 144/1999

Decision Date : 23 March 2000

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Tan Lee Meng J; L P Thean JA

Counsel Name(s) : Engelin Teh SC, Thomas Sim and Juliana Lee (Engelin Teh & Partners) for the appellant; Philip Fong, Chang Man Phing and Chua Sui Tong (Harry Elias Partnership) for the respondents

Parties : Tan Tiang Hin Jerry — Singapore Medical Council

Administrative Law – Administrative discretion – Unreasonableness – Irrationality – Proportionality – Whether decision of Complaints Committee to send matter for further inquiry before Disciplinary Committee unreasonable, irrational and disproportionate

Administrative Law – Disciplinary proceedings – Time limits – Time frame for appointing Disciplinary Committee – Whether time limit breached – Whether breach mere irregularity or sufficient to nullify disciplinary process – s 41(3) Medical Registration Act (Cap 174, 1998 Rev Ed)

Administrative Law – Disciplinary proceedings – Time limits – Time frame within which applicant has to be informed of further inquiry by Disciplinary Committee – Whether time limit breached – ss 40(14) & 41(5) Medical Registration Act (Cap 174, 1998 Rev Ed)

Administrative Law – Natural justice – Audi alteram partem – Charges of advertising and promotion for further inquiry by Disciplinary Committee – Whether applicant given right to be heard by Complaints Committee on allegation of advertising and promotion before charges framed against him

Administrative Law – Natural justice – Nemo judex in causa sua – Composition of Disciplinary Committee – Apparent bias or reasonable suspicion or apprehension of bias – ss 40(4), 42(1) & 42(2) Medical Registration Act (Cap 174, 1998 Rev Ed)

Administrative Law – Remedies – Certiorari – Disciplinary proceedings – Jurisdiction of Complaints Committee of Singapore Medical Council in conducting inquiries into complaints – Whether inquiry going beyond scope of complaint – Whether charges framed relate to matters complained of – s 40(14) Medical Registration Act (Cap 174, 1998 Rev Ed)

(delivering the judgment of the court): ***Introduction***

This appeal concerns the disciplinary proceedings instituted by the Singapore Medical Council (`SMC`), the respondent, against one Dr Jerry Tan Tiang Hin (`Dr Tan`), the appellant. In the proceedings below, Dr Tan applied for an order of certiorari to quash the decision of the Complaints Committee of the SMC that certain matters arising from a complaint made to the SMC be referred to the Disciplinary Committee and also for an order of prohibition prohibiting the Disciplinary Committee of the SMC from holding an inquiry into two charges framed by the SMC against him touching his professional conduct. The application was dismissed by the High Court, and against the decision, this appeal is now brought.

Background

Dr Tan is an ophthalmologist and a registered medical practitioner under the Medical Registration Act (Cap 174, 1998 Ed) (`MRA`). He owns and runs a clinic, Jerry Tan Eye Surgery Pte Ltd, at Gleneagles Medical Centre. At all material times, he owns one-third of the shares in a company called Excimer

Centre Pte Ltd, which owns another company called Specialist Eyecare Pte Ltd. This latter company, in turn, owns an optical shop known as Specialist Eyecare Centre (`the optical shop`) as well as an eye clinic known as Specialist Eyecare Clinic (`the eye clinic`). The optical shop and the eye clinic are located next to each other at Great World City Shopping Mall situated at Kim Seng Road. The optical shop, which carries on the business of providing spectacles, contact lenses and other optical products, commenced business on 28 October 1997 and is managed by one Mr Francis Wong. The eye clinic commenced the practice of ophthalmology under one Dr Daniel Sim on 4 December 1997. The licence for the eye clinic was at all material times in the name of Dr Tan but was transferred to Excimer Centre Pte Ltd on 9 April 1999.

On 26 January 1998, an article under the title `New eyecare chain opens $2m shop in Singapore` appeared in ***The Business Times*** . This article was based on an interview with Mr Francis Wong and alluded, amongst other things, to the optical shop having `a licensed eye clinic under the same roof`.

About two months later, on 8 April 1998, Dr Cheong Pak Yean (`Dr Cheong`), the president of the Singapore Medical Association (`the SMA`) at the time, wrote a letter of complaint relating to the optical shop and the eye clinic to the SMC. We shall refer to this letter of complaint in detail shortly. The chairman of the Complaints Committee of the SMC, Dr Wong Poi Kwong, by a letter to Dr Tan dated 21 April 1998 forwarded a copy of this complaint and invited him to submit a written explanation on the complaint, and also informed him that his explanation and any accompanying enclosures could be used `as evidence in subsequent action`. Dr Tan replied by a letter dated 20 May 1998, providing the Complaints Committee with his explanation of the matters complained of by Dr Cheong and denying the allegations contained in Dr Cheong`s complaint, which, in Dr Tan`s own words, were `based on allegations of conflict of interest etc`.

About seven months later, on 18 December 1998, the Complaints Committee wrote to Dr Tan informing him that it had decided to place the matter before the Disciplinary Committee of the SMC. Three months after this, on 25 March 1999, the SMC`s solicitors, Messrs Harry Elias Partnership, wrote to Dr Tan enclosing a notice of inquiry setting out the two charges that would be preferred against him. The charges are:

> *1 That you, Dr Jerry Tan Tiang Hin, are charged that sometime in January 1998, whilst the licensee of Specialist Eyecare Clinic at [num]01-38A, 1 Kim Seng Promenade, Great World City, Singapore 237994 (`the Clinic`), and whilst a shareholder and director of Specialist Eyecare Centre at [num]01-38, 1 Kim Seng Promenade, Great World City, Singapore 237994, which is a shop in the business of retail eyewear (`the Shop`), you did improperly attempt to profit at the expense of professional colleagues by advertising the services offered by the Clinic, to wit, you allowed and/or acquiesced to the publication of an article dated 26 January 1998 in* ***The Business Times*** *entitled ` **New eyecare chain opens $2m shop in S`pore** ` containing laudatory statements about the Clinic, and in relation to the facts alleged you have been guilty of infamous conduct in a professional respect.*
>
> *2 That you, Dr Jerry Tan Tiang Hin, are charged that sometime in January 1998, whilst the licensee of Specialist Eyecare Clinic at [num]01-38A, 1 Kim Seng Promenade, Great World City, Singapore 237994 (`the Clinic`), and whilst a shareholder and director of Specialist Eyecare Centre at [num]01-38, 1 Kim Seng Promenade, Great World City, Singapore 237994, which is a shop in the business of retail eyewear (`the Shop`), you did bring the medical profession into disrepute, to wit, you allowed and/or acquiesced to the Clinic being used in*

> *the promotion of the Shop in an article dated 26 January 1998 in* ***The Business Times*** *entitled ` **New eyecare chain opens $2m shop in S`pore** ` and in relation to the facts alleged you have been guilty of infamous conduct in a professional respect.*

The hearing before the Disciplinary Committee was fixed for 5 July 1999. However, before that date, there was a flurry of correspondence between Dr Tan`s solicitors and the solicitors for the SMC regarding Dr Tan`s queries on the following matters: the completion date of the Complaints Committee`s inquiry into the matter, the members who would constitute the Disciplinary Committee and the minutes of the meeting at which it was decided to place the matter before the Disciplinary Committee. Dr Tan was not satisfied with the answers from the SMC, and on 12 June 1999 he filed an originating summons seeking judicial review of the Complaints Committee`s decision. In the originating summons, Dr Tan applied for an order of certiorari to quash the decision of the Complaints Committee that a formal inquiry be held by a Disciplinary Committee to hear the two charges and an order of prohibition prohibiting the Disciplinary Committee appointed by the SMC from holding an inquiry into the two charges and from making any orders in respect of the two charges against him.

Before the court below Dr Tan advanced mainly five grounds in support of his application for the order of certiorari and one ground for his application for the order of prohibition. The trial judge hearing the application rejected all his grounds and dismissed the application. Against the decision of the learned judge, Dr Tan now brings this appeal. Before us counsel for Dr Tan raises the same grounds as were raised below. Principally, there are six grounds which we shall consider seriatim.

Powers of Complaints Committee

The first ground relates to the powers of the Complaints Committee in conducting an inquiry under s 40(14) of the MRA, which provides as follows:

> *A Complaints Committee shall inquire into the complaint or information and complete its preliminary inquiry not later than 3 months from the date the complaint or information is laid before it.*

It is contended by counsel for Dr Tan that s 40(14) of the MRA limits the powers of the Complaints Committee in inquiring into a complaint. In this case, the Complaints Committee was only entitled to inquire into the complaint raised by Dr Cheong and no further. Dr Cheong`s complaint only relates to the matter of Dr Tan`s shareholding in the optical shop and raised the question of whether by reason of this interest Dr Tan had compromised the independence expected of him as an ophthalmologist, as a potential conflict could arise between his duty to his patients and his financial interest in the optical shop. The Complaints Committee was not entitled to go beyond the scope of that complaint, as the complaint forms its terms of reference and demarcates the boundaries of its powers of inquiry. It could only inquire into the question of whether Dr Tan`s shareholding in the optical shop amounted to professional misconduct on the part of Dr Tan. The Complaints Committee, however, in inquiring into the complaint had ventured beyond the scope of Dr Cheong`s complaint, and went on to inquire into extraneous matters which resulted in the SMC framing the two charges against him: the first charge relating to advertising the services offered by the eye clinic, and the second charge relating to the use of the eye clinic in the promotion of the optical shop.

Counsel for the SMC does not dispute that under s 40(14) of the MRA the Complaints Committee was only entitled to inquire into the complaint laid before it. However, his contention is that the matters raised in the two charges were a part of the complaint and the Complaints Committee was therefore entitled to inquire into those matters which it did, and consequently the SMC was entitled to frame the two charges for the inquiry before the Disciplinary Committee.

The learned judge was also of the view that the Complaints Committee in conducting the inquiry into the complaint must act within the scope of its power under s 40(14) of the MRA. He said at [para] 7 of his judgment:

> *I think that it is beyond dispute that the Complaints Committee must act within the scope of its powers as the Act may confer. Its duty under the Act obliges it to inquire into such complaint as the Chairman of the Complaints Committee may lay before it. It follows as a matter of common sense that it should focus on the complaint and nothing more. It is obvious that the Complaints Committee must not take into account matters that are extraneous and irrelevant to the complaint.*

However, the learned judge then went further. In the same [para] 7, he continued:

> *It does not follow, however, that the Complaints Committee must be restrained from taking a broad and sensible view of the nature and context of the complaint. The Complaints Committee must not be unreasonably fettered if it is to discharge its statutory duty effectively. How the balance is struck depends on the facts of each individual case.*

He held that on the facts set out by Dr Cheong certain parts of the SMC`s Ethical Code might have been breached and the Complaints Committee was entitled to examine the facts and make its determination thereon. He said at [para] 9 and 10 of his judgment:

> *9 It is axiomatic that the complaint must be considered in its context to see exactly what the complainant was unhappy with. In most instances, the grievance arises from a state of affairs, which is a matter of fact. In this case, it is obvious that the cause of the complaint is the relationship between Dr Tan`s practice and the optical shop, and the possible adverse impressions that might arise as a result of the article in the Business Times. It is, therefore, incumbent upon the Complaints Committee to inquire whether any ethical code has been breached in relation to this state of affairs ...*
>
> *10 It is, therefore, important to ascertain the factual essence in Dr Cheong`s complaint. ... On the facts set out Dr Cheong reckons that certain parts of para 20 of the SMC`s Ethical Code may have been breached and so referred to them as being `possibly relevant`. The ultimate determination whether that is so lies with the Complaints Committee. It will naturally require the Complaints Committee to examine the facts complained of against its own Ethical Code. I am therefore of the view that the Complaints Committee had not strayed out of the complaint in such a way that its decision must be nullified.*

It is contended by counsel for Dr Tan that in these parts of the judgment the learned judge erred.

`(b)(1)	Pharmaceutical Chemists (now known as pharmacies) - A doctor should not have a financial interest in directing his patient to a particular chemist.
(c)	Opticians - The same ethical considerations hold with opticians as with pharmaceutical chemists (now known as pharmacies).`

The issue turns on the scope and substance of Dr Cheong`s complaint, and it is convenient at this stage to set out his complaint in full, which is as follows:

> *Complaint against Dr Jerry Tan Tiang Hin*
>
> *1 This complaint is brought against Dr Jerry Tan Tiang Hin (NRIC No 1234118/J) (`Dr Jerry Tan`) in respect of the following matters:*
>
> *(a) Dr Jerry Tan`s shareholding interest in an optical shop; and*
>
> *(b) the possible conflict between Dr Jerry Tan`s role as a doctor and financial interest in an optical shop.*
>
> *2 Dr Jerry Tan is an ophthalmologist in private practice.*
>
> *3 It came to the attention of the Singapore Medical Association (`the SMA`) by way of an article in **The Business Times** of 26 January 1998 (copy annexed as `A`) that a doctor is a shareholder in Specialist Eyecare Pte Ltd. This doctor was subsequently confirmed through a Registry of Companies & Businesses (`RCB`) search to be Dr Jerry Tan. Specialist Eyecare Pte Ltd operates an optical shop known as Specialist Eyecare Centre at 1 Kim Seng Promenade, [num]01-38, Great World City, Singapore 237994.*
>
> *4 Upon checking the information retrieved from the RCB, it was ascertained that through several tiers of shareholdings, Dr Jerry Tan and his wife Dr Goh Suan Choo jointly hold approximately a 1/3 shareholding interest in Specialist Eyecare Pte Ltd. Copies of the following documents relating to the shareholding structure are annexed as:*
>
> *(a) `B` - a summary of the shareholding of the various parties interested in Specialist Eyecare Centre;*
>
> *(b) `C` - RCB search result of Specialist Eyecare Centre;*
>
> *(c) `D` - RCB search result of Specialist Eyecare Pte Ltd;*
>
> *(d) `E` - RCB search results of The Excimer Centre Pte Ltd, Jerry Tan Eye Surgery Pte Ltd and Capitol Optical Company (Pte) Ltd.*

5 It should be noted that Dr Jerry Tan is also a director in Specialist Eyecare Pte Ltd, apart from some of the other companies stated above.

6 It is felt that Dr Jerry Tan should not be engaged in a business enterprise that may compromise the professional independence that is expected of a medical practitioner in his position. The SMA requests that the Singapore Medical Council rules on whether Dr Jerry Tan`s involvement in the business enterprise (as particularised above) amounts to professional misconduct.

7 The SMA Ethical Code specifically states in Chapter IV - `Relationship with other professions`:

8 A further matter of grave concern arising from the above is the relationship between Specialist Eyecare Centre and the medical clinic known as Specialist Eyecare Clinic.

9 The licensee of Specialist Eyecare Clinic is Dr Jerry Tan. The doctor practising at the clinic is Dr Daniel Sim. The clinic is located just next door to Specialist Eyecare Centre at Great World City. Both share and display the same business logo with the words `Specialist Eyecare`.

10 In relation to the above, the following provisions of para 20 of the Singapore Medical Council Ethical Code are possibly relevant:

`(b)(i) abuse of the relationship between practitioners and patients - improperly exerting undue influence upon a patient in relation to transactions in which the practitioner has an interest,

(e)(ii) conduct discreditable to the practitioner and his profession - carrying on a trade business or calling which is incompatible with and/or detracts from the profession of the practice of medicine and which bring his profession into disrepute.

(f)(i) improper attempts to profit at the expense of professional colleagues - canvassing or touting for patients.`

11 In the newspaper article (annex `A`), the following were stated:

(a) `Besides retailing eyewear, the Specialist Eyecare concept also has a licensed eye clinic under the same roof.`

(b) `This [referring to the above] is different from the usual optical shops which provide eyesight correction services but do not deal with problems like cataracts, said Mr Wong [a director of Specialist Eyecare Pte Ltd].`

(c) `... it is a mega store providing a one-stop solution for eyecare, said Mr Wong ...`

12 Given:

(a) the close links between Specialist Eye Clinic and Specialist Eye Centre and their physical proximity; and

(b) the financial interest that Dr Jerry Tan has in Specialist Eyecare Centre, the possible (sic) of a professional conflict of interest may arise.

13 The SMA requests the Singapore Medical Council to look into the above matters to decide whether all the above taken as a whole constitutes professional misconduct on the part of Dr Jerry Tan.

In considering the complaint, the learned judge was of the opinion that while the Complaints Committee could not take into account matters that are extraneous and irrelevant to the complaint, it did not follow that the Complaints Committee must be restrained from taking `a broad and sensible view` of the matter. He held that the Complaints Committee was entitled to take a `broad and sensible view` of the nature of the complaint and could thus form the conclusion that the question of advertising was also in issue.

The reason for the decision of the learned judge quite clearly lay in his view that `the cause of the complaint lay in the relationship between Dr Tan`s practice and the Shop` and the `possible adverse impressions that might arise as a result of the article in ***The Business Times*** ` and it was therefore incumbent upon the Complainant Committee to inquire whether any Ethical Code had been breached. We agree that the cause of the complaint was the relationship between the eye clinic and the optical shop; but, with respect, we are unable to agree with the learned judge that by reason of the `possible adverse impressions that might arise as a result of the article in ***The Business Times*** `, it was incumbent upon the Complaints Committee to inquire whether any ethical code had been breached. What the Complaints Committee must determine is what was Dr Cheong`s complaint, and having done that it is then incumbent on the Complaints Committee to investigate only such breach or breaches of the provisions of the Ethical Code as relate to that complaint.

In our opinion, it is amply clear from Dr Cheong`s letter that the complaint made was in respect of the shareholding of Dr Tan in the optical shop and the potential conflict between Dr Tan`s role as an ophthalmologist and his financial interest in the Shop. The opening paragraph of the complaint stated in no uncertain terms that the complaint was made against Dr Tan in respect of (i) his shareholding in the optical shop and (ii) the potential conflict between his role as a doctor and his financial interests. The rest of the body of the complaint was devoted to detailing the facts relating to Dr Tan`s shareholding and the close link between the optical shop and eye clinic and the related provisions of the Ethical Code. The penultimate paragraph reiterates the possibility of a professional conflict of interests arising on Dr Tan`s part and nothing more. Clearly, the essence of Dr Cheong`s complaint was Dr Tan`s financial involvement in the optical shop and the potential conflict of interests that might arise as a result.

It is significant that Dr Cheong did not say anything of advertising of the eye clinic or the use of the eye clinic for the promotion of the optical shop. The reference made to ***The Business Times*** article was purely as Dr Cheong`s source from which he had found out that Dr Tan was involved in the optical shop through his shareholding in the holding companies. The reference was not made in relation to advertising by the publication of the article or the use of the eye clinic to promote the optical shop. The reference was to bolster the complaint that the eye clinic and the optical shop were linked in such a manner that gave rise to concerns about the potential conflict that could arise between Dr Tan`s duty to his patients and his financial interests.

Counsel for the SMC argues that in the last paragraph of the complaint Dr Cheong requested the SMC to `look into the above matters and decide whether all the above taken as a whole constitutes professional misconduct on the part of Dr Jerry Tan`, and on that basis the Complaints Committee was entitled to inquire into the matters of advertising and promotion, and decide that there was sufficient information to charge Dr Tan with misconduct in connection with advertising and promotion. We do not think that this is a correct interpretation of the complaint. That paragraph should be read in the context of the whole complaint. The phrase `all the above matters` refers to the complaint of Dr Tan`s financial interest in the optical shop and the conflict between his role as an ophthalmologist and his interest in the optical shop, and is not a request or invitation to the Complaints Committee to consider whether any other form of misconduct had possibly been committed.

It is also submitted by counsel for the SMC that Dr Tan`s response to the complaint indicated that Dr Cheong`s complaint did in fact cover the issue of advertising. This is because Dr Tan had addressed the issue of advertising in his reply, and had enclosed a copy of the letter he had written to the Medical Audit & Accreditation Unit of the Ministry of Health dealing with that issue. We are unable to agree with this argument. The question of whether the Complaints Committee had acted ultra vires its powers of inquiry under s 40(14) of the MRA does not really depend on what Dr Tan said in his response. The crux of the issue is what Dr Cheong complained and not what Dr Tan said in his response.

In the passage of the judgment quoted above, the learned judge said that the question as to which part of the Ethical Code has been breached may be relevant to the Complaints Committee in framing the charge but not essential so far as the complaint is concerned. With respect, we are again unable to agree. The question as to which part of the Ethical Code has been breached must bear some relevance to the complaint. True, as the learned judge said, it was purely fortuitous that the complainant in this case was a doctor and not a lay person and was therefore able to refer to specific portions of the Ethical Code in his complaint. On the other hand, it is precisely that Dr Cheong is familiar with the Ethical Code that he knew exactly what he complained about. He was very specific with regard to the complaint: he said in clear terms what his complaint against Dr Tan was and identified the specific provisions of the Ethical Code which have or may have relevance to his complaint. Dr Cheong only referred to the sections of the Ethical Code dealing with the conflict of interests between doctor and patient, conduct discreditable to the profession through carrying on a trade or business incompatible with the medical profession and improper attempts to profit by canvassing or touting for patients. Dr Cheong did not refer to the provision dealing specifically with the issue of advertising which is different from the act of canvassing or touting. In our opinion, the complaint read as a whole indicated that Dr Cheong was only complaining about Dr Tan`s financial interest in the optical shop and the close relationship between the optical shop and the eye clinic, and by reason of these a potential conflict of interests might arise on Dr Tan`s part. This being the case, by reason of s 40(14) of the MRA it was not open to the Complaints Committee to inquire into any breach of the Ethical Code which has no relevance to the complaint.

The learned judge distinguished the present case from **Re Seah Pong Tshai** [1992] 1 SLR 399 on the basis that in that case the Disciplinary Committee considered the charge based on an allegation of fact which was not the subject of the complaint, which, in his opinion, was not the case here. With respect, we find it difficult to distinguish this case from ***Seah Pong Tshai*** . The facts in that case were briefly these. The complainant made a complaint to the Law Society of Singapore alleging that the respondent solicitor had overcharged him and had not returned a deposit of $1,000 that he had paid. The material part of the complaint was as follows:

> *Re: Complaint of cheating by a lawyer*

I, Ang Beng Kheng, IC 1410117/I, sincerely wish to bring this matter regarding this lawyer, PT Seah & Co ... that he refused to refund $1,000, part of the legal fee which I paid to his assistant Mr Thomas in his office on 17 December 1987 in the present of my friend Petros Lek. That amount was part of the payment for him to represent me in court for a innocent case which I was charged.

However, I terminated his service on 19 December 1987 in the morning before his first appearance in court because it was trickery and I was overcharged. Upon paying the $1,000 legal fee, he only gave me a plain warrant to act receipt for me to fill up the necessary entries without his signature. When I asked for a payment receipt, Mr Thomas only write on top of the warrant to act form saying it was evidence for accepting my fee. He also demanded for extra $1,000 if I want a receipt. The total fee he ask was $4,000 whereas the present lawyer I engaged is $2,000.

Since he is overcharging me and its service is trickery I wanted to take back some of my hard-earned money after deducting whatever cost he might incurred during that three days of service - 17, 18 and 19 December 1987. It is really too much for him to forfeit all my initial fee - $1,000 without even attending any of the court mention. I tried in vain calling him and finally went to his office but he refused to refund part of my legal fee. ... I consulted my present lawyer but was told that he declined [sic] taking my money.

...

... I hereby enclosed the warrant to act form which I received upon payment of my hard-earned legal fee.

The complaint was referred to an inquiry committee which made its findings to the Law Society which then referred the matter to the Disciplinary Committee, and before that committee the Law Society framed a charge alleging that the solicitor had falsely denied the receipt of the said sum. The Disciplinary Committee determined that cause of sufficient gravity existed for disciplinary action and an application was made to show cause why he should not be dealt with under the then s 80 of the Legal Profession Act (Cap 161) (`LPA`). The court of three judges held that the charge framed was different from the complaint both in form and in substance. The complaint was not that the solicitor had falsely denied receipt of the sum of $1,000, although in the complaint the complainant mentioned that the solicitor had denied taking his money. The complaint was that the solicitor had overcharged the complainant and had refused to refund the amount. That was the gravamen of the complaint. The Law Society was thus in error in framing such a charge and bringing it before the Disciplinary Committee for hearing and investigation, as the Disciplinary Committee had no jurisdiction over such a matter and to make a determination thereon. The court said at p 402:

It is clearly evident that the charge so framed was different from the complaint both in form and in substance. The complainant did not complain that the respondent `falsely denied the receipt of the said sum of $1,000`. No doubt it is true that the complainant in his letter said that he consulted his `present lawyer` - that presumably was Mr Guru - and was told that the respondent denied taking his money, and that he therefore sought the Law Society`s assistance to settle the matter `carefully earlier because ["the respondent"] might not admit taking any money`. But these statements, in the context of the letter, were made by the way and were purely incidental to the complaint.

> *The complaint was not that the respondent had falsely denied receipt of the sum of $1,000 but that the respondent had overcharged him and had refused to refund the amount. That, in our opinion, was the gravamen of the complaint. We do not think that the complainant was concerned with the question whether or not the respondent denied receipt of that amount; his concern was the respondent`s refusal to refund that amount, and it was for that purpose that he wrote to the Law Society. The Law Society was in error in framing such a charge and bringing it before the disciplinary committee for hearing and investigation, as the disciplinary committee had no jurisdiction over such a matter and to make a determination thereon.*

The court then reviewed the relevant provisions of the LPA and the relevant cases including the Privy Council`s decision in **Ratnam v Law Society of Singapore** SLR 39 , and concluded thus at p 405:

> *The instant case was certainly much stronger. The subject matter of the charge preferred against the respondent before the disciplinary committee was never inquired into by the inquiry committee. What was referred to and inquired into by the inquiry committee was the complaint as contained in the letter of 22 January 1988 of the complainant. That was the complaint on which the inquiry committee reported to the Council and it is in respect of that complaint that the Council applied to the Chief Justice to appoint a disciplinary committee, and the disciplinary committee was so appointed to hear and investigate that complaint; it had no jurisdiction to hear and investigate anything else other than the complaint. The disciplinary committee was in error in hearing and investigating the charge and making a determination thereon. That error, in our judgment, was unquestionably fatal to the entire proceedings. The order nisi that the respondent show cause must therefore be discharged, and we so ordered.*

Another case which is of some relevance is the English case of **R v Board of Education** [1910] 2 KB 165. In the district of Swansea in England there were two categories of schools: `provided` and `non-provided` schools. The local educational authority gave an increase to the salaries paid to teachers in `provided` schools but did not do likewise for the salaries of teachers in `non-provided` schools. A complaint was made by the Oxford Street school, which was a non-provided school, to the Board of Education that the local education authority was acting in breach of the Education Act 1902 by paying different salaries to teachers in provided and non-provided schools. The Board of Education appointed a barrister, Mr JA Hamilton KC, to hold an inquiry into the matter. After hearing the evidence, Mr Hamilton reported that although Oxford Street school had been maintained and kept efficient, this had been done by the funds provided by the managers of the school and that the school could not be kept efficient unless higher salaries than those which the local authority fixed were paid. The Board of Education decided that there had been no failure on the part of the local education authority to fulfil its statutory duty to maintain the school and that it had not been shown that the money provided by the local education authority was inadequate for the purpose of maintaining and keeping efficient the school in question. The complainant applied for a writ of certiorari to quash the Board of Education`s decision and for a mandamus. The Divisional Court held that the local education authority had no power to discriminate between provided and non-provided schools in the matter of the salaries paid to the teachers and they allowed the application on the ground that the Board had not decided the true question submitted to them. The board appealed and the appeal was dismissed. The Court of Appeal was of the opinion that the question placed before the Board was whether there were any circumstances existing in the school managed by the complainants such as to justify a different treatment from that accorded to provided schools of the same

character. The Board did not address this question at all and there was no indication of the Board`s view on this matter. The Court of Appeal thus upheld the first instance decision to grant the application, holding that the Board had acted in a manner that amounted to a non-exercise of the jurisdiction entrusted to it. Cozens-Hardy MR said at pp 174-175:

> *The Divisional Court held that a writ of certiorari ought to issue on the ground that the question submitted to the Board had not been answered. On this simple ground I am clearly of opinion that the decision of the Divisional Court was correct. The question was formulated in paras 3 and 4 of the letter of 3 February 1908. It was not whether the Oxford Street school was efficient, in the sense of being able to earn a Government grant, but whether there were any circumstances existing in the case of the Oxford Street school such as to justify a different treatment from that accorded to the `provided` schools of the same character. There is nothing in the Board`s decision to indicate that the right to discriminate, about which the whole battle raged, had ever been challenged. Still less is there anything to indicate the view of the Board as to the existence of such a right. It is not alleged that the Board had any materials before them, except Mr Hamilton`s report and the evidence on the inquiry, and there is not a scintilla of evidence to justify the statements in the letter conveying the decision of the Board. It was argued that the Board were entitled to act upon their general knowledge. They do not purport to do so, and I repudiate the suggestion that they could thus wholly disregard and throw aside the materials which they had themselves procured and to which alone they refer.*

Similarly, the `question asked` in Dr Cheong`s complaint was whether Dr Tan`s financial involvement in the optical shop and the close link between that optical shop and the eye clinic would lead to a professional conflict of interests, such that Dr Tan had compromised the independence expected of him as a medical practitioner. In our judgment, the Complaints Committee has no power to inquire into matters beyond the complaint, and the SMC cannot on the basis of Dr Cheong`s complaint proceed against Dr Tan in respect of the charges of advertising and promotion before the Disciplinary Committee.

The principle of audi alteram partem

We now turn to the second ground contended on behalf of Dr Tan. Counsel for Dr Tan submits that the SMC in framing the charges against Dr Tan concerning advertising of the service of the eye clinic and promotion of the optical shop had not given him prior notice of these charges, as the subject matters of these charges were different from the complaint, and that accordingly he was substantially prejudiced by the lack of an opportunity to explain fully to the Complaints Committee and be heard on these charges. Counsel invokes the cardinal principle of natural justice that no person shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard: audi alteram partem. The operation of this rule is reflected in s 40(20) of the MRA. That section provides:

> *Where a Complaints Committee is of the opinion that a registered medical practitioner should be called upon to answer any allegation made against him, the Complaints Committee shall post or deliver to the registered medical practitioner -*
>
> *(a) copies of any complaint or information and of any statutory declaration or*

affidavit that have been made in support of the complaint or information; and

(b) a notice inviting the registered medical practitioner, within such period (not being less than 21 days) as may be specified in the notice, to give to the Complaints Committee any written explanation he may wish to offer.

It is submitted by counsel that Dr Tan was invited to give an explanation only on the matters complained of by Dr Cheong, ie Dr Tan`s shareholding interest in the optical shop and the possibility of a conflict of interest between his duty to his patients as an ophthalmologist and his financial interest in the optical shop. At no time was he asked to give any explanation as to why he allegedly advertised the services of the eye clinic by allowing or acquiescing in the publication of the article, or why he allowed or acquiesced to the eye clinic being used to promote the optical shop. Nor were the allegations of advertising and promotion apparent on the face of the complaint. Nevertheless, the Complaint Committee apparently proceeded to inquire into the matters concerning the advertising and promotion, which resulted in the SMC preferring the two charges against Dr Tan before the Disciplinary Committee.

On the other hand, counsel for the SMC submits that Dr Tan knew that matter of advertising was a major live issue in the complaint and that Dr Tan in his reply to the Complaints Committee dealt with the matter of advertising and in particular he enclosed a copy of the letter dated 12 February 1998 from the eye clinic to the Medical Audit & Accreditation Unit of the Ministry of Health. Dr Tan therefore cannot complain that he had not been given an opportunity to reply to that issue in the complaint.

It is true that in his reply to the Complaints Committee, Dr Tan in two paragraphs dealt with the suggestions of advertising in relation to the publication of the article in ***The Business Times*** . However, reading the lengthy reply as a whole - which consists of some 30 paragraphs - it is clear that his explanation was not in answer to any allegation of advertising or promotion contained in the charges. The references to the issue of advertising in the reply were made in passing and were incidental to the main focus of his reply which was in response to the allegation relating to the potential conflict between his role as a doctor and his financial interest in the optical shop. The main part of the explanation was devoted entirely to answering Dr Cheong`s complaint that his involvement in the optical shop compromised the professional independence that is expected of him as an ophthalmologist. The point to bear in mind is not whether Dr Tan in his reply had touched on the advertising issue but whether looking at the manner in which the complaint was framed and the circumstances in which Dr Tan was asked to give his explanation any notice of the subject matters of the charges was given to Dr Tan. In our judgment, Dr Tan was clearly not given any notice by the Complaints Committee of the charges that were subsequently framed by the SMC.

In **Board of Trustees of the Maradana Mosque v Badiuddin Mahmud & Anor** [1967] 1 AC 13, a school, Zahira College, was an `unaided school` subject to s 6 and s 11 of the Assisted Schools And Training Colleges (Special Provisions) Act of Ceylon. The appellants were a body corporate charged with the administration of a mosque and the school. By s 6(i) the proprietor of an unaided school was bound to pay teachers their salary in respect of any month by a certain time, and by s 6(k) was bound to satisfy the Director of Education that necessary funds to conduct the school would be available. Under the Act, the Minister of Education had the power, if satisfied that an unaided school was administered in contravention of any provisions of the Act, to declare that the school should cease to be unaided school. The Director received two letters of complaint from the unpaid teachers, and one of these alleged that the management did not have the necessary funds to manage the

institution properly. On receipt the Director sent a formal letter of complaint to the appellants that they had contravened s 6(i) of the Act and invited them to show cause why the school should not be taken over under s 11 of the Act. The letter made no reference to s 6(k) and did not invite them to satisfy the Director that necessary funds to conduct and maintain the school were available. The appellants replied and assured the Director that future salaries would be paid on time. Subsequently, an order was made for the school to be taken over for director-management under s 11. Two months later, the Minister made a public statement that the appellants had violated not only s 6(i) but also 6(k) of the Act which pointed to the fact that the appellants had no funds available to pay even a month`s salary of the teachers and in the circumstances the Director had no alternative but to issue the order. The appellants took out an application for an order of certiorari to quash the order issued by the Director. The Supreme Court of Ceylon dismissed the application, but on appeal the Privy Council held that the managers had not been given notice of what was charged against them and allowed to make an answer. The order against the school was thus quashed. Lord Pearce delivering the judgment of the Board said at pp 23-25:

> *So far as a contravention of s 6(i) was alleged, the appellants had fair warning. The director, on 11 August 1961, sent the formal complaint that they had failed so far to pay the salaries of the teachers for the month of July, 1961, and that they had thereby contravened s 6(i) and it concluded with the invitation to show cause why he should not recommend that the school be taken over.*
>
> *The appellants accordingly showed cause in their letter of 15 August 1961. So far as concerned the promise of payment on 18 August and of good behaviour in the future, that answer was satisfactory ...*
>
> *In respect of the complaint under s 6(i), therefore, it cannot be said that the appellants were denied an opportunity of stating their case.*
>
> *They had, however, no notification that any complaint was being made under s 6(k) which is a different and, in this case, more far-reaching matter. If, therefore, an imputed failure under s 6(k) can be shown to have played a material part in the Minister`s decision, the appellants were not fairly treated ...*
>
> *... In their Lordship`s view it is sufficiently established by the government paper that the Minister in making the Order was largely influenced by an alleged contravention of which the appellants had no notice.*
>
> *... In the present case their Lordships cannot assume that the appellants had no means to satisfy the provisions of 6(k). It would appear that the Mosque had funds out of which it lent money to the school in order to provide the greater part of the payment which was tendered to the teachers on 18 August. It may be that, if challenged under 6(k), the appellants would have made funds available to the school for its maintenance. If indeed no funds were available, it seems hardly likely that this appeal would have been launched, since its success would in that case be followed immediately by a fresh order based on a contravention of 6(k).*
>
> *On the appellants` first argument, therefore, the appeal succeeds.*

In **Fairmount Investments Ltd v Secretary of State for the Environment** [1976] 2 All ER 865[1976] 1 WLR 1255, a local council published documents showing reasons for a proposal to purchase compulsorily a number of houses owned by the appellant and a summary of the principal grounds of unfitness of the houses. The summary emphasised settlement in particular as a reason for unfitness. There was no reference to any defects in the foundations in the summary and no mention was made of it at the hearing as well. However, after the hearing, the inspector appointed by the Secretary of State visited the houses and concluded that the settlement was due to the defective foundations. It was based on this opinion that the Secretary of State then confirmed the compulsory purchasing order. It was held that the appellant had no opportunity of refuting the inspector`s observation or showing that the defects could not be repaired and accordingly the decision of the Secretary of State was quashed. Viscount Dilhorne in his speech said at p 1260:

> *The respondents` complaint is twofold. They were given no opportunity of showing that what appeared to the inspector to be the case, was not so in fact. No trial holes had been bored which would have established whether or not the foundations were inadequate. They were given no opportunity of showing that if they were inadequate, that did not make satisfactory rehabilitation not a financially viable proposition.*
>
> *It was on account of his belief as to the inadequacy of the foundations that the inspector, taking that into account with the other defects, ruled out rehabilitation. So it appears that the inspector attached great weight to a factor which formed no part of the council`s case, of which the respondents had not been given notice and with which they had been given no opportunity of dealing.*
>
> *In my opinion there is great substance in the respondents` complaints. Just as it would have been contrary to natural justice if the Secretary of State in making his decision had taken into account evidence received by him after an inquiry without an objector having an opportunity to deal with it, so here in my view it was contrary to natural justice for his decision to confirm the order to be based to a very considerable extent on an opinion, which investigation might have shown to be erroneous, that the foundations were not taken down deep enough, and an opinion, which also might have been shown to be erroneous, that the inadequacy of the foundations showed that rehabilitation was impractical.*
>
> *By the failure to give the respondents any opportunity to deal with these matters, they were in my opinion substantially prejudiced ...*

Lord Russell of Killowen who delivered the other main speech of the House said at p 1265:

> *[I]n this case I am unable, consonant with the essential principles of fairness in a dispute, to uphold this compulsory purchase order. All cases in which principles of natural justice are invoked must depend on the particular circumstances of the case. I am unable, my Lords, in the instant case, to generalise. I can only say that in my opinion, in the circumstances I have outlined, Fairmount has not had - in a phrase whose derivation neither I nor your Lordships could trace - a fair crack of the whip.*
>
> *...*

> *The second point is the question of the sheared tell-tale. Of course we know nothing of the details of this. For the applicant it was argued that this fact should have been known to Fairmount, and so Fairmount should have anticipated a possible conclusion, based on it, as to progressive settlement, and therefore due, in even these old houses, to foundation inadequacy. I agree that it was reasonable for the inspector to suppose that Fairmount knew of the existence of a `tell-tale`, just as in the* ***Paddington Rent Tribunal*** *case it might be supposed that the landlord knew that the ceilings were only eight feet: but that is not the same as reasonably anticipating the inference that might be drawn: and we know nothing of the date of the tell-tale, or of its shearing. Its existence does not persuade me that Fairmount was not taken by surprise in a relevantly unfair way by the conclusions of the inspector accepted by the Secretary of State.*

Another case which is of some assistance is **H Sabey & Co Ltd v Secretary of State for the Environment & Ors** [1978] 1 All ER 586. There, an application by the plaintiffs to the planning authority for the extraction of sand and gravel from certain land was refused on the ground that that the extraction would seriously reduce the agricultural quality of the land and therefore its productivity. The plaintiffs appealed and an inquiry was held at which objection was raised by the Ministry of Agriculture and others. At the inquiry, much of the evidence was directed at the objection that the agricultural quality of the land would be reduced by the extraction. The Ministry led no evidence on the issue whether the removal of the gravel and the replacement by other materials would have adverse effect on the necessary supply of moisture to the land for agricultural purpose. In his report, the inspector found that the removal and replacement of gravel would put at great risk the supply of moisture necessary for high yield to be expected of the land. The Secretary of State accepted the inspector`s report and dismissed the appeal. The plaintiffs applied for an order of certiorari to quash the decision of the Secretary of State. Willis J who heard the application granted the order, holding that there was nothing which emerged during the hearing which could be said to put the plaintiffs on notice that the moisture question was a factor which would have an important bearing on the Secretary of State`s decision and therefore there was nothing which could have alerted them to call evidence on that issue. Willis J said at p 590:

> *On the whole, however, I have come to the conclusion that if there was any evidence on which to base para 214 and the Secretary of State`s decision, as to which I feel very considerable doubt, to have acted on it as he did without giving the applicants the opportunity to deal with it if they could, the Secretary of State acted in breach of his duty audi alteram partem.*
>
> *In the circumstances of this case I do not think anyone is to blame, but I am left with the strong feeling that justice will not be done unless the applicants are afforded an opportunity to present their evidence on the `moisture question` before the Secretary of State reaches his final conclusion. Accordingly, the decision must be quashed.*

Reverting to the present case, it seems to us that if Dr Tan had been informed by the Complaints Committee that it would be inquiring into the allegations of advertising and promotion (referred to in the two charges) he would probably have given a detailed account of his involvement, if any, or the absence of such involvement, in the article in ***The Business Times*** and led evidence, if any, in support. We think that Dr Tan was taken by surprise by the two charges that were subsequently preferred against him. It is impossible to say that if the Complaints Committee had given Dr Tan prior

notice of and an opportunity to be heard on the allegations of advertising and promotion with which he was subsequently charged, the committee might not have decided to refer the matter to the Disciplinary Committee. On this point, it is helpful to remind ourselves of the following observations made by Lord Simon of Glaisdale in ***Ratnam*** (supra) (a case which dealt with, inter alia, a similar point under the LPA) at p 50:

> *It is no light matter for a professional man to have to appear before a disciplinary committee of his professional body. The person who is the subject matter of enquiry might well have such an answer as to ensure that the report of the Inquiry Committee so exculpates him that the Law Society may determine either that no formal investigation is necessary s 88(1)(a) or that the case may be met by a small penalty under s 88(1)(b) and s 89.*

The third ground advanced on behalf of Dr Tan was that he was misled as to the basis on which the Complaints Committee found its decision and that he was precluded from putting his case forward. This ground, in substance, raised the same points which we have just discussed and it is not necessary to deal with it separately.

MRA

The fourth ground advanced on behalf of Dr Tan is that the Complaints Committee and the SMC were in breach of ss 40(14) and 41(3) of the MRA. These provisions deal with the time frames for completion of the preliminary inquiry by the Complaints Committee and the subsequent appointment of the Disciplinary Committee by the SMC. Section 40(14) provides that the Complaints Committee shall inquire into the complaint and complete its preliminary inquiry not later than three months from the date the complaint was laid before it. And s 41(3) provides that where a Complaints Committee has made an order for a formal inquiry to be held by a Disciplinary Committee, the SMC `shall forthwith appoint` a Disciplinary Committee which shall hear and investigate the complaint. Reverting to the chronology, the complaint was dated 8 April 1998 and presumably it was laid before the Complaints Committee on or about that date. Following strictly s 40(14), the deadline for the Complaints Committee to complete its preliminary inquiry was therefore on or about 8 July 1998. However, Dr Tan was only informed of the Complaints Committee`s decision to refer the matter to the Disciplinary Committee on 18 December 1998. Counsel for Dr Tan therefore submits that the Complaint Committee had not complied with s 40(14). Counsel further submits that, in relation to the appointment of the Disciplinary Committee, that committee was not appointed even by the time the notice of proceedings was despatched to Dr Tan, that is, on 25 May 1999. Thus, the SMC was also in breach of 41(3) of the MRA.

Section 40(14)

The learned judge did not accept these submissions. He found that the Complaints Committee had completed its inquiry within the period of three months prescribed in s 40(14) and that this was evidenced by the minutes of a meeting of the Complaints Committee dated 30 June 1998. The fact that Dr Tan was informed of its decision after the expiry of the period of three months is not relevant, as the Complaints Committee`s obligation did not extend to notifying Dr Tan of this fact within the same period. The learned judge referred to another provision, namely, s 41(5) of the MRA, which provides:

> *Every Complaints Committee shall notify the registered medical practitioner*

> *concerned and the person who has made the complaint or information of the manner in which it has determined the complaint or matter.*

The learned judge held that this section does not prescribe a time frame within which Dr Tan had to be notified of the Complaints Committee`s decision and accordingly there was no breach of s 40(14) of the MRA on the part of the Complaints Committee.

It is urged on us by counsel for Dr Tan that the inquiry cannot be said to have been completed until and unless he was notified of the determination of the complaint. As his livelihood is at stake in these proceedings, the provisions governing such disciplinary proceedings should be strictly construed and followed. The claim by the Complaints Committee that it had completed the inquiry on 30 June 1998 is factually unsustainable, as it did not notify Dr Tan until about six months later, namely, on 18 December 1998 and the SMC took a further three months to notify him of the charges. In any event, even if, on a literal reading of s 40(14) of the MRA, the period of three months means only the period in which the Complaints Committee must complete its inquiry, the long delay in notifying Dr Tan of the committee`s decision rendered the decision void. Counsel submits that, in accordance with the rules of natural justice, these statutory procedures should be treated as minimum rather than maximum requirements and additional safeguards should be implied by the court where appropriate. In support, counsel relies on the following passage of the speech of Lord Bridge of Harwich in **Lloyd & Ors v McMahon** [1987] AC 625, 702-703:

> *[I]t is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.*

Counsel also relies on the Malaysian case of **Majlis Peguam Malaysia & Ors v Au Kong Weng Joseph** [1993] 2 MLJ 57 , where it was held that the period for appointing a disciplinary committee prescribed by the Malaysian Legal Profession Act was mandatory and that the appointment made out of time by some 12 days was void.

It is further submitted by counsel that the evidential quality of the minutes of the Complaints Committee was not satisfactory as the minutes were unsigned. Even if the minutes were a true record, it could not be said that the Complaints Committee had carried out an `inquiry` as such, on the ground that, so far as concerned the present inquiry, there was only a one line minute referring to the decision to send Dr Tan`s case before the Disciplinary Committee.

We are unable to accept these submissions. First, apart from his allegation that the minutes were not signed, Dr Tan had no evidence that the minutes were not a true record of the meeting held on 30 June 1998. True it is that what was produced was, in relation to the present inquiry, a one line minute, but it has been explained to us that the minutes produced contained other matters which had nothing to do with the present inquiry and for obvious reason had to be expunged or `blanked out`, and that accounted for the blank spaces appearing on the copy of the minutes produced. We accept this explanation and agree with the learned judge`s finding that the document produced represents a true record of the proceedings before the Complaints Committee.

Secondly, the Complaints Committee was not required to detail its deliberation in the minutes of the

meeting, and as long as there was a record of its decision, that would be adequate to show that the inquiry had been conducted and a decision taken. There is no suggestion, and nor has it been shown, that the Complaints Committee had failed to conduct a real inquiry into his case.

Thirdly, we do not agree with the submission that the Complaints Committee had not completed the inquiry within the three months in compliance with s 40(14) of the MRA merely because Dr Tan had not been informed of its decision within that time. Section 40(14) of the MRA provides that the inquiry must be completed within three months, and with that the Complaints Committee had complied. There was no breach of s 40(14) of the MRA.

The obligation of the Complaints Committee to notify Dr Tan of its decision is contained in s 41(5). However, this provision does not a prescribe a time limit within which the Complaints Committee must notify Dr Tan of its decision, and accordingly the law implies a reasonable time within which the Complaints Committee must notify Dr Tan of its decision. On this, the Complaints Committee did not notify Dr Tan of its decision until some five months thereafter, and that was far beyond a reasonable time. There was therefore a breach of s 41(5). The question then is whether Dr Tan has suffered any substantial prejudice or disadvantage as a result of this breach. We do not find that he has suffered any. No evidence was adduced by Dr Tan in this respect. In any event, in so far as s 41(5) is concerned, the complete answer to Dr Tan`s case is that what he complained of is a breach of s 40(14) and not s 41(5), and so far as former is concerned, we are satisfied that the Complaints Committee had complied with the provision.

We now turn to the observations of Lord Bridge of Harwich in ***Lloyd v McMahon*** (supra). First, we do not think that what was said there is applicable in all circumstances, and secondly that the passage quoted must be understood in the proper context and in particular in the context of that part immediately preceding the passage. We set out here the entire paragraph (containing the quoted passage) at pp 702-703:

> *My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.*

Even on the basis of what Lord Bridge said, there was in this case no unfairness visited on Dr Tan by the Complaints Committee in notifying him of its decision some five months later. True, there was a delay, but as we have just said, Dr Tan has not suffered any substantial prejudice or disadvantage by reason of the delay; nor has any injustice in any other way been occasioned. In the circumstances, on the facts of this case, it would be going too far to imply an `additional procedural safeguard` to the effect that the failure of the Complaints Committee to notify Dr Tan of its decision within a reasonable time rendered its decision void.

Next, the case of ***Majlis Peguam Malaysia*** relied by Dr Tan. There, the secretary of Bar Council made a complaint of two lawyers for mismanagement of a trust account. The Bar Council referred the matter to a state bar committee in Penang, which considered the matter and subsequently forwarded

its report and recommendation to the Bar Council. The latter had only six weeks from the date of receipt of the report and recommendations to apply to the Chief Justice to appoint a disciplinary committee. However, it did not do so within the time and was out of time by 12 days. The High Court held that the time prescribed was mandatory and consequently the appointment of the disciplinary committee was null and void. The Council appealed and the appeal was dismissed by the Supreme Court. That case turned on the construction of the relevant provisions of the legislation in question and the Malaysian Courts were of the opinion that the time limits imposed by those provisions were mandatory and that non-compliance with these time limits rendered the proceedings thereunder incurably void. That is not the position in the present case. For the reason given in the preceding paragraph, we do not think that the time limit implied for notifying Dr Tan of the Complainants Committee` decision is mandatory, such that a failure to comply with that time would render its decision void.

Section 41(3)

We now turn to the issue of the time lag between the Complaints Committee`s decision to order a formal inquiry and the appointment of the Disciplinary Committee by the SMC. Section 41(3) of the MRA requires the Disciplinary Committee to be appointed `forthwith` after the Complaints Committee has decided to make the order for a formal inquiry to be held by the Disciplinary Committee. That section provides as follows:

> *(3) Where a Complaints Committee has made an order for a formal inquiry to be held by a Disciplinary Committee, the Medical Council shall forthwith appoint a Disciplinary Committee which shall hear and investigate the complaint or matter.*

The learned judge acknowledged that there was some delay from the time the Complaints Committee completed its findings on 30 June 1998 to the time the notice of inquiry was served on Dr Tan on 25 March 1999. However, there is no provision in the MRA or regulations thereunder that invalidates the disciplinary process by reason of delay. Therefore, the position at common law applies. In this regard, the learned judge considered that the most significant factor is any prejudice suffered by the person concerned by reason of the delay. In the instant case, the learned judge was satisfied that Dr Tan had not suffered any prejudice by reason of the delay. Accordingly, he held that the delay alone was not a sufficient cause to set aside the Complaints Committee`s decision to refer the matter before the Disciplinary Committee.

We agree with the learned judge that there was a non-compliance with s 41(3) of the MRA on the part of the SMC, as there was a delay of approximately nine months between the Complaints Committee`s decision to place the matter before the Disciplinary Committee and the sending of the notice of inquiry by the Disciplinary Committee to Dr Tan. Clearly, the Disciplinary Committee was not `appointed forthwith`. Indeed, in our view, there was an inordinate delay on the part of SMC in appointing the Disciplinary Committee.

Counsel for the SMC argues that s 41(3) of the MRA does not require the Disciplinary Committee to be constituted immediately upon the Complaints Committee`s decision to order a formal inquiry. Section 41(3) merely states that the Disciplinary Committee shall be appointed forthwith, and there is a distinction between `constitution` and `appointment` of the Disciplinary Committee. On the basis of this distinction, counsel submits that the Disciplinary Committee was appointed formally upon the

Complaints Committee deciding to refer the matter to the Disciplinary Committee and that committee was constituted later when the members were named. On this point, counsel relies on s 42(5) of the MRA which provides that the SMC may at any time remove any member of or fill any vacancy in a Disciplinary Committee.

We reject this argument. We do not see how it can be said that a Disciplinary Committee is appointed, when at the same time the members of such a committee have not been named. Without naming them we do not see how it can be said that the committee has been appointed. The attempted distinction between `appointment` and `constitution` of a Disciplinary Committee, even for the purpose of s 41(3), is unsupportable and is spurious. Plainly s 41(3) obliges the SMC to appoint the actual members that will form the Disciplinary Committee. Section 42(5), which is relied on by counsel, only gives the SMC the powers to make changes to the appointees as necessary, such as removing any member of or filling the vacancy in a Disciplinary Committee, and does not support the case that a Disciplinary Committee is first appointed with its members to be named, and thereafter upon naming the members, the committee is constituted.

In our judgment, there was a breach of s 41(3) of the MRA on the part of SMC, and the immediate question is whether this breach is a mere irregularity or has the effect of nullifying the disciplinary process. On this point, we find of assistance the case of **Coney v Choyce & Ors** [1975] 1 All ER 979. That case concerned proposals for the reorganisation of Roman Catholic schools in a number of neighbouring towns. Wide publicity had been given to these proposals, and the defendants, who were the managers and governors of certain schools affected, submitted the proposals to the Secretary of State and took the necessary steps to give the requisite public notice under the Education Act 1944 and in accordance with the requirements of the Country and Voluntary Schools (Notices) Regulations 1968. In consequence, information of the proposals was widely circulated in the area. However, in respect of two schools the regulations were not fully complied. Within the time permitted objections were received and the Secretary of State having considered the proposals proceeded to approve them, well knowing that the requirements of publicity had not been fully complied with. Two parents of the children of the school affected brought an action seeking a declaration that the Secretary of State`s approval was invalid and an injunction restraining the defendants from carrying out the proposals. Templeman J (as he then was) considered the scope and object of the regulations and treated them as directory and held that since there had been no substantial prejudice suffered by those for whose benefit the requirements had been introduced, the non-compliance with the regulations was a mere irregularity and did not render the approval of the Secretary of State invalid. In coming to this conclusion, he adopted (at pp 988-989) the test stated in ***de Smith`s Judicial Review of Administrative Action*** (3rd Ed, 1973) at p 123 which is as follows:

> *The courts must therefore formulate their own criteria for determining whether the procedural rules are to be regarded as mandatory, in which case disobedience will render void or voidable what has been done, or as directory, in which case disobedience will be treated as an irregularity not affecting the validity of what has been done (though in some cases it has been said that there must be `substantial compliance` with the statutory provisions if the deviation is to be excused as a mere irregularity). Judges have often stressed the impracticability of specifying exact rules for the assignment of a procedural provision to the appropriate category. The whole scope and purpose of the enactment must be considered, and one must assess `the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act`. Furthermore, much may depend upon the particular circumstances of the case in hand. Although `nullification is the natural and usual consequence of disobedience`, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature, or if no substantial prejudice has been suffered by those for whose benefit the requirements were*

introduced, or if serious public inconvenience would be caused by holding them to be mandatory, or if the court is for any reason disinclined to interfere with the act or decision that is impugned.

Reverting to the case at hand, the MRA does not specify the consequences of a failure to comply with any provisions therein relating to the conduct of the disciplinary process. We find the test stated above very apt and, in our view, it is equally applicable here. Looking at the terms and object of the relevant provisions of the MRA, we do not think that Parliament intended that there should be, in the words of Templeman J, `strict insistence of the letter` of the Act `being carried out subject to the dire penalty of the whole thing being invalid`. In our opinion, s 41(3) of the MRA is directory.

In this case, Dr Tan has not suffered any substantial prejudice as a result of the long delay on the part of the SMC in appointing the Disciplinary Committee. Counsel for Dr Tan has not really addressed this point. No evidence of any prejudice was adduced, and what was before us was a bare assertion that he had to live with the `stain of misconduct`. We think that this assertion is highly exaggerated.

We should also consider, in contrast, the case of **R v Chief Constable of Merseyside Police, ex p Calveley & Ors** [1986] QB 424 where a protracted delay had been held to have the effect of nullifying the decision of a disciplinary tribunal. There, complaints were made against five police officers, and an investigating officer was appointed. But the officers were not given formal notice of the complaint under the relevant regulations until nearly two and a half years later, and the disciplinary hearing was held some nine months following the notice. At the hearing before the Chief Constable, a submission was made on behalf of the officers that they had been irremediably prejudiced by the long delay, in that the records and logs relating to the period, in which the incident giving rise to the complaint had occurred, had been routinely destroyed. However, that submission was rejected and the hearing proceeded, at the conclusion of which the officers were found guilty and were dismissed or required to retire. The officers had a right of appeal under the relevant legislation, and they did appeal. However, before that appeal was heard they applied for judicial review of the Chief Constable`s decision and the application was dismissed by the Divisional Court on the ground that the application was premature as there was the alternative process which was then pending. The officers appealed and the Court of Appeal allowed the appeal, and granted an order of certiorari quashing the decision of the Chief Constable, holding that that was an exceptional case. May LJ had to consider the effect of a three-year delay between the commencement of investigations into complaints against five police officers and the official notification of the officers that such complaints had been made or that they were being investigated. His Lordship made the following observations at p 439:

Although judicial review can provide an effective, convenient and relatively swift remedy, it should only be granted, particularly where the basis of the application is merely delay in taking the necessary proceedings, where this can properly be described as amounting to an abuse of process. Unnecessary delay in legal and analogous proceedings, such as the disciplinary ones in the instant case, is of course to be deplored, but it does occur and, in the absence of mala fides, should not tempt one to resort to judicial review where no real abuse or breach of natural justice can be shown.

May LJ then went on to hold that, on the facts, abuse could be shown as during the three years, documents pertinent to the complaints would have been routinely destroyed. The officers would not have been able to obtain the names of or statements from any witnesses they may have wished to

call. The learned judge thus felt that the delay was grave enough to warrant the granting of judicial review. He said at pp 439-440:

> *That said, however, I think that abuse can be shown in the instant case. Apart from the failure to give the notices under reg 7 timeously, over three years passed between the alleged offences and the hearing before the Chief Constable. In that time the radio log sheets and the parade states and other documents which would have shown what other officers were on duty at the relevant time have been destroyed. Although I suspect that the fact that complaints under s 49 of the Police Act 1964 had been made was known shortly afterwards to the applicants, they were never formally warned at that time nor have they been able to obtain the names of or statements from any witnesses that they might have wished to call. Further, the investigating officer did nothing between the end of 1981 and July 1983. In addition, I respectfully do not think that the Chief Constable appears to have had the question of possible prejudice sufficiently in mind when he rejected the preliminary point on the reg 7 notices taken by Sergeant Ashton at the start of the original disciplinary hearing. Finally, it is clear that even now it will be at least some months before the appellate tribunal can hear any appeal and even then it has to report to the Home Secretary and he has to consider that report.*

It cannot really be said that in this case there was an abuse or breach of rules of natural justice and that the delay has resulted in Dr Tan being unable to garner evidence that may have since been destroyed. In our judgment, in the circumstances of this case, the breach of s 41(3) of the MRA on the part of the SMC is a mere irregularity and is not a sufficient ground for nullifying or setting aside the decision of the Complaints Committee or the disciplinary process instituted by the SMC.

Unreasonableness, irrationality and disproportionality

The final ground relied upon by Dr Tan to quash the decision of the Complaints Committee was that the decision was unreasonable, irrational and disproportionate. It is submitted by counsel for Dr Tan that there was no evidence before the Complaints Committee which a reasonable tribunal could have regarded as sufficient to justify the decision that was made. In other words, no reasonable Complaints Committee would have decided to refer to the Disciplinary Committee the two charges of advertising and promotion based on the materials placed before it. Such a decision is also irrational. It is lastly submitted that the Complaints Committee`s decision, if it concerned the allegation of advertising and promotion, was disproportionate, as the matters involved were a minor offence which could be dealt with under s 41(1)(a) instead of sending the matter for determination by the Disciplinary Committee under s 41(1)(b) of the MRA.

The learned judge, proceeding on the premise that Dr Cheong`s complaint included the matters referred to in the two charges, opined that the Complaints Committee had not acted in such a manner as to render its decision unreasonable irrational or lacking in proportionality. The learned judge held that it was entirely within the discretion of the Complaints Committee to determine whether a matter should be dealt with under ss 41(1)(a) or 41(1)(b) of the MRA, and held that unless the decision was made unfairly, it could not be challenged by Dr Tan. From the evidence before it, the Complaints Committee obviously thought that Dr Tan was connected to the facts in ***The Business Times*** article in such a way as to warrant a further investigation by the Disciplinary Committee. The learned judge did not think that there was sufficient evidence before him to conclude that the Complaints Committee had erred in deciding to send the matter before the Disciplinary Committee.

We are unable to accept that the Complaints Committee in deciding as it did acted in a manner which no reasonable tribunal would have acted or which is irrational or disproportionate. The Complaints Committee was only mistaken in their view as to the scope of their powers of inquiry under s 40(14) of the MRA. We would not characterise its decision as irrational, unreasonable or lacking proportionality.

Application for an order of prohibition

We now turn to the main ground for the order of prohibition. It is said that the SMC is in contravention of the principle of natural justice: nemo judex in causa sua, and that the SMC is, at once, the complainant and prosecutor and would be the judge in this matter. The basis for saying this is as follows. First, the Complaints Committee in inquiring into the matters contained in the two charges went beyond the scope of the complaint of Dr Cheong and effectively was the complainant itself. Under s 40(4) of the MRA, a Complaints Committee comprises four members and two of them are members of the SMC, and of these two one is the chairman who has a casting vote. Thus, by reason of these members in the committee the SMC is effectively the decision maker of the committee. Second, the SMC is clearly the prosecutor in relation to the charges brought against Dr Tan. Third, under s 42(1) of the MRA, the Disciplinary Committee comprises not less than three medical practitioners of whom at least two are members of the SMC. Thus, the majority of the Disciplinary Committee is made up of members from the SMC resulting in the SMC being a judge in its own cause.

The real point of complaint made on behalf of Dr Tan is that by reason of the composition of the Disciplinary Committee there would be apparent bias or a reasonable suspicion or apprehension of bias on the part of the Disciplinary Committee, and that any reasonably minded person sitting at the back of the room in which the Disciplinary Committee would meet to hear this matter will go away saying to himself that there can be no fair trial before this tribunal. Counsel cites various authorities in support of her contention of apparent bias.

We think that what is asserted here is highly exaggerated and clearly has no merit. On this issue, it is necessary to bear in mind the relevant provisions of the MRA. First, s 40(4) provides:

> *The Chairman of the Complaints Panel may from time to time appoint one or more committees comprising -*
>
> *(a) a chairman, being a member of the Complaints Panel who is a member of the Medical Council;*
>
> *(b) a member of the Complaints Panel who is a member of the Medical Council;*
>
> *(c) a member of the Complaints Panel, not being a member of the Medical Council, who is a registered medical practitioner; and*
>
> *(d) a member of the Complaints Panel who is a lay person.*

Next, we turn to s 42(1) which specifically provides as follows:

> *The Medical Council may from time to time appoint one or more committees*

comprising -

(a) not less than 3 registered medical practitioners of at least 10 years` standing of whom at least 2 shall be members of the Medical Council; and

(b) one observer to be chosen by the Medical Council from a panel of lay persons nominated by the Minister,to be known for the purposes of this Act as Disciplinary Committees to inquire into any matter in respect of which a Complaints Committee has under section 41(1)(b)(ii) ordered that a formal inquiry be held or into any matter referred to it under section 40(2).

It is Parliament`s intention that members of the SMC must be included in the make-up of the Complaints Committee and the Disciplinary Committees and the minimum requirement is that at least two SMC members must be on a Complaints Committee and a Disciplinary Committee respectively. Parliament has provided a safeguard in the form of s 42(2) of the MRA which states that a member of a Complaints Committee inquiring into any matter concerning a registered practitioner shall not be a member of a Disciplinary Committee inquiring into the same matter. Clearly, it is intended that members of the SMC play an active role in both committees.

We now turn to the cases cited by counsel for Dr Tan. First, the case of **De Souza Lionel Jerome v A-G** [1993] 1 SLR 882 . The applicant in that case was a former police officer who was dismissed after disciplinary proceedings were brought against him. It was alleged, inter alia, that the officer who conducted the proceedings was biased as he had prejudged the applicant`s guilt, that defending officer was not given reasonable opportunity to cross-examine prosecution witnesses and that he came to the conclusion that the principal witness who gave evidence against the applicant was a truthful witness even before any cross-examination was carried out and also on the basis of other material evidence adduced. Lim Teong Qwee JC who tried the case held that on the facts of the case there was a reasonable suspicion of bias and that the decision of the officer had been made in breach of the rules of natural justice.

Next, the case of **Re Singh Kalpanath** [1992] 2 SLR 639 . There, the impartiality of the tribunal was impugned on the ground that the chairman of the Disciplinary Committee had in the course of two conversations advised a legal assistant who was a witness for the applicant that he should tell the truth. This implied that the chairman did not believe that the legal assistant was a truthful or impartial witness and was evidence from which reasonable people might draw the inference that the chairman might or could not bring an unprejudiced mind to the inquiry before him.

There is also the case of **Re the Medical Registration Act (Cap 174)** [1994] 1 SLR 176 , where a medical practitioner was found to be guilty of `infamous conduct in a professional respect` for over-prescribing certain drugs. The decision of the Medical Council to strike his name off the register of medical practitioners was set aside, as one of the members of the Medical Council who heard the complaint against the applicant had been the chief executive officer of the Ministry of Health, the complainant at the material time. There was thus reasonable suspicion of bias on the part of this member, as he was likely to have been associated with the prior investigations and the complaint against the applicant. The facts in the present case are far removed from that case, as none of the members of the Disciplinary Committee are the original complainants against Dr Tan.

The material difference between the present case and the authorities is that in those cases there

were distinct incidents that gave rise to the reasonable suspicion of bias on the part of those tribunals in question. In the present case, we can find no basis for saying that there is a reasonable suspicion of bias on the part of the Disciplinary Committee which was appointed to hear the complaints.

Counsel refers to the case of **Hannam v Bradford City Council** [1970] 2 All ER 690 in support of her contention that it is not necessary to pinpoint specific incidents that give rise to a reasonable suspicion of bias on the part of certain members of the Disciplinary Committee. In that case, the plaintiff`s employment as a schoolmaster was terminated by the board of governors of the school. The staff sub-committee of the defendants considered the exercise of the governors` discretion in dismissing the plaintiff under the circumstances and held an inquiry as to whether it should exercise its statutory power to prohibit the plaintiff`s dismissal by the governors. Three of the ten members of the sub-committee were governors of the school and one of them was the chairman of the sub-committee. However, none of them were at the meeting of the board of governors at which it was decided that the plaintiff should be dismissed. The sub-committee resolved not to exercise its powers to prohibit the plaintiff`s dismissal. On the plaintiff`s application, the court held that the rules of natural justice were breached, as the sub-committee was improperly constituted. Those governors did not, by donning their sub-committee hats, cease to be part of the governors even though they did not attend the meeting of the board of governors where the plaintiff was dismissed. This was fatal to the proceedings on the ground that the governors who were members of the sub-committee were likely to have a built-in tendency to support the decision of the governors even if they did not sit in on that particular meeting at which the relevant decision was taken.

The important difference between this case and ***Hannam v Bradford City Council*** is that the sub-committee there was in substance deciding whether or not to overturn the decision of the board of governors. In this case, the only decision made by the Complaints Committee was that the matter required investigation by the Disciplinary Committee. The Disciplinary Committee is not acting in the role of an appellate tribunal in relation to the decision of the Complaints Committee as compared to the role of the sub-committee in ***Hannam v Bradford City Council*** . Its role is to carry out further investigations into the matter. The SMC has not made up its mind that Dr Tan is guilty of those charges and is placing him before a tribunal made up largely of its own members who are likely to be of the same view. Thus ***Hannam v Bradford City Council*** does not support Dr Tan`s case that there is a reasonable suspicion of bias due to the constitution of the Disciplinary Committee.

Conclusion

We have decided that the matters referred in the two charges preferred against Dr Tan were not the subject raised in the complaint of Dr Cheong and therefore in inquiring into such matters, the Complaints Committee had acted outside its powers in its determination. We have also decided that before the Complaints Committee, in respect of the subject matters of the two charges, Dr Tan had not received any prior notice of such charges and were not afforded an opportunity to be heard on those charges. On these two grounds we allow the appeal and make an order of certiorari quashing the decision of the Complaints Committee and in consequence an order of prohibition prohibiting the Disciplinary Committee from proceeding to hear the two charges.

Costs

We now come to the question of costs. Both here and below, several grounds have been raised on behalf of Dr Tan impugning the conduct of the SMC in carrying on the disciplinary process, and before

us only two have succeeded. A great deal of time and costs have been incurred in dealing with those grounds which have no substance or merit. For this reason, the general rule should not fully apply, namely, that costs follow the event. In view of the fact that the unsuccessful grounds have caused a significant increase in the length and costs of the proceedings both here and below, Dr Tan should not be allowed the full costs here and below: **Re Elgindata Ltd (No 2)** [1993] 1 All ER 232 and ***Tullio v Maoro*** [1994] 2 SLR 489. In the circumstances, a fair order as to costs would be to award Dr Tan only two thirds of the costs here and below. We so order. We make the usual consequential order for the refund to Dr Tan or his solicitors of the deposit in court as security for costs.

Outcome:

Appeal allowed.