IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2023] SGHC 111

Registrar's Appeal (State Courts) No 27 of 2022 (Summonses Nos 30 and 156 of 2023)

In the matter of Section 9 of the Consumer Protection (Fair Trading) Act (Cap 52A)

Between

Nail Palace (BPP) Pte Ltd

… *Appellant*

And

Competition and Consumer Commission of Singapore

… *Respondent*

In the matter of District Court Originating Summons No 285 of 2021

Between

Competition and Consumer Commission of Singapore

… *Plaintiff*

And

Nail Palace (BPP) Pte Ltd

… *Defendant*

Registrar's Appeal (State Courts) No 28 of 2022 (Summons No 29 of 2023)

In the matter of Section 9 of the Consumer Protection (Fair Trading) Act (Cap 52A)

Between

Nail Palace (SM) Pte Ltd

… *Appellant*

And

Competition and Consumer Commission of Singapore

… *Respondent*

In the matter of District Court Originating Summons No 286 of 2021

Between

Competition and Consumer Commission of Singapore

… *Plaintiff*

And

Nail Palace (SM) Pte Ltd

… *Defendant*

GROUNDS OF DECISION

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Goh Yihan JC
27 March 2023

26 April 2023

Goh Yihan JC:

1 There were three applications before me, namely, HC/SUM 29/2023 ("SUM 29"), HC/SUM 30/2023 ("SUM 30"), and HC/SUM 156/2023 ("SUM 156"). SUM 29 was made under the main action of HC/RAS 28/2022 ("RAS 28"), whereas SUM 30 and SUM 156 were made under the main action of HC/RAS 27/2022 ("RAS 27"). These summonses arose in the broader context of the claims that the Competition and Consumer Commission of Singapore ("the respondent") brought against Nail Palace (BPP) Pte Ltd ("NPBPP") and Nail Palace (SM) Pte Ltd ("NPSM"). NPBPP and NPSM are companies that provide, among other things, manicure and pedicure services, and foot-related treatments. They and other related companies operate under the business name "Nail Palace" but are all separate legal entities. In the

proceedings below, the respondent brought two claims (DC/OSS 285/2021 ("OSS 285") and DC/OSS 286/2021 ("OSS 286")) against NPBPP and NPSM, respectively. This partially explains why there were three summonses before me.

2 In summary, the respondent claimed that NPBPP and NPSM committed an unfair practice under s 4(*d*) of the Consumer Protection (Fair Trading) Act 2003 (2020 Rev Ed) ("CPFTA"), read with paragraph 3 of the Second Schedule to the CPFTA, by making misleading representations to a consumer concerning the need for a fungal treatment package. In addition, the respondent claimed that NPSM committed an unfair practice under s 4(*a*) of the CPFTA by omitting to inform a consumer that certain products were included in the price of a treatment package. This omission by NPSM therefore misled the consumer. On 8 August 2022, the learned District Judge ("DJ") found for the respondent in both of its claims in *Competition and Consumer Commission of Singapore and another v Nail Palace (BPP) Pte Ltd and another matter* [2022] SGDC 171 ("the Judgment").

3 At the hearing before me, I dismissed all three applications and delivered brief grounds orally to the parties. I now provide the full grounds of my decision.

Summons No 29 of 2023

4 SUM 29 was NPSM's application for leave to amend the Notice of Appeal in RAS 28 which was filed against the decision of the DJ in OSS 286 that was contained in the Judgment.

Background

5 In the Judgment, the learned DJ made several orders, including granting declarations and injunctions against NPSM. These orders are contained in DC/ORC2624/2022 ("ORC 2624"), an Order of Court dated 8 August 2022. NPSM then, on 19 August 2022, applied for leave to make further arguments with respect to paragraphs 4 and 5 of ORC 2624. These paragraphs read as follows:

> 4. The Defendant publishes, at its own expense, within fourteen days from the date of this Order, details of the declarations and injunctions granted against it, by way of a full page public notice in the Straits Times, Lianhe Zaobao, Berita Harian, and Tamil Murasu.
>
> 5. The Defendant must, before any consumer enters into a contract in relation to a consumer transaction with it during a period of two years from the date of this Order:
>
> > (1) notify the consumer in writing about the declarations and injunctions in force against the Defendant; and
> >
> > (2) obtain the consumer's written acknowledgement of receipt of the said notice.

In summary, these paragraphs relate to (a) a Publication Order; and (b) a Notification Order against NPSM. For completeness, paragraphs 1 and 2 of ORC 2624 relate to declarations that NPSM engaged in various unfair practices, and paragraph 3 pertains to an injunction restraining NPSM from engaging in those unfair practices. Paragraph 6 contains an order requiring NPSM to inform the respondent of, broadly speaking, changes in the nature of its corporate structure and ongoings. Paragraph 7, the last in ORC 2624, pertains to the costs of OSS 286.

6 On 2 September 2022, the learned DJ heard and dismissed the further arguments in relation to the Publication Order and the Notification Order. On 9 September 2022, another Order of Court was issued (DC/ORC 2622/2022

("ORC 2622")). In ORC 2622, (a) NPSM was granted an extension of time to comply with the Publication Order; (b) the Notification Order was reiterated; and (c) the costs of the application to make further arguments was fixed.

7 According to NPSM, it instructed its former solicitors on or around 9 September 2022 to appeal against both ORC 2622 *and* ORC 2624 but the solicitors filed an appeal only in respect of ORC 2622. Thus, in the Notice of Appeal filed on 14 September 2022 ("the Notice of Appeal"), the appeal was clearly stated to be "against the decision of [the learned DJ] given on 02-September-2022", *ie*, against ORC 2622. The Notice of Appeal then lists the orders in ORC 2622.

8 On 21 September 2022, NPSM replaced its former solicitors with its present solicitors. NPSM's present solicitors informed the respondent's solicitors on 28 September 2022 that their preliminary instructions were to amend the Notice of Appeal filed in RAS 28 and RAS 27. However, they made no formal application to amend the Notice of Appeal until 4 January 2023, when they filed SUM 29 to apply for leave to amend the Notice of Appeal to be against the *whole* of the learned DJ's decision in RAS 28.

My decision: SUM 29 was dismissed

9 I dismissed SUM 29. In the first place, SUM 29, properly characterised, was not merely an application to amend the Notice of Appeal but was really an application for an extension of time to file a notice of appeal. This was due to the substantive character of the amendment sought, which would widen the scope of what was being appealed against and, *in effect*, allow new aspects of the learned DJ's decision to be appealed out of time.

The applicable law

(1) Whether an application is, in substance, an extension of time to file a notice of appeal

10 In my view, in considering the applicable standard with which to determine an application to amend a notice of appeal, it must be ascertained whether the amendment should be characterised as having a substantive character. An amendment will have such a character where it has a material bearing on the *merits and outcome* of the appeal. In such a case, the amendment application is, in essence, an application for an extension of time to file a fresh notice of appeal. Examples of substantive amendments include that which seek to include an appeal against an order by the lower court which was not included in the original notice of appeal (see the Court of Appeal decision of *Projector SA v Marubeni International Petroleum (S) Pte Ltd* [2005] 2 SLR(R) 1 ("*Projector SA*") at [4]), or that which seek to include a new prayer in the appeal which was not granted by the lower court (see the Court of Appeal decision of *Leong Mei Chuan v Chan Teck Hock David* [2001] 1 SLR(R) 261 ("*Leong Mei Chuan*") at [12] and [21]). In contrast, where the amendment sought is merely of a technical nature, such as to simply correct a typographical error, then it is properly characterised as an amendment of a notice of appeal.

11 In the present case, the proper characterisation of SUM 29 is a crucial point because, as NPSM submitted, the courts generally lean in favour of allowing an amendment to a notice of appeal unless grave prejudice or hardship to the opposing party can be shown (see *Leong Mei Chuan* at [21]). In other words, the courts apply a less stringent standard towards an application to amend a notice of appeal. In contrast, the courts adopt a more stringent standard towards an application for an extension of time to file a notice of appeal (see the

Court of Appeal decision of *Lee Hsien Loong v Singapore Democratic Party and others and another suit* [2008] 1 SLR(R) 757 ("*Lee Hsien Loong*") at [32]). For convenience, I shall refer to these two contrasting approaches as applied to an application to amend a notice of appeal and as applied to an application for an extension of time to file a notice of appeal, as the "less stringent standard" and the "more stringent standard", respectively.

(2) Whether the more stringent standard should be applied to determine an application to amend a notice of appeal

12 Assuming that an application to amend a notice of appeal is, in substance, an application for an extension of time to file a fresh notice of appeal, it must next be considered whether the more stringent standard should apply in its determination.

(A) THE COURT OF APPEAL DECISION OF *LEONG MEI CHUAN*

13 In considering this question, it is necessary to first discuss the Court of Appeal decision of *Leong Mei Chuan*. Indeed, it may be argued that the facts in the present case are similar to those in *Leong Mei Chuan*, in which the Court of Appeal did not apply the more stringent standard to an application to amend a notice of appeal despite the substantive character of the amendments sought.

14 Turning to that case, the appellant wife married the respondent husband, but the marriage later broke down. After an uncontested divorce, the learned DJ considered ancillary matters, including the division of certain stock options in a company in which the husband was an employee at the material time. The options fell into three broad categories, namely: (a) those that had vested in the husband and had not been exercised by him; (b) those that had vested in the husband and had been exercised by him; and (c) those that had not yet vested.

In an order made on 20 January 2000, the DJ dealt with the stock options that had vested in the husband and had been exercised, as well as those that had not yet vested. However, the DJ did not make an order for the division of the stock options that had vested in the husband but had not been exercised by him, *ie*, category (a).

15 Both parties appealed against the decision. The appeals were set down to be heard by a High Court judge in chambers on 13 April 2000. In her original notice of appeal, the wife sought only a greater share in the stock options that had vested in the husband and had been exercised by him, and a share in the stock options that had not yet vested. However, the wife did not seek an order giving her a share in those stock options that had vested in the husband but had not been exercised, *ie*, the order that the DJ did not make. During the hearing on 13 April 2000, the wife's newly appointed solicitors sought an adjournment, which was granted. The wife instructed her new solicitors to write to the husband's solicitors to indicate her intention to amend the notice of appeal to raise arguments pertaining to the division of the stock options that had vested in the husband but had not been exercised by him. On 9 May 2000, the wife filed an application to amend the notice of appeal.

16 The High Court dismissed the wife's application to amend the notice of appeal (see *Leong Mei Chuan v David Chan Teck Hock* [2000] SGHC 150). The court treated the application to amend the notice of appeal substantially as an application for an extension of time to file an appeal (at [14]). The court therefore applied the more stringent standard that is usually applied to assess an application for such an extension of time (at [15]). In particular, the court held that the appellant was seeking to appeal, out of time, against that part of the DJ's

order concerning the stock options, and that the wife had not satisfied the more stringent standard in order for the court to allow the amendments (at [26]–[28]).

17 The Court of Appeal allowed the appellant's appeal against the High Court's decision not to allow the amendment. More broadly, the court regarded that the more stringent standard required in an application for extension of time to file an appeal is not absolute and applicable to all cases where an extension of time is sought (see *Leong Mei Chuan* at [15]). In particular, the court did not think that the facts of the case warranted the application of the more stringent standard. In this regard, the court gave three reasons (at [20]). First, what the appellant sought by the amendment had been raised in the affidavit or argument before the DJ. Second, the appeal process in that case was an accelerated process, as the appellant had to initiate the appeal within 14 days of the DJ's decision as opposed to the longer time under the general process. Third, the rationale underlying the more stringent standard as to time with respect to an application for an extension of time to file an appeal is to ensure certainty and finality, and this rationale does not apply as readily to an application for leave to amend the notice of appeal.

18 *Leong Mei Chuan* was applied and followed in *Projector SA*. In *Projector SA*, the Court of Appeal, citing [21] of *Leong Mei Chuan*, explained that the court should generally be inclined to grant the application to amend a notice of appeal if the opposing party will not sustain grave prejudice or hardship that cannot be compensated by costs (at [10]). In considering whether the opposing party will sustain grave prejudice or hardship, the court will consider factors such as: (a) notice to the opposing party; (b) the time available for the opposing party to deal with the amendment; and (c) whether the argument was brought up below or is a new one (at [10]).

19 On a broader level, the exercise of the court's discretion to allow an application to amend a notice of appeal is underpinned by several policy considerations, which were summed up by the High Court in *Chwee Kin Keong and others v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594 (at [85]) and cited with approval by the Court of Appeal in *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 ("*Susilawati*"). As the Court of Appeal put it in *Susilawati* at [59]:

> Having stated the general rule, it is imperative that the rationale underlying this approach be understood. Rules of court which are meant to facilitate the conduct of proceedings invariably encapsulate concepts of procedural fairplay. They are not mechanical rules to be applied in a vacuum, devoid of a contextual setting. Nor should parties regard pleadings as assuming an amoeba-like nature, susceptible to constant reshaping. Rules and case law pertaining to amendments are premised upon achieving even-handedness in the context of an adversarial system by:
>
> > (a) ensuring that the parties apprise each other and the court of the essential facts that they intend to rely on in addressing the issues in controversy or dispute;
> >
> > (b) requiring that an amendment should be attended to in the usual course of events, at an early stage of the proceedings, to ensure that no surprise or prejudice is inflicted on or caused to opposing parties;
> >
> > (c) requiring careful consideration whether any amendments sought at a late stage of the proceedings will cause any prejudice to the opposing party. Prejudice is to be viewed broadly to encompass any injustice and embraces both procedural and substantive notions;
> >
> > (d) recognising that while a costs award against the party seeking late amendments can frequently alleviate any inconvenience caused, this may not always be appropriate;
> >
> > (e) taking into account policy considerations that require finality in proceedings and proper time management of the courts' resources and scheduling. From time to time there will be cases where this is an overriding consideration.

> In short, where does the justice reside? There is constant tension in our legal system to accommodate the Janus-like considerations of fairness and finality.

20 For present purposes, a threshold question raised by *Leong Mei Chuan* is whether, when an application to amend the notice of appeal is, in substance, a request for an extension of time to file an appeal, *Leong Mei Chuan* has completely precluded the application of the more stringent standard applicable to an application for an extension of time to file an appeal. In my view, it has not. First, the court clearly held that "the stringent standards required in an application for extension of time to file an appeal are not absolute and applicable to *all* cases where an extension of time is sought" (at [15]) [emphasis added]. Logically, if the more stringent standard does not apply to all cases, then it must still apply to *some* cases involving an application for an extension of time. Second, and relatedly, the court in *Leong Mei Chuan* clearly explained why, on the *facts of that case*, it was not appropriate to apply the more stringent standard (at [20]). That was a fact-sensitive inquiry, which means that there will be cases in which the facts do make it *appropriate* to apply the more stringent standard.

(B) THE RELEVANT FACTORS TO CONSIDER

21 Having concluded that *Leong Mei Chuan* does not prohibit the application of the more stringent standard to determine an application to amend a notice of appeal that is, in substance, an application for an extension of time to file a notice of appeal, I turn now to *when* the more stringent standard should be applied in such circumstances. Indeed, it does not mean that the stringent standard will apply to *every* application to amend a notice of appeal that is, in substance, an application for an extension of time to file a notice of appeal. In considering this question, I am of the view that a court should ask broadly whether the amendment sought for, and the circumstances surrounding the

application, strongly engage the concerns of achieving even-handedness in the context of an adversarial system (see *Susilawati* at [59]). If so, then the more stringent standard should apply such that the application to amend a notice of appeal is treated and assessed like an application for an extension of time to file an appeal.

22 In assessing whether the amendment would engage the concerns of achieving even-handedness in the context of an adversarial system, the court should consider the following factors. First, reasoning from *Leong Mei Chuan*, whether the amendment raises a new point that was not canvassed in the affidavit or argument in the court below (see *Leong Mei Chuan* at [20]). Second, it may also be relevant to consider whether the applicant (or would-be appellant) had sufficient time to consider the filing of a notice of appeal but still filed the one for which the amendment is sought (see *Leong Mei Chuan* at [20]). Lastly, whether the lower court's orders were sufficiently distinct and if the applicant (or would-be appellant) understood this but nonetheless decided to file a notice of appeal only with respect to some of those orders and for which the amendment is sought. If, at this stage, the court concludes that these concerns are strongly engaged, then generally the more stringent standard would apply.

23 Ultimately, in my respectful view, that an application has been framed as one to amend a notice of appeal cannot, by itself, preclude a court from considering the important policy considerations of certainty and finality to the decision of a court. If this were so, this would afford parties a convenient method of circumventing timelines for an appeal by first filing a threadbare notice of appeal within the deadline to file such a notice, but then applying to "amend" the notice of appeal beyond that deadline to add on additional, substantive points of appeal. This cannot be an acceptable outcome. Indeed, the Court of Appeal

in *Leong Mei Chuan* could not have countenanced such an outcome when it stated that "a less stringent approach should be adopted in considering an application for leave to amend the notice of appeal" (at [20]). More broadly, such an outcome would be a classic example of favouring form over substance, which is something that the Singapore courts do not tolerate in civil procedure (see, *eg*, the decision of the Court of Appeal in *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd* [2016] 4 SLR 351 at [19]–[23]; see also *Lee Hsien Loong* at [29]).

(3) Summary

24 In summary, I adopted the following analytical framework to decide whether the more stringent standard should apply to determine an application to amend a notice of appeal:

(a) First, I considered whether the application to amend the notice of appeal is, in essence, an application for an extension of time to file a fresh notice of appeal. An amendment will have such a character where it has a material bearing on the *merits and outcome* of the appeal.

(b) Second, assuming that an application to amend a notice of appeal is, in substance, an application for an extension of time to file a fresh notice of appeal, I considered whether the more stringent standard should apply in its determination. In doing so, I took into account the factors discussed above at [22].

It goes without saying that if the conclusion at the end of these two questions is that the more stringent standard should apply, then that would apply to

determine whether to allow the application to amend the notice of appeal at hand.

The more stringent standard for an extension of time to file an appeal applied to SUM 29

25 I turn now to the facts of the present case. As a preliminary point, I concluded that SUM 29 was, in substance, an application for an extension of time to file an appeal. This is because the proposed amendments sought to include an appeal against ORC 2624, which was not included in the original Notice of Appeal.

26 As for whether the more stringent approach should apply to assess SUM 29, I concluded that it should apply for the following reasons. First, I took into account the fact that the proposed amendments sought to include an appeal against ORC 2624. Although there was no indication that NPSM would raise a new point on appeal that had not been raised in affidavit or in argument before the DJ, there was equally no indication that the NPSM would not do so. Therefore, I regarded the issue of whether the proposed amendments raised new arguments as a neutral factor.

27 Second, it was my view that NPSM had ample time to decide what to include in the Notice of Appeal. It is true that NPSM originally had 14 days to file a notice of appeal from the date of the learned DJ's decision on 8 August 2022 (see O 55 r 4(1) of the Rules of Court (2014 Rev Ed) ("ROC 2014")) as the appellant did in *Leong Mei Chuan*. However, unlike *Leong Mei Chuan*, NPSM would have had more time to decide whether to file an appeal when it first filed its application to make further arguments on 19 August 2022. This is because, pursuant to O 55C r 1(6)(*b*)(i) of the ROC 2014, the 14-day timeline for NPSM to file a notice of appeal would start to run only from 2 September

2022, when the learned DJ heard and dismissed the further arguments. The deadline would therefore fall on 16 September 2022. Accordingly, counting from 8 August 2022 to 16 September 2022, NPSM had the luxury of close to 39 days to decide whether to file an appeal. It decided, within that long period (in contrast to *Leong Mei Chuan*), to appeal only against ORC 2622 and not ORC 2624. Therefore, this was a factor that supported applying the more stringent standard for an extension of time to file an appeal.

28 Third, unlike *Leong Mei Chuan*, it was clear in the present case that there were two Orders of Court emanating from the learned DJ's decisions on *two* different occasions, *ie*, in August and September 2022. Yet, NPSM consciously appealed only against ORC 2622. Indeed, the Notice of Appeal failed to include any reference to ORC 2624 but was drafted very specifically that the appeal was in respect of the decision of the learned DJ "given on 02-September-2022", *ie*, ORC 2622. The Notice of Appeal also set out the specific orders appealed against, which clearly related only to ORC 2622. Given the particular circumstances in the present case where there was a clear demarcation in the learned DJ's orders, which were given on two separate occasions, I did not think that NPSM could portray what was substantively an application for an extension of time to file an appeal as one to amend the Notice of Appeal. Otherwise, it would mean that NPSM could slip in a fresh appeal that was clearly out of time. In my view, this was a determinative factor.

29 On the same point, it was clear that NPSM and its officers knew that there were two separate Orders of Court but chose to appeal only against ORC 2622. To begin with, both ORC 2624 and ORC 2622 were personally served on NPSM and its officers in September 2022. Further, on 8 November 2022, NPSM filed a summons for stay of execution of the judgment or order in

OSS 286, pending its appeal in RAS 28. It is evident from the supporting affidavit filed by NPSM that it was well-aware that there were two separate Orders of Court, *ie*, ORC 2624 and ORC 2622. However, the affidavit made no mention of NPSM's intention to appeal against ORC 2624. Indeed, the affidavit was clearly concerned with the execution of ORC 2622 and the "damage" that would be caused if a stay of execution was not granted. In my judgment, all these showed that NPSM and its officers were clearly aware that there were two orders, but they still maintained the original Notice of Appeal until the application to amend was filed belatedly in January 2023.

30 Accordingly, for all these reasons, I found that the more stringent standard applied. Indeed, the consequence of the NPSM's "amendment" was to include a separate appeal against ORC 2624. Given the lateness of this application and my finding that NPSM and its officers deliberately chose not to appeal against ORC 2624, strong concerns of finality were engaged. It would be in the interests of achieving even-handedness in the context of an adversarial system to subject NPSM's application to the more stringent standard.

NPSM did not meet the requirements for an extension of time to file an appeal

31 The purpose of the more stringent standard, as applied to applications for an extension of time for the filing of a notice of appeal, is primarily to ensure finality (see *Lee Hsien Loong* at [23]). In applying this more stringent standard, it is well settled that the court has to consider the following factors: (a) the length of the delay; (b) the reasons for the delay; (c) the chances of the would-be appellant succeeding on appeal; and (d) the degree of prejudice to the would-be respondent, that cannot be compensated by costs, if the extension of time were granted. Among the four factors, the emphasis, in the first instance at least, is invariably on the first two, *ie*, the length of delay and the reasons for the delay

(see *Lee Hsien Loong* at [19]). Having carefully considered these factors, I dismissed the applicant's application for what is effectively an extension of time for the following reasons.

32 First, there was a gross and ordinate delay of some 110 days, or more than 3.5 months, on the part of NPSM. The period of delay was from 16 September 2022, which was the deadline for NPSM to file its notice of appeal after its further arguments were dismissed, to 4 January 2023, which was when the present application was filed. This, by any measure, and certainly in line with the authorities, was a very substantial delay (see *Lee Hsien Loong* at [52]). Furthermore, if I were to take the view that the present application to amend is the wrong form that the application should rightfully take, then the delay would be even longer.

33 For completeness, I did not think that NPSM could rely on the email that its present solicitors sent to the respondent's solicitors on 28 September 2022 to say that the respondent was given notice of its intention to amend the Notice of Appeal in September 2022. In the first place, what matters is the date which the formal application was filed. Moreover, as Mr Kenny Chooi, who appeared for the respondent, pointed out, the parties' emails between September and December 2022 showed NPSM did not form a clear intention to amend the Notice of Appeal until late-December 2022 at the earliest. Indeed, the respondent's solicitors wrote to NPSM's solicitors on 25 October 2022 seeking to clarify what the latter had meant when they stated in an earlier email dated 18 October 2022 that they were instructed to "amend the Notice of Appeal … to appeal against the whole decision of District Judge Elaine Lim Mei Yee given

on *2 September 2022*" [emphasis added].[1] The respondent's solicitors sought clarification because NPSM had, in its Notice of Appeal, already appealed against the whole decision given on *2 September 2022*, *ie*, ORC 2622. Yet, despite chasers on 29 November 2022 and 30 November 2022, NPSM's solicitors did not provide any clarification. In the circumstances, it could not lie in the mouth of NPSM to say that they had given the respondent notice of their intention to also appeal against ORC 2624.

34 Second, I did not think that NPSM provided any good reason to explain the delay. Its primary explanation was that its former solicitors did not file the appeal as instructed. Leaving aside the potential impropriety of NPSM's current solicitors permitting the applicant to make such allegations against its former solicitors without affording the latter an opportunity to respond (see r 29 of the Legal Profession (Professional Conduct) Rules 2015), I agreed with the respondent that NPSM's explanation lacked substantiation. There was nothing beyond a bare assertion, when NPSM could have filed an affidavit from its former solicitors. As for NPSM's secondary explanation that its director, Mr Kaiden Cheng ("Mr Cheng"), was preoccupied with managing its business, this was not satisfactory as well. Indeed, I agreed with the respondent that it should not take an inordinate amount of time for instructions to be given to appeal. And if the appeal were truly so important to NPSM, I could not see why Mr Cheng could not have attended to the matter as a priority over NPSM's other businesses (which would be affected by the various orders made against it).

35 Third, in relation to the chances of the appeal succeeding, although I did not think that the appeal would be "hopeless" (see *Lee Hsien Loong* at [19]), it

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[1] Affidavit of Xie Junhao (Angus Xie) in HC/SUM 29/2023 dated 30 January 2023 at p 28.

suffices to say that I was not convinced as to the chances of the would-be appeal succeeding. In this regard, Mr Cheng explained that the basis of SUM 29 was for NPSM to seek leave to adduce further expert evidence to be led regarding the visual assessment of fungal infection in a toenail. This would supposedly provide the court with the relevant medical evidence on whether it would be possible to assess fungal infection in a toenail based on a visual assessment. However, NPSM has not filed any such application in RAS 28. As such, the main ground for SUM 29 falls away and, with it, a key supporting reason for the potential success of the appeal.

36 Fourth, if I were to grant an extension of time, there would be serious prejudice that cannot be compensated by costs. On this issue, I note that the Court of Appeal has said that the prejudice concerned is the prejudice to the would-be respondent if the extension of time were granted, and not the prejudice to the would-be appellant if the extension were not granted (see the decision of the Court of Appeal in *Wee Soon Kim Anthony v UBS AG and others* [2005] SGCA 3 at [53]; *Lee Hsien Loong* at [24]). While the prejudice of the would-be appellant is not relevant, I note for completeness that I did not think that NPSM would be prejudiced in any case. This is because Mr Navinder Singh, who appeared for NPSM (and NPBPP), said that the basis of NPSM's appeal was primarily to argue that the Publication Order and the Notification Order were out of all proportion to the relatively small number of breaches that the learned DJ had found. As such, it appeared to me that NPSM's appeal remained focused on ORC 2622 and that it did not really need to challenge the findings of fact made by the learned DJ that were the subject of the declarations in ORC 2624.

37 Consistent with this point, considerations of prejudice take on a wider ambit where public interests are concerned. Where issues are litigated in the public interest, involving public bodies as in the present case, considerations of prejudice should take into account the persons, or class of persons whose interests, as represented by the would-be respondent, would be affected by the conduct or outcome of the litigation.

38 In this regard, I agreed with the respondent that it commenced this action for the public interest and hence any compensation in terms of costs would not be meaningful. It should be kept in mind that RAS 28 is not the typical litigation between private entities or persons, where the fruits of the litigation would be for a private benefit or, more specifically, for damages or a monetary account. Instead, the respondent here sought various declarations, injunctions, and related reliefs against NPSM to protect and benefit consumers in the greater public interest. In this respect, given that NPSM has applied for a stay of execution of the relevant Orders of Court pending appeal, an order of costs would not address the concern that there was a real risk that NPSM would persist in its unfair practices and affect consumers. More broadly, NPSM should not be allowed to, in effect, file an appeal against ORC 2624, which was at least 3.5 months after the expiry of the time to appeal, so as to drag out its compliance with the orders that it had not appealed against within time.

39 For completeness, NPSM argued that if it was not allowed to make the amendments to the Notice of Appeal, it would be subject to the various reliefs against it. As I understand it, at a higher level of generality, NPSM was suggesting that it would be denied *substantive* justice if its *procedural* faults were not forgiven. Be that as it may, even on their suggestion that it would be in the interests of substantive justice to allow this application, there were

considerations of procedural justice that could not be ignored in the present case. As Andrew Phang Boon Leong JC (as he then was) opined in *United Overseas Bank Ltd v Ng Huat Foundations Pte Ltd* [2005] 2 SLR(R) 425 at [8], "[t]he quest for justice, therefore, entails a continuous need to balance the procedural with the substantive". The approach by the courts cannot simply be that the ends justify the means.

40 In the present case, having regard to my conclusions in respect of the four factors above, I was of the view that the considerations of procedural justice prevailed. What tipped the balance was that it was within NPSM's prerogative to appeal within the time prescribed. Despite clearly knowing of its right to do this, it *chose* not to do so. Instead, it left it to 3.5 months after the expiry of the time to file an appeal before bringing this application. For all these reasons, I dismissed SUM 29.

Summons No 30 of 2023

41 I turn now to SUM 30, which was NPBPP's application for leave to amend the Notice of Appeal in RAS 27 which was filed against the decision of the learned DJ in OSS 285.

Background

42 The procedural background to SUM 30 is largely similar to SUM 29. On 8 August 2022, the learned DJ made several orders against NPBPP in an Order of Court dated 8 August 2022 (DC/ORC 2625/2022 ("ORC 2625")). On 18 August 2022, NPBPP applied for leave to make further arguments with respect to paragraphs 3 and 4 of ORC 2625. These paragraphs read as follows:

> 3. The Defendant publishes, at its own expense, within fourteen days from the date of this Order, details of the declaration and

> injunction granted against it, by way of a full page public notice in the Straits Times, Lianhe Zaobao, Berita Harian, and Tamil Murasu.
>
> 4. The Defendant must, before any consumer enters into a contract in relation to a consumer transaction with it during a period of two years from the date of this Order:
>
> > (1) notify the consumer in writing about the declaration and injunction in force against the Defendant; and
> >
> > (2) obtain the consumer's written acknowledgement of receipt of the said notice.

Similar to ORC 2624 in OSS 286, these paragraphs relate to: (a) a Publication Order; and (b) a Notification Order against NPBPP. For completeness, paragraph 1 of ORC 2625 relates to a declaration that NPBPP had engaged in an unfair practice, and paragraph 2 pertains to an injunction restraining NPBPP from engaging in that unfair practice. Paragraph 5 contains an order that required NPBPP to inform the respondent of, broadly speaking, changes in the nature of its corporate structure and ongoings. Paragraph 6, the last in ORC 2625, pertains to the costs of OSS 285.

43 On 2 September 2022, the learned DJ heard and dismissed the further arguments. On 9 September 2022, another Order of Court (DC/ORC 2623/2022 ("ORC 2623")) was issued. In ORC 2623, (a) NPBPP was granted an extension of time with respect to the Publication Order; (b) the Notification Order was reiterated; and (c) the costs of the application to make further arguments was fixed.

44 Again, as with SUM 29, NPBPP's position is that on or around 9 September 2022, its former solicitors were instructed to appeal against ORC 2623 *and* ORC 2625. But an appeal was filed only against ORC 2623. Thus, in the Notice of Appeal dated 14 September 2022 ("Notice of Appeal

(RAS 27)"), it was stated that the appeal was "against the decision of [the learned DJ] given on 02-September-2022". The Notice of Appeal (RAS 27) then proceeded to list out the exact orders in ORC 2623. On 4 January 2023, NPBPP filed SUM 30 to apply for leave to amend the Notice of Appeal (RAS 27).

My decision: SUM 30 was dismissed

45 As with SUM 29, I found that the more stringent standard applied to SUM 30. In this regard, it was not correct to think of SUM 30 as a mere application to amend the Notice of Appeal (RAS 27).

46 The only difference between SUM 29 and SUM 30 was that NPBPP also filed SUM 156 in RAS 27 for leave to adduce further expert evidence. This related to what I had alluded to above (at [35]) about how Mr Cheng said NPSM would rely on such evidence to show that it would be possible to assess fungal infection in a toenail based on a visual assessment. This is a factor that would go towards the prospects of the appeal succeeding. I will explain my decision in relation to SUM 156 subsequently in these grounds.

47 But to my mind, whether I allowed SUM 156 or not, the other three factors against an extension of time that I had discussed in relation to SUM 29, and which also applied here to SUM 30, would overwhelm any positive prospects of the would-be appeal succeeding. Accordingly, for reasons the same as those in relation to SUM 29, I also dismissed SUM 30.

Summons No 156 of 2023

Background

48 SUM 156 was NPBPP's application for leave to adduce the doctor's memo of one Dr Roy Chio ("Dr Chio") from Famicare Bedok Clinic dated 6 January 2023 ("the Memo"). This would supposedly provide the court with the relevant medical evidence on whether it would be possible to assess the type of fungal infection in a toenail based on a visual assessment. The Memo is quite short, and I reproduce it for reference.[2]

> To: Whom IT MAY CONCERN,
>
> Dear Sir/Madam
>
> I had been asked to give my opinion as to the Diagnosis and treatment rendered to a Ms Cai WeiTing Lynn, who consulted a Doctor at Royal Care Medical Family Clinic in Choa Chu Kang.
>
> First, I have to State that I have never seen or ever attended to the patient. I was asked by Mr Kaiden Cheng Kai Teng to CLARIFY some medical terminology and possible treatments that were administered
>
> 1) Tinea Pedis refers to a fungal infection commonly seen between the toes (or other digits), especially in tropical countries with high humidity. It is distinct from Onycholysis, which is an infection of the toe/finger nails.
>
> 2) It has been stated to me that Ms Lynn was treated for Onycholysis of the Toe nails. The gold standard of Diagnosis is with nail scrapings. However, that applies to Secondary (Private Skin specialist) and Tertiary Dermatological Centres (Eg National Skin Centre).
>
> At the Primary care level, it is a commonly and widely acceptable practice to treat Empirically.
>
> The signs and symptoms of [Onycholysis] are:
>
> - Pitted, indented or crumbly nails

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[2] Affidavit of Kaiden Cheng Kai Teng in HC/SUM 156/2023 dated 18 January 2023 at p 9.

> -If detached from the nailbed, usually white and opaque
>
> - Generally painless and non-itchy
>
> Indeed, I note on a recent visit to a popular Pharmacy that there are many widely available treatments for Tinea Pedis and Onycholysis.
>
> 3) Having stated the above, this is NO way an endorsement of the Diagnoses or whatever therapy the Centre has performed on Ms Cai.
>
> AND I reiterated that I have Never seen the patient or indeed, even photos of the alleged condition(s).
>
> Kindly revert if more information is needed.
>
> [emphasis in capital in original]

My decision: SUM 156 was dismissed

The applicable law

49 The applicable law was not in dispute. Under O 55D r 11(1) of the ROC 2014, it is provided that:

> **General powers of court (O. 55D, r. 11)**
>
> **11.**—(1) The General Division shall have power to receive further evidence on questions of fact, either by oral examination in the General Division, by affidavit, or by deposition taken before an examiner, but no such further evidence (other than evidence as to matters which have occurred after the date of the decision from which the appeal is brought) may be given except on *special grounds*.
>
> [emphasis added]

Parenthetically, the language in O 55D r 11 as reproduced above is substantially similar to the language used in O 18 r 8(6) of the Rules of Court 2021 ("ROC 2021"). Thus, the jurisprudence in respect of the latter would still be relevant to the former. This is similarly the case with O 19 r 7(7) of the ROC 2021 (see also the High Court decision of *Chan Tam Hoi (alias Paul Chan) v Wang Jian and other matters* [2022] SGHC 192 at [28]).

50 Although the term "special grounds" in O 55D r 11 of the ROC 2014 is not defined either in the Rules of Court or the Supreme Court of Judicature Act 1969 (2020 Rev Ed), the courts have consistently interpreted it to refer to the threefold requirements in the seminal English decision of *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") (see, for example, the Court of Appeal decisions of *Toh Eng Lan v Foong Fook Yue and another appeal* [1998] 3 SLR(R) 833 at [34], *ARW v Comptroller of Income Tax and another and another appeal* [2019] 1 SLR 499 at [99], and *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 ("*AnAn Group*") at [21]). In this regard, the three requirements in *Ladd v Marshall* are:

(a) first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial or hearing;

(b) second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; and

(c) third, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.

These three requirements have often been referred to, respectively, as the criteria of non-availability, relevance, and credibility.

51 I also observe, following the Court of Appeal's comments in *AnAn Group* at [35], that the cases applying the *Ladd v Marshall* requirements should be analysed as lying on a spectrum. On one end of the spectrum are appeals against trials or hearings having the full characteristics of a trial, where the requirements would apply with full rigour, and on the other end, appeals against

decisions not touching upon the merits at all, such as interlocutory applications, where the requirements would serve as a guideline which the court is entitled but not obliged to refer to in the exercise of its unfettered discretion.

52 This present application fell in the middle of the spectrum because the judgment against which an appeal was sought was one rendered after a hearing on the merits, but which did not bear the characteristics of a trial. In this regard, the Court of Appeal laid down three relevant (non-exhaustive) factors that courts may use to consider how strictly to apply the first requirement of *Ladd v Marshall*, *ie*, the criterion of non-availability. The factors are: (a) the extent to which evidence, both documentary and oral, was adduced for the purposes of the hearing; (b) the extent to which parties had the opportunities to revisit and redefine their cases before the hearing; and (c) the finality of the proceedings in disposing of the dispute between the parties (see *AnAn Group* at [35]). Applying these factors, I found that the *Ladd v Marshall* requirement of non-availability should be applied more strictly in this case for the following reasons. First, while the witnesses were not cross-examined, there was a significant extent of fact-finding based on the documentary evidence adduced for the purposes of the hearing (see the Judgment at [27]–[31]). Second, there was no indication that the parties did not have ample opportunity to refine and revisit their cases before the hearing. Indeed, this was not like the situation of an urgent interlocutory application where there are pressing time-constraints. Third, subject to any appeal, the proceedings below finally disposed of the dispute between the parties, and it would not be in the interests of finality and certainty for a party to easily reopen his or her case by adducing new evidence.

NPBPP did not meet the requirements for further evidence to be adduced

53 Considering the three requirements in *Ladd v Marshall*, I dismissed SUM 156.

54 First, as to non-availability, even NPBPP's present solicitors admitted that the Memo "may have been readily available" to NPBPP.[3] However, NPBPP's position was that because of the compressed timelines below, the parties might have overlooked the Memo because it was not relevant for the arguments below. I disagreed with this. It was clear from the record that the parties had multiple hearings below and multiple occasions to exchange affidavits. At no point did NPBPP see it fit to adduce the Memo as evidence. Indeed, if the Memo were so important in the case, it stands to reason that NPBPP's former solicitors would have considered adducing the evidence. Yet, NPBPP did not do so.

55 Second, as to relevance, I found that the Memo was not relevant to the learned DJ's decision. To begin with, the learned DJ's relevant finding was that NPBPP engaged in an unfair practice by making a misleading representation to the complainant, Ms Cai Weiting Lynn ("Lynn"), on 16 August 2020 concerning the need for fungal treatment packages. In coming to this conclusion, the learned DJ concluded that: (a) NPBPP's employee made the representations to Lynn; (b) the representations were false or misleading because NPBPP's employee had no basis to conclude that Lynn suffered from a fungal infection on her toenails based simply on a visual inspection; and (c) Lynn relied on these representations to purchase various treatment packages from NPBPP (see the Judgment at [27]–[31]). In so far as the potential relevance

[3] Appellant's Written Submissions in HC/SUM 156/2023 at para 41.

of the Memo was concerned, the learned DJ said as follows at [30] of the Judgment:

> 30 Turning to the issue of whether that the 16 Aug Representations were false or misleading, I find that they were, because Ms Chen had no grounds to conclude that Ms Cai had fungus on her toenails purely based on a visual inspection. In this regard, it is undisputed that one cannot rely only on a visual inspection of a customer's nails to determine whether the customer has a nail fungal infection:
>
> > (a) The Group's own SOP requires its employees to conduct the 'Fungusless test' to confirm whether a customer has a nail fungal infection, before recommending any fungal treatment
> >
> > (b) Moreover, it is Mr Xie's unchallenged evidence that in their respective interviews with the plaintiff, Mr Cheng and Ms Lai had conceded that (i) there are other skin or nail disorders which have similar physical symptoms to nail fungal infection, and (ii) hence, the defendants' staff cannot rely solely on a visual inspection of a customer's nails to determine if the customer has a nail fungal infection, as they may otherwise possibly misdiagnose him to have nail fungal infection when he actually does not have such an infection.

56 As can be seen, the learned DJ's reasoning was that NPBPP's employee had no grounds to conclude that Lynn suffered from a fungal infection on her toenails based solely on a visual inspection. Therefore, for the Memo to constitute relevant rebuttal evidence against the learned DJ's reasoning, it must, at the very least, state that it is possible for NPSM's employee to have diagnosed a fungal infection on toenails visually *in the present case*.

57 In my judgment, the Memo does not say this at all. In this regard, the Memo explains the different types of fungal infections, *ie*, the difference between *tinea pedis* and/or *onycholysis* of the toenails. However, the type of fungal infection which Lynn was suffering from was not material to the learned DJ's finding that NPBPP engaged in an unfair practice by making

misleading representations to Lynn. Further, the Memo does not say that NPBPP's staff could actually diagnose that Lynn was suffering from a fungal infection on her toenails based simply on a visual inspection. Rather, the Memo states that "the gold standard of diagnosis is with nail scrapings". In sum, I failed to see the relevance of the Memo to NPBPP's appeal.

58 Third, as to credibility, although I had no reason to doubt Dr Chio's credibility, I would reiterate that the Memo was not quite relevant. Indeed, the Memo lacked specific credibility in the present case because it states that it is not an endorsement of the diagnoses or whatever therapy that NPBPP had performed on Lynn. Further and crucially, the Memo states that Dr Chio had not seen any photos in the present case. That, to my mind, diminished its credibility in the present case because it was not possible to ascertain whether NPBPP's employees could have discerned Lynn's condition based on a visual inspection.

59 Above all, for the same reasons as SUM 29 and SUM 30, I agreed that the prejudice caused to the respondent by adducing any further evidence could not be adequately compensated by costs.

60 For all these reasons, I also dismissed SUM 156.

Conclusion

61 For all these reasons, I dismissed all three summonses, *ie*, SUM 29, SUM 30, and SUM 156. I also directed the parties to seek further directions from the Registry as to the timelines for the hearing of the substantive appeals in RAS 27 and RAS 28.

62 After hearing the parties on the appropriate costs orders, I fixed costs of $5,000 for SUM 29, $5,000 for SUM 30, and $5,000 for SUM 156 plus reasonable disbursements in respect of each of the three summonses, to be paid by NPBPP and NPSM to the respondent.

Goh Yihan
Judicial Commissioner

Singh Navinder and Paul Aman Singh Sambhi (KSCGP Juris LLP)
for the appellants;
Chooi Yue Wai Kenny and Joel Jaryn Yap Shen (Adsan Law LLC)
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