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THE HIGH COURT AS *DE FACTO* COURT OF APPEAL: A REVISITATION OF LEAVE REQUIREMENTS IN THE CRIMINAL AND FAMILY COURT JURISDICTIONS

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The High Court almost always sits in its judicial capacity with a single Judge. The exceptions are limited. This article is concerned with the expanded constitution of the High Court in the exercise of its criminal and family court jurisdictions, and with the opinion expressed in some recent cases that the enlarged three-judge panel of the High Court might in these contexts be viewed as a *de facto* Court of Appeal. Upon a contemplation of the consequences said to result from such occasional expansions of the court, it is suggested in this article that the practice, while defensibly founded on practical necessity, should also lead to consideration of another method that could achieve the same outcome.

I. INTRODUCTION

Unless otherwise provided by written law, every proceeding in the High Court and all business arising thereout shall be heard and disposed of before a single Judge.[1] The exceptions to this imposed solitude are limited to a handful of categories. The Singapore International Commercial Court, a division of the High Court, normally sits with a single Judge but its proceedings must be heard by three Judges (i) upon the Chief Justice's direction or (ii) where the parties to the case agree that those proceedings are to be heard by three Judges (unless the Chief Justice has otherwise directed).[2]

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1 *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed Sing) [*SCJA*], s 10(1).

2 *Ibid*, s 18G; *Rules of Court* (Cap 322, R5, 2014 Rev Ed Sing), O 110(1) r 53(1); *Singapore International Commercial Court Practice Directions*, para 23(1)-(3). Decisions issued by three-judge benches include *BCBC Singapore Pte Ltd v PT Bayan Resources TBK* [2016] 4 SLR 1 and [2017] 5 SLR 77; *Arris Solutions, Inc v Asian Broadcasting Network (M) Sdn Bhd* [2017] 4 SLR 1; *Tozzi Srl v Bumi Armada Offshore Holdings Ltd* [2017] 5 SLR 156; *BNP Paribas SA v Jacob Agam* [2018] 3 SLR 1; *DyStar Global Holdings (Singapore) Pte Ltd v Kiri Industries Ltd* [2018] 5 SLR 1. For more on the Singapore International Commercial Court, see generally Yeo Tiong Min, "Staying Relevant: Exercise of Jurisdiction in the Age of the SICC" (Eighth Yong Pung How Professorship of Law Lecture, 13 May 2015); Man Yip, "The Resolution of Disputes Before the Singapore International Commercial Court" (2016) 65 ICLQ 439; Teh Hwee Hwee, Justin Yeo & Colin Seow, "The Singapore International Commercial Court in Action: Illustrations from the First Case" (2016) 28 Sing Ac LJ 692; Justin Yeo, "On Appeal from Singapore International Commercial Court" (2017) 29 Sing Ac LJ 574; Andrew Godwin, Ian Ramsay & Miranda Webster, "International Commercial Courts: The Singapore Experience" (2017) 18 Melb J Int L 219; Kenny Chng, "The Impact of the Singapore International Commercial Court and

The second exception is the High Court having to sit with three Judges to hear an appeal against an order of a Disciplinary Tribunal under the *Medical Registration Act*.[3] A third exception is where the High Court hears certain civil appeals from decisions of the District Court and the Magistrate's Court; the Judge to whom the appeal is assigned for hearing may, if she thinks fit, reserve the appeal for the decision of a court consisting of three Judges.[4] The fourth exception is where the High Court is hearing specified matters (*ie* appeals, review applications and cases stated) under its criminal jurisdiction, with the enlargement of the court to three members contingent on the Chief Justice's direction or consent.[5] And the last exception mentioned here occurs when the High Court hears appeals from the Family Court or the Youth Court; in this scenario there is, oddly, no reference to the involvement of the Chief Justice (or indeed of any other Judge) in deciding whether the appellate court is to be constituted by one or three Judges.[6]

This article discusses the enlarged constitution of the High Court in the exercise of its aforesaid criminal and family court jurisdictions. Such expansion to three sitting Judges is not unknown in the legal annals,[7] but enlarged panels have returned in the High Court after a long hiatus and with some prominence at that. Between 2014 and 2018, there were reported 13 cases[8] in the criminal jurisdiction (all Magistrate's Appeals) and two cases[9] in the family appellate jurisdiction where a jumbo court was empanelled in the High Court. What is relevant to the present discourse is that, in at least two of these instances, the litigants applied for leave to take their causes higher to the Court of Appeal. In both the application was denied. Because each of the demurring courts issued a written decision, it is possible to analyse and compare the reasoning therein. It is also fortunate from the point of coverage that one was a criminal matter and the other a family court matter.

But why precisely are these two judgments deserving of sustained commentary? The first reason, I suggest, is that notwithstanding that the principles in the earlier

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Hague Convention on Choice of Court Agreements on Singapore's Private International Law" (2018) 37 CJQ 124.

3 *Medical Registration Act* (Cap 174, 2014 Rev Ed Sing), s 55(10).

4 *SCJA*, *supra* note 1, s 21(2).

5 *Ibid*, s 19(a)-(b); *Criminal Procedure Code* (Cap 68, 2012 Rev Ed Sing) [*CPC*], ss 386(1), 386(4)(a), 394I(5)(b) and 395(13); *Organised Crime Act 2015* (Act 26 of 2015), s 34(4); *Organised Crime Regulations 2016* (S 236 of 2016), rr 11(1) and 11(4)(a).

6 *Family Justice Act 2014* (Act 27 of 2014) [*FJA*], ss 23(3)(a) and 24(3)(a).

7 One example (a criminal appeal) shortly after independence was *Mah Kah Yew v Public Prosecutor* [1968-1970] SLR(R) 851. As a bit of historical trivia, note also that until 1992 criminal trials in respect of a capital offence were heard by two Judges in the High Court, and an accused person could only be sentenced to death by a unanimous decision (*Criminal Procedure Code* (Cap 185, 1985 Rev Ed Sing), s 194). The law was amended in 1992 to allow capital cases to be tried by one Judge (*Criminal Procedure Code (Amendment) Act*, Act 13 of 1992).

8 *Public Prosecutor v Hue An Li* [2014] 4 SLR 661; *Mohammed Ibrahim s/o Hamzah v Public Prosecutor* [2015] 1 SLR 1081; *Mohamad Fairuuz bin Saleh v Public Prosecutor* [2015] 1 SLR 1145; *Public Prosecutor v Ng Sae Kiat* [2015] 5 SLR 167; *Chew Soo Chun v Public Prosecutor* [2016] 2 SLR 78; *Sim Yeow Kee v Public Prosecutor* [2016] 5 SLR 936; *Koh Yong Chiah v Public Prosecutor* [2017] 3 SLR 447; *Public Prosecutor v Lam Leng Hung* [2017] 4 SLR 474 [*Lam Leng Hung (HC)*]; *Chinpo Shipping Co (Pte) Ltd v Public Prosecutor* [2017] 4 SLR 983; *Public Prosecutor v Sakthikanesh s/o Chidambaram* [2017] 5 SLR 707; *Amin bin Abdullah v Public Prosecutor* [2017] 5 SLR 904; *Public Prosecutor v Yeo Ek Boon, Jeffrey* [2018] 3 SLR 1080; the composite decision in *Tay Wee Kiat v Public Prosecutor* [2018] 4 SLR 1315 and [2018] 5 SLR 438.

9 *TUC v TUD* [2017] 4 SLR 877; *UKM v Attorney-General* [2018] SGHCF 18 [*UKM*].

opinion were endorsed in the later decision, there are at least two key differences in the procedural histories of the cases that ought not to be overlooked. Secondly, a statement of general application set out in the judgments requires some explication to avoid a potentially unsatisfactory use of the expansionary practice in future cases. The third reason I offer is that the stated consequences of the rulings, in view of their novelty, may lead one to wonder whether some of the original objectives for convening an expanded court could conceivably be achieved by another method with relatively less disruption.

II. Perusing the Cases

A. TUC v TUD

It is first necessary to provide some background, and here the narrative starts really with an earlier (and factually unrelated) case. In *BDU v BDT*,[10] a dispute arose between a German father and a Singaporean mother over the custody of a child located in Singapore. The mother refusing to return the child to the father pursuant to a German order of court, the father applied in May 2012 to the Singapore courts under the *International Child Abduction Act*[11] for an order that the child be returned to him in Germany. This was granted in August 2012 by the District Court at first instance.[12] An appeal was filed by the mother to the High Court. That was dismissed by Judith Prakash J (as she then was) in May 2013. Dissatisfied with that decision, the mother appealed further to the Court of Appeal. In February 2014 the court issued its judgment unanimously dismissing the appeal.[13] As all the Judges recognised, this was the first case under the *ICAA* and the *Convention on the Civil Aspects of International Child Abduction*[14] to be litigated in Singapore. It might well have been to meet a perceived imperative to provide guidance for future cases that the Court of Appeal heard the appeal. From start to end the matter took close to 21 months to conclude—which one suspects may not actually be too far out from the existing average for three rounds of hearing—but the unavoidable fact was that the parties and their child had been stuck in judicial limbo for almost two years, with anguish and uncertainty not unlikely their main emotions during this time.

The next temporal marker is July 2016, when a different father applied in Singapore under the *ICAA* asking for an order that the mother of his children return them to him in the United States. The Family Court dismissed his application in November 2016,[15] following which the father appealed to the High Court. This time a three-judge panel of the High Court, comprising Sundaresh Menon CJ, Andrew Phang Boon Leong and Judith Prakash JJA, was convened to hear the case in March 2017; they also appointed an *amicus curiae* to assist them. Eventually the High Court unanimously allowed the father's appeal in May 2017: *TUC v TUD*.[16] In just

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10 *BDU v BDT* [2013] 3 SLR 535.
11 (Cap 143C, 2011 Rev Ed Sing) [*ICAA*].
12 *BDU v BDT* [2012] SGDC 363.
13 *BDU v BDT* [2014] 2 SLR 725.
14 25 October 1980, Hague 28 (entered into force 1 December 1983) [*Hague Convention*].
15 *TUC v TUD* [2016] SGFC 146.
16 *TUC v TUD* [2017] 4 SLR 877.

under 10 months, therefore, the parties had obtained the resolution of their litigation by a court constituted of the three most senior permanent members of the Court of Appeal.[17] This was less than half the time taken in *BDU v BDT*. But the mother was not content with this outcome. In short order she applied to the High Court for leave to appeal against the decision to the Court of Appeal. Prakash JA heard and dismissed this application, rendering written grounds of decision later in June 2017.[18] Her proffered reasons were as logical as they were unprecedented.

In her opinion, two factors had motivated the Chief Justice's appointment of a trio to hear the appeal from the Family Court. These may conveniently be labelled as expertise and expedience. Elaborating on the first, it was said that an enlarged court was convoked in order to give the fullest possible consideration to the novel and important issues up for determination (which issues Prakash JA identified as the proper approach to be adopted in determining "habitual residence" under art 3 of the *Hague Convention* and in construing the "consent" exception under art 13(a) of the said *Convention*).[19] On the second reason, it was thought necessary to resolve the matter as expeditiously as possible in the courts, so as to avoid compromising the prompt return of those children who had been wrongfully removed or retained, which was after all the objective of the *Hague Convention*. A three-judge bench of the High Court, made up of permanent members of the Court of Appeal, would secure that objective while still allowing for ample consideration of the legal issues.[20] Mention was made of the protracted history of *BDU v BDT*, which went through two tiers of appeal as described earlier.[21]

It was in these uncommon circumstances that Prakash JA deemed inapplicable two of the usual three grounds for allowing leave to appeal to the Court of Appeal.[22] She said that those had been designed for a situation where the High Court decision was made by a single Judge. Here, although there were undoubtedly questions of general principle to be decided for the first time, and although it would be to the public advantage to have these questions determined by a higher tribunal, that was precisely why a three-judge bench of the High Court, comprising permanent members of the Court of Appeal, had been constituted. In this case, therefore, any further consideration by a bench of three or more Judges in the Court of Appeal would not be necessary, helpful or advantageous.[23] Prakash JA went so far as to distinguish this from the usual situation by adding that:

> The position here was different not only because of the number of judges but also because the constitution of the bench made it plain that *in effect the Court of Appeal was sitting albeit as a bench of the High Court*.[24]

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17 Leaving apart the then incumbent Vice-President of the Court of Appeal, Chao Hick Tin JA, who was due to retire in September 2017.

18 *TUC v TUD* [2017] 4 SLR 1360 [*TUC (Leave Application)*].

19 *Ibid* at paras 3, 12.

20 *Ibid* at para 11.

21 See also, in the UK, *KO (Nigeria) v Secretary of State for the Home Department* [2018] 1 WLR 5273 at paras 57-60.

22 The three grounds were previously enunciated by the Court of Appeal in *Lee Kuan Yew v Tang Liang Hong* [1997] 2 SLR(R) 862 and *IW v IX* [2006] 1 SLR(R) 135.

23 *TUC (Leave Application)*, *supra* note 18 at paras 9, 10.

24 *Ibid* at para 9 (emphasis added).

She then laid down a general principle for the first time. If an appeal was heard by a High Court bench comprising three Judges, leave to appeal against that decision ought not to be granted on the two aforementioned grounds save in exceptional circumstances. Possible exceptions might be where the High Court disagreed either with (but was bound to follow) a prior Court of Appeal decision or with an established line of High Court authority, or where there was a divergence of opinion among the three Judges on a point of law. In these exceptional scenarios the Court of Appeal's authoritative guidance might still be necessary, warranting the grant of leave to appeal.[25]

Three passing observations may be made of *TUC (Leave Application)* before moving on further. Prakash JA does not comment adversely on the *first* of the usual three grounds for granting leave to appeal—which is where a *prima facie* case of error can be demonstrated—and so that remains unaffected whether it is a one- or three-judge panel of the High Court that hears the appeal. Separately, and as alluded to earlier, ss 23(3)(a) and 24(3)(a) of the *FJA* do not expressly mention the Chief Justice's role in determining whether the High Court is to sit with one or three Judges when hearing appeals from the Family Court or the Youth Court. Prakash JA's judgment indicates that it is the Chief Justice who ultimately makes the listing decision, which seems entirely proper given that such decisions fall within the ambit of the administration of court business, for which the Chief Justice is responsible. On the other hand, it is slightly unfortunate that *TUC (Leave Application)* does not provide more detailed and certain criteria on when any given case will be heard by an expanded panel of the High Court. I have elsewhere described the difficulties that can arise with the position of the Court of Appeal sitting in an enlarged panel of five Judges,[26] some of which would appear to feature equally in respect of the High Court. It is not proposed to overburden this commentary by repeating them here.

B. Chew Eng Han v Public Prosecutor

We turn next to another decision that discussed the issue of the High Court effectively sitting as a Court of Appeal. It stemmed from the alleged misuse of funds by certain leaders of City Harvest Church. After a lengthy trial, the District Court found them guilty of (among other charges) criminal breach of trust in respect of property entrusted in the way of business as an agent ("aggravated CBT").[27] The accused persons appealed to the High Court against their convictions and sentences. A panel of three (Chao Hick Tin JA, Woo Bih Li and Chan Seng Onn JJ) sat to hear the appeal.[28] By a majority decision, the charges of aggravated CBT on which the accused persons were convicted were reduced to that of CBT *simpliciter*. Chao JA and Woo J did not agree with the Prosecution that a director, simply by virtue of her capacity as a director, would be acting in the way of her business as an agent; this therefore meant that a key element of the offence of aggravated CBT was not made

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25 *Ibid* at paras 13, 14.

26 Lau Kwan Ho, "Enlarged Panels in the Court of Appeal of Singapore" [forthcoming in (2019) Sing Ac LJ].

27 *Public Prosecutor v Lam Leng Hung* [2015] SGDC 326 and [2015] SGDC 327.

28 *Lam Leng Hung (HC)*, *supra* note 8.

out in the case of the accused persons. Chan J dissented on this legal point. He would have upheld the convictions on the aggravated CBT charges.

After the High Court issued its decision, one of the accused persons sought leave to refer questions of law of public interest to the Court of Appeal for its determination.[29] This leave application was heard and denied by the Court of Appeal in July 2017. Detailed grounds of decision were subsequently issued in October 2017 by Phang JA, who wrote on behalf of the court in *Chew Eng Han v Public Prosecutor*.[30]

I do not intend to delve deeply into the specific reasons for the Court of Appeal's withholding of leave. It said that none of the questions came close to meeting the usual four conditions for leave to be granted to bring a criminal reference. For present purposes, what was instead significant was the introduction of an *additional* consideration, over and above the typical leave conditions, where the decision below had been made by a High Court bench composed of three Judges.

Endorsing Prakash JA's observations in *TUC (Leave Application)*, the court said that a three-judge panel of the High Court hearing a Magistrate's Appeal was a *de facto* Court of Appeal, convened precisely to deal with important questions affecting the public interest which required detailed examination. The decision of such a panel ought therefore to generally represent a final and authoritative determination of the issues arising from the case, and no leave would (absent exceptional circumstances) be given for a further reference to the Court of Appeal. Otherwise, unnecessary duplication of efforts would result, and, more importantly, the very reason for specially convening the enlarged panel in the first place would be undermined.[31]

There was a caveat to this which Phang JA, with respect, correctly and astutely recognised. Under the doctrine of *stare decisis*, the High Court—whether sitting with one or three Judges—did not have the power to overturn or overrule other High Court decisions or depart from decisions of the Court of Appeal.[32] Therefore the central question (which Phang JA alternatively expressed as an additional consideration) in a leave application case where a three-judge panel of the High Court had already heard the Magistrate's Appeal below was:

> whether the question of law of public interest posed is one that only the Court of Appeal can properly deal with by virtue of the position and powers that it has as the apex court of the land.[33]

Similar to Prakash JA's earlier opinion in *TUC (Leave Application)*, Phang JA said that this additional hurdle would be surmounted only in exceptional cases, such as where there was a need to reconsider and possibly overturn an established line of High Court authority or depart from a decision of the Court of Appeal.[34] He did not mention though the existence of dissent in the lower High Court decision as an exceptional circumstance (but more on that shortly).

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29 At the time this would have been the only way of bringing the case any higher, because the legislation provided for no further avenue of appeal. The law has since been amended to confer upon the Court of Appeal a power to review the High Court's decision (*CPC*, *supra* note 5, s 394I(7)(a)).

30 [2017] 2 SLR 1130 [*Chew Eng Han*].

31 *Ibid* at paras 45-48.

32 *Ibid* at para 49.

33 *Ibid* at para 50 (emphasis in original omitted).

34 *Ibid*.

Three points may, again, be parenthetically noted. The first, already adumbrated above, is that the frequency of three-judge panels hearing Magistrate's Appeals has increased in recent years. The reasons for this are to address significant or novel sentencing issues where they arise and to provide the lower courts with guidance on sentencing that is more authoritative and the result of fuller deliberation in an enlarged court, as both Menon CJ and Chao JA have mentioned extra-judicially,[35] although this does not seem to foreclose an expanded panel occasionally being constituted where it is a point of substantive criminal law that is in issue, with *Lam Leng Hung (HC)* being an example of this.

The second observation is that the Court of Appeal in *Chew Eng Han* did on the facts actually go on to put its mind to the additional consideration. It stated that the High Court below had already answered the questions of law carefully, comprehensively and unanimously, without having to overturn any line of High Court authority or depart from any decision of the Court of Appeal. This was therefore not a case in which only the Court of Appeal, by virtue of its powers and position, could deal with the issues raised; and on that basis alone the leave application could have been dismissed.[36] We can surmise from this that the additional consideration, where it arises, is very much a crucial inquiry for any prospective applicant to address since the application could fall on it alone.

Thirdly, in relation to the exceptional circumstances that would warrant the grant of leave, the emphasis placed by Phang JA on the unanimity of the court below suggests that the presence of any dissent in the High Court decision might also constitute an exceptional circumstance, not dissimilar to Prakash JA's view in *TUC (Leave Application)*. This hypothesis may find some support in the present legislation, which actually requires a three-member bench of the High Court to ordinarily give a single judgment in disposing of the Magistrate's Appeal, with separate judgments to be delivered only if the presiding Judge so directs.[37] *Ex hypothesi*, therefore, a significant difference of opinion exists when a separate judgment is recorded against the ordinary rule. Between 2014 and 2018, *Lam Leng Hung (HC)* was, it should be noted, the only decision of the 13 reported Magistrate's Appeals where an enlarged panel was convened that contained separate judgments. Such a difference of opinion could tip the balance in favour of the Court of Appeal's intervention to resolve a sticky legal point or—now that the Court of Appeal has power to review the High Court's decision[38]—to examine whether the majority's application of the law to the

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35 Sundaresh Menon, "Response by Chief Justice Sundaresh Menon" (Speech delivered at the Opening of the Legal Year 2019, 7 January 2019) at para 16; Chao Hick Tin, "The Art of Sentencing – An Appellate Court's Perspective" (Speech delivered at the Sentencing Conference 2014: Trends, Tools & Technology, 10 October 2014) at paras 36-42. For a discussion of this development, see Amardeep Singh s/o Gurcharan Singh, "Sentencing Reform in Singapore: Are the Guidelines in England and Wales a Useful Model?" (2018) 30 Sing Ac LJ 175 at paras 11-21.

36 *Chew Eng Han*, *supra* note 30 at para 54.

37 *CPC*, *supra* note 5, s 298(6)-(7). For a general discussion on the rule, see Lau Kwan Ho, "A Study in Separate Judgments" in Goh Yihan and Paul Tan, eds, *Singapore Law – 50 Years in the Making* (Singapore: Academy Publishing, 2015), at paras 4.48-4.69.

38 *Ibid*, s 394I(7)(a). Conceivably this reviewing jurisdiction will be very rarely invoked, not only because of the strict conditions in s 394J to be satisfied, but also because due regard will be given to the reasoning of the High Court Judge, who should generally have had the benefit of considering the trial decision and also an opportunity to appoint an *amicus curiae* to assist the court. The introduction of this new provision is nevertheless welcome, for it will at times seem more appropriate for (and some counsel

facts is demonstrably wrong. Indeed, some will remember that it was a similar sort of reasoning that prompted, for a time, the continuance of criminal appeals to the Privy Council solely for cases in which the Court of Criminal Appeal's decision was *not* unanimous and which involved an offence punishable with death or life imprisonment.[39]

C. Public Prosecutor v Lam Leng Hung

Chew Eng Han, as it transpired, was not the only attempt to bring a criminal reference to the Court of Appeal arising out of the High Court's decision in *Lam Leng Hung (HC)*. The Public Prosecutor, who does not need leave to bring a reference,[40] separately referred two questions for the Court of Appeal's determination. Both of these questions were concerned with the issue of law that had split the High Court in *Lam Leng Hung (HC)*, namely, the meaning and scope of the phrase "in the way of his business as… an agent", which was an element of the aggravated CBT offence. Judgment was reserved by the Court of Appeal after the oral hearing in August 2017. In February 2018, the court handed down a unanimous decision containing its answers to the questions: *Public Prosecutor v Lam Leng Hung*.[41]

I am going to focus on the procedural rulings made by the court, rather than on its substantive answers to the questions posed. Phang JA, who again delivered the court's judgment, took the opportunity to clarify certain rulings in *Chew Eng Han*. Following an even-keeled analysis, he stated that the additional consideration laid down in that earlier decision—which by its own terms was directed only to the scenario where a party *other than* the Public Prosecutor sought leave to bring a criminal reference—applied likewise where it was the Public Prosecutor who was bringing a reference against a Magistrate's Appeal heard by three Judges. How did this transposition work? Well, the fact that the Public Prosecutor did not require leave to bring a reference did not mean that the Court of Appeal was invariably bound to answer all the questions of law referred to it; and if these questions had already been considered and answered below in the High Court by a specially convened three-judge panel—a *de facto* Court of Appeal—then those questions could properly be regarded as settled and the Court of Appeal would generally *decline* to exercise its substantive jurisdiction to answer the questions.[42] In the present case, however, the apex court was prepared to determine the questions referred by the Public Prosecutor for three reasons: (i) a determination of the disputed issue would involve overturning or overruling High Court authority, something which could only be accomplished as a matter of *stare decisis* by the Court of Appeal; (ii) there were inconsistent positions within both local and foreign jurisprudence on the legal issue; and (iii) the

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may harbour less personal embarrassment in persuading) the Court of Appeal to hold in an appropriate case that the High Court's decision is either demonstrably wrong or tainted by fraud or a breach of the rules of natural justice.

39 *Judicial Committee Act* (Cap 148, 1985 Rev Ed Sing), s 3(4), repealed by *Judicial Committee (Repeal) Act*, Act 2 of 1994.

40 *CPC*, *supra* note 5, s 397(2).

41 [2018] 1 SLR 659 [*Lam Leng Hung (CA)*] (noted in Tan Yock Lin, "Liability of Directors for Criminal Breach of Trust: Recovering a Lost Interpretation" [2018] Sing JLS 57).

42 *Ibid* at paras 50, 57.

judicial split below in *Lam Leng Hung (HC)* itself indicated that an authoritative determination from the Court of Appeal was necessary.[43]

This last point builds on *Chew Eng Han* and helpfully confirms that a difference in opinion among the three Judges hearing the Magistrate's Appeal *will* constitute an exceptional circumstance in favour of the Court of Appeal's intervention. Another important ruling relates to a second exceptional circumstance, that being the existence of divergence in High Court authority that ultimately requires the Court of Appeal to have to overturn or overrule some earlier High Court decision. In *Lam Leng Hung (CA)*, there was said to be such a divergence caused by conflict between a prior authority (*Tay Choo Wah v Public Prosecutor*[44]) and the majority in *Lam Leng Hung (HC)*. This means that in order to stir the Court of Appeal into action, it is at least enough (where this ground is relied upon) that (i) the divergence is generated *by the very decision made in the High Court which is now under scrutiny* and (ii) that divergence can take the form of a departure from just one earlier High Court authority. There is *not* needed—although it would undoubtedly further justify the Court of Appeal's involvement if there were—an existing split in High Court jurisprudence *prior to* the instant decision below.

There is much to commend the position taken on the divergence of authority point. Judicial differences at co-ordinate level are unfortunate in that they lead not only to a real uncertainty for those litigants already wending their way through the courts, but also to ambiguity in an area—the criminal law—the content of which traditionally stakes a primary claim to the value of certainty, in view of its cautionary role in society and the punishments imposed following its infringement. These insalubrious consequences are observed whether the difference is longstanding or relatively current, and whether the judicial camps on either side of the river are populated by many or one. There is therefore ample justification for the Court of Appeal to rule as soon as reasonably possible on the disputed point, and what more appropriate case than in the instant reference being brought, where the court's authoritative pronouncements should apply immediately to the affected litigants themselves. The case for jumping into the ring at the earliest possible opportunity is enhanced when one considers that the same issue may not come before the Court of Appeal again in the near future; the decision in *Tay Choo Wah*, for instance, stood for over 40 years before being overruled in *Lam Leng Hung (CA)*.[45]

One permutation did not have to be (and was not) explored in the judgment. Assume that the majority in *Lam Leng Hung (HC)* had *agreed* with *Tay Choo Wah*,

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43 *Ibid* at paras 58, 59.

44 *Tay Choo Wah v Public Prosecutor* [1974-1976] SLR(R) 725 [*Tay Choo Wah*].

45 *Lam Leng Hung (CA)*, *supra* note 41 at para 268. There are other judicial differences seemingly brewing within the High Court. One is over whether imprisonment is a mandatory sentence for certain classes of repeat offenders under the *Road Traffic Act* (Cap 276, 2004 Rev Ed Sing) (see *Chong Pit Khai v Public Prosecutor* [2009] 3 SLR(R) 423 at para 24; *Choo Kok Hwee v Public Prosecutor* [2014] 3 SLR 1154 at para 11; *Pua Hung Jaan Jeffrey Nguyen v Public Prosecutor* [2017] 5 SLR 1120 at para 17). Another centres on whether a court may impose what it finds to be a mandatory criminal punishment only in future cases, and not on the convicted person in the instant case itself, in an application of the prospective overruling doctrine (contrast *Sim Wen Yi Ernest v Public Prosecutor* [2016] 5 SLR 207 at para 57 with *Poh Boon Kiat v Public Prosecutor* [2014] 4 SLR 892 at para 114; discussed in Kwan Ho Lau, "On Mandatory Criminal Sentences, Legislative Interpretation, and the Prospective Application of the Law: A View from Singapore" (2018) Statute L Rev (25 September 2018), online: Statute Law Review <https://doi.org/10.1093/slr/hmy020>).

leaving it to the minority Judge to decline to follow that precedent. Strictly speaking, no divergence in authority would have occurred since the resulting decisions pointed the same way. But there was, in this alternate reality, a dissenting opinion in the later case. Should the presence of this dissent lie in favour of the Court of Appeal hearing a criminal reference on an exceptional basis? The answer, it is suggested, is in the positive. The minority Judge's opinion will have betrayed an uncertainty on a point of law even following full arguments and judicial conferences in the High Court. That point ought therefore to be resolved promptly and authoritatively by the Court of Appeal, because future Judges sitting in the High Court are not bound strictly by the majority's decision and might otherwise decide to follow the minority's views,[46] giving rise to some of the detriment described in the previous paragraph. It seems hard also to ignore the fact that, if the High Court appeal had been heard by that minority Judge sitting as a court of *one*, those views would have carried the day and thereby resulted in a contrary authority that *did* run against the older decision. On this analysis the Court of Appeal would, arguably, be justified in tackling the issue in a criminal reference.

III. Further Discussion

With this backdrop in place, we can look more closely into the reasoning and implications of the decisions. It is possible to establish some initial common ground. Each of the relevant rulings of law was actually applied to the facts in *TUC (Leave Application)*, *Chew Eng Han* and *Lam Leng Hung (CA)* and is clearly *ratio*. The first decision is one made in the High Court and therefore does not strictly bind other Judges sitting at co-ordinate level in the High Court. The latter two decisions, both of the Court of Appeal, are likewise not binding in strict terms on that court itself, but for a different reason, of course, which is the operation of the 1994 Practice Statement on Judicial Precedent.[47] Nevertheless it can be expected that the rulings will generally be followed out of judicial comity, not only because of the authority of their sources but also, in the case of *TUC (Leave Application)*, because the Court of Appeal has since separately endorsed the principle.

As mentioned earlier also, there are at least two key differences in the procedural histories of the cases.

A. *Composition*

The first distinction is in the composition of the High Court panels in the two underlying cases. It will be remembered that *TUC v TUD* was heard in the High Court by

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[46] Judges sitting in the High Court are not strictly bound to follow another Judge's decision made in that same court (see, for example, the statements in *Wong Hong Toy v Public Prosecutor* [1985-1986] SLR(R) 656 at para 11; *Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR(R) 854 at paras 14, 24; *Downeredi Works Pte Ltd v Holcim (Singapore) Pte Ltd* [2009] 1 SLR(R) 1070 at para 27; *Attorney-General v Shadrake Alan* [2011] 2 SLR 445 at para 4; *Peter Low LLC v Higgins, Danial Patrick* [2018] 4 SLR 1003 at paras 134-136).

[47] *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689. For a discussion on the past invocation of the statement, see Lau Kwan Ho, "The 1994 Practice Statement and Twenty Years On" [2014] Sing JLS 408.

three of the most senior Judges in the land, all of whom were permanent members of the Court of Appeal. Great force is lent, therefore, to the claim that the High Court there was specially convened to sit as a *de facto* Court of Appeal.[48] Turning to the High Court's decision in *Lam Leng Hung (HC)*, however, only one of the three sitting Judges was a permanent member of the Court of Appeal; the other two were puisne High Court Judges. Recognising immediately that the last-mentioned duo are senior Judges of redoubtable ability and expertise, the *de facto* Court of Appeal image is, nominally at least, nevertheless not as clear here as it was in *TUC v TUD*.

Interestingly this appears to be something already taken into consideration (albeit implicitly) by Phang and Prakash JJA in their statements of general application in *Chew Eng Han* and *TUC (Leave Application)* respectively. In their view, the exceptional displacement of the usual conditions for the grant of leave occurred upon a particular trigger: where the appeal had already been heard by a High Court bench comprising three Judges. One notes that the reference is simply to Judges, and not to Judges of Appeal or a minimum number thereof. A trio of puisne Judges or Judicial Commissioners sitting together on appeal in the High Court would conceivably fall within such a group. Now the potential difficulty with such a wide definition is best illustrated using that hypothetical trio. When parties seek leave for a further appeal or reference to the Court of Appeal, some of them subjectively expect, not unreasonably, their case to be heard by Judges in the apex court who are of greater seniority and experience than those sitting at the High Court; it is part of the notion of error correction. They might then be heard to react with minor disbelief if informed that their case goes no further because the enlarged High Court panel that heard their appeal—in our depiction, the trio of puisne Judges or Judicial Commissioners—is a *de facto* Court of Appeal.

The technical rebuttal, of course, is that there can be no assurance, even in the Court of Appeal, that the most senior Judges will hear the case.[49] It is a consequence

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[48] A similar occurrence took place recently in the UK, where a Divisional Court comprising Lord Thomas of Cwmgiedd CJ, Sir Terence Etherton MR and Sales LJ (as he then was) first heard the Brexit litigation at High Court level in *R (Miller) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583 [*Miller*], something which led a few commentators to remark that the court was sitting effectively or essentially as a Court of Appeal (see David Campbell, "*Marbury v. Madison* in the U.K.: Brexit and the Creation of Judicial Supremacy" (2018) 39 Cardozo L Rev 921 at 940, 941; Mark Elliott, Jack Williams & Alison L Young, "The *Miller* Tale: An Introduction" in Mark Elliott, Jack Williams & Alison L Young, eds, *The UK Constitution after Miller: Brexit and Beyond* (Oxford: Hart Publishing, 2018) at 5). Indeed, Sales LJ himself confirmed in an extra-judicial lecture that the composition of that Divisional Court was such as to make it equivalent in practical terms to the Court of Appeal (Philip Sales, "Legalism in Constitutional Law: Judging in a Democracy" [2018] PL 687 at 688). It must be added, however, that *Miller* certainly has not been the only case in which the Divisional Court was composed entirely of Court of Appeal Judges (see, for example, *Brown v Government of Rwanda* [2009] EWHC 770 (Admin); *R (TN (Vietnam)) v First-tier Tribunal (Immigration and Asylum Chamber)* [2018] EWHC 3546 (Admin)).

[49] See *SCJA*, *supra* note 1, s 29(3), which allows for *ad hoc* staffing of the Court of Appeal. More recent (but still infrequent) instances of Court of Appeal panels comprising only puisne Judges include *Wee Soon Kim Anthony v UBS AG* [2005] SGCA 3; *Mohammad Zam bin Abdul Rashid v Public Prosecutor* [2007] 2 SLR(R) 410; *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568; *Lai Swee Lin Linda v Attorney-General* [2016] 5 SLR 476 (note that Mrs Justice Prakash was appointed Judge of Appeal after the hearing of this appeal, but before the date of judgment). On rare occasions, Judicial Commissioners may also be required to sit in the Court of Appeal (see, for example, *Fones Christina v Cheong Eng Khoon Roland* [2005] 4 SLR(R) 803; *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565; *Chijioke Stephen Obioha v Public Prosecutor* [2017] 1 SLR 1).

of the court not sitting *en banc*, not to mention due allowances having to be made for occasional recusals and vacancies. In any event, going by the present practice in the High Court, any prospect of our imaginary litigants suffering the type of discomfiture described in the preceding paragraph is unlikely to eventuate in the future. In all bar one of the 13 reported criminal matters between 2014 and 2018 where an enlarged panel of the High Court was convened, two of the three sitting Judges were permanent members of the Court of Appeal (the sole exception being *Lam Leng Hung (HC)* itself).[50] And in both of the family matters (*TUC v TUD* and *UKM*), permanent members again numbered no less than two out of the three Judges. A deliberate decision thus appears to have been made to enlist, as far as possible, the participation of at least two members of the Court of Appeal in any expanded bench of the High Court, meaning also that a court of three puisne Judges or Judicial Commissioners is not likely to materialise any time soon. If this observation is accurate then such an approach is to be welcomed, for the result will be to encourage public confidence in the legitimacy and coherency of our justice system. In theory it should also make for an even higher quality of decision-making, since some of the accumulated experience of the Court of Appeal members is made available for the determination of appeals in the High Court.

B. *Urgency*

The next difference is that urgency of resolution of the case was relevant in *TUC v TUD* but not something that featured significantly at all in *Chew Eng Han*. Is expediency a factor which pertains to the anterior inquiry of whether an enlarged panel of the High Court should be constituted? And does it then carry any weight at a later stage when a court is considering whether to grant a party leave to take the case higher? The response to the first question appears reasonably in the affirmative. If the objective is to allow the parties to obtain a final and authoritative resolution of their dispute as quickly as possible, then the case for an expanded panel is well made by comparing the disposal times of *BDU v BDT* and *TUC v TUD*. In contrast, the relevancy of the urgency factor is not as obvious when it comes to the leave application stage. Take the *TUC v TUD* litigation as an example. It could perhaps be said that a further appeal to the Court of Appeal would not have benefitted the child or, indeed, the parents, for that would have prolonged the dispute and compounded their respective plights. But is that not too remote from the actual concerns of the parties? One suspects that the mother would almost certainly have been willing to endure any uncertainty for a bit longer, if that had produced a result in her favour in the Court of Appeal. Ditto the father if he had lost in the High Court. There is no question that speedy justice is generally desirable, but urgency *in itself* does not require to be pitted against party autonomy. It means that if other exceptional circumstances are present—such as disagreement with an established line of High Court authority or a divergence of opinion among the three Judges on a legal issue, as Prakash JA mentions in *TUC (Leave Application)*—then the mere ideal of a short resolution to the case should be of very little weight, if any, in the balance. Compensation for this

[50] See the cases at note 8.

last element can be achieved more simply by expediting the hearing of the appeal proper.

C. *An Alternative Path?*

Persisting for the moment with the analyses in the judgments, let us try to summarise the current framework. We have observed from the foregoing discussion that there are two key motivations for the extraordinary empanelment of a three-judge bench in the High Court as a *de facto* Court of Appeal to hear appeals. Such a court is generally able to provide a final and authoritative determination on novel or important legal issues, and what is particularly helpful where there is urgency in resolving the matter is the disposal period of the case being much shortened, since any further excursion to the Court of Appeal is effectively rendered superfluous.

Significant downside will therefore materialise, it is said, should a second appeal or a reference be too readily heard in a case where the High Court below has already sat with three Judges. Phang JA framed it in efficiency terms in *Chew Eng Han*; he said that granting leave without any exceptional circumstances being present would undermine the very reason for specially convening the enlarged High Court panel and result in unnecessary duplication of efforts.[51] Prakash JA used slightly broader language in *TUC (Leave Application)*, stating that further consideration of the case by the Court of Appeal, absent any exceptional circumstances, would not be necessary, helpful or advantageous.[52]

This leads then to the limited exceptions that may justify raising the case to the apex court, all of which ultimately reduce to one question: is there a point of law on which only the Court of Appeal, by virtue of the position and powers it has as the apex court, can provide final and authoritative guidance? This might be so where the High Court decision had expressed reservations on a prior Court of Appeal ruling or disagreed with a line of High Court authority, or if there was a divergence of opinion among the three Judges.

Looking at this summary, two things are highlighted here which will form the basis of the discussion in this concluding section. The especial convocation of a three-member High Court panel in the exercise of its criminal and family court jurisdictions, while certainly permitted by the legislation, is at the same time also a reflection of the constraint in the existing appellate structure. It is because there is generally only one round of appeal from the first instance decision made in the State Courts, with that first appeal having invariably to proceed for hearing in the High Court, that makes the enlargement of the judicial panel there a mechanism of *practical* necessity:

(i) The schema of the *FJA* provides specifically for the Family Court and the Youth Court to be the first instance court in a number of matters. An appeal generally lies therefrom to the High Court. There is a usual entitlement to one appeal, which is the hearing before the High Court; a second appeal to

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[51] *Chew Eng Han, supra* note 30 at para 48. An application for the grant of leave in such circumstances might even be an abuse of process (*Chew Eng Han v Public Prosecutor* [2017] 2 SLR 935 at para 5).

[52] *TUC (Leave Application)*, *supra* note 18 at paras 9, 13.

the apex court is only granted to the parties exceptionally.[53] This is also the only avenue in which the Court of Appeal can become seised of the case (of which a recent instance is *BNS v BNT*).[54]

(ii) A criminal matter originating in the State Courts may generally be appealed to the High Court. That matter can also reach the Court of Appeal in four ways. The first is after the High Court has ruled on an appeal against the first instance decision; the Court of Appeal has power to review the High Court's decision.[55] The second is, again, after the High Court has made its decision on appeal, and the parties apply to refer a question to the Court of Appeal; this was what happened in *Chew Eng Han* and *Lam Leng Hung (CA)*.[56] The third way is analogous to the second, save that the reference application is made after the High Court's exercise of its revisionary jurisdiction (as opposed to its appellate jurisdiction).[57] The fourth is during or after the trial itself, when a case on a question of law may be stated directly by the trial court to the Court of Appeal (effectively "leapfrogging" the High Court).[58]

As we have seen, an accommodation of the enlarged three-judge panel in the current appellate structure has, in turn, entailed *substantive* modifications to the requirements for leave to take the case higher to the Court of Appeal.

We can wonder, had the design of the appellate system been *tabula rasa*, whether a parallel route of appeal *direct* from the State Courts to the Court of Appeal—call this a leapfrog appeal—would ideally be permissible in exceptional circumstances.[59] In an appropriate case, it would achieve the twin objectives of true authoritativeness and expediency of decision. It would avoid unnecessary duplication of cost and effort. It would result in significantly less disruption to the existing law on leave applications. And it would not now be seen a radical innovation, at least not in Singapore where a case on a question of law may, in criminal matters, already be stated directly by the trial court to the Court of Appeal.[60] Indeed, when he introduced this last-mentioned procedure in 2010, the Minister for Law offered the view that the taking of such a direct route to the Court of Appeal, if appropriate in the circumstances, would save the parties time and cost.[61]

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53 *SCJA*, *supra* note 1, s 34(4). This was recently reiterated by the Court of Appeal in *TMY v TMZ* [2017] 2 SLR 1063 at para 25.

54 [2015] 3 SLR 973 at para 9.

55 *CPC*, *supra* note 5, s 394I(7)(a).

56 *Ibid*, s 397(1)-(2).

57 *Ibid*.

58 *Ibid*, s 396(1). Sections 395(2) and 396(4) further state that the time at which an application to state a case is to be made depends on the nature of the question of law being asked. For a question of law as to the interpretation or effect of any provision of the Singapore Constitution, the application can be made at any stage of the proceedings after the question arises. For any other question of law, the application must be made within 10 days from the time of the making or passing of the judgment, sentence or order by the trial court.

59 See also Tan Yock Lin, "Supreme Court of Judicature (Amendment) Act 1993" [1993] Sing JLS 557 at 563.

60 *CPC*, *supra* note 5, s 396(1).

61 *Parliamentary Debates Singapore: Official Report*, vol 87 at cols 418-419 (18 May 2010) (Mr K Shanmugam). See also *Mohammad Faizal bin Sabtu v Public Prosecutor* [2013] 2 SLR 141 at para 28.

What are the potential drawbacks to offering a direct path to the Court of Appeal? Well, it would be likely to put additional pressure on that court's overall caseload. Some litigants whose cases clearly do not warrant the additional scrutiny might still be tempted to file direct appeals to the top court. But both objections do not seem all that convincing. The pressure on individual members of the Court of Appeal is going to increase anyway if they sit more regularly in the High Court as part of a three-judge bench, and the solution instead may be to tap on senior High Court Judges more often in the disposition of appeals. As for the possibility of abuse, those applications which are frivolous or unmeritorious can be sieved out by means of some sort of test that is policed judiciously and, ideally, aided by clear guidance in the authorising statute.

If this proposal is attractive from an architectural perspective, what has to be changed in the existing system of appeals to prepare for its adoption? Quite clearly the legislation will need to be amended, and consideration can be given to the position in other jurisdictions (for example, Hong Kong,[62] Ireland[63] and the UK[64]) which already have provision for leapfrog appeals. It is of relatively minor significance whether the permission to appeal takes the form of a grant of leave and/or a certificate issued by the trial judge, and the base concerns seem instead to be framed by two other questions: what are the exceptional conditions that will warrant the direct interposition of the Court of Appeal, and will the leapfrog regime apply equally to civil and criminal appeals? The intention not being to delay the conclusion of this article any longer than necessary by embarking on a full discussion, it is suggested simply that some deference can be given to the sensitive formulations enunciated by Phang and Prakash JJA in relation to the unique position and powers of the Court of Appeal to resolve novel or significant issues of law finally and authoritatively, and that there appears to be no particular factor that significantly distinguishes the civil case from the criminal case in this context (save, perhaps, that an accused person is an involuntary participant in the proceedings and may be subject to peculiar qualifications (such as indigence) affecting her ability to engage proper representation,[65] and there is also an imperative not to keep an accused person (who may eventually be found innocent) within the criminal justice system for any longer period than required).

IV. Conclusion

The expanded three-judge panel in the High Court is undoubtedly an enhancement of the ability of our courts to deal with novel or difficult legal issues, and to reach reasoned and authoritative decisions thereon in a timeous manner. Any objective

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62 Decisions of the Court of First Instance in Hong Kong may be appealed in certain circumstances directly to the Court of Final Appeal (*Hong Kong Court of Final Appeal Ordinance* (Cap 484), ss 27A-27F).

63 Decisions of the High Court in Ireland may be appealed in certain circumstances directly to the Supreme Court (*Constitution of Ireland*, art 34.5.4°).

64 Decisions of the Special Immigration Appeals Commission, the High Court and certain tribunals of equivalent jurisdiction in the UK may be appealed in certain circumstances directly to the Supreme Court (*Special Immigration Appeals Commission Act 1997* (c 68), ss 7B-7D; *Administration of Justice Act 1969* (c 58), ss 12-16; *Tribunals, Courts and Enforcement Act 2007* (c 15), ss 14A-14C; *Employment Tribunals Act 1996* (c 17), ss 37ZA-37ZC).

65 Which raises, of course, the issue of legal aid.

perusal of the decisions delivered between 2014 and 2018 will show that to be the case. At the same time, litigants and their counsel—including the Public Prosecutor—must realise that these benefits are accompanied by some real consequences so far as they might seek to take their cases any further to the Court of Appeal. That is the clear and consistent message of the courts in *TUC (Leave Application)*, *Chew Eng Han* and *Lam Leng Hung (CA)*.

This article has discussed some aspects of the reasoning in these three judgments. They prompt reflection on whether an alternative procedure, the leapfrog appeal, might be introduced as a parallel route for criminal and family court cases in the State Court to reach the Court of Appeal. For the reasons explained above, there may be some merit in creating a direct path in exceptional situations. The details will require much thought and deliberation,[66] but it has already been done once in Singapore and there is certainly room in this nimble-footed jurisdiction to at least consider adopting, in her inimitable style, yet another possible innovation to secure the favour of her Lady Justice.

[66] The task is not to be underestimated. In England and Wales, for example, an unforeseen issue with the leapfrog procedure arose in *R (Jones) v Ceredigion County Council* [2007] 1 WLR 1400 over the potential (and unintended) bifurcation of appeals brought against a first instance decision, in a scenario where permission to appeal to the apex court had been given in respect of only some but not all of the Judge's rulings.