

**To Leave or Not to Leave – Guidelines for Leave Applications from
the Appellate Division to the Court of Appeal:
UJM v UJL [2021] SGCA 117**

I. Executive Summary

In 2021, certain amendments to the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) (“**SCJA**”) and the Rules of Court (Cap 322, R 5, 2014 Rev Ed) (“**ROC**”) came into effect. As a result, the Appellate Division of the High Court (“**AD**”) was established and the High Court (“**HC**”) was renamed to the General Division of the High Court (“**Gen Div**”). The effect of these amendments was first explored in *Noor Azlin bte Abdul Rahman and another v Changi General Hospital Pte Ltd* [2021] 2 SLR 440 (“**Noor Azlin**”), which concerned an application for leave to transfer an appeal from the AD to the Court of Appeal (“**CA**”).

As explained in *Noor Azlin*, one of the goals of the AD is to alleviate the caseload of the CA and allow the CA to focus on cases that will benefit most from its expertise. Consequently, the AD will serve as the final appellate court in most cases. However, in limited circumstances, parties may apply for leave under section 47 of the SCJA for the CA to hear an appeal against a decision of the AD (“**AD/CA Leave Application**”). If leave is granted, the case will be heard by the CA.

UJM v UJL is the first instance of an AD/CA Leave Application and presented a valuable opportunity for the CA to consider a further aspect of this profound and momentous change to the Singapore court system. In this decision, the CA outlined the relevant statutory provisions governing an AD/CA Leave Application, and the factors that the CA would consider before granting such an application.

II. Background Facts

The present AD/CA Leave Application was the latest episode in a series of protracted legal proceedings between the parties. The dispute arose from a dispute concerning the division of the parties’ matrimonial assets and costs following a divorce. The appellant Husband and respondent Wife were born in Pakistan. They were married in Pakistan in 1995 but later moved to Singapore and became Singaporean citizens. Subsequently, they were divorced in Pakistan in 2016. The parties’ pool of matrimonial assets contained several properties, including three in Pakistan.

The Husband alleged that the Wife agreed to divide their matrimonial assets in a settlement agreement dated 13 July 2015 (the “**Settlement Agreement**”). The crux of the present dispute was whether the Wife could be granted financial relief beyond the terms of the Settlement Agreement.

The present dispute commenced when the Wife applied for leave to apply for financial relief under section 121B of the Women’s Charter (Cap 353, 2009 Rev Ed) (“**Women’s Charter**”). Leave was granted by the District Judge (“**DJ**”). The Husband appealed against the DJ’s grant of leave but the Gen Div dismissed his appeal. The Gen Div also allowed the Wife’s application for financial relief under s 121G of the Women’s Charter, among other issues.

The Husband appealed the Gen Div’s decision to the AD. The AD dismissed the appeal. The Husband then applied for leave to appeal against the entirety of the AD’s judgment.

III. Issues on Appeal

The CA first noted that the Husband filed his AD/CA Leave Application after the seven-day period stipulated by the ROC had elapsed, making the application ten working days after the AD decision was issued. The Husband did not provide an explanation for this delay in filing. He also did not address the general requirements for the grant of an extension of time. On that basis alone, the CA dismissed his appeal. However, since this application was the first of its kind, the CA nevertheless

proceeded to consider the applicable statutory provisions and principles. The CA held that even if the application was filed on time, the Husband's application would have been denied on its merits.

A. Preliminary Issues

Before discussing the applicable statutory provisions, the CA first stressed the following preliminary points. First, AD/CA Leave Applications would be brought only in situations where the AD has already heard an appeal and delivered its decision. Hence, the parties would have already had an opportunity to litigate their disputes before an appellate court which usually sits as a coram of three judges. The parties would therefore be seeking a "further appeal" from the AD. Second, the AD was established to alleviate the CA's growing caseload while simultaneously permitting the CA to focus its resources on matters which would benefit from its expertise as the apex court of the land. Third, flowing from the above two points, the AD is a court which in some respects is "akin to" an intermediate appellate court, because the AD is located just under the CA in the court hierarchy. However, the AD is not meant to be a "further tier" of appeal that must be crossed before a matter can reach the CA. In the vast majority of cases, the AD is the final appellate court.

Thus, the purpose of the statutory scheme governing AD/CA Leave Applications is to provide a "tightly confined and highly limited" avenue for parties to appeal against certain decisions of the AD. These requirements are set out under sections 46 and 47 of the SCJA and Order 57 rule 2A(3) of the ROC.

Section 46 of the SCJA automatically excludes certain categories of decisions from being appealed. These categories are set out in the Ninth Schedule of the SCJA. Section 47(1) states that the CA is responsible for approving an AD/CA Leave Application, and section 47(2) states that leave to appeal from the AD to the CA will be granted only if it concerns a "point of law of public importance" (the "**Threshold Merits Requirement**"). However, the court is not *required* to grant leave just because a case crosses this threshold.

Additionally, Order 57 rule 2A(3) of the ROC serves to further restrict the situations in which the CA will grant AD/CA Leave Applications. Specifically, the CA must also consider all relevant matters, including either or both of the following:

- a. whether a CA decision is required to resolve a point of law;
- b. whether the interests of the administration of justice requires consideration by the CA.

These two matters under the ROC will henceforth be referred to as the "**Stipulated Considerations**", and the overall question of whether it is appropriate for the CA to hear a further appeal from the AD pursuant to Order 57 rule 2A(3) of the ROC when deciding whether to grant leave under section 47(1) of the SCJA will be referred to as the "**Discretionary Appropriateness Requirement**".

In short, the statutory scheme lays out clear steps governing AD/CA Leave Applications. First, the applicant must determine that the appeal does not fall within any of the prescribed categories to the Ninth Schedule of the SCJA. Next, the applicant must file an AD/CA Leave Application seeking leave to bring the appeal before the CA. Lastly, the applicant must show that the appeal fulfils both the Threshold Merits and Discretionary Appropriateness Requirements. Even if the CA finds that all of these requirements have been fulfilled, the CA retains discretion over whether or not to allow the appeal.

Before applying these provisions to the present AD/CA Leave Application, the CA first addressed two ambiguities in the statutory wording. It also clarified the interaction between the statutory scheme and the common law.

(1) First ambiguity

The first ambiguity the CA addressed was determining whether the Stipulated Considerations should be considered under the Threshold Merits Requirement or the Discretionary Appropriateness Requirement. On the one hand, section 47(3) of the SCJA states that “the CA is to have regard to the matters prescribed by the ROC” when:

- a. considering whether to grant leave to appeal under section 47(1) of the SCJA; or
- b. determining, for the purposes of section 47(2) of the SCJA, “whether an appeal will raise a point of law of public importance”.

This suggests that because the Stipulated Considerations are contained within the ROC, they may also be relevant to the Threshold Merits Requirement.

On the other hand, the phrase “in addition to the matter specified [in section 47(2) of the SCJA]” in Order 57 rule 2A(3) of the ROC suggests the Stipulated Considerations should be considered separately. This would indicate that the Stipulated Considerations are relevant *only* to the Discretionary Appropriateness Requirement.

To resolve the two conflicting interpretations, the CA held that the Stipulated Considerations should be considered only under the Discretionary Appropriateness Requirement. First, the phrase “in addition to” in Order 57 rule 2A(3) of the ROC distinguishes between the matters in the SCJA and the ROC. There is also no mention of the Stipulated Considerations in section 47 of the SCJA. Their absence suggests Parliament did not intend for the CA to consider the Stipulated Considerations in the context of the Threshold Merits Requirement. Second, this interpretation is aligned with the parliamentary debates, where Parliament intended for the Discretionary Appropriateness Requirement to accord the CA flexibility in considering “all relevant matters”, including the Stipulated Considerations. Third, the Stipulated Requirements are points of law. Since the requirement of “point of law” was already separately considered under the Threshold Merits requirement, it would be strange to consider it twice under the same requirement.

The CA clarified that its holding in this case regarding the Stipulated Considerations applied only to AD/CA Leave Applications. Insofar as an applicant seeks to convince the CA that the appeal will raise a point of law of public importance in the context of a transfer application, the holding in *Noor Azlin* will continue to apply.

(2) Second ambiguity

The second ambiguity is whether the fulfilment of both the Threshold Merits Requirement and Discretionary Appropriateness Requirement will guarantee the grant of leave. Section 47(4) of the SCJA clarifies that the fulfilment of the Threshold Merits Requirement does not automatically lead to the grant of leave. Although there is no corresponding provision in the ROC for the Discretionary Appropriateness Requirement, the CA clarified that fulfilment of both requirements only goes towards supporting any applicant’s case rather than guaranteeing the grant of leave.

(3) Interaction with the common law

Another question that arose was whether the principles used in deciding applications for leave to appeal Gen Div decisions to the AD also applied in AD/CA Leave Applications. The CA answered this in the negative.

Under the common law, leave to appeal against Gen Div decisions have previously been granted in three situations:

- a. where there is a *prima facie* case of error;
- b. where there is a matter involving a question of general principle being decided for the first time; or

- c. where there is a matter involving a question of public importance, so it would be advantageous for a higher tribunal to render a decision.

Although the grant of leave to appeal is not confined to such situations, applications for leave to appeal Gen Div decisions to the AD are to be assessed on these principles.

Notably, the CA held that these principles do not apply to AD/CA Leave Applications. First, the relevant statutes have laid down the precise criteria by which AD/CA Leave Applications should be assessed. Even though Parliament would have been aware of the common law principles, it chose to depart from the common law criteria to enact novel criteria. Second, Parliament made it clear that AD/CA Leave Applications are to be assessed differently, in terms of both criteria and the stringency of review. Third, the CA noted that AD/CA Leave Applications are intrinsically different from applications to appeal Gen Div decisions to the AD. This is because when submitting an AD/CA Leave Application, the parties would have already had one round of appeal. If the same principles were to apply, it would lead to an absurd situation where, in every case that leave against a Gen Div decision is granted by the AD, leave would automatically be granted in an AD/CA Leave Application against the eventual AD's decision of the same case. This would run against the intention behind the establishment of the AD, which is to alleviate the caseload of the CA. Furthermore, the CA noted that AD/CA Leave Applications are judicially similar to appeals against Gen Div decisions with a three-judge coram. The considerations from such appeals would therefore be instructive insofar as they highlight the CA's heightened scrutiny in AD/CA Leave Applications, and emphasise the granting of leave only in exceptional circumstances.

B. Interpretation of the AD/CA Leave Provisions

With the above in mind, the CA then considered the statutory provisions that the Husband sought to rely on in respect of his AD/CA Leave Application.

(1) The Threshold Merits Requirement

The Threshold Merits Requirement is encapsulated in section 47(2) of the SCJA, which states that the CA may grant leave under section 47(1) only if “the appeal will raise a point of law of public importance”. The phrase can be broken up into three parts: “an appeal will raise”, “a point of law”, and “of public importance”. Although this statutory wording is wholly replicated under Order 56 rule 12(3)(b) of the ROC, which suggests that they should be interpreted in a similar fashion, the CA cautioned that the wording in the ROC appears in the different and distinguishable context of transfer applications.

The CA therefore applied a modified approach in interpreting each of these three phrases. The CA first referred to the analysis from *Noor Azlin*, which considered the possible interpretations of the plain wording of these statutory provisions. The CA would then consider whether these interpretations could apply within the statutory scheme as a whole.

On the first phrase, “an appeal will raise”, the CA clarified that there must be a live issue that arises on the facts of the case. This issue must also have a substantial bearing on the outcome of the appeal if the leave is granted. As a matter of good practice, the onus is on the applicant to explain how both requirements will be met. Additionally, this issue must also arise from the decision and reasoning of the AD. It would be insufficient for the applicant to show that the Gen Div had considered the claimed point of law if that point was subsequently abandoned by the AD. The court highlighted that it would otherwise be an abuse of process to raise arguments on an entirely new case.

On the second phrase, “a point of law”, the CA endorsed the distinction stated in *Noor Azlin* between questions of fact and law. Questions of law would apply universally to other similar situations, whereas questions of fact are confined to the case at hand. Thus, this provision would not be engaged if the appeal relates to points which are factual in nature, even if they are of public importance.

Last, on the third phrase, “of public importance”, the CA held that its observations from *Noor Azlin* were generally, equally applicable to AD/CA Leave Applications. The only exception was the discussion on the Stipulated Considerations and whether it would be more appropriate for the CA to hear an appeal than the AD. The proper consideration in the context of an AD/CA Leave Application was, instead, whether it was appropriate for the CA to hear a *further appeal* from the AD.

The CA further noted that the purpose and object of section 47(2) of the SCJA and the Threshold Merits Requirement is clear. The Threshold Merits Requirement was to serve as a threshold condition that must be fulfilled before the CA can grant leave under section 47(1) of the SCJA. It serves to sift out unmeritorious matters which do not deserve to be heard in a further appeal before the CA from the outset. Indeed, there is no need to consider the Discretionary Appropriateness Requirement if the Threshold Merits Requirement is not fulfilled.

(2) Discretionary Appropriateness Requirement

The Discretionary Appropriateness Requirement is found in Order 57 rule 2A(3) of the ROC, which states that the CA is to have regard to “whether it is appropriate” for the CA to hear a further appeal from the AD, “taking into account all relevant matters”. This provision envisions a situation in which the AD has already heard an appeal and presumably dealt with the same legal issues which the applicant was seeking leave to litigate in a *further appeal* before the CA. This context must also be informed by the status and powers that the CA possesses as the apex court of the land, and the court hierarchy as set out in the SCJA and the ROC.

As a court akin to an intermediate appellate court, the AD has the power to overrule decisions of the Gen Div as well as other lower courts. It can depart from previous AD precedents but it does not have the powers, unlike the CA, to:

- a. overturn or overrule other decisions of the AD; or
- b. depart from decisions of the CA.

As such, the CA highlighted three features apparent about the Discretionary Appropriateness Requirement. First, in contrast to the Threshold Merits Requirement, which functions as a threshold condition for the grant of leave, the Discretionary Appropriateness Requirement provides the CA with the discretion to determine whether a further appeal against a decision of the AD ought to be heard. Second, “appropriateness” is not a monolithic concept, but rather a matter of degree. Hence, whether the threshold for leave is crossed should be determined according to the facts and circumstances of the case. That is why, third, in determining whether the threshold is crossed, the CA has the flexibility to consider any and all matters that it considers relevant. This means that its discretion in respect of the Discretionary Appropriateness Requirement is a broad and wide-ranging one.

That said, this discretion can be exercised only after considering at least one of the two Stipulated Considerations, along with any other matter deemed relevant by the CA. The first Stipulated Consideration is whether a decision of the CA is “required” to resolve the point of law. The word “required” suggests that no court apart from the CA is capable of resolving the point of law in question. As such, it is not enough for the point of law to be novel, or for it to be one that has not been considered by the CA before. This is because the AD is well-equipped to resolve complex and novel points of law. Therefore, the situations that require the CA’s consideration to resolve a point of law will be rare and exceptional. The CA outlined some examples of when such situations may occur, such as:

- a. where there are conflicting decisions of the CA or AD on the point of law;
- b. where the bench of the AD diverged on a point of law which has a substantial bearing on the outcome of a case and which had directly contributed to the split; and

- c. where the bench of the AD was unanimous in their decision, but expressed strong reservations about the principles which they are bound to apply.

The second Stipulated Consideration is whether “the interests of the administration of justice, either generally or in the particular case, require” the CA’s consideration of the point of law. The CA considered this to be simultaneously both a stricter and more lenient provision than the first Stipulated Consideration. On the one hand, it is stricter because a CA decision is not only “required” in a general sense, but also required for the specific purpose of furthering “the interests of the administration of justice”. On the other hand, it is more lenient because the words “generally or in the particular case” suggest that the second Stipulated Consideration may be fulfilled even where the interests of the administration of justice are furthered only in a particular case. This strikes a good balance because the provision allows the CA to intervene when it is crucial to further the administration of justice in a particular case. At the same time, this provision prevents abuse by opportunistic litigants by imposing a heightened threshold of necessity. Given the threshold condition that the point of law raised in the appeal must be of “public importance”, cases where the second Stipulated Condition will be engaged will be few and far between. The CA acknowledged it would be difficult to prescribe “hard and fast rules” in respect of the Second Stipulated Consideration. However, some examples of cases in which the CA’s consideration of a point of law may be required “in the interests of the administration of justice” may include those which concern the functioning of crucial aspects of Singapore’s legal system or will remedy serious injustice.

In deciding whether to grant leave under section 47(1) of the SCJA, the CA is to consider whether it is appropriate for the CA to hear a further appeal from the AD “taking into account all relevant matters”. The CA noted that it is presently unclear what other matters might be “relevant” to the CA’s inquiry. However, it held it was currently unnecessary to lay out concrete rules for this purpose. Instead, the CA emphasized that its scrutiny in respect of any “relevant matter” must be searching to prevent the abuse of the statutory scheme governing AD/CA Leave Applications. This accords with the purpose and object of the statutory scheme, where only truly exceptional cases will warrant a grant of leave.

The CA further noted that the above interpretation of the Discretionary Appropriateness Requirement and the Stipulated Conditions was in line with their two-fold purpose. First, the provision acts as a “fine-meshed sieve” to further restrict the number of cases which will warrant a further appeal before the CA. Second, it accords the CA a broad and wide-ranging discretion to determine whether to hear a further appeal against a decision of the AD.

IV. Application

It is with the above principles in mind that the CA reiterated that AD/CA Leave Applications are designed to provide a “tightly confined and highly limited avenue” for parties to appeal against decisions of the AD. In the Husband’s case, the CA concluded that even if leave was granted for the appeal to be filed out of time, the Husband had failed to show that his appeal fulfilled the Threshold Merits Requirement. The CA noted that the circumstances of the case did generate “thought-provoking legal issues”. However, these legal issues had not been raised because the parties had run their cases along *factual* lines before the AD. As such, the AD judgment was almost entirely factual in nature, with no definitive pronouncements on points of law. Further, the six questions the Husband sought to raise in support of the present application were questions of fact, not law. As such, the appeal was dismissed.