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ENLARGED PANELS IN THE COURT OF APPEAL OF SINGAPORE

For many years the Court of Appeal of Singapore generally sat with no more than three judges to hear cases. Since 2014, however, quintets have increasingly been constituted in that court. This article considers the recent practice in Singapore and, drawing on comparisons with the position in some other Commonwealth jurisdictions, offers a few thoughts on its possible operation in the future.

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I. Introduction

1 The Court of Appeal sits literally and figuratively at the apex of the Singapore judiciary. It feeds on a varied diet of cases. Its constitution is a healthy mix of permanent members – the Chief Justice, the Vice President, the judges of appeal – and other High Court judges who sit *ad hoc* at the Chief Justice's request. Litigants before that court often see two or three austere faces bearing down on them – or at least, that was so until recently. Now they increasingly have to field questions from an attacking quintet. The five-judge panel has made its return in the Court of Appeal.

2 Singapore, separating from Malaysia, became an independent republic in 1965. By a historical oddity its judiciary did not dissociate fully from the Malaysian court system until 1970. That was when the Court of Appeal and the Court of Criminal Appeal were established, in place of the Federal Court, as the topmost judicial tribunals in Singapore. In July 1993 the two courts were merged into a single Court of Appeal with both civil and criminal jurisdiction. All this while, one thing did not change. It was that but a maximum of three judges would sit to hear the case. Often it would be a trio, possibly a duo where the case related to some interlocutory or procedural matter.

3 A peculiar event then occurred in August 1993. A five-judge panel of the Court of Appeal was convened to decide a criminal appeal.[1]

1 *Mok Swee Kok v Public Prosecutor* [1994] 3 SLR(R) 134.

By all accounts, it was the first time the court (by whatever name called) had constituted itself in a quintet since the founding of the nation. Scarcely had the reverberations settled when another criminal matter, this time a reference on certain questions of law, reached the Court of Appeal; again, it sat five strong to hear the case.[2] This marked the second time a full hand of judges decided a matter in that court.

4 Nearly two decades would pass without another quinary Court of Appeal being convened in Singapore. In January 2014, Sundaresh Menon CJ indicated that that court would freshly explore the prospect of constituting five-judge panels for selected cases of jurisprudential significance, so that difficult or unsettled issues which arose were resolved with the benefit of the collective wisdom and insight of a larger pool of judges.[3] Within two months an expanded five-member court would be convened to hear a criminal appeal.[4] Since then, 34 other written decisions have been issued by a jumbo Court of Appeal, as at the end of 2018. The present article first provides a short background of the expanded court in common law systems, followed by an analysis of the cases in Singapore with a view to ascertaining some trends in the summoning of an expanded panel here. Observations are then offered as regards the possible operation and further refinement of the Singapore practice in future cases, in the light of the experiences of other Commonwealth jurisdictions.

II. Background

5 Apex courts in the common law world typically arrange themselves into one of two models in the disposal of cases. The first is the *en banc* court, where cases are ordinarily heard and decided by all of the permanent members appointed to that court. The New Zealand Supreme Court and the US Supreme Court are examples of this. The

2 *Public Prosecutor v Tan Meng Khin* [1995] 2 SLR(R) 420.

3 Sundaresh Menon, "Response by Chief Justice Sundaresh Menon" Opening of the Legal Year 2014, Singapore (3 January 2014) at para 31. See also Sundaresh Menon, "Foreword" in David Llewelyn, Ng Hui Ming & Nicole Oh Xuan Yuan, *Cases, Materials and Commentary on Singapore Intellectual Property Law* (Academy Publishing, 2018) at p v. As for the uncommon expansion of the *High Court* to hear certain appeals made thereto, Judith Prakash JA wrote in *TUC v TUD* [2017] 4 SLR 1360 at [3] and [12] that this would be justified where the case required the court to give its fullest possible consideration to novel or important legal issues requiring detailed examination. Such a procedure was generally approved by the Court of Appeal in *Chew Eng Han v Public Prosecutor* [2017] 2 SLR 1130 at [47]–[48]. See also Lau Kwan Ho, "The High Court as *De Facto* Court of Appeal: A Revisitation of Leave Requirements in the Criminal and Family Court Jurisdictions" [2019] SingJLS (forthcoming).

4 *Muhammad Ridzuan bin Md Ali v Public Prosecutor* [2014] 3 SLR 721.

second model is the court which sits generally in panels, each of which is composed of a subset of the court's total permanent membership. The top courts in Singapore, Australia, Canada and the UK utilise this model.

6 To these default positions there exist a variety of exceptions. Most will be discussed here by way of overview only, with the remainder of this article to focus on one particular exceptional situation.

7 For a court that sits *en banc*, one exception is that it need not always sit with the full complement of judges. While the usual practice in the US Supreme Court is for all nine justices to sit to hear cases, the quorum for the court to be duly constituted is six justices.[5] It is rare but not unheard of for that court to sit in a panel smaller than nine; the common instances are where a permanent justice has to recuse himself or herself, or has retired or passed away, and leaves a temporary vacancy in the court.

8 A second exception is that even a court in the *en banc* tradition may not always sit with a permanent membership. The quorum in the New Zealand Supreme Court is five judges.[6] Currently only five permanent judges have been appointed. Occasionally, one or more of them cannot hear a case owing to recusal or other circumstances. The solution in New Zealand is that any temporary gap will be filled by acting judges (who are retired Supreme Court or Court of Appeal judges) functioning in a supernumerary role.[7]

9 Another exception, one that potentially applies to both models, is that a reduced number of judges can decide on limited categories of matter. These include leave to appeal applications, appeals against interim, interlocutory or ancillary orders and the making of case management orders. An efficient allocation of judicial resources is usually cited as the reason for having them heard and decided by a smaller number of judges. The temptation to label these as non-substantive matters should be resisted given that they may have very real effects on the disposal of any given case; it might be better to

5 28 USC § 1 (US); Rules of the Supreme Court of the United States, r 4.2.

6 Supreme Court Act 2003 (2003 No 53) (NZ) s 27(1).

7 Supreme Court Act 2003 (2003 No 53) (NZ) s 23. Notably, a former judge of the Supreme Court did not believe this arrangement to work well primarily because there might not be enough of such retired judges and they were not necessarily keeping up with changes in the law: Peter Blanchard, "The Supreme Court – A Judge's View", speech at the University of Auckland Conference on the New Zealand Supreme Court, Auckland (14 November 2014). Criticism had also been levelled by Michael Taggart in "Acting Judges and the Supreme Court of New Zealand" (2008) 14 Canterbury L Rev 217.

classify them imperfectly as proceedings of an ancillary, interim or interlocutory nature.

10 The last exception covered here, and which is observed only in those courts which do not sit *en banc*, is that the usual size of the panel may be enlarged on a suitable occasion. Any expansion is subject to contrary legislation – a common limitation is that there must still be an odd number of judges – but after that it is usually left to the court itself whether to puff up, so to speak, for the hearing and disposal of specific cases. It is this particular scenario with which the present article is concerned.

III. Trends

11 Certainly there is no doubt in Singapore that a sitting Court of Appeal may under legislation expand to five or more members. The chief authorising provision is s 30(1) of the Supreme Court of Judicature Act,[8] which reads:

> The civil and criminal jurisdiction of the Court of Appeal shall be exercised by 3 or any greater uneven number of Judges of Appeal.

Paragraph 85A of the Supreme Court Practice Directions then returns a discretion to the Court of Appeal itself to determine, as and when appropriate, whether to convene a panel of five or any greater uneven number of judges. Yet other provisions and instruments are germane in setting out the Chief Justice's discretion to constitute an expanded court.[9] (A third formulation exists but that applies only in a choice between a two- or three-judge panel for the hearing of certain specified interlocutory or non-final appeals and applications; here it is the first instance judge or a Judge of Appeal who should resolve any confusion or uncertainty as to the appropriate size of the panel.)[10] The convening of an enlarged panel being therefore a *judicial* practice, it would be useful in the first instance to understand how the Singapore judiciary perceives its utility.

8 Cap 322, 2007 Rev Ed.

9 For criminal matters, see ss 386(2), 386(4)(*b*), 394I(5)–394I(7), 395(14) and 396(4) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed); s 34(4) of the Organised Crime Act 2015 (Act 26 of 2015); and regs 11(2) and 11(4)(*b*) of the Organised Crime Regulations 2016 (S 236/2016). For civil matters in the Singapore International Commercial Court, see O 110 r 53(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) and para 24(3) of the Singapore International Commercial Court Practice Directions (effective 1 November 2018).

10 Paragraphs 85(2)–85(4) of the Supreme Court Practice Directions (2006 Ed), read with s 30(2) of, and para 3 of the Sixth Schedule to, the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed).

12 The clearest expression has been the statement of Menon CJ in January 2014 cited above. It appears to be a guide and the words should not be read strictly like a statutory directive. They mention three criteria against which a case might be evaluated for appropriateness of hearing by an enlarged court: jurisprudential significance, difficulty and unsettledness. It is not told immediately whether the first criterion (which can appear to be an umbrella category) overlaps wholly or in part with the second or third, or if it can form a separate category of cases on its own – for example, a case might not raise particularly difficult or unsettled issues but could conceivably be of legal significance, such as where the court is asked to construe a newly enacted statute of relatively broad application. Each category is also capable of individual application without reference to the other categories, but conversely this should not perhaps automatically discount the case in which partial elements of the various criteria are all present to make it an appropriate one for hearing by a fuller court.

13 In similar vein but with comparatively more detail are the guides published by the UK Supreme Court, the High Court of Australia and the New Zealand Court of Appeal regarding the convocation of enlarged panels. In the UK, five criteria have been specified: (a) if the court is being asked to depart, or may decide to depart, from a previous decision; (b) a case of high constitutional importance; (c) a case of great public importance; (d) a case where there is conflict between decisions in the Privy Council, the House of Lords and/or the Supreme Court; and (e) a case raising an important point in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms[11] ("ECHR").[12] In Australia, the categories are not dissimilar, namely, those cases: (a) which involve interpreting the federal constitution; (b) where the court may be invited to depart from one of its previous decisions; or (c) where the court considers the principle of

11 Eur TS No 5, 213 UNTS 221, 1953 UKTS No 71 (4 November 1950; entry into force 3 September 1953).

12 Available at https://www.supremecourt.uk/procedures/panel-numbers-criteria.html (accessed March 2019). The current President of the court has further indicated that at least seven will sit if the court is being asked to depart from a previous decision of the House of Lords or the Supreme Court, and that nine will sit if the court has to reconcile conflicting decisions at that or Privy Council level: Baroness Hale of Richmond, "Should the Law Lords Have Left the House of Lords?" Michael Ryle Lecture 2018, London (14 November 2018). See generally Chris Hanretty, "Optimal Panel Size on the UK Supreme Court" (17 February 2016) <http://acle.uva.nl/binaries/content/assets/subsites/amsterdam-center-for-law--economics/conferences/celse-2016/conference-papers/session-ii/paper-hanrety---2016.pdf> (accessed March 2019); James Lee, "Against All Odds: Numbers Sitting in the UK Supreme Court and Really, Really Important Cases" in *Apex Courts and the Common Law* (Paul Daly ed) (University of Toronto Press, 2019).

law involved to be one of major public importance.[13] For New Zealand, the main criteria are where: (a) the establishment or revision of sentencing guidelines is proposed; or (b) the appeal involves issues of evidence, procedure or practice of general application or some other issue which will be of major significance to other cases, particularly where there is no right to apply to the New Zealand Supreme Court for leave to appeal.[14]

14 It will be seen that the New Zealand criteria are more specific, whereas the UK and Australian positions overlap in some areas with the criteria in Singapore but are wider: they include cases that are of great public importance or raise an important point relating to the ECHR (which cases, at least on a facial reading of the criteria, need not be jurisprudentially significant or raise difficult or unsettled issues). Now there is no similar rights convention in the Singapore context, but one would not be surprised if the stated criteria here were subsequently refined to mention also those cases the resolution of which would have great public importance – it will be seen later that a few of the decided cases can probably be said to already fall into that bracket.

A. Preliminary observations

15 From 2014 to 2018, 35 written decisions were issued by a five-judge Court of Appeal in Singapore. Some preliminary observations on them can be made. First, the cases warranting review by an expanded court have arisen in both the civil and criminal arenas. Seven of the 35 decisions were criminal matters, of which one was on criminal breach of trust;[15] one was on rape and sexual assault;[16] two were on the subject of drug trafficking;[17] and three were in connection with a conviction of murder.[18] This count is undoubtedly inflated by the *Kho Jabing* line of cases, where one offender managed to exercise the same curial quintet on three different occasions.

16 As to the civil cases, these are quite a mixed bunch. Two have been in the admiralty jurisdiction,[19] three concerned companies

13 Available at http://www.hcourt.gov.au/about/operation-of-the-high-court (accessed March 2019).

14 Available at https://www.courtsofnz.govt.nz/the-courts/court-of-appeal/cases-to-court (accessed March 2019).

15 *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659.

16 *Pram Nair v Public Prosecutor* [2017] 2 SLR 1015.

17 *Muhammad Ridzuan bin Md Ali v Public Prosecutor* [2014] 3 SLR 721; *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394.

18 *Public Prosecutor v Kho Jabing* [2015] 2 SLR 112; *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135; *Kho Jabing v Public Prosecutor* [2016] 3 SLR 1259.

19 *The STX Mumbai* [2015] 5 SLR 1; *The Chem Orchid* [2016] 2 SLR 50.

legislation,[20] three dealt with intellectual property,[21] two were on family law,[22] one on the doctrine of *res judicata*,[23] one on the conflict of laws,[24] one on land law,[25] one related to commercial arbitration,[26] two were on investment arbitration,[27] two on constitutional adjudication,[28] five on contract law[29] and five on tort.[30] It is fair to say that the expansionary practice has been put to use across a variety of subjects.

17 To put these figures in context, the 35 decisions constitute about 9.8% of all the written decisions issued by the Singapore Court of Appeal from 2014 to 2018. (This excludes the court's decisions made on appeal from the Singapore International Commercial Court, of which more will be discussed later.)[31] It is an incomplete but useful proxy for the percentage of cases which are heard by a five-judge panel: incomplete because the Court of Appeal sometimes rules in a case without issuing a written decision (in such a scenario it is almost always a dismissal of the appeal after the hearing), but useful nevertheless given the absence of detailed and globalised official figures. And if one peers still more closely at the civil-criminal divide, then using the same methodology it is roughly 9.9% of the written civil decisions and 9.3% of the written criminal decisions that have been issued by an expanded court during the same period. Although the sample size cannot of necessity be a large one, it appears preliminarily that there is virtually no

20 *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95; *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd* [2017] 2 SLR 898; *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129.

21 *Société des Produits Nestlé SA v Petra Foods Ltd* [2017] 1 SLR 35; *Global Yellow Pages Ltd v Promedia Directories Pte Ltd* [2017] 2 SLR 185; *Warner-Lambert Co LLC v Novartis (Singapore) Pte Ltd* [2017] 2 SLR 707.

22 *TMO v TMP* [2017] 1 SLR 585; *UDA v UDB* [2018] 1 SLR 1015.

23 *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104.

24 *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd* [2018] 2 SLR 1271.

25 *Chan Lung Kien v Chan Shwe Ching* [2018] 2 SLR 84.

26 *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312.

27 *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536; *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho* [2019] 1 SLR 263.

28 *Kho Jabing v Attorney-General* [2016] 3 SLR 1273; *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850.

29 *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd* [2017] 2 SLR 129; *Ochroid Trading Ltd v Chua Siok Lui* [2018] 1 SLR 363; *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2018] 2 SLR 655; *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua* [2019] 1 SLR 214; *BOM v BOK* [2019] 1 SLR 349.

30 *Goh Lay Khim v Isabel Redrup Agency Pte Ltd* [2017] 1 SLR 546; *ACB v Thomson Medical Pte Ltd* [2017] 1 SLR 918; *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492; *Ng Huat Seng v Munib Mohammad Madni* [2017] 2 SLR 1074; *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866.

31 See para 31 below.

difference in the rate of five-judge panels being convened between civil and criminal cases.

18 If we focus on the annualised figures, a clear year-on-year increase is generally observed. The following table contains for the calendar years 2014 to 2018 the written decisions issued in a five-judge court as a rounded-off percentage of all the Singapore Court of Appeal's written decisions in the relevant period.[32]

Year	Percentage of all written decisions
2014	1.6%
2015	4.3%
2016	10.1%
2017	17.1%
2018	14.1%

19 Another notable aspect is the level of consensus seen in the five-judge Court of Appeal. Save for two decisions,[33] all of the 35 cases were disposed of unanimously with a solitary judgment. And those judges who wrote separately in the two outliers were in broad agreement with the majority's analysis of the law. Overall, this combined rate of dissent and concurrence in five-judge panels (around 5.7%) is higher than that appearing in written decisions of the more usual two- or three-judge panel for the same period (around 2.5%),[34] although a reduced statistical

32 For consistency, the year of issue of a decision was taken as the reference point notwithstanding that in a small number of cases the decision was issued after oral arguments had been heard in the previous year.

33 *Public Prosecutor v Kho Jabing* [2015] 2 SLR 112; *The Royal Bank of Scotland NV v TT International Ltd* [2015] 5 SLR 1104. On dissenting and concurring judgments in Singapore generally, see Lau Kwan Ho, "A Study in Separate Judgments" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan eds) (Academy Publishing, 2015) ch 4.

34 For recent dissents and concurrences emanating from three-judge panels of the Court of Appeal, see *Public Prosecutor v Chum Tat Suan* [2015] 1 SLR 834; *PT Perusahaan Gas Negara (Persero) TBK v CRW Joint Operation* [2015] 4 SLR 364; *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944; *Grains and Industrial Products Trading Pte Ltd v Bank of India* [2016] 3 SLR 1308; *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373; *Harven a/l Segar v Public Prosecutor* [2017] 1 SLR 771; *Gopu Jaya Raman v Public Prosecutor* [2018] 1 SLR 499; and *Mohamed Affandi bin Rosli v Public Prosecutor* [2019] 1 SLR 440. This occurrence of dissent and concurrence in smaller panels is itself generally consistent with historical averages: see Lau Kwan Ho, "A Study in Separate Judgments" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan eds) (Academy Publishing, 2015) at paras 4.22 and 4.26.

significance may be unavoidable here owing to the inherent limitation on sample size.

20 Turning to the judges who sat on these expanded panels in Singapore, 18 of the 35 cases were first heard by a court that comprised permanent members of the Court of Appeal as well as other High Court judges sitting *ad hoc*. Panels composed entirely of permanent members heard the other 17 cases. The backstory here is likely to be one of timing. It is only since August 2016 that there have been at least five permanent members of the Court of Appeal at any given point in time.[35] Unsurprisingly, therefore, all of the cases that were first heard by a five-judge Court of Appeal *prior* to August 2016 included at least one High Court judge sitting *ad hoc* at the Chief Justice's request. However, from that time onwards only seven of the 24 cases where a quintet was convened contained a High Court judge on the court when the case first came on for hearing;[36] the rest were heard by a panel staffed entirely by permanent members. It may further be observed that all of the written decisions in these 24 cases were penned by a permanent member: Menon CJ and Andrew Phang Boon Leong JA lead with seven each, followed by Judith Prakash JA (four) and Chao Hick Tin, Tay Yong Kwang and Steven Chong Horng Siong JJA (two each). The three judges at the top of this authorial leaderboard generally happen also to be the more senior of the permanent members, in terms of when they were appointed to that court.

21 On these figures the current practice seems to be that all of the permanent members will ordinarily sit when a five-judge court is constituted (allowing of course for any debilitating or disentitling circumstances), and that the leading judgment will normally be written by a permanent member. Is it therefore right, as a matter of terminology,

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35 The five permanent members are, as at the time of writing, Sundaresh Menon CJ, Andrew Phang Boon Leong, Judith Prakash, Tay Yong Kwang and Steven Chong Horng Siong JJA. A sixth judge, Chao Hick Tin SJ, recently took senior status but is expected to sit in the Court of Appeal from time to time. And it should additionally be noted that Belinda Ang Saw Ean J (judge in charge of the High Court), Woo Bih Li J and Quentin Loh Sze-On J (judge in charge of the Singapore International Commercial Court) will now also be sitting more frequently in the Court of Appeal: Sundaresh Menon, "Response by Chief Justice Sundaresh Menon" Opening of the Legal Year 2018, Singapore (8 January 2018) at para 7; Sundaresh Menon, "Response by Chief Justice Sundaresh Menon" Opening of the Legal Year 2019, Singapore (7 January 2019) at para 18.

36 The seven cases being *L Capital Jones Ltd v Maniach Pte Ltd* [2017] 1 SLR 312; *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] 2 SLR 492; *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850; *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659; *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866; *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394; and *BOM v BOK* [2019] 1 SLR 349.

to now say that the Singapore Court of Appeal sometimes sits *en banc* or as a full court when all five permanent members are hearing the case? That is probably not far wrong but those adopting the parlance should presently be slow to associate it with any formal outcome in particular; there is certainly no consequence spelt out in the extant legislation.[37] The technical state is, borrowing Lord Greene MR's words, that what can be done by a full court can be done by a division of the court, and what cannot be done by a division of the court cannot be done by the full court.[38] Whether the system will seek to maintain a customary quintet of permanent appellate judges and assign it additional distinction awaits future reckoning. In this regard, one anticipates that the issue may be visited in greater detail when the proposed reform of the appellate structure within the Supreme Court is deliberated upon in due course.[39]

B. The cases

22 With these initial observations in mind the 35 recent cases that were thought to merit consideration by an exceptional Court of Appeal of five judges can be examined more closely. Which category – jurisprudential significance, difficulty or unsettledness – do they belong to? The inquiry can be a subjective one and there might be cases that could be said to fall into more than one category. In these multiplicative instances the author has sought to highlight the thinking in classification below. As alluded to earlier, it may not always be entirely satisfactory to take the categories as being discrete from each other, but in the author's view the exercise is still useful as a broad assessment of the types of cases which have come before an enlarged panel of judges.

23 Beginning with difficulty, it can be comfortably said that at least ten of the 35 decisions featured one or more legal issues for determination carrying with them a major degree of difficulty. These

37 One historical example of a consequence laid down by legislative implication was in s 9 of the New Zealand Judicature Amendment Act 1913 (1913 No 41) (discussed in *In re Rayner* [1948] NZLR 455 at 485). The comparativist can also follow the interesting study of the *en banc* procedure in the US Court of Appeals for the Ninth Circuit in Stephen L Wasby, "Why Sit *En Banc*?" (2012) 63 Hastings LJ 747.

38 *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 at 725. This decision regarding the Court of Appeal prompted Sir Robert Megarry to wonder, extra-judicially, whether it might be desirable for a court of five or more to have power to reconsider earlier decisions of a court of three: Robert E Megarry, "Decisions by Equally Divided Courts as Precedents" (1954) 70 LQR 318 at 321; Robert E Megarry, "Fair Wear and Tear and the Doctrine of Precedent" (1958) 74 LQR 33 at 37–38. See also *Mah Kah Yew v Public Prosecutor* [1968–1970] SLR(R) 851 at [1].

39 For more on this proposed reform, see Edwin Tong, Senior Minister of State for Law and Health, keynote address at the Litigation Conference 2019, Singapore (22 April 2019) at paras 88–100.

include *ACB v Thomson Medical Pte Ltd*[40] (upkeep costs of child wrongly fathered with stranger's sperm during in-vitro fertilisation), *Sanum Investments Ltd v Government of the Lao People's Democratic Republic*[41] (interpretation of bilateral investment treaty), *Swissbourgh Diamond Mines (Pty) Ltd v Kingdom of Lesotho*[42] (jurisdiction of tribunal in international investment arbitration) and *Société des Produits Nestlé SA v Petra Foods Ltd*[43] (trade marks over shapes). The other cases similarly presented complex legal issues but could on another perspective also fall within a different category: a quartet of contract law cases – *PH Hydraulics & Engineering Pte Ltd v Airtrust (Hong Kong) Ltd*,[44] *The STX Mumbai*,[45] *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[46] ("*Turf Club*") (respectively discussing the unsettled issues of punitive damages for breach of contract, anticipatory breach for executed contracts, and *Wrotham Park* and *AG v Blake* damages)[47] and *Ochroid Trading Ltd v Chua Siok Lui*[48] ("*Ochroid*") (a decision on illegality easily qualifying as jurisprudentially significant) – as well as *The Royal Bank of Scotland NV v TT International Ltd*,[49] which required intricate analysis of a number of unsettled areas of the law. Special mention must be made of *Public Prosecutor v Lam Leng Hung*,[50] in which the Singapore Court of Appeal was not only concerned with the difficult interpretation of a criminal statute going against some previous authorities but also had to answer certain questions of law that split a three-judge panel of the High Court below.[51] This happens to be the first

40 [2017] 1 SLR 918.
41 [2016] 5 SLR 536.
42 [2019] 1 SLR 263.
43 [2017] 1 SLR 35.
44 [2017] 2 SLR 129.
45 [2015] 5 SLR 1.
46 [2018] 2 SLR 655.
47 So named after the decisions of *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 and *Attorney General v Blake* [2001] 1 AC 268.
48 [2018] 1 SLR 363.
49 [2015] 5 SLR 1104.
50 [2018] 1 SLR 659.
51 The occurrence of three-judge panels of the High Court (including for the hearing of Magistrate's Appeals) has increased in recent years. As at the time of writing, excluding sittings of the Singapore International Commercial Court, at least 15 reported decisions have been issued in the last five years by such multi-member panels: *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; *TUC v TUD* [2017] 4 SLR 877; *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*

(*cont'd on the next page*)

modern instance in Singapore of a five-judge Court of Appeal having to consider the decision of a three-judge High Court made in the very same matter itself. It may, quite naturally, be thought appropriate by some that a larger panel should sit in review of a smaller panel's decision – the numbers theory will be considered in more detail below – although in Singapore it is too soon to tell whether the case heralds a consistent practice in this regard.

24 A further 11 cases can probably be identified as belonging in the "unsettled" category. Each of the decisions in *The Chem Orchid*,[52] *L Capital Jones Ltd v Maniach Pte Ltd*,[53] *Global Yellow Pages Ltd v Promedia Directories Pte Ltd*,[54] *Pram Nair v Public Prosecutor*,[55] *Chan Lung Kien v Chan Shwe Ching*[56] and *Vinmar Overseas (Singapore) Pte Ltd v PTT International Trading Pte Ltd*[57] revisited, or had to clarify or extend, the reasoning in some older Singapore authorities. In four other cases the court had to deal with issues on which differing approaches had been taken (or suggested to be taken) in various jurisdictions.[58] And while there was no doubt that the main issue in *UDA v UDB*[59] was unsettled given the state of the prior authorities, that case certainly also qualified as jurisprudentially significant, touching as it did on the potential conflict and overlap of the matrimonial and general civil jurisdictions in a property ownership dispute.

25 Moving on to the "jurisprudential significance" category – which, for the purpose of classification in this commentary, represents those cases that are important from the perspective of legal or jurisprudential development but do not feature especially difficult or unsettled issues – not less than five cases should independently make the cut. *Hii Chii Kok v Ooi Peng Jin London Lucien*[60] refined the

Public Prosecutor [2018] 4 SLR 1315 and [2018] 5 SLR 438; and *UKM v Attorney-General* [2018] SGHCF 18. For a discussion of the criminal cases, see Amardeep Singh s/o Gurcharan Singh, "Sentencing Reform in Singapore: Are the Guidelines in England and Wales a Useful Model?" (2018) 30 SAcLJ 175 at 181–187, paras 11–21. See also Lau Kwan Ho, "The High Court as *De Facto* Court of Appeal: A Revisitation of Leave Requirements in the Criminal and Family Court Jurisdictions" [2019] SingJLS (forthcoming).

52 [2016] 2 SLR 50.

53 [2017] 1 SLR 312.

54 [2017] 2 SLR 185.

55 [2017] 2 SLR 1015.

56 [2018] 2 SLR 84.

57 [2018] 2 SLR 1271.

58 *Goh Lay Khim v Isabel Redrup Agency Pte Ltd* [2017] 1 SLR 546; *Ng Huat Seng v Munib Mohammad Madn*i [2017] 2 SLR 1074; *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 301* [2018] 2 SLR 866; *BOM v BOK* [2019] 1 SLR 349.

59 [2018] 1 SLR 1015.

60 [2017] 2 SLR 492.

treatment of the combined *Bolam* and *Bolitho* test for medical negligence, while *Warner-Lambert Co LLC v Novartis (Singapore) Pte Ltd*[61] involved (among other issues) the validity of Swiss-style claims under the Singapore patent registration system. The other three cases involved the construction of newly enacted statutory provisions that had been designed purposefully to be of remedial application to identified classes of persons.[62]

26 This leaves a few remaining cases which do not fit easily into the stated categories. *Turf Club Auto Emporium Pte Ltd v Yeo Boong Hua*[63] and the three subsequent *Kho Jabing* cases[64] can be quickly dealt with; given that the initial appeal had already been decided by five judges, the related matters were, quite rightly, heard by the same line-up. Next, a trio of cases demonstrates that the public importance of the decision potentially also justifies the matter being heard by an enlarged court of five. *TMO v TMP*,[65] *Tan Cheng Bock v Attorney-General*[66] and *Diablo Fortune Inc v Duncan, Cameron Lindsay*[67] could all be characterised as involving a relatively straightforward question of legislative interpretation, but it was possibly their added signal and embracive importance – these were decisions respectively impacting the Muslim community, the presidential election and the shipping industry – which the court viewed to support determination by an expanded court. And, finally, *Muhammad Ridzuan bin Md Ali v Public Prosecutor*[68] and *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd*[69] are probably the only cases in which there appears little going for them (in terms of a heightened legal or public interest) to justify decision by an exceptional five-judge court, instead of the usual three judges.

C. Further conclusions

27 Drawing the strands together some conclusions can be reached regarding the expansionary practice of the Court of Appeal. As seen above, there is no overt indication that enlarged courts will only be

61 [2017] 2 SLR 707.
62 *Public Prosecutor v Kho Jabing* [2015] 2 SLR 112; *Ting Shwu Ping v Scanone Pte Ltd* [2017] 1 SLR 95; *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394.
63 [2019] 1 SLR 214.
64 *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 (CA); [2016] 3 SLR 1259 (CA); *Kho Jabing v Attorney-General* [2016] 3 SLR 1273.
65 [2017] 1 SLR 585.
66 [2017] 2 SLR 850.
67 [2018] 2 SLR 129. The court's ruling that a shipowner's lien was a registrable charge has since been superseded by legislation: Companies (Amendment) Act 2018 (Act 35 of 2018) s 2.
68 [2014] 3 SLR 721.
69 [2017] 2 SLR 898.

constituted where particular fields of law are in issue; rather, they have been readily summoned in cases across a number of diverse areas, although the mere fact that a case is criminal does not appear to suffice as a justification. An analysis of the actual decisions supports the view that the main emphasis has instead been on the difficulty or unsettledness of the issues up for determination, with a sizeable number of residual cases justifying decision by an enlarged panel because of the jurisprudential or legal significance of the matter, or, variously, the public importance and implications of the result for a substantial section of society.

28 As illustrated earlier, the tally further indicates a general increase in the occurrence of five-judge panels in the Singapore Court of Appeal, with the written decisions of such panels peaking in 2017 at around 17.1% of the total number of written decisions issued. How does this compare with the apex courts in Australia and the UK? The High Court of Australia and the UK Supreme Court each ordinarily sits with five judges, but this number may on occasion be enlarged. The following table records the rounded-off percentages of, for the High Court, written decisions where the case was heard by an expanded court, and, for the Supreme Court, appeals which were heard by an expanded court for the past nine years (the comparison is different owing to limitations on the available data).

Year[70]	**Percentage of HCA written decisions where case was heard by an expanded court**[71]	**Percentage of UKSC appeals heard by an expanded court**[72]
2009	32.7%	23.3%

70 For the High Court of Australia, the year of study is the relevant calendar year. For the UK Supreme Court, the year of study is the one-year period beginning on 1 April of that year (save that of 2009, where the relevant period was 1 October 2009 (the date the court commenced operations) to 31 March 2010).

71 The relevant figures are obtained from the annual studies conducted by Andrew Lynch and George Williams: see "The High Court on Constitutional Law: The 2009 Statistics" (2010) 33 UNSWLJ 267 at 272; "The High Court on Constitutional Law: The 2010 Statistics" (2011) 34 UNSWLJ 1030 at 1036; "The High Court on Constitutional Law: The 2011 Statistics" (2012) 35 UNSWLJ 846 at 850; "The High Court on Constitutional Law: The 2012 Statistics" (2013) 36 UNSWLJ 514 at 517–518; "The High Court on Constitutional Law: The 2013 Statistics" (2014) 37 UNSWLJ 544 at 550; "The High Court on Constitutional Law: The 2014 Statistics" (2015) 38 UNSWLJ 1078 at 1082; "The High Court on Constitutional Law: The 2015 Statistics" (2016) 39 UNSWLJ 1161 at 1166; "The High Court on Constitutional Law: The 2016 Statistics" (2017) 40 UNSWLJ 1468 at 1472; "The High Court on Constitutional Law: The 2017 Statistics" (2018) 41 UNSWLJ 1134 at 1141.

72 The relevant figures are obtained from the annual reports of the UK Supreme Court, available at https://www.supremecourt.uk/about/planning-and-governance.html (accessed March 2019).

2010	41.7%	35.5%
2011	45.8%	29.0%
2012	41.0%	12.0%
2013	41.8%	5.0%
2014	22.4%	12.4%
2015	33.3%	14.1%
2016	28.6%	12.1%
2017	37.3%	7.1%

29 In the UK Supreme Court there has been a noticeable drop in the percentages since 2012 – perhaps partly down to Lord Neuberger of Abbotsbury succeeding Lord Phillips of Worth Matravers as the court's president that year[73] and partly for caseload management reasons[74] – but at least on the basis of the more recent annualised figures the Singapore Court of Appeal is utilising the expansionary practice along a similar pace. Both these courts though far trail the approximated numbers in the High Court of Australia, which are consistently elevated due in part to the latter's tradition of having the full court hear constitutional cases.[75]

73 Lord Phillips recounted that during his first few years as President there were a number of high-profile appeals involving important public law issues which were thought appropriate for decision by an expanded panel: Lord Phillips of Worth Matravers, "The Birth and First Steps of the UK Supreme Court" (2012) 1(2) CJICL 9 at 11; see also Alan Paterson, *Final Judgment*: *The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) at p 195 and Rosemary Hunter & Erika Rackley, "Judicial Leadership on the UK Supreme Court" (2018) 38 LS 191 at 201. Lord Neuberger, on the other hand, could not be said to have been exceedingly enthused over expanded courts; while acknowledging the concern that different judges having different outlooks could be said to support a case for having more panels with seven or nine justices, his view was that some cases simply did not merit more than five justices, enlarged panels could lead to more delay before judgment, and they made it difficult for more than one panel to sit: Lord Neuberger of Abbotsbury, "Tweaking the Curial Veil" The Blackstone Lecture 2014, Oxford (15 November 2014) at para 54. A few years later he estimated that sitting in panels of five, occasionally seven, and very occasionally nine, enabled the UK Supreme Court to get through around twice as many cases as it otherwise would, with hearings before five judges normally also more manageable for the judges and the advocates: Lord Neuberger of Abbotsbury, "Twenty Years a Judge: Reflections and Refractions" Neill Lecture 2017, Oxford (10 February 2017) at para 30.

74 Described in Penny Darbyshire, "The UK Supreme Court – Is There Anything Left to Think About?" (2015) 21 *European Journal of Current Legal Issues*.

75 The practice of the High Court of Australia finds detailed coverage in the annual studies of Andrew Lynch and George Williams, the more recent of which are cited at n 71 above. See also s 23(1) of the Judiciary Act 1903 (Cth).

30 A careful reader of the judgments by five-judge panels of the Singapore Court of Appeal will generally also find the analyses in them to be of extremely high quality. This may well be down to a thoroughness of review and consultation between the five sitting members; notably, though, more hands do not necessarily mean more judgments and there has not been a significant spike in dissents and concurrences in five-judge panels, which have remained broadly consistent with historical figures.[76] At this level of investigation, the present suggestion is that putting five judges in the same court room has not, for that reason alone, changed the balance or collegiality of the Court of Appeal overnight.

31 It bears pointing out that the high standard of the judgments not only is encouraging to immediate court users but bodes well for the development of an influential jurisprudence possessing the requisite internationalist outlook. These desiderata happen to coincide in one of Singapore's latest offerings. Decisions of the newly created Singapore International Commercial Court, which functions as a division of the High Court, may be appealed to the Court of Appeal. It is at that point open to the parties to agree to make an application for five judges to hear the appeal.[77] So far, so good. In a move then that emulates the Hong Kong Court of Final Appeal and goes one better, international jurists of renown across the common and civil legal traditions can sit in the Singapore Court of Appeal by designation (this has occurred already in no less than six cases).[78] Given the impressive track record amassed so

76 Some studies in other jurisdictions have concluded that an increase in panel size is said to be a factor that increases the probability of disagreement within the relevant court: see Charles M Lamb, "A Microlevel Analysis of Appeals Court Conflict: Warren Burger and His Colleagues on the DC Circuit" in *Judicial Conflict and Consensus: Behavioral Studies of American Appellate Courts* (Sheldon Goldman & Charles M Lamb eds) (University of Kentucky Press, 1986) and Donald R Songer, John Szmer & Susan W Johnson, "Explaining Dissent on the Supreme Court of Canada" (2011) 44 *Canadian Journal of Political Science* 389.

77 Singapore International Commercial Court Practice Directions (effective 1 November 2018) para 24(3).

78 See *Jacob Agam v BNP Paribas SA* [2017] 2 SLR 1 (where Dyson Heydon IJ sat), *Qilin World Capital Ltd v CPIT Investments Ltd* [2018] 2 SLR 1; [2019] 1 SLR 1 (where Bernard Rix and Dyson Heydon IJJ sat), *Yuanta Asset Management International Ltd v Telemedia Pacific Group Ltd* [2018] 2 SLR 21 (where Bernard Rix IJ sat), *Bumi Armada Offshore Holdings Ltd v Tozzi Srl* [2019] 1 SLR 10 (where Beverley McLachlin and David Neuberger IJJ sat), *PT Bayan Resources TBK v BCBC Singapore Pte Ltd* [2019] 1 SLR 30 (where Dyson Heydon IJ sat) and *BNP Paribas SA v Jacob Agam* [2019] 1 SLR 83 (where Dyson Heydon and David Neuberger IJJ sat). A full list of the international jurists can be found on the website of the Supreme Court of Singapore. 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, Singapore (13 May 2015); Man Yip, "The Resolution of Disputes before the Singapore International Commercial Court" (2016)

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far, the prospect of more five-judge panels of the Court of Appeal being specially constituted to decide important cases, whether of a commercial or other nature, in a bid to strengthen the court's thought leadership in the region and across the Commonwealth is inviting. Indeed, the general direction that contract law is taking in Singapore has already aroused the curiosity of Lord Thomas of Cwmgiedd CJ.[79] More than that, the discerning use of quintets should also build and retain the confidence of those who seek a fair, just and practicable resolution of their disputes.

IV. The future of the practice

32 Subject to the outcome of the proposed structural reform of the Supreme Court, which was alluded to earlier,[80] there is, in summary, little to suggest that the Court of Appeal of Singapore will not continue to constitute expanded five-judge panels in appropriate cases in the near future. To be sure, that court had before 2014 served its function for five decades without more than three judges hearing each case and still gained acclaim as one of the leading common law courts in the Commonwealth. It is possible to accept this and still appreciate the stated rationale for occasional expansions of the panel. Cases pose real difficulty for judges due in large part to them having to apply and sometimes mould the law to evolving conditions of society. The quicker the evolution, the faster the law becomes outdated. In today's age, where heightened interconnectivity means that daily disruptions elsewhere are swiftly and acutely felt locally, both legislation and judge-made rules can fade into obsolescence as soon as there is a change in the original circumstances that prompted their appearance. Given that the general difficulty of cases may now be expected to magnify, it is understandable

65 ICLQ 439; Teh Hwee Hwee, Justin Yeo & Colin Seow, "The Singapore International Commercial Court in Action: Illustrations from the First Case" (2016) 28 SAcLJ 692; Justin Yeo, "On Appeal from Singapore International Commercial Court" (2017) 29 SAcLJ 574; Andrew Godwin, Ian Ramsay & Miranda Webster, "International Commercial Courts: The Singapore Experience" (2017) 18 *Melbourne Journal of International Law* 219; and Kenny Chng, "The Impact of the Singapore International Commercial Court and Hague Convention on Choice of Court Agreements on Singapore's Private International Law" (2018) 37 CJQ 124.

79 Lord Thomas of Cwmgiedd, "Keeping Commercial Law Up to Date" Jill Poole Memorial Lecture, Birmingham (8 March 2017) at para 9. Illuminating accounts of the Singapore journey can be found in Peh Aik Hin, "Contract Law: A Rationalisation Process towards Coherence and Fairness" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan eds) (Academy Publishing, 2015) ch 10 and Andrew Phang & Goh Yihan, "Contract Law in Commonwealth Countries: Uniformity or Divergence?" (2019) 31 SAcLJ 170.

80 See para 21 above.

why consideration by an enlarged five-judge panel would increasingly be thought useful when resolving some of those cases.

33 There are other oft-cited justifications for the enlargement of a court. Deliberations upon especially difficult cases by a fuller number tend to lend greater certainty to the law by providing a forum where any disagreement among more (or even all) members of the court is aired and resolved, thereby also settling the issue clearly for the guidance of the lower courts in future cases. And a court constituted by a larger set of its permanent members avoids any accusation that a case which was especially close (usually but not always on the legal issues) or which held particular public importance (such as one having political or human rights dimensions) might have been decided another way if the court had been differently constituted.

34 Against the perceived benefits are some natural limiting and countervailing forces. As a matter of judicial administration, the greater frequency of enlarged courts is likely to result in a slowing down of the disposal rate, since each judge will be individually engaging with more disparate cases. The obvious benefit to sitting in panels (as opposed to sitting *en banc*) is that the same number of judges – here it must be remembered that we have not an unlimited supply of appellate judges – can get through more appeals, and that same mathematical certainty applies when one is comparing smaller and larger panels. These constraints should not be underestimated, a point more senior lawyers in Singapore will especially appreciate from history. A further (conceptual) problem is in identifying the categories of cases warranting an expanded court and avoiding any arbitrary and unfair results if such differentiation should portend some very real consequences, such as an expanded court possessing greater willingness to overrule or depart from an earlier precedent.

35 All this, in other words, is to say that the considerations which go into developing the expansionary practice should be carefully balanced. The practice itself must constantly be evaluated for possible improvement.[81] Fundamentally, that evaluation requires addressing historical concerns over transparency and accountability as well as conceptual questions about the use of multi-membered panels in the business of judging. It is thus helpful to understand and clarify some aspects of the practice before thinking further about its refinement.

81 A useful study on Canada may be found in Benjamin Alarie, Andrew Green & Edward Iacobucci, "Is Bigger Always Better? On Optimal Panel Size, with Evidence from the Supreme Court of Canada" University of Toronto, Legal Studies Research Paper no 08-15 (June 2009).

A. Judges and better judging

36 The justification from expertise provides the main rationale in Menon CJ's proposal to utilise enlarged panels more frequently.[82] That justification relies on a simple proposition. The more complex a problem is, the more attention should be devoted to it, which entails putting more judicial heads at the task.

37 Let us look a bit closer at this. The modern apex court is invariably a multi-membered court. The benefits of such group decision-making were once described by Karl Llewellyn in the following terms:[83]

> It is trite that a group all of whom take full part is likely to produce a net view with wider perspective and fewer extremes than can an individual; and it is a fair proposition also that continuity is likely to be greater with a group; prior action, attitudes, and unrecorded doubts or reservations which an individual can later easily overlook are likely to be recalled and revived by some other group member … One recalls also that the drive for a written group opinion – with some members intent upon the past and typically some members concerned about the future – tends also to stabilization and to a consequent rise in reckonability in the deciding process itself.

We observe that there can be both positive-type benefits (the result arrived at by a group is one of wider perspective) and negative-type benefits (a group is less likely to overlook elements which bear relevantly on the decision; at the same time there is an evening out of any extreme positions within the group).

38 Harry Jones (who himself was mentored by Llewellyn) discussed further the negative-type benefits by perceptively asking what exactly made judicial decision-making so different from other disciplines (such as art, literature and the natural sciences) where the greatest results were achievements not of group action but of the individual creative mind.[84] He suggested (correctly in my view) that judges, unlike artists, poets or scientists, were not completely

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82 Notably, some academic writing has also pointed to diversity of debate as the main purpose for empanelling a larger court: Margaret J Beazley, Paul T Vout & Sally E Fitzgerald, *Appeals and Appellate Courts in Australia and New Zealand* (LexisNexis Butterworths, 2014) at para 3.29.

83 Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little Brown, 1960) at pp 31–32. Llewellyn further highlighted the following advantages of group decision making in appellate benches: an increased likelihood of vision and balance, as well as safety factors against bias, effective corruption, improper influence, overhaste and sickness.

84 Harry W Jones, "Multitude of Counselors: Appellate Adjudication As Group Decision-Making" (1980) 54 Tul L Rev 541 at 552–553.

autonomous in their ambit of action; when ruling on cases they had to follow authoritative sources of law and accept the traditional and political limits placed on the judicial function. Without this sort of restraint the judgments of courts could not be counted on as sources of guidance for future action.[85]

39 It is of course the positive-type benefits which appear to be the main driver in Menon CJ's statement on the occasional expansion from trio to quintet. Every judge brings a unique expertise to a case.[86] It is particularly an advantage in multi-membered courts, where horses may sprint for different courses and the specialist on the topic can offer the other members an especially deep well of knowledge to tap on. As one instance in the UK, Lord Hope of Craighead points out that it was desirable for Lord Walker of Gestingthorpe to have delivered the main judgment in *BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc*,[87] the latter being an undoubted specialist in insolvency law.[88] Lord Walker himself once said that he expected to sit on quite a lot of "chancery-type" cases.[89] In the UK, it has indeed been some years now that cases in the Supreme Court (and its predecessor, the House of Lords) as well as in the Court of Appeal of England and Wales are assigned for hearing by a mix of subject specialists and non-specialists.[90]

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85 Harry W Jones, "Multitude of Counselors: Appellate Adjudication As Group Decision-Making" (1980) 54 Tul L Rev 541 at 553.

86 David Pannick, "'Better That a Horse Should Have a Voice in the House [of Lords] Than That a Judge Should' (Jeremy Bentham): Replacing the Law Lords by a Supreme Court" [2009] PL 723 at 733–734.

87 [2013] 1 WLR 1408.

88 Lord Hope of Craighead, "A Light at the End of the Tunnel? – *BNY* in the UK Supreme Court", speech at Banking and Financial Services Law Association, Gold Coast, Australia (29 August 2013).

89 Lord Walker of Gestingthorpe, "Moving In and Moving On – One Justice's View" (2011) 7(2) *Cambridge Student Law Review* 1 at 2.

90 John Donaldson, "The Office of Master of the Rolls" (1984) 17 Bracton LJ 19 at 21; Lord Bingham of Cornhill, "A New Supreme Court for the United Kingdom", Spring Lecture 2002 at The Constitution Unit, London (1 May 2002); Lord Hope of Craighead, "The Creation of the Supreme Court – Was It Worth It?" Barnard's Inn Reading, London (24 June 2010); Lord Hope of Craighead, "Do We Really Need a Supreme Court?", speech at Newcastle Law School (25 November 2010); Lord Neuberger of Abbotsbury, "Tweaking the Curial Veil" The Blackstone Lecture 2014, Oxford (15 November 2014) at para 46; Lord Neuberger of Abbotsbury, "The Role of the Supreme Court Seven Years On – Lessons Learnt" Bar Council Law Reform Lecture 2016, London (21 November 2016) at para 24; Lord Neuberger of Abbotsbury, "Twenty Years a Judge: Reflections and Refractions" Neill Lecture 2017, Oxford (10 February 2017) at para 22; Baroness Hale of Richmond, "Judges, Power and Accountability: Constitutional Implications of Judicial Selection", speech at Constitutional Law Summer School, Belfast (11 August 2017); Baroness Hale of Richmond, "Should the Law Lords Have Left the House of Lords?" Michael Ryle Lecture 2018, London (14 November 2018); Lord Reed, "The Supreme Court Ten Years On" Bentham Association

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40 Now there is quite properly a line not to be crossed in that no judge should defer excessively and give undue weight to another judge's views,[91] but it is a very bright line and modern-day tribunals, at least, are on constant alert to observe the right side of it. Provided that this is respected, the inclusion of subject experts in an expanded court can be helpful in the disposal of certain cases. Here – and with due consideration for the views held by Sir Richard Buxton, who featured on many panels in the Court of Appeal of England and Wales – it is possible that the generalist judge may even after listening to the arguments of learned counsel in an arcane area still take something away from the internal conferences with his or her specialist colleague.[92]

41 One can recount examples of the thoughtful selection of personnel. In Singapore, the five-judge court in *Société des Produits Nestlé SA v Petra Foods Ltd* (a trade marks case) included an intellectual property specialist in George Wei J. In England and Wales, *Nowotnik v Nowotnik*,[93] an appeal on a point of family law practice, was decided by a quintet of which three had had prior experience of the matrimonial jurisdiction. In *Heil v Rankin*,[94] the five members of the court who reviewed the principles for the awarding of damages for pain, suffering and loss of amenity not only had the relevant professional experience but were of differing seniority, thus ensuring that their overall experience would cover a substantial period of time. *In re Trinity Mirror plc*,[95] an important case about restrictions on media coverage of criminal trials where the interests of children might be affected, was heard by an exceptionally strong five-judge court that included the Lord Chief Justice and the President of the Family Division. In *R v McLoughlin*,[96] again it was a panel of five, this time composed of the Lord Chief Justice, the President of the Queen's Bench Division, the Vice President of the Criminal Division, Treacy LJ (then Chairman of the Sentencing

Lecture 2019, London (6 March 2019); Baroness Hale of Richmond, "What is the United Kingdom Supreme Court For?" Macfadyen Lecture 2019, Edinburgh (28 March 2019). See also the answers given to a Freedom of Information Act 2000 (c 36) inquiry discussed further in Brice Dickson, "The Processing of Appeals in the House of Lords" (2007) 123 LQR 571 at 589–590. And further insight on the selection process and profile may respectively be located in Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) at pp 70–73; Rosemary Hunter & Erika Rackley, "Judicial Leadership on the UK Supreme Court" (2018) 38 LS 191 at 209–213.

91 *Dwr Cymru Cyfyngedig v Albion Water* [2008] EWCA Civ 97 at [17].

92 *Contra* Richard Buxton, "Sitting En Banc in the New Supreme Court" (2009) 125 LQR 288 at 292.

93 [1967] P 83 (referred to in *Gooday v Gooday* [1968] 3 WLR 750 at 759).

94 [2001] QB 272.

95 [2008] QB 770.

96 [2014] 1 WLR 3964.

Council) and Burnett J (as he then was), that ruled on the compatibility of the whole life order with Art 3 of the ECHR. More recently, two significant criminal matters were decided by five-judge courts that included the Lord Chief Justice and the President of the Queen's Bench Division.[97]

42 The enlargement of the court therefore seems a practical and legitimate device to draft in additional insight and specialist expertise. It is franked by the reasonable supposition that difficult cases require an even closer and more multifarious inspection of views than is usual in order to arrive at a correct, well-reasoned decision. And it is not just these traditional primacies which might be thought to merit an invite; the current debate over greater diversity in the Judiciary appears to be slowly but surely moving in a certain direction,[98] the outcome of which can eventually be expected to percolate through to the actual composition of appellate courts in particular cases. All in all, and borrowing Brennan J's mixed metaphors, one can strive to generate a marketplace of ideas, a judicial town meeting.[99] A supreme caucus was certainly convened in *Allen v Flood*,[100] where no less than 17 foreheads famously collided in the House of Lords in a Victorian tortious conspiracy case that was said to possibly carry rather tremendous consequences for the unionist landscape at the time.[101] Other instances in the UK which have justified the summoning of more hands to the

97 *R v Hunter* [2015] 1 WLR 5367; *R v Kahar* [2016] 1 WLR 3156. See also *R v Goodyear* [2005] 1 WLR 2532; *R v James* [2006] QB 588.

98 One recent development saw Mrs Justice Prakash appointed as Singapore's first female Judge of Appeal. In the UK, Baroness Hale of Richmond has been a prominent judicial advocate in this area. Hark, for example, her call in *Granatino v Radmacher* [2011] 1 AC 534 at [137] as well as her extra-curial exhortations in Brenda Hale, "Equality and the Judiciary: Why Should We Want More Women Judges?" [2001] PL 489; Brenda Hale, "Equality in the Judiciary: A Tale of Two Continents" 10th Pilgrim Fathers' Lecture, Plymouth (24 October 2003); Baroness Hale of Richmond, "It's a Man's World: Redressing the Balance" Norfolk Law Lecture 2012, Norwich (16 February 2012); Baroness Hale of Richmond, "Women in the Judiciary" Fiona Woolf Lecture for the Women Lawyers' Division of the Law Society, London (27 June 2014); Baroness Hale of Richmond, "Appointments to the Supreme Court", speech at the Conference to Mark the Tenth Anniversary of the Judicial Appointments Commission, Birmingham (6 November 2015); Baroness Hale of Richmond, "Judges, Power and Accountability: Constitutional Implications of Judicial Selection", speech at Constitutional Law Summer School, Belfast (11 August 2017); Baroness Hale of Richmond, "2018 – A Year of Anniversaries" 2018 Pankhurst Lecture, Manchester (8 February 2018); and Baroness Hale of Richmond, "100 Years of Women in the Law: From Bertha Cave to Brenda Hale", speech at King's College London, London (20 March 2019).

99 William J Brennan Jr, "In Defense of Dissents" (1986) 37 Hastings LJ 427 at 430.

100 [1898] AC 1.

101 An engaging discussion of the judicial personalities involved can be found in Robert F V Heuston, "Legal Prosopography" (1986) 102 LQR 90.

table since the Judicature Acts of 1873[102] and 1875[103] are where conflicting authorities are to be reconciled, guiding principles laid down, relatively controversial or significant issues resolved, or inconvenient precedents overruled.[104]

43 So far as criminal matters are concerned, a further reason may stem from the default rule in the old English Court of Criminal Appeal, now the Criminal Division of the Court of Appeal ("CACD"), that that court must issue a solitary judgment unless it is convenient for its members to pronounce separate judgments.[105] Its main rationale has been stated at various times to be a judicial obligation to set the criminal law definitively in a single opinion to guide the lower courts, and to uphold the moral legitimacy of the meted punishment without having the offender tilt hopelessly at a favourable but impotent dissent.[106] Short of overtaxing this commentary by wading into the debate over the continued desirability of the rule, it suffices to note as one of its corollaries that the sometime practice has been for a criminal court

102 c 66 (UK).

103 c 77 (UK).

104 The criteria in the UK Supreme Court for considering whether more than five justices should sit on a panel have already been described above. Admittedly they do not fully explain why seven judges should be summoned in some cases and nine in others (on this, see Brice Dickson, "The Processing of Appeals in the House of Lords" (2007) 123 LQR 571 at 601 and Andrew Burrows, "Numbers Sitting in the Supreme Court" (2013) 129 LQR 305 at 309), but the current President of the court has since stated that at least seven will sit if the court is being asked to depart from a previous decision of the House of Lords or the Supreme Court, and that nine will sit if the court has to reconcile conflicting decisions at that or Privy Council level: Baroness Hale of Richmond, "Should the Law Lords Have Left the House of Lords?" Michael Ryle Lecture 2018, London (14 November 2018). For historical expansions in the UK Supreme Court and other courts, see the decisions cited at nn 93–97 above and 149 below, and also *Winyard v Toogood* (1882) 10 QBD 218; *R v Labouchere* (1884) 12 QBD 320; *R v Baskerville* [1916] 2 KB 658; *R v Taylor* [1950] 2 KB 368; *Willcock v Muckle* [1951] 2 KB 844; *R v McBride* [1962] 2 QB 167; *Ibralebbe v The Queen* [1964] 1 AC 900; *R v Arkle* (1972) 56 Cr App R 722; *R v Watson* [1988] 1 QB 690; *Taylor v Lawrence* [2003] QB 528; *R v Simpson* [2004] QB 118; *Attorney General's Reference (No 1 of 2004)* [2004] 1 WLR 2111; *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433; *Attorney General for Jersey v Holley* [2005] 2 AC 580; *R v Rowe* [2007] QB 975; *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269; *R v F* [2012] 2 WLR 1038; *R (KM) v Cambridgeshire County Council* [2012] 3 All ER 1218; *R v Oakes* [2013] QB 979; and *Willers v Joyce (No 2)* [2016] 3 WLR 534.

105 Senior Courts Act 1981 (c 54) (UK) s 59.

106 *Report of the Interdepartmental Committee on the Court of Criminal Appeal* (Cmnd 2755, 1965) at para 250; James Fitzjames Stephen, *A General View of the Criminal Law of England* (Macmillan, 2nd Ed, 1890) at p 178 (quoted in "Topics of the Month" (1927) 5 Can Bar Rev 424 at 429). This is discussed further (and against the Singapore context) in Lau Kwan Ho, "A Study in Separate Judgments" in *Singapore Law – 50 Years in the Making* (Goh Yihan & Paul Tan eds) (Academy Publishing, 2015) at paras 4.55–4.58.

divided after the initial hearing to have the parties reargue the matter before a larger panel.[107] The immediate significance here is that the Singapore Court of Appeal happens to be subject to an equivalent default rule as the CACD.[108] To date only one reported criminal case exists in Singapore where a matter was reargued before an enlarged court,[109] and that having taken place more than two decades ago the practice (if ever there was one established in Singapore) can probably be said to have fallen into desuetude.

B. Counting the number of heads

44 The Singapore Court of Appeal holds an important distinction as the apex court within its jurisdiction. This supremacy is relevant to the expansionary practice in at least two ways. The first relates to how the court is not strictly bound by its previous decisions.[110] In Singapore, there is little doubt that the top court possesses the power *whether it sits as a panel of two, three, five, seven or more* to depart from its older rulings in an appropriate case. In other words, the power rests upon the court as a whole without reference to its membership numbers at any given time (the only requirement is that it has to have acted through a quorum). However, to avoid the distorted optical effect the public would otherwise witness, not to mention the additional matter of preservation of judicial comity, it may be a point of institutional practice (in many parts of the common law world) that a decision made by a specially enlarged tribunal will not usually be departed from or overruled by a smaller-sized panel even if both panels are, constitutionally speaking, co-ordinate actors. That is not to say it has not been done before; it certainly has, and perhaps more readily in a criminal case where the rules of precedent must yield to personal liberty if that is what justice requires.[111] By convention, however, and speaking to the matter

107 Discussions of the practice can be found in *R v Healey* (1956) 40 Cr App R 40 at 42 and *R v Shama* [1990] 1 WLR 661 at 662–663. See also Lord Goddard, "The Court of Criminal Appeal in England" (1950) 67 *South African Law Journal* 115 at 117.

108 Criminal Procedure Code (Cap 68, 2012 Rev Ed) ss 298(6)–298(7).

109 *Mok Swee Kok v Public Prosecutor* [1994] 3 SLR(R) 134.

110 Pursuant to the *Practice Statement (Judicial Precedent)* [1994] 2 SLR 689, similar to that issued by the House of Lords at [1966] 1 WLR 1234 and now applicable in the UK Supreme Court: *Austin v Southwark London Borough Council* [2011] 1 AC 355 at [24]–[25]; UK Supreme Court Practice Directions 3 and 4. For a discussion of the position in Singapore, see Lau Kwan Ho, "The 1994 Practice Statement and Twenty Years On" [2014] SingJLS 408.

111 In the UK, see, for instance, *Conway v Rimmer* [1968] AC 910 (distinguishing and not following *Duncan v Cammell, Laird and Co Ltd* [1942] AC 624); *R v Gould* [1968] 2 QB 65 (overruling *R v Wheat* [1921] 2 KB 119); *Hanning v Maitland (No 2)* [1970] 1 QB 580 (not following *Nowotnik v Nowotnik* [1967] P 83); *R v R* [2004] 1 WLR 490 (not following *R v T* [2003] 4 All ER 877); *contra R v Felstead* (1914) 9 Cr App R 227. In Malaysia, see, for instance, *Mohd Amin bin Mohd Razali*

(*cont'd on the next page*)

generally, if it is sought to impugn or derogate from the ruling of the first enlarged court, a second panel composed of an equal or greater number of judges should be convened for this purpose. This is the case in Australia,[112] New Zealand[113] and the UK.[114] The practice, which does not appear immediately unsound, ought not to be confined to only those common law jurisdictions. It can be supported as an aspect of maintaining the "soft" legitimacy of the later decision in the eyes of the hoi polloi: justice must not only be done but be seen to be done. The public might wonder whether something had gone awry with the administration of justice were a quintet's decision to be cast aside by a later trio (or a septet overruled by a quintet) bearing in mind that the numerically smaller group was in fact sitting no higher than the larger group but only in the same court and at the same level of hierarchy.

45 It is more generally about the way in which precedents are treated. As Lord Wilberforce stated in modern terms, the law knows of no better way to resolve doubtful issues than by the considered majority opinion of the ultimate tribunal.[115] Another principle is that a shifting of the balance of views arising solely from a mere change in membership of the tribunal in no way justifies the overruling of authority. This time we may quote Lord Pearson as saying that, if a tenable view taken by the majority in the first appeal could be overruled by a majority preferring another tenable view in a second appeal, then the original tenable view could be restored by a majority preferring it in a third appeal; and finality of decision would be utterly lost.[116] There would seem to follow from these two guiding principles a third: should it be deemed necessary or desirable to resolve a deep-seated conflict of judicial opinion or a question of high legal, constitutional or public importance, the apex tribunal could, circumstances permitting, go about this by specially convening an enlarged panel in order for the eventual decision to be made by what is effectively a super-majority – a majority of all (or

v Public Prosecutor [2003] 4 MLJ 129 (overruling *Public Prosecutor v Sihabduin Bin Haji Salleh* [1980] 2 MLJ 273).

112 *R v The Commonwealth Court of Conciliation and Arbitration* (1912) 15 CLR 586 at 606; *Zecevic v Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645 at 664–665.

113 *Aoraki Corp Ltd v McGavin* [1998] 3 NZLR 276.

114 *Ward v James* [1966] 1 QB 273; *Doherty v Birmingham City Council* [2009] 1 AC 367 at [19], [61], [82], [115] and [126]; *Manchester City Council v Pinnock* [2011] 2 AC 104 at [47].

115 *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345 at 1349. *Cf* Jeremy Waldron, "Five to Four: Why Do Bare Majorities Rule on Courts?" (2014) 123 Yale LJ 1692.

116 *Jones v Secretary of State for Social Services* [1972] AC 944 at 996–997. See also *Lewis v Attorney General of Jamaica* [2001] 2 AC 50 at 90; *Willers v Joyce (No 2)* [2016] 3 WLR 534 at [9]. For a different view, see Bruce V Harris, "Final Appellate Courts Overruling their Own 'Wrong' Precedents: The Ongoing Search for Principle" (2002) 118 LQR 408 at 420–422.

nearly all) of the judges then available to sit – thereby shutting out the possibility of other smaller constitutions of the tribunal coming to contrasting conclusions on similar cases in the near future.[117] It may help to avoid, in particularly close or vexing cases, what Lord Oliver of Aylmerton gamely described as the "exciting element of lottery" introduced by the anomaly of a final and authoritative tribunal sitting normally in smaller divisions and not *en banc*.[118] Now it would be careless not to equally observe that it was no more than about a decade ago when three dissenting judges in *Gibson v Government of the United States of America*[119] disagreed that the majority decision of an enlarged seven-member committee of the Privy Council was a persuasive reason for overruling the precedent authority in question there. This does not, however, conflict with the supposition that, where a larger-than-usual tribunal *is* convened with this purpose in mind, it should be deeply injurious to the certainty of the law for the resulting decision itself to then be overruled in the future by a smaller division of the court. Where would the to and fro end? It is not so much a question of the existence of the overruling power (any quorate court should have that)[120] as whether it ought to be exercised under those particular conditions.

46 For these reasons, therefore, it would not be surprising if this non-statutory convention were also to be generally observed in Singapore should a quintet's decision be called into doubt; that is, the decision would, practically speaking, likely be overruled or departed from only by a court of similar or greater size.

47 It should be said immediately that the occasion for overruling a decision of five is likely to be very uncommon in Singapore, going by the barometer of the historical quality of the Court of Appeal's judgments.[121] Like Graham Zellick, though, the author suggests that the convention should not for this reason escape all scrutiny.[122] Certainly

117 See the cases cited at n 114 above, as well as *R v Kansal (No 2)* [2002] 2 AC 69 at [19]–[21]; *Jones v Kernott* [2012] 1 AC 776 at [58]; *Bilta (UK) Ltd v Nazir (No 2)* [2016] AC 1 at [15]; *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 at [132]. In Australia, see, for instance, *Baker v Campbell* (1983) 153 CLR 52.

118 Lord Oliver of Aylmerton, "The Appeal Process" (1992) 2 *Journal of Judicial Administration* 63 at 74.

119 [2007] 1 WLR 2367. *Cf* Lord Walker of Gestingthorpe, "How Far Should Judges Develop the Common Law?" (2014) 3 CJICL 124 at 128.

120 E Wyndham White, "*Stare Decisis*: Indecision in the Court of Appeal" (1939) 3 MLR 66 at 68.

121 A study of the overruling practice in the Singapore Court of Appeal can be found in Lau Kwan Ho, "The 1994 Practice Statement and Twenty Years On" [2014] SingJLS 408.

122 Graham Zellick, "Precedent in the Court of Appeal, Criminal Division" [1974] Crim L Rev 222 at 232–233.

there is not presumed here any originality in raising this as an issue. An observer of the old Court of Criminal Appeal in England once rhetorically discussed the notion of a 19-member court having to be assembled to reconsider a decision of a 17-member court,[123] while another commentator wrote that an authoritative pronouncement was necessary on the question whether a decision of six lords justices was liable to be overturned by a full bench of the Court of Appeal.[124] And Brice Dickson in his arithmetic appeared implicitly to assume that the decision of an expanded panel would likely be reversed only in a case heard by an equal- or larger-sized panel.[125] So far as this author is aware, however, even accounting for some infrequent indications from the bench there has been no significantly fuller discussion of how this might be fairly, consistently and efficiently achieved in practice.

48 The issue might in frankness be taken deeper. If the aforesaid aspect of public perception is put to one side for the moment, it can be asked, validly, if the resort to numbers when deciding whether to abide by or move away from a prior ruling is, without more, overly simplified.[126] The hypothetical 17-member court may seem a remote

123 D Seaborne Davies, "The Court of Criminal Appeal: The First Forty Years" (1951) 1 JSPTL (ns) 425 at 439.

124 E Wyndham White, "*Stare Decisis*: Indecision in the Court of Appeal" (1939) 3 MLR 66 at 68.

125 Brice Dickson, "The Processing of Appeals in the House of Lords" (2007) 123 LQR 571 at 593.

126 For instance, one can respectfully ask whether a single sentence on court size in *Kelly & Co v Kellond* (1888) 20 QBD 569 at 572 should have sufficiently encapsulated the overruling practice of the Court of Appeal at the time. In this age it is suspected that more justification will be required. Sir Louis Blom-Cooper and Gavin Drewry did say that the straightforward counting of judicial heads was a pointless exercise as soon as one appreciated the different roles played by the courts at different levels: Louis Blom-Cooper & Gavin Drewry, "The Use of Full Courts in the Appellate Process" (1971) 34 MLR 364 at 365. Lord Oliver, comparing the House of Lords to the Court of Appeal, quite simply admitted there was no necessary or logical reason to suppose that five judges were more likely to get it right than three (Lord Oliver of Aylmerton, "The Appeal Process" (1992) 2 *Journal of Judicial Administration* 63 at 74); one wonders if he would have agreed that seven was greater but no better than five. More recently, Lord Neuberger would not himself have had any qualms with a committee of three in the Privy Council hearing an appeal from a decision of three judges, but he did not get his way for those he had consulted generally still felt that five should sit to consider a decision of three: Lord Neuberger of Abbotsbury, "The Judicial Committee of the Privy Council in the 21st Century" (2014) 3 CJICL 30 at 45. On the other hand, Lord Hope was one of those who thought that there were benefits in the fact that the UK Supreme Court sat in larger panels than was usually the case in the Court of Appeal: Lord Hope of Craighead, "Do We Really Need a Supreme Court?", speech at Newcastle Law School (25 November 2010). See also a somewhat similar opinion of the High Court of Australia in Michael Kirby, "What Is It Really Like to Be a Justice of the High Court of Australia? A Conversation between Law Students and Justice Kirby" (1997) 19 Syd L Rev 514 at 519.

possibility today but, taken *ad infinitum*, starts to assume absurdly comical proportions and should at least prompt further examination. In his illuminating essay on judicial decision-making by majority vote, Jeremy Waldron dismisses Condorcet's Jury Theorem as a proper legitimisation of majority decisions.[127] He may have a point there. Certainly, the keeping of judicial score (sometimes even across generations) can appear an odd metric by which a litigant measures his or her chances of success. Are there not other factors – such as societal developments and the occasional upheaval in morality, not to mention the allelopathic and seemingly relentless propagation of primary and secondary legislation in just about every area of life – which feed into the judicial mill to make this more than just a numbers game?

49 One can imagine also practical and conceptual objections being taken where the actual legal result was partly (but critically) dependent upon the decisions made to list different cases for hearing before panels of differing sizes. In *R v Simpson*,[128] Lord Woolf CJ, delivering the judgment of the court, said with some delicacy that the fact of the CACD sitting in a five-judge constitution (rather than the usual three) was of relevance in deciding whether it would depart from a previous authority. The CACD being ordinarily bound by its past decisions, this was undoubtedly a concession to the practicalities of adjudication. What the judgment unfortunately did not provide was necessary guidance on the anterior (and now extremely significant) question of how the court machinery was to differentiate, in a principled way, those cases which did, and did not, warrant hearing by an enlarged five-judge panel (now apparently possessed of an added discretion to depart from older decisions). In New Zealand, the same can be asked of *Dahya v Dahya*.[129]

50 Within recent memory the high-water marks for the expansion of courts in the UK must include the Brexit case of *R (Miller) v Secretary of State for Exiting the European Union*[130] ("*Miller*") and the decision on

127 Jeremy Waldron, "Five to Four: Why Do Bare Majorities Rule on Courts?" (2014) 123 Yale LJ 1692 at 1714–1718. See also Paul H Edelman, "On Legal Interpretations of the Condorcet Jury Theorem" (2002) 31 J Legal Stud 327; Maxwell L Stearns, "The Condorcet Jury Theorem and Judicial Decisionmaking: A Reply to Saul Levmore" (2002) 3 *Theoretical Inquiries in Law* 125. *Contra* Saul Levmore, "More than Mere Majorities" [2000] Utah L Rev 759 at 767–771; Michael Abramowicz, "*En Banc* Revisited" (2000) 100 Colum L Rev 1600 at 1632–1633; Saul Levmore, "Ruling Majorities and Reasoning Pluralities" (2002) 3 *Theoretical Inquiries in Law* 87; and Stephen Gageler, "Why Write Judgments?" (2014) 36 Syd L Rev 189 at 193–196.

128 [2004] QB 118 at [38]. See also *R v Magro* [2011] QB 398 at [30].

129 [1991] 2 NZLR 150 at 156–157 and 168 (discussed in *R v Chilton* [2006] 2 NZLR 341 at [100]).

130 [2018] AC 61.

illegality in *Patel v Mirza*[131] ("*Patel*"). *Miller* was heard by all 11 of the then-serving justices of the UK Supreme Court, while *Patel* was heard by nine justices. But the reason for enlargement was not precisely the same in each case. *Miller* was decided by the full court, as Baroness Hale of Richmond later explained, so that no one could say that the result would have differed had the panel been different.[132] Lord Neuberger put it more broadly although with a similar sentiment: the intense public interest in *Miller* meant that a full judicial panel was important to ensure public confidence in the legitimacy of the decision, particularly in the event of a close decision.[133] *Patel*, however, involved nowhere the same degree of public exposure. This was more lawyers' law: the nine-member panel was specially constituted to definitively lay down the modern rules on illegality in contract law and to give the quietus to arguments based on divergent lines of authority.[134] Indeed this was presaged by Lord Neuberger, who in *Bilta (UK) Ltd v Nazir (No 2)*[135] had suggested that a panel of nine should soon undertake consideration of the proper approach to the illegality defence.

51 Clearly, therefore, leading members of the senior judiciary view the number of heads involved to be linked to the legitimacy or authority of a decision. One cannot ignore palpable sense when Lady Hale says that the greater the number of judges who agree upon a decision, the greater authority it lends to the decision,[136] although because she does

131 [2017] AC 467.

132 Baroness Hale of Richmond, "Judges, Power and Accountability: Constitutional Implications of Judicial Selection", speech at Constitutional Law Summer School, Belfast (11 August 2017). She had earlier expressed similar thoughts on the risk of differing outcomes from judicial panels in Brenda Hale, "A Supreme Court for the United Kingdom?" (2004) 24 LS 36 at 41. And from his perspective, Lord Walker (who did not sit on the *Miller* court) would possibly have agreed with this: Lord Walker of Gestingthorpe, "Moving In and Moving On – One Justice's View" (2011) 7(2) *Cambridge Student Law Review* 1 at 2.

133 Lord Neuberger of Abbotsbury, "Twenty Years a Judge: Reflections and Refractions" Neill Lecture 2017, Oxford (10 February 2017) at para 31.

134 *Patel v Mirza* [2017] AC 467 ("*Patel*") at [164]. Lady Hale subsequently confirmed that the nonet was convened in *Patel* to try and resolve the differences of judicial opinion on the scope and rationale of the illegality defence: Baroness Hale of Richmond, "Legislation or Judicial Law Reform: Where Should Judges Fear to Tread?", speech at the Society of Legal Scholars Conference 2016, Oxford (7 September 2016).

135 [2016] AC 1 at [15]. Another challenge appears to be in store for a nine-member court, this time to rule on the possible shift to proportionality as the basis for judicial review: *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 at [132]; *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457 at [55].

136 Baroness Hale of Richmond, "Appointments to the Supreme Court", speech at the Conference to Mark the Tenth Anniversary of the Judicial Appointments Commission, Birmingham (6 November 2015); Baroness Hale of Richmond,

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not go on to elaborate why size should matter in a non-elected body charged to boot with checking majoritarian impulses, for present purposes the author considers more insightful the formulation of Lord Clarke of Stone-cum-Ebony, who thought it perhaps self-evident that a decision of nine was likely to be more representative of the views of the whole court than a decision of five.[137] Another candid observer was Lord Rodger of Earlsferry. His view was that an appeal court which did not sit *en banc* was not really a court that could readily pursue any particular line in developing the law;[138] and *Patel* is, the author ventures to suggest, such a modern instance of a court characterised precisely by its fuller representation that is trying very hard to set the tone of the law right. In Singapore, the same can probably be said of *Ochroid* and *Turf Club*.

52 But once it is whispered that a decision of an enlarged panel may take on added weight and consequences not associated with the ruling of a smaller division, the difficulty that floats up is how to decide on the number of judges to hear particular cases. (It is not proposed to touch on the identity of the judges chosen to sit, which raises additional considerations.)[139] Claims of arbitrariness or unfairness can be levelled against the decision to assign one case but not another to be heard by a specially expanded court, since the larger court might feel at greater liberty to steer the law away from its existing course, or if some judicial convention is observed that only an enlarged panel may overrule another enlarged panel's decision. The actual result can therefore end up at the mercy of the listing procedure. Andrew Burrows additionally cites a possible lack of transparency and consistency.[140] These are serious charges which if left unaddressed would lead to a perception of justice as a series of adventitious and unprincipled endeavours, and, in my opinion, it rather misses the point if debate were simply to turn to whether an apex tribunal might or should treat as reviewable allegations

"Should the Law Lords Have Left the House of Lords?" Michael Ryle Lecture 2018, London (14 November 2018).

137 Lord Clarke of Stone-cum-Ebony, "The Supreme Court – One Year On" Bracton Law Lecture, Exeter (11 November 2010) at para 31.

138 Lord Rodger of Earlsferry, "What Are Appeal Courts For?" (2004) 10 Otago L Rev 517 at 524. See also Alec Samuels, "The House of Lords *In Banc*" (1991) 10 CJQ 6.

139 As Alan Paterson concludes in a significant study, the composition of any given panel is important not simply because of the outlook of the individual members of the panel but also because of their approach to collective decision-making, mutual persuasion, group interaction and tactical calculations: Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court* (Hart Publishing, 2013) at p 207.

140 Andrew Burrows, "Numbers Sitting in the Supreme Court" (2013) 129 LQR 305 at 309.

made against its own listing procedure.[141] With the erosion of public confidence in the Judiciary disappears the ultimate basis of its authority and legitimacy.

53 Timeous assurances would therefore be valuable from the senior judiciary that it follows fixed and transparent criteria when determining the size of the panel – for instance, the UK Supreme Court, the High Court of Australia and the New Zealand Court of Appeal each publishes its criteria online – and that there is no question at all of any packing of the court, assurances hopefully accompanied by a current and accessible elucidation of this aspect of the judicial process.[142] Where overruling is in issue it is suggested that the ordinary practice in Singapore should be for the decision of a larger-than-normal panel of the apex tribunal to be departed from only by a panel of equal or greater size. At least two other measures might then be instituted to allay the concerns identified above.

54 First, litigants in Singapore are already required to state in a court form whether they are asking for reconsideration of a previous Court of Appeal decision.[143] It should now be modified to also ask litigants to indicate whether that decision was one made by an expanded panel. This particularisation will facilitate the listing of the matter before an appropriately constituted court, and a further practice direction could be issued in this regard with any other necessary emendations to the rules or guidelines.

55 Secondly, if a smaller division is already sitting but any litigant or judge indicates during the hearing that a previous decision of an enlarged panel may have to be revisited, it should then be necessary for the court to consider *ex proprio motu* (perhaps over a whispered conference or during a momentary adjournment) whether it would be

141 It may be noted that Sir Richard Buxton, writing extra-judicially, thought listing decisions of this sort to be unreviewable, with a contrary position threatening a state "as anarchic as it would be unedifying": Richard Buxton, "Sitting *En Banc* in the New Supreme Court" (2009) 125 LQR 288 at 291–293. Contrast this perhaps with the listing of appeals in the High Court, for which (possibly due to that court's position) a stronger argument could be made ought to be reviewable by the Court of Appeal: *cf Maxwell v Keun* [1928] 1 KB 645.

142 Lord Neuberger of Abbotsbury, "Tweaking the Curial Veil" The Blackstone Lecture 2014, Oxford (15 November 2014) at paras 46–54; Lord Neuberger of Abbotsbury, "The Role of the Supreme Court Seven Years On – Lessons Learnt" Bar Council Law Reform Lecture 2016, London (21 November 2016) at para 24.

143 In the Appeals Information Sheet to be completed by the parties, one of the instructions is to "specify the critical questions of law on appeal, including but not limited to any questions of law which may give rise to substantial consideration and/or potential distinguishing/overruling of existing precedent cases": Supreme Court Practice Directions (updated 15 March 2019) Form 27; Singapore International Commercial Court Practice Directions (updated 15 March 2019) Form 18.

convenient to have the case reargued before a fuller bench, weighing relevant factors such as the benefit of having more judges determine the issue at hand, the possibility of prejudice or a denial of justice to the parties owing to the delay (for instance, where there is urgent need for interlocutory relief or if a final decision is required in respect of an offender facing criminal punishment on a fast-approaching date)[144] and any other legitimate and practical concerns concomitant with the adjournment of the case (including those over increased usage of judicial resources and legal costs). Before the court announces its decision in this regard, the parties should also be offered an opportunity for reply. Whether certain categories of disputes like those raising a point of constitutional significance should presumptively be heard by a jumbo court is more debatable[145] – as mentioned earlier, Australia is an example where a special place seems to have been accorded to constitutional cases – but what is clear is that each jurisdiction must account for its own circumstances. Throughout all this it should be kept in view that the foregoing, whilst conceivably representing a suitable judicial practice, is no totem invariable and may be departed from in exceptional circumstances. To flexibly carry out justice in an appropriate case, a smaller division of the apex tribunal has to remain able and possessed of the power not to follow its prior decisions, even those handed down by a specially enlarged court. As one anonymous justice of the UK Supreme Court pointed out, the fact that that court had not felt it necessary to sit in a specially expanded panel should not be taken to mean that it had already resolved not to depart from an earlier decision.[146]

C. Some questions

56 Like any other fresh development the configuration of a five-judge Court of Appeal in Singapore will throw up the odd question or two over its operation. For example, if the second suggestion above is followed then an antecedent issue will be over the propriety of even allowing a case to be reargued before a larger panel of judges. As an illustration, could the court list a case for hearing before two or three judges and, upon discovering the presence of a very complicated issue after argument had commenced, adjourn the case to be heard by a bench of five or other greater number? Now the power to adjourn is said

144 *In re Yates' Settlement Trusts* [1954] 1 WLR 564.

145 See, for instance, Lord Neuberger of Abbotsbury, "The Role of the Supreme Court Seven Years On – Lessons Learnt" Bar Council Law Reform Lecture 2016, London (21 November 2016) at para 28.

146 "How Much Has Changed? And What Might Change in the Years Ahead?" Supreme Court of the UK: Fifth Anniversary Seminar, London (1 October 2014) https://www.supremecourt.uk/docs/fifth-anniversary-seminar.pdf (accessed March 2019).

to be inherent in every court.[147] The possibility does not appear to be excluded by the hodgepodge of legislation in Singapore.[148] Perchance it may be a matter of curial practice; late convocations of an enlarged panel have previously occurred in Singapore and for many years in the UK and other Commonwealth jurisdictions.[149] Indeed, that the court may in fact *decline* the parties' invitation to adjourn the case for this reason points to it being the master of its own procedure,[150] recognising of course that the discretion to adjourn should ultimately be exercised in accordance with legal principles and upon relevant and not irrelevant or extraneous considerations.[151]

147 *R v Southampton Justices* (1907) 96 LT 697 at 700; *Hinckley and South Leicestershire Permanent Benefit Building Society v Freeman* [1941] Ch 32 at 38–39; *Fussell v Licensing Committee of the Justices of Somerset* [1947] KB 276 at 279; *R v Cox* [1960] VR 665 at 667.

148 See nn 8–9 above for the relevant legislation. The powers conferred on the Singapore Court of Appeal appear wide enough to contemplate an order for adjournment being made in appropriate cases; see ss 390(2), 390(3)(*b*) and 397(5) of the Criminal Procedure Code (Cap 68, 2012 Rev Ed) and O 57 r 13(3) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

149 In Singapore, see *Mok Swee Kok v Public Prosecutor* [1994] 3 SLR(R) 134. In New Zealand, see, for instance, *Mitchell v Jones* (1905) 24 NZLR 932; *Collector of Customs v Lawrence Publishing Co Ltd* [1986] 1 NZLR 404; *Rawlinson v Rice* [1997] 2 NZLR 651. In Malaysia, see, for instance, *Public Prosecutor v Sihabduin bin Haji Salleh* [1980] 2 MLJ 273. In the UK, see, for instance, *Saunders v Richardson* (1881) 7 QBD 388; *R v Cox and Railton* (1884) 14 QBD 153; *R v Dennis* [1894] 2 QB 458; *Bradford v Dawson* [1897] 1 QB 307; *Allen v Flood* [1898] AC 1; *Kruse v Johnson* [1898] 2 QB 91; *R v Stoddart* (1909) 2 Cr App R 217; *R v Ellis* [1910] 2 KB 746; R v Machardy [1911] 2 KB 1144; *R v Hudson* [1912] 2 KB 464; *Hunt v Richardson* [1916] 2 KB 446; *Oaten v Auty* [1919] 2 KB 278; *R v Norman* [1924] 2 KB 315; *R v Chapman* [1931] 2 KB 606; *King v King* [1943] P 91; *R v Turner* [1944] KB 463; *Young v Bristol Aeroplane Co Ltd* [1944] KB 718; *Bracegirdle v Oxley* [1947] 1 KB 349; *R v Clucas* [1949] 2 KB 226; *Younghusband v Luftig* [1949] 2 KB 354; *Wrottesley v Regent Street Florida Restaurant* [1951] 2 KB 277; *R v Whybrow* (1951) 35 Cr App R 141; *Simpson v Peat* [1952] 2 QB 24; *Berkeley v Papadoyannis* [1954] 2 QB 149; *Morelle Ltd v Wakeling* [1955] 2 QB 379; *R v Vickers* [1957] 2 QB 664; *R v Hopkins* (1957) 41 Cr App R 231; *R v Matheson* [1958] 1 WLR 474; *R v Evans* [1959] 1 WLR 26; *R v Green* [1959] 2 QB 127; *R v McVitie* [1960] 2 QB 483; *Gelberg v Miller* [1961] 1 WLR 153; *R v Patterson* [1962] 2 QB 429; *R v Evans* [1963] 1 QB 979; *Ward v James* [1966] 1 QB 273; *R v Anderson* [1966] 2 QB 110; *R v Assim* [1966] 2 QB 249; *R v Newsome* [1970] 2 QB 711; *R v Locker* [1971] 2 QB 321; *Jones v Secretary of State for Social Services* [1972] AC 944; *R v Lillis* [1972] 2 QB 236; *R v Breeze* [1973] 1 WLR 994; *R v Medway* [1976] 1 QB 779; *R v Groom* [1977] 1 QB 6; *R v Weeder* (1980) 71 Cr App R 228; *Pepper v Hart* [1993] AC 593; *Boyce v The Queen* [2005] 1 AC 400; *In re Trinity Mirror plc* [2008] QB 770; *R v T* [2010] 1 WLR 2655; *R v Waya* [2013] 1 AC 294; *International Energy Group Ltd v Zurich Insurance plc UK Branch* [2016] AC 509; *R v Kahar* [2016] 1 WLR 3156.

150 *R v Redbourne* [1992] 1 WLR 1182; *R v Finch* (1993) 14 Cr App R (S) 226.

151 *Matheson v Matheson* [1952] VLR 27 at 30; *In re Yates' Settlement Trusts* [1954] 1 WLR 564; *Lee v Saint* [1958] VR 126 at 129–131.

57 One technical argument against allowing any such adjournment is that, once seised of the appeal, a duly constituted court of two or three judges has an unavoidable positive duty to either uphold or overturn the lower decision, following a line of authority in *R v Bridgend Justices*,[152] *R v Bromley Justices*[153] and *R v Redbridge Justices*.[154] (The respondent is perhaps more likely to raise such an argument, in an attempt to turn any judicial indecision into a dismissal of the appeal in its favour.) Notably, however, the tribunals involved in these cases were all subject to different legislation governing their powers and obligations; the cases can therefore be distinguished. More significant is the authority of *R v Shama*[155] ("*Shama*"), where an objection was taken that the reconstituted court lacked jurisdiction to hear the appeal. The argument is not fully captured (because it was not ultimately required to be resolved) but a verbal exchange recorded in the Criminal Appeal Reports hints at the content of the objection. The appellant, it seems, had thought "there was a jurisdiction issue so far as Archbold dealt with the matter".[156] Upon investigation, however, we see that Archbold's chapter entitled "Criminal Appeal" mentions nowhere the occasional practice of the court reconstituting itself after the initial hearing.[157] One is left to surmise whence the appellant got the inspiration for the demurral. The tenuous possibilities are the chapter's coverage of cases where it is stated that the CACD (being a creature of statute) did not have any inherent jurisdiction, and, separately, its citation of s 55(5) of the Supreme Court Act 1981 (now the Senior Courts Act 1981)[158] declaring that:

> … [w]here an appeal has been heard by a court consisting of an even number of judges and the members of the court are equally divided, the case shall be re-argued before and determined by an uneven number of judges not less than three.

Now the former should not reasonably found an objection to a court reconstituting itself if it were already properly seised of jurisdiction and not *functus officio* after the initial hearing. And the latter is concerned with a quite different scenario of a court comprising an even number of judges that is split down the middle; it does not say that that is the only situation in which a court may adjourn the case for hearing before a

152 [1975] Crim LR 287.
153 [1984] Crim LR 235.
154 [1992] QB 384.
155 [1990] 1 WLR 661; (1990) 91 Cr App R 138.
156 (1990) 91 Cr App R 138 at 140.
157 *Archbold: Pleading, Evidence and Practice in Criminal Cases* (Stephen Mitchell & P J Richardson eds) (Sweet & Maxwell, 42nd Ed, 1985) ch 7; *Archbold: Pleading, Evidence and Practice in Criminal Cases* (Stephen Mitchell, P J Richardson & D A Thomas eds) (Sweet & Maxwell, 43rd Ed, 1988; First Supplement 1988) ch 7.
158 c 54.

larger panel. On a fair examination *Shama* ought hardly to constitute a negative authority on the court's discretion to adjourn. The practice itself has not attracted criticism in the leading commentaries.[159]

58 The final point discussed in these pages pertains to the selection method of the judges to sit on expanded panels of the Singapore Court of Appeal. It is an important procedural matter which can tangibly affect the quality of justice dispensed, and two models are particularly ripe for consideration: one where the additional judges are by default drawn from the existing complement of permanent members, and the other where they are more readily enlisted from elsewhere, such as puisne judges or judges on senior status. In brief, the first offers stability in that smaller divisions of the court are less likely to rule differently in future cases and there can be a settled expectation as to prevailing judicial attitudes (realistically, this advances the certainty of advice given to laypersons); on the other hand, drawing solely from the permanent wells can (particularly where there is a practice of persistent dissent) lead to judges taking unpersuadable legal positions – this will depend on the individual personalities involved – and also the court's ability to tap on specialist expertise located elsewhere is reduced. This last factor is of course the major advantage of the second model, with an ancillary benefit being the increased capacity of the court to hear more cases, but some will point out the optical drawback of non-permanent judges sitting on an expanded panel of the final appellate court and having a significant (and possibly outsized) influence on the development of the law, which should be the rare preserve of judges permanently appointed to that court. Further, in isolated cases there may arise real or perceived risks to the independence of puisne judges who are up for promotion to the appellate bench.

59 The first model is observed by the High Court of Australia, whereas the UK Supreme Court draws relatively more often on the experience of judges who do not usually sit on that court. Current evidence, presented above,[160] shows Singapore adopting a practical and fairly flexible stance on this issue. For five-judge panels of the Court of Appeal the normal practice is that only the permanent members will sit – this is possibly aimed at the sound development of an influential jurisprudence and the reduction of the risk of smaller divisions taking on conflicting reasoning in the future – while non-permanent judges may be asked to participate more frequently on three-member panels as

159 See, for instance, *Taylor on Criminal Appeals* (Paul Taylor ed) (Oxford University Press, 2nd Ed, 2012) at paras 5.08 and 11.74; Susan Holdham & Alix Beldam, *Court of Appeal Criminal Division: A Practitioner's Guide* (Sweet & Maxwell, 1st Ed, 2012) at para 2-009; *Archbold: Criminal Pleading, Evidence and Practice 2018* (P J Richardson ed) (Sweet & Maxwell, 2017) at para 7-30.

160 See para 20 above.

one aspect of the court's exercise in efficient caseload management (it was mentioned earlier how Menon CJ had previously indicated that Chao Hick Tin SJ (who recently took senior status) and three other senior High Court judges would increasingly be hearing more Court of Appeal cases). If the foregoing accurately summarises the existing practice then one can only add that there is no necessary inconsistency in this selection of judges. Each jurisdiction must chart its own course and this extends to the practice of the courts; what is more vital is to identify and evaluate its rationale and consequences, and then to constantly see if the practice keeps up with the changing circumstances. On this standard there is, as has been suggested here, sufficient justification for the current procedure taken by the Singapore Court of Appeal.

V. Conclusion

60 Studying the business of our top courts has not always been easy. Initially there were the alleged concerns over secrecy. The hole in public knowledge of what went on behind the velour was to some extent filled when outsiders were able to start collecting more empirical information about courts in a bid to "gaze inwards" using indirect data proxies. But today many courts have shed the older attitudes and readily disclose – indeed are proud of – their performance indicators in their annual reports. Top judicial administrators regularly give speeches on various aspects of decision-making.[161] More and more they see the discussion of better judicial procedures and processes as encompassing not just dialogues between all the stakeholders involved but also conversations between judiciaries in different countries. Existing practices are shared with openness; improvements are suggested with candour; changes are made with humility.

61 The practice of constituting an enlarged court to hear appropriate cases provides a good illustration. In the old days such listing decisions would probably have been viewed purely as a matter of internal court administration, and an inquiry into the considerations behind those decisions might have been met with a polite but firm rebuff. Within the last two decades, however, the expanded panel has for the reasons adumbrated earlier found increasing modern utility, and this has also meant that some thought has had to be given to the intelligible distinguishment of cases which warrant the additional judges and those

161 For example, as Lord Hodge has observed extra-judicially of the UK, senior judges there have in recent years given public lectures to explain the justice system in a way which was forbidden 60 years ago: Lord Hodge, "Preserving Judicial Independence in an Age of Populism", speech at the North Strathclyde Sheriffdom Conference, Paisley (23 November 2018) at para 24.

which do not. With increasing openness more of these differentiating criteria have become public knowledge, so that there is clarity, accountability and transparency of that component of the process.

62 In Australia, New Zealand and the UK the senior courts have issued for themselves what seem to be rather comparable criteria, although New Zealand has probably the narrowest position expressed. As has been discussed, Singapore has struck a similar balance on the core criteria, and yet there are two things that stand out in particular in an evaluation of how the practice has functioned so far. Where a fuller court is convened it has more often been staffed by all of the permanent members of the Court of Appeal; and the lack of any obvious increase in dissents or concurrences emanating from five-judge panels tends to indicate that the expansionary practice has not, on that measure, affected the working collegiality in that court. The signs are that it will continue to operate in Singapore for its perceived benefits, but if an appropriate opportunity should arise then it is hoped that the next step may be taken to elaborate further on the types of cases which justify determination by an enlarged court, and, in related vein, to clarify the status of the decisions made by such a court.