Re Millar Gavin James QC
[2007] SGHC 85

Case Number : OS 621/2007

Decision Date : 01 June 2007

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Peter Cuthbert Low (Peter Low Partnership) for the applicant; Davinder Singh SC and Jaikanth Shankar (Drew & Napier LLC) for the respondents/plaintiffs; Pradeep Kumar for the Law Society; Valerie Thean and Leonard Goh for the Attorney-General

Parties : —

Legal Profession – Admission – Ad hoc admission of Queen's Counsel – Three-stage test for admission – Whether issues raised in appeals sufficiently difficult or complex to warrant admission of Queen's Counsel – Application of the principle of equality of arms – Section 21 Legal Profession Act (Cap 161, 2001 Rev Ed)

1 June 2007 Judgment reserved.

Tan Lee Meng J:

1 The applicant, Mr Gavin James Millar, a Queen's Counsel ("QC"), sought to be admitted to practise as an advocate and solicitor of the Supreme Court of Singapore under s 21 of the Legal Profession Act (Cap 61, 2001 Rev Ed) ("LPA"). The application was made in order for him to be the leading counsel for Review Publishing Company Limited ("Review"), a Hong Kong company that publishes the *Far Eastern Economic Review* ("FEER"), and Mr Hugo Restall, the editor of FEER (both referred to as "the defendants"), in relation to two libel suits instituted against them by Mr Lee Hsien Loong, the Prime Minister, and Mr Lee Kuan Yew, the Minister Mentor (both referred to as "the plaintiffs") and all other proceedings, including interlocutory or appeal proceedings, connected with the libel suits until their final disposal. For a start, Mr Millar wishes to represent the defendants in two appeals before the Court of Appeal in July 2007 regarding the jurisdiction of the High Court in relation to the libel suits.

2 The two libel suits in question, namely Suit Nos 539 and 540 of 2006, which were instituted by Prime Minister Lee and Minister Mentor Lee respectively on 22 August 2006, arose out of an article ("the article") entitled *"Singapore's 'Martyr', Chee Soon Juan"*, which was published in the July/August 2006 issue of the FEER. The article may also be read on the Internet. The plaintiffs, who asserted that certain parts of the article defamed them, have claimed damages from the defendants as well as an injunction restraining the publication, sale, offer for sale, distribution or other dissemination by any means whatsoever of the defamatory allegations, or other allegations to the same effect.

3 As Review, which is incorporated in Hong Kong, and Mr Restall, who is ordinarily resident in Hong Kong, refused to accept service in Singapore, the plaintiffs applied for leave to serve the Writs out of jurisdiction. Leave to do so was granted on 28 August 2006 and the Writs, Statements of Claim and the relevant Orders of Court were served on the defendants in Hong Kong on 4 September 2006.

4 On 6 October 2006, the defendants instituted proceedings to set aside the service of the Writs on two main grounds. The first ground was that the application for leave to serve the Writs out of jurisdiction was an abuse of process as the claims for injunctive relief were not confined to damages

sustained or actions taken in Singapore. The second ground was that the Writs had not been served in accordance with the Treaty on Judicial Assistance in Civil and Commercial Matters (the "Treaty"), which had been signed by the Republic of Singapore and the People's Republic of China in 2001.

5 After failing to persuade Assistant Registrar Dorcas Quek ("AR Quek") that the court lacked jurisdiction to hear the cases, the defendants appealed against her decision.

6 The defendants' appeal against AR Quek's decision was dismissed on 21 February 2007 by Sundaresh Menon JC: see [2007] SGHC 24. Menon JC held at [68] that the risk of the plaintiffs abusing the court's process was fanciful and ought to be disregarded. As for the application of the Treaty, after considering the opinions of both parties' experts, he held that the Treaty did not apply to Hong Kong and that the plaintiffs had discharged their burden of proving that the service of process was proper and ought not to be set aside.

7 The defendants lodged Civil Appeal Nos 28 and 29 of 2007 (the "jurisdiction appeals") against Menon JC's decision and on 24 April 2007, the present proceedings were initiated for the admission of Mr Millar on an *ad hoc* basis to represent the defendants in, inter alia, the jurisdiction appeals and the libel suits.

Whether the application should be allowed

8 The *ad hoc* admission of a QC is governed by s 21 of the LPA, which provides as follows:

> (1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case where the court is satisfied that it is of sufficient difficulty and complexity and having regard to the circumstances of the case, admit to practise as an advocate and solicitor any person who –
>
> (a) holds Her Majesty's Patent as Queen's Counsel;
>
> (b) does not ordinarily reside in Singapore or Malaysia but who has come or intends to come to Singapore for the purpose of appearing in the case; and
>
> (c) has special qualifications or experience for the purpose of the case.

9 The objective of s 21 of the LPA has been considered by the courts on innumerable occasions. In *Re Oliver David Keightley Rideal QC* [1992] 2 SLR 400, Chan Sek Keong J (as he then was) said at 402:

> The object of [s 21] was to lay the foundation for the development of a strong local bar by the imposition of more stringent conditions for the admission of Queen's Counsel to appear in our courts, but at the same time, to continue to allow litigants to avail of their services in appropriate cases.

10 Similarly, in *Price Arthur Leolin v Attorney General* [1992] 2 SLR 972 ("*Re Price Arthur Leolin*"), the Court of Appeal at 975 reiterated that the object of s 21 was to "help the development of a strong core of good advocates at the local bar by restricting access to Queen's Counsel only in the more difficult and complex cases".

11 For the purpose of determining whether or not a QC should be admitted on an *ad hoc* basis, the courts have adopted a "three-stage test". In *Re Caplan Jonathan Michael QC (No 2)*

[1998] 1 SLR 440, the Court of Appeal explained as follows at [11], 444:

> The requirements of [s 21] were considered at length by the Court of Appeal in *Price Arthur Leolin v A-G* [1992] 2 SLR 972. In its judgment, the court articulated a three-stage test for admission under s 21(1). At the first stage, the applicant must demonstrate that the case in which he seeks to appear contains issues of law and/or fact of sufficient difficulty and complexity to require elucidation and/or argument by a Queen's Counsel. Such difficulty or complexity is not of itself a guarantee of admission, for the decision to admit is still a matter for the court's discretion. At the second stage, therefore, the applicant must persuade the court that the circumstances of the particular case warrant the court exercising its discretion in favour of his admission. Finally, he has to satisfy the court of his suitability for admission.

12 When applying the three-stage test to Mr Millar's application to be admitted on an *ad hoc* basis to represent the defendants, a distinction must be made between the jurisdiction appeals and the libel suits.

The jurisdiction appeals

13 With respect to the jurisdiction appeals, the two main issues are whether the service of the Writs outside jurisdiction was an abuse of the process of the court and whether the plaintiffs complied with the Treaty when serving the writs on the defendants in Hong Kong. The defendants' counsel, Mr Peter Cuthbert Low, argued that as the plaintiffs and defendants engaged experts in public international law to present lengthy and detailed submissions to the court, the public international law issue in dispute is self-evidently difficult and complex and requires elucidation by a QC.

14 That experts on public international law had been invited to present their opinions to the court does not, without more, justify the admission of a QC. The question under s 21 of the LPA is not whether or not a case is difficult and complex but whether it is "*sufficiently*" difficult and complex to warrant the admission of a QC. Menon JC summed up the issues in the jurisdiction appeals as follows in the last paragraph of his judgment (see [2007] SGHC 24 at [125]):

> The central question raised in these appeals is whether the [plaintiffs] have complied with the rules and procedures necessary to invoke this court's jurisdiction. In the main, this turned on two questions: whether their claims, as required by the sub-rules of O 11 r 1 of the Rules [of Court], are limited to damages and injunctive relief within Singapore; and whether the manner of service employed, was appropriate in the circumstances.

15 Evidently, the jurisdiction appeals are not so difficult and complex that they cannot be dealt with by local lawyers. Indeed, in his judgment, Menon JC took pains to stress at [16] that "Mr Low was satisfied and confirmed that through him and his firm, the [defendants] were fully and ably represented" for the purpose of arguing the appeals before him. It follows that the defendants' contention that the case is sufficiently difficult and complex to warrant the admission of a QC lacks substance.

16 Apart from there being no issue of law and/or fact of sufficient difficulty and complexity that cannot be dealt with by local counsel, it must be borne in mind that QCs are admitted because of their expertise in the subject matter of the dispute. When the defendants' counsel, Mr Low, wrote to Mr Michael Hwang SC and Ms Engelin Teh SC on 19 March 2007 to enquire about their willingness to act for the defendants in the jurisdiction appeals, he expressly stated that his clients "require a Senior Counsel with experience of private and/or public international law". As was rightly pointed out

by the plaintiffs' counsel, Mr Davinder Singh SC, and Ms Valerie Thean, who represented the Attorney-General, nothing in Mr Low's affidavit suggests that Mr Millar, who has expertise in defamation cases, is also a specialist in "private and/or public international law". Even the Law Society's counsel, Mr Pradeep Kumar, had to concede that while the Law Society supported Mr Millar's application, there was no evidence that he specialises in the legal issues arising in the jurisdiction appeals. As such, even if the issues in the jurisdiction appeals are sufficiently difficult and complex to warrant the admission of a QC, Mr Millar cannot, as is required in the final part of the three-stage test for the admission of a QC, satisfy the court that he is a suitable candidate to be admitted to represent the defendants in the jurisdiction appeals.

17 For the reasons stated, Mr Millar's application to be admitted on an *ad hoc* basis to represent the defendants in the jurisdiction appeals is dismissed.

The libel suits

18 As for the libel suits, Mr Millar has the requisite expertise in such actions. As such, only the first two stages of the test for admission of a QC enunciated in *Re Caplan Jonathan Michael QC (No 2)* have to be considered.

19 As for the first stage, which is that the case must involve issues of law and/or fact of sufficient difficulty and complexity to require elucidation and/or argument by a QC, the Court of Appeal noted as follows in *Re Price Arthur Leolin* at 976:

> In our opinion, it is clear from the wording of s 21(1) that Queen's Counsel will not be admitted for the routine and the ordinary cases which require no special experience or knowledge and which can be competently handled by Singapore lawyers. The salutary effect of s 21(1) therefore is that litigants are assured of the specialized services of Queen's Counsel in cases of genuine complexity and difficulty, while the opportunities for specialization among Singapore lawyers are gradually developed.

20 In *Re Oliver David Keightley Rideal QC,* Chan J explained at 402 that it is the judge and not the parties or their counsel or other interested parties who has to be satisfied that a case is of sufficient difficulty and complexity. He added that while the considered views of instructing solicitors on the issues raised are relevant and should be given their proper weight, mere assertions that cases or issues are difficult and complex are of no assistance to the court in discharging its duty. As such, the applicant's counsel must identify the issues to the judge hearing the application and offer his views on the applicable law. In similar vein, in *Re Price Arthur Leolin*, the Court of Appeal made it clear at 975 that an application by a QC for admission under s 21(1) of the LPA "should be supported by an affidavit or affidavits setting out concisely the issues concerned in the case for which admission is being sought".

21 Mr Low, who submitted that the case involves difficult and complex issues, pointed out that the fact that the Law Society supported his position is relevant. However, the Law Society did not identify any issue of law and/or fact that is sufficiently difficult and complex. As for the defendants, they have not yet filed their defence. The court cannot be expected to speculate on what their defences might be in order to determine whether the issues are sufficiently difficult and complex to warrant the admission of a QC. Leaving aside the fact that the defendants have yet to file their defence, a question arises as to what can be gleaned from Mr Low's affidavit about the difficulty and complexity of the libel suits. In para 17 of his affidavit filed in support of the application on 23 April 2007, he explained the issues in the libel suits in the following far too general terms:

(1) what, if any, occasions of publication can be established by [the plaintiffs]…. ;

(2) whether the words complained of bore or were capable of bearing the natural and ordinary/innuendo meanings alleged by [the plaintiffs] or any meanings defamatory of [them];

(3) what, if any alternative factual meanings defamatory of [the plaintiffs] those words bore and whether such imputations can be substantially justified;

(4) whether some or all of the words complained were or amounted to comment and, to the extent that this was so, whether the same were fair comment on a matter of public interest;

(5) the application to this case of the principles in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 and *Jameel v Wall Street Journal Europe Sprl* [2006] 3 WLR 642 (the public interest reporting defence) in light, in particular, of the political discussion and reportage in the article;

(6) whether the words complained of were published on an occasion of qualified privilege; and

(7) what, if any, relief(s) [the plaintiffs] may be entitled to in the event of a judgment in their favour.

22 The fact that more is required to establish that a case is sufficiently difficult and complex than a mere reference to general issues has been pointed out by the courts on a number of occasions. In *Re Reid James Robert QC* [1997] 2 SLR 482, Choo Han Teck J, who noted that the explanation in the affidavit in support of the application for the admission of a QC in that case had merely listed the issues in general and vague terms, stated at [11] that such an explanation was of no assistance to the court and that the application could be dismissed on this ground alone. Similarly, in *Re Nicholas William Henric QC and another application* [2002] 2 SLR 296, Tay Yong Kwang J, who noted that the affidavits in support of the two applications had merely asserted that the cases were extremely complex defamation matters without explaining how they were so, pointed out at [39] that the issues listed were "general in nature and case law and legal writing on such issues must abound here and in other common law jurisdictions". The applications in question for the admission of a QC were thus dismissed by Tay J.

23 In the present case, Mr Low's general statements on issues that may arise in a defamation case are certainly unhelpful for the purpose of determining whether the libel cases in question raise issues of law and/or fact that are sufficiently difficult and complex to warrant the admission of a QC. With respect to his assertion that the application of the *Reynolds* defence in Singapore is sufficiently difficult and complex, Mr Singh asserted that *Reynolds* is nothing more than an extension of the common law to embrace developments in the United Kingdom and Europe towards recognising a greater latitude for the media. He pointed out that in New Zealand and Australia, the courts have applied their own tests and adopted the common theme that each court has to decide for itself according to local conditions. Whether *Reynolds* should apply in Singapore was considered in *Lee Hsien Loong v Singapore Democratic Party and Ors* [2007] 1 SLR 675 by Belinda Ang J, who stated at [75] and [76] that given the Court of Appeal's ruling in *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 that the terms of art 14 of the Constitution of the Republic of Singapore (1999 Rev Ed) differ materially from that of art 10 of the European Convention on Human Rights, it is fairly clear that the *Reynolds* position on "responsible journalism" should not be followed in Singapore. In Mr Singh's view, whether or not the Singapore position should be re-considered is a question that ought be considered by local lawyers. Ms Valerie Thean, who agreed with Mr Singh, pointed out that it would be more helpful for local counsel to deal with *Reynolds* and *Jameel* and explain how these English cases could be useful to the development of the law of defamation in Singapore because our

courts have often stressed that our aim is to develop an autochthonous legal system that is sensitive to the needs and mores of our society.

24 In my view, the application of the *Reynolds* defence does not make a case sufficiently difficult and complex so as to warrant the admission of a QC. It is worth recalling that in *Re Platts-Mills Mark Fortescue QC* [2006] 1 SLR 510, Yong Pung How CJ stressed at [15] that it will only be "*in the most exceptional circumstances* that a case is so difficult and complex that no local counsel in Singapore is able and willing to take the case" (emphasis added). In 2001, Lai Kew Chai J commented in *Re Flint Charles John Raffles QC* [2001] 2 SLR 276 at [9] that the local Bar has matured and that there is now a body of SC, potential SC and an impressive group of young advocates and solicitors with excellent academic credentials. The pool of talent has increased considerably since 2001. Apart from the fact that more SCs have been appointed, it must be noted that for the purpose of determining whether there is enough local legal expertise in any particular area of law, one must be mindful of the many younger lawyers who have repeatedly impressed with their knowledge of the law and advocacy skills. In view of this, the fact that QCs have been admitted in the past for defamation cases cannot by itself justify their continued admission for defamation cases except in the most exceptional circumstances.

25 As for whether the facts in the libel suits in question are sufficiently difficult and complex to warrant the admission of a suitably qualified QC, Mr Low pointed out that the plaintiffs are the incumbent Prime Minister and a former Prime Minister while the FEER is a well known international publication. However, these facts, without more, do not make the libel suits sufficiently difficult and complex to warrant the admission of a QC.

26 For the sake of completeness, Mr Low's reference to the principle of equality of arms ought to be considered. He argued that as the plaintiffs have retained the services of Mr Singh, who has been described as "Singapore's most revered litigator and the counsel of choice of many clients on the highest profile cases", it would not be fair if his clients did not have a QC to represent them. Properly understood, the principle of equality of arms does not support such a line of argument, which was considered and rejected by the Court of Appeal in *Godfrey Gerald, Queen's Counsel v UBS AG and others* [2003] 2 SLR 306 ("*Re Godfrey Gerald")*. In that case, the respondent was also represented by Mr Singh and the appellant argued that he would be embroiled in a battle of "David and Goliath" proportions if he was not allowed to have a QC represent him. This argument did not impress the Court of Appeal, which affirmed the decision of Tay Yong Kwang JC (as he then was), to dismiss the application to admit the QC in question.

27 I thus find that the libel suits do not, on the evidence presented by the defendants, raise sufficiently difficult and complex issues of law and/or fact to warrant the *ad hoc* admission of a QC.

28 Whether there are other circumstances to justify the admission of a QC may also be considered. In *Re Price Arthur Leolin*, the Court of Appeal noted as follows at [11], 977:

> Another consideration may be the desirability of admitting foreign counsel in a case where on grounds of self-interest or acquaintanceship, in view of the size of our jurisdiction and population, no local counsel ought to or is willing to take the case.

29 Mr Low asserted that in the present case, he had failed to get a SC to represent his clients. He pointed out that the defendants' Malaysian counsel, Dato Muhammad Shafee Abdullah, had written many letters to SCs in August 2006 and had failed to get anyone of them to act for the defendants. In his affidavit filed in support of the application on 23 April 2007, Mr Low stated in para 34 as follows:

> The outcome of the search for a Senior Counsel – by Dato Shafee – is as follows: Out of 12 letters Dato Shafee wrote to the Senior Counsel, two (2) failed to respond. Another two (2) gave unsatisfactory responses. The rest declined – mostly – with no reasons given.

30 From the documents exhibited, it appears that not all the SCs approached by Dato Shafee had declined to represent the defendants. In fact, on 10 August 2006, Messrs Tan Rajah & Cheah informed Dato Shafee that it had no conflict of interest and that Mr CR Rajah SC and his team of lawyers would act for the defendants "provided the client is prepared to accept our advice on the merits of its case and how it is to be run". The firm, which made it clear that the defendants were free to discharge it if they were "not happy" with the advice given, furnished details of the billing rate for its litigation team and added that if the terms were acceptable to the defendants, the impugned article and a deposit of $20,000.00 should be forwarded to it. Messrs Tan Rajah & Cheah's response cannot, without more, be construed as an "unsatisfactory response".

31 Dato Shafee's correspondence with Mr Michael Hwang SC also merits attention. On 10 August 2006, Mr Hwang informed Dato Shafee that he had no conflict of interest in the matter and added that if he acted for the defendants, his role "would be to advise whether the court would be likely to find the publication defamatory and, if so, what the likely damages would be so that client can know how to negotiate for a settlement which is normally the best way of dealing with this type of case". He added that he handled such defamation cases in a certain way based on his own assessment of the likely outcome of any litigation in Singapore and that this meant that he could not immediately take into account the defendants' other concerns such as overall reputation, the wish to protect the morale of editorial staff and other extra legal considerations. Mr Hwang, who pointed out that he was not prepared to undertake a defence based on justification because he did not believe that such a defence will work in the circumstances of this case, asked for a copy of Messrs Drew & Napier's letter so that he could "see the full context of the way they put their case". Dato Shafee replied to Mr Hwang on 1 September 2006 to say that he took it that Mr Hwang was not prepared to act for his clients if the latter were to fully defend the suit in a full trial. No light was shed on how he came to this conclusion.

32 Had the defendants been more serious about having a SC represent them, they would have had further discussions with either Mr Rajah or Mr Hwang. Mr Low offered no explanation as to what had really transpired after Dato Shafee received the responses of these two SCs. From the correspondence exhibited, it appears that Mr Hwang had to write a letter to Dato Shafee on 16 October 2006 to point out that as it appeared from press reports that the defendants had appointed Mr Low to act for them, he took this to mean that his services were not needed and that he could close the file.

33 It is also pertinent to note that Mr Harry Elias SC, who was reported in the local press as having volunteered to represent the defendants, confirmed in a letter to Mr Low on 7 May 2007 that if no SC came forward to represent the defendants, he was willing to do so. In his letter, Mr Elias stated:

> The newspaper report is accurate. I was asked by the reporter for my stance on the basis that no Senior Counsel was willing to come forward to represent FEER, and I expressed myself in the manner reported.
>
> I was aware that I had previously declined to accept the brief. However, since no Senior Counsel had come forward to represent FEER I thought it appropriate to offer myself notwithstanding my previous refusal.

34 Mr Low informed the court that the defendants had declined to accept Mr Elias' offer to represent them because of the disparity between his private statements to their lawyers and his public statement to the press. In this context, another extract from Mr Elias' letter to Mr Low on 7 May 2007, which is as follows, ought to be considered:

> There is no disparity between my previous private statements to Mr Peter Low and Dato Shafee and my comments to the press. My comments to the press are premised on and in response to the statement that no Senior Counsel came or would come forward to represent FEER. My expressed view was because of this premise.
>
> As to the issue of conflict, I take the view that this cannot arise since your clients or you would have been aware of my previous unconnected cases before you had approached me in the first instance. Furthermore, even after my initial refusal, you and/or your clients approached me again knowing that I had represented certain PAP Ministers or Members of Parliament in previous unconnected actions. At all stages there was no conflict nor is there one now.
>
> I trust this explains my position.

35 Mr Low candidly admitted that even if other SCs stepped forward to offer their services to the defendants, they, being foreigners, would prefer to have a QC represent them. A client's preference is not a factor to be taken into account when evaluating whether a QC should be admitted on an *ad hoc* basis for a particular case under s 21 of the LPA.

36 It cannot be overlooked that the defendants are presently represented by Mr Low, a senior lawyer and a former President of the Law Society. At no time did Mr Low say that he was unwilling or unable to represent the defendants. Indeed, as has been mentioned, he had assured Menon JC during the hearing of his clients' appeal against the decision of AR Quek on the issue of jurisdiction that he and his firm ably represented the defendants.

37 In *Re Godfrey Gerald*, the Court of Appeal pointed out at [29] that while the availability of local counsel is not *per se* an absolute bar to the admission of a QC, there would be very little justification in admitting a QC if local counsel are ready and able to act. After taking all circumstances into account, I am not satisfied that the defendants are unable to have a local counsel represent them in the libel suits or for that matter, in the jurisdiction appeals.

38 As the issues in the libel suits are not sufficiently difficult and complex and can be handled by local counsel, such as Mr Low, to whom any QC may offer advice, the application to admit Mr Millar on an *ad hoc* basis to represent the defendants in the libel suits is dismissed.