**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2018] SGHC 207**

Originating Summons No 732 of 2018

In the matter of Section 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed)

And

In the matter of Originating Summons No 375 of 2018

And

In the matter of an application by **BSL**, Queen's Counsel of England

BSL

… *Applicant*

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# JUDGMENT

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[Legal Profession] — [Admission] — [Ad hoc]

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# *Re* BSL

**[2018] SGHC 207**

High Court — Originating Summons No 732 of 2018
Steven Chong JA
18 September 2018

20 September 2018 Judgment reserved.

**Steven Chong JA:**

## Introduction

1 This is an application under s 15 of the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA") for the applicant, BSL ("the Applicant"), to be admitted to represent the plaintiff in High Court Originating Summons No 375 of 2018 ("OS 375").

2 In OS 375, the plaintiff seeks to set aside an award rendered by an International Chamber of Commerce ("ICC") tribunal in an arbitration seated in Singapore. The plaintiff's case in OS 375 is that: (a) the arbitral tribunal breached the rules of natural justice by failing to consider the parties' evidence and submissions; and (b) the plaintiff was unable to present its case in the arbitration.

3 The underlying dispute in the arbitration concerned the performance and termination of a contract between the parties in OS 375 for the construction of

a gas pipeline management and communication system in another country. The Applicant had acted in the arbitration proceedings as lead counsel for the plaintiff in OS 375.

## Overview of the *ad hoc* admissions regime

4 The court's inquiry in an application under s 15 is a two-stage one (*Re Beloff Michael Jacob QC* [2014] 3 SLR 424 ("*Re Beloff*") at [54]; *Re Harish Salve and another appeal* [2018] 1 SLR 345 ("*Re Harish Salve*") at [12]–[13]). First, the court must be satisfied of the three mandatory requirements in s 15(1) of the LPA, which reads as follows:

> **Ad hoc admissions**
>
> **15.**—(1) Notwithstanding anything to the contrary in this Act, the court may, for the purpose of any one case, admit to practise as an advocate and solicitor any person who —
>
> (*a*) holds —
>
> (i) Her Majesty's Patent as Queen's Counsel; or
>
> (ii) any appointment of equivalent distinction of any jurisdiction;
>
> (*b*) does not ordinarily reside in Singapore or Malaysia, but 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.

5 If the mandatory requirements are satisfied, the court will go on to decide whether to exercise its discretion to admit the applicant, having regard to the matters specified in para 3 of the Legal Profession (Ad Hoc Admissions) Notification 2012 (S 132/2012) ("the Notification Matters"):

> **Matters specified under section 15(6A) of Act**
>
> **3.** For the purposes of section 15(6A) of the Act, the court may consider the following matters, in addition to the matters specified in section 15(1) and (2) of the Act, when deciding

> whether to admit a person under section 15 of the Act for the purpose of any one case:
>
> > (*a*) the nature of the factual and legal issues involved in the case;
> >
> > (*b*) the necessity for the services of a foreign senior counsel;
> >
> > (*c*) the availability of any Senior Counsel or other advocate and solicitor with appropriate experience; and
> >
> > (*d*) whether, having regard to the circumstances of the case, it is reasonable to admit a foreign senior counsel for the purpose of the case.

6 The touchstone for the admission regime under s 15 of the LPA is that foreign senior counsel should only be admitted on the basis of "need", and not merely because admission would be "desirable or convenient or sought as a matter of choice" (*Re Beloff* at [42] and [65]).

**Mandatory requirements**

7 First, I deal with the mandatory requirements under s 15. It is undisputed that the Applicant satisfies the two formal requirements under s 15(1)(*a*) and (*b*) in that he is a Queen's Counsel and is not ordinarily resident in Singapore or Malaysia. The first question which arises for the court's determination is whether the Applicant has "special qualifications or experience for the purpose of this case" under s 15(1)(*c*) of the LPA.

8 The Applicant's case in this regard is, broadly, twofold. He contends that he has "special qualifications and experience" on the basis of, first, his extensive experience in international commercial arbitration and, second, his familiarity with the factual and legal issues in the arbitration proceedings underlying OS 375 given his involvement as lead counsel in the arbitration.

9 The focus on the s 15(1)(*c*) inquiry is on the *relevance* of counsel's qualifications and experience to the specific issues in the case at hand (*Re Rogers, Heather QC* [2015] 4 SLR 1064 ("*Re Rogers*") at [17]; *Re Fordham, Michael QC* [2015] 1 SLR 272 ("*Re Fordham*") at [50]). At the same time, the Court of Appeal recently cautioned in *Re Harish Salve* at [37] that the issues in question must not be framed too narrowly. As the Court stated, "[a]s long as an applicant's curriculum vitae ("CV") demonstrates that he has wide as well as deep expertise and experience in the area of law with which the court will be concerned, it should not matter that he has not previously dealt with the particular issue in dispute."

10 It is contended in the Applicant's submissions that there are novel and complex legal issues in OS 375 relating to whether a tribunal's failure to consider the parties' arguments and evidence at the oral hearing and the post-hearing submissions would amount to a breach of the rules of natural justice or a party's right to present its case. The burden is upon the Applicant to show that he possesses special qualifications or experience with reference to the issues relating to breach of natural justice.

11 In contrast to *Re Harish Salve*, the expertise of the Applicant in the present case does not relate to any discrete legal issue but to a general body of law. I find it troubling that the Applicant's submissions go no further than to refer to his general expertise in international commercial arbitration. This relates to a general field of legal practice and hardly meets the requirement of specificity. Nonetheless, at the hearing before me, Mr Thio Shen Yi SC, appearing for the defendant in OS 375, was prepared to accept that lawyers in the field of international arbitration like the Applicant would likely have court experience arguing applications to set aside or resist the enforcement of awards on the commonly cited ground that the tribunal breached the rules of natural

justice. Mr Jeyendran Jeyapal, appearing for the Attorney-General, was able to point to one particular English case in the Applicant's CV where the award was challenged on grounds including breach of natural justice.

12 Based on this, I am satisfied that the Applicant has special qualifications and experience in cases involving the setting aside of an arbitral award on grounds relating to breach of natural justice. I stress, however, that my finding does not displace the principle that it is incumbent upon the applicant seeking admission to draw the court's attention to his qualifications and experience in the relevant areas of law, and not to rely on other parties to do so as was unfortunately the case here.

13 Given my finding that the mandatory requirements under s 15(1) of the LPA have been met, there is no need for me to consider whether the mandatory requirements are met on the ground of the Applicant's special experience as lead counsel in the arbitration proceedings. As this argument is also relevant to the next part of the inquiry relating to whether the court should exercise its discretion to admit the Applicant, I will go on to consider it through the prism of the Notification Matters instead.

**Notification Matters**

14 The crux of the Applicant's submission is that he should be admitted on the basis of his involvement as lead counsel in the arbitration proceedings. He relies on *Re Joseph David QC* [2012] 1 SLR 791 ("*Re Joseph*"), a High Court case which was decided just before the 2012 amendments to s 15 which widened the scope for *ad hoc* admissions. In allowing the application, it is true that V K Rajah JA considered at [54] that the applicant had been the plaintiff's "lead counsel throughout the lengthy and complex Arbitration and [had] intimate

knowledge of what [had] transpired" and that "extensive and substantive submissions on issues [would] inevitably arise again" in the High Court proceedings. However, on a proper reading of *Re Joseph*, it is clear that the primary factor that led the court to allow the application was the complex legal issues in that case and not the applicant's involvement as lead counsel in the underlying arbitration *per se*. This is clear from the judgment at [27] where the court identified three salient issues in the case:

> (a) whether the Defendants are entitled to resist enforcement of the Awards in the country in which the Awards were made when they did not, within the statutorily prescribed period, take any steps to set aside the same ("Issue 1");
>
> (b) whether the Defendants have a right to revive a challenge based on the alleged lack of an arbitration agreement and a misjoinder of the sixth to eighth plaintiffs to the Arbitration well after the Award has been made ("Issue 2"); and
>
> (c) whether the enforcement of an award in Singapore can be affected by a ruling made in another country over the enforcement of the same award ("Issue 3").

15 All three issues were of considerable complexity and legal significance. They concerned issues of jurisdiction and, more specifically, issues which were particularly thorny in the wake of the debate surrounding the UK Supreme Court's decision in *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan* [2011] AC 763. Further, Rajah JA, recognising that his decision might be misconstrued to support the proposition that lead counsel in the underlying arbitration should invariably be admitted to argue cases arising from an arbitration, specifically stressed in *Re Joseph* at [59] that his holding in that case did "not mean that in future every application involving the same Queen's Counsel who has been the lead counsel in the arbitration proceedings below will be favourably viewed". Rather, he cautioned that the courts must adopt "[a] matter centric approach that pays

particular attention to the sufficiency of complexity and difficulty of the issues raised" (at [59]).

16 As mentioned earlier at [10], the Applicant contends that OS 375 engages novel points of law pertaining to whether a tribunal's failure to consider the parties' arguments and evidence at the oral hearing and the post-hearing submissions would amount to a breach of the rules of natural justice or a party's right to present its case. I do not think that the issues in OS 375 are particularly complex, novel or beyond the expertise of local counsel. Such applications regularly come to court and they are invariably handled by local counsel. There can be no dispute that there is a pool of local counsel well versed in international arbitration matters, specifically in relation to issues relating to breach of natural justice in an arbitration setting. I can see no reason why the current solicitors for the plaintiff in OS 375, WongPartnership LLP, would not be able to adequately represent it in the setting-aside proceedings. In this connection, it is apposite to refer to my observation in *Re Landau, Toby Thomas QC* [2016] SGHC 258 ("*Re Landau*") at [5] that:

> … however complex the facts may be, the principles for setting aside an award for breach of natural justice are reasonably well-settled. Further, the inquiry will ultimately be based on the events as they have unfolded in the arbitration. That is largely, if not entirely, assisted by reviewing the record of the arbitration.

17 The Applicant further argues that there are complex and technical issues of fact and contract law underlying the arbitration. Even supposing that these issues are of a sufficient degree of complexity, I reject the Applicant's characterisation that they are separate from the issue concerning a breach of natural justice. This submission fails to appreciate that the court's task in OS 375 is not to examine the merits of the award, but to determine whether the tribunal failed to consider the parties' arguments and evidence at the oral

hearing and the post-hearing submissions such that there was a breach of the rules of natural justice or the Applicant's right to present its case. The analysis of the facts and issues of contract law must ultimately relate to this central question. In any case, I am not satisfied that the underlying issues are so factually or legally complex that they cannot be competently handled by local counsel.

18 At the hearing of this application, the Applicant tendered several Hong Kong authorities which purportedly stand for the proposition that where foreign counsel seeks admission under s 27(4) of the Legal Practitioners Ordinance (Cap 159) (Hong Kong) for the purposes of a case emanating from arbitration proceedings in which he appeared as counsel, "the court will readily accede to such application" (*Re Goddard QC* [2008] 2 HKC 294 at [4]). The Hong Kong courts term this consideration "the arbitration factor" and recognise it as being independent of any other factor including complexity and the availability of local counsel (*Re Andrew White QC* [2005] HKCU 1019 at [12]; *Re Robert Alun Jones QC* [2008] HKCU 2035 at [10]). The plaintiff in OS 375 relies upon this as justification for why it has not made any attempts to find local counsel to represent it in OS 375, arguing that only the Applicant would be able to provide it with the benefit of continuity of representation.

19 The Hong Kong cases cited by the Applicant must be treated with great caution in light of the appreciable differences between the Singapore and Hong Kong regimes for *ad hoc* admissions. Hong Kong legislation does not prescribe any guidelines equivalent to the Notification Matters and the cases recognise the open-textured criterion of the public interest as "the paramount if not the sole consideration in the exercise of the court's discretion" (*Re Flesch QC and another* [1999] HKCU 1638 ("*Re Flesch*"). The Hong Kong courts, in decisions such as *Re Flesch*, have developed their own guidelines articulating what would

be in the public interest; factors considered relevant in Hong Kong include the development of Hong Kong jurisprudence, the growth of the local Bar and parties' right to choice of representation. In contrast, under our admissions regime, the factors most pertinent to the exercise of the courts' discretion have been specified in the Notification Matters (see *Re Andrews Geraldine Mary QC* [2013] 1 SLR 872 at [32] and [36(c)]). While the courts retain a broad discretion in every case, it is not for our courts to admit counsel on the basis of public policy considerations that bear no direct relevance to the Notification Matters, such as the desirability of enhancing Singapore as an arbitration hub or the continuity of representation. As the Court of Appeal observed in *Re Harish Salve* at [50], the emphasis "must always be on what will assist the court rather than on achieving external and unrelated ambitions."

20 Taken to its logical conclusion, the upshot of the Applicant's position regarding continuity of representation is that arbitration counsel must invariably be admitted to handle court applications for the setting aside and recognition of awards. Not only is this proposition contrary to our existing jurisprudence (see *Re Joseph* at [59]), this is also entirely at odds with Parliament's clearly-stated intention that parties in arbitration-related matters heard in the Singapore International Commercial Court ("SICC") must be represented by Singapore-qualified lawyers. As clarified during the second reading of the Supreme Court of Judicature (Amendment) Bill (Bill 47 of 2017) earlier this year, foreign lawyers are not allowed to appear before the SICC in respect of matters under the International Arbitration Act (Cap 143A, 2002 Rev Ed), "notwithstanding that the foreign lawyers had represented the parties in the original arbitration" (*Singapore Parliamentary Debates, Official Report* (9 January 2018) vol 94 (Indranee Rajah, Senior Minister of State for Law). This applies with equal force to cases before the High Court such as OS 375. I therefore reject the

Applicant's submission that he should be admitted on account of ensuring continuity in representation.

21 Having regard to the relevant circumstances of this case with reference to the considerations specified in the Notification Matters, I do not think it would be reasonable or appropriate to admit a foreign senior counsel such as the Applicant for the purposes of OS 375. I agree with the Law Society's submissions that the Applicant's case only goes so far as to show his client's *preference* for his services, and not a *necessity*.

**Conclusion**

22 For the above reasons, I dismiss this application with costs fixed at $6,000 inclusive of disbursements. Consistent with the costs order in *Re Rogers* and *Re Landau*, such costs are to be paid by the "true party" who stood to benefit from these two applications, *ie*, the plaintiff in OS 375 and not the Applicant.

Steven Chong
Judge of Appeal

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