Re Godfrey Gerald QC
[2002] SGHC 260

Case Number : OM 22/2002

Decision Date : 02 November 2002

Tribunal/Court : High Court

Coram : Tay Yong Kwang JC

Counsel Name(s) : Mark Goh Aik Leng (Goh Aik Leng & Partners) for the plaintiff and the applicant; Davinder Singh SC, and Hri Kumar (Drew & Napier) for the defendant; Laurence Goh for the Law Society; Pang Khang Chau for the Attorney-General's Chambers

Parties : —

Legal Profession – Admission – Ad hoc – Three-stage test for admission of Queen's Counsel – Whether issues sufficiently complex to warrant admission of Queen's Counsel – Whether Queen's Counsel had special qualifications or experience for the purpose of the case – Whether ability and availability of local counsel a bar to admission of Queen's Counsel – Legal Profession Act (Cap 161, 2001 Ed) s 21(1)

Judgment

GROUNDS OF DECISION

1. This Originating Motion sought an order to admit Gerald Godfrey, Queen's Counsel to practise as an Advocate and Solicitor of the Supreme Court for the purpose of appearing on behalf of Anthony Wee Soon Kim, the Plaintiff in High Court Suit No. 834 of 2001, against the Defendant, UBS AG. It was filed by Goh Aik Leng & Partners and supported by an affidavit by Mark Goh Aik Leng.

SUMMARY OF FACTS IN SUIT NO. 834 OF 2001

2. The following facts appear in the aforesaid affidavit as well as in the affidavit of Philippa Kilburn-Toppin, Executive Director of the Defendant, filed on 14 October 2002 to oppose the Originating Motion.

3. Anthony Wee Soon Kim is a 72 year old retired lawyer suffering a serious heart ailment complicated by diabetes and renal failure. UBS AG is an international private bank carrying on business in Singapore in accordance with the Association of Banks in Singapore's Code of Conduct.

4. In August 1997, Anthony Wee's son, Richard, received a tip that the Malaysian Ringgit ('RM') was likely to strengthen and decided, with his father's consent, to use his father's account with the bank to purchase RM35 million against a US$ loan. However, the RM weakened against the US$. By December 1997, Anthony Wee was deeply concerned about the mounting losses he was suffering as a result of that transaction. He therefore asked the bank for suggestions on how he could effectively manage his losses.

5. The bank offered him the following 3 alternative strategies :

(1) keep his existing RM position and do nothing;

(2) cut his RM position immediately and convert it into US$, realizing his losses;

(3) adopt the 'DFF Strategy' which consisted of an investment in the bank's US$ denominated Dynamic Floor Fund ('DFF') and a 12-month Forward Foreign Exchange trade buying RM against the US$.

After several meetings, Anthony Wee decided to adopt the DFF Strategy.

6. Around the middle of 1998, interest rates for the RM shot up to almost 30% per annum as the Malaysian government aggressively raised interest rates in order to fend off speculative attacks on the RM. When Anthony Wee eventually unwound the DFF Strategy on 28 July 1998, it had yielded him a positive return of about RM915,000. He would have been much better off financially had he kept his RM position intact in December 1997. In September 1998, as a result of the capital measures imposed by Bank Negara, the bank converted Anthony Wee's RM deposits at US$1 to RM4, the rate adopted by the Association of Banks in Singapore

7. On 4 July 2001, Anthony Wee commenced this action against the bank, alleging that the bank's representatives misrepresented the DFF Strategy to him. He also claimed that the conversion of his RM deposits was wrongful and took issue with various charges and fees debited against his account. Engelin Teh, SC and Thomas Sim represented Anthony Wee while the bank was defended by Davinder Singh, SC and his assistants.

8. The trial began on 26 February 2002. At the commencement of Anthony Wee's cross-examination, his then counsel requested that he be cross-examined in the morning sessions only as he was not fit enough to continue the full day. That was granted by the trial judge. During the course of the cross-examination, Anthony Wee also asked for breaks on account of his medical condition. The cross-examination thus took up the three weeks fixed for the trial. The trial was then scheduled to continue for a further six weeks from 22 July to 30 August 2002.

9. In the meantime, Anthony Wee discharged his lawyers 'because of differences with Mr Thomas Sim as to the conduct of the case.' He then engaged the services of Goh Aik Leng & Partners who, on 9 July 2002, filed and served the Notice of Appointment of Solicitors to act for Anthony Wee. However, in their letter to the bank's solicitors, the new solicitors stated that they were the solicitors on record and that Anthony Wee 'will still be conducting his own case as counsel' and 'will be assisted by his co-counsel Mr Mohan Singh'.

10. On 15 July 2002, the parties appeared before the trial judge for the hearing of an interlocutory application. Anthony Wee turned up accompanied by Mark Goh and Mohan Singh. Mohan Singh informed the judge that he had been instructed to have conduct of the application in the event Anthony Wee was not medically fit to continue. Mark Goh told the judge that Anthony Wee would be arguing the application himself. The judge ruled that Anthony Wee could not do so as he had solicitors acting for him. He then stood the matter down for Anthony Wee and his solicitors to discuss the matter.

11. When the parties returned to the judge's chambers, Mark Goh applied to discharge himself on the basis that Anthony Wee insisted on arguing the application himself. He was discharged accordingly but was permitted to remain to assist Anthony Wee as a 'McKenzie friend'. The interlocutory application was subsequently dealt with.

12. On 19 July 2002, Goh Aik Leng & Partners filed a second Notice of Appointment of Solicitors but did not serve it on the bank's solicitors.

13. The trial resumed on 22 July 2002. Anthony Wee was absent as he was unwell. Mark Goh and Mohan Singh attended the proceedings introducing themselves as the 'friend' and the 'co-counsel' respectively. Mohan Singh told the trial judge he had been instructed, in view of Anthony Wee's age and condition, to assist him in the event he was unable to carry on and to cross-examine and re-examine such witnesses as directed by Anthony Wee, who would remain a litigant in person. The judge took issue with this. The hearing was then adjourned to 24 July 2002.

14. On 24 July 2002, only Mark Goh attended on behalf of Anthony Wee. He informed the judge that Anthony Wee had instructed Mohan Singh to withdraw from the action. The judge permitted Mark Goh to act as the 'friend' but refused his application for leave to address the court on Anthony Wee's behalf. An appeal against this ruling is pending before the Court of Appeal in Civil Appeal No. 81 of 2002, due to be heard in November 2002. The judge also directed that a medical certificate in respect of Anthony Wee be produced.

15. On 26 July 2002, Mark Goh produced a medical certificate stating that Anthony Wee was unfit to attend court for 60 days from 24 July 2002 to 21 September 2002. The trial dates were thus vacated.

16. Later that day, Goh Aik Leng & Partners faxed the second Notice of Appointment of Solicitors to the bank's solicitors. At around the same time, the parties were informed to attend before the trial judge again at 4 pm that day to clarify the position on the second Notice. When they attended before the judge, Mark Goh explained that the said second Notice was filed in error and that Anthony Wee remained a

litigant in person.

17. Four days later, on 30 July 2002, the same firm of solicitors wrote to the Registrar of the Supreme Court on behalf of Anthony Wee to request further arguments on the interlocutory application. On 1 August 2002, the Registrar replied stating that the judge had instructed that such a request should come from Anthony Wee as he was a litigant acting in person.

18. Anthony Wee sent a response to the Registrar on 2 August 2002, arguing that his duly appointed lawyer had 'the lawful right to act on my behalf, and on that footing to request for further argument regardless of my status as a litigant in person'. An exchange of correspondence between the Registry and Anthony Wee followed. On 12 August 2002, Goh Aik Leng & Partners wrote to the Registrar with the concluding paragraphs of that letter stating:

> "In view of the uncompromising directions and our client's life threatening heart disease aggravated by the difficulties thrown his way as regards the filing of the various Court documents, he has, with great reluctance, instructed us to advise you to treat his Notice of Intention to Act in Person as withdrawn so that the perceived legal impediments may cease to exist.
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> In the premises, we trust that we will now be able to represent Mr Wee to the fullest extent the Legal Profession Act (Cap 161) would allow."

19. On 2 October 2002, the present Originating Motion was filed by Goh Aik Leng & Partners.

THE DECISION OF THE COURT

20. The law on admission of Queen's Counsel under section 21 of the Legal Profession Act is clear. As set out in *Re Caplan Jonathan Michael QC* [1998] 1 SLR 432 at 435 and applied in many subsequent cases, an application for admission under that section has to satisfy a three-stage test. 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, the applicant has to satisfy the court of his suitability for admission.

21. According to Mark Goh Aik Leng, the factual matrix of the action was complex and difficult. The difficulty was compounded by the presence of allegedly altered documents and the bank's campaign of selective and misleading disclosure. Accordingly, the facts would 'require considerable acumen on the part of any counsel for (Anthony Wee)'. It was also submitted that there were many legal issues involving negligence, fraud, fiduciary and equitable duties and breach of contract. It was pointed out that the law in respect of fiduciary duties owed by a private banker to a client had undergone significant evolution in recent years to keep pace with the changes in the banking industry and that there was no local authority that definitively addressed the issues relating to private banking. The applicant's written submissions (at paragraph 56) state:

> "In essence, the issues in Suit 834 of 2001 relate to the basic principles stemming from contract, tort and equity, albeit in a novel and undeveloped area of the law from the perspective of a special relationship of a private investment banker versus a high net worth customer."

22. The above view as to the complexity and difficulty of the case in fact and in law was not shared by all the other parties to this application. The bank's view was that the issues concerned essentially the relationship between a bank and its customer and allegations of misrepresentation and/or fraud. It was argued that the issues were largely factual and were not unique or complex and that such issues have been considered in many local decisions argued by local counsel. The law in respect of banker-customer relationship, it was submitted, was no different for private bankers. The Attorney-General's Chambers and the Law Society of Singapore were also of the same view.

23. I agree that the facts and the legal issues in the proceedings between Anthony Wee and the bank are not of sufficient difficulty and complexity to warrant the admission of Queen's Counsel. A long story is not always a complicated one. New factual situations, like new business practices, will always arise. With each new permutation of facts, the law is applied, sometimes by way of extension, at other times by refinement, of the principles involved. The existing local case law and legal treatises would probably be more than adequate to dispose of the legal issues that arise. Even if reference has to be made to decisions elsewhere, and that is hardly unique to this case, I do not see why that should necessarily elevate the case to such level of difficulty or complexity that it would require elucidation or argument by Queen's Counsel.

24. I now consider the other circumstances in this case. The applicant submitted that the ability and the availability of local counsel to handle this case was not by itself an absolute bar to the admission of a Queen's Counsel. In *Re Beloff Michael Jacob* [2000] 2 SLR 782, the defendants (Singtel) appointed local Senior Counsel to argue their case. The plaintiffs (Japura) did not attempt to engage local counsel but successfully sought the admission of Stuart Lindsay Isaacs QC to argue their case. Following that, the defendants decided that they also wanted a Queen's Counsel to argue their case. In allowing the defendants' application to admit their Queen's Counsel, Yong Pung How CJ said :

> "13. Japura's first objection was that Singtel was already ably represented by Senior Counsel Mr Michael Hwang SC and junior counsel, and therefore did not require the services of Mr Beloff. The first point to note is that the availability and ability of local counsel is not *per se* an absolute bar to admission of a Queen's Counsel – at the second stage of the test for admission, the court is required to engage in a balancing exercise, and the ability and availability of local counsel is only one of the factors to be placed on the scales: see *Re Caplan Jonathan Michael QC (No 2)*[1998] 1 SLR 440. The second point to note is that there is no general rule that prohibits a litigant from engaging both a Queen's Counsel and a local Senior Counsel to argue his case. What the court is concerned with in each case is whether, having found that the issues of fact and law are of sufficient difficulty or complexity to justify the admission of a Queen's Counsel, there are circumstances in that particular case which point the court towards either exercising or not exercising its discretion in favour of the applicant. Each case must be decided on its own facts.
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> 14. … In my judgment, having held that the factual and legal matrix of the case were sufficiently complex and difficult to warrant the admission of Mr Isaacs on Japura's behalf, it was important to ensure a level playing field by also allowing Singtel to engage a Queen's Counsel, if it so wished. I found no reason to penalise Singtel simply because it had already retained local Senior Counsel. After all, the fact that Japura had not made any attempt at all to engage local Senior Counsel was not held against it when it sought to admit Mr Isaacs."

25. In the present case, let us examine how Anthony Wee came to be in the predicament he found himself in where the issue of legal representation is concerned. Mark Goh Aik Leng's affidavit makes the following statements (with Anthony Wee referred to as 'the Plaintiff') :

> "53. The Plaintiff has previously appointed a leading local Senior Counsel to act for him. However, much to his dismay, he found that her strongly recommended assistant also refused to take the Plaintiff's instructions and on that basis she offered to withdraw. The Plaintiff was thus compelled to act in person. However, the Plaintiff's health and age precludes him from continuing to act as a litigant in person.
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> 54. Senior Counsel Davinder Singh of Drew & Napier acts as lead counsel for the Defence. In the course of his illustrious career, her has acquired a daunting, if not

absolutely fearsome reputation as Singapore's foremost litigator.

55. Mr Davinder Singh acted for UBS AG Singapore and commenced an Originating Summons No. 546 of 1999 against the Plaintiff, his wife Betty Wee and his son Richard Wee as the 1st, 2nd & 3rd Defendants respectively for an order that the Plaintiff's personal assets held under his personal account with UBS AG Hong Kong Branch be delivered to the Plaintiff's and/or his wife's and/or son in Singapore on the false premise that said personal assets were previously held in their joint account No. 110628 in Singapore.

56. On the recommendation of a fellow lawyer, the Plaintiff then instructed Senior Counsel Harry Elias and his partner one Lawrence Quahe to resist the aforesaid OS 546/99 as well as to commence an action against UBS AG in Singapore. Regrettably, at the hearing before a Judicial Commissioner, Mr Elias SC did a *volte face* and strongly advised the Plaintiff to accept the delivery of the assets in question. As an inducement, Mr Elias SC even offered to waive his costs without a fight. The other inducement was that the Plaintiff would be free to commence the intended action without delay. His partner Mr Lawrence Quahe opposed the taxation of the bill of costs submitted by Drew & Napier which was claimed at $56,563.07 in an uncontested application.

57. In the result, the Plaintiff was not able to find a local Senior Counsel that he could be comfortable with. This is particularly so, in view of his experience with his Senior Counsel Engelin Teh of Engelin Teh Practice LLC and Senior Counsel Harry Elias."

26. It was said in court that Anthony Wee did not wish to go into the reasons why he was not comfortable with the two Senior Counsel who had acted for him previously. Mohan Singh was only willing to play a supporting role and the case was said to be too complex for Mark Goh Aik Leng's one-man firm. Due to his age and the poor state of his health, Anthony Wee was unable to handle the case himself and 'was compelled to seek assistance of a Queen's Counsel whose ability and more importantly whose integrity (he) is comfortable with.'

27. The crux of all that is set out above appears to be that there is no dearth of local lawyers able and willing to handle the case and to act for Anthony Wee but he is not willing to have them for his lawyers. It would seem that, of the two lawyers in Singapore he is comfortable with, one is willing to assist only but not to conduct the case while the other feels totally inadequate for the task. Even assuming his feelings about the two Senior Counsel are justified, is it reasonable of him to assume that the twenty or so other Senior Counsel would disappoint him in like fashion ? Surely not. What about the 3,000 other practising members of the local Bar? His unjustifiable stance in this case does not warrant the court exercising its discretion in his favour.

28. I was also urged to take into consideration the large amount of money involved in the case and the fact that Singapore aims to be the regional hub for financial and banking services. I do not see how disallowing the application to admit Queen's Counsel in the circumstances here would detract from this objective. It is patently clear that there is no shortage of local lawyers who are more than capable of handling the factual and legal issues for Anthony Wee in his dispute with the bank.

29. I now consider the qualifications of Gerald Godfrey QC. He practised at the Chancery/Commercial Bar in England for 30 years, 15 of which were as a Queen's Counsel. He appeared frequently in the High Court and the Court of Appeal in England and in Hong Kong as well as in the House of Lords and the Privy Council. He has also appeared in Singapore, Malaysia, Brunei, the Bahamas and Kenya. He is an experienced arbitrator and a Fellow of the Chartered Institute of Arbitrators. He is also a member of the International Academy of Estate and Trust Law and of the Insolvency Practitioners Association. He has addressed many international law conferences in his various fields of expertise and has given lectures by invitation at Harvard and Tufts Universities in the USA.

30. In 1981, he was appointed Chairman of the team investigating the affairs of St Piran Ltd ordered by the United Kingdom's Director

of Trade. The matter involved allegations that a financier who had acquired a public listed company was stripping its assets to the detriment of the minority shareholders. It was submitted that this illustrated the Queen's Counsel's 'expertise and skill went beyond his extensive Chancery/Commercial practice into the field of fraud by crooked financiers' and that he is therefore eminently qualified to assist the court in determining whether Anthony Wee had been defrauded by the bank.

31. In 1986, Gerald Godfrey QC was appointed a High Court Judge in Hong Kong. In that capacity, he delivered many landmark judgments in conveyancing, trust, arbitration, revenue and company law. In 1993, he was appointed to the Court of Appeal in Hong Kong and in 2000 he became the Vice-President of that Court. He retired on 29 July 2001 and was honoured with a CBE on 31 December 2001.

32. The bank submitted that the Queen's Counsel did not meet the criterion of 'special qualifications or experience for the purpose of the case' [section 21(1)(c) of the Legal Profession Act]. It argued that there was no evidence he had conducted or had been involved in cases involving banker-customer issues, fraud or breach of fiduciary duties. The landmark decisions delivered by him as a Judge also did not concern these issues. This view was shared by the Attorney-General's Chambers and the Law Society of Singapore.

33. With the greatest of respect to Gerald Godfrey QC, despite his very impressive achievements and ability, his qualifications and experience do not quite meet the requirements of the case before the court. It is not immediately obvious from all that has been stated in the documents before me that he has special qualifications or experience in the area of banking law, private or otherwise. The criterion set out in the said section 21(1)(c) has therefore not been satisfied.

34. For the above reasons, I dismissed the Originating Motion with costs fixed at $5,000 to be paid by Anthony Wee to the bank.

Sgd:

Tay Yong Kwang

Judicial Commissioner