Re De Lacy Richard QC
[2003] SGHC 55

Case Number : OM 4/2003

Decision Date : 13 March 2003

Tribunal/Court : High Court

Coram : Tay Yong Kwang J

Counsel Name(s) : Mark Goh Aik Leng (Goh Aik Leng & Partners) for the Applicant and for Anthony Wee Soon Kim, Plaintiff in High Court Suit No. 834 of 2001; Davinder Singh SC and Hri Kumar (Drew & Napier) for UBS AG, Defendant in High Court Suit No. 834 of 2001; Wilson Hue (Attorney-General's Chambers) for the Attorney-General's Chambers; Laurence Goh Eng Yau (Laurence Goh Eng Yau & Co.) for the Law Society of Singapore

Parties : —

Civil Procedure – Costs – Principles – Payment of costs by non-party to application – Whether litigant in main suit non-party to application to admit Queen's Counsel – Whether litigant can be ordered to pay costs

Legal Profession – Admission – Ad hoc – First stage test s 21 Legal Profession Act – No material change in facts – Whether test can be re-argued after court rejected earlier application under same section – Legal Profession Act (Cap 161, 2001 Rev Ed) s 2

Legal Profession – Admission – Ad hoc – Second stage test s 21 Legal Profession Act – Whether circumstances justified exercise of judicial discretion in applicant's favour – Legal Profession Act (Cap 161, 2001 Rev Ed) s 21

Introduction

1 This Originating Motion seeks an order that Richard de Lacy, Queen's Counsel (QC) be admitted to practise as an advocate and solicitor of the Supreme Court of Singapore for the purpose of appearing on behalf of Anthony Wee soon Kim, the Plaintiff in High Court Suit No. 834 of 2001. Anthony Wee is a 72 year old retired lawyer with a serious heart condition complicated by diabetes and renal failure. The Defendant in that action is UBS AG, an international private bank carrying on business in Singapore. The trial of that action has commenced but was adjourned due to Anthony Wee's health problems.

Originating Motion No. 22 of 2002 ("The First Application")

2 The present application is the second application for the admission of QC to represent Anthony Wee in the said suit. The first application was Originating Motion No. 22 of 2002 in respect of Gerald Godfrey QC. I heard that application on 15 October 2002 and dismissed it with costs fixed at $5,000 to be paid by Anthony Wee to UBS AG. The facts relating to the dispute between Anthony Wee and UBS AG and the circumstances leading to the first application for admission of QC are set out in my grounds of decision dated 2 November 2002 in that Originating Motion. I dismissed the first application as I was of the view that it failed all three stages of the test in section 21 Legal Profession Act explained in *Re Caplan Jonathan* Michael QC [1998] 1 SLR 432. In summary, I held as follows in the first application:

(1) the facts and the legal issues in the action were not of sufficient difficulty and complexity to warrant the admission of QC;

(2) Anthony Wee's unjustifiable stance which caused him to be without legal representation

in the course of trial did not warrant the court exercising its discretion in his favour; and

(3) despite the QC's very impressive achievements and ability, his qualifications and experience did not quite meet the requirements of the action before the court.

Anthony Wee has lodged an appeal against the above decision in Civil Appeal No. 114 of 2002. The appeal is scheduled to be heard by the Court of Appeal next Monday, 17 March 2003.

The Present Application

3 This Originating Motion was scheduled to be heard on 6 March 2003 but was refixed for hearing one week later at the request of Anthony Wee who stated in his letter of 3 March 2003 that his solicitor, Mark Goh Aik Leng, was out of the country on urgent business and would not be back until 10 March 2003. When hearing commenced this morning, Mark Goh applied for special leave to allow Anthony Wee, who was present in court, to address the court, to be followed by a summing up by his counsel. He explained that this case was extremely important to the Plaintiff and it would be better for the Plaintiff to address the court personally. As Mark Goh was still on record as the Plaintiff's solicitor, I refused such leave. Mark Goh then requested to speak to Anthony Wee in court and I allowed him to do so. After conferring privately with his client, Mark Goh informed me that since Anthony Wee insisted on addressing the court himself, he had no choice but to apply to be discharged as his solicitor. Bearing in mind the history of the proceedings at trial (which I dealt with at some length in my earlier decision), I refused the application. Parties should not be permitted to engage in a continuum of appointing, discharging and then re-appointing their solicitors at their whim during the course of proceedings. Mark Goh then indicated he would have to read the submissions prepared by Anthony Wee and written in the first person. He proceeded to do so.

Anthony Wee's Arguments

4 The present application, like the first one, is supported by an affidavit by Mark Goh Aik Leng. After succinctly describing the action as one in which Anthony Wee is "seeking remedies in respect of the Defendant's obligations to advise on foreign exchange trades carried out by its employees", Mark Goh repeats essentially the same matters listed out in his affidavit in the first application. This time, however, no allegations are made against the lawyers who have acted for Anthony Wee in the recent past. The affidavit concludes in the following manner:

"44. In view of his age, the Plaintiff engaged the services of M/s Goh Aik Leng and Partners to assist as he was unable to undertake the conduct of his case without the assistance of a practising advocate and solicitor.

…

48. In particular, it should be pointed out that the law in regard to the fiduciary duties owed by a private banker to a client has undergone significant evolution in recent years. These changes have had to be made in order to keep pace with the changes in the banking industry and especially in the provision of private banking services. There is no local authority that definitively addresses these issues. It is a difficult and complex area of the law that pools the wisdom laid down in more than a century of decided cases from multiple jurisdictions and distils the same against the modern face of the banking industry.

49. In the circumstances, such factual matrix require considerable forensic ability on the part of any counsel for the Plaintiff.

50. Needless to say, neither the Plaintiff nor I with limited experience had that forensic ability in the somewhat difficult law in private banking and/or the ability to unravel the complex documents produced by Drew & Napier, which required at least eight (8) affidavits to explain (a) how taped telephone conversations were destroyed or "erased" and why only telephone conversations of Colin Koh and David Lim were recorded that flouted the Defendant's General Compliance Manual and the Telephone Recording Procedures Directive Drew & Napier discovered under compulsion of law which it subsequently disclaimed as being irrelevant.

Attempts to appoint local senior counsels

51. After the unsuccessful application for the admission of Mr. Gerald Godfrey QC, I was instructed and did approach several local senior counsels intending for them to conduct this matter. All our attempts have been unsuccessful.

52. I approached Mr. Michael Khoo SC, but was told that Mr. Khoo would be engaged in another case and could not take on the case. Mr Alvin Yeo SC was also unable to accept the case as there might be a potential conflict of interests. We were also rejected by Mr. Kenneth Tan SC, for reasons of conflict of interests again.

Mr. Richard De Lacy QC

53. I annex hereto the curriculum vitae of Richard De Lacy, which I believe will demonstrate that he is amply qualified to conduct this case. Annexed hereto marked "GAL-6" is a copy thereof."

5 The written submissions seek mainly to re-argue that the action between Anthony Wee and UBS AG was sufficiently difficult and complex to warrant the admission of QC. Where the second stage of the test for admission is concerned, Anthony Wee argues that as an experienced lawyer, he is fully conscious that one should never change horses in mid-stream. He denies any suggestion that he has been flippant in appointing and discharging his lawyers or that it was done for tactical reasons. He claims that his previous instructing solicitor, Thomas Sim, was unwilling to take his instructions and that he tried to resolve the differences without success. He exhibits a letter dated 13 June 2002 from his then counsel, Engelin Teh SC, which reads:

"I refer to your letter of 12 June 2002.

All my efforts to explain and improve the situation have only resulted in further accusations from you. I take particular objection to your remarks that the costs agreement that we have sent to you for your execution was to enable us 'to print money at (your) expense'. Your remarks are insulting and unwarranted. You are not obliged to sign the costs agreement or to even engage us. In order not to further aggravate the situation, I will not respond to the matters raised in your letter at this stage.

I really do not see how my firm can continue to act for you in the light of the allegations which you are making against my firm. Please arrange for another firm of solicitors to take over the conduct of the matter as soon as possible. My firm will render all assistance necessary to get your new lawyers up to date on the matter.

As for costs, I will leave it to the Court to decide if we are entitled to the amounts billed."

6 Anthony Wee also states that it is a fallacy "to assume that all Senior Counsel are familiar

with or experienced with private banking dealing with foreign exchange trade contracts". He submits that the "availability and ability" of local counsel is not the predominant factor for the second-stage test, relying on *Re Beloff Michael Jacob QC* [2000] 2 SLR 782. In performing its "balancing act", he says, the court should have due regard to his age and his health and to the fact that he is not able to find a Senior Counsel to take over the case from Engelin Teh SC. He also states that the fact that the trial was only part-heard after three weeks and the voluminous documents involved belie the Defendant's argument that the case is a simple one and that "it would not be unreasonable to infer (Davinder Singh SC) would not normally descend to lead in a case which is simple and uncomplicated". If the admission of QC is refused, there would be "an unequal playing field pitting Mr (Mark) Goh against a giant, a role that Mr (Mark) Goh does not relish".

7 Richard de Lacy QC's curriculum vitae shows he was called to the English Bar in 1976 and became a QC in 2000. He practised at the Chancery Bar between 1978 and 1986 in various fields including banking. From 1986 to date, he practises "in the banking and commercial chambers of R. Neville Thomas QC in the fields of commercial law, especially banking and arbitration, professional negligence claims against accountants and solicitors, insolvency (corporate and individual), receiverships, company law, financial services law". The banking litigation he was involved in includes claims relating to international settlement of currency trades. The QC is also the specialist editor of Banking and Financial Services in *Bullen & Leake & Jacob*, *Precedents of Pleadings*, 13th edition (2000) and 14th edition (2002).

8 There was no issue estoppel in making the present application as the QC here is not the same as the one in the first application. The first and the second stages of the test for admission can be re-argued as shown by the decision in *Re Price Arthur Leolin* [1999] 3 SLR 766.

UBS AG's Arguments

9 Koh Wo Bin, a director of UBS AG, in her affidavit to oppose the present application, after stating that paragraph 50 of Mark Goh Aik Leng's affidavit (above) suggests that there are complex issues of discovery, proceeds to refute the suggestion as follows:

> "8. This argument is clearly contrived. Wee obviously did not believe that the issue of taped recordings was complex when he applied to admit Godfrey QC. Now that that application has been dismissed, Wee makes this argument because he knows that he has to come up with new reasons to support his application. He is clearly clutching at straws to overcome his burden of demonstrating sufficient complexity.
>
> 9. In any event, Wee's argument is plainly misconceived. The suggestion appears to be that UBS has withheld certain taped conversations. But the fact is that UBS has given discovery of all taped conversations in its possession. Wee applied for specific discovery of various documents, including the tapes, on 23 November 2001. Following that application, UBS filed three affidavits through me, on 10 December 2001, 22 February 2002 and 26 April 2002 to explain UBS' tape recording policies and storage procedures, and to confirm that UBS had given discovery of all relevant tape recordings in its possession.
>
> 10. Wee was not satisfied with this response, and served Interrogatories on UBS which were designed to ascertain if there were other recordings, which UBS had failed to disclose. In response to this application, I filed two affidavits on 2 July 2002 and 12 July 2002, essentially repeating the position in my earlier affidavits. On 18 July 2002, the Court ordered these Interrogatories to be withdrawn and Wee to pay UBS costs fixed at $4,000. Wee did not appeal this order. Neither did he take out any further applications for discovery.

11. In the circumstances, Goh's reference to UBS filing "at least 8 affidavits to explain (the tape recordings)" is inaccurate."

10 Davinder Singh SC says that there is nothing in the present application which was not before me in the first application except for the approaches made to the three Senior Counsel. He submits that the exercise to approach Senior Counsel must be a sham in the light of Anthony Wee's statement in the first application that he was not comfortable with local counsel. The fact that three Senior Counsel turned him down does not mean other Senior Counsel or other lawyers are not able and willing to handle the case. He asserts that the circumstances leading to the discharge of B. Mohan Singh at the trial show that it was a tactical ploy.

11 Where the QC's qualifications and experience are concerned, Davinder Singh SC says their research shows 15 reported cases in which Richard de Lacy QC appeared as counsel. The cases relate to trust law and company liquidation. None of them involved banking.

The Attorney-General's Views

12 The Attorney-General agrees that the action is not of sufficient difficulty and complexity to warrant the admission of QC. He argues that local lawyers have made great strides in the last decade or so in banking and other areas of the law and that the interest in developing the local Bar outweighs the need to ensure that a QC be admitted for justice to be done in this particular case. As the local Bar matures, admission of QC should correspondingly become more and more the exception.

13 While having no doubts that Richard de Lacy QC is an eminent lawyer, State Counsel Wilson Hue submits he may not have the special qualifications and experience for this case. This is because his contributions as specialist editor appear to be in "equitable remedies, financial services, sale of shares, stock exchange. The section on "bankers" is provided by another writer. The portion on financial services relates to the English Financial Services Act which has no application here.

The Law Society's Views

14 The Law Society of Singapore submits that the issues raised in the action are more factual than legal and that "there are other lawyers who are eminently qualified with the relevant expertise to handle the Plaintiff's case". In its view, none of the issues in the case raises novel or difficult issues of law which require elucidation or argument by QC.

15 The fact that three Senior Counsel could not accept the case does not by itself justify admission of QC. The Law Society of Singapore feels that the manner in which Mark Goh Aik Leng has handled the case is evidence that he understands the issues very well and that he seems to be well equipped and proficient to handle the case himself. It notes that Anthony Wee has chosen not to continue with the services of Engelin Teh SC, Harry Elias SC and B. Mohan Singh, lawyers previously engaged by him. It therefore holds the view that the second-stage test has not been satisfied.

16 The Law Society does not doubt the "credibility and credentials" of Richard de Lacy QC.

The Decision of the Court

17 Since the date of my decision in the first application, only two things have happened insofar as the facts of the action are concerned. The first is that the appeal in Civil Appeal No. 81 of 2002 has been dismissed by the Court of Appeal on 23 January 2003. That concerns the appeal against the

ruling of the trial judge in the action permitting Mark Goh to act as a 'McKenzie friend' but refusing him leave to address the court on Anthony Wee's behalf. I mentioned this matter in paragraph 14 of my grounds of decision in the first application. The second matter is that the appeal in Civil Appeal No. 75 of 2002 (concerning bankers' books under Part IV of the Evidence Act) has also been dismissed. That was heard at the same time as Civil Appeal No. 81 of 2002 on 23 January 2003 when judgment was reserved and then delivered on 10 February 2003.

18 Beyond these two matters, which upheld the trial judge's decisions, nothing has changed insofar as the difficulty or complexity of the case is concerned. The attempt here to raise matters already canvassed or which ought to have been mentioned in the first application is akin to the application in *Re Lee Chu Ming Martin QC and another application* [2002] 4 SLR 929. That case concerns a second set of applications to admit QC after I dismissed the first. In dismissing the second set of applications, Lee Seiu Kin JC held:

> "8. The applicants have not appealed against the dismissal by Tay Yong Kwang JC of their previous applications. In the premises, they are bound by the findings of the judge that the suits in question are not of sufficient difficulty and complexity and that there was no evidence that the circumstances of the case warranted admission of Queen's Counsel. They are therefore estopped from contending otherwise in this application. …
>
> 9. In the present applications the parties are the same, the issues to be decided by the court are the same as those in the previous applications. The decision is clearly set out by Tay Yong Kwang JC in his written grounds of decision and it is final, save that the applicants have a right of appeal against it to the Court of Appeal. If the applicants are not satisfied with the decisions of Tay Yong Kwang JC, the proper course of action would have been to file an appeal. If they have fresh evidence, the correct procedure would be to apply to the Court of Appeal for leave to adduce such evidence. For me to entertain this second set of applications would be tantamount to hearing an appeal against the judge's decision in respect of the first set of hearings. I have no jurisdiction to do that. It would also mean that an applicant who is not satisfied with the dismissal by a judge of his application can make a new one to another judge and keep doing so until he obtains an outcome that he is satisfied with. Clearly this cannot be the case."

19 The only differences between the present application and those in the case cited above are that an appeal has been filed against my decision in the first application, that three Senior Counsel have since been approached and the QC sought to be admitted here is not the same QC in the first application. It is permissible to raise new matters occurring after the first application which may have an impact on the second-stage test in section 21 Legal Profession Act. It is also permissible to seek admission of another QC (for the third-stage test) in view of what I have held in respect of the first QC. However, the first-stage test (whether the case is of sufficient difficulty and complexity) cannot be re-argued in the present application without a material change in the facts. I acknowledge that there is a pending appeal but my decision on the first-stage test stands until the Court of Appeal holds otherwise.

2 0 *Re Price Arthur Leolin* [1999] 3 SLR 766 appears to support Anthony Wee's attempts to re-open the first-stage test here. In that case, judgment was given in favour of a bank against one Teo Siew Har. She then sought to admit Leolin Price QC for the purposes of appearing as leading counsel in her appeal to the Court of Appeal. The application was disallowed on 12 January 1999 on the ground that the case was not of sufficient difficulty and complexity. Her appeal against judgment came up for hearing on 21 January 1999 and was adjourned to 24 March 1999. On 24 March 1999, the Court of Appeal granted her a final adjournment to enable her to make a further application for

the admission of QC. The second application came up for hearing before Rubin J on 8 April 1999. It was objected to by the bank. The Attorney-General also objected to the second application on the ground that the issue had already been decided by the High Court on 12 January 1999. Rubin J held:

> "11. The order made by the Court of Appeal on 24 March 1999 reads: 'Court orders: Grant adjournment to allow admission of QC. This is the very last adjournment – to second sitting of CA in April.' The foregoing order seems to suggest that the Court of Appeal was in favour of the admission of a Queen's Counsel in the circumstances of the case and was inclined to treat the applicant's case on appeal as one of sufficient difficulty and complexity. Hence its decision to grant leave to the applicant to make a fresh application. In the circumstances, the objection based on *res judicata* appears to lack merit and is not valid."

The judge then went on to hold that the case was both complex and difficult and, coupled with the fact that Teo was unable to find a local counsel to argue her appeal, allowed the admission of the same QC.

21 It can be seen that the facts in the above decision are unique. Rubin J appeared to have taken the view that the Court of Appeal disagreed with the decision refusing Teo's first application to admit the QC and felt he was therefore at liberty to consider the matter afresh.

22 The present application before me is far removed from the situation in the case cited. If successive applications may be made to reconsider the first-stage test by inserting the name of a different QC each time, thereby modifying the equation slightly, there will be no end to such applications in any particular case, at least not until the party concerned gets what it wants. I said in *Re William Henric Nicholas QC* [2002] 2 SLR 296 that Section 21 Legal Profession Act contemplates an application by a QC and not the litigants in the case in question. However, such applications, although taken out in the name of the QC, are really applications by the parties in the action. The language used in many judgments in such matters shows clearly that judges regard the applications in the way I have stated. To treat such applications otherwise is to ignore common sense. I therefore hold the view that the first-stage test may not be re-visited this way unless there has been a material change in the facts of the case.

23 Even if it is permissible to re-visit the first-stage test of the application, I am still of the opinion that the facts and the legal issues raised in the action are not of sufficient difficulty and complexity to warrant the admission of QC. Whatever packaging the cake is placed in now, the contents and the ingredients remain the same. We are still looking at essentially the same action. The discovery issue existed when the first application was heard. It could have been raised there but was not. In any event, discovery of documents is a routine matter, handled quite frequently and effectively by lawyers with no more than a few years' experience. Where the "complex documents" are concerned, they are in the main documents pertaining to the telephone conversations regarding the foreign exchange trades. Making sense out of such transcripts of conversations, especially if they cover a long span of time and involve many transactions, may be a tedious process but it is not something beyond the skills of any reasonably competent local lawyer. It certainly does not warrant the forensic ability of a QC.

24 Where the second-stage test is concerned, I am mindful that I need not be convinced of the absolute absence of any local counsel able and willing to take on the case here *(Re Caplan Jonathan Michael QC (No. 2)* [1998] 1 SLR 440). However, I reiterate my view in the first application that the predicament Anthony Wee finds himself in where legal representation is concerned is entirely of his own making and that the court's discretion should not be exercised in his favour in the circumstances.

25 Where Richard de Lacy QC's qualifications and expertise for this case are concerned, I am prepared to hold that he satisfies the third-stage test for admission. It would be helpful if such applications list out some relevant prominent cases handled by the QC in the past.

26 It follows that this Originating Motion is dismissed. On the issue of costs, Mark Goh submits that the prescribed fee [pursuant to section 21(5) Legal Profession Act read with the Legal Profession (Fees for Ad Hoc Admission) Rules] is $1,000 each for the Attorney-General and the Law Society. He argues that it would therefore be giving a windfall to the other party if the court awards more than that for costs. He also submits that Anthony Wee is not the party in this application anyway. He recognizes the court's jurisdiction to award costs against non-parties but says it should be exercised sparingly.

27 Indeed, the court can award costs against non-parties [see Order 59 rule 2 (2) of the Rules of Court]. However, as I have indicated above, Anthony Wee as litigant is the true party in this application anyway, as is the case in all such applications to admit QC. Parliament saw it fit to prescribe the fee payable to the Attorney-General and the Law Society but not for the parties to the action. The costs payable to the other party in the action will therefore be decided according to the principles on costs. I am of the view that Anthony Wee should pay UBS AG costs of $5,000 for this application.