Re Sher Jules QC
[2002] SGHC 140

Case Number : OM 600039/2001

Decision Date : 08 July 2002

Tribunal/Court : High Court

Coram : Lai Kew Chai J

Counsel Name(s) : K Shanmugam SC and Prakash Pillai (Allen & Gledhill) for the applicant; Cavinder Bull (Drew & Napier) for the plaintiff; Hema Subramanian (State Counsel) for the Attorney General; Laurence Goh (Laurence Goh Eng Yau & Co) for the Law Society of Singapore

Parties : —

Legal Profession – Admission – Ad hoc admission of Queen's Counsel – Three-stage test for admission – Whether issues in suit sufficiently complex to warrant admission of Queen's Counsel – s 21(1) Legal Profession Act (Cap 161, 2001 Ed)

Judgment

GROUNDS OF DECISION

By this originating motion, Mr Jules Sher QC ("Mr Sher") sought ad hoc admission under s 21 of the Legal Profession Act (Cap 161) ("the Act") as an advocate and solicitor of this court to appear on behalf of Singapore Telecommunications Limited ("SingTel"), the defendant in Suit No. 934 of 2001/Y ("the suit") until its final disposal. In the suit, the plaintiff was claiming in restitution the sum of $388 million from SingTel on the ground that in making that payment to SingTel as part of the compensation it had made a mistake of law. Counsel for the plaintiff in the suit did not object to the application. The representative of the Attorney-General left the matter to the court. Counsel for the Law Society of Singapore, however, opposed the application. Initially, I was reluctant to order the ad hoc admission and I pressed Mr Shanmugam SC on the matter, commenting that he was working very hard out of a very interesting brief. In the end I was persuaded that the three-fold test laid down in Singapore by a long line of case-law was fulfilled. Bearing in mind the principles governing the exercise of my discretion as laid down by s 21(1) of the Act and case-law, I allowed the application. I now set out the background and the circumstances under which the facts were applied in accordance with the principles governing the admissions of QCs.

Section 21 of the Legal Profession Act

2 Section 21 of the Act states as follows:

"(1) Notwithstanding anything to the contrary in this Act, the court may, for the purposes 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 qualification or experience for the purpose of the case."

3 Mr Sher obtained the degree of Bachelor of Commerce followed by an LL.B at the University of Witwaterstrand, Johannesburg in 1964. He was awarded the degree Cum Laude and was awarded the

Society of Advocates' prize for the best law student over the three years of the LL.B course. He was called to the Bar in South Africa. He took the post-graduate Bachelor of Civil Law at Oxford University, New College, in 1967 and was called to the Bar of England and Wales in 1968 by the Honourable Society of the Inner Temple. He has practiced at the Bar of England and Wales since then. In 1981 he was appointed one of Her Majesty's Counsel. He is a member of the Chancery Bar Association and the Commercial Bar Association. In 1987 he was appointed a Recorder and a Deputy High Court Judge in the Chancery Division in 1989 and more recently in the Queen's Bench Division, Commercial Court.

4 Mr Sher has appeared as counsel in several cases in Singapore. At the time of his application he was instructed in a very large scale litigation in the Cayman Islands and in Hong Kong and other jurisdictions. In the United Kingdom he has appeared regularly in the High Court, the Court of Appeal, the Privy Council and the House of Lords, both as junior and in silk. He appeared in *William Sindall plc v Cambridgeshire County Council* in the Court of Appeal [1994] 1 WLR 1016 which was a case involving mistake in the realm of contract and of relevance at the trial of the suit. He also appeared in *South Tyneside Metropolitan Borough Council v Svenska International plc* [1995] 1 All ER 545 which involved the law of contract and restitution and the defence of change of position, and which would also be relevant to the issues in the suit.

5 In the light of the very impressive credentials of Mr Sher, it was obvious that the requirements of special qualifications and experience under s 21(1) of the Act were not in issue before me.

6 For more than 10 years our courts have been dilating on s 21(1) of the Act. It was noted that the section was aimed at specifying some guidelines in the ad hoc admission of Queen's Counsel. The objective was to help develop a strong core of good advocates at the local Bar, but it was also recognized that in the appropriate cases litigants would be allowed to avail themselves of the services of QCs. The guidelines were most usefully set out by Yong Pung How CJ in *Re Caplan Jonathan Michael QC (No 2)* [1998] 1 SLR 440 [para 11]:

> 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 of 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.

7 *In Re Flint Charles John Raffles QC* [2001] 2 SLR 276 I had occasion to consider the import of s21(1) of the Act. Mr Flint applied for ad hoc admission to appear for a Malaysian company to recover substantial damages of about US$75 million against each of the then 30 defendants for, inter alia, conspiracy to defraud, equitable compensation and/or damages for breaches of contract of employment, fiduciary duties or inducement of breaches of contract and for dishonest assistance or as recipients of trust moneys. Local counsel in that case had played prominent roles in the pre-trial preparation of the case and had convincingly demonstrated before me in many interlocutory matters that he would ably assist the plaintiffs and the court. Much of the crucial leg-work had been done and such trial advocacy as would be required was well within the abilities of local counsel. I formed the view that the opportunity must be offered to the local Bar to take up the challenge and appear at the trial and conduct it. The nurturing of the local Bar was endorsed by Yong Pung How CJ in *Re Howe Russell Thomas QC* [2001] 3 SLR 575 para 7. Yong CJ in that case stated clearly that that application "did not pass the first stage of the test" which he laid down in *Re Caplan Michael QC*.

8 In the light of the pronouncements of our courts I went on to analyse the nature of the suit to

consider if it merited the ad hoc admission of a Queen's Counsel.

The Facts

9 The plaintiff ("IDA") in the suit is a body corporate established pursuant to the Info-Communications Development Authority of Singapore Act (Cap 137A). Its predecessor in title and power was the Telecommunications Authority of Singapore ("TAS"), which was established under the Telecommunications Authority of Singapore Act (Cap 323) ("the TAS Act"), and which had made the payment in question. SingTel is a public company incorporated in Singapore and is engaged in, among other things, the business of providing telecommunication services in Singapore.

10 On 1 April 1992 TAS granted SingTel a licence under the TAS Act to provide telecommunication services to Singapore until 2017 with monopoly rights for the provision of basis telecommunication services until 2007. In October 1993 SingTel's licence was amended to provide that TAS would have the right to licence additional operators to provide basic telecommunication services from 1 April 2002 "provided those services were ancillary and incidental to the principal services" provided by those operators ("the 1993 amendment").

11 By a letter to SingTel dated 11 May 1996, TAS gave notice pursuant to s 28 of the TAS Act of its intention to modify a condition of SingTel's licence. TAS stated that the compensation payable for any damage caused by this modification was assessed by TAS to be $1.5 billion and that SingTel was given 28 days from the date of service of that letter to make representations to the proposed modification.

12 SingTel replied and stated that they confirmed their acceptance of the proposed modification referred to in TAS's letter and the compensation of $1.5 billion for the damage to SingTel, being SingTel's "loss of profits in each of the years from 2000 to 2007, caused by the proposed modification." The quoted words reflected, evidently, a desire to spread the losses over those years and reduced the quantum of income tax, if any.

13 On receipt of the letter, TAS by its Director-General called SingTel's officers and said that TAS was not agreeable to the form in which the letter was couched and requested that the words "in each of the years from 2000 to 2007" be deleted. SingTel agreed to the deletion. On the same day, TAS wrote to SingTel as follows:

> " We refer to the letter …dated 30 May 1996 and Singapore Telecom's decision to delete the words *'in each of the years from 2000 to 2007,'* from paragraph 2 thereof.
>
> 2 We note Singapore Telecom's acceptance of the proposed modification in our letter of 11 May 1996 and acceptance of the compensation amount of $1.5 billion for damage caused by the modification.
>
> 3 This amount will be full and final payment."

14 On or about 31 March 1997 TAS paid the compensation sum of $1.5 billion to SingTel.

15 On 4 October 2000, the Inland Revenue Authority of Singapore informed IDA and SingTel that no tax would be payable on the compensation amount received by SingTel.

16 By a letter dated 14 March 2001 IDA as the successor in title requested SingTel to repay the amount

allegedly overpaid by TAS of $388 million. SingTel rejected the claim and refused to pay the same. IDA commenced the suit in July 2001. The pleadings were exhibited in the proceedings before me. The following issues arose from the pleadings and they were summarised as follows:

> "a. Did TAS make a mistake of including in the compensation sum of S$1,500,000,000.00 a tax provision of S$388,000,000 or did TAS assume the risk that tax may not be payable.
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> b. Did the Defendants likewise make the same mistake or did they assume the risk that tax would be payable and if so at what rate and in over what timescale.
>
> c. What was the state of the law as at the time the compensation sum was proposed with regards to the taxability of the compensation sum.
>
> d. If TAS did make a mistake, was it a mistake of fact or law, or mixed fact and law.
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> e. If it was a mistake of law (whether wholly or in part), does that entitle the Plaintiffs to seek restitution of the S$388,000,000, i.e. is restitution for mistake of law a valid cause of action in Singapore. TAS followed the statutory procedure laid down in section 28 of the TAS Act in sending its letter of 11 May 1996 which embodied the statutory notice referred to in sub-section (2) of that section. That notice stated the proposed modifications to the Defendants' licence and that the compensation payable would be S$1,500,000,000.00 to be paid on 31 March 1997. The Defendants had 28 days to object. Had they objected and had TAS either not changed its mind or amended the proposed modifications or compensation, the Defendants would have had 14 days to appeal to the Minister. As the Defendants did not object, TAS became statutorily obliged to carry out the modifications and statutorily obliged on 31 March 1997 to pay the Defendants the sum of S$1,500,000,000.00 being the sum specified in the statutory notice emobided in the letter of 11 May 1996. In the circumstances, even assuming there was a mistake in the original calculation of the S$1,500,000,000.00 inserted in the letter of 11 May 1996, the issue is whether TAS were statutorily obliged to pay that sum on the 31st March 1997.
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> f. In the events that happened, as pleaded by the Defendants, was TAS contractually obliged to pay the Defendants S$1,500,000,000.00 on 31 March 1997, on the basis that that sum would be a full and final settlement of the claim for compensation so that neither the Defendants nor TAS would be able to reopen the sum whether or not any one or more of the many assumptions of present and future fact and law that lay behind the determination of the compensation turned out to be erroneous.

g. If so, is a valid compromise a defence to a claim for restitution for mistake of law, such that the Plaintiffs cannot claim repayment of the compensation or any part thereof without obtaining from the Court rescission of the contract embodying the compromise. If so, can the contract in pursuance of which compensation was paid, be rescinded by the court.

h. On the basis of the facts as pleaded by the Defendants, in particular, that the Defendants reasonably proceeded on the basis that the offer of S$1,500,000,000.00 by TAS would on acceptance result in a full and final settlement of the Defendants' entitlement to compensation arising from the modification of their licence, and accordingly refrained from making representations with regard to TAS's letter of 11 May 1996 within the statutory 28 day period, are the Plaintiffs estopped from claiming restitution of the S$388,000,000.00.

i. On the basis of the facts as pleaded by the Defendants, in particular, that following payment of the compensation on 31 March 1997, the Defendants declared on 9 July 1999 a special interim dividend of 12 cents per share for the financial year 1999/2000 (the nett dividend payout of which was in the sum of S$1,374,040,751.02) is the defence of change of position available to the Defendants."

17 These issues would span the law of restitution and contract and they raised important, difficult and complex questions, amongst others, as to what would be the operative mistakes of law which would kick in the restitutionary reliefs and the defences available in the light of this newly recognized cause of action in the laws of Singapore. Several questions would arise for the first time, which would require treatment by our courts.

18 Counsel for the Law Society of Singapore submitted that the High Court had recently ruled that unjust enrichment under a payment made under a mistake of law was reversible: see *Management Corporation Strata Title No 473 v De Beers Jewellery Pte Ltd* [2001] 4 SLR 90. He expressed the view that Mr Shanmugam SC could with equal facility appear for SingTel and would appear on its behalf and pursue with equal vigour the rights of SingTel as any QC would.

19 In response, Mr Shanmugam SC observed that the law bearing on a restitutionary claim based on mistake of law and the defences was obviously evolving. Many of the issues on what would amount to an operative mistake of law and the defences would be new and had not been dealt with in any jurisdiction in the world. The new cause of action would require delineation and further amplification. Equally, the defences available to meet this restitutionary claim, as foreshadowed by the issues outlined, would require careful consideration and exposition. Elucidation and arguments by a Queen's Counsel well versed in this new branch of the law would be most desirable. That would be of great assistance to our courts. Secondly, he pointed out that the Government of Singapore was a substantial shareholder of SingTel. SingTel was concerned to ensure that the international investing community, its shareholders, amongst whom were fund-managers, must be demonstrably satisfied that the prosecution of its defence was being pursued with vigour and determination.

20 Having considered the matter carefully, I formed the view that SingTel's concern was

understandable. Like it or not, we had to address the perceptions (whether well-founded or not) of the international and local market place. Whilst it was true that local counsel could appear for SingTel adequately, that was one relevant factor to be considered in the entire balancing exercise. I was also very mindful of the seminal issues which would probably arise in this relatively new and evolving areas of the law of restitution which I had personally followed with great interest over the last decade generally and particularly since the decision handed down by the House of Lords in *Kleinwort Benson v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349. In my view, the three-fold test referred to earlier was fulfilled and in the exercise of my discretion I allowed the application.

Sgd:

Lai Kew Chai

Judge