In The Supreme Court of Bermuda
CIVIL JURISDICTION
2010: No. 100

IN THE MATTER OF AN APPLICATION UNDER SECTION 51(3)
OF THE SUPREME COURT ACT 1905

AND IN THE MATTER OF MR. THOMAS LOWE QC

REASONS

(In Chambers)[1]

Date of Hearing: March 31, 2010
Date of Reasons: April 5, 2010

Mr. Mark Chudleigh, Sedgwick Chudleigh
for the Applicant

Introductory

1. On March 31, 2010, I granted the Applicant's ex parte application for an order specially admitting him to the Bermuda Bar under section 51(3) of the Supreme Court Act 1905, subject to the proviso that the Minister issues him a work permit. The application was made to enable the Applicant to appear as Leading Counsel for the Defendant at the trial of Civil Jurisdiction (Commercial List) 2009: No. 178 and 374 between *BNY AIS Nominees Limited (as nominees for each of the 2nd to 6th Plaintiffs) et al-v- New Stream Capital Fund Limited*.

2. I indicated that I would give reasons for this decision to depart from the standard approach contemplated by the January 12, 2007 Practice Direction issued by the Chief

[1] Should the Applicant's attorneys or the Bermuda Bar Council consider that this Judgment should not be published in its present form or at all, they should notify the Registrar within 7 days.

Justice, 'Applications for Special Admission to the Bar' (Circular No. 2 of 2007). The application was made on the basis that if it was granted Mr. Chudleigh would invite the Bar Council and the Minister to reconsider their initial decisions to oppose and refuse the granting of a work permit.

Section 51(3) of the Supreme Court Act 1905

3. Section 51(3) of the 1905 Act provides as follows;

> " *The Court shall have power to admit and enrol any qualified person to practise as a barrister and attorney in the courts of Bermuda in any particular case or series of cases which, in the opinion of the court, involve questions of law or practice of considerable difficulty or public importance.*"

4. Section 51(3) must be read with subsection (6) of the same section, which provides: "*For the avoidance of doubt, nothing in this section shall be construed so as to abridge or derogate from the provisions of the Bermuda Immigration and Protection Act 1956.*" The combined effect of these provisions appears to be that the ultimate decision on whether a qualified person may be specially admitted is vested with this Court, provided that any admission of a person subject to Immigration control requires the applicant to be issued with a work permit in accordance with the 1956 Act.

5. The Practice Direction provides as follows:

> "***Applications for Special Admission to the Bar***
>
> *1. This Practice Direction is made after consultation with the Bar Council, and amends Circular No. 9 of 2006 ("Applications for Admission to the Bar"), by limiting the application of that Practice Direction to applications for full Admission under section 51(2) of the Supreme Court Act 1905.*
>
> *2. Applications for Special Admission under section 51(3) of the Supreme Court Act 1905 ('Special Admission') are no longer required to be served upon the Bar Council. Paragraph 3(c) below has been added in place of this requirement.*
>
> *3. Applications for Special Admission must be supported by an affidavit or affidavits:*
>
> > *(a) setting out the questions of law or practice of considerable difficulty or public importance which are relied upon as justifying the admission;*
> >
> > *(b) exhibiting a copy of the work permit issued by or on behalf of the Minister responsible for immigration; and*

> *(c) exhibiting a copy of the letter from the Bermuda Bar Association to the Minister containing the Bar Council's representations on the issue of that work permit.*
>
> *4. Special Admission will normally be limited to one overseas Queen's Counsel per party, and will not normally be appropriate for second overseas counsel or solicitors.*"

6. Although the Practice Direction clearly envisages that applications to the Court will be made in cases where the applicant has already obtained a work permit, there can be no serious suggestion that this policy statement is intended to oust the statutory jurisdiction of this Court to entertain applications under section 51(3) wherever a work permit has been refused or not yet granted. Rather, the Practice Direction sets out the usual procedure which interested persons can reasonably expect will be followed in most cases and only departed form in exceptional circumstances.

Did the case "involve questions of law or practice of considerable difficulty or public importance"?

7. The Affidavit in support of the present application describes the circumstances in which Thomas Lowe QC seeks admission to represent the Defendant in the case, a Bermudian mutual fund company which is also a segregated account company. I am the assigned judge for the trial at which the Applicant seeks to appear, and also presided over the related hearing of an application by another shareholder of the Defendant to appoint a receiver. I also took into matters of record in relation to both the past and present litigation, which clearly afforded me a more complete picture than that available to the Bermuda Bar Council and the Minister.

8. The distilled facts which are formally before this Court for the purposes of the present application may be further distilled as follows. The Defendant company has sought to wind-up its affairs in light of the financial crisis through an out of court process through pooling combined assets worth more than $600 million under an out of court Plan. The Plaintiffs' interest in these assets is $165 million; they seek relief which would potentially unwind the out of Court plan altogether, affecting the commercial interests of investors with claims worth some $435 million, based on the contention that the Plan is in breach of the Segregated Account Companies Act 2000. This issue has never been considered before in Bermuda or elsewhere in the comparatively small number of jurisdictions where segregated account companies legislation exists. The trial is scheduled to last some 10 days and does not simply entail legal argument as to Bermuda internal law. Expert evidence as to US law will be adduced, and live factual and expert witnesses will likely be called on both sides. The Plan involves not simply investors in the Defendant but investments in connected companies in Cayman and the US as well.

9. In the objections to the application made to the Bermuda Bar Council in response to an October special admission application in relation to the present case which was deferred, Attride-Stirling & Woloniecki contended that Mr. Chudleigh was quite capable of representing the Defendant at the relevant trial because he had over 20 years' experience. This ground of opposition was not reiterated when the application was renewed. At the hearing of the present application Mr. Chudleigh confirmed what I thought was well known; namely that he has limited advocacy experience, having worked as a solicitor outside Bermuda for many years. His firm employs one full-blooded litigator, but he has not previously acted as lead counsel in such a substantial and complex case, despite the fact that Mr. Chudleigh is undoubtedly an experienced and specialist commercial lawyer.

10. It is true that one aspect of the case to which the admission application relates has been the subject of previous proceedings, referred to in the papers as the Tensor Proceedings (the pending litigation is referred to as the Gottex Proceedings). This was the question of the grounds upon which a receiver may be appointed under the 2000 Act. Yet in this related earlier matter, Mr. Lowe was granted a work permit without any objections being raised by the Bar Council in or about November, 2009. This Court (the Chief Justice) specially admitted him in relation to a final hearing which was far shorter than the trial of the present action is expected to be. The questions of legal difficulty and public importance surrounding what the legal parameters of the segregated account structure are, which fall to be considered in the present litigation, were not directly considered in the Tensor Proceedings.

11. Based on all the material before me, it was not easy to comprehend how it could fairly be concluded that the requirements of section 51(3) were met in the Tensor Proceedings but were not met in the Gottex Proceedings. The latter proceedings in my judgment clearly raises questions of no less (and probably greater) legal difficulty and public importance. However the section 51(3) criteria are not to be looked at in isolation from an independent assessment from an immigration perspective of whether or not appropriate local expertise is available for the case in question. The legal difficulty and public importance standard is to my mind a fluid one, with the bar being raised and lowered depending on the size of the pool of available and suitable local counsel. Accordingly, it was important to consider how this Court's powers under section 51(3) of the Supreme Court Act 1905 interact with the Minister's powers under the Bermuda Immigration and Protection Act 1956, which powers are expressly preserved by section 53(5) of the 1905 Act.

The role of the Minister and the Bermuda Bar Council

12. Section 60(4) of the Bermuda Immigration and Protection Act 1956 provides as follows:

> "*(4) The Minister, in considering any application for the grant, extension or variation of permission to engage in gainful occupation, shall, subject to any general directions which the Cabinet may from time to time give in respect of the consideration of such applications, take particularly into account—*

(a) the character of the applicant and, where relevant, of his or her spouse;

(b) the existing and likely economic situation of Bermuda;

***(c) the availability of the services of persons already resident in Bermuda and local companies**;*

(d) the desirability of giving preference to the spouses of persons possessing Bermudian status;

(e) the protection of local interests; and

(f) generally, the requirements of the community as a whole,

***and the Minister shall, in respect of any such application**, consult with such public authorities as may, in the circumstances, be appropriate, and shall in particular, **in the case of an application for permission to practise any profession in respect of which there is established any statutory body for regulating the matters dealt with by that profession, consult with that body**.*" [emphasis added]

13. In relation to an application to admit a foreign Queens Counsel to appear at a trial or an appeal before Bermuda's courts, the Minister is plainly required to consult with the Bermuda Bar Council. There will rarely be any issue around the matters set out in section 60 (4) (a), (b) or (d). The primary considerations will ordinarily be whether local lawyers are available to provide the relevant legal services and whether the interests of the local Bar generally would be prejudiced by granting the application. In addition, perhaps, wider community needs may have to be taken into account, for example (a) the need for a person charged with a particularly heinous offence to be seen to be afforded the best possible representation, or (b) the need for an international business litigant in commercially significant proceedings to have what the litigant considers to be the best possible representation. In most cases, however, the main focus of the Minister and the Bar Council should logically be on the section 60(4) of the Immigration Act criteria, albeit analysed with reference to the criteria to be focussed on by the court under section 51 of the Supreme Court Act 1905.

14. The crucial facts in the present case appeared to me to be that a comparatively small firm with considerable commercial expertise but no in-house senior specialist advocate had been retained in a substantial matter in which firms which possess the requisite advocacy expertise are unavailable to act because of conflicts as happens from time to time with large commercial matters with multiple interested parties. But this crucial factual matrix, extracted from counsel in the course of the ex parte hearing, was seemingly not advanced in support of the special work permit application at all. Assuming these assertions to be accurate, the Gottex Proceedings did not appear to me to be such that the attorneys of record could conveniently instruct a senior local commercial counsel in another firm, or indeed that the clients of Sedgwick Chudleigh had freely chosen to instruct a firm with no

de facto leading counsel capacity when firms which possessed the requisite capacity were available to act.

15. It was unclear to me which of the section 60(4) criteria had been relied upon as a basis for the Bar Council's decision to oppose the work permit application, upon which objection the Minister in turn relied. A practice appears to have arisen, which all parties involved appear to have ritualistically followed in the instant case, of applications for special work permits for foreign leading counsel to solely address the section 51(3) legal requirements and to ignore those of the Bermuda Immigration and Protection Act. As the Court of Appeal pointed out in *Re Heslop* [1990] Bda LR 20, it "*is not an edifying spectacle that a special call to the Bar should become the occasion of conflict between two contending protagonists*" (per Harvey daCosta JA at page 8). In the two decades since these wise words were written, the conflict relating to special admissions merely appears to have relocated to the alternative forum of the Bermuda Bar Council's role of consulting the Minister under the 1956 Act. This is perhaps the first occasion since 1990 that the doubtless routine pre-trial skirmishes surrounding the special admission process have been revealed to the Court .

16. On February 5, 2010, Sedgwick Chudleigh applied to the Bermuda Bar Council to renew its deferred application to admit Mr. Lowe in relation to the case to which this application relates. The application, without explicitly citing section 51(3), exclusively dealt with criteria under the 1905 Act and made no reference to the Immigration Act criteria. Attride-Stirling & Woloniecki, attorneys for the Plaintiffs in the contentious litigation, responded in detail on February 9, 2010, again focussing exclusively (and explicitly) on the section 51(3) criteria and opposing the application on the grounds that these criteria were not met. When the Bermuda Bar Council objected to the Minister, it did so on March 8, 2010 because " *Sedgwick Chudleigh have not made out a case of complexity in accordance with Section 51(3) of the Supreme Court Act 1905...it does not appear that the matter can be said to be one of considerable legal difficulty...*" This conclusion was clearly influenced by the opposing litigant's understandably partisan characterisation of the case and does not avert to immigration issues at all. Huggins JA in *Re Heslop*, after describing the practice (in force 20 years ago) of opposing litigants making representations to Bar Council about the complexity or public importance of cases in relation to which a special admission was sought, opined as follows:

> "*I confess that it seems to me unseemly and undesirable that the parties to the litigation should play any part in an application under s.51(3), but I am not unappreciative of the reasons which have led to the adoption of such a procedure.*"

17. On March 10, 2010, the Minister's refusal was notified on the grounds that "*Bar Council objects, as a local counsel can be found*". This clearly shows that the Minister looked at the matter through an immigration lens, rather than a call to the Bar lens, and assumed that the Bar Council had done the same thing. Yet when the Bar Council objection is scrutinised, it does not even explicitly avert to the availability of local counsel, which ought (one might think) to have been the crucial issue. This was because the application itself, seemingly based on longstanding practice, focussed on the section 51(3) criteria

potentially bypassing the clearest possible consideration of the primary issue upon which the Minister required advice under section 60(4) of the 1956 Act: was a suitably experienced and qualified advocate available in Bermuda to represent Sedgwick Chudleigh's client at trial. Of course, in the ordinary case where availability is not in question, it may well suffice to focus solely on the question of whether or not the complexity of the relevant proceedings warrants the importation of leading counsel.

Conclusion

18. In these circumstances, it seemed to me to be appropriate, to accede to Mr. Chudleigh's request that I afford the Applicant an opportunity to invite the Bar Council to reconsider this matter, not just in light of the different view I have taken of whether the section 51(3) criteria are met by the litigation in question. In my judgment it may be pertinent to the Bar Council's view of the present application to have regard to:

    (a) potentially significant "facts" elicited by me from counsel in the course of the *ex parte* application about the unavailability of suitably experienced specialist advocates in Bermuda for the case in question; and

    (b) whether or not, as a result of these fresh matters, sufficient attention was given to the requirements of section 60(4) of the 1956 Act in the course of Council's initial deliberations.

19. Nothing in this Judgment is intended to undermine the right of Bar Council to adopt a restrictive approach to special admission applications when local counsel generally regarded as *de facto* leading counsel are available as often is the case. All that is being indicated here is that when the requirements of section 51(3) have been met is not amenable to a mechanistic assessment, and the standard to be met ought properly to take into account in objective terms the requirements of the 1956 Act as well. These requirements in turn would not appear to be cast in stone, but will be shaped by the exigencies of each case. In the vast majority of cases this Court will not entertain applications for special admission in circumstances where the applicant has not first obtained a work permit. It is a matter for the Minister and the Bermuda Bar Council to decide whether a special work permit ought to be issued. It is a matter for this Court to decide whether a particular applicant ought to be specially admitted to the Bar, assuming he or she is able to jump through whatever hoops the Immigration Authorities may require.

20. The exceptional nature of this case flows from the fact that:

    (a) a special work permit was previously granted in respect of a related and seemingly more straightforward trial before me. It is difficult to comprehend, as trial judge in the second matter and based on the material placed before for the purposes of the present *ex parte* application, on what basis a different approach was rationally justifiable; and

(b) it is unclear, having regard to the way in which the application for a special work permit was formulated and the relevant statutory regime, whether the Minister and the Bermuda Bar Council had been afforded an adequate opportunity to consider all matters truly germane to the present matter.

21. For these reasons I granted the special admission application of Thomas Lowe QC, subject to the condition that he obtains a temporary work permit.

Dated this 5th day of April, 2010 _____
KAWALEY J