



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

2021: No. 98

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

AND IN THE MATTER OF MR. MICHAEL ALAN TODD QC

## RULING

*Application for Special Admission of Foreign Counsel, Objection by the Bermuda Bar Council and the Defendants in the Substantive Matter*

Date of Hearing: Application on the Papers

Date of Ruling: 26 April 2021

RULING of Mussenden J

### Introduction

1. This is an application by Ex Parte Notice of Motion for an application submitted by Carey Olsen Bermuda Limited (“**Carey Olsen**”) for Mr. Michael Todd QC (“**Mr. Todd QC**”) to be admitted as a Barrister and Attorney in the Court so as to appear on behalf of the Plaintiffs in Civil Jurisdiction case 359 of 2018 Annuity & Life Re Ltd et al v Kingboard Copper Foil Holdings Limited et al (“**the Proceedings**”). It is supported by the First

Affidavit of Sam Stevens (“**Mr. Stevens**”) sworn on 24 March 2021 along with his Exhibit “**SHS-1**”. Mr. Stevens is employed as counsel in the Dispute Resolution Department of Carey Olsen. He has had conduct of the Proceedings on behalf of the Plaintiffs. The Application is also supported by the First Affidavit of Keith Robinson sworn 12 April 2021 along with his Exhibit “**KLHR-1**”.

2. The Applicant invited the Court to consider the application on the submitted documents and information.

### **Background**

3. Mr. Stevens in his evidence provides some background to the application. The Proceedings arise out of a long-running and complex litigation between the parties involving claims of minority shareholder oppression, which claims came before the Bermuda Court of Appeal in Civil Appeal No. 24 of 2015 (“**Antecedant Litigation**”). Subsequent to the Court of Appeal’s Ruling, the parties entered into an agreement to settle the Antecedant Litigation (“**Settlement Agreement**”). These Proceedings relate to actions taken by the Defendants in Singapore which the Plaintiffs allege trigger a right to be paid further monies pursuant to the terms of the Settlement Agreement.
4. Amended Pleadings have been filed and exchanged in the Proceeding, and the Defendants now seek to have part of the Plaintiff’s Amended Statement of Claim struck out under Order 18 r 19 of the Rules of the Supreme Court (“**RSC**”) (“**the Strike-out Application**”).

### **The Application**

5. Mr. Stevens’ evidence is that both the Strike-out Application and the substantive claim in the Proceedings concern complex matters of law and contractual interpretation, with overlapping issues of Singapore law and regulation (which will be the subject of expert evidence from Singapore-qualified lawyers). He states that the Plaintiffs have long been advised in all these matters by Mr. Todd QC who has an intimate knowledge of the facts

and the legal issues arising in this case, and the Plaintiffs have retained Mr. Todd QC to represent them in these proceedings.

6. Mr. Todd QC will not be in a position to travel to Bermuda due to ongoing travel restrictions imposed by the UK Government in respect of the Covid-19 pandemic. The Plaintiffs therefore request a virtual hearing of the Strike-out Application.
7. Mr. Stevens submits that since Mr. Todd QC will not be travelling to Bermuda, then based on the Bermuda Bar Association guidance on its website (“**the Guidance**”) it is not necessary to produce a work permit issued by the Department of Immigration in order to make this application. The Guidance states as follows:

***“COVID-19 QC APPLICATION PROTOCOL IN RELATION TO VIDEO LINK HEARINGS HELD IN THE BERMUDA COURTS***

*Due to challenges caused by the Covid-19 pandemic, the Bermuda Courts have in some instances arranged for hearings to take place via video link. Where this is the case law firms are still required to submit Special Admission applications to Bar Council for review and approval when and where appropriate to do so. Work permits are not currently required for QCs who will not be conducting an in person case on island, that said all of the other usual steps remain in place and should be followed. Upon receiving Bar Council's approval for QCs, please submit a completed Fit & Proper Person (FPP) and Special Practising Certificate application form to the Bar Office for processing. If the hearing is to be held virtually, please indicate on the Special Practising Certificate application form 3 Rule 5 item #2 by crossing off the "valid work permit " sentence by replacing with the wording "virtual hearing scheduled due to Pandemic". Copies of the FPP and Special Practising Certificates will be provided to the Registrar of the Supreme Court to place in the Judges file. ”*

8. Mr. Stevens exhibited relevant supporting documents for Mr. Todd QC in support, namely a UK Certificate of Good Standing dated 15 March 2021 and a current Practising Certificate issued by the Chief Executive of the Bar Council. Mr. Robinson exhibited a

Bermuda Bar Association Fit and Proper Person Certificate issued to Mr. Todd QC (Special Admission Bermuda Bar Application) dated 7 April 2021.

### **Objections by the Bermuda Bar Council and the Defendants in the Proceedings**

9. The Bermuda Bar Council submitted its objection to the application for special admission of Mr. Todd QC. This was in the capacity as the statutory board for attorneys in Bermuda, wherein the Minister consulted with the Bermuda Bar Council in respect of the application pursuant to the Bermuda Immigration and Protection Act 1956 section 60(4). The objection stated “*Bar Council objects on the basis that it [the application] does not meet the test of Section 51(3) of the Supreme Court Act 1905.*” and was signed by Ms. Christopher, President of the Bermuda Bar Association.
10. In the Proceedings, Mr. Jeffrey Elkinson represents the Defendants. By way of a letter to the Bermuda Bar Council dated 21 March 2021 and by way of an email to the Registrar of the Supreme Court dated 5 April 2021 he objected to the special admission of Mr. Todd QC for the following reasons: (a) the Plaintiffs had not indicated up to 21 March 2021 that there were seeking to retain Mr. Todd QC for the Strike-out Application; (b) the submissions that were provided to the Court on 7 January 2021 were prepared in Bermuda; (c) the Strike-Out Application was due to be heard in person in Court; (d) his client had not agreed to have the matter heard by Zoom; and (e) if Bar Council agreed to grant permission for Mr. Todd QC, then he is instructed that his Client would wish to consider instructing its own Queen’s Counsel.

### **The Law, Practice Direction and Bar Council Guidance**

11. The Supreme Court Act 1905 section 51(3) 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) Notwithstanding the provisions of this section, the court may, for good cause, refuse to admit any person as a barrister and attorney.*

*(5) 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”*

12. The Supreme Court Practice Direction Circular No. 2 of 2007 issued by Chief Justice Ground CJ, as he then was, provided as follows:

*“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 question 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*
- (cc) exhibiting a copy of the letter from Bermuda Bar Association to the Minister containing the Bar Council’s representations 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.”*

13. In a Bermuda Bar Council Guidance dated 20 October 2014 it stated as follows:

*“2. Section 51(3) of the Supreme Court Act 1905 ("the Act") recognizes that foreign counsel may be admitted to appear in the courts of Bermuda in any particular case or series of cases which involve questions of law or practice of considerable difficulty or public importance. As an exception to the rule, and in rare cases, Bar Council will support an application to admit foreign leading counsel to appear in a particular case provided that the broad criteria set out in Section 51(3) of the Act is satisfied.*

*The Criteria*

*3. In considering whether exceptional circumstances exist warranting the admission of foreign leading counsel in a particular case the Bar Council shall be guided by the following criteria in descending order of importance:-*

*(i) The legal complexity of the case before the Bermuda courts and/or the general public importance of the case in Bermuda, including the importance of the case to Bermuda's offshore services industry.*

*(ii) The availability of local counsel within Bermuda to adequately present the case.*

*(iii) The impact of the case upon the individual client, for example in criminal, defamation and professional negligence cases.*

*4. As a general rule the Bar Council will only support an application for the admission of foreign leading counsel to appear at the trial of the action and not in relation to interlocutory applications. It is recognized that exceptions may be made where the criteria set out in Section 51(3) of the Act is satisfied in relation to a particular interlocutory application.*

5. *Where Bar Council supports an application to admit foreign leading counsel, it will only do so in relation a particular hearing pending before the Bermuda courts and will not support an application for foreign leading counsel to appear in the case generally.*”
14. In respect of which entity makes the ultimate decision on whether a qualified person may be specially admitted, in the judgment of Kawaley J in *The Matter of Mr. Thomas Lowe QC* [2010] SC (Bda) 18 Civ, he stated as follows:

*“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.”*

15. In respect of whether a case “involved questions of law or practice of considerable difficulty or public importance”, in *Thomas Lowe QC*, Kawaley K stated as follows:

*“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.”*

16. In respect of the role of the Minister and the Bermuda Bar Council, in *Thomas Lowe QC*, Kawaley J stated as follows:

*“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 by Kawaley J]*

*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 focused on by the court under section 51 of the Supreme Court Act 1905.”*

17. In respect of the right of Bar Council adopting a restrictive approach to special admissions and the Minister responsible for immigration to issue work permits for special admissions, in *Thomas Lowe QC*, Kawaley J stated as follows:

*“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.”*

## Analysis

18. The Covid-19 pandemic has caused everyone the world over to define new methods of doing business, particularly as a result of social distancing, working from home and strict travel restrictions and quarantine.
19. In this application, Mr. Todd QC does not seek to travel to Bermuda because of the UK travel restrictions. As a result, Carey Olsen in reliance of the guidance on the Bermuda Bar Association website, have submitted that a work permit is not required for Mr. Todd QC as he will not be present in Bermuda. However, it appears to me that the work permit process was engaged as the Bar Council submitted its objection to the grant of a work permit for Mr. Todd QC for the reasons stated. The Bar Council guidance gave recognition to the fact that in virtual hearings a work permit is not required but the Guidance also stated that “*all of the other usual steps remain in place and should be followed*”. In my view, Bar Council is responding to the Covid-19 pandemic with practical solutions for matters in Court to continue but it has also properly retained its statutory obligation of consultation by the Minister. In this case, Bar Council objected to the special admission of Mr. Todd QC as was their right to do so. In any event, the ground of objection is one for which Kawaley J stated in *Thomas Lowe QC*, “... *that the ultimate decision on whether a qualified person may be specially admitted is vested with this Court ...*”
20. In respect of meeting the first part of the test in the Supreme Court Act 1905 section 51(3), the Bar Council issued a Fit and Proper Person Certificate for Mr. Todd QC. On that basis, Mr. Todd QC is a qualified person.
21. In respect of meeting the next part of the test, namely, whether the matter involve questions of law or practice of considerable difficulty or public importance, there is the need to consider the Strike-Out Application and then the substantive hearing. First, on the papers before me, I have reviewed the Amended Statement of Claim and the Amended Defence and the relevant parts of each in respect of the Strike-out Application. The paragraph in issue in the Strike-Out Application is in respect of a claim in the region of \$5 million claimed by the Plaintiffs pursuant to a Settlement Agreement arising out of a long-running

dispute which is now subject to contractual interpretation. As Mr. Stevens stated in his evidence, the Proceedings are a part of long running and complex litigation and concern complex matters of law and contractual interpretation, with overlapping issues of Singapore law and regulation (which will be the subject of expert evidence from Singapore-qualified lawyers). In my view, the law in Bermuda on the interlocutory application of a strike-out is well settled and such applications are regularly made in the context of a range of issues including contractual issues. In my view, that is subject matter that the highly experienced counsel at Carey Olsen are able to present with full and undoubted competency even taking into account the substantive matters in the claim. On that basis, taking into consideration the Bar Council Guideline dated 20 October 2014, I do not grant approval for the special admission of Mr. Todd QC for the Strike-out Application.

22. Second, in respect of the trial of the substantive matter, I have again considered the evidence of Sam Stevens about the complexity of the matter. In my view, at this stage of the proceedings, and again taking into consideration the Bar Council Guideline dated 20 October 2014, I am inclined to adjourn the matter in respect of special admission for the trial so that Carey Olsen can re-address Bar Council if necessary and to appear in person before the Court to make further submissions in due course.

### **Conclusion**

23. In light of the above reasons, I make the following orders:

- a. The application for special admission for the interlocutory Strike-out Application hearing is denied; and

- b. The application for special admission for the trial of the substantive matter is adjourned for further submissions ex parte in person at a date to be fixed.

Dated 26 April 2021

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**HON. MR. JUSTICE LARRY MUSSENDEN  
PUISNE JUDGE OF THE SUPREME COURT**