Summary of Judgment

In the Matter of the application of Mark Taylor Simpson QC for admission as a barrister of the HKSAR

CACV 543/2019; [2021] HKCA 22

Decision : **Applicant's appeal dismissed**
Date of Hearing : **30 November 2020**
Date of Judgment : **8 January 2021**

Background

1. This appeal concerned an application for *ad hoc* admission of Mark Simpson QC ("Applicant") pursuant to section 27(4) of the Legal Practitioners Ordinance, Cap 159 ("LPO")[1] for the purpose of advising and appearing on behalf of the plaintiffs at a 10-week trial concerning a substantial audit negligence claim ("Application"). The Application was made on the basis that the Applicant would only appear with solicitor advocate ("SA")[2] without instructing a local barrister. It was opposed by the Bar Council of the Hong Kong Bar Association and supported by the Secretary for Justice ("SJ").

2. On 31 October 2019, the Court of First Instance ("CFI") allowed the Application on the condition that the Applicant should appear together with a local barrister ("Condition")[3]. The main reasoning of the CFI Judgment was that SAs are more restrictive than barristers in terms of their availability to the general public and play a significantly less important role than barristers in enhancing access to justice.

3. The Applicant appealed, arguing that the Condition should not be imposed. SJ in the role of public interest filed a Respondent's Notice and supported the Application. The Law Society of Hong Kong ("Law Society") intervened at the appeal stage and supported the Application.

4. On 8 January 2021, the Court of Appeal **dismissed** the appeal by an unanimous

[1] Pursuant to section 27(4) of LPO, an overseas counsel may be admitted, on an ad hoc basis, as a barrister for the purpose of any particular case or cases, if the Court considers that he or she is fit and proper; is qualified in his or her own jurisdiction to engage in work similar to that undertaken by a barrister in Hong Kong; and has substantial experience as an advocate in court.

[2] The Applicant originally proposed two SAs (both having conduct of the matter) would appear together with the overseas counsel. However, at the appeal stage, one of the proposed SAs have left the team and therefore the application was then made on the basis that one SA would appear with the overseas counsel.

[3] Re Simpson QC [2019] 5 HKLRD 441 ("CFI Judgment")

judgment.

Issues in dispute

5. The issues considered by the Court of Appeal are:-

   (1) whether the legislative intention in the introduction of SAs in 2012 is to confer equality between barristers and SAs;
   (2) whether the higher level of independence enjoyed by barristers is a valid or material distinction between barristers and SA in the context of an *ad hoc* admission application;
   (3) whether the public interest in having a strong body of advocates (including both barristers and SAs) in Hong Kong has been denied by the Condition ;
   (4) whether the learned judge erred in fettering his discretion in failing to balance the competing public interest considerations on a case by case basis;
   (5) whether the differential treatment of barristers and SAs is contrary to Article 35 of the Basic Law ("BL 35"); and
   (6) whether there is utility in requiring an applicant to make enquiries of local Senior Counsel when it has been accepted by the applicant that there were available local Senior Counsel.

Department of Justice's Summary of the Court's Rulings
(Full text of the judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132834&QS=%2B&TP=JU)

6. On **Issue (1)**, the Court of Appeal held that the CFI rightly concluded that the legislative intention was not to confer equal standing on barristers and solicitor advocates such that they should be equated for all intents and purposes including an application for ad hoc admission of overseas leading counsel. The introduction of solicitor advocates was only to remove the monopoly of barristers in respect of the rights of audience in the higher courts. (paras 38-40)

7. On **Issue (2)**, the Court of Appeal agreed with the CFI Judgment that barristers enjoy a higher level of independence as compared to SAs, and that this is a valid and material distinction which significantly impacts on the access by the public to a wide pool of counsel from which real and meaningful choice of suitable counsel can be made, and is extremely important to the administration of

justice.[4] (paras 41-48)

8. On **Issue (3)**, the Court of Appeal held that the public interest in facilitating the growth and development of SAs would not be excluded by the Condition. The Condition imposed would not prevent the SA from working or continuing working on the case, whether as the second junior counsel or as the instructing solicitor. Further, it is speculative to argue that the Condition would discourage litigants from engaging SAs from costs perspective. On the other hand, if the Condition is not imposed, this would exclude local barristers entirely and deny them the benefits of working together with overseas counsel. (paras 49-54)

9. On **Issue (4)**, the Court of Appeal held that the Condition will be imposed unless there are wholly exceptional circumstances justifying an overseas admission without engaging a local barrister. The Condition is justified in view of the great weight to be given to the development and maintenance of a strong and independent local Bar in the overall balancing exercise. Access to justice would be undermined if the Condition is not imposed, as the local Bar may be by-passed completely and the growth and development of the local Bar would be inhibited. As it is a rare opportunity for local barristers to work with the Applicant in the underlying trial which is of considerable magnitude and complexity, the Court of Appeal did not accept that no threat to the Bar would be posed if the Condition is not imposed in this case. (paras 55-60)

10. On **Issue (5)**, the BL 35 argument is rejected. It was held that the "choice of lawyers" in BL 35 means no more than that a litigant is free to choose his counsel from those available to represent him. He has no right to insist on being represented by a lawyer who does not have a general right to practise in Hong Kong. (para. 61)

11. On **Issue (6)**, it is well established by authorities that enquiries of the availability of suitable local counsel should have been made. (para. 62)

12. Having concluded that the above analysis was sufficient to dispose of the appeal, the Court of Appeal further commented that it was clearly not appropriate for the Court to admit the Applicant without imposing the Condition in light of the specific facts of this case, being that the proposed number of junior counsel to be engaged together with the Applicant for the 10-week trial was reduced from

[4] However, in respect of the "cab-rank" rule on the acceptance of instructions, the Court of Appeal does not agree with the CFI that the differences between the professional rules respectively applicable to barristers and SAs in this regard are material to the court's exercise of discretion in the context of an *ad hoc* admission application.

two SAs to one. The Court of Appeal noted that this was a material change of circumstances of the Application, yet the Applicant's solicitors failed to explain why it was considered sufficient to engage just one SA as junior counsel, and why the costs earmarked for the SA who have dropped out of the case could not now be used to engage a local barrister. (paras 63-70)

Civil Division
Department of Justice
8 January 2021