IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 8 OF 2001

BETWEEN

GABRIEL MOSS QC — Appellant

AND

THE LIQUIDATORS — Respondent
(Amedeo Development Corporation Sdn Bhd
in Court Winding-Up)

IN THE MATTER OF HIGH COURT ORIGINATING MOTION NO. 8 OF 2001

In the matter of Legal Profession Act Cap 132 Section 7
(Ad Hoc Admission)

Interparte: Gabriel Moss, QC of 3 /4 South Square, Grays Inn London WC1R 5HP.

AND

COMPANIES (WINDING UP) NO. 5 OF 1999
IN THE MATTER OF AMEDEO DEVELOPMENT CORPORATION SDN BHD

BETWEEN

TANAH MAS DEVELOPMENT PTE LTD — Applicant

AND

THE LIQUIDATORS — Respondent

(Amedeo Development Corporation Sdn Bhd
in Court Winding-Up)

Before : HUGGINS, P.; FUAD AND SILKE, JJ.A..

Date of Hearing : 16TH OCTOBER 2001.

Date of Judgment : 25TH OCTOBER 2001.

HUGGINS, P.:

The Appellant, one of Her Britannic Majesty's counsel, applied for admission to practise as an advocate in Brunei in order to represent Tanah Mas Development (S) Pte. Ltd. (hereinafter called "the Company"), which is the appellant in Companies Winding-up No.5 of 1999. Notice of Motion was served on the Attorney General, who had no objection to the application and was not represented when the matter was heard before Saied, C.J. The learned Chief Justice dismissed the application, and the Applicant now appeals to this Court.

Section 7(1)(a) of the Legal Profession Act, under which the application was made, is in these terms:

> "(1) Notwithstanding anything to the contrary contained in this Act, a judge may, in his discretion, admit to practice for the purpose of any one case any person who satisfies the requirements either of paragraph (a) or of paragraph (b), that is to say -
>
> > (a) a person who holds Her Britannic Majesty's Patent as Queen's Counsel; and also –
> >
> > > (i) does not ordinarily reside in Brunei Darussalam but has come, or intends to come, to Brunei Darussalam for the purpose of appearing in the case on instructions of an advocate and solicitor; and
> > >
> > > (ii) possesses special skill and qualifications for the purpose of the case which are not otherwise available in Brunei Darussalam."

It is not disputed that Mr Moss has great skill and qualifications in the law of insolvency and the law of receivers of companies, the field in which his services are sought. However, Saied, C.J. held that the issues which fall to be considered in the particular winding-up proceedings were not such as to justify the briefing of an English silk.

In those proceedings the Company lodged a proof of debts in respect of work it had done for Amedeo Development Corporation Sdn Bhd in the sums of S$283,322,594.88 and MR$55,048,877.58. The Liquidators were not satisfied on the evidence before them that some of the debts had been incurred. The Company appealed to the Judge in Chambers. That appeal came before Roberts, C.J. shortly before his retirement. He clearly thought that the Company was unlikely to succeed on parts of its claim as the evidence then stood, but, no doubt having regard to the size of the debts alleged, he decided, not without hesitation, to allow the Company "another chance". He had thus decided that the decision of the Liquidators might have to be varied. Nevertheless he embarked upon a Judgment, although the issue before him was whether the decision of the Liquidators should be reversed or varied and that involved a consideration of all the evidence, which would not be available until the Company had taken such advantage as it thought fit of the "second chance" given to it. Of necessity any finding made before the evidence was complete would be provisional. In the Judgment he said that he was satisfied that the Liquidators had been entitled to reject the proof of debts on the grounds stated by them in the letter of rejection. It was, of course, irrelevant that, on the evidence before them, the Liquidators had rightly rejected the proof, because the issue he had to decide was whether, on the evidence before *him*, the proof should be received or rejected. The learned Chief Justice proceeded to order that affidavits from four sources be forwarded to the Court and the Liquidators within 14 days and that "the Liquidators, within a further 14 days after the expiry of [that Order], should forward an affidavit to [the Company] and the Court, commenting on the [four] affidavits". All the deponents were to be present (presumably at a later hearing) for cross-examination and re-examination. The appeal was then adjourned to a date to be fixed.

It would seem that the Company experienced difficulty in obtaining all the affidavits ordered and that their solicitors were anxious as to what would happen if the Company were unable to comply with the order. The solicitors therefore wrote a letter to the Chief Justice asking whether a failure to comply, should it arise, would result in the

dismissal of the appeal "or is it a question of the weight of the evidence?" There is no indication that the Liquidators were consulted, but the Chief Justice replied, with what could be no more than advice, that inability to comply with "any of the orders made" would not lead to dismissal of the appeal but that the absence of any of the affidavits ordered in the Judgment would be only a question of the weight of the evidence produced.

Further affidavits were filed, but Roberts, C.J. retired before the appeal could be disposed of, and it is in relation to that appeal that the Company desires to have the assistance of Mr Moss.

When Saied, C.J. came to consider the application which led to the present appeal, he thus found the winding-up proceedings in a state of some confusion. However, as he saw it what remained in contention before him was, first, "whether the special skill and qualifications possessed by [the Appellant] are 'not otherwise available' in Brunei Darussalam", and, secondly, whether the issues to be decided in the winding-up appeal were such that the Company should have the assistance of Mr Moss. Half way through his Judgment he said:

> "in the end it is a matter that depends solely upon the exercise of the Court's discretion in the light of the circumstances as a whole".

He referred at length to the Judgment of Roberts, C.J. and then said:

> "Whatever difficulty and complexity there may have been or was perceived to have existed at the beginning has diminished and reduced to almost negligible proportions as a result of the findings that have already been made in the motion to appeal hearing."

By the "motion to appeal hearing" counsel agree that he meant the hearing before Roberts, C.J.. As I have said, any findings at that hearing could only be provisional: they could not diminish or reduce the difficulty or complexity of the winding-up appeal. Unfortunately the statement that they did undermines the decision of Saied, C.J.. We therefore have to consider this application de novo and exercise our own discretion.

Much of the argument of Mr Lee for the Appellant was directed to the contention that, because s.7 of the Legal Profession Act does not, as does the comparable provision in Singapore, expressly refer to the complexity and difficulty of the case in which an applicant wishes to be heard, they are factors which are irrelevant in Brunei. I cannot agree. Even if the words "for the purpose of the case" which appear in s.7(1)(a)(ii) must be interpreted in the same way as those words in the different context of the Singapore provision, I am satisfied that the complexity and difficulty of the case to be argued are relevant factors. When read as a whole it is clear that s.7(1) is intended to protect the local Bar against the intrusion of outside practitioners save where the nature or difficulty of a particular case is such the the Court may be hampered in its deliberations if it does not have the assistance of counsel with special skill and qualifications and where such counsel are not available locally.

Mention was made in argument of the addition to the cost of litigation if outside counsel are briefed. That is certainly a factor which is relevant to an application under s.7(1), but it is only one factor and not a governing factor. The suggestion that outside counsel can adequately assist the Court without their being admitted to practise may occasionally be true, but this cannot be regarded as a satisfactory alternative in every case, a fact which the very existence of s.7(1) indicates.

I now turn to see what will be involved in deciding the outstanding issue and the subsidiary issues in the winding-up. We were referred to the "main issues" set out in para.11 of the affidavit of Mr Lee Yew Choh. They were, first, the effect of the Order of 13th March 2001 by Roberts, C.J.. I have already alluded to this and am satisfied that

nothing more needs to be said about it. Second was the question whether the Liquidators (and therefore the Court) could properly rely merely on the Company's consolidated financial statements to reject the proof of debt. By that no doubt was meant the failure to mention in the accounts the debts sought to be proved. The answer must be "Yes", since that left them unsatisfied as to the existence of the debts. Third, whether the Liquidators were bound to consider the certificates issued by the Company's quantity surveyors to the effect that the work in respect of which the claims are made had in fact been done. The answer must be "Yes", because the Liquidators had to consider all the evidence before them, as will the Judge. Fourth, whether the position of Mr Danny Wong in and of itself was enough to raise suspicion sufficient to justify rejection of the proof of debt "without considering the certificates issued by [the quantity surveyors]". I have already said that the Liquidators were bound to consider all the evidence before them, including the certificates. They did not decide solely upon any suspicion raised by the position of Mr Wong. Fifth, whether the burden is on the Company to prove that a debt has not been paid or on the Liquidators to prove that it has been paid. The statute clearly requires the creditor to prove its debt. None of these matters raises any question of difficulty.

Although I appreciate that there may be much affidavit evidence and a plethora of documents before the judge, I am now persuaded that the conclusion reached by Saied, C.J. was, in the event, right and that there is nothing of particular complexity or difficulty which will have to be decided in the winding-up appeal. I would dismiss this appeal.

FUAD, J.A..:

I agree.

SILKE, J.A.:

I agree that we are in a position to exercise our discretion in this application.

Briefly my reasons are that the Judgment, given by the then Chief Justice Dato Sir Denys Roberts and dated the 13th March 2001, was, in reality, reasons why he was giving the appellants, Tanah Mas, a second chance.

Following the useful dissertation by Buckley J. in Kenwood Construction Limited [1960] 2 ALL ER 664, approved and adopted as it was by the Court of Appeal in Re Trepea Mines Ltd [1960] 3 All ER 304, it is clear that it is not the function of the court, on an appeal from a rejection of a Proof, to simply decide whether the Liquidator was right or wrong.

When there is such an appeal the evidence before the appellate Judge is normally much fuller than that before the Liquidators and the Judge must decide the rights of the appellant in the light of that evidence. The judge approaches the matter de novo.

Given that the appellant here did not have his tackle in order at the initial hearing before Sir Denys and that they were being given a "second chance" to make that deficiency good, nothing to be described as "findings" can enter into the matter. The appellate judge must still consider all the evidence finally placed before him to come to his conclusions as to the correctness, or not, of the claim by Tanah Mas.

It was perhaps unfortunate to use the word "findings" to describe that which Sir Denys Roberts said in the course of his reasons; namely:

> "……In the result, therefore, I am satisfied that the Liquidators were entitled to reject the Proof of Debt of Tanah Mas on the ground stated by them in their rejection."

This was, at its highest, premature and cannot be treated in any way as binding on the judge who eventually hears the appeal of Tanah Mas.

Counsel were also misled, as Mr. Sawan for the Liquidators frankly admitted, by the tone and content of the judgment of the 13th March 2001.

All the issues are still open and evidence concerning them is still required. This evidence may emerge from the affidavits, referred to by Sir Denys Roberts in paragraphs (a), (b), (c) and (d) of that which he describes as an "order" when he was giving Tanah Mas the "second chance" – or it may not.

Therefore in stating at p 8 of his judgment in this application that:

> "Whatever difficulty and complexity there may have been or was perceived to have existed at the beginning has diminished and reduced to almost negligible proportions as a result of the findings that have already been made in the motion to appeal hearing."

Mohammed Saied C.J was, with great respect, in error – an error brought about by the contents of Sir Denys Robert's judgment and the submissions Mr. Sawan made before him.

So what are those issues which now lie for consideration?

Mr. Y. C. Lee at paragraph 11 of his affidavit of the 24th July 2001 in these proceedings set them out as follows:

> "(a) the effect of the Chief Justice's order of 13th March 2001 read together with his direction in his letter to M/s Y.C. Lee & Co. dated 24th March 2001."

On this I think I have said sufficient to show that, in reality, it is a non issue. There has to be evidence sufficient to satisfy the appellate judge that he should reverse or vary the rejection by the Liquidator. Sir Denys Roberts was indicating in his "order" the obvious necessity of hearing, in all the circumstances of the appeal, some explanation. In

the absence of explanations, or additional evidence, Tanah Mas may well find its task a difficult one.

The letter of the 24th March 2001 has no binding effect. In my judgment (a) is not an issue.

Mr. Lee's further suggested issues are set out in the judgment of my Lord President. I do not intend to repeat them.

I am however of the view that, while we are agreed they are live issues, I think them to be of a rather more complex nature, and ones from which subsidiary issues of some difficulty may arise, than do my brothers.

I think that there is in issue the consolidated Financial Statements of Tanah Mas, their validity, their credibility and such contrast as may arise between them and such other Financial Statements as may be placed in evidence at the hearing.

Further that the contents of certificates issued by LAH Consultants is of moment. The position of Danny Wong, his credibility and whether he is in breach of any fiduciary duty will no doubt be fully explored. Decisions may well have to be made as to the validity of claims for payment, through Tanah Mas, by the nominated subcontractors.

In his submissions before us Mr. Lee made the point that, involved in the Tanah Mas claim, are 52 separate contracts. The documentation extends to 1000 folios. The amount of the claim, the largest to the Amedeo Liquidator, is BD$300 million. Possible double payments will need consideration as the account will run from 1993 to 1998. BD$900 million has already been paid. Is the $300 million now claimed part of that? Danny Wong's authorisation for the contracts, if any, and, if given, was Danny Wong in breach of a fiduciary duty will also fall for decision. Further there will be consideration

of claims not certified by the Quantity Surveyor. All this depending, of course, on the state of the evidence before the hearing judge.

None of these are self-contained issues. Nor is the whole matter a simple exercise of prove your claim or not.

No one doubts the high degree of skill and competence of Mr. Gabriel Moss Q.C. in matters of this kind.

The Attorney General was not represented as the hearing before Saied C.J. He had signified by letter that he did not object to the admission of Mr. Moss.

Assuming that such evidence will be available, does this application fall within the provisions s.7(1)(a)(ii) of the Legal Profession Act as amended by Emergency (Legal Profession Act) Order 1989, all the other provisions being satisfied?

Does Mr. Moss possess the skill and qualifications for the "purpose of the case" which are not otherwise available in Brunei Darussalam?

This necessitates the Courts deciding what the "purpose of the case" is and it is these words which, in my view, govern the admission or otherwise of Queen's Counsel.

I have earlier set out what I consider to be the purpose of the case. While there are many skills and qualifications available in Brunei Darussalam the proceedings at the resumed hearing of this claim promises to be, depending on the evidence being available, of such complexity encompassing as it does a "complicated factual matrix" and a "convoluted web of facts" (see Re Caplan Jonathan Michael QC (No.2)[1998] 1SLR 474) that the services of Mr. Moss should be made available to Tanah Mas.

It is not enough that the advocates for Tanah Mas can seek and get counsel's opinion on the issues - something done day in day out. I would not, with great respect, adopt the suggestions contained in Re Gyles Q.C [1996] 2 SLR 695 where Choo Han Teck JC said at p 698(b).

> "……..If a case involved a complex set of facts it may be adequate if the Queen's Counsel is engaged to draw up some order and meaning to them and organise the way they should be presented. Again, in such situation it is not necessary to have the Queen's Counsel admitted under s 21."

This matter here involves presentation and cross-examination on both sides and I do not think that a mere organisation of the facts would suffice.

I find myself in unfortunate, but firm, disagreement with the judgment of my Lord President and my brother, Fuad. I would allow the appeal and accede to the admission of Mr. Moss.

SIR ALAN HUGGINS
President, Court of Appeal

DATO SERI PADUKA KUTLU TEKIN FUAD
Judge, Court of Appeal

WILLIAM SILKE
Judge, Court of Appeal

Mr Lee Yew Choh — for Appellant

Mr Christopher Sawan — for Respondent