THE LAW SOCIETY OF BRUNEI DARUSSALAM … **Appellant**

AND

AZRIL ANWAR BIN HJ AHMAD … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 1 of 2015)

Before: Mortimer P, Leonard and Burrell JJ A.
30th May 2015

Mr Eric Siow Kin Seong and Ms Elaiza Hanum Merican binti Idris Merican (M/S Abrahams Davidson & Co) for the Appellant
Mr Balendran Balasingam (M/S Ho & Siong) for the Respondent

Mortimer. P:

This is an appeal by the Law Society (the society) against the Chief Justice's decision on 24 December 2014 to admit the applicant respondent (the applicant) as an advocate and solicitor of the Supreme Court of Brunei Darussalam.

The appellant also applied to adduce further evidence at the outset of the appeal. We refused this application and at the end of this judgment will give our reasons having dealt with the merits of the appeal.

Background

The applicant applied to be admitted as an advocate and solicitor of the Supreme Court in a Petition dated 29 September 2014 on the basis that he was a 'qualified person' under section 3 of the Legal Profession Act (cap 132) (the LPA) as under section 3 (3) he was neither a citizen of Brunei nor a permanent resident and had been in active practice as an advocate and solicitor in Malaysia for at least 7 years immediately preceding his application.

His application was opposed by the society on 2 grounds. The first that he was not qualified because he had not been in 'active practice' in Malaysia for the necessary period and second that in his application he had not made full and frank disclosure of relevant matters contrary to section 11 of the act.

The Chief Justice found against the society on both grounds and ordered the applicant's admission. This is the society's appeal against the Chief Justice's decision.

The application is made under section 3 (3) of the Legal Profession Act (the LPA). This provides:

> *"3. (1) a person shall be a qualified person for the purposes of this Act if, subject to the provisions of subsection 3, he –*
>
> *(a)……*
>
> *(b)……*
>
> *(c) has been in active practice as an advocate and solicitor in….any part of Malaysia….*
>
> *(3) a person who is not, on the date of his petition for admission, either a citizen of Brunei Darussalam or a permanent resident, shall only apply for admission if, in addition to satisfying the requirements of subsection (1), he has been in active practice…… in any part of Malaysia…… for at least 7 years immediately preceding such application."*

There is no dispute that the applicant is not a citizen or permanent resident of Brunei Darussalam. Further, he had practising certificates from the High Court of Malaysia for over the necessary 7 years before the application.

Residence in Malaysia is not a requirement for a Malaysian practising certificate. The applicant has been resident in Brunei Darussalam since 2013. He spent 182 days in Brunei between 20th of April 2013 and 11 December 2013 and 220 days here from 1 January 2014 to the 29 September 2014.

The applicant's evidence was that he was resident in Brunei with his family but he was employed by a firm in Malaysia on the basis that he would work for that firm while here in Brunei working generally for his employer including attending clients and witnesses who happened to be in this jurisdiction.

In support of his evidence he produced a letter from his employers stating:

> *"The firm agreed and allowed (the applicant) to reside mainly in Brunei Darussalam where he will be referred legal work of matters arising in our firm for him to work in Brunei. He also will attend to clients and witnesses in Brunei who has legal matters in Malaysia and happens to be in Brunei.*
>
> *There is no requirement that an advocate and solicitor of Malaya must reside in West Malaysia or any particular region or country. There is further no requirement for work (the applicant) does for our firm as advocate and solicitor of Malaya to be done in any particular region or country.*
>
> *……*

> *We hereby confirm that from June 2013 (to) the date of this letter, (the applicant) is working with our firm and has been continuously practising as an advocate and solicitor of Malaya during these dates."*

The society challenged the truth of the applicant's statements about his employment and the letter from his employers but did so without any contrary evidence and without requesting the applicant's attendance for cross examination. The consequence is that the society invited the judge to say that the applicant had not satisfied the burden of proof on the facts disclosed.

The Chief Justice's Findings

The Chief Justice was concerned about the true meaning of the words 'active practice' in section 3(3) of the LPA. He concluded:

> *"8. Has the petitioner been in active practice in any part of Malaysia for at least 7 years immediately preceding such petition? The plain and ordinary meaning of the words is that he must be working as a lawyer in Malaysia for at least 7 years immediately before the petition. Working as a lawyer in Malaysia would require a person to actually reside in Malaysia for at least 7 years before the petition.*
>
> *The plain and ordinary interpretation of the words does lead to an absurdity because it cannot be the intention of the legislation to require a lawyer practising in Malaysia to be unable to leave Malaysia either for legal work or their personal commitment for at least 7 years before the petition. If this is the requirement many competent and well experienced lawyers from Malaysia, United Kingdom, Singapore and Australia would not be qualified to practice in this country. This would defeat the purpose of the law which is to admit such foreign lawyers so as to assist the local bar and thus contribute to the social and economic development of the country.*
> Consequently he decided:
>
> *10. In this case the petitioner was issued with practising certificates, allowing him to practice in Malaysia from 2000 62,014. He has been employed as a legal assistant since 2006 by a legal firm for several years in Kuala Lumpur and one half years in Johor. For the last 8 years he resided in Malaysia, most of the time except for the year 2013 and 2014 when he spent most of his time in Brunei Darussalam to be with his wife and children. In his affidavit in reply he also affirmed that when in Brunei Darussalam he would do the legal work in Brunei Darussalam referred to him by his firm in Malaysia.*
>
> *By giving section 3 (3) a purposive interpretation, I am satisfied that the petitioner from the evidence available before me has complied substantially the requirement that he had been in active practice in Malaysia for at least 7 years before the petition even though he spent most of his time Brunei Darussalam in 2013 and 2014".*

The Chief Justice then rejected the society's submission that the applicant had failed to make full and frank disclosure in his application on the basis that at the outset he had not set out the length of time that he had spent in Brunei Darussalam.

The issues

There are 3 broad issues for our consideration.

1. What is the true meaning of "active practice" in section 3 (3) of the LPA? Was the Chief Justice correct in making a purposive interpretation or are the words to be interpreted in their ordinary and natural meaning?
2. Was the Chief Justice's decision on the facts in accordance with the proper interpretation? Or was he plainly wrong?
3. Was the Chief Justice in error in rejecting the society's contention that the applicant was guilty of suppressing material facts in his application?

The Society's Contentions

In summary the society contends that the Chief Justice was wrong to apply a purposive interpretation to the words 'active practice'. The plain and ordinary meaning of these words does not lead to absurdity because they cannot mean that an applicant must be in daily attendance at his office to practice nor that for the necessary period he is unable to leave his jurisdiction for nonprofessional purposes such as holidays or visiting.

However, Mr Siow for the society submits that the ordinary meaning of the words does require ordinary residence in the necessary jurisdiction and normal attendance at the place from which the applicant practices. Therefore he says the Chief Justice's decision in favour of the applicant is plainly wrong and ought to be reversed.

Finally he contends that the Chief Justice was obliged to find that the applicant had failed to disclose material facts in his application so that it was 'misleading in substance'. See section 11 of the LPA.

Discussion

Turning to the true interpretation of section 3 (3) of the LPA We agree with Mr Siow that the plain and ordinary meaning of the words "active practice" does not lead to any absurdity or indeed ambiguity. If the meaning does require an applicant to stay permanently for 7 years in his jurisdiction and to attend his practice, this would lead to absurdity. We have no doubt that the ordinary meaning of the words does not lead to such a conclusion. No doubt the legislation had the purpose ascribed to it by the Chief Justice. In consequence there is little divergence between our view of the ordinary meaning of the words and the Chief Justice's purposive interpretation.

In this we do not suggest that the application of the ordinary meaning is easy. It is obviously a question of degree. Whereas 'active' does not mean 'daily' it cannot mean 'intermittent' or 'sporadic'. It would be very difficult for an applicant to establish active practice in the absence of having chambers or an office in his jurisdiction. His legal work will be generated from, or for, such a place of practice even if he physically works in another place.

It always must be a question of degree and in the infinite range of factual possibility the facts of this case are within, but near the limit of "active practice" in the necessary jurisdiction.

Whereas in the past usual daily presence at an applicant's place of practice would be necessary, in modern circumstances this is not so. Modern communications are such that physical attendance to be in active practice in a particular place is no longer necessary. Commonplace equipment enables a person, as an employee or otherwise, to access libraries and authorities with ease, to scan and transfer documents, to write emails, which are delivered immediately and receive prompt replies, and even to confer or interview face-to-face on video link. It is a common situation for people to work almost permanently away from their place of business using these modern facilities.

In his decision the Chief Justice held that the applicant had demonstrated "substantial" compliance with section 3 (3) of the LPA. As this word cannot mean that the applicant had "nearly" complied but nevertheless had not complied, we are satisfied that he decided that the applicant had complied. No doubt his use of the word "substantial" was a reflection that this decision is one of degree.

With this background we turn to the Chief Justice's finding of fact bearing in mind that when applied to the facts of this case his interpretation of the statute was not materially different from our approach.

In the circumstances was it open to the Chief Justice to decide on the evidence that this applicant was in "active practice" for the necessary period in Malaysia? We are perfectly satisfied that it was open to him to decide the point as he did and further that it is not established that in doing so he was plainly wrong.

Next, Mr Siow says that the Chief Justice ought to have dismissed the application for a failure to disclose material facts such as are required by section 11 of the LPA. It is to be noted that this section only applies to a person who has already been admitted and enrolled but it goes without saying that an applicant must comply with those standards when making an application to be admitted. A failure to disclose material facts by an applicant which are contrary to his case is certainly fatal. However this standard cannot relate to relevant facts favourable to the applicant. If he fails to disclose facts favourable to his case he may risk not succeeding but it is not a matter for the dismissal of his application.

For these reasons Mr Siow cannot rely upon the applicant's failure to elaborate upon his employment. As to whether the applicant ought to have disclosed that he was resident in Brunei, arguably he ought to have disclosed this, but the address on his affidavit shows that he was not trying to conceal it and the whole picture was before the court at the time of the hearing. Further the times of his residence in Brunei were not in dispute. Given the Chief Justice's decision that he had established his case under section 3 of the LPA this is not a basis upon which his application could be dismissed.

Finally, Mr Siow contends that the Chief Justice was wrong to find on the evidence that the applicant was of good character. A serious allegation of this kind cannot be left to inference must be clearly made out. If the applicant was working without an appropriate visa evidence of this must be readily available to the society and none has been put forward. This allegation is without foundation.

Conclusion

Finally, for the reasons we have given we are satisfied that on the proper interpretation of section 3 (3) of the LPA the Chief Justice's decision on the facts, that the applicant had established that he was in "active practice" in Malaysia, is one which was open to him on the evidence and was not otherwise plainly wrong The society would have to establish that he was plainly wrong in order to succeed.

For the above reasons we will dismiss the appeal with an order nisi for costs.

Reasons for Refusing to Admit Further Evidence

At the beginning of the hearing Mr Siow applied on behalf of the society for leave to adduce further evidence. This evidence consists primarily of 2 emails from a former member of the firm now representing the applicant.These emails were written to the president of the Society and allege that when the maker was present at the firm before 23 November 2014 he saw the applicant receiving monthly payments from a member of the firm in the form of cash cheques or cash. Also, that the applicant was working on sharia law personal injury files and that he was at the firm for nearly a year. The allegation is that this was not disclosed in the application and that the firm was complicit in the nondisclosure. He says this matter warrants investigation by the law society. The 2nd email provides more detail of the same allegations after he had seen the affidavits in the application – presumably provided by the law society. These emails, sought to be put in evidence, are respectively dated the 12 January 2015 and 16 January 2015.

The society also applied to introduce letters from the Bar Council of Malaysia to support a statement in the 2nd email that the applicant returned to Malaysia face disciplinary proceedings. There were some such proceedings but the applicant was cleared of any wrongdoing.

In further support of his contention that the allegations in the emails are to be believed Mr Siow invited our attention to an affidavit from the applicant in reply to the society's additional evidence if we allowed it to be given. Mr Siow relied upon the applicant's concession that he was receiving money from a member of the firm in Brunei. Until that moment the applicant's affidavit in reply was not before the court. However, Mr Siow cannot rely upon this concession without putting into consideration the affidavit containing a full explanation by the applicant that he was working at this firm of solicitors on behalf of his employer in Malaysia and that the payments were made on behalf of his employer.

As a final twist to the status of the allegations made in the emails there was a further email from the person who made the allegations withdrawing them.

In summary the further evidence was not available at the time of the hearing of the application and it could not have been reasonably obtained. The allegations in the emails are hearsay and have been withdrawn by the maker. There is no affidavit from him, there is no suggestion that he could or would give evidence nor that he could be made available for cross-examination. Having regard to the serious nature of the allegations themselves no tribunal could give weight to this evidence even without a consideration of the applicant's affidavit in reply.

We are satisfied that this evidence is such that, if given, it would not have an important influence on the result of the case and further that it is not such as is presumably to be believed. It does not comply with the second and third tests in well-known authority *Ladd v Marshall [1954] 3 All. E. R. 745.*

For these reasons we refused the society's application to adduce further evidence.

Orders

1. The appeal is dismissed.
2. The application for further evidence is refused.
3. We order nisi that the appellant will pay the costs of the appeal and the costs of the application to adduce further evidence. If either party wishes to address the court on costs it must give notice to the other side and the registry at or before 10.00 AM on Saturday, 30 May 2015 otherwise the order will be made final at midday on Saturday 30th of May 2015.

Mortimer, P.

Leonard, J.A. **Burrell, J.A**