IN RE GEOFFREY ROBERTSON
COURT OF APPEAL, KUALA LUMPUR
HAIDAR MOHD NOOR, JCA; ABDUL HAMID MOHAMAD, JCA; ABDUL KADIR SULAIMAN, JCA
CIVIL APPEAL NOS: W-02-810-1999, W-02-811-1999, W-02-812-1999 & W-02-813-1999
29 JUNE 2001
(2001) 4 CLJ 317

By four separate motions, the appellant herein, a Queens' Counsel practising in England, had applied to the High Court under s. 18(1) of the Legal Profession Act 1976('the Act') for an *ad hoc* admission as an advocate and solicitor to enable him to represent one Rapheal Pura as a lead counsel in four defamation suits. The Bar Council and the Kuala Lumpur Bar Committee strongly supported the said applications stating that the appellant had vast experience in defamation and media law and that he had special qualifications and experience not readily available amongst advocates and solicitors in Malaysia. The Attorney General and the plaintiffs in the four suits objected to the applications on the ground that the nature of the said suits was not novel or complex to the extent that local advocates and solicitors could not handle them. Further, the appellant's intellectual honesty and professional conduct had been demonstrated to be highly questionable over his article published in the Observer newspaper in London wherein he had attacked the Malaysian judiciary, the government and the Prime Minister. It was also contended that the appellant was not literate in Bahasa Malaysia and had not passed the Bahasa Malaysia Qualifying Examination and neither was he exempted from it as required by s. 11 of the Act. The learned judge heard the four applications jointly and dismissed them. Hence the instant appeals.

Held:

Per Abdul Hamid Mohamad JCA (dissenting)

[1] The amendment Act of A567 re-enacted the earlier provision as was in the Advocates and Solicitors Ordinance 1947 ('the Ordinance') into s. 18(1) of the Actbut with a slight change wherein the words "would be a qualified person" in the Ordinance were replaced with the words "would be eligible to be admitted". The reason for the change lay in the introduction of s. 11(2) by the same amendment Act which required a qualified person to pass or be exempted from the Bahasa Malaysia Qualifying Examination.

[2] Prior to the introduction of s. 11(2) of the Act, a "qualified person" was eligible to be admitted provided he fulfilled the requirements of the then s. 11 (now s. 11(1)). But with the introduction of s. 11(2) that is not enough. He must also pass or be exempted from the Bahasa Malaysia Qualifying

examination. If the words "a qualified person" are retained, that will not cover the requirement of s. 11(2) because the requirement in s. 11(2) is not one of the requirements to be satisfied for a "qualified person" under s. 3 of the Act. Hence, the word "eligible" is used.

[3] At first glance the opening words of s. 18(1) of the Act, *ie*, "Notwithstanding anything contained in this Act" appear to take away the requirements of s. 11. If that is so, then the whole phrase "if he was a citizen of, or a permanent resident in Malaysia would be eligible to be admitted as an advocate and solicitor of the High Court" will be rendered superfluous. In s. 11 the word "is" is used in the phrase "is either a Federal citizen or a permanent resident of Malaysia" to mean that in a normal application, the applicant must be a citizen or a permanent resident of Malaysia. In s. 18 the word "was" is used instead to mean that he need not be a citizen or a permanent resident but he has to satisfy all other requirements applicable to a citizen or a permanent resident applying for admission under s. 11. It followed, therefore, to give effect to the opening words in s. 18(1), they must be taken to mean that notwithstanding the normal admission under s. 11, there is yet another type of admission in special cases under s. 18.

[4] To interpret the opening words of s. 18(1) of the Actto mean that all other provisions in the Act are not applicable would render the said subsequent clause wholly superfluous. Furthermore, the said clause is preceded by the phrase "and subject to the following subsections" and immediately followed by the clause "and no person shall be admitted..." followed by the conditions in paras. (a) and (b). These clearly show that the conditions in paras. (a) and (b) are in addition to the conditions earlier mentioned in s. 18(1). In other words, the conditions in paras. (a) and (b) of s. 18(1) are not the only conditions that must be satisfied for admission under s. 18.

[5] In an application under s. 8A of the Ordinance, an applicant must satisfy the court that if he was a citizen of Malaysia, he would be "a qualified person within the meaning of the Ordinance". In other words, it is not sufficient merely to satisfy the court that he has been instructed by an advocate and solicitor in Malaysia and for that particular case he has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. This clearly shows that the opening words of s. 8A of the Ordinance (which are exactly the same as the opening words in s. 18(1) of the Act) do not remove all other requirements of the Ordinance in an application for an *ad hoc* admission. Similarly, the opening words of the present s. 18(1) do not remove all the requirements under s. 11 including the requirement of passing

or being exempted from the Bahasa Malaysia Qualifying Examination.

[6] The Bahasa Malaysia requirement under s. 11(2) of the Actis a condition that an applicant must satisfy the court to be admitted as an advocate and solicitor in Malaysia. A foreign lawyer should not be allowed to practice in the court of a country, even on an *ad hoc* basis and to appear as a lead counsel, if he does not know the language of that country.

[7] The relevant qualifications and experience of the applicant must be looked at with reference to the issues in the case with reference to Malaysia. It was according to Malaysian law that the suits were to be decided. The supporting affidavits did not state whether the applicant had special qualifications and experience of Malaysian law (substantive and procedural) not available amongst local advocates and solicitors.

[8] The appellant might have vast experience in defending libel cases in other countries but whether a statement or an article was libellous or not in this country depended on the law of this country and how the general public of this country understood it and the appellant might not have an understanding of local sensitivity or insensitivity.

[9] Although it was said that the appellant had vast experience in defamation law including mass media, the manner in which the words were published, whether in a newspaper, magazine, internet or whatever, was not going to have any bearing on the meaning of the words. If they were defamatory (or not), they were defamatory (or not) irrespective of how they were published.

[10] Our courts are quite capable of administering justice whether or not with the assistance of any advocate and solicitor. They are also capable of taking care of the trend in the award of damages in defamation cases. The recently reported judgment of the Court of Appeal in *Liew Yew Tiam & Ors v. Cheah Cheng Hoc* is a clear example.

Per Abdul Kadir Sulaiman & Haidar Mohd Noor JJCA (concurring)

[1] The fate of an application under s. 18 of the Actdepends entirely on the meaning and interpretation of s. 18(1)(a) of the Act(subject of course to the compliance with the other provisions of the section). In the appellant's case, the issue was whether or not on the evidence before the court, it was satisfied that for the purpose of the four suits, the appellant had special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. If the court was satisfied, then the court was empowered to admit the appellant for the purpose of the four suits to represent the defendant as his

lead counsel. Once the appellant was admitted on the basis of his acquisition of the special qualifications or experience required by the said section, some of the concerns of the learned judge ought to be left to the judge trying the suits.

[2]Sub-section (3) of s. 18 of the Actrequires the court to have regard to the views of each of the persons served with the applications. The views of the Bar Council and the Kuala Lumpur Bar Committee were of utmost importance in assisting the learned judge to make a decision as to whether the appellant should be granted his applications. But for extraneous reason, the learned judge ignored their views and decided to rely on the general assertion of the Attorney General and the plaintiffs that the cases were of ordinary types without having regard to the substance and evidence supporting the applications. Unless the stand taken by the said two bodies representing local advocates and solicitors was suspect, they were in a better position to assist the court in determining the fate of the applications of the appellant.

[3] The learned judge should have been concerned with whether the appellant in terms of s. 18(1)(a) of the Acthad special qualifications or experience of a nature not available amongst local advocates and solicitors. The supporting evidence put forward by the appellant together with the stand taken by the two bodies representing the interests of the local advocates and solicitors spoke volumes of the nature of the qualifications and experience of the appellant.

[4]Section 18 of the Actis not of a general application. This section makes provisions for admission in special cases applicable to foreign lawyers whereas s. 11 is of a general application applicable to either a Federal citizen or a permanent resident of Malaysia as stipulated by sub-s. (1)(c) thereof. Secondly, the opening words of s. 18(1) itself, *ie*, "Notwithstanding anything contained in this Act" takes s. 11 out of its ambit except that the applicant concerned cannot be any person other than a person having the qualifications of an advocate and solicitor.

[5] The plaintiffs' submission that local lawyers had more than enough relevant experience and that in time of need they could get written opinion from abroad, was contrary to the evidence tendered on behalf of the appellant. If written overseas opinion sufficed, then s. 18 of the Actwould be otiose and not in conformity with the wishes of the legislature.

[6] As to the so-called intellectual dishonesty and professional misconduct of the appellant, there was no evidence before the court that as a result of such a publication, some action had been taken against the appellant in England or elsewhere with a view to disbar, disqualify or suspend him from practice.

*[**Bahasa Malaysia** Translation Of Headnotes]*

Melalui empat usul yang berasingan, perayu kini, seorang Peguam Diraja berkhidmat di England, telah memohon kepada Mahkamah Tinggi di bawah s. 18(1) Akta Profesion Undang-Undang Malaysia 1976 ('Akta tersebut') untuk kebenaran diterima sebagai peguambela dan peguamcara *ad hoc* supaya membolehkan beliau mewakili seorang Rapheal

Pura sebagai peguamcara utama di dalam empat guaman fitnah. Majlis Peguam dan Jawatankuasa Peguam Kuala Lumpur menyokong permohonan-permohonan tersebut dengan tegas dan mengatakan bahawa perayu memperolehi pengalaman luas dalam undang-undang fitnah dan media dan juga mempunyai pengalaman dan kelayakan khas yang tidak didapati di kalangan peguamcara dan peguambela di Malaysia. Peguam Negara dan plaintif-plaintif dalam empat guaman tersebut membantah permohonan-permohonan tersebut berdasarkan sifat guaman-guaman tersebut tidak merupakan sesuatu yang baru atau rumit sejauh mana ianya tidak boleh dikendalikan oleh peguamcara dan peguambela tempatan. Lagipun kejujuran intelektual dan kelakuan profesional beliau telah digambarkan sebagai sesuatu yang boleh dipersoalkan berikutan artikel beliau yang telah diterbitkan di dalam suratkhabar Observer di London di mana beliau telah mengkritik Kehakiman Malaysia, Kerajaan dan Perdana Menteri. Ia juga ditegaskan bahawa perayu tidak boleh membaca dan menulis Bahasa Malaysia dan tidak lulus dalam Peperiksaan Kelayakan Bahasa Malaysia dan juga tidak dikecualikan daripadanya sepertimana dikehendaki oleh s. 11 Akta tersebut. Hakim yang arif telah mendengarkan kempat-empat permohonan bersama dan menolak mereka. Kini rayuan-rayuan terhadap keputusan itu.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR (menentang)

[1] Akta A567 terpinda telah memperbuat semula peruntukan dahulu sepertimana dalam Ordinan Peguambela dan Peguamcara 1947 ke dalam s. 18(1) Akta tersebut dengan sedikit perubahan di mana perkataan-perkataan "would be a qualified person" dalam Ordinan tersebut digantikan dengan perkataan-perkataan "would be eligible to be admitted". Alasan untuk perubahan tersebut disebabkan dengan pengenalan s. 11(2) oleh Akta terpinda yang sama yang memerlukan seorang berkelayakan untuk melulus atau dikecualikan daripada Peperiksaan Kelayakan Bahasa Malaysia.

[2] Sebelum pengenalan s. 11(2) Akta tersebut, "a qualified person" berlayak untuk diterima sekiranya beliau memenuhi keperluan-keperluan s. 11 yang dulu (kini s. 11(1)). Akan tetapi dengan pengenalan s. 11(2) itu tidak mencukupi. Beliau juga perlu melulus atau dikecualikan daripada Peperiksaan Kelayakan Bahasa Malaysia. Sekiranya perkataan-perkataan "a qualified person" dikekalkan, ianya tidak akan memenuhi keperluan s.11(2) kerana keperluan dalam s. 11(2) tidak merupakan sesuatu daripada keperluan-keperluan yang patut dipenuhi untuk "a qualified person" di bawah s. 3 Akta tersebut. Oleh itu perkataan "eligible" digunakan.

[3] Pada pandangan pertama perkataan-perkataan permulaan s. 18(1) Akta tersebut iaitu "Notwithstanding anything contained in this Act" nampaknya mengeluarkan keperluan-keperluan s. 11. Sekiranya demikian, ungkapan keseluruhan "if he was a citizen of, or a permanent resident in Malaysia would be eligible to be admitted as an advocate and solicitor of the High Court" akan dijadikan melimpah ruah. Di dalam s. 11 perkataan "is" dipakai dalam ungkapan "is either a Federal citizen or a permanent resident of Malaysia" untuk bermakna bahawa dalam permohonan biasa, pemohon seharusnya seorang warganegara atau seorang bermaustatin tetap di Malaysia. Sebaliknya di dalam s. 18 perkataan "was" dipakai untuk bermakna bahawa beliau tak

perlu merupakan seorang warganegara atau seorang bermaustatin tetap akan tetapi beliau perlu memenuhi segala keperluan-keperluan lain yang berkaitan untuk seorang warganegara atau seorang bermaustatin tetap yang memohon kebenaran untuk diterima masuk di bawah s. 11. Justeru untuk memberi kesan kepada perkataan-perkataan permulaan dalam s. 18(1), ianya perlu diberikan makna bahawa meskipun terdapat kebenaran diterima masuk biasa di bawah s. 11, adanya satu cara lain bagi kebenaran diterima masuk dalam kes-kes khas di bawah s. 18.

[4] Maka mentafsirkan perkataan-perkataan permulaan s. 18(1) Akta tersebut sebagai bermakna bahawa segala peruntukan-peruntukan lain dalam Akta tersebut tidak boleh dipakai akan menjadikan ungkapan yang berikut melimpah ruah. Lagipun ungkapan tersebut didahului oleh ungkapan "and subject to the following subsections" dan dengan serta merta diikuti oleh ungkapan "and no person shall be admitted..." diikuti oleh syarat-syarat dalam perenggan-perenggan (a) dan (b). Ini dengan jelas menunjukkan bahawa syarat-syarat dalam perenggan-perenggan (a) dan (b) adalah tambahan kepada syarat-syarat yang tersebut dahulu dalam s. 18(1). Dalam lain perkataan, syarat-syarat dalam perenggan-perenggan (a) dan (b) dalam s. 18(1) bukan sahaja syarat-syarat yang perlu dipenuhi untuk diterima masuk di bawah s. 18.

[5] Dalam sesuatu permohonan di bawah s. 8A Ordinan tersebut, pemohon perlu menyakinkan mahkamah bahawa sekiranya beliau seorang warganegara Malaysia, beliau adalah seorang berkelayakan selaras dengan makna dalam Ordinan tersebut. Dengan perkataan lain, ianya tidak mencukupi untuk hanya menyakinkan mahkamah bahawa beliau diarahkan oleh seorang peguamcara dan peguambela di Malaysia dan untuk guaman tertentu itu beliau memperolehi kelayakan dan pengalaman khas yang tidak didapati di kalangan peguamcara dan peguambela di Malaysia. Ini dengan jelasnya menunjukkan bahawa perkataan-perkataan permulaan dalam s. 8A Ordinan tersebut (yang sama seperti perkataan-perkataan permulaan dalam s. 18(1) Akta tersebut) tidak mengeluarkan segala keperluan-keperluan lain Ordinan tersebut dalam permohonan untuk suatu kebenaran diterima masuk *ad hoc*. Bersamaan juga, perkataan-perkataan permulaan dalam s. 18(1) kini tidak mengeluarkan segala keperluan-keperluan di bawah s. 11 termasuk keperluan mengenai kelulusan atau kecualian Peperiksaan Kelayakan Bahasa Malaysia.

[6] Keperluan Bahasa Malaysia di bawah s. 11(2) Akta tersebut adalah suatu syarat yang perlu dipenuhi oleh pemohon supaya dibenarkan masuk sebagai peguamcara dan peguambela di Malaysia. Seorang peguam asing tidak harus dibenarkan berkhidmat dalam mahkamah di sesuatu negara, meskipun secara *ad hoc* dan sebagai peguam utama sekiranya beliau tidak memahami bahasa negara tersebut.

[7] Kelayakan dan pengalaman perayu yang relevan perlu diberikan perhatian dengan merujuk kepada isu-isu dalam kes berkaitan dengan Malaysia. Guaman-guaman tersebut akan diputuskan selaras dengan undang-undang Malaysia. Afidavit-afidavit penyokong tidak menyatakan samada perayu mempunyai kelayakan dan pengalaman khas dalam undang-undang Malaysia (substantif dan prosedur) yang tidak didapati dalam kalangan peguamcara dan

peguambela tempatan.

[8] Perayu mungkin memperolehi kelayakan dan pengalaman luas dalam pembelaan kes-kes fitnah di negara-negara lain akan tetapi samada sesuatu pernyataan atau artikel berfitnah atau tidak dalam negara ini bergantung kepada undang-undang negara ini dan bagaimana orang awam negara ini memahaminya, dan perayu mungkin tidak mempunyai pengertian sensitiviti atau ketidaksensitiviti tempatan.

[9] Walaupun ternyata bahawa perayu memperolehi pengalaman luas dalam undang-undang fitnah termasuk mass media, cara perkataan-perkataan diterbitkan, samada dalam suratkhabar, majalah, internet atau apapun juga, tidak akan mempunyai sebarang pertalian dengan maksud perkataan-perkataan tersebut. Sekiranya ianya berfitnah (atau tidak) ianya berfitnah (atau tidak) tidak kira bagaimana ianya diterbitkan.

[10] Mahkamah kita agak bermampu mentadbir keadilan samada dengan pertolongan daripada seorang peguamcara dan peguambela atau tidak. Mereka juga bermampu mengendalikan aliran award ganti rugi dalam kes-kes fitnah. Suatu contoh yang jelas adalah penghakiman Mahkamah Rayuan dalam *Liew Yew Tiam & Ors v. Cheah Cheng Hoc* yang dilaporkan baru-baru ini.

Oleh Abdul Kadir Sulaiman & Haidar Mohd Noor HHMR (bersetuju)

[1] Nasib sesuatu permohonan di bawah s. 18 Akta tersebut bergantung kepada makna dan interpretasi s. 18(1)(a) Akta tersebut (tertakluk kepada pematuhan peruntukan-peruntukan lain seksyen tersebut). Dalam tindakan perayu, isu adalah samada mengikut keterangan di hadapan mahkamah, ianya berpuashati bahawa untuk tujuan keempat-empat guaman, perayu memperolehi kelayakan atau pengalaman yang tidak didapati di kalangan peguamcara dan peguambela di Malaysia. Jikalau mahkamah berpuashati, maka mahkamah berkuasa untuk membenarkan perayu mewakili defendan di dalam keempat-empat guaman sebagai peguamcara utama. Sebaik sahaja perayu diterima masuk berdasarkan kelayakan atau pengalaman khasnya sepertimana dikehendaki oleh seksyen tersebut, sebahagian daripada khuatiran hakim yang arif sebenarnya perlu dibiarkan untuk hakim yang memutuskan guaman-guaman tersebut.

[2] Sub-seksyen (3) s. 18 Akta tersebut memerlukan mahkamah mempertimbangkan pandangan setiap orang yang diserahkan dengan permohonan-permohonan tersebut. Pandangan-pandangan Majlis Peguam dan Jawatankuasa Peguam Kuala Lumpur penting untuk membantu hakim yang arif membuat keputusan samada perayu perlu diberikan apa yang dipohon. Akan tetapi berdasarkan alasan yang tidak relevan, hakim yang arif tidak mempedulikan pandangan-pandangan mereka dan memutuskan untuk bergantung kepada pernyataan-pernyataan penyeluruhan oleh Peguam Negara dan plaintif-plaintif bahawa guaman-guaman tersebut adalah yang tidak luar biasa, tanpa mempertimbangkan kekukuhan dan keterangan yang menyokong permohonan-permohonan. Melainkan jika pendirian kedua-dua perbadanan tersebut yang mewakili peguamcara dan peguambela tempatan dicurigai,

mereka adalah dalam kedudukan yang lebih baik untuk membantu mahkamah memutuskan nasib permohonan-permohonan perayu.

[3] Hakim yang arif sepatutnya mempertimbangkan samada perayu selaras dengan s. 18(1)(a) Akta tersebut mempunyai kelayakan atau pengalaman khas yang tidak didapati di kalangan peguamcara dan peguambela tempatan. Keterangan penyokong yang dimajukan oleh perayu serta pendirian oleh kedua-dua perbadanan yang mewakili kepentingan peguamcara dan peguambela tempatan membuktikan taraf kelayakan dan pengalaman perayu.

[4] Seksyen 18 Akta tersebut bukan pemakaian secara umum. Seksyen ini membuat peruntukan untuk membenarkan masuk peguam asing dalam kes khas manakala s. 11 adalah secara umum berkaitan dengan seorang warganegara Persekutuan atau seorang yang bermaustatin tetap di Malaysia sepertimana ditetapkan oleh sub-s.(1)(c). Keduanya, perkataan-perkataan permulaan di s. 18(1) sendiri iaitu "Notwithstanding anything contained in this Act" mengeluarkan s. 11 daripada lingkungannya kecuali pemohon berkenaan memperolehi kelayakan seorang peguamcara dan peguambela.

[5] Penhujahan plaintif-plaintif bahawa peguam-peguam tempatan mempunyai pengalaman yang cukup dan pada masa yang perlu mereka boleh memperolehi pendapat secara bertulis daripada luar negeri bertentangan dengan keterangan yang dimajukan bagi pihak perayu. Jikalau pendapat secara bertulis daripada luar negeri mencukupi, maka s. 18 Akta tersebut menjadi lewah dan tidak sesuai dengan kehendak badan perundangan.

[6] Mengenai ketidakkejujuran intelektual dan salah laku profesional perayu, tidak ada sebarang keterangan di hadapan mahkamah bahawa akibat penerbitan tersebut sesuatu tindakan telah diambil terhadap perayu di England atau di tempat lain dengan niat memecat, melarang atau menggantung beliau daripada praktik guaman.

[Rayuan dibenarkan dengan majoriti.]

Reported by Usha Thiagarajah

Case(s) referred to:

D'Cruz v. AG [1971] 1 LNS 26; [1971] 2 MLJ 130 ***(refd)***

Graham Starforth Hill v. The Bar Council of Malaya & Anor [1972] 1 LNS 38; [1972] 2 MLJ 178 ***(refd)***

In re Geoffrey Robertson [2001] 4 CLJ 146 ***(refd)***

Jude Philomen Benny v. Majlis Peguam Malaysia [1997] 1 LNS 42; [1997] 5 MLJ 309 ***(refd)***

Lee Wong Tiang v. PP [1970] 1 LNS 58; [1971] 2 MLJ 40 ***(refd)***

Liew Yew Tiam v. Ors v. Cheah Cheng Hoc & Ors [2001] 2 CLJ 385 ***(refd)***

Louis Blom-Cooper v. Attorney General, Malaysia & Ors [1978] 1 LNS 109; [1979] 1 MLJ 68 ***(refd)***

Nepline Sdn Bhd v. Jones Lang Wooter [1995] 1 CLJ 865 ***(refd)***

Re Andrew Hilary Caldecott QC [1998] 4 CLJ Supp 379 ***(not foll)***

Re B Larbalestier QC [1987] 2 CLJ 34; [1987] CLJ (Rep) 489 ***(refd)***

Re C Ross-Munro QC [1986] 1 LNS 122; [1988] 2 MLJ 654 ***(refd)***

Re Michael John Mustill [1970] 1 LNS 137; [1971] 1 MLJ 175 ***(refd)***

Re Reginald W Goff QC [1962] 1 LNS 165; [1962] 28 MLJ 241 ***(refd)***

Legislation referred to:

Advocates and Solicitors Ordinance 1947, ss. 5(5), 8A(1)

Civil Law Act 1956, s. 3(1)

Federal Constitution, art. 10

Legal Profession Act 1976, ss. 3, 11(1)(c), (2), 18(1)(a), (b), (3)

Other source(s) referred to:

"Justice Hangs in the Balance" Observer Newspaper, 28 August 1988

Counsel:

For the appellant - Cecil Abraham (Muhammad Shafee & Gurmeet Kaur); M/s Shafee & Co

For the plaintiffs - Dato' V Sivaparanjothi (S Rutheram & Ashok Vijay); M/s V Siva & Partners

For the AG - Dato' Azhar Mohd SFC

For the Bar Council - Edmund Bon

For the Bar Committee - Yasmeen Shariff

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-17-33-99]

JUDGMENT

Abdul Hamid Mohamad JCA:

In 1996, four civil suits were filed against Raphael Pura ("defendant"), a journalist with the Asian Wall Street Journal ("ASWJ"). They are:

> (a) KLHC Civil Suit No. S1-23-41-96 between Tan Sri Vincent Tan & 2 Ors. against Raphael Pura;
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> (b) KLHC Civil Suit No. S1-23-51-96 between MBF Capital Berhad & 2 Ors. against Raphael Pura;
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> (c) KLHC Civil Suit No. S2-23-42-96 between Insas Berhad & Megapolitan Sdn. Berhad against Raphael Pura; and
>
> (d) KLHC Civil Suit No. S5-22-90-96 between Dato' v. Kanagalingam against Raphael Pura.

The said civil suits concern a claim in libel and slander allegedly arising from statements attributed to the defendant in an article entitled "Malaysian Justice On Trial" in November 1995 issue of the International Commercial Litigation Magazine.

The defendant in the said civil suits are represented by Messrs. Shafee & Co. Upon instruction by the defendant, Messrs. Shafee & Co. wished to engage the appellant to act as lead counsel for the appellant. Consequently, four originating motions were filed in the High Court for leave of the High Court for the appellant to be admitted and enrolled as an advocate and solicitor of the High Court of Malaya on an *ad hoc* basis as required by s. 18 of the Legal Profession Act 1976. All the four motions were heard together and dismissed by the High Court. The appellant appealed to this court.

It should be noted that the Bar Council and the Kuala Lumpur Bar Committee have no objection to the application. However, the Attorney General Malaysia objects. The Bar Council in fact filed an affidavit in support of the application.

Before going any further, it should be noted that an application for an ad hoc admission cannot be treated in the same way as, say, a civil claim. In a civil claim the plaintiff is claiming against the defendant. If the defendant admits the claim the court is obliged to give judgment for the plaintiff. If the defendant puts up a certain defence the court only considers

that defence. If both the parties agree to a certain fact, the court must accept that fact.

In an *ad hoc* application, an applicant is not claiming against the Bar Council, the State Bar Committee nor the Attorney General. He is applying to court for permission to appear before the court as counsel. The Bar Council, the State Bar Committee and the Attorney General only appear to assist the court. They may not do so if they do not wish to. They all may have no objections to the application. They may even support the application. That does not mean that the court is therefore obliged to grant the order applied for. They all may agree to a certain fact, eg, that the applicant has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. That does not mean that the court must accept that as a fact. As provided by s. 18(3), the court "shall have regard" to their views. The court is not bound by their views. They or one of them may file affidavits to oppose the application. They may not file any affidavit to oppose the application at all or all of them may file affidavits to support the application. That does not mean that, therefore, the court must accept the facts stated in all the supporting affidavits.

It may be said, in such circumstances, how is the court going to reject such statements of facts when there is no affidavit in opposition of the application? My answer is that as this is not a contest between two opposing parties, but an application to court to appear in court as an advocate and solicitor, the court should be free to import its own knowledge or take judicial notice of such facts. Nobody sees and listens to lawyers who appear in court more than judges. Judges should know.

There are two main issues in this appeal. First, whether the provision regarding the Bahasa Malaysia requirement as provided by s. 11(2) is applicable to an application under s. 18. Secondly whether the appellant is a person who, in the opinion of the court, has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia.

I shall deal with the first issue first.

A brief history of the provisions of the law on ad hoc admission may be relevant.

The Advocates and Solicitors Ordinance 1947, as at the date prior to the coming into force of the Legal Profession Act 1976 provides:

> 8A (1), Notwithstanding anything contained in this Ordinance the Court may for the purpose of any one case and subject to the following sub-sections admit to practice as an advocate and solicitor any person who if he was a citizen of Malaysia or a permanent resident in Malaysia would be a qualified person within the meaning of this Ordinance.
>
> (2) No person shall be admitted to practise as an advocate and solicitor under sub-section (1) unless:
>
> > (a) for the purpose of that particular case he has, in the opinion of the Court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and
> >
> > (b) he has been instructed by an advocate and solicitor in

Malaysia.

The Legal Profession Act 1976 came into force on 1 June 1977. Section 18(1) provides:

> 18. (1) Notwithstanding anything to the contrary contained in this Act, the Court may, in its sole discretion for the purpose of any one or more specific causes or matters, admit to appear as counsel any person:
>
> > (a) who holds her Britanic Majesty's Patent as Queen's Counsel or has special qualifications or experience for the purpose of such cause or matter or has been in active practice as an advocate and solicitor in Singapore for not less than seven years immediately preceding the filing of the application for admission;
> >
> > (b) who does not ordinarily reside in Malaysia but who has come or intends to come to West Malaysia for the purpose of appearing in such causes or matters; and
> >
> > (c) who is or will if admitted be instructed by an advocate and solicitor.

The provision of s. 18(1) was amended by Act A567 with effect from 16 December 1983. It provides:

> 18(1) Notwithstanding anything contained in this Act, the Court may, for the purpose of any one case and subject to the following subsections, admit to practise as an advocate and solicitor any person who, if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court and no person shall be admitted to practise as an advocate and solicitor under this subsection unless:
>
> > (a) for the purpose of that particular case he has, in the opinion of the Court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and
> >
> > (b) he has been instructed by an advocate and solicitor in Malaysia;

The same amendment Act also introduced the definition of "Bahasa Malaysia Qualifying Examination" in s. 3 and amended s. 11 by inserting a new sub-s. (2) as follows:

> (2) As from the 1st January 1984, no qualified person shall be admitted as an advocate and solicitor unless, in addition to satisfying the requirements of subsection (1), he has passed or is exempted from the Bahasa Malaysia Qualifying Examination.

These provisions remain unchanged until today.

We see that s. 18(1) of the Legal Profession Act 1976now in force is very similar to the

provision of s. 8A(1) of the Advocates and Solicitors Ordinance 1947. In other words, after about six years after the enactment of the Legal Profession Act 1976, with a different provision regarding ad hoc admission, the legislature decided to re-enact the earlier provision as was in the Ordinance with a slight change ie, the words "would be a qualified person within the meaning of this Ordinance" were replaced with the words "would be eligible to be admitted as an advocate and solicitor of the High Court".

Why the change in the words "would be a qualified person" with the words "would be eligible to be admitted"?

To my mind, the answer lies in the introduction of the requirement of passing or is exempted from the Bahasa Malaysia Qualifying Examination. That requirement is an additional requirement. The definition of a "qualified person" in s. 3 of the Legal Profession Act 1976was not changed. Prior to the introduction of s. 11(2) a "qualified person" was eligible to be admitted provided he fulfilled the requirements of the then s. 11 (now 11(1)). But with the introduction of s. 11(2) that is not enough. He must also pass or is exempted from the Bahasa Malaysia Qualifying examination. If the words "a qualified person" were retained, that would not cover the requirement of s. 11(2) because that requirement is not one of the requirements that makes a person a "qualified person" as defined in s. 3. Hence the word "eligible" is used.

What do the words "if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court" mean?

To understand it we have to go back to the normal admission. In the case of a normal admission, to be eligible for admission a person must be a "qualified person", and he must satisfy the conditions of s. 11 including being either a Federal citizen or a permanent resident of Malaysia and has passed or is exempted from the Bahasa Malaysia Qualifying Examination.

What are the conditions that must be satisfied for an *ad hoc* admission under s. 18?

At first glance it appears that the opening words of s. 18(1) ie, "Notwithstanding anything contained in this Act" appear to take away all the requirements of s. 11. But, if that is so then the whole phrase "if he **was** a citizen of, or a permanent resident in, Malaysia would be eligible to be admitted as an advocate and solicitor of the High Court" will be rendered superfluous. Note that in s. 11 the word "is" is used in the phrase "is either a Federal citizen or a permanent resident of Malaysia." What it means is that in a normal application, the applicant must be a citizen or a permanent resident of Malaysia. In s. 18 the word "was" is used instead. It means that he need not be a citizen or a permanent resident but he has to satisfy all the other requirements applicable to a citizen or a permanent resident applying for admission under s. 11.

How then do we give effect to the opening words of s. 18(1), ie, "Notwithstanding anything contained in this Act"? In my view effect can still be given to them. What they mean is that notwithstanding the normal admission under s. 11, there is yet another type of admission in special cases under s. 18.

No doubt that this is restrictive interpretation. But, at least by giving such an interpretation the said opening words of s. 18(1) are given effect to while the clause "if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an advocate and

solicitor of the High Court" are also given effect to. On the other hand to interpret the opening words of the section to mean that all other provisions in the Act are not applicable would render the said subsequent clause wholly superfluous. Furthermore, that said clause is preceded by the phrase "and subject to the following subsections" and is immediately followed by the clause "**and** no person shall be admitted..." followed by the conditions in para (a) and (b). These clearly show that the conditions in paras. (a) and (b) are in addition to the conditions earlier mentioned in s. 18(1). In other words, the conditions contained in paras. (a) and (b) of s. 18(1) are not the only conditions that must be satisfied for admission under s. 18.

As I have pointed out earlier the old s. 8A of the Ordinance is similar to the present provision of s. 18, except for the small difference that I have pointed out. Section 8A has been interpreted by the Federal Court in *Graham Starforth Hill v. The Bar Council of Malaya & Anor[1972] 1 LNS 38*; [1972] 2 MLJ 178. In that case the appellant had applied for an ad hoc admission as an advocate and solicitor of the High Court in Malaya for the purpose of appearing as leading counsel in an income tax appeal case before the Special Commissioners of Income Tax and in any appeal therefrom. The High Court dismissed the application. Appeal to the Federal Court was also dismissed on the ground that it had not been demonstrated that for the particular case he had special qualifications and experience of a nature not available amongst advocates and solicitors in Malaysia.

What is important is what Suffian FJ (as he then was) said in the judgment of the court delivered by him at p. 179:

> It is to he observed that an application under section 8A must be for the purpose of "any one case" only. To succeed, Mr. Hill has to satisfy four conditions, namely:
>
> > (a) he is a person who if he was a citizen of Malaysia or a permanent resident in Malaysia would be a qualified person within the meaning of the Ordinance;
> >
> > (b) he has been instructed by an advocate and solicitor in Malaysia;
> >
> > (c) for the purpose of that particular case he has, in the opinion of the court, special qualifications or experience of a nature,
> >
> > (d) not available amongst advocates and solicitors in Malaysia.

I am of the view that this case is binding on this court. However, whether it is binding or not, I am of the view that that is the correct view and I am following it.

It must be noted that under condition (a) above an applicant must satisfy the court that if he was a citizen of Malaysia or a permanent resident in Malaysia he would be "a qualified person within the meaning of the Ordinance." In other words, it is not sufficient merely to satisfy the court that he has been instructed by an advocate and solicitor in Malaysia and that for the particular case and that he has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia. This clearly shows that the opening words of s. 8A of the ordinance (which are exactly the same as the opening words in s. 18(1)

now) do not remove all the other requirements of the Ordinance in an application for an ad hoc admission.

Similarly, in my view the opening words of the present s. 18(1)do not remove all the requirements under s. 11 of the Actincluding the requirement of passing or being exempted from the Bahasa Malaysia Qualifying Board.

In the circumstances, I agree with the conclusion reached by Azmel J in *Re Andrew Hilary Caldecott QC[1998] 4 CLJ Supp 379*that the provision of s. 11 of the Actapplies in an application under s. 18. It follows that the Bahasa Malaysia requirement as provided by s. 11(2) must be satisfied. With respect, I am unable to agree with the view expressed by Nik Hashim JC (as he then was) in *Jude Philomen Benny v. Majlis Peguam Malaysia[1997] 1 LNS 42*; [1997] 5 MLJ 309 on the relevancy of the Bahasa Malaysia issue in an application under s. 18 of the Act. It is a condition that an applicant must satisfy the court.

It may be said that that would lock out all foreign lawyers from appearing in Malaysian Courts. My answer is: so be it. That is the law made by Malaysian Parliament and the court must give effect to it. Policies are determined by the Executive. The legislature legislates it. Court gives effect to it. Each branch of the government should respect the other's jurisdiction. Almost 40 years ago in *Re Reginald W Goff QC[1962] 1 LNS 165*; [1962] 28 MLJ 241, in an application for ad hoc admission "by a very eminent Queen's Counsel" which was refused, Thomson CJ said at p. 242:

> Judges are not here to make the law. They are not here to find faults in the law. They are here to administer and declare the law as it has been set out by the Legislature. If, therefore, what I have said creates any difficulty it is a matter for the legislative to deal with. After all I am here to enforce the law. I am not here to set a bad example to the public by driving a coach and horses through it.

Anyway, I do not think that the law under consideration is an unreasonable law. Where in the world can a foreign lawyer apply to practice in the court of a country, even ad hoc, and to appear as leading counsel, if he does not know the language of the court of that country?

The leading case under the original provision of s. 18(1) of the Actis *Louis Blom-Cooper v. Attorney General, Malaysia & Ors[1978] 1 LNS 109*; [1979] 1 MLJ 68 (FC). But that case is no longer authority as the section has been amended.

I shall now turn to the second issue.

The qualifications and experience of the appellant, as contained in the supporting affidavit affirmed by Muhammad Shafee Abdullah may be summarised as follows:

The appellant was born in 1946. He obtained his BL LL.B (Hon) degree from Sydney University. He was a Rhodes Scholar and obtained his BCL from the University of Oxford in 1972. He was admitted to the Bar of England and Wales in 1973 and has been in practice for 27 years. He was appointed Head of his set of chambers, Doughty Street Chambers. He was appointed a Queen's Counsel in 1988, Assistant Recorder in 1993 (he is now a Recorder and in 1997 was made a Master of the Bench of Middle Temple). He has also been admitted to practise in New South Wales and Australia, Trinidad and Tobago, Antigua (in special cases)

and also for specific cases in Singapore and Hong Kong. He was made a visiting professor at Birkbeck College, University of London, University of New South Wales and the University of Warwick. He has also been regularly invited to deliver lectures organised by the American Bar Association. The appellant is accepted in England, United States and the British Commonwealth as being a leading barrister in the area of defamation, media and civil liberties law and has richly contributed to the development of law in these areas. The appellant is also recognised as one of the top, if not the top, barristers in England specialising in the area of defamation, media and civil liberty laws. He is also a published author:

> (a) co-authored "Media Law" (1989) with Andrew Nicol QC. The appellant was the author of the chapter on defamation in that book;
>
> (b) co-authored "Freedom. The individual and the Law", 6th and 7th edns;
>
> (c) "People Against Press", a detailed study of defamation and the alternative dispute remedies to the same such as independent and self-regulating Press Councils.

He has appeared and argued landmark cases in the area of defamation and civil liberties laws in the highest courts in England, the Commonwealth including Singapore and the European Union. He was also appointed advisor to the previous Australian government on defamation matters and more recently has been invited to conduct a special inquiry in Mauritius on the country's media laws at the behest of the Mauritius Government. He had been invited to deliver the following lectures:

> (a) The Goodman Media Lecture at the University of London on "The Media and Human Rights Act."
>
> (b) The Malaysian Bar Council's seminar on "Development's Pertaining to Media Law with special reference to Defamation and Contempt";
>
> (c) At the XII Commonwealth Conference held in Kuala Lumpur on various topics concerning defamation, contempt of court and civil liberties.

I must admit that the list is very impressive. I do not think any local advocate and solicitor can produce an equally impressive biodata. But is that the test? Does the fact that a foreign lawyer who knows more and has experience appearing in the courts in many countries necessarily mean that he has "special qualifications and experience of a nature not available amongst advocates and solicitors in Malaysia"? To my mind, the relevant qualification and experience must be looked at with reference to the issues in the case and with reference to Malaysia. It is according to Malaysian law that the suits are to be decided.

Does he have special qualification and experience of Malaysian law (substantive and procedural) pertaining to the issues and the conduct of the suits that are not available amongst advocates and solicitors in Malaysia? First, even the supporting affidavits say nothing of his knowledge not to speak of qualification and experience of Malaysian law relevant to the issues in the four suits.

True that Malaysian law on defamation is of common law origin. But, first, as pointed out by the learned judge of the High Court, there is the provision of s. 3(1) of the Civil Law Act

1956made about a year before the British granted the then Malaya her independence that cannot be ignored. What is the effect of that provision? Even though I have given my view as a High Court judge (See *Nepline Sdn Bhd v. Jones Lang Wooter[1995] 1 CLJ 865*), I do not wish to say anything on it now, sitting in this court, as I do not want to prejudice the mind of the High Court judge, whoever he may be, who may eventually hear the said civil suits. Depending on the view taken by the trial judge, the appellant's special knowledge of the recent developments of the law of libel in many countries may not be of relevance at all.

Even if the cases on the recent development of defamation law are relevant, I do not think it is necessary to get the counsel who argued those cases to come and explain to our judges what they mean. Authorities from other jurisdictions, especially English and Indian, are cited in Malaysians Courts, from the highest to the lowest, every day. I do not think it has even been said that local lawyers and judges cannot understand them and require the counsel in those cases to come and explain to us.

Secondly, the appellant may have vast experience in defending libel cases in other countries. But, whether a statement or an article is libellous or not in this country depends on the law of this country and how the general public of this country understand it. Can we honestly say that the appellant has special "qualification and experience" in the understanding of the local sensitivity or insensitivity that will assist in the understanding of the application of Malaysian law in the Malaysian context that is not available amongst advocates and solicitors in Malaysia? With respect, I do not think so.

It is said that he has a vast experience in defamation law involving mass media. I am of the view that the manner in which the words are published, whether in a newspaper, magazine, internet or whatever, is not going to have any bearing on the meaning of the words. If they are defamatory (or not), they are defamatory (or not) irrespective of how they are published.

I am obliged to the learned counsel for the appellant for giving a list of Malaysian cases on similar application even though the list may not be exhaustive. I shall try to list them in chronological order omitting cases decided during the period when the provision of the Act was different and try to see if a trend can be established.

In *Lee Wong Tiang v. PP[1970] 1 LNS 58*; [1971] 2 MLJ 40, Sharma J allowed an application by a Singapore lawyer, who had appeared in that same case during the trial in the High Court, to argue the appeal in the Federal Court. (The Attorney General did not object strongly. The Bar Council took a neutral stand).

In *D'Cruz v. AG[1971] 1 LNS 26*; [1971] 2 MLJ 130, an application for *ad hoc* admission by no other than Dato' David Marshall to defend the accused in a corruption case was dismissed by Syed Othman J (as he then was). What the learned judge said at p. 132 is of particular interest to me:

> In the context of the expression appearing in the affidavits, the clear implication is that without the assistance of Dato' David Marshall in the case the courts here would be able to do justice up to a certain measure only. It would also seem to suggest that there is not a single advocate and solicitor practising in this country who is capable of assisting the courts in doing justice to the applicant. I disagree with the view that has been expressed in the

affidavits.

In the first place, *I am sure that our courts are quite capable of administering justice whether or not with the assistance of any advocate or solicitor*. The matters deposed in the affidavit which Dato' David Marshall is alleged to be specially qualified for or experienced in are commonplace and should be within the knowledge of any ordinary practitioner. The corruption legislation has been with us in some form or other for many years and corruption cases are not uncommon here as in another country where a foreign practitioner may be practising. Most of the celebrated cases of corruption which appear in *The Malayan Law Journal* have been decided by our courts. *I therefore find it difficult to accept that there is among the large body of advocates and solicitors in this country who live with our laws, not a single one who possesses special qualifications or experience to defend these cases and that a practitioner from another country, who does not live with our laws, is better equipped than the practitioners in this country with such qualifications or experience.* In any case, whether or not a practitioner from outside the Federation possesses special qualification or experience "to do justice in a case", whatever that expression is intended to mean, is irrelevant for the purpose of ad hoc admission. What is relevant is whether for the purpose of a particular case he possesses special qualifications or experience not available amongst advocates and solicitors in Malaysia. To say that a practitioner whether in this country or elsewhere possesses the qualifications or experience to do justice in a case is inimical to our concept or justice. **The administration of justice is a matter for the courts and not a matter for any advocate and solicitor in this country, let alone from abroad.** His duty is to assist the courts in the administration of justice. This duty is paramount. It overrides his duty to his client. Although he is at all times required to act in the best interests of his client his duty does not entail him to get his client acquitted of the charge at all costs. It is for him to assist the courts in eliciting the truth and to argue on facts and law. It has been said the result of the cause should be a matter of indifference to him. (emphasis added). (Both the Attorney General and the Bar Council objected)

In *Graham Starforth Hill v. The Bar Council of Malaya & Anor[1972] 1 LNS 38*; [1972] 2 MLJ 178 (FC), an application by the appellant to appear in an income tax case was dismissed (I have reproduced the four requirements that must be satisfied, earlier). (Both the Attorney General and the Bar Council objected).

In *Re Michael John Mustill[1970] 1 LNS 137*; [1971] 1 MLJ 175, Yong J allowed an application by the applicant to appear for the defendant in a suit in connection with the loss of cargo of steel pipes on board ship during a voyage from Prai to Brunei under a policy of marine insurance. (Both the Attorney General and the Bar Council did not object).

In *Re B Larbalestier QC[1987] 2 CLJ 34; [1987] CLJ (Rep) 489*, Mohamed Dzaiddin J (as he then was) dismissed an application by the applicant to appear in a case involving certain drug offences. (Both the Attorney General and the Bar Council objected).

In *Re C Ross-Munro QC[1986] 1 LNS 122*; [1988] 2 MLJ 654, Zakaria Yatim J (as he then was) allowed an application by the applicant to appear in the Supreme Court on behalf of

Lorraine Esme Osman. The learned judge (as he then was) took into account that another Queen's Counsel had earlier been admitted to appear before the Supreme Court in respect of a similar matter. (Both the Attorney General and the Bar Council did not object).

In *Jude Philomen Benny v. Majlis Peguam Malaysia[1997] 1 LNS 42*; [1997] 5 MLJ 309, an application by a Singapore lawyer to appear in a civil suit in which the issues involved were navigational aspects of shipping, seamanship and the method of stability calculations of ocean-going vessels and the methods of salvage, was dismissed by Nik Hashim JC (as he then was). According to the judgment of the learned judge, the then President of the Bar Council submitted that these were not issues of marine insurance law but are issues which are encountered regularly in marine insurance and which have already been dealt with and litigated in Malaysia in a number of cases in which local Malaysian counsel have appeared. Five such cases were listed. (The Attorney General did not object. The Bar Council objected).

In *Re Andrew Hilary Caldecott QC[1998] 4 CLJ Supp 379*, Azmel J, dismissed an application by the Queens Counsel described as "a specialist in the field of defamation law and related areas of breach of confidence and contempt of court, to appear on behalf of Skrine & Co. in five civil suits arising from certain alleged defamatory statements in an article in an overseas magazine, was dismissed. (The Attorney General objected. The Bar Council did not).

Very recently, in *In re Geoffrey Robertson[2001] 4 CLJ 146*, Vohrah J (as he then was) allowed the application of the appellant (in this case) to appear in a libel case arising from the publication of an article entitled *"Malaysia Props Up Crony Capitalists"* in AWSJ. (The Attorney General objected. The Bar Council supported).

What do these cases show? They show that Malaysian Courts would normally not allow applications for ad hoc admission in criminal cases, except in the very early case (1971) where the same lawyer had in fact represented the accused at the trial and was applying to appear in the appeal in the same case. The court had not allowed an application to appear in an income tax case. On the other hand the court allowed an application in a case where issues of proper law and forum convenience are involved and where another Queen's Counsel had been allowed to appear in a related case. In "shipping cases", an application was allowed in 1971 (not objected to by the Attorney General and the Bar Council) but in 1997 an application (not objected to by the Attorney General but objected to by the Bar Council) was dismissed. In defamation cases, the High Court is divided. And both are recent cases. Prior to these two cases, there appears to be no application made in respect of defamation cases.

We will now look at the stand taken by the Attorney General. It can be seen that the Attorney General has been quite consistent in objecting to applications in criminal, income tax and defamation cases. The Attorney General also did not object in cases involving "shipping law" and conflict of laws. On the whole the Attorney General's stands appear to be quite sensible.

The Bar Council too has been quite consistent in objecting to applications in criminal and income tax cases. Regarding "shipping cases", after 26 years (1971-1997) the Bar Council appears to have changed its stand from not objecting to objecting. This shows that after 26 years the Bar Council was of the opinion that local lawyers were equally qualified and experienced to handle such cases, even though only five such cases handled by local lawyers could be listed. I find the Bar Council's stand on this matter quite sensible too. In defamation

cases, the Bar Council supports such applications, all are in recent cases.

Can one honestly say that defamation cases are more complex and more difficult than "shipping cases"? With respect, I do not think so.

What is obvious is that the outstanding feature in the recent defamation cases are the personalities involved and the concern about the trend of awarding astronomical damages in such cases. It would also be naive not to take note of the stand taken by the Bar Council (rightly or wrongly) on the issues and the personalities involved as we often read in the press releases of the Bar Council. In that sense, the Bar Council's stand is understandable and consistent.

But, as is often said, the court is no respector or persons. I am convinced, as was Syed Othman J (as he then was) said in *D'Cruz v. AG[1971] 1 LNS 26*; [1971] 2 MLJ 130 that our "courts are quite capable of administering justice whether or not with the assistance of any advocate or solicitor."

I am also convinced that our courts, are capable of taking care of the trend in the awards of damages in defamation cases. The recently reported judgment of the Court of Appeal in *Liew Yew Tiam v. Ors v. Cheah Cheng Hoc & Ors[2001] 2 CLJ 385*is a clear example. The Court of Appeal in reducing the total amount of damages from RM1,000,000 to RH100,000 said at p. 395.

> In the process of making our assessment we have not overlooked the recent trend in this country of claims and awards in defamation cases running into several million ringgit. No doubt that trend was set by the decision of this court in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun (supra)*. It is a decision that has been much misunderstood. The underlying philosophy of that decision is that injury to reputation is as, if not more, important to a member of our society than the loss of a limb. But we think the time has come when we should check the trend set by that case. This is to ensure that an action for defamation is not used as an engine of oppression. Otherwise, the constitutional guarantee of freedom of expression will be rendered illusory.

The parties in that appeal were represented by local lawyers.

Take away the personalities involved in the cases concerning which these applications are made, it is just another defamation case. Defamation cases have been filed and heard even in Subordinate Courts in this country, represented by local lawyers all these years. It is an irony to say that, now there are no local lawyers who are experienced or qualified enough compared to a foreign lawyer who has never appeared in our courts and who do not even speak the language of the court, to defend such cases. I am not convinced that the appellant has shown that he has special qualification and experience in local laws (substantive and procedural), practice in our courts, local circumstances, relevant to the case that none of the 9000 over Malaysian lawyers has.

On these two grounds I would dismiss the appeals with costs.

Abdul Kadir Sulaiman JCA:

The appellant, a Queen's Counsel practising in England, has been instructed by an advocate and solicitor in Malaysia to represent one Rapheal Pura as his lead counsel, in four defamation suits instituted against him alleging him of libel and slander over a certain article published in London. By four separate motions the appellant applied to the High Court under s. 18(1) of the Legal Professions Act 1976(hereinafter referred to as "the Act") for his admission as an advocate and solicitor to enable him to carry out the instruction. As the suits centre around the same libel and slander, the learned judge heard the four applications jointly and at the end of it, he dismissed all the applications. Hence these four appeals before us. On our part, with the consent of the parties, these four appeals are similarly heard together.

As regards the four applications, the Bar Council and the Kuala Lumpur Bar Committee did not object. In fact they strongly supported the said applications of the appellant. The affidavit from the Bar Council states that the appellant has vast experience in the area of defamation and media law and that he possesses special qualifications and experience not readily available amongst advocates and solicitors presently in practice in Malaysia and it is of the view that the appellant is a fit and proper person therefore to be granted *ad hoc* admissions as lead counsel in the suits. The only objection came from the Attorney General and the plaintiffs in the four suits. The grounds of objection by the Attorney General and the plaintiffs are essentially that the nature of the suits is not novel or complex. The defences of the defendant are normal defences pleaded in defamation suits. The affidavit on behalf of the appellant did not state in detail the so-called serious and complex issue that would arise in the suits to the extent that local advocates and solicitors cannot handle. The issue on art. 10 of the Federal Constitutionhad been successfully argued by the local advocates and solicitors before the courts. Further, the appellant did not state that he was conversant with the Federal Constitution. The plaintiffs' additional objection is that the appellant's intellectual dishonesty and professional conduct had been demonstrated to be highly questionable over his article *"Justice Hangs in the Balance"* published in the Observer Newspaper in London on 28 August 1988 which viciously and scurrilously attacked the Malaysian judiciary, the government and the Prime Minister. The plaintiff also contended that the appellant has failed to comply with the requirements of ss. 11and 18 of the Actin that he is not literate in Bahasa Malaysia and has not passed the Bahasa Malaysia Qualifying Examination and neither has he been exempted from it as so required by s. 11(2) of the Act.

The learned judge in his grounds of decision in support of his dismissal of the four applications of the appellant, whilst acknowledging the support of the Bar Council and the Kuala Lumpur Bar Committee of these applications of the appellant and also the outstanding academic record of the appellant, chose to ignore them and in fact has held that it was illogical for the Bar Council to state that in the field of defamation and media law in Malaysia there is none among the local advocates and solicitors to match the special qualifications or experience of the appellant. Hence, he disagreed with the views of the Bar Council. Instead, the learned judge favoured the views put forward on behalf of the Attorney General. More so, in the light of the provisions of s. 3(1) of the Civil Law Act 1956wherein in West Malaysia, the principles of the English common law and the rules of equity after 7 April 1956 are no longer binding on the courts here. The local advocates and solicitors would be more learned than the appellant in the quest to shape the common law of Malaysia.

With all respect to the learned judge, we think that the learned judge has missed the point here in regard to the intent and purport of s. 18 of the Actwhich states:

> 18(1) Notwithstanding anything contained in this Act, the Court may, for the

purpose of any one case and subject to the following subsections, admit to practise as an advocate and solicitor any person who, if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court, and no person shall be admitted to practise as an advocate and solicitor under this subsection unless:

(a) for the purpose of that particular case he has, in the opinion of the Court, special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia; and

(b) he has been instructed by an advocate and solicitor in Malaysia.

(2) (Not relevant)

(3) Before admitting a person under this section the Court shall have regard to the views of each of the persons served with the application.

(4) (Not relevant)

(5) (Not relevant)

(6) In this section the words "cause or matter" include any interlocutory or appeal proceedings connected with any cause or matter.

We are of the view that in an application under s. 18 of the Actsuch as that of the appellant, the fate of the application before the learned judge depends entirely on the meaning and interpretation of s. 18(1)(a) of the Act, (subject of course to the compliance with the other provisions of the section) ie, in the appellant's case, whether or not on the evidence before the court, it is satisfied that for the purpose of the four suits, the appellant has special qualifications or experience of a nature not available amongst the advocates and solicitors in Malaysia. If the court is so satisfied, then the court is empowered to admit the appellant for the purpose of the four suits to represent the defendant as his lead counsel. Once the appellant is admitted on the basis of his acquisition of the special qualifications or experience required by the section, some of the concern of the learned judge ought to be left to the judge trying the suits. This s. 18 is a special provisions catering for the need of a litigant for a lawyer who is a non-citizen of, or a non-permanent resident in, Malaysia to represent him in place of those advocates and solicitors of the High Court being citizens of, or permanent residents in, Malaysia admitted to practise generally under the Act. So as to harmonise the interests of the advocates and solicitors of Malaysia with the wishes of a particular litigant who desires to retain a particular foreign lawyer, certain stringent conditions are imposed by s. 18 upon foreign lawyers as so spelt out in sub-s. (1)(a) thereof. If, however, this foreign lawyer meets the stringent conditions imposed by the sub-section, there should not be any grouse on the part of the local advocates and solicitors for giving way to this foreign lawyer because the qualifications or experience is of a nature not available amongst them. The court having satisfied of the qualifications or experience required, is then empowered to admit to practise as an advocate and solicitor this foreign lawyer to represent the particular litigant in respect of any particular case this foreign lawyer is called upon to represent. However, before admitting him, sub-s. (3) thereof requires the court to have regard to the views of each of the persons served with the applications. In the instant case before the learned judge, the views of

the two bodies concerned with the promoting and safeguarding the interests of the local advocates and solicitors ie, the Bar Council and the Kuala Lumpur Bar Committee, are of utmost importance in assisting the judge to make a decision as to whether the appellant should be granted his applications. But for extraneous reason, the learned judge ignored their views and decided to rely on the general assertion of the Attorney General and the plaintiffs that the cases are of ordinary types without having regard to the substance and the evidence supporting the applications. Unless the stand taken by the said two bodies representing the local advocates and solicitors are suspect, which we do not think so, they are in a better position to assist the court in determining the fate of the applications of the appellant.

As stated earlier, what should be the concern of the judge attending to the application of this nature is whether the appellant, in term of s. 18(1)(a) of the Act, has special qualifications or experience of a nature not available amongst advocates and solicitors here. The supporting evidence put forward by the appellant together with the stand taken by the two bodies representing the interests of the local advocates and solicitors, speak volume of the nature of the qualifications or experience of the appellant to be eligible to represent the defendant in the four suits as his lead counsel.

Before us, Dato' Azhar for the Attorney General, while contending that the qualifications or experience of the appellant was not its main objection, pointed to us that in the light of the phrase "if he was a citizen of, or a permanent resident in, Malaysia, would be eligible to be admitted as an advocate and solicitor of the High Court", the appellant must meet the requirement of s. 11(2) of the Act. This sub-section stipulates that as from 1 January 1984, no qualified person shall be admitted as an advocate and solicitor unless, in addition to satisfying the requirements of sub-s. (1), he has passed or is exempted from the Bahasa Malaysia Qualifying Examination. We see no merit in the contention because firstly, this s. 18 is not of general application. This section makes provisions for admission in special cases applicable to a foreign lawyer whereas s. 11 is of general application applicable to either a Federal citizen or a permanent resident of Malaysia as so stipulated by sub-s. (1)(c) thereof. Secondly, the opening words of s. 18(1) itself - "Notwithstanding anything contained in this Act" - takes it out of the ambit of s. 11 except that the applicant therein cannot be any person other than a person having the qualification to be an advocate and solicitor. In *Re Michael John Mustill[1970] 1 LNS 137*; [1971] 1 MLJ 175, a case relating to a matter of application made under the equivalent of s. 18 of the Actappearing as s. 8A in the repealed Advocates and Solicitors Ordinance 1947, an objection was raised that the petitioner had failed to show "special grounds" which were required to be shown under s. 5(5) thereof for the shortening of the statutory period of posting of the notice as well as for dispensation of reading in chambers. Yong J in his decision at p. 176 has this to say:

> In my opinion 'special grounds' imposed under section 5(5) for the shortening of the statutory period of posting of notices and the dispensation of reading in chambers are not relevant to application for *ad hoc* admissions under section 8A. To hold that 'special grounds' should be proved in addition to the conditions laid down in section 8A would render the granting of *ad hoc* admissions even more difficult than ordinary admissions to practice generally throughout Malaya at all times and this would stultify the objects of section 8A of the Ordinance.
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> Under sub-section (2) of section 8A the court is empowered to admit the petitioner if it is satisfied that he is a qualified person as described in sub-

> section (1) and has special qualifications or experience of a nature not available amongst advocates and solicitors in Malaysia for the purpose of that particular case which requires such qualifications or experience.

Similarly in the instant case of the appellant, by the nature of the applications and the special provisions provided by s. 18 of the Act, it cannot be the intention of the legislature to impose the requirements of s. 11(2)upon him. If admitted, the appellant cannot appear in the courts in all cases except for the four defamation suits to which his applications relate.

Dato' Azhar referred us to the case of *Re Andrew Hilary Caldecott QC[1998] 4 CLJ Supp 379*, also a case of an ad hoc admission under s. 18 of the Act. One of the issues raised in the case was in the light of the presence of the words 'would be eligible to be admitted as an advocate and solicitor of the High Court' whether s. 18 should be read together with s. 11 and in particular sub-s. (2) thereof. Referring to s. 11(2) Azmel J at p. 384 said:

> This is a policy of the government to effect maximum usage of Bahasa Malaysia in the courts. In order to be admitted as an advocate and solicitor of the High Court of Malaya as of 1 January 1984, an applicant, **permanent or otherwise,** must have passed his Bahasa Malaysia Qualifying Examination. (emphasis added).

On this issue, with respect, we cannot agree with the view expressed by Azmel J in regard to s. 11(2) in relation to an applicant under s. 18 of the Act. Apart from the opening words of s. 18(1) excluding anything contained in the Act, s. 11(2)must be read in the context of the requirement of sub-s. (1) which is applicable to either a Federal citizen or a permanent resident of Malaysia of which an applicant under s. 18is not such a person. The specific provisions in the Act applicable generally to an applicant to be admitted and enrolled as an advocate and solicitor of the High Court cannot be made applicable to an applicant in a special case of an *ad hoc* admission under s. 18 of the Act.

For the Attorney General it was further submitted that considering the statements of defence of the defendant and the affidavit in support, the four suits appear to be straight forward case. As such there is not a need for a person of the appellant as any local lawyer can easily handle them. We were referred the case of *Re B Larbalestier QC[1987] 2 CLJ 34; [1987] CLJ (Rep) 489*wherein Mohamed Dzaiddin J (as he then was) thought what the law intended to mean is that special qualification or experience were required to be of a quality and type which could not be had amongst the advocates and solicitors in Malaysia. So, the learned counsel asked whether the appellant's qualification cannot be found among local lawyers. To answer this question posed, we need only to look at the affidavit on behalf of the Bar Council mentioned earlier and also the evidence proffered in the affidavits filed on behalf of the appellant in support of the four motions.

As to what is meant by the words "special qualifications or experience of a nature not available amongst the advocates and solicitors in Malaysia" appearing in s. 18(1)(a) of the Act, the interpretation of Sharma J in *Lee Wong Tiang v. PP[1970] 1 LNS 58*; [1971] 2 MLJ 40 relating to the same words appearing in s. 8A of the repealed Ordinance is instructive. Beginning at p. 40 the learned judge said:

> The words 'qualification' used in section 8A(2)(a) denotes an accomplishment or a quality and the adjective 'special' qualifying it indicates that the

> accomplishment contemplated should be of an exceptional degree or such that excels in some way the measure of accomplishments reached by the advocates and solicitors of Malaysia. As I read sub-section (2)(a) the applicant should be such a person who, as a lawyer and on the evidence before the court, exhibits distinguished qualities or is devoted to a particular branch or field of law. Instances would be of persons who specialise, for example, in income tax law, or trade marks, divorce practice, shipping law, etc. and have achieved such heights in the exercise of their profession that they stand out as great luminaries in the firmament of law. The list of such examples can by no means be exhaustive. It all depends upon the particular qualifications a particular lawyer has or the particular subject to which he has devoted himself. There may be, for example, instances where a lawyer exclusively practises before the highest courts of the land, or the highest appellate courts of the various countries of the Commonwealth or other lands where the law is similar to our own.
>
> The words 'not available' used in sub-section (2)(a) seem to mean 'not obtainable.' It would thus seem that it is the excelling virtue born of the applicant's special qualifications or experience that has got to be considered and that excelling virtue must be such as outclasses the excellence to be found in the local lawyers. The special qualifications or experience are required to be of a quality and type which cannot be had amongst the advocates and solicitors in Malaysia. The applicant may have special qualifications or experience but that alone does not seem to be sufficient under the statute. He has to go further and satisfy the court that the special qualifications he possesses or the experience he professes to have are comparatively of such a type and character that no advocate and solicitor practising in Malaysia can be said to possess or equal that high degree of accomplishment which has been acquired or exhibited by the applicant. I have said earlier that in my view section 8A seems apparently aimed to facilitate the admission of those members of the Bar from other countries who have attained renown and distinction.

Looking at the evidence produced by the appellant and particularly the affidavit on behalf of the Bar Council in the light of the pleadings of the defendant in the four suits, we entertain no doubt that the appellant has satisfied the requirements of s. 18(1)(a) to be eligible to be admitted to practise as an advocate and solicitor to represent the defendant in the four suits as his lead counsel. That special qualifications or experience attained by the appellant is certainly of a nature not available amongst advocates and solicitors in Malaysia. We find that the learned judge when dealing with the applications of the appellant has not properly exercised his discretion under s. 18 to admit the appellant by taking into consideration extraneous matters more relevant for the consideration of the judge at the trial of the suits later.

As for the submission of the learned counsel for the plaintiffs, he adopts the submissions on behalf of the Attorney General. As to the experience mentioned in sub-s. (1) he named a few advocates and solicitors of the High Court who according to him have more than enough experience and in time of need these local lawyers could get written opinion from abroad. But this is contrary to the evidence tendered on behalf of the appellant and if overseas written opinion suffices, s. 18 of the Actwould be otiose and not in conformity with the wishes of the

legislature. As to the issue of the so-called intellectual dishonesty and professional conduct of the appellant, there is no evidence before the court that as a result of such publication, some action has been taken against the appellant in England or elsewhere with a view to disbar, disqualify or suspend him from practice.

My learned brother, Haidar bin Mohd. Nor, JCA has seen the judgment in draft and has agreed with the views expressed therein.

In the circumstances of this case, we are of the opinion that this is a fit and proper case to allow the four motions of the appellant. We hereby make an order admitting the appellant under s. 18 of the Actfor the specific purpose as stated in the four motions. The four appeals of the appellant are hereby allowed with costs here and below against the plaintiffs in the four suits.