ADVOCACY
and The Silk Road

inter se JAN – JUN 2008

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IT has been 20 years since the Academy's birth. Over the years, we have witnessed many changes including changes to our Senate Members and in the Judiciary, and even a change in our location from St Andrew's Road to Supreme Court Lane. We have seen a steady influx of Academy Members, as well as modifications in the delivery of legal knowledge on a new legal platform. The Academy's growth has taken place amidst the modernisation of our legal system.

One thing remains steadfast, and that is our commitment to promote and maintain high standards of conduct, learning and professional competence in the legal profession, and to foster fellowship and interaction among the different branches of the legal fraternity. We have tried to capture the Academy's baby steps in "Serving and Learning" under the Academy Buzz section. 2008 marks 20 years of our unstinting support of the legal community.

This issue, we feature the Senior Counsel Scheme, a scheme founded on the English Queen's Counsel system of Silks. Although Singapore's Senior Counsel have not adopted the outward garment of silk gowns and powdered wigs, the Scheme's objective remains the same, that of honouring those at the pinnacle of the profession, the *crème de la crème* of advocates. With this issue, we pay tribute to these advocates of distinction who have honed their skills to select what is most important out of a mass of material (especially in this electronic age of search engines which throw up lengthy search results) and marshal it to the most effective use. It would be remiss to forget their flair and finesse in the execution of this skill, for after all, advocacy is an art – the art of persuasion, of convincing others, of conducting cases in court.

There is a mistaken belief that advocates are just warmongers (with a *modus operandi* of "take no prisoners") or courtroom brawlers with a penchant for arguing. In truth, it takes more than just the love of a good argument to be a successful advocate. As with any art, skill, aptitude, dedication and experience are essential to create a masterpiece. None alone will take you on the Silk road to success. These requisite qualities, however, are not specific to Senior Counsel; they apply to all advocates. Our Q&A with a representative of the Selection Committee (the ones who say aye and nay to any SC applicant), will reveal as much, if not more.

In this "brief to counsel", we feature editorials on advocates, for advocates and written by successful advocates, past and present, with the aim of discovering more about advocacy, the experiences an advocate will likely face, and the road to successful advocacy. As you are reading, I trust some of you will look back and relish your own moments of adversarial glory.

Finally, we appreciate your support over the last 20 years. The Academy will not be where it is if not for that support. We look forward to another successful 20 years with you.

Warm regards,

Serene Wee

May it Please the Court:

An Opinion on Advocacy's Enduring Aspects

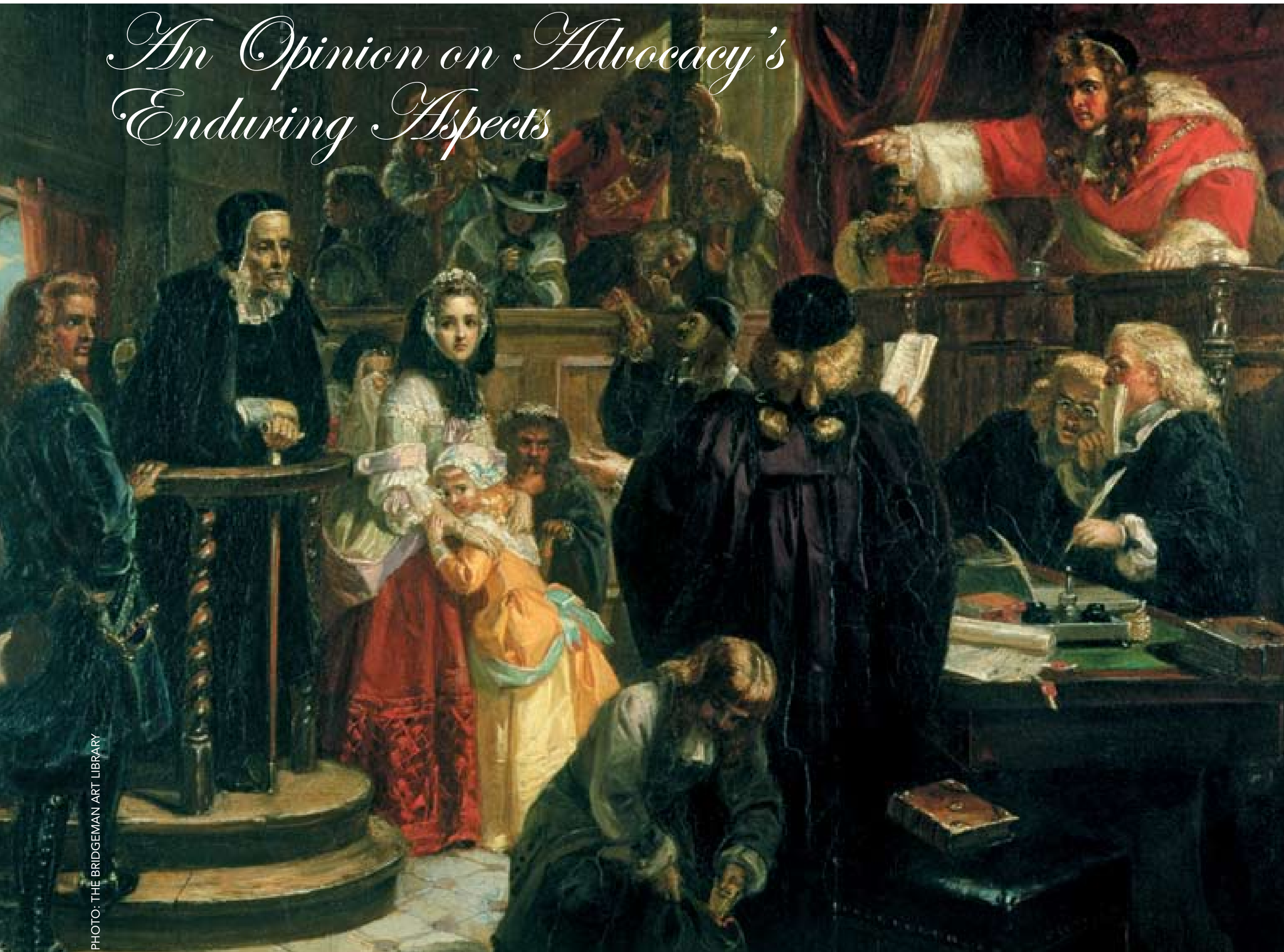


PHOTO: THE BRIDGEMAN ART LIBRARY

By **The Honourable Justice Choo Han Teck, Supreme Court**

THE HONOURABLE JUSTICE CHOO HAN TECK RUMINATES OVER THE PAST, PRESENT AND FUTURE OF ADVOCACY IN OUR COURTS AND OPINES ON THE QUALITIES THAT DEFINE AN ADVOCATE AND THE LOST ART OF ORAL ADVOCACY.

THE advocate in Singapore practises under a system of law he[1] understands as the common law system. How the common law system came to be and then how that system came to be ours are matters that beg a deep understanding of history and comparative jurisprudence, and are not the subject of this essay. The subject of this essay is more modest in its scope – an opinion on the qualities that defined an advocate then, defines him now and may define him in time to come. It is not being suggested that a study of past and present trends will enable one to predict the future of advocacy. Prediction belongs to a different art and the focus of this review is something deeper than trends. Rather, I hope that what follows will be taken as an invitation to think about the lasting qualities that constitute good advocacy.

One could draw up a long list of technical skills required for effective advocacy as a way of beginning to engage with the nature and significance of such skills over the last 30 years or so. Instead, as a starting point, I offer this proposition:

> The advocate finds work in the ruin and misfortune of his fellow man.

Such a caricature of the advocate as someone as much feared for his avarice as for his forensic skills abound in the works of Charles Dickens. This is of little surprise considering that Dickens himself had entered into no less than five Chancery suits to enforce his copyright in his literary works – the endeavour leaving him financially poorer for having won and causing him to declare that "it is better to suffer a great wrong than to have recourse to the greater wrong of the law".

The starkness of this unqualified description of the advocate as a heartless and shameless scavenger, concerned only with fees and fame, must neither define nor dishearten. Instead, it offers

1 Every lawyer would have been told that "man" embraces "woman".

two important insights into the role of the advocate. First, the advocate has an opportunity to alleviate rather than exacerbate the ruin and misfortune of his fellow man. Second, the advocate, through his professional conduct, bears significant responsibility for ensuring that public faith in the legal system is earned and maintained.

An advocate is a professional pleader of the *causes of others*. The denotative value of the word "advocate" lies in its Latin root "*advocare*" meaning "call (to one's aid)".[2] The advocate's primary duty therefore is to help the court, his client and his fellow advocate, and ensure that ruin and misfortune are minimised if not avoided where it is a just outcome. How effectively the advocate comes to the aid of those he serves is a combination of personal integrity, court craft and willingness to adapt to change.

Even though I would disagree with Dickens' harsh view of the law and lawyers, we are in agreement on at least one thing: "A word in earnest is as good as a speech".[3] Obfuscated thinking often manifests itself in verbose speech and a turgid writing style. Advocates in the past have traditionally been fond of sycophantic expressions and exchanges with each other as well as with the court, such as that between the Lord Chief Justice and counsel in the *Tichborne* case.[4] Modern trials are more straightforward, less verbose, almost to the point of being brusque. This approach has the virtue of clarity at the expense of sophistication. At times, however, subtlety is lost to crudity, or worse, vulgarity; complex points are rushed through. Gradual development of the point, whether of fact or law or of argument, may be forsaken.

While one should aim to have one word carry the weight of ten rather than to employ ten words to convey a solitary meaning, economy of words does not signify an economy of thought. There is no necessary connection between the two. The effective advocate must spend much time thinking about his case and when he is done with the substance, he should proceed to consider the form of his argument. This is the crucial stage when the advocate needs to pay special attention to his choice of words.

One noticeable change over the years has been the courts' growing reliance on the written word heralding a shift from advocacy being an almost exclusively oral art to an increasingly written one. In the past, with well-chosen words, counsel could coax answers from witnesses so that the evidence appeared to issue from the witnesses naturally. Where oral advocacy is concerned, the more expertly counsel does his job, the less the witness appears primed or coached.

2 Oxford English Dictionary ("OED Online") <http://www.oed.com>.

3 Charles Dickens, *Bleak House* (1852).

4 For a full account of the second longest trial (102 days) in British history, see Rohan McWilliam, *The Tichborne Claimant: A Victorian Sensation* (Hambledon & London, 2007); Fredrick Maugham, *The Tichborne Case* (Hyperion, 1975).

The use of the affidavit of evidence-in-chief* ("AEIC") has reduced the opportunities to nurture this forensic skill. It has also exerted pressure on the advocate to find a way to compensate for the lost opportunities that would have been had in the oral examination of evidence-in-chief.

Yet, although it has been some years since the affidavit of evidence-in-chief has replaced the oral testimony of such evidence, many lawyers have not developed the skills to make the best of this change. Lawyers, experienced and newly-qualified, find themselves in something of a catch-22 situation. The experienced lawyers who have thrived and excelled in an environment defined by oral advocacy are now having to change how they approach the trial and their role as advocates. Younger, less experienced counsel who learn much from the tutelage of their more experienced mentors find that they may not have as much guidance or as many sources of advice as they would like or need. It is here that, perhaps, a perspective from the Bench may be helpful.

When a witness tells his story by oral testimony, the judge will be listening to the witness's voice and watching the manner in which he tells his story. Thus, both the story and the storyteller are being evaluated simultaneously. When it comes to the affidavit evidence, the judge will be reading the evidence of the witness usually *as the witness's lawyer conceived it to be*. The result is that the evidence-in-chief loses the appearance of freshness and authenticity. It is no longer what the judge hears for the first time, out of the witness's mouth, in his own

> "The advocate's primary duty therefore is to help the court, his client and his fellow advocate, and ensure that ruin and misfortune are minimised if not avoided where it is a just outcome. How effectively the advocate comes to the aid of those he serves is a combination of personal integrity, court craft and willingness to adapt to change."

words, but the reporting of what the witness had told his lawyer in witness interviews.

Herein lies the challenge facing the advocate of today. No two witnesses are the same and in the course of a year, a lawyer may have to take up to a hundred statements from all sorts of witnesses – young, old, educated, illiterate and, most importantly, truthful and untruthful ones. The lawyer should realise that because the witnesses differ, he might have to adapt his draft of the affidavit accordingly. Unfortunately, this is almost never the case. From the way an affidavit is drafted, an attentive and experienced judge will not only know that it is not the witness's words on the page,

but he might even be able to tell which lawyer had drafted it. Often, the overly-drafted affidavit is the result of an advocate wanting a technically sound document at the expense of a document that is an accurate expression of who his witness is. How, then, does one reach an effective compromise and maximise the impact of the affidavit?

Some witnesses are extremely articulate and so it may be best, in such cases, for the advocate to use the witness's own words in his affidavit. In such a situation, editing may be kept to matters such as arranging which point is to be made first and which is to follow, and limiting the amount of detail or repetition so that the affidavit does not become verbose. The advocate may also advise the witness against exaggeration and stating other irrelevant matters. If the witness is not well educated, it would serve the advocate and his client well to encourage the witness to use short, simple sentences to give his testimony. The biggest problem with a witness who is not conversant with the English language is that what is stated in his affidavit is often a poorly-understood version by the recording lawyer. When the lawyer misunderstands or misinterprets the witness, it will require an improbable coincidence to have the court interpreter make the same mistake such that the witness's answer under cross-examination remains consistent. Inconsistency between affidavit and oral evidence is a prevalent problem in cases where the lawyer recording the witness's statement did not think it sufficiently important to use a qualified interpreter speaking through the language that the

"No advocate is entitled to encourage a witness to lie. He is, however, entitled to advise that certain details are not necessary or relevant and need not be offered unless asked."

witness was most familiar with. Finally, it is important to let the witness go through the affidavit himself as well as with his counsel so as to be sure that the witness is satisfied not only with the truth of the deposition but is also comfortable with the manner and style the assertions are made.

This leads us to another important facet of the affidavit of evidence-in-chief. It is indelible. A statement can be corrected, sometimes at the cost of credibility, but the original statement cannot be erased and remains on record. An oral statement once uttered also goes on record and in that sense, it too is indelible, but the crucial difference is that the statement in oral testimony is elicited by counsel at trial whereas counsel may not have looked at the affidavit of evidence-in-chief until long after it has been sworn and filed. An experienced advocate will know that this creates problems that he would rather avoid, but all too often, he does not have the time to prevent it.

The choice, however, is his. The counsel who has early familiarity with his witnesses' affidavits has the advantage over the one who has not.

It is a mistake for an advocate to assume the role of the scribe only. The advocate's professional duty requires him to prepare his witnesses for trial and he would not have done this properly if he had merely recorded what the witness had told him. The advocate has to be the first and foremost critic of his witnesses, and he must not let them take the witness's stand unless they are fully prepared. Here, it is important to say what this does not mean before saying what it does mean. No advocate is entitled to encourage a witness to lie. He is, however, entitled to advise that certain details are not necessary or relevant and need not be offered unless asked.

This allowance is sometimes dubiously used as an excuse by a lawyer hoping to encourage his witness to omit details by claiming that they are "unnecessary or irrelevant". What is the test to tell a genuinely unnecessary or irrelevant detail from an attempt at cheating? There is none save for the honesty of an advocate to depend on, and this, if taken to heart by every advocate, should be sufficient.

There are many legitimate ways in which an advocate can fairly control the amount of detail flowing into the trial. If, for instance, he has taken into account the basic rule that crucial evidence must be expressly and clearly adduced and irrelevant evidence excluded, he could use "intermediate" evidence as bait for his opponent. Intermediate evidence is evidence the absence of which does not harm the advocate's case but, if adduced at the right moment, works to emphasise aspects of the advocate's case. For example, if it were necessary to explain why the plaintiff left the country when she did, the advocate could advise the plaintiff that she need only tell the court, "in the last two years of the marriage the defendant had been unkind to me", without having to say what exactly the defendant had done to be unkind in those two years. Experienced opposing counsel would not fall for such a manoeuvre and would respond simply by saying, "my client denies that he was unkind to yours, but we will hear it from him directly when he testifies" and no more. If he takes the bait and asks, "Can you explain in what ways the defendant was unkind to you?" he is inviting trouble.

There is one more point to make about the written word in advocacy and this is in

connection with the opening address and the closing address, which have become popularly known as the opening statement and the closing submission respectively. The opening statement has become a written document and it is more common nowadays for counsel to hand in written submissions to the court. The written word is the stronger invitation to verbosity. When one is given time and space to write, one may tend towards prolixity. As has been pointed out, advocacy as it was practiced, and the oratorical skills required, take on a different character in the light of such a shift. The root nature and purpose of advocacy, however, do not. Hence, the advocate today should study how the great advocates of the past conducted their trials with oratory instead of authorship – by guarding against excess.

The advocate should master the art of weaving the fabric of his case from common threads connecting the opening address, the evidence, and the closing speech. In the opening address, the advocate tells the court what the case is about, briefly, and what he has to prove and how he intends to prove it. The advocate then leads evidence and challenges the evidence of the opposing party, and when all evidence has been adduced, the advocate delivers his closing speech, telling the court why judgment should be returned in his client's favour.

It is not uncommon nowadays for the court to either invite or permit the advocate to make a short oral opening address as well as a brief oral closing speech in addition to allowing written opening and closing statements. This is a modern modification

"The advocate should master the art of weaving the fabric of his case from common threads connecting the opening address, the evidence, and the closing speech."

that the advocate should think about so as to make the best use of what is a double privilege. To each his style, but it may seem sensible to leave the details to the written statements where references and cross-references can be usefully made to the sources of the evidence as well as the authorities cited. Counsel may then concentrate on making an oral address that is an embodiment of the best qualities of advocacy (whether written or spoken) – words used forcefully, eloquently and succinctly.

The wig of yesteryear might have gone, the sombre dress of present days may one day also become obsolete, but, however he dresses in future, there is no likely substitute for the mesmerising voice of a well-trained advocate pleading his client's cause in court, a voice carrying the weight of reason, sweetened with graceful brevity. That never fails to please the court. *IS*

* More on the AEICs may be viewed at p12 of this issue of *Inter Se*.

FAIR GAME:
ADVOCACY, THE WITNESS AND THE PURSUIT OF JUSTICE

By **Thio Shen Yi, Legal Practitioner**

HOW DO ADVOCATES, ON A PRACTICAL LEVEL, BALANCE THEIR FUNCTIONS AND LOYALTIES AS OFFICERS OF THE COURT AND REPRESENTATIVES OF THEIR CLIENTS? HOW DO THEY FIGHT FOR THEIR CLIENTS WITH ROBUSTNESS AND INTENSITY, YET AVOID SUBVERTING THE TRUTH, PERHAPS EVEN UNWITTINGLY? HOW DOES FIDELITY TO THE TRUTH OVERRIDE AN ADVOCATE'S OBLIGATION TO ADVANCE HIS OR HER CLIENTS' CASES? THESE TENSIONS AND CONFLICTS ARE THE FOCUS OF THIS ARTICLE.

WE all accept the reasons for affidavits of examination-in-chief ("AEICs"). They save time and aid the preparation of cross-examination. AEICs clarify and sometimes narrow factual disputes. They allow us to "manage" the impact of the information presented and thereby assist us in advancing the clients' case. To what extent do they assist the court in getting to the truth? How may they best be used in a way that facilitates the pursuit of justice? Here are some observations gathered from my experience as an advocate thus far – though I am sure that there is still much to learn.

AEICs AND ORAL EXAMINATION-IN-CHIEF

Where the emphasis of a case is on non-documentary evidence, and where witnesses are likely to contradict each other, it becomes important for the court to assess the credibility of a witness, and the quality of a witness's recollection. Does the witness actually recall the event, or is it an *ex post facto* reconstruction of what should or was likely to have happened? With AEICs, the court is limited in its ability to observe the demeanour of the witness. The judge is presented with a sanitised version of events. A witness's level of doubt or confidence in the quality of the recollection is not communicated. Words may be put into a witness's mouth, and what may have been a messy and chaotic event is reconstituted with more order and discipline in its re-telling. Often, with grammatical, precise and cogent drafting, a witness appears to recall things more concretely; statements of fact are drafted more confidently, and the evidence appears a lot more definite than it actually is. The judge sees evidence which does not communicate the nuances of doubt or degrees of confidence; and sometimes, the evidence may radically depart from reality.

Is there a case for going back to the oral examination-in-chief? Probably not. AEICs are meant to save time, and they do. However, the practice of exchanging affidavits started when evidence was recorded by hand, and the pace of a trial was constrained by how fast a judge could write. We now have audio recordings, and the possibility of "live" or "next day" transcripts. Oral evidence-in-chief would still slow down a case, but this would be balanced by other savings in time. I suspect we cannot fully turn back the clock. So how do we allow the court to hear and assess a witness's testimony in its unedited form? One or two modest proposals come to mind.

First, a trial judge or tribunal can direct that certain evidence be adduced orally, perhaps where evidence is likely to be both material and contentious. All other evidence, much of which may be formal, background or undisputed evidence, can be set out in affidavits. The evidence to be adduced orally can be set out broadly in an un-sworn witness statement, or a summary of the evidence intended to be adduced. This preserves the advantages of the current procedure, and avoids "trial by ambush". With the introduction of a "docket" system where the trial judge is appointed in advance and manages the interlocutory stages of a case, this becomes practicable. However, this may be too radical a change from the existing process.

This leads us to a second suggestion. We should ensure that the text of the affidavit represents, as closely as possible, the voice of the witness. It should be a true reflection and representation of a witness's narrative, speech patterns, degree of certainty in his or her recollection. Obviously, left to their own devices, witnesses do not always narrate events in a strict chronological or sequential manner. Memories can be elusive, events which are recalled with clarity are not always explained with the same clarity, but jumbled up and juxtaposed with other events out of sequence; language is used imprecisely and inconsistently; a witness's knowledge can be derived from many sources including conjecture, hearsay, *ex post facto* rationalisation and inferences as to what probably happened.

While lawyers have to impose organisation, intelligibility and precision (and correct grammar!) to the evidence adduced, should we not be alive to the vagaries of evidence, and seek to communicate the quality of the evidence in as realistic a way as possible? The precise degree of any one witness's recollection may be from 0–100%, and it is perfectly legitimate for a witness to depose that an event did or did not happen, but that he or she cannot be absolutely sure. Where a witness has reconstructed or recalls events after being directed to and refreshed by contemporaneous documents, that should be explained. This may be easier said than done as the advocate's job is to present the case in an advantageous manner to his client. But from the perspective of assisting the court to find the truth, or to arrive as close to the truth as is possible, might not

managing the evidence in this way risk subtle misdirection?

Perhaps to ameliorate this, simple steps can be taken, starting with the use of language and the choice of words[1]. Many of us may have experienced instances where a witness did not understand words or phrases used in the affidavit. Less egregiously, words and phrases, while understood by a witness, may clearly not be part of his or her vocabulary. These instances are met more often than not, only with mild irritation or grudging tolerance by the judge, rarely with admonishment. There are limited disincentives to continue "managing" the evidence in the AEICs. As a better practice, one that is more faithful to accuracy of both sense and sentiment, perhaps we should try to draft AEICs using the natural speech patterns of a witness as far as grammatically possible. Most people speak in short sentences, use direct speech and active verbs[2]. Yet affidavits are overlaid with passive verbs, indirect speech, and sentences that are paragraphs in themselves. If such affidavits were treated with greater scepticism by the court, and if that were communicated to counsel, it could encourage advocates to take more proactive measures to ensure consistency between what a witness would say orally, and what appears in written form. It should be open to opposing counsel to contend and argue that the affidavit as a whole should be accorded less weight as it was not a substantially accurate representation of the actual evidence. If these arguments meet with some success from time to time, that would probably have a direct impact in the way affidavits are drafted.

"As a better practice, one that is more faithful to accuracy of both sense and sentiment, perhaps we should try to draft AEICs using the natural speech patterns of a witness as far as grammatically possible."

THE WITNESS AND CROSS-EXAMINATION

Of course, a witness is still subject to cross-examination, and arguably, this is where the demeanour and credibility of a witness is revealed. This, however, only mitigates the problems arising from an overly-polished AEIC and cross-examination becomes prolonged. First, it may be necessary to deconstruct and rebuild a witness's evidence to properly understand its true impact, and the degree to which the witness has confidence in his or her own testimony. Only after that can one test, clarify and, if necessary, attack the evidence. In the interests of justice, the unedited truth should emerge as early as possible. Further, to rely on cross-examination to discover the whole truth about the witness is not always the most effective method. While cross-examination does reveal truth and clarify answers, witnesses can be guarded, defensive or intimidated. While they sometimes show their true colours, at other times, these colours go into hiding. Honest witnesses can be made to look evasive, disingenuous or confused under skilled cross-examination, or frightened into making unjustified concessions under aggressive cross-examination. They do not always acquit themselves with honour even when telling the truth. Further, as demeanour is not observed during a relatively stress-free oral examination-in-chief, the court cannot compare that demeanour against their observations of the witness during cross-examination. The first time a judge hears substantive evidence from a witness is when that witness is under hostile fire.

The great Roman lawyer Marcus Tullius Cicero was reputed to have remarked, "When you have no basis for argument, abuse the plaintiff."[3] The Roman Senate may have been the arena for verbal gladiatorial contests, but the common law system has long removed itself from trial by combat or trial by ordeal. It is true that our adversarial system requires and depends on fearless, robust cross-examination. It is the crucible in which evidence is refined and clarified, and where the evidence is false or exaggerated, reduced to ashes. It is a tool to seek truth, to hunt for and expose inconsistencies in specific instances. We are reminded of the power and cautioned of the danger of cross-examination in a classic American treatise on the subject:[4]

> Not even the abuses, the mishandlings, and the puerilities which are so often found associated with cross-examination have availed to nullify its value. It may be that in more than one sense it takes the place in our system which torture occupied in the mediaeval systems of the civilians. Nevertheless, it is beyond any doubt the greatest legal engine invented for the discovery of truth … A lawyer can do anything with a cross-examination if he is skilful enough not to impale his own cause upon it. He may, it is true, do more than he ought to do: he may "make the worse appear the better reason, to perplex and dash maturest counsels" – may make the truth appear as falsehood. But this abuse of its power may be remedied by proper control.

It is therefore important that we constantly remind ourselves that cross-examination is a privilege that must be treated with respect. It is the "principle test which the law has devised for the

1 As a graphic illustration of this, it is not uncommon to see words used by witnesses in affidavits that would never see the light of day in normal 21st century conversation, *eg*, verily, therein, thereto, hereinbefore, hereinafter, aforesaid, said, crave leave, vicissitudes, contemporaneous, reprobate, repudiate, innominate *ad nauseam*.

2 See, for example, any of Ernest Hemmingway's novels or Lord Denning's judgments to get a sense of this.

3 In fairness to Cicero, this is attributable to him as a "humourous" quote. He did also say that the "foundation of justice is good faith".

4 John Henry Wigmore & James Harmon Chadbourn, *Evidence in Trials at Common Law* (Chadbourn Revision, 1970).

ascertainment of truth"[5] and a valuable weapon for testing the veracity of a witness and the accuracy and completeness of his story. It is entrusted to counsel in the confidence that it will be used with discretion, and with due regard to the assistance to be rendered by it to the court, not forgetting at the same time the burden that is imposed upon the witness.[6] No matter how robust and aggressive the cross-examination, it has to be tempered with fairness to ensure that we get to the truth, and not just our clients' versions of the truth.

For example, fairness requires a witness to be allowed to respond to facts or allegations that purport to contradict his or her evidence. It allows the judge to hear both sides of the story. Rule 60(*g*) of the Legal Profession (Professional Conduct) Rules (Cap 161, R 1, 2000 Rev Ed) states that the advocate is not entitled to make an allegation against a witness whom he had the opportunity to cross-examine unless he gave the witness an opportunity to answer the allegation in cross-examination. The court and the opposing party are protected from being blindsided. The court is also not required to consider an argument without the benefit of all the evidence.

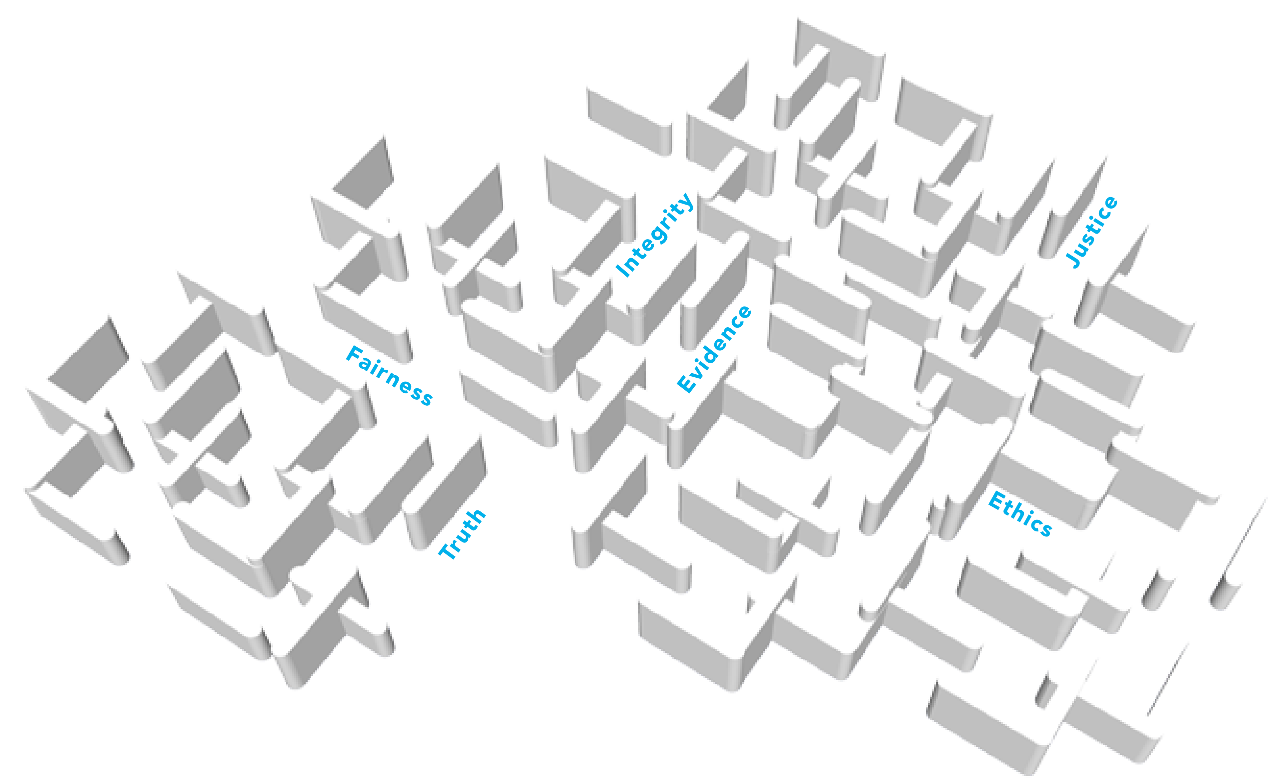
Related to this is the rule in *Browne v Dunn*, where if a submission is going to be made about a witness (*eg*, bias) or the evidence given by that witness (*eg*, facts going to contradict that witness's testimony), and that witness was not given an opportunity to address, counter or respond to that submission because it was not put to him by the other party, then that submission cannot be made. However, this is not a rigid technical rule. Not every point has to be put to the witness. The submission or the point made must be of such a nature or of such importance that fairness dictates that it should have been put to a witness. It is also not a rhetorical formula which is satisfied by a recitation of a party's case to a witness, with an invitation to agree or disagree.[7] In fact, if counsel on cross-examination recites a series of "puts" to the witness, and insists only on a "yes" or "no", "agree" or "disagree" answer, that may itself be unfair as it may seek to constrain the evidence or elicit an incomplete answer. Again, that is not helpful for discovering the whole truth. Obviously, where a point has been canvassed and explored in cross-examination, it does not need to be "put" to a witness. Even if it is done out of an abundance of caution, a witness does not have to repeat his prior answers and can give a more limited response. Advocates need to seek a balance between efficiency and caution, as failing to put a point to a witness, if it was material enough, could imply acceptance of the evidence-in-chief.[8] Another

5 Sir Matthew Hale, *The History of the Common Law in England* (1713).

6 *Mechanical & General Inventions Co v Austin* [1935] AC 346 at 359; cited with approval in *Wong Kai Chung v The Automobile Association of Singapore* [1992] SGHC 16.

7 See *Hong Leong Singapore Finance Ltd v United Overseas Bank Ltd* [2007] 1 SLR 292 at [42]; see also *Lo Sook Ling Adela v Au Mei Yin Christina* [2002] 1 SLR 208 and *Ong Jane Rebecca v Lim Lie Hoa* [2005] SGCA 4.

8 *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 1 SLR 720.



aspect of fairness is the need to treat witnesses with due courtesy and respect. This is not weakness on the part of the cross-examiner, and such respect and courtesy "is by no means inconsistent with a skilful, yet powerful cross-examination".[9] The privilege of cross-examination must be used responsibly, and cases "can be conducted with the greatest vigour, without discourtesy and insult to witnesses and no room should be left for an uneasy feeling to be created". The purposes of cross-examination "can be and are generally achieved without using language which in ordinary society would be regarded as insulting or offensive. The privilege to counsel to use in court language which would not be tolerated out of

9 *Mechanical & General Inventions Co v Austin* [1935] AC 346 at 359; cited with approval in *Wong Kai Chung v The Automobile Association of Singapore* [1992] SGHC 16; see also r 61 of the Legal Profession (Professional Conduct) Rules.

> Scare tactics or aggressive questioning does sometimes work, but at other times, is counter-productive for getting to the truth, and therefore a degree of restraint and discretion is called for.

court is only justified when the ends of justice require it. The cases when it is justified are not common".[10] Yet, this frequently is a rule more honoured in the breach than in the observance.

Not all witnesses are equal. Some are confident, others are tentative. Some speak cogently, others ramble. Some are articulate, others have an indifferent command of English. There are witnesses who come to court with an intention to lie or be economical with the truth. Others have convinced themselves that their version of events is the truth. Still others have poor recall, but fill in the gaps of what might have been; and others while telling the truth, either tell it badly, or from their own perspectives which may not be in accord with your client's views. One cannot take a broad brush approach and treat them as or accuse all of them of being liars just because their evidence does not conform to your client's case. While that may amount to a satisfying performance for the client, it does not always advance the cause of justice. Judicial Commissioner V K Rajah (as he then was) cautioned, "While counsel are allowed to probe a witness for consistency and credibility, the micro-dissection of the evidence of an unschooled witness will often produce some inconsistencies. Indeed, it has often been said … that a witness who can give flawless evidence may be treated with some caution as perhaps a rehearsed witness."[11]

We all know that some witnesses have to be shaken and broken down in order for the truth to emerge. The cross-examination must be robust, aggressive, even accusatory. However, other witnesses may not be of similar constitution. To the uninitiated, court proceedings can be intimidating, and the interrogative nature and artificiality of cross-examination induce tension and nervousness. This is exacerbated if they make minor errors of recollection or are inconsistent on non-material detail, and counsel takes advantage of this to excoriate them, often for no other purpose than to soften them up for later questions. Do we get good, reliable evidence from petrified witnesses? As a minor digression, I once put an otherwise confident and blunt contractor on the stand. He was in court for the first time, and when cross-examined, was so nervous that he referred to the judge as "Your Majesty"! Aggressive and robust cross-examination can reduce an honest but timid witness to jelly, and it is possible that they will either say anything to get the ordeal over and done with, including agreeing to any answer that the cross-examiner suggests, or their answers become confused and equivocal. This may be good for our client, but undermines the court's ability to arrive at the truth. Aggressive or hostile cross-examination may alienate a witness, or make a defensive witness even more defensive, with the result that they become non-communicative, and restrict their responses to monosyllabic replies when more detail is called for. Again, we only get to part of the truth, not the whole truth.

I am reminded of a case with a Senior Counsel on the other side, where it was clear that he disagreed with the evidence of a foreign witness. He never once accused the witness of being a liar, but when challenging the evidence, would say almost regretfully to her, "I am sorry that I must say this to you, but I suggest that the last statement you made is simply not true." That was a measure of courtesy and graciousness that left an impression on the witness, who commented favourably on the dignity and respectfulness of court proceedings in Singapore. The point to take from this is that scare tactics or aggressive questioning does sometimes work, but at other times, is counter-productive for getting to the truth, and therefore a degree of restraint and discretion is called for.

Another practice which could result in unfairness is when counsel is overzealous in controlling the witness in the course of cross-examination. It is not uncommon to see counsel, when cross-examining the witness, insist on a "yes" or "no" answer. When such an answer is forthcoming, but the witness wants to qualify or expand on the answer, the cross-examiner cuts off the witness and refuses to let the witness continue. Insisting on a "yes" or "no" answer is fair enough because if such a response is not given and the witness launches into an explanation or qualification, he or she will be explaining or qualifying an answer which has not actually been given. I am, like many others, guilty of this. Our usual justification is that the witness needs to be controlled, the explanation may not be relevant, or that the witness is answering an anticipated question and not the actual question.

However, some hazards do arise when witnesses are cut off repeatedly. The court builds up a record of incomplete responses. Counsel then uses these incomplete responses as the basis of challenging subsequent answers. The witness's responses may not make sense in the absence of those explanations or qualifications that he or she was trying to give before being cut off. Sometimes a witness answers a question on the basis of these yet to be articulated explanations or qualifications, and the cross-examiner and witness talk at cross purposes, rendering the cross-examination otiose. None of this helps the court determine the true state of affairs. My view is that with the benefit of an audio transcript, there is no harm in giving the witness some latitude, to dispel any subsequent objection that a witness was not allowed to give a complete answer. The additional time used is marginal. On occasion, a witness, given sufficient

10 Per Hope JA in *Albrighton v Royal Prince Alfred Hospital* [1980] 2 NSWLR 542 at 782.

11 *Cheong Ghim Fah v Murugian s/o Rangasamy* [2004] 3 SLR 193.

opportunity to explain, may even end up discrediting themselves by the content or manner of that explanation.

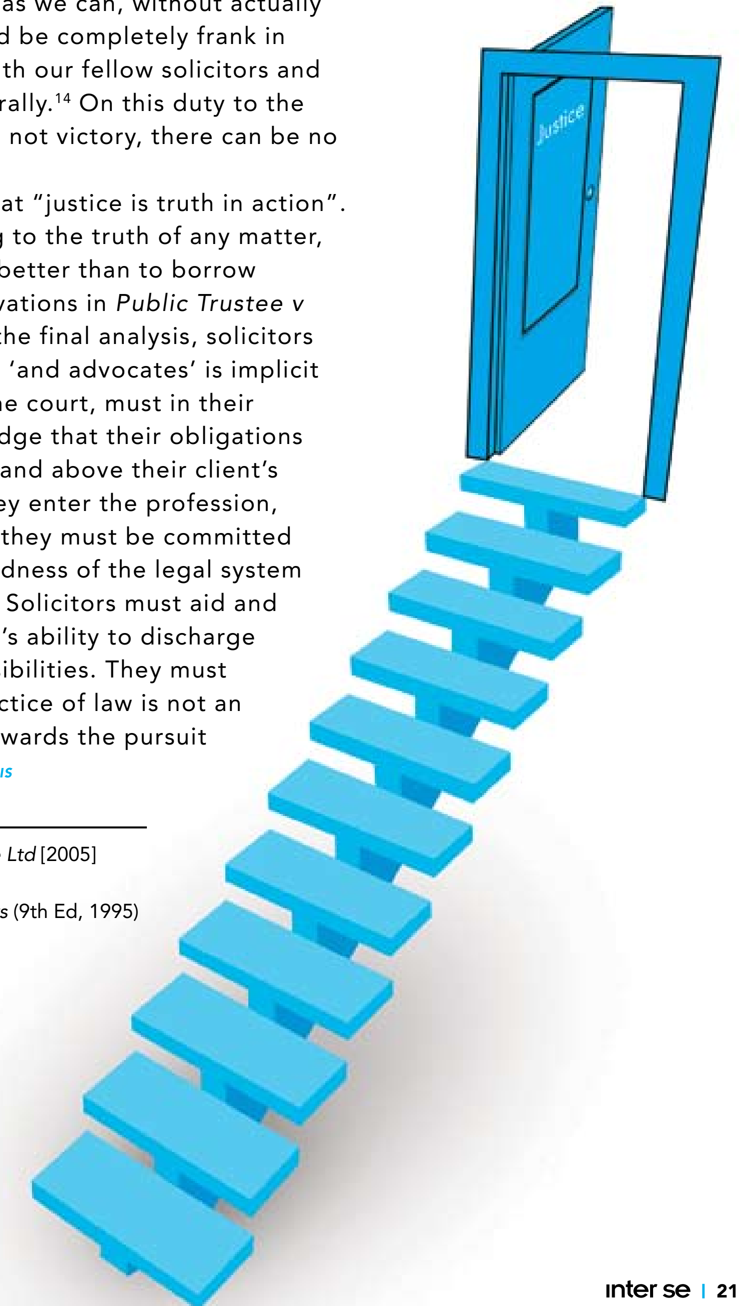
Continuing in this vein, cutting off a witness can be hazardous to one's own case. I recall a case where my witness was repeatedly cut off when he was trying to explain or qualify his "yes" or "no" answers. Later in the cross-examination, he would be asked questions like, "You said 'yes' just now, that cannot be correct because ...". As he had been unable to qualify the previous "yes" answer, and was not allowed to qualify his current "yes" or "no" answer, the evidence, on its face, was inconsistent or unintelligible. To his annoyance, he was continuously accused of lying, but still not allowed to justify his answers. I raised continuous objections over the course of the cross-examination, requesting that the witness be given a chance to explain, and predicted that much of my re-examination would simply be asking him to complete his answers. I added that if this happened, following re-examination, opposing counsel would ask for a second round of cross-examination. The trial judge noted this but chose not to interfere. Subsequently, on re-examination, the witness was able to rebut and explain the accusations made in cross-examination. As anticipated, opposing counsel asked for leave to cross-examine on these explanations. I objected saying that if the cross-examiner chose to cut off the witness on almost every occasion, he could not get a second bite off the cherry. The judge agreed. While this was procedurally correct, we lost the opportunity to test the information that would have otherwise emerged during cross-examination but for the witness being cut off.

Perhaps we need a change of mindset to see cross-examination as a tool to help the court unravel the truth, instead of using it as a tool to force the evidence into our case theory. Most counsel never consciously attempt to mislead the court, but we are human, and do try in subtle ways to make the evidence conform to our client's theory of the case. The checks and balances lie in our conscience as officers of the court. Counsel need to be alert to the need to keep the cross-examiner in check, to object when witnesses are badgered, or when they are not allowed to complete their answers. It is our role to assist the court when we think that the cross-examination is being abused, or the witness is being bullied. The role of the court is to play referee (while judges can protect witnesses, they should not automatically be expected to do so[12]), and ultimately develop some level of consensus on how they deal with overzealous or over-robust cross-examination.

OUR DUTY TO THE COURT AND THE PURSUIT OF JUSTICE

While we can present our client's cases in the best light reasonably possible, we need to be frank and candid about any problems which may affect or compromise that position. Our duty of candour in any given case is "indivisible, uncompromising and enduring".[13] This is not fulfilled if we are economical with the truth. It has been said that so far as we can, without actually letting our client down, we should be completely frank in all our dealings with the court, with our fellow solicitors and with members of the public generally.[14] On this duty to the court in our pursuit of justice and not victory, there can be no compromise.

Benjamin Disraeli once said that "justice is truth in action". Without a commitment to getting to the truth of any matter, justice is not served. I can do no better than to borrow Justice V K Rajah's parting observations in *Public Trustee v By Products Traders Pte Ltd*, "In the final analysis, solicitors [because of our fused profession, 'and advocates' is implicit in this reference], as officers of the court, must in their dealings with the court acknowledge that their obligations to the court reign supreme, over and above their client's and their own interests. When they enter the profession, solicitors accept a responsibility, they must be committed to ensuring the sanctity and soundness of the legal system and the administration of justice. Solicitors must aid and assist, and never impair the court's ability to discharge its impartial adjudicatory responsibilities. They must recognise and affirm that the practice of law is not an amoral business geared purely towards the pursuit and satisfaction of private ends." *IS*



12 Though from observation, and anecdotal evidence, judges have since the early 90s become progressively less tolerant of rude cross-examination or badgering of a witness.

13 *Public Trustee v By Products Traders Pte Ltd* [2005] 3 SLR 449 at [30].

14 Michael Cook *et al*, *Cordery on Solicitors* (9th Ed, 1995) at para 1404.

IN DEFENCE OF THE DEFENSIBLE: AN OVERVIEW OF THE SENIOR COUNSEL SCHEME

PAUL TAN OUTLINES THE EVOLUTION OF THE SENIOR COUNSEL SCHEME AND FOCUSES ON THE EFFECTIVENESS OF SUCH A SCHEME.

By **Paul Tan, Legal Practitioner**

IS the Scheme of appointing Senior Counsel ("SC") too blunt as an instrument for recognising good litigators? Does the Scheme distort the free market? Does it serve any purpose given the present plethora of legal publications that rank lawyers? Or has the Scheme been successful in its original aims of raising the standard of the local Bar, to inspire young lawyers and to create a ready pool of lawyers from which judicial candidates may be sourced?

The recent Horizon Towers saga brought together five SC, and their performances were so riveting that one spectator was reported saying, "Can you imagine a young lawyer doing it? He would have been slaughtered." We expect, of course, that SC would always be equal to the task. But the perception that lawyers who are not SC are no match for SC may be somewhat unfair. On the tenth anniversary of the inception of the SC Scheme, this article reflects briefly on how the Scheme began and has evolved, evaluates its effectiveness today, and questions its relevance in the future.

A BRIEF HISTORY

Although the first batch of SC was appointed in 1997, the legislative framework for such appointments had already been passed some ten years before that. In 1989, the Legal Profession Act (Cap 161, 2001 Rev Ed) (the "Act") was amended to allow the appointment of SC to those with standing of at least ten years, if, "by virtue of that person's ability, standing at the Bar or special knowledge or experience in law he is deserving of such distinction".

As Minister for Law, Prof S Jayakumar then explained, "our [SC] will, in effect, be the local equivalent of Queen's Counsel in England and it is hoped that these leaders at the Bar will provide the inspiration for the younger members of the profession to strive for excellence in their profession". [*Singapore Parliamentary Debates, Official Records* (17 February 1989) vol 52 at cols 744–745 (S Jayakumar, Minister for Law).]

The Queen's Counsel ("QC") scheme which is the basis of our SC Scheme may be traced back to the 16th century

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when leaders of the Bar were appointed as King's Sergeants as advisers to the Crown. Appointments to the common law court Bench came only from their ranks. However, their role diminished with the appointment of the King's Attorney (the equivalent of Attorney-General ("AG")) and the King's Solicitor (the equivalent of Solicitor-General ("SG")). Consequently, a body of assistants to these two principal legal officers was created and they were known as the King's Learned Counsel. In time, however, the King's Learned Counsel were regarded more as ranks of distinction than as deputies to the AG and SG. Following from this more modern development of the scheme in England, our SC Scheme is patterned on appointments being ranks of distinction; awarded in recognition for the highest standards of professionalism and legal expertise.

By operation of s 30(3) of the Act which deems the AG and the SG to have been appointed as SC, the first SC to be appointed were former Attorney-General Tan Boon Teik and former Solicitor-General Koh Eng Tian. Interestingly, although the Act permits all Legal Service officers to be eligible for appointment as SC, it is likely that the only legal service officers who will be conferred the title of SC will be the AGs and SGs. The rationale behind this, as former Chief Justice Yong Pung How explained in his speech at the Opening of the Legal Year in 1997, is that the Legal Service is a graded service with its own *indicia* of recognition.

The first, and largest, group of practitioners appointed as SC was comprised of only male lawyers, and was described by the press largely as general litigators. Appointments, however, have since diversified. The second group of practitioners appointed as SC included three female lawyers (one of whom, Ms Belinda Ang Saw Ean, now sits on the High Court bench), as well as specialists such as Mr Steven Chong, who is known for his expertise in shipping. Over the years, the pool of appointees has included practitioners in small firms (Mr R Palakrishnan in 2001), criminal defence lawyers (Mr Palakrishnan in 2001 and Mr Sant Singh in 2007), and academics (Prof Tan Cheng Han in 2004, who also practises occasionally). Another academic honoured with the title of SC, Prof Andrew Phang Boon Leong, is presently Judge of Appeal of the Supreme Court of Singapore.

A CYCLE OF CREATING AND RECOGNISING TALENT?

As a mark of distinction, the appointment of SC was intended both to recognise a maturing Bar and to incentivise the local Bar to raise its standards of advocacy. Not only would the desire to be conferred the title of SC be a powerful rousing factor for lawyers generally, those who are appointed as SC are likely to be stimulated to work even harder in order to meet the higher expectations of them. In this regard, Mr Michael Hwang SC, who was among the first to be appointed as SC, believes that the Scheme has probably gone a long way in promoting excellence among litigators.

Our courts, too, share this view, and have demonstrated this in their growing reluctance to admit QC on an *ad hoc* basis.

Indeed, in the year before the first batch of SC was appointed, it was reported that approximately 20 cases were being handled by QC; whereas in the last ten years,

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the number of QC admitted on an *ad hoc* basis have been few and far between. Notable exceptions include Charles Gray QC in the defamation case between then Prime Minister Goh Chok Tong and Tang Liang Hong; Jules Sher QC in the Singtel-IDA dispute; and Michael Jacob Beloff QC and Stuart Lindsay Isaacs QC in the Japura-Singtel dispute.

In an oft-cited passage, the late Justice Lai Kew Chai praised local lawyers in the following terms (see *Re Flint Charles John Raffles QC* [2001] 2 SLR 276 at [9]):

> [T]he local Bar has matured and is acquitting itself commendably. There has been forged and carefully nurtured, particularly over the last ten years, a body of [SC], potential senior counsel and an impressive group of young advocates and solicitors, both in the public service and in the private sector, with excellent academic credentials and a right attitude.

Most recently, Tay Yong Kwang J in *Re Millar Gavin James QC* [2007] SGHC 178 went further and observed that "as the local Bar continues to mature and the number of SC increases", allowing QC to be admitted even on an *ad hoc* basis would be "increasingly incongruous".

Together with raising the standard of the local Bar, one of the aims of the SC Scheme was to "create an elite set of lawyers who could form a pool from which future judges could be selected" (see the Singapore Academy of Law *Newsletter* (February 1997) at p1). Statistically, of the six appointments to the High Court bench from outside the Singapore Legal Service after the SC Scheme took root, four were SC at the time of their appointment to the Bench. Of the three Legal Service officers appointed to the Bench, two were SC by virtue of s 30(3) of the Act.

Although these statistics are not conclusive, they show a strong correlation between SC and judicial appointments. This is not surprising given that many of the qualities required of SC – including intellectual prowess, professional skill and ethical bearing – are the same qualities one expects of judges. However, there are other qualities that one looks for in a judge – judicial temperament and a desire for public service, for example – that perhaps explains why the correlation is not exact. It would be inaccurate, therefore, to view the title of SC as restricting the field from which the higher Judiciary is selected, or viewing the rank of SC as a prerequisite to a judicial appointment. In truth, even if one may look to the pool of SC as an obvious source for judicial candidates, the two appointments are probably sufficiently different and should be regarded as positions of honour in their own rights.

DOES THE SC SCHEME DISTORT THE FREE MARKET?

If SC are regarded, in some respects, as first among equals, and even form the bulk of judicial appointments, can it be argued that the SC Scheme exercises a distorting effect on the free market? When abolition of the QC scheme was debated in England, one of the arguments in favour of abolition was that the scheme was unnecessary because the free market could serve the same function. Moreover, some went as far as to suggest that it distorted the free market since it created the impression that the only lawyers worth hiring were QC because as clients continually turned to QC, even very good junior barristers might be deprived of the opportunity to be engaged for the best work.

This worry, as it is relevant to the SC Scheme, has been a cause for some study and debate in Singapore. Statistics gathered (albeit from a very small sample size over the last two years) suggest that as a percentage of cases heard in the High Court and Court of Appeal, SC do not even appear in a majority of cases. In 2006, SC appeared in slightly above 28% of cases before the Court of Appeal; and in 2007, the ratio dipped mildly to about 26% (as of the end of October). As a proportion of civil cases heard in the High Court in 2006, approximately 8% were led by SC; and in 2007, about 10% (as of the end of October).

Statistics also reveal that only in about one-fifths of all cases in which an SC appears, there was another SC representing another party. To some extent, this shows that clients are discerning and do not engage SC simply to achieve an appearance of "equality of arms" for its own sake.

Of course, these figures do not tell the whole story. Due to the impossibility of definition, they would not, for example, reflect the proportion of "high profile" or "landmark" cases handled by SC. However, the numbers do provide some reassurance that the broader litigation community and particularly young lawyers are not being deprived of opportunities to do meaningful litigation work to develop professionally to the best of their abilities.

Indeed, one of the hopes in institutionalising the SC Scheme was that it would attract more lawyers to litigation and more young lawyers to stay on as litigators. Mr Anand Nalachandran, former Chairman of the Law Society's Young Lawyers' Committee, opined that the SC Scheme was beneficial to young lawyers in two ways. First, the opportunity to be recognised may provide incentive to young lawyers to excel. Second, it provided a benchmark of professionalism to strive towards. Young lawyers could learn and be inspired by working with or observing SC.

It is also worth observing that the courts do recognise the talent and promise of young lawyers. Justice Tan Lee Meng, in a recent application to admit a QC, said that (see *Re Millar Gavin James QC* [2007] 3 SLR 349 at [24]):

> The pool of talent has increased considerably since 2001. Apart from the fact that more SC have been appointed, it must be noted that for the purpose of determining whether there is enough local legal expertise in any particular area of law, one must be mindful of the many younger lawyers who have repeatedly impressed with their knowledge of the law and advocacy skills.

This again shows that notwithstanding the SC Scheme, there are opportunities for young lawyers to excel, and the courts are taking notice.

The argument that the SC Scheme may have a distorting effect on the forces of the free market assumes incorrectly that lawyering is simply a two-dimensional relationship between counsel and client. Especially in litigation, counsel owe a duty to the courts as well as their clients. Although they should be permitted to prosecute their clients' cases vigorously, they are obliged to do so within the framework of certain ethical and professional obligations to the court.

To the extent that the SC Scheme may not necessarily reflect the free market, this only means that the Scheme has been successful in persuading members of the Bar to view their own commercial interests within a broader compass. As Jonathan Sumption QC observed in his written response to the Department of Constitutional Affairs during the review of the QC system, the court system would be worse off, and its work impossible, if judges could not rely on the objectivity and integrity of counsel who appear before them. The SC Scheme, like its English counterpart, actively promotes, encourages and recognises those who make the effort to strike that balance.

The latter point – that lawyers simultaneously discharge a public function – also explains why the SC Scheme remains relevant in an age where rankings by legal publications abound. Whereas rankings by legal publications are based on clients' feedback (who, in turn, tend to prize winning in high profile cases as the dominant consideration), the SC Scheme confers a title based primarily on observation by the Judiciary* over a substantial period of time as to how well counsel have discharged their professional obligations and functions before the court. It is precisely because the appointment as SC is not contingent on winning records or beholden to influential groups of clients that it is able to act as an important counterbalance against an unhindered pursuit of commercial success at the expense of nobler aims. To take just one example, it is no secret that criminal litigation is not a lucrative trade; and therefore does not feature in many, if not any, of the legal publications. But for the SC Scheme, truly excellent criminal litigators would not be recognised.

THE SC SCHEME AND THE NON-LITIGATOR

While it remains likely that the SC Scheme is here to stay, there is, however, a question at the back of many minds, which is whether non-litigators should also be appointed as SC.** While this is technically possible, there is a serious handicap in the ability of the Judiciary to observe and assess the work of those who do not appear before them on a regular basis.

One counter-argument to this has been that academics, too, do not regularly appear in court, but have been appointed as SC. While this may be true, the works of academics, being an important secondary resource in litigation work, may be evaluated by the Judiciary in the way such works are referred to in court and the degree to which such works impact the outcome of a trial. As Prof Tan Cheng Han SC notes, conferring the title of SC on academics affirms the integral association and interplay between academic work and the development of case law. The Judiciary is therefore in a position to assess an academic's contribution to the law; whereas the same is less likely to be true for non-litigators generally.

CONCLUSION

By most accounts, the SC Scheme has been successful in raising the standard of the local Bar, both among senior and young lawyers. Additionally, by recognising counsel who are able to respond to their clients' commercial needs in a professionally and ethically responsible manner, the Scheme benefits the operation of the justice system and the rule of law generally. As our legal services market grows and develops, the continuation of the SC Scheme, and the new directions it takes to accommodate changing needs, will no doubt remain an important driver in motivating the local Bar "to strive for excellence in their profession". *IS*

* More on the criteria for selection of Senior Counsel may be viewed at pp30–35 of this issue of *Inter Se*.

** More on honorary SC may be viewed at pp33 and 34 of this issue of *Inter Se*.

Up Close

THE LEADING QUESTIONS:

AN INTERVIEW WITH THE SENIOR COUNSEL SELECTION COMMITTEE

INTER SE APPROACHED THE SENIOR COUNSEL SELECTION COMMITTEE FOR AN UNDERSTANDING OF THE SENIOR COUNSEL SCHEME ("SC SCHEME") FROM THOSE WHO EVALUATE AND SELECT FROM ITS APPLICANTS. THE HONOURABLE THE CHIEF JUSTICE CHAN SEK KEONG, A REPRESENTATIVE OF THE SELECTION COMMITTEE, DELVES INTO SOME OF THE QUESTIONS WE POSED AND SHARES HIS VIEWS ON THEM.

What circumstances led to the implementation of the SC Scheme in Singapore in 1997? Was it a matter of natural progression, having cut formal legal ties with England in the early 1990s? Or was the Scheme started to provide a career path for practitioners? Would not competence, reputation and previous experience provide adequate distinction? How important was it, at that time, to put in place a scheme that would allow the Singapore legal community to develop its own pantheon of respected advocates?

It was extremely important for Singapore to put in place a formal scheme whereby our best advocates would be accorded due recognition by the Judiciary for their legal expertise and advocacy skills. In the absence of a such a scheme and the easy availability of Queen's Counsel ("QC") to plead in our courts, it was inevitable that however good or skilful our advocates might be, they would be looked upon by litigants and the public as second-class litigators and inferior to any QC, whatever his seniority might be. This did not reflect the reality in many cases, although in general it had to be conceded that the best QC was a notch above our best advocate.

In other words, without a formal SC Scheme, we could end up short-changing our own lawyers. The situation was, unfortunately, exacerbated by the perception that QC would get a better hearing from the Judiciary than local advocates, with the result that if one party appointed a QC to represent him, his opponent felt that his case would not be given the same consideration if he did not appoint another QC to represent him. In order to build up our own corps of advocates that could be immediately recognisable by prospective litigants and also by other advocates and solicitors, the SC Scheme was introduced. Such a public recognition would also serve as an incentive for advocates to improve and enhance their legal expertise and advocacy skills in order to attain that status.

Clearly, the SC Scheme is patterned on the tradition of QC in England. Is the Senior Counsel ("SC") simply "Singapore's equivalent to the QC"?

The SC Scheme was, of course, based on the English QC scheme which had a long history and was recognised throughout the common law world as being able to identify the best

and most skilful advocates to provide the best legal services that money could buy. The English QC Bar is a relatively large Bar made up of a sufficient number of barristers to specialise in all areas of law, however esoteric they may be. The English QC Bar enjoys the advantages of volume and depth in terms of the types of legal problems in all fields of law that come before the courts. Singapore is a small jurisdiction, but there is no reason why in most areas of law practice, our SC are not in a position to offer legal advice or services of a quality equal to many of them. A Singapore SC is not simply an English QC transplanted with all the cultural values and prejudices of an English QC. A Singapore SC, having lived and worked in Singapore all his life, and enured to the cultural values of a Singaporean, may not necessarily view a legal dispute in the same way as an English QC.

So we need to take into account the societal context in which we have established the SC Scheme. I do not think it is feasible, given our political, economic and cultural circumstances, that we could or should aim to produce SC to challenge the role of English QC in the common law world, although from time to time, it is possible that we may produce a few SC who can match the best of the English QC in terms of advocacy and mastery of the relevant law. For example, to my personal knowledge, we have today a number of SC who are equal to the best QC or at least better than many QC who have appeared before our courts.

The title of SC is awarded to an advocate and solicitor of the Supreme Court of Singapore or a legal officer who, in the opinion of the Selection Committee, is deserving of such distinction "by virtue of the person's ability, standing at the Bar or special knowledge or experience in law" and "the emphasis ... will be upon outstanding ability as an advocate, professional integrity and maturity, extensive grasp of the law as well as a successful practice". What are the Selection Committee's benchmarks for these broad criteria?

In the case of some advocates who have been appointed as SC, it has not been difficult for the Selection Committee to agree that they deserved the accolade. In the case of others, there were questions of character. An advocate might be eloquent or knowledgeable on the law, but one of the most important qualities we look for is character. It is very difficult to define character but what we look for is the integrity and honesty of the applicant and whether we have implicit trust in him in doing the right thing, such as not misleading the court in small things, citing legal principles out of context. This means that those advocates who plead before the Court of Appeal often are the most likely to be noticed and assessed on their character and merits long before they apply for appointment as SC. Others who appear in the High Court will of course be assessed by the judges before whom they have appeared.

Are there regular re-appraisals and re-accreditations of SC? If so, what is the basis? If not, should there be?

The current system does not provide for regular re-appraisals or re-accreditations of SC. Frankly, we did not think about it when the legislation was drafted. We might have to reconsider the need for it. In England, a QC's normal occupation is to plead in court. Therefore according a barrister the honour of a QC appointment does not change his normal occupation. But, because Singapore has a fused profession, many of our SC have been pleading less and less. So, in order that the SC Scheme does not fall into disrepute where SC find it more lucrative to evolve into corporate lawyers, I will set up a committee to see whether we should impose certain conditions for the appointment of SC in future.

With few exceptions, the appointment of SC is something associated with advocacy. Section 30(1) of the Legal Profession Act (Cap 161, 2001 Rev Ed), however, is framed broadly so that it is possible that non-advocates may be appointed under it. Is the SC Scheme advocate-centric simply because it has evolved from a tradition that was reserved for English barristers or has it been a deliberate decision?

Currently, the SC Scheme is meant for advocates. We are not contemplating appointing pure corporate lawyers as SC, although we will continue to appoint first-class academics as SC. One serious problem is that the Selection Committee may not have the requisite knowledge to assess corporate lawyers. We cannot rely entirely on the judgment of others for this purpose.

We might consider appointing Legal Officers with the requisite advocacy skills and legal knowledge as SC if there is a need for it. Currently, the AG and SG are *ex officio* SC.

Are the selection criteria different for practising SC and honorary SC?

The selection of honorary SC would be from a very small circle of academics who have a proven record of outstanding contribution to the development of the law.

What might be the response to those who argue that in the light of Singapore's fused profession, the idea of a scheme for "advocates" only is introducing a "quasi-split profession" with the majority of complex litigation work going to a handful of SC?

Whether or not we have the SC Scheme, litigation, whether simple or complex, had always been confined to a small group of top

quality and experienced advocates. That is inevitable in all professions. A surgeon who has operated on a 100 cases is likely to be better than one who has just operated on ten. Experience counts a lot in advocacy. Therefore, the establishment of the SC Scheme does not create a monopoly of litigation in SC. What it does is merely to give recognition to the fact that they are already qualified to do the complex litigation work. It is inevitable that complex litigation work will go more often to SC than ordinary advocates, especially where the parties are corporations or institutions with deep pockets.

In July 2002, the UK government published a consultation paper entitled *In the Public Interest?* seeking views on the perceived benefits and potential drawbacks of the QC system. Some of the concerns raised were: does the conferment of "QC" mean a "licence" for those with the title to charge a higher fee? Does the award enhance a QC's competitive position over others? Does the rank restrict competition and not allow market forces freely to determine the allocation of resources?
Is/will Singapore facing/face similar issues?
Our litigation Bar is a small Bar and most of our best advocates are partners in the largest law firms. That is a natural development because these firms would have the best research and other resources for any litigation. The conferment of the SC title would probably allow an advocate to charge fees that are commensurate with this standing. But, I do not think that it is a licence to charge higher fees. After all, the client has a choice. He does not have to pay the proposed fees because there are enough SC in the pool of SC to cater to the needs of clients. The SC Scheme does not restrict competition* in any way, although it has to be admitted that the problem of SC being conflicted out of difficult cases can be a serious problem. However, I should add that the current composition of the Court of Appeal is such that a party with a good case on the law and/or the facts is not likely to lose the case because his advocate is less accomplished or skilful than the advocate of the other party.

Are there plans to admit increasing numbers of non-litigation practitioners as SC on the grounds that specialist knowledge of the law and high regard by the Bar is manifesting in increasingly diverse ways and the advocate-solicitor dichotomy is inappropriate to our local context? Is more being done to recognise potential honorary SC who specialise in areas of the law where the majority of his or her work is on paper or is directed towards achieving resolution out of court, *eg*, lawyers in trust, tax, employment law?
There are no plans to appoint non-litigators as SC,** apart from qualified academics. Top corporate lawyers are constantly subjected to evaluation and scrutiny by their clients for the quality of their work. The Asian Legal Business awards and also the rankings of the Legal 500 directory are probably better guides to the quality of work of our non-litigation lawyers, especially the corporate lawyers. We must be focused on what we are trying to achieve through the SC Scheme. For the moment, the senior judges are in the best position to judge who are the best and most trusted advocates of the day. In contrast, the commercial sector is in the best position to judge whether they are getting the best value for the fees they pay to their corporate counsel.

The appointment as SC is on an applications basis. Why is this so? Has this approach in any way prevented due credit from being given to the deserving? Is there an avenue for review for unsuccessful candidates?
There was no particular reason why we could not have adopted a scheme of appointing SC. But it cannot be a criticism of the Scheme because an application has to be made. If an advocate believes that he has all the qualities of an SC and deserves the appointment, he should apply to be so appointed. I do not see how an application system has prevented due credit from being given to the deserving. There is no reason why an advocate should be appointed as SC if he shows no interest in being an SC. But this is not an inflexible system. It is not uncommon for a deserving advocate to be given encouragement or some hint that he is fit to be appointed as SC.

There is no review for unsuccessful applicants. They can apply as often as they think they have a chance of being appointed. Not all first-time applications succeed. In any case, all applications are confidential and members of the panel will take sufficient steps to respect their confidentiality.

In *Inter Se* Print (Jul–Dec 2007), the Chief Justice remarked that "Senior Counsel must act as role models for the young lawyers". Is there a mentoring scheme in place? How may Senior Counsels fulfil this role effectively?
Role models are not supposed to act as mentors but simply to serve and act as examples of what a model SC should be, *ie*, to display the qualities that we look for in an SC, such as: (a) having a high standard of advocacy in terms of articulation of arguments; (b) displaying knowledge of the substantive law relevant to the dispute; (c) having the ability to marshal complex facts and simplify them for legal exposition; (d) demonstrating mastery of legal procedure; (e) having the ability to think on his feet and produce sensible rebuttals of contrary arguments or a state of mind that can deal with unexpected difficulties or events; (f) conducting himself or herself with courtesy to the court; and (g) most importantly, being exemplary in ethical conduct and professionalism and someone whom junior advocates can look up to and emulate.

In Confucian terms, he would be regarded as a "superior" advocate. *IS*

Inter Se thanks the Chief Justice for agreeing to this interview.

* More on the SC Scheme and the free market may be viewed at p27 of this issue of *Inter Se*.

** More on honorary SC may be viewed at p29 of this issue of *Inter Se*.

Up Close

CONFESSIONS FROM THREE SENIOR COUNSEL

THREE SENIOR COUNSEL SPEAK CANDIDLY TO TAN BOON KHAI ABOUT THE TRIALS AND TRIBULATIONS OF AN ADVOCATE'S CAREER, FEELING LIKE THEY ARE ON TOP OF THE WORLD, AND THE IMPORTANCE OF STAYING GROUNDED THROUGH IT ALL.

By **Tan Boon Khai, Legal Service Officer**

(left to right) Mr Harry Elias SC, Justice V K Rajah, and Ms Deborah Barker SC.

EVER wonder what makes a Senior Counsel ("SC") tick? What drives and motivates them? Is the SC Scheme good for the Singapore legal profession as a whole? What now for those who are appointed as SC – is this the end of it all or the beginning of a new chapter in their professional career?

Several weeks back, when *Inter Se* asked me to pen an article to mark the passing of a decade since Singapore's very own SC were first appointed, these were precisely the questions running through my mind. After all, it is not everyday that one gets SC to share their personal perspectives with you. As someone mentioned to me, such information was priceless (for everything else, there is MasterCard, of course!).

So off I went, searching for "answers" to these questions. A senior member of the Bar once told me, "In law, it is not always about what you know about the law, but where you find the law." As any lawyer would do, I applied this piece of "advice" literally, which meant, for the purposes of this article, approaching a few of our most distinguished SC.

I started first with Mr Harry Elias SC whom, as many would know, was one of the first SC appointed by the former Chief Justice Yong Pung How in January 1997. It was certainly a privilege when I managed to sneak in an appointment with him at short notice. By some measure of good fortune, I also managed to squeeze in two separate interviews with two other SC. One was with The Honourable Justice V K Rajah, one of the youngest SC when he was appointed in 1997, now Judge of Appeal of the Supreme Court of Singapore; and the other with Ms Deborah Barker SC, one of the few female SC (or, as I was reminded anonymously, one of the "roses" amongst the thorns).

If there is anything that one should know before meeting an SC (whether in court or otherwise), it is always be prepared. At each interview, I posed three thought-provoking questions to this distinguished panel of SC. In typical SC fashion, I took away more than I bargained for. Curious to know what these three distinguished SC shared with me? Then read on!

It has been more than ten years since SC were first appointed in Singapore. In your view, has the appointment of SC altered the legal landscape in Singapore? If so, in what way?

Harry Elias SC: It has certainly raised the standard of the Bar here, but I must also say that the fact that you have these titles does not make you a giant because the giant is in the man himself, not in the title, and I can certainly give you the names of several non-SC who are on par with our SC today. Are you saying I will definitely have an advantage over them? Not necessarily. I am just putting these views so that we do not get carried away.

Justice V K Rajah: I think that it has made a serious difference to the litigation landscape in Singapore. Both for those within and outside the profession, there is now an independent mark of quality. This mark of quality is acknowledged as being objective and largely accurate in singling out some of the better advocates of the day. There is now a presumption that an SC has all the necessary prerequisites to handle the most difficult and sensitive cases. Having said that, it is important to recognise that for one reason or another, there are a number of extremely good advocates who are not SC. My experience, both as a private practitioner and judge, is that while an SC will certainly get a good hearing and be taken seriously when he presents a case, other lawyers are certainly not disadvantaged if they do have good cases or points to argue. Personally, I have witnessed a number of cases where SC have not succeeded against parties represented by other advocates. Indeed, I am sure many of us can still remember the matrimonial matter where two well-known SC roundly lost their arguments and bearings against a feisty female litigant in person. It was the talk of the town. If my memory serves me well, a leading daily had a banner headline that read something like this, "Jane and the Two Tarzans". Not all SC have a well-rounded experience that gives them a distinct advantage over advocates who specialise in particular fields. So the advantage conferred on an advocate as an SC is mainly one of market recognition and an acknowledgment within the legal community that the advocate concerned is one of the better advocates, but it is by no means a guarantee that that SC will succeed in all their cases and/or will be more effective than other lawyers in all cases undertaken. At the end of the day, I can now say with confidence, the court looks at the message and not the messenger. I must also stress that being an SC is not necessarily the be all and end all. One can be recognised as being a good and effective advocate without ever being appointed as SC. Appointment to the ranks of SC is just the beginning of another track and not the end point.

> At the end of the day, I can now say with confidence, the court looks at the message and not the messenger.

Deborah Barker SC: Even before the day of SC, certain people were recognised as having risen to the top of the profession and being very good in their field. But the fact of having an SC quality mark has assisted that trend, and certainly assisted our profession by allowing us to rely more on our own resources. The very fact that you have a selected group approved by their profession and the Bench has encouraged the trend of not looking outside for foreign Queen's Counsel ("QC"). You look inside to whoever you have here, and this is a good thing. Of course if there is someone who is really the best or the only one in that area, a QC would still be available to be appointed, and I would have nothing against that. So the SC Scheme, by encouraging local lawyers and setting the trend to look inside at your own talent, is good. I would also add, just on a very superficial level, I certainly do not think QC stand out more than our SC today.

People often ask how it feels like being the cream of the profession. Has being an SC changed your life or your practice? How so?

H Elias: Not particularly, although what it did give me was the pride and joy that I had been part of the first batch to be chosen from among the profession. You certainly feel honoured. Did I celebrate? I would say "yes". Did I bring a lot of joy to the family? I would undoubtedly say "yes" also. And did I walk around with a strut? At the beginning, "yes"! But over the years, it is an accepted norm that you have more critical matters to do other than strutting around. And one of the things that SC should, and must do, is to give back to the profession. So for me, I would like the day to come when the phone rings, and someone says, "My name

Up Close

is XYZ, I have a criminal matter, my client is ... Can you please come and help on a free basis?", I would say "yes".

Rajah JA: It was a matter of considerable pride and satisfaction to be appointed as SC and thereby ranked amongst the better advocates in Singapore. The fact that this was among the very first appointments made it special. I must acknowledge that it benefited my practice, and gave me an extra fillip with clients who were not familiar with me and/or my practice. The fact that there were so few SC initially appointed did not hurt. It also encouraged me to grow the firm rather rapidly. But let me say this. With the benefits and privileges comes a responsibility to the legal community to share knowledge and expertise. I like to think that I played my part. Today, I feel that a small fraction of SC may not be wholeheartedly discharging their role as role models for younger advocates. This disappoints me. I hope all SC will be more involved either in the Singapore Academy of Law and/or the Law Society of Singapore, working with them, through legal education or in the various committees. As a *quid pro quo* for the recognition, they ought to make time to contribute to the legal community. I hope more, if not all, will step forward. The Senior Counsel Forum* is unfortunately rather lacking in vigour and direction.

D Barker: It has not changed my life in any real way I suppose, although I recall that when I was appointed as SC in January 2001, about a week later I conducted a case before the Court of Appeal. I remember feeling very nervous, because in my mind I was wondering whether, now that I was an SC, the court expected me to be brilliant, and whether I would be able to live up to the court's expectations? So the one thing about being an SC is that you do feel some pressure about the standard you may have to live up to and that all eyes are on you. Also, there is the feeling that since you have been given this honour and privilege, you should give back to the profession and do some "national service". Personally, I also wanted to get the appointment in memory of my father, and in that sense, I was very pleased and honoured when I did.

Finally, what are some things which, as an SC, you would share with our young lawyers today? Is there a secret to your success which you could impart to today's aspiring young litigation lawyers?

H Elias: That is a difficult question. A lot of young people nowadays make the mistake of coming into the law without knowing what it is all about. So I would encourage those who wish to practise law to find out what exactly it is before jumping in.

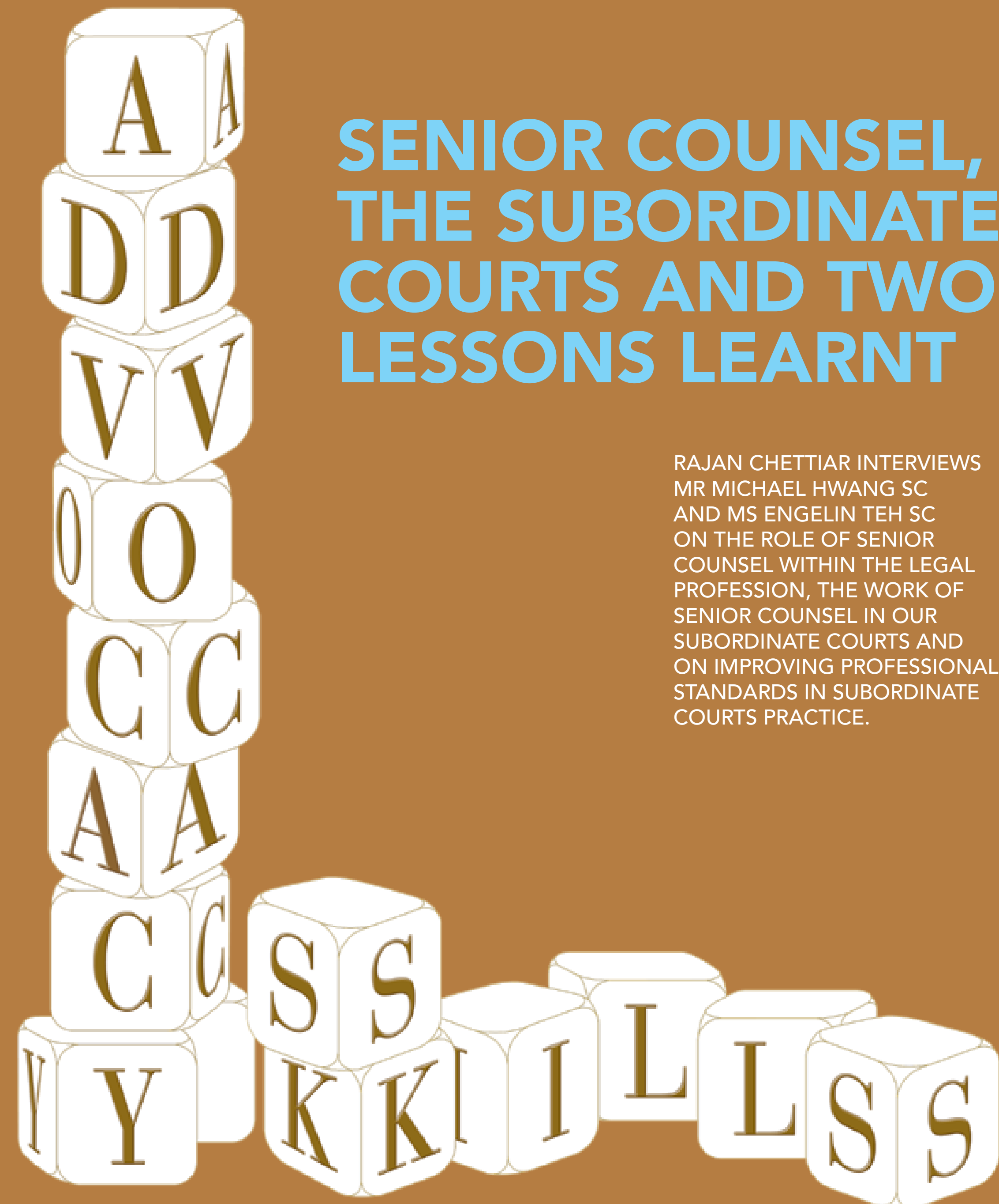
Rajah JA: There are two or three attitudes I would like to share. They are not peculiar to me. First, always be thoroughly prepared for any court appearance. It is better to be over-prepared than under-prepared. Work on the basis that it is important to maintain your credibility with the court at all times by showing that you have applied yourself to the matter and have covered all grounds, factual and/or legal. It is also important to establish a rapport with the court. Once you have done that, it leads to a better hearing. After credibility is established, the court will be prepared to repose more confidence in the advocate. Second, be passionate about what you are doing. The satisfaction comes not so much from just the material rewards but from the sense of pride in craftsmanship that when a job has to be done, it is done well. Receiving recognition from the court and/or your peers will bring with it an incalculable measure of satisfaction. The greatest satisfaction in litigation is being able to bring a personal dimension to a matter which perhaps few others could have brought, in short, *being able to make a tangible difference to your clients and to the court*. In the final analysis, this can only be effectively done if there is a real and abiding commitment to the profession and its ideals. *It must also be appreciated that one cannot be always correct or successful.* Accept adverse results with equanimity when you have done your best and move on.

> "Receiving recognition from the court and/or your peers will bring with it an incalculable measure of satisfaction."

D Barker: I can see why some young lawyers feel that they will have a less stressful life if they are not in litigation or in the profession at all, or if they are in-house counsel. I would think one has to accept that and that we cannot completely eradicate the trend of litigation lawyers leaving the profession. To a large extent, litigation requires a certain mindset and character, but for those who have it, I would say that it can be very satisfying. Doing a case can be a thrilling experience – you reach highs and lows. Personally, I find doing cases exciting, and it gives great intellectual joy and satisfaction. So I think there is a very special job satisfaction, but you must do it to know about it, so I would encourage young people to try it. You must, however, distinguish this satisfaction from glamour, I do not recall it being glamorous at all, given that it involves a lot of hours and hard work! *IS*

Inter Se thanks Mr Harry Elias SC, Justice V K Rajah and Ms Deborah Barker SC for their time in granting us this interview and wishes them every success.

* More on the Senior Counsel Forum may be viewed at p43 of this issue of *Inter Se*.



SENIOR COUNSEL, THE SUBORDINATE COURTS AND TWO LESSONS LEARNT

RAJAN CHETTIAR INTERVIEWS MR MICHAEL HWANG SC AND MS ENGELIN TEH SC ON THE ROLE OF SENIOR COUNSEL WITHIN THE LEGAL PROFESSION, THE WORK OF SENIOR COUNSEL IN OUR SUBORDINATE COURTS AND ON IMPROVING PROFESSIONAL STANDARDS IN SUBORDINATE COURTS PRACTICE.

By **Rajan Chettiar, Legal Practitioner**

UP to 1997, clients sought lawyers based on recommendations of their seniority and expertise. In the Opening of the Legal Year 1996, then Chief Justice Yong Pung How said, "Over the last few decades, our legal profession has grown in experience and expertise; and I think the time has come when we are ready to endorse those at the apex of the profession." One year later, Chief Justice Yong, at the Opening of the Legal Year 1997, announced the appointment of Singapore's first 12 Senior Counsel ("SC").

Legal Service officers, lawyers who excel in their practice and academics who make significant contributions to legal education have been appointed as SC. As at 2 July 2007, 41 men and 5 women have been appointed as SC. This number grows each year.

The SC appointment is much-coveted. Although the exact number of applications filed by lawyers aspiring to SC status every year is not known, it is understood that of the many lawyers who apply to the Selection Committee headed by the Chief Justice, the Attorney-General and the Judges of Appeal, only a handful from the pool of applicants is eventually selected. In 2002, Chief Justice Yong gave an insight into the selection process by sharing that all the facets of a lawyer's career are considered during the selection process. Factors such as the candidate's grasp of the law, advocacy skills, integrity, experience and standing in the Bar are fully considered. The views of all of the Supreme Court judges are also sought before the final selection is made.

Looking at the individuals who currently make up our pool of SC, it is reasonable to say that each of them is an experienced and a respected member of our legal profession who would have been well sought after even without his or her appointment as SC. Yet, appointment as SC is something more than just an official form of accreditation recognising the best in Singapore litigation. There are heavy responsibilities that come with the status. First, SC stand at the forefront of assisting the various stakeholders in the administration of law and justice. Second, SC are expected to work with their fellow lawyers to improve standards of professionalism and to enhance the quality of legal services. SC have a duty not only to display high standards of integrity, professional conduct and legal skill but to encourage, by example, similar standards in the wider legal community. Recognising their responsibility as role models, a handful of SC in private practice decided to proceed in the direction of collective action in 2001. The result was the Senior Counsel Forum.

SENIOR COUNSEL FORUM

Headed by Mr Michael Hwang SC, the Senior Counsel Forum (the "Forum") is an informal group which communicates through e-mails and holds two dinners a year. The first of the two yearly dinners is to welcome new SC appointed at the Opening of the Legal Year and the second dinner is usually hosted in honour of a local legal luminary or visiting foreign legal dignitary. Apart from serving as an important professional support network, a key agenda of the Forum is to look at the various ways in which SC can contribute to the administration of justice in Singapore.

Minority Report

On the achievements of the Forum, Mr Hwang SC shared that through the work of the Forum, a pro-bono mediation scheme to resolve disputes between lawyers has been set up. Some of the members of the Forum have been amongst the first appointed to act as Specialist Judges under a scheme initiated in the Subordinate Courts. The Forum has also functioned as a source of feedback to various committees.

The activities of the Forum have not prevented some from asking why SC are not doing more for the profession at the level of practitioners themselves. Highlighting this to Mr Hwang SC during our interview, Mr Hwang SC explained that the main reason for the Forum not doing more for the legal profession was the sizeable demands on the time of SC who are often left having to juggle higher expectations from the Bench, Bar and clients as a result of their appointment. "Having said that, there are some shining examples of SC who have served the profession above and beyond the call of duty," states Mr Hwang SC who cites Philip Jeyaretnam SC as one such person. Mr Jeyaretnam SC has served four years as President of the Law Society of Singapore.

SENIOR COUNSEL IN THE SUBORDINATE COURTS

Moving on to another area of debate surrounding SC, it was put to Mr Hwang SC and Ms Engelin Teh SC that being top lawyers, SC are at liberty to charge premium fees and that this has made representation by SC a privilege afforded to and affordable by the privileged only. This may seem to manifest in the comparably large numbers of High Court cases in which SC appear* and the relative dearth of SC appearances in Subordinate Courts cases.

Both Mr Hwang SC and Ms Teh SC are well-placed to shed light on this belief since they have both acted in criminal proceedings in the Subordinate Courts. Mr Hwang SC pointed out that where SC appear is largely a matter determined by clients, "Some clients feel that certain white collar cases and civil cases are of sufficient importance to justify the expenses of engaging an SC. So, it is really up to the client whether he wishes an SC to represent him in the Subordinate Courts." Contrary to belief, SC do not make a conscious decision to restrict themselves to appearances in the High Courts. Clients have instructed SC on matters ranging from suits in the courts to arbitrations, and many SC have appeared in Subordinate and Family Courts. One example cited is Mr Lok Vi Ming SC who appeared for the Defence when Mediacorp actor Christopher Lee was charged in the Subordinate Courts recently.

Ms Teh SC, a specialist in family law, is quick to point out that the prejudice against certain specialisations is misguided, "I do not see why SC should not appear in family law matters. I want to dispel the myth that family practice is simple, factual and routine. I have seen some opposing counsel making half-hearted efforts in advancing their clients' cases. They lose their cases because of insufficient preparation and poor advocacy and not due to unmeritorious cases. This is unfair to the client who instructs them."

According to Ms Teh SC, family law is not fairly settled in Singapore; there are controversial legal issues, which require careful analysis. She further elaborates on the ways in which SC can contribute, "Some provisions in the legislation require changes in order to meet the changing world we live in. Cogent arguments have to be made to effect these changes. Also, research needs to be conducted on corresponding law in other countries."

ADVOCACY IN THE SUBORDINATE COURTS

To wrap up the interview, Mr Hwang SC and Ms Teh SC were invited to comment on the apparent disparity in standards between High Court advocacy and Subordinate Courts advocacy. In the Subordinate Courts, Mr Hwang SC expressed that the standard of advocacy is more variable because of the large numbers of lawyers who go before the courts, "I find it very disappointing to see very senior lawyers not trying hard enough for their clients. A lawyer who makes a plea-in-mitigation owes it to his client to say everything that can possibly make a difference to the sentence and not merely say, 'I leave it to the court to decide'." On the other hand, Mr Hwang SC also notes that there are a number of outstanding senior lawyers who act in Subordinate Court matters.

In the Family Courts, Ms Teh SC feels that the level of advocacy needs to be improved and that there is little that SC alone can do to improve it except to ensure that they take all steps to maintain the standards in the presentation of their own cases. However, she is of the view that the Family Court judges can do more in this area. "It is common to read opposite parties' affidavits which contain numerous grammatical and typographical errors. Their submissions are either poorly prepared or not prepared at all. Judges should take issue with this and insist on certain standards from the lawyers appearing before them."

Ms Teh SC notes that institutional changes to the Family Courts may also help to raise standards of professionalism which may be suffering due to the increasing case loads before the Family Courts. Her suggestions? Increase the number of deputy registrars and judges to cope with the sharp increase in family matters, improve the administrative system so that there is less difficulty in getting urgent hearing dates and ensure that sufficient time is properly allocated for hearings.

SUMMING UP

In my conversations with Mr Hwang SC and Ms Teh SC, I have come to realise two important things. First, it should not matter what you are called, just what you choose to do with your calling. Second, it should not matter what your practice is, just how you choose to practise it. We can spend our professional days agonising about the whats but we will probably be better off working on the hows – for two lawyers I had the pleasure of speaking with, this has certainly been the case, both in and out of the Subordinate Courts. *IS*

* More on the statistics of SC appearances in courts may be viewed at p27 of this issue of *Inter Se*.

THE SMALL LAW FIRM LITIGATOR

By **Mark Goh Aik Leng, Legal Practitioner**

MARK GOH DEBUNKS THE MISTAKEN PERCEPTION THAT THE WORK OF SMALL LAW FIRMS IS CONFINED TO PROCEDURAL OR ADMINISTRATIVE MATTERS, IS LESS CHALLENGING OR DEMANDING AND IS CONFINED TO THE SUBORDINATE COURTS PRACTICE.

THE Subordinate Courts are often perceived as the main arena for the small litigation firms. The extension of such a perception is that the work of the small law firm lawyer in the Subordinate Courts comprises work mainly of the procedural and/or administrative nature. Compared to the larger firms' high profile work in the Supreme Court, the work of the small law firm in the Subordinate Courts is less demanding intellectually and less glamorous.

Thus, a small law firm set-up, with limited resources (in terms of both man and brain power), would fare well to stay within the comfortable walls of the Subordinate Courts. This article hopes to dispel the above perception.

THE SMALL LAW FIRM IS ANYTHING BUT SMALL

The Law Society defines a small law firm as one comprising one to five lawyers and less. By that definition, the small law firm becomes stereotyped as a firm with limited man and brain power. The *raison d'être* for such a definition by the Law Society was not to typecast the small law firms, but was necessary for administrative reasons. Their putting a number to size was for different considerations, *eg*, insurance and training programmes. The number and delineation was not intended to limit small law firms to certain markets, or type of work or client.

As at 13 August 2007, there were 690 small law firms in Singapore, and they are difficult and/or almost impossible to categorise, given the diverse nature of their business goals, economic considerations, set-up, proprietors'/partners' profiles and areas of speciality.

Minority Report

While the list may not be exhaustive, some may be described as boutique law firms, doing only one or two specific practice areas. Others may be described as community law firms, having firm roots in and serving a specific community, and yet others may be described as small poly-practice firms offering reasonably priced, wide-ranging legal services. There is a common mistake that small law firms are cheaper than larger law firms and small law firms shrewdly exploit this to their advantage.

TECHNOLOGY LEVELS PLAYING FIELD

In the epic battle between David and Goliath, the heavily armed Goliath was a formidable foe to behold. Goliath's choice of weapons were, firstly, "fear" as a psychological weapon, and secondly, size and strength. David would easily be defeated if the distance between him and Goliath closed.

David eventually defeated Goliath by using the technologically more advanced weapon – the slingshot. The slingshot was a projectile weapon and it allowed David to strike Goliath from a safe, stand-off distance. In skilled hands, the slingshot, launched accurately, proved to be more deadly than the sword.

Likewise in skilled hands, today's technology and advanced research tools have levelled the playing field for small law firm lawyers. More importantly, the cost of access to such technology is no longer prohibitive, when compared to about five to six years ago. The platforms have become more intuitive and user friendly. There is now a plethora of platforms, tools and software for research, management, billing, accounts, clients' log, presentation and archival needs. With better and more intuitive search tools, and the know-how to exploit the tools, a small law firm litigator can use technology to shore up his arguments.

Perhaps the greatest contribution which technology has given to the small law firm lawyer is instant connectivity. Working in an inter-connected environment, complex problems and issues are often floated between friends. Being connected allows the small law firm lawyer to be in touch with the latest cases and developments in the community. Like David's slingshot, technology allows the small law firm lawyer to close the distance.

THE CLIENT TYPES IN A SMALL LAW FIRM

Perhaps the only distinguishing feature of the small law firm would be the lawyer-client relationship. The type of clients a law firm retains may be evidenced by the classification of a law firm's "goodwill". "Goodwill" is best described as the probability of an old client returning to the old premises whether or not the lawyer continues to occupy the premises. In the old English case of *Whiteman Smith Motor Company v Chaplin* ([1934] 2 KB 35 at 42), "Goodwill" was classified as either the "dog", "cat" or "rat" elements of goodwill. The "dog" element of goodwill involves customers who remain attached to the individual person. The "cat" element customers are those who are attached to the place, *ie*, the brand. The remaining customers are those who are neither attached to the person or place, and may desert both the person and place.

At the heart of most small law firms, the partners and proprietors strive daily to cultivate the "dog" element of goodwill. However, and because of common prejudices about size and price, they have had their fair share of clients who form no attachment to the law firm nor lawyer. To the clients who remain loyal to the lawyer, the lawyer is not merely a service provider but also a friend, confidant and advisor.

CAN THE SMALL LAW FIRM LAWYER BE A "LAWYER COUNSELLOR"?

In his book, *Lawyer: A Life of Counsel and Controversy* (PublicAffairs, 1998), Arthur L Liman wrote, "Behind my desk hangs a nineteenth-century Old Testament sampler that Ellen found for me in a flea market. It is from the Book of Isaiah, and it reads 'Fear Thou Not, For I am With Thee.' To me, the quotation expresses perfectly what every lawyer should strive for in the lawyer-client relationship, but oddly, the very idea – of lawyer as counsellor – is today rejected in certain professional quarters." For decades, Arthur Liman represented the very best of the legal profession in America.

It would be erroneous to think that litigation work begins only in court. On the contrary, it happens before the case goes to court. It involves counselling your client to manage expectations and organising his case. A substantial amount of work, goodwill and revenue can and do come from the "lawyer as counsellor" role. This is certainly true for the boutique-type and community-type small law firms. As for the small poly-practice type law firms, they can avert the scourge of the "rat" element of goodwill, if they are able to latch onto some institution.

Economic reality compels small law firms to pay attention to harnessing more of the "dog" element of goodwill, and do more of the "lawyer as counsellor" type of work.

Otherwise, the natural progression would be to build a house brand, so as to be able to attract clients of the "cat" element of goodwill and do more of the institutional type of work. The foundations for successful small law firms comprise clients of the "dog" element of goodwill and performing this type of work. It cannot survive in a highly competitive market by constantly dishing out highly administrative and procedural services with low intellectual content.

UNDERTAKING LITIGATION WORK

Unfortunately, and often, clients may have to face litigation. In such circumstances, the "lawyer as counsellor" becomes the natural choice litigator. The client will expect its "lawyer as counsellor" to assume position at the helm, helping the client navigate the strange and unfamiliar waters of litigation. At the heart of most small law firms is the "lawyer as counsellor", the "lawyer as litigator" is only an ancillary role.

It does not matter whether the litigious work undertaken by the lawyer in a small law firm is conducted in the Subordinate Courts, Supreme Court or other tribunal. Regardless of where it is conducted, the litigation work involved is the same and it may be undertaken by big or small firms. Whether in court or a tribunal, the client expects the "lawyer as litigator" to perform in the same personal and professional level as the "lawyer as counsellor". The decision to litigate in the Subordinate Courts may be determined by constraints of finances, resources and time, but that does not mean it is any less challenging.

INTERACTION WITH COURTS NOT DETERMINED BY SIZE

Law firms, whatever their size or moniker, can choose how they wish to interact with the courts. For some, economics will dictate that the interaction gravitates towards the administrative/procedural types of work. It is true that the Subordinate Courts handle more of the administrative/procedural types of work, compared to the Supreme Court and special tribunals. The challenge thus for the Subordinate Courts is the ability to discern between the types of firms, regardless of size.

It is humbly proposed that such an approach, will allow the Subordinate Courts to better cater to the diverse needs of different litigants. Efficiency and consistency may rank highly for litigants with administrative/procedural issues. While fair play and empathy may rank highly with matters of great concern to litigants.

CONCLUSION

Small law firm lawyers practising in any court or tribunal should not be characterised as only capable of handling the administrative/procedural types of work. It is not uncommon now to find Senior Counsel practising as sole proprietors or in small law firm set-ups. Also, there are just as many small law firms working alongside Senior Counsel and Queen's Counsel in the courts and tribunals.

The small law firm lawyers are in fact such a diverse group, there is no one-size fits all characterisation of small law firms. *IS*

THEY ARE AMONGST US:

THE UNTOLD, SECRET STORY OF THE SC PROJECT

By **Adrian Tan, Legal Practitioner (and *Inter Se*'s freelance conspiracy theorist)**

READER, BEWARE THE INVASION OF THE SUPERLAWYER! OR ARE YOU ONE OF THEM? THE TRUTH IS HERE.

MODERN science has a lot to answer for. With the advent of genetic engineering, scientists have been able to create new breeds of organisms. Such genetically-modified or "GM" creatures are generally improved versions of the original species. For example, in Europe, farmers are growing GM crops which produce better yields and are more resistant to herbicides and pests.

Singapore is a hub for the life sciences and it is not surprising that it is at the forefront of GM research to create new and better life forms. It is heartening to note that one of the first beneficiaries of the new technology is the legal industry. Where hitherto the public has had to make do with mere advocates and solicitors, a marriage of science and the Legal Profession Act (Cap 161, 2001 Rev Ed) has introduced a new breed of Superlawyer in the form of the Senior Counsel ("SC").

According to the Singapore Academy of Law website, SC are appointed pursuant to statute and by a selection committee constituted under s 30 of the Legal Profession Act comprising the Chief Justice, the Attorney-General and the Judges of Appeal.

The Selection Committee appoints SC on the basis of applications received from persons who have had a minimum of ten years' experience as advocates and solicitors or as Legal Service officers or both. The Selection Committee may appoint a member of the Bar as SC if they are of the opinion that, by virtue of the person's ability, standing at the Bar or special knowledge or experience in law, the person is deserving of such distinction. What is generally not known is that such applicants also have to undergo a secret deoxyribonucleic acid ("DNA") test to verify that they are in fact part of the SC Project.

In short, therefore, an SC is a genetically-modified barrister who is stronger, smarter and more resistant to attacks from opponents. In terms of billings, an SC also produces better yields for law firms, which explains why law firms are all eager to grow or import their own.

How this breed of Superlawyer has assimilated into mainstream legal culture is yet another stroke of genius. The SC Project has sought to draw our attention away from the immense advocacy powers of the SC (and resulting probing questions of how it can be possible for a mere lawyer to be possessed of such skill, grace and billing powers) by linking this superior being with connotations of dotage and general lack of anything resembling *savoir faire*.

To start with, SC are, by their very name, "Senior", *ie*, old. It is no accident that in England, the best lawyers are called "Queen's Counsel", and in other countries, such as Sri Lanka, the term used is "President's Counsel". The implication in those names is that Queen's Counsel and President's Counsel are lawyers who are so good that they are fit to counsel the head of state. On the other hand, the SC Project has eschewed such labelling, preferring instead to use the term "Senior", which merely denotes age, rather than skill. Obviously, they had remembered their Julius Caesar, where Cassius remarked:

> You wrong me every way. You wrong me, Brutus.
> I said an elder soldier, not a better.
> Did I say "better"?

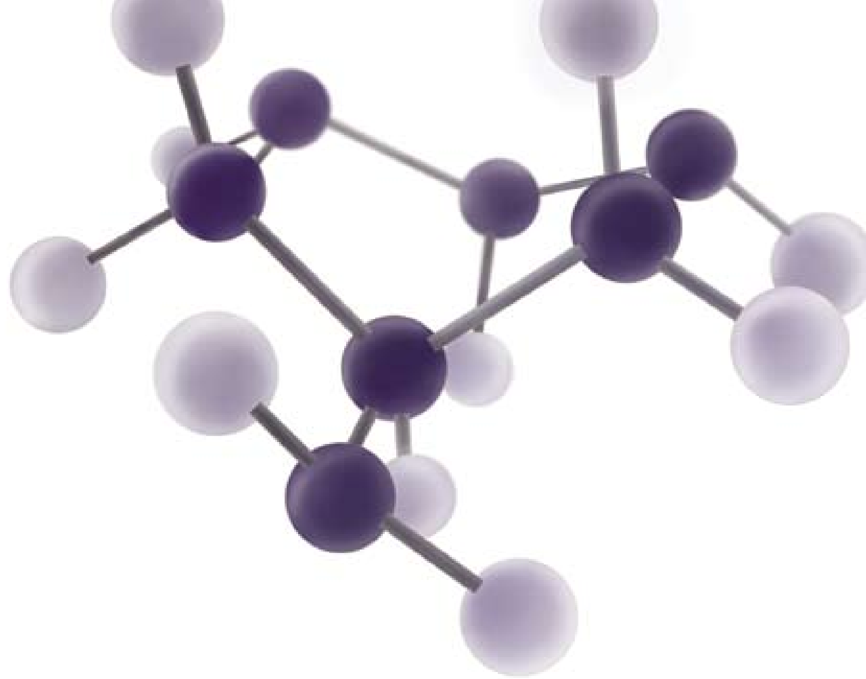
Shakespeare had no trouble making the distinction between a better soldier and one who was merely "elder". By the same token, the key feature shared by all SC is their "seniority" and advanced years. That enables the rest of us who are not (yet) SC to comfort ourselves by saying that the only reason we do not carry the post-nominal is because we are still too young, and it is only a question of time. Contented with this explanation, we ask no more questions.

SC have also shown fine disregard for their hair. Many appear not to care about it, some have very little of it and one even covers it up. The garments favoured by SC are also noteworthy. In court, they wear robes that, to put it kindly, have seen better days. The idea is basically the more bedraggled the robe, the more learned the wearer.

Because many of their robes have lost their shape, seasoned SC have developed what is universally recognised as the "SC shrug". Often, in the middle of their ringing oratory in open court, an SC will abruptly grab his robe (which is fast slipping off his shoulders in a far from enticing manner) and hitch up his garments in a violent shrug. Many High Court judges have been quite discreet in noticing the number of times certain SC have shrugged in the middle of their closing arguments. It is not true, further, that bored members of the press have placed bets on which SC will produce the most shrugs in any given one-hour period.

Outside the courtroom, SC are noticeable for their curious gait. Many walk at speeds which are, frankly, quite excessive in the circumstances. Often, they rush into court (using their statutory right to skip queues) and thereafter rush out again. In fact, it has been recorded that the speed at which they depart a hearing is inversely proportional to the level of success they have had at the hearing itself. Hence, an SC who saunters out of chambers has usually had a very good hearing, whereas an SC who scampers out (usually with a mobile phone attached to each ear) is thinking of filing an appeal.

The only time an SC suddenly slows down is when he leaves the main door of the Supreme Court. That is because one simply has to give the press photographers a fighting chance. (That is usually the only time one sees an SC smile –



a terrifying sight where unused facial muscles are wrenched into shapes they are unaccustomed to hold.)

By employing the "God is fair" approach to the engineering of the SC, the SC Project has had unparalleled success in maintaining the secrecy of its grand experiment. Sadly, there are simply not enough SC to go around. At last count there were only about three dozen in active practice. Hence, some firms have had to go without, while other firms have selfishly refused to share. How can this issue of scarcity be addressed?

One innovative solution has been for litigators, who are not themselves SC within the meaning of the Legal Profession Act (*ie*, those lacking the requisite modified DNA), to assume the look of an SC. The strategy of mimicry is adopted from nature, where harmless snakes have fooled predators by evolving to look like their more deadly cousins by having the same colouring and – in the case of the Eastern Yellow-bellied Racer (Coluber constrictor)– even having a rattle at the end of its tail in an effort to imitate a rattlesnake.

These quasi-SC (or "QSC") are no slouches. They are careful to adopt the grey-haired, grizzled and worn-out visage, curious gait and terrifying smile of SC and do it with the lack of panache needed to be convincing. Over the years, they have evolved to such an extent that not only are the public confused, but sometimes even fellow lawyers are not quite sure. These QSC have played an integral part in helping the SC to assimilate into mainstream society, allowing them to live amongst us in a fairly inconspicuous manner.

If there is one thing, however, that QSC have failed to master has been the SC's native language, which is English, but spoken at such a rapid rate and with such complexity and repetition as to sound almost foreign to normal ears. This lone quality is what sets the SC apart from everyone else in a crowd. So, if you find yourself in the Supreme Court one day, in a courtroom or dining at the Academy Bistro, and come face-to-face with an elderly person dressed in shapeless robes, listen very, very carefully – you may just be in the presence of a real SC.*IS*

academy buzz

SERVING AND LEARNING: OUR 20TH ANNIVERSARY

"**THE** Academy has to create a strong collegiate feeling, set the tone for the profession, and regain for it the high esteem of the public." This is how Minister Mentor Lee Kuan Yew defined the work of the Singapore Academy of Law (the "Academy") at its official opening in August 1990, two years after the Academy came into being on 1 November 1988 under the Singapore Academy of Law Act (Cap 294A).

The Academy was, and continues to be, the first institution of its kind to bring together the various branches of the legal profession under one membership body. Its members include the Judiciary, private practitioners, the Government Legal Service, corporate lawyers and the academics in the law schools.

On the occasion of its 20th year of working "To Build Up the Intellectual Capital and Infrastructure of our Members", we take a brief look at the path taken thus far and commemorate good times – so COME ON! Read on. Let us celebrate …

EARLY DAYS

The Academy started small. There was no single institution where different branches of the legal profession could gather to share experiences and expertise and facilitate social and professional interaction. "The Academy of Law fills this void," said former Chief Justice, the late Dr Wee Chong Jin, who was also the first President of the Academy. At its opening, Chief Justice Wee said that the Academy would strive to provide "a comfortable venue and genial surroundings for all its members to interact socially … relax and meet friends and also to enrich themselves in the law and contribute to its development".

In 1990, the Academy's Senate was made up of eight committees: Publications, Library, Legal Education, Membership & Rules, Law Reform, Endowment, House & Social, Young Lawyers and Students' Affairs. Resources were thin and the committees worked with what they had, supported by Supreme Court Assistant Registrars and a few legal officers from the Attorney-General's Chambers. In its early days, the Academy was unabashed in asking and accepting donations from charitable foundations, firms and individual well-wishes so that the committees could implement activities for members.

EXPANDING ITS SERVICES AND REACH

Just like its people, the Academy has grown over the years. The Academy's increasing ability to do more for the legal community has been credited to its Senate leadership, its strong institutional networking structure and talent base and its ability as an umbrella body for the legal fraternity to pull together the Bench, the Bar, academics, legal officers, in-house counsel and legally-trained people working for large companies and businesses in Singapore.

The diversity of its membership has meant that the Academy's focus has not just been on services catering to traditional litigation but on a whole host of dispute resolution alternatives. The primary work relating to alternative dispute resolution ("ADR") has been undertaken by the Singapore Mediation Centre.

ADR services

The Singapore Mediation Centre ("SMC"), a subsidiary of the Academy was formed in 1997, focusing on providing commercial mediation services in Singapore and mediation training workshops regionally. The idea of SMC was first mooted by The Honourable the Chief Justice Chan Sek Keong in his Opening of Legal Year address in 1996 when he was then Attorney-General. He was inspired by an article he read on how some states in the United States had successfully used mediation to resolve family law disputes.

(left to right) ADR services – SMC's Tenth Anniversary and Launch of Asian Mediation Association; Academy Publishing – publishing arm of the Academy; Launch of LawNet2; Legal Education – SAL Conference 2006 and Launch of *SingaporeLaw* website.

In late December 1996, the Supreme Court and the Academy stated a pilot project under the chairmanship of then Justice Goh Joon Seng to study how SMC could provide quality mediation services. The Supreme Court supported the project by referring suitable cases for mediation. Two years later, SMC was ready to take off. It had dealt with 84 mediation cases, 75% of which had been successfully settled.

With the continued support of the Singapore judiciary and Ministry of Law, SMC is now a leading mediation organisation and well known as an incubator of future mediators. SMC's training programmes are well sought after by public and private bodies in Singapore and regionally.

As the Academy grew and the legal community evolved, this development was matched by the corpus of Singapore law available. This growing resource was to become the foundation for a number of key Academy projects over the next two decades.

Legal publishing

In the 1980s, Singapore did not have its own set of law reports. Judgments in the Singapore courts were reported into the Malayan Law Reports. The Academy started the Singapore Law Reports in 1992 in partnership with a legal publisher. "As we got better organised, we became the publishers," says Chief Executive Serene Wee. "Producing the fortnightly series was not an easy task and we learnt a lot from this experience. We also introduced the Academy Digest, pushing for short succinct summaries of every judgment for which there are written grounds." The Digest provided a quick, weekly update for the profession on the latest on case law. "As we had more resources, we published the Annual Review of Singapore Cases and the last issue covered some 20 areas of law."

In 2007, the Academy set up a dedicated publishing arm, Academy Publishing, to further its aim of disseminating legal knowledge. Nearly 20 years after the founding of the Academy, the issue of professional ethics of lawyers remains a concern and the first book published by Academy Publishing was, fittingly, *Ethics and Professional Responsibility: A Code for the Advocate and Solicitor* – a work commissioned by Chief Justice Chan and written by Prof Jeffrey Pinsler.

Not content with this traditional approach to originating and disseminating legal knowledge, the Academy has actively pursued electronic publishing avenues as well in the form of the Legal Workbench and more broadly, LawNet.

LawNet2

The idea of organising the various primary sources of Singapore law under a single search engine was first mooted in 1996. There were sceptics at the outset. However, the LawNet Committee was convinced of the value of it and thought it was worth the investment of resources. In 1996, the Academy took over the LawNet Secretariat from the Attorney-General's Chambers and is now fully responsible for the development and management of LawNet, the IT portal which provides users instant access to a wide range of legal information and transactional databases.

Academy Turns 20!

LawNet2, an improved version of the platform was launched in August 2007.

Recognising that the legal community's key resource is the over 6,000 members that comprise the Academy's membership, however, has meant that the focus of the Academy's activities has always been the provision of opportunities for continuing legal education for its members.

Legal education

Some 300 members attended the first legal education seminar held at the Academy's Function Hall in May 1989. In his keynote address, the late Justice Lai Kew Chai, then Chairman of the Committee on Legal Education and Studies, was optimistic that the Academy's legal education workshops would afford meaningful opportunities for the different branches of the profession to interact and exchange views in a congenial and intellectually stimulating atmosphere. These programmes, he hoped, would over time "acquire a distinctive character and reputation".

Over the years, the Academy has focused on signature events such as the Annual Lecture which was started in 1994. In the last 14 years, the Academy has hosted a line of distinguished speakers for this annual event, most of whom have been Chief Justices from major legal jurisdictions around the world. Much thought has gone into the Academy's programmes which are the result of careful planning of topics and speakers. Today, the Academy holds large conferences with a reputation for quality of discussion and succinct summary of the law.

However, keeping up to date alone is insufficient if not informed by a sense of what has come before and not motivated by a drive to innovate what comes after. The Academy's legal heritage and legal research work underscore the importance of this point.

Legal research and heritage

Former Attorney-General Tan Boon Teik chaired the Academy's first Law Revision and Reform Committee which was set up in January 1989. Chief Justice Chan, who was then a Supreme Court judge, was Vice-Chairman of the 13-member committee which included senior government lawyers from the Attorney-General's Chambers, law academics and senior lawyers in private practice. Describing the role of the committee, Mr Tan said, "Our business is not to be involved in policy changes ... [but] to assist in helping our lawmakers to focus attention on matters legal." Helping to focus and refine issues for lawmakers continues to be a guiding principle for the committee today.

Just as law reform work today is helping to shed light on the path forward, the Academy's legal heritage work has sought to shed light on those who have allowed us to arrive where we are as a legal community and system today. A Legal Heritage Exhibition was held at the City Hall Chamber in 1995 and the Academy participated in a documentary, "The Passage of Law", in collaboration with the then Television Corporation of Singapore. "It's an area that few organisations in Singapore want to invest in but it is amazing that for such a forgotten subject, there are good people who offer their time for research and documentation," said Serene Wee. "It is work that creates a sense of fraternity in this profession. People do want to remember their past and celebrate their heroes."

It is this celebration of heroes from the past and the hopes for the future that the Academy wishes to commemorate on the occasion of its 20th year in the service of the legal community.

20 YEARS AND COUNTING ...

In some way, every year which the Academy has worked to live up to its mission statement has been a remarkable year for those who work for and with the Academy. In its 20th year, the Academy will venture further in working with the *SingaporeLaw* Committee set up in 2005 to take Singapore law beyond our shores and create an international relevance to it. It will continue to ask itself, "What are we here for? How can we continue to be relevant to this profession and the industry?"

But in its 20th year, the Academy will also pause to ask itself, "How can we thank our members who have supported us through the years and who have grown with us and made our growth possible?"

We would like to begin to answer this question by inviting you to celebrate with us in various ways throughout 2008.

To start off the year, the Academy will be presenting members with a limited edition Member's Diary. In it you will find nuggets of legal heritage photographs. We have also included contact information which we trust will make your work more convenient.

A legal heritage exhibition is also in store later in the year to provide an opportunity for the legal community and the public to take a trip down memory lane to discover how the legal landscape has evolved over the years.

The Academy will also launch a 20th Anniversary website in January 2008. We would like to invite members to share with us memories, memorabilia, photographs and reflections from experiences at the Academy since its inception. Please send your contributions to Audrey Chan (Tel No: 6332 5371 or e-mail: audrey_chan@sal.org.sg).

We are 20 years young, and we have loved every minute of it. We hope you have too. IS

Distinguished Visitors

THE HONOURABLE MURRAY GLEESON AC CHIEF JUSTICE OF AUSTRALIA

By **Goh Yihan and Nathaniel Khng, Justices' Law Clerks, Supreme Court**

THE Honourable Chief Justice of Australia Murray Gleeson AC, the guest speaker at the 14th Singapore Academy of Law Annual Lecture, cites winning the Lawrence Campbell Oratory Competition in both 1953 and 1955 when he was at St Joseph's College as one of the factors which influenced him to read law. "The fact that I was keen on debating at school and at university was one of the considerations which led me to take an interest in becoming a lawyer, but I did not decide that I was suitable, hardly, until I was well into my university course."

Whatever the motivation, Gleeson CJ graduated from the University of Sydney with first-class honours in arts and law in 1962 and went on to have an outstanding career at the Bar. He was appointed Queen's Counsel in 1974 and in 1988 was the first barrister to be directly elevated to the position of Chief Justice (of the Supreme Court of New South Wales) since 1934. Ten years later, Gleeson CJ was appointed Chief Justice of Australia.

What follows is an account of an interview which Gleeson CJ kindly granted *Inter Se* in which the head of the Australian judiciary shares his views on the Australian legal system and its ties with Singapore.

GLEESON CJ ON ASPECTS OF THE AUSTRALIAN JUDICIARY

Judicial appointment

On the topic of judicial appointments, particularly with respect to the desirability of appointing judges from anywhere other than the Bar, Gleeson CJ is of the view that a lot depends on the local context. In Australia, the Bar does not have a monopoly on appointments to the Judiciary and there have been some very successful appointments in recent years of people who have spent most of their working life as law teachers or solicitors. Those who have been law teachers have usually spent some time in practice before they have been appointed to the Bench. That having been said, in New South Wales, which is where Gleeson CJ comes from, the Bar is still the principal source of appointments to the Bench as the view is that experience in advocacy remains a very useful background for judicial appointment.

Going into a related topic, Gleeson CJ stated that one of the reasons he has encouraged formal systems of judicial education or training in Australia is that this is the only way of effectively widening the gene pool of judicial appointments. In Gleeson CJ's words, "It is not fair to expect people to go to the Bench without training or experience and in effect throw them in the deep end." In order to widen the gene pool effectively, state governments in Australia have recognised that they have to establish appropriate systems of judicial training.

Judicial education

When asked how best to implement judicial education (and this is especially helpful in the local context given that Singapore does not have a formal programme of judicial training), Gleeson CJ said that the proper approach, and this has been recognised in Australia, England and the United States, and most of the Commonwealth world, is to ensure that programmes of judicial training are judge-led. In his view, the risk of inappropriate pressurisation of judges is one of which people are conscious and the best way to deal with the risk is to rely on judges to have a large input. In Australia, in addition to reliance on judges for input, the judges provide the training themselves. Indeed, the courses in judicial education in Australia are largely conducted for judges by judges, although there is also the invaluable assistance of experienced law teachers.

Interest in judicial decisions

Moving to the issue of increased public interest in judicial decisions, Gleeson CJ thinks that this is a healthy development. In his view, it is a sign of rigorous democracy, where all branches of government are subject to public interest and public comment. Furthermore, he has not heard of any judge in Australia feeling pressure as a result of comments of this kind. Indeed, Gleeson CJ candidly said that, "Anybody who is exposed to comment will feel uncomfortable from time to time, but that is too bad, it comes with the nature of the job."

Increasing legislation

As with other Commonwealth jurisdictions, Australia is now witnessing an increasing prevalence of legislation, which intervenes in areas traditionally regarded as under the Judiciary. In relation to this, Gleeson CJ expressed that he does not have a problem with it at all. He cited two examples in Australia of increased legislative activity in areas previously reserved for judges. The first would be sentencing. He pointed out that the public is becoming more and more interested in the administration of criminal justice and parliamentarians are becoming increasingly interested in legislating in that area. This he regarded as a natural and healthy development. The second example Gleeson CJ gave is in the area of what he referred to as tort law reform. In this respect, there has been major legislative activity in the Australian states in recent years on issues pertaining to tort law. Both of those examples, according to Gleeson CJ, simply show that the public and politicians are taking an interest in law reform, and this is a good thing.

GLEESON CJ ON AUSTRALIA'S CONTRIBUTION TO THE COMMON LAW

On the topic of Australia's contribution to the common law, Gleeson CJ shared that Australia regards itself as being in the mainstream of the common law tradition, but there are some areas where the common law of Australia has developed differently, and in some respects, this reflects local conditions. An obvious example of an aspect of Australian law in which judicial decisions are heavily influenced by the Australian constitution and the local context is administrative law. In order to understand Australian administrative law, it is necessary to keep in mind the constitutional context in which it is operating, and also the legislative context, which includes among other things, an extensive system of merits review of administrative decision-making.

As jurisdictions become increasingly connected, Gleeson CJ thinks that it is desirable for courts to continually refer to other jurisdictions in aid of their decision-making process. However, he cautioned that it is an obvious risk that foreign decisions may not be completely understood, and obviously, when the courts in Australia refer to decisions of other jurisdictions (including decisions of non-common law jurisdictions), there is a need to be careful to ensure that the courts are understanding these decisions, and especially, the context in which they are delivered. The courts also need to ensure that they are relevant to local situations. If these two problems are avoided, there should not be unpredictability in decision-making. Subject to these qualifications, Gleeson CJ thinks that such inter-reference across jurisdictions is a very healthy development.

GLEESON CJ ON THE INTERACTION BETWEEN AUSTRALIAN AND SINGAPORE LAW

When asked to give his views on the interaction between Australian and Singapore law, Gleeson CJ opined that both jurisdictions regard themselves in the mainstream of common law tradition and, on a professional level, there is a good deal of interaction. Gleeson CJ pointed to the "healthy interest on the part of Australia and Singapore in each other's legal system". He highlighted that there is also a degree of cross-fertilisation at the level of law teaching and legal study.

Gleeson CJ also said that an Australian law journal has recently published an article which makes references to Singapore cases on property law (it is, of course, well known that Singapore took its Torrens system from Australia). Gleeson CJ observed that there was quite an extensive commentary in the article on the Singapore decisions and suggested that this was an excellent example of the two jurisdictions benefiting from each other's decisions. Incidentally, Gleeson CJ also remarked that "it would be hard to beat" the Torrens system as it is one of the best exports of the Australian legal system.

> "I would recommend to anybody starting out as a barrister to try to take every opportunity to gain any advocacy opportunity that is available and to appear in a wide variety of jurisdictions."

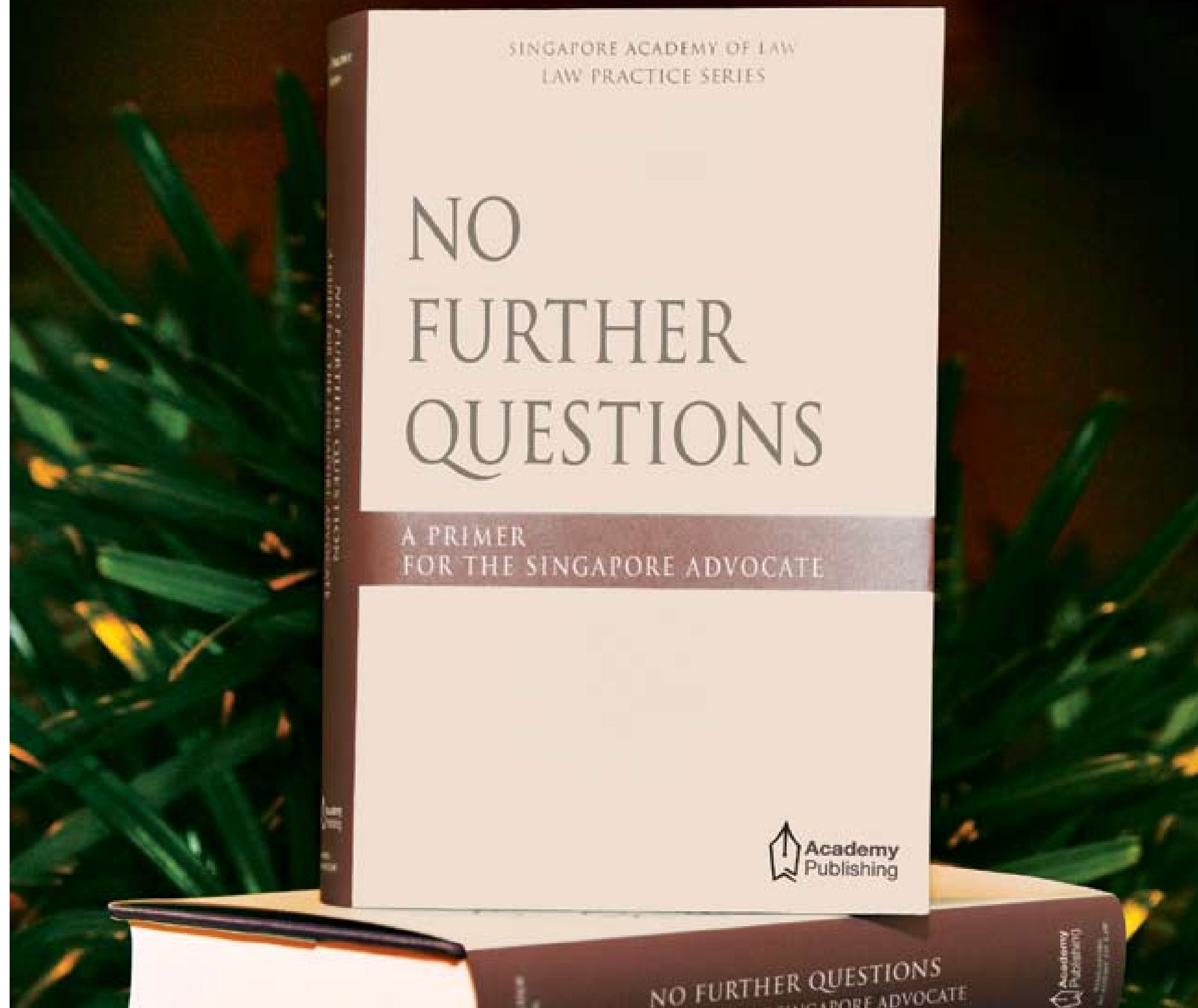
GLEESON CJ ON THE ART OF ADVOCACY

Finally, in light of the theme of this issue of *Inter Se*, it is fitting that we end off this account of our interview with what Gleeson CJ shared about his 25 years as a barrister. Gleeson CJ commented that experience in advocacy is extremely useful in the early years of a young lawyer's career. "I would recommend to anybody starting out as a barrister to try to take every opportunity to gain any advocacy opportunity that is available and to appear in a wide variety of jurisdictions. Specialisation can come later, but advocacy itself is a specialist skill and it can be developed by looking out for opportunity to appear in a good variety of jurisdictions."

When informed that the possibility of replicating his experience is quite remote in Singapore as the big law firms, in general, do not allow junior counsel to speak in court, Gleeson CJ stressed that watching and learning from others can also be an important way of picking up advocacy skills. If the opportunities for appearing in cases are limited, "the next best thing is to watch others do it and learn from them". *IS*

ADVOCATING ADVOCACY

FIRST-EVER GUIDE FOR THE SINGAPORE ADVOCATE



By **Eleanor Wong, Associate Professor, Faculty of Law, National University of Singapore**

Book Title:	No Further Questions: A Primer for the Singapore Advocate
Authors:	SC and former and current High Court judges
General Editors:	Assoc Prof Eleanor Wong, Mr Lok Vi Ming SC and Mr Vinodh Coomaraswamy SC
Publisher:	Academy Publishing, 2008

THE idea was mooted almost five years ago by the Singapore Academy of Law ("SAL") Professional Affairs Committee ("PAC") under its then Chairman, the late Justice Lai Kew Chai: a book on trial advocacy written by Singapore practitioners for Singapore practitioners. While there is no dearth of books on advocacy generally and while it may fairly be said that many principles of good advocacy are universal, Singapore litigation (like so much else of Singapore) has its own unique flavour. Context, culture and character influence the practice of advocacy in subtle ways. General primers written for other jurisdictions can only go so far. The time seemed ripe for this project.

Since then, the idea has gone through several incarnations and sets of editorial committees. From the start, one of the thorniest questions was – who would write this book? To pick just one or two writers would scarcely do credit to the rich talent of the local Bar and would hardly expose the reader to the full range of insight and opinion available. To write by committee was, on the other hand, unwieldy and impracticable; and to simply request contributions from all and sundry would result in incoherence. After much discussion, the solution was to appoint a small team of general editors who would guide the overall format, content and coherence of the book but who would call on contributors to write individual chapters.

In 2006, the core team was constituted and we got to work hammering out our wish-list of contributors and topics. We were (some might say ingenuously) ambitious. The proposal called for 20 chapters written by a selection of Senior Counsel and members of the Bench. Getting them on board (and on time) would be a dream or a nightmare. Likely both. By this time, we had lost our dear colleague Justice Lai, and the helm of the PAC had passed to the indefatigable Justice V K Rajah. With characteristic energy, Justice Rajah issued what must have been irresistible invitations. The result is a contributors list that reads like a who is who of the Singapore litigation Bar, and a real treat for a reader hoping to get a glimpse into the secrets and strategies of the Singapore Bar's most valuable players.

Some chapters deal in detail with specific aspects or parts of trials. There are

> The chapters contain anecdotes and samples of effective practice. They discuss the different strategies that may be available to counsel at different stages of a case and the concrete considerations that may affect decisions.

chapters on case theory, pleadings, interlocutory proceedings, affidavits (including affidavits of evidence-in-chief), cross-examination, expert witnesses, admissibility of evidence, opening statements and closing submissions. Different forms of advocacy also get their own treatment, with two chapters on criminal advocacy, one on alternative dispute resolution and another on appellate advocacy.

Other chapters tackle broad, overview questions. The book kicks off with ten tips from one of the Bar's senior statesmen and ends with two chapters containing observations from the Bench (both past and present) as to the qualities of effective advocates. In between, there are chapters on etiquette and ethics and on how to deal with the media. There is even a chapter intriguingly titled "Advocacy for the Long Haul" which the General Editors hope will reveal the secret of how to achieve the lawyer's equivalent of "sustainable development". Family members may want to read this chapter too!

The approach throughout the book is to provide not just general principles but specific examples of how those principles might play out in a Singapore court or case. The chapters contain anecdotes and samples of effective practice. They discuss the different strategies that may be available to counsel at different stages of a case and the concrete considerations that may affect decisions. Inevitably, certain topics crop up in more than one chapter. The extent to which our top advocates differ in their approach to these topics is as revealing as the areas of commonality. The chapters reveal the distinctive voices and characters of their different writers, reminding us that advocacy is, at the end, an art. An art engaged in by master artists.

The book is targeted at the mid-level advocate. Someone who has a few years of advocacy under his or her belt and who would appreciate a more in-depth discussion. Nevertheless, anyone interested in knowing what Singapore advocates do and how they go about doing it should also find it an illuminating read. *IS*

No Further Questions: A Primer for the Singapore Advocate *will be available mid-2008 for purchase through the Academy's website at www.sal.org.sg or at major bookstores.*