

SUPREME COURT OF QUEENSLAND

CITATION: *Cohen v Legal Practitioners Admissions Board (No 2)* [2012] QCA 106

PARTIES: **PHILIP LAWRENCE COHEN**
(applicant)
v
LEGAL PRACTITIONERS ADMISSIONS BOARD
(respondent)

FILE NO/S: SC No 8547 of 2009

DIVISION: Court of Appeal

PROCEEDING: Application for Admission

ORIGINATING COURT: Legal Practitioners Admissions Board

DELIVERED ON: Order delivered ex tempore on 12 March 2012
Reasons delivered on 20 April 2012

DELIVERED AT: Brisbane

HEARING DATE: 12 March 2012

JUDGES: Margaret McMurdo P and Applegarth and P Lyons JJ
Separate reasons for judgment of each member of the Court,
each concurring as to the order made

ORDER: **Delivered ex tempore on 12 March 2012:**

Application for admission as a legal practitioner granted.

CATCHWORDS: QUALIFICATIONS AND ADMISSION – QUEENSLAND – GENERAL MATTERS – where the applicant had been the director of a company that had engaged in misleading conduct – where the applicant had demonstrated an unacceptable attitude towards his company directorship – where the applicant had since 2007 been unable to persuade the Court of his suitability as a fit and proper person pursuant to s 31 *Legal Profession Act* 2007 (Qld) to be admitted to legal practice – where the Court required 'objective independent confirmation' of the applicant's suitability for admission – where a solicitor for whom the applicant had worked for six weeks gave evidence about his insight and remorse into his previous indiscretions and was diligent and competent in his legal work – whether the applicant was suitably fit for admission as a legal practitioner

Legal Profession Act 2007 (Qld), s 31

Barristers' Board v Khan [\[2001\] QCA 92](#), cited
Re Bell [\[2005\] QCA 151](#), cited

Cohen v Legal Practitioners Admissions Board [2008] QCA 63, related
Re: Hampton [2002] QCA 129, cited
Thomas v Legal Practitioners Admissions Board [2005] 1 Qd R 331; [2004] QCA 407, cited

COUNSEL: J G Crowley QC for the applicant
 A J MacSporran SC for the respondent

SOLICITORS: No appearance for the applicant
 Legal Practitioners Admissions Board for the respondent

- [1] **MARGARET McMURDO P:** On 12 March 2012, this Court ordered that the applicant, Philip Lawrence Cohen, a 66 year old accountant and tax agent, be admitted as a legal practitioner. The Court reserved its reasons for that order. What follows are my reasons for joining in that order despite the opposition of the Legal Practitioners Admissions Board.
- [2] The matter has a long history. Mr Cohen originally applied for admission as a legal practitioner on 13 December 2007, having complied in all respects with the requirements of admission save as to the question of his suitability as a fit and proper person to be admitted under s 31 *Legal Profession Act 2007* (Qld). The Board questioned his suitability for admission. His application was adjourned until 17 March 2008 when the Board continued to oppose it. In refusing the application,¹ this Court stated:
- "[2] The Board opposed the application because it was not satisfied of the applicant's fitness. A range of matters arose, including his criminal history, his bankruptcy, his driving history and his company's failure to lodge BAS statements. But it was his company College of Financial Studies Pty Ltd and his attitude to company directorships which principally founded his present difficulty.
- [3] We have read the transcript of the uncompleted examination of the applicant before the Victorian Board of Examiners. He chose not to pursue his Victorian application after searching questioning finished part-heard on 24 October 2007. Although he says this is because he relocated to Queensland, he may have sensed as significant an at least sceptical attitude in the Board.
- [4] The material shows the applicant did not accept the authority of the finding of the Consumer Trade and Tenancy Tribunal that his company had been guilty of misleading conduct. He was evasive and equivocal when questioned about this before the Board. He could not answer the Board's fundamental concern, that the subject course offered by the College appeared not to be registered (attracting ASIC accreditation).
- [5] Significantly, in his affidavit filed 27 November 2007, the applicant denied his company engaged in misleading conduct. Notwithstanding what he has claimed subsequently, his fundamental position in approaching this court was to reject the

¹ *Cohen v Legal Practitioners Admissions Board* [2008] QCA 63.

finding of the Tribunal, and notwithstanding that an appeal to the New South Wales Supreme Court failed. There is some retreat in paras 34 and 35 of his most recent affidavit, filed 29 February 2008, but that comes very late.

- [6] The applicant let the company be deregistered without ensuring payment of the \$9,000 ordered to be paid to the three students. He recently paid them \$1,000 each, inferentially to help his application here. When challenged about the former matter before the Board, he replied, discredibly, that "(the) students can always pay to have the company re-registered".
- [7] The other serious matter emerging from the Board's hearing is the applicant's unacceptable attitude to his company directorships. For what he called "nominal" directorships, he denied any responsibility, even in one case where he was sole director and secretary for three years until 8 January 2006.
- [8] It is no answer to say that reflected attitudes then generally held. Especially as a registered tax agent, the applicant should have known better. Also, as in the case of that particular company, we are not necessarily concerned with times long ago.
- [9] At his mature age especially, his attitudes to these matters are a matter for considerable concern, when this court comes to assess his suitability for admission as a legal practitioner. Consistently with those attitudes, his disclosure was not initially comprehensive, leading to the Board's not being satisfied as recently as 22 January 2008 that he had made full and frank disclosures of all suitability matters.
- [10] Mr Crowley QC submitted the public would be protected, should the applicant err, by intervention by the Legal Services Commission. Our approach should not assume the possibility of infraction.
- [11] We appreciate the gravity of refusing an application for admission, but the court's obligation to protect consumers of legal services transcends the personal interest of an applicant in cases like these.
- [12] We were not for these reasons satisfied of the applicant's fitness for practice, and that is why the application was refused."
- [3] Mr Cohen re-applied for admission on 7 September 2009 (Application No BS8547 of 2009). The Board opposed his application which was adjourned to November 2009 when it was again opposed and adjourned, but only after this Court noted:

"The applicant needs to demonstrate objectively a general change in attitude beyond his own say so. We could not admit to practice someone bearing the long term burdens discussed in the reasons of 17th of March 2008 unless satisfied by compelling independent evidence of his suitability."
- [4] Mr Cohen renewed his application for admission on 16 December 2010 and the Board again opposed it. In support of it, Mr Cohen deposed to the following. He

had approached a large number of community legal centres offering his services pro bono but they were all looking for qualified lawyers. If admitted, he hoped to do pro bono legal work and to go to the Bar. He had given evidence for the Commonwealth Director of Public Prosecutions in a matter which resulted in a conviction of an offender. The Commonwealth wrote to him thanking him for giving evidence. He and his wife were defendants in a civil case during 2009 and 2010; during the course of settlement negotiations, the plaintiff's solicitor provided a reference to the effect that the applicant had handled the action very capably.

- [5] This Court adjourned the application to 14 March 2011 noting:

"[T]he burden of the applicant's past meant that before the Court could be satisfied of his suitability for admission, we would need compelling objective independent confirmation of that.

The applicant's further affidavit really stops at offering assistance to community justice centres, giving evidence in a Commonwealth prosecution and conducting himself reasonably as a party to litigation. Incidentally, we're not told any detail of his involvement in that prosecution or the nature of the litigation to which he was a defendant.

The position may be different if the applicant were to secure employment in a legal office under the supervision of a practitioner over a substantial period and thereby demonstrate in a practical way the rehabilitation which he claims has occurred.

The burden of the applicant's past is a heavy burden in this context and the burden of demonstrating suitability, notwithstanding, is therefore proportionately heavy. For my part, I am not satisfied that the applicant has discharged that burden."

- [6] The applicant next renewed his application for admission on 12 September 2011. He deposed that, on 12 April 2011, he had commenced work with Michael Dwyer, a Southport solicitor, two to three days per week for no financial reward. Mr Dwyer provided a letter in support of the application. He stated that Mr Cohen had performed unpaid work experience for two days per week over five months and showed himself to be diligent and honest. The Board again opposed the application and it was adjourned to 15 December 2011, but this Court noted that any information from a solicitor concerning Mr Cohen should be in affidavit form so that the solicitor could be cross-examined before the Court.
- [7] The application next came before the Court on 15 December 2011 and the Board again opposed it. Mr Cohen deposed that Mr Dwyer would not provide him with an affidavit as it was not his practice. Mr Cohen also deposed that he was currently president of a local high school Parents and Citizens Association and that he currently held a leadership position in another community organisation. This Court reiterated that any lawyer who spoke in favour of Mr Cohen's suitability as a legal practitioner should provide an affidavit concerning the matter and attend Court so that the Board could have the opportunity to cross-examine and test those claims. The Court needed independent corroboration of Mr Cohen's capacities and suitabilities. The application was again adjourned.
- [8] Mr Cohen renewed his application on 12 March 2012 and the Board again opposed it. Mr Cohen deposed that since 13 January 2012, but for a two week period when

he was overseas, he has worked under the supervision of Ms Kerry Douglas, the principal of Kerry Smith Douglas Lawyers.

- [9] Ms Douglas provided an affidavit in which she described him as a hard working, diligent and honest employee whose attitude had matured. She considered he now had great insight into the seriousness of the matters in his background which had concerned this Court about his suitability for admission. He had demonstrated to her his sincere remorse for his past conduct. She was prepared to employ him for a period of three years or longer. In her opinion he was a fit and proper person to be admitted as a legal practitioner of the Supreme Court of Queensland.
- [10] Mr MacSporran SC for the Board cross-examined Ms Douglas at length. She enthusiastically affirmed that she had detailed discussions with Mr Cohen about the entries in his criminal history; his shortcomings resulting from his association with the College of Financial Studies; and the other matters raised as concerns by this Court in March 2008. He now understood the serious view the Court took of these matters and that he must accept and respect the judicial findings concerning them. He was remorseful for his past indiscretions as a director and had matured. Whilst he was working for her firm, he had conducted himself professionally. He had instructed experienced counsel, including senior counsel, in criminal and commercial law matters, one of which was a successful special leave application in the High Court of Australia.
- [11] A person is suitable for admission to the legal profession under the *Legal Profession Act 2007* (Qld) only if the person is a fit and proper person to be admitted, taking into consideration each of the suitability matters set out in the Act to the appropriate extent, together with other matters that the Court considers relevant.² The term "suitability matters" is relevantly defined in s 9 of the Act to include whether the person is currently of good fame and character;³ whether the person is or has been an insolvent under administration;⁴ whether the person has been convicted of an offence in Australia and, if so, the nature of the offence, how long ago it was committed, and the person's age when it was committed;⁵ and whether the person has been the subject of disciplinary action, however expressed, and relating to another professional occupation that involved a finding of guilt.⁶ The Board's role is to assist the Court in determining suitability matters by making a recommendation in relation to each application for admission.⁷ It is also to provide particular assistance to the Court on the issue of whether the applicant is a fit and proper person for admission to the legal profession having regard to all relevant suitability matters.⁸ The Court is most grateful for the Board's assistance on the many occasions Mr Cohen's applications have been before it.
- [12] In light of Mr Cohen's unimpressive background, deciding whether he has demonstrated his suitability for admission was a difficult and finely balanced question, despite his recent work with Ms Douglas and her strong evidence in his support. In determining the suitability of an applicant for admission as legal practitioner, the Court is not concerned to punish an applicant for past misconduct

² *Legal Profession Act 2007* (Qld) s 31.

³ Above, s 9(1)(a).

⁴ Above, s 9(1)(b).

⁵ Above, s 9(1)(c).

⁶ Above, s 9(1)(g).

⁷ Above, s 39(1).

⁸ Above, s 39(2)(c).

but seeks to ensure the public is well served by the legal practitioner in whom they place their trust, and to maintain the confidence in the legal profession as an institution which serves the public.

- [13] It is true that Mr Cohen has some criminal and traffic history. His traffic history is minor and he has not breached any traffic regulations for almost seven years. His criminal history is more concerning but it is also relatively minor and he has not been found guilty of any criminal offences for almost 27 years. He was bankrupt in about 1972 but his bankruptcy has long since passed. None of those matters, either alone or in combination, make him unsuitable for admission as a legal practitioner in light of Ms Douglas's evidence. What has always been of particular concern to the Court is his past treatment of the students in his business, his attitude during and after the ensuing litigation, including his reluctance to accept the legal outcomes, and his attitude towards his company directorships. The Court was also concerned that his initial disclosures to the Board were not full and frank. An applicant for admission as a legal practitioner must be candid and act with the utmost good faith in making comprehensive disclosure of issues relevant to any matters which might reasonably be regarded as touching on the applicant's fitness to become a legal practitioner: *Barristers' Board v Khan*;⁹ *Re: Hampton*;¹⁰ *Thomas v Legal Practitioners Admissions Board*;¹¹ *Re Bell*.¹²
- [14] What can be said in Mr Cohen's favour on the issue of disclosure to the Board is that, at least since 2009, it has been full and frank. He has shown persistence, resilience and determination in attempting to satisfy this Court of the rightly stringent suitability requirements for admission which followed from his unsatisfactory past. This has been problematic for him because he has found it difficult to obtain employment in a legal firm or a community legal centre whilst not admitted as a legal practitioner. To his credit, he worked for Mr Dwyer for no payment for two days a week over a five month period. Mr Dwyer's reluctance to prepare an affidavit in support of Mr Cohen's suitability and to make himself available for cross-examination, having received Mr Cohen's services free of charge for an extended period, may not be through any fault of Mr Cohen.
- [15] More recently, he has obtained employment with Kerry Smith Douglas Lawyers although only for a period of six weeks. I would have been more readily persuaded of Mr Cohen's suitability had he worked for Ms Douglas for a greater period. But she provided an affidavit, attended Court and was extensively cross-examined about both the quality of his work for her firm and his attitude to his prior indiscretions. She considers he is a fit and proper person to be a solicitor of the Supreme Court of Queensland despite his past shortcomings. There is no reason not to accept Ms Douglas's evidence that he is diligent, hardworking and competent and that he now has insight into his past failings and an appreciation of why this Court has been cautious in admitting him to practice.
- [16] For these reasons, I was at last satisfied to the necessary high degree that, despite his previous indiscretions, he is now a suitable person to be admitted to practice as a legal practitioner and that both the public and the legal profession will be served by this.

⁹ [2001] QCA 92, p 5.

¹⁰ [2002] QCA 129, [14], [26]-[29], [36]-[37].

¹¹ [2005] 1 Qd R 331, 334-335; [2004] QCA 407, pp 8-10.

¹² [2005] QCA 151, [5].

- [17] **APPLEGARTH J:** I agree with the reasons of the President.
- [18] Following the cross-examination of Ms Douglas on 12 March 2012, the Board's principal submission was that the application for admission was premature. The period during which Mr Cohen had been employed by Ms Douglas was submitted to be too short, and less than the period that the Court previously had indicated would be necessary. There was considerable force in those submissions.
- [19] On 15 December 2011 when the Court agreed to adjourn the matter it indicated that it "would need sworn evidence from a solicitor who has had experience with the applicant as to the suitability of the applicant based on that experience". This was to enable the solicitor to be cross-examined before the Court, if required.
- [20] On 16 December 2010 the Court contemplated that Mr Cohen might "secure employment in a legal office under the supervision of a practitioner over a substantial period and thereby demonstrate in a practical way, the rehabilitation which he claims has occurred." Mr Cohen was not able to secure such employment for the reasons explained by him in an affidavit sworn on 2 December 2011. He explained that he had approached several law firms, as well as legal services, in an attempt to get a position. He had been told that they only employed admitted lawyers or young people completing their work experience. He did not meet either of these criteria. He was born in 1946.
- [21] Instead of employment, Mr Cohen obtained an unpaid position with a solicitor named Michael Dwyer, and worked for Mr Dwyer two days per week over a period of five months in 2011. During this period Mr Cohen gained knowledge of practice in the lower courts. This unpaid work was undertaken to the detriment of Mr Cohen's family since he was unable to earn income to pay his mortgage and to support his wife and two children when he was undertaking unpaid work for Mr Dwyer.
- [22] The purpose of Mr Cohen's working under the supervision of a solicitor was to obtain independent verification of Mr Cohen's evidence about how he has changed his ways and his attitudes. An individual's understanding of past failings and expressions of remorse may be easily expressed but not easily examined for truth or falsity. In this and in other jurisdictions, including the criminal and disciplinary jurisdictions, expressions of remorse are hard to test.
- [23] The proposal that Mr Cohen undertake employment with a solicitor was not to enhance his legal skills to a standard that made him suitable for admission. It was to provide an employer with an adequate opportunity to assess his suitability for admission and his attitude.
- [24] Like the President, I would have been more readily persuaded of Mr Cohen's suitability had he worked for Ms Douglas for a greater period. However, there is no reason to not accept Ms Douglas' evidence about Mr Cohen's insight into his past and his remorse. Ms Douglas has had an opportunity to assess Mr Cohen's suitability and his attitude. An adjournment of the application for a few months would have provided Ms Douglas with an additional opportunity to confirm or revise these assessments. However, the probability is that they would not have changed. Both the sworn evidence of Ms Douglas and the unsworn evidence of Mr Dwyer established that Mr Cohen has worked diligently and honestly in their respective legal practices.

- [25] In applying for admission, Mr Cohen carried a high onus to demonstrate that he is a person suitable for admission to the legal profession. That onus was not discharged by his persistence over the last four years in seeking admission, or by his preparedness to make a substantial personal and financial sacrifice in undertaking unpaid work for Mr Dwyer over a period of five months. However, his work for Mr Dwyer and, more recently, his full time work for Ms Douglas, has given him experience in the legal profession. It has also provided an opportunity for practitioners to assess his attitude and his conduct in dealing with clients and others in the course of legal practice. Ms Douglas' sworn evidence serves to confirm Mr Cohen's sworn evidence that he has matured in his attitude.
- [26] Notwithstanding the force in the Board's submissions that the application should be adjourned so that Ms Douglas could provide an assessment based upon a longer period of practice, I was persuaded that Mr Cohen had satisfied the heavy onus of proving that he was suitable to be admitted to practice as a legal practitioner.
- [27] **PETER LYONS J:** I agree with the reasons of the President. I also agree with the reasons of Applegarth J.