

SUPREME COURT OF QUEENSLAND

CITATION: *Doolan v Legal Practitioners Admissions Board* [2013] QCA 43

PARTIES: **RICHARD FRANCIS JOHN DOOLAN**
(appellant)
v
LEGAL PRACTITIONERS ADMISSIONS BOARD
(respondent)

FILE NO/S: Appeal No 430 of 2012

DIVISION: Court of Appeal

PROCEEDING: Miscellaneous Application – Civil

DELIVERED ON: 12 March 2013

DELIVERED AT: Brisbane

HEARING DATE: 8 November 2012

JUDGES: Margaret McMurdo P and Fraser and Gotterson JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. The appeal is allowed.**
2. The Board's refusal to make the declaration sought by the appellant is set aside.
3. The appellant's application is referred to QCAT under s 32(3)(b) for a direction as to:
a. (i) whether, in light of the appellant's mental health, he is currently able to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner, with or without conditions attached to his admission as a legal practitioner; and
(ii) if with conditions, their nature; and
b. whether the declaration sought by the appellant under s 32 should be made.
4. No order as to costs.

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – QUALIFICATIONS AND ADMISSION – FIT AND PROPER PERSONS – where the appellant had met the academic and practical training requirements for admission as a legal practitioner in Queensland – where the appellant had applied unsuccessfully on a number of occasions to the Legal Practitioners Admissions Board for a declaration that a suitability matter would not, without more, adversely affect

the Board's assessment as to whether he was a fit and proper person for admission – where the appellant had frankly disclosed a history of mental illness – whether the notification given to the appellant amounted to an "information notice" pursuant to s 32(5) of the *Legal Profession Act 2007* (Qld) – whether the Court should review psychiatric reports and make the declaration sought by the appellant – whether the Board denied the appellant natural justice by refusing him access to personal medical information – whether the Board should have referred the application to QCAT – whether the Board has been uncooperative and caused the appellant financial hardship

COUNSEL: The appellant appeared on his own behalf
P F Mylne for the respondent

SOLICITORS: The appellant appeared on his own behalf
Legal Practitioners Admissions Board for the respondent

[1] **MARGARET McMURDO P:** The appellant has met his academic and practical training requirements for admission as a legal practitioner in Queensland; indeed, he holds a Master of Laws. He has not yet applied to the Supreme Court for admission as a legal practitioner. He has applied on a number of occasions since 2006 to the respondent, the Legal Practitioners Admissions Board ("the Board"), for a declaration under s 32(2) *Legal Profession Act 2007* (Qld) ("the Act") that a suitability matter will not, without more, adversely affect the Board's assessment as to whether he is a fit and proper person to be admitted to the legal profession. To his credit, he has frankly disclosed to the Board his history of mental illness and provided it with relevant medical reports. He has also made himself available for examination by psychiatrists nominated by the Board. This demonstrates a degree of insight and professionalism on his part. His steps towards admission have been slow, expensive and frustrating as the Board, although deeply sympathetic to his position, has refused to make the declaration he seeks for reasons which I set out later. The appellant, who is self-represented, appeals under s 32(5)(b) of the Act from the Board's most recent refusal on 19 December 2011.

[2] His grounds of appeal are as follows:

- "1. The notification to the Appellant from the Respondent did not amount to an 'information notice' pursuant to s32(5) of the Act and the decision is a nullity;
2. The refusal to make a declaration of suitability is based on grounds that are not suitability matters[;]
3. The Respondent's decisions are based upon medical opinions that are manifestly incorrect, discriminatory and unscientific, the most important of which are based on one-off interviews of a short duration;
4. The Respondent's decisions are based largely upon a psychiatric report that states the Appellant 'received two or three sessions of counselling by the school counsellor, the deceased notorious paedophile, Kevin Lynch'[;]

5. The psychiatric reports relied on by the Respondent do not state the appellant should not be admitted[;]
 6. The only reliable evidence of the Appellant's suitability is provided by the medical reports of Dr Wilkie dated 8 April 2011 and 26 August 2011 and the letter of Dr Ah-Hoon dated 11 November 2011 and these state that the Appellant is suitable for admission;
 7. The Respondent denied the Appellant natural justice by refusing access to personal medical information since 2006 and in refusing to meet with the [Appellant];
 8. The matter should have been referred to the tribunal under s32(3)(b) of the Act[;]
 9. The Respondent has been uncooperative and has caused the appellant considerable hardship and financial loss."
- [3] During the appeal hearing, the appellant stated that he sought orders allowing the appeal and setting aside the Board's decision to refuse to make the declaration. He submitted this Court should make an order giving him the declaration he sought. Alternatively, he sought an order admitting him as a legal practitioner subject to conditions. In the further alternative he sought an order referring his most recent application to the Board to the Queensland Civil and Administrative Tribunal ("QCAT") for a direction as to his abilities to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner, with or without conditions; if with conditions, the direction should specify their nature.
- [4] Before discussing the grounds of appeal it is helpful to set out relevant aspects of the Act and the Board's reasons for refusing to make the declaration.

The relevant provisions of the Act

- [5] Included in the main purposes of the Act is the provision for the regulation of legal practice in Queensland in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally: s 3(a).
- [6] Ch 1 Pt 1.2 is headed Interpretation and its Div 2 contains the meaning of various terms, relevantly suitability matters and information notices. In s 9(1), suitability matters include:
- "(m) whether the person currently is unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner".

Section 10 provides:

"10 Information notices

- (1) An *information notice* is a written notice to a person about a decision relating to the person stating—
- (a) if the person may apply to the tribunal for a review of the decision—the matters mentioned in the QCAT Act, section 157(2); or

- (b) otherwise—
 - (i) the decision; and
 - (ii) the reasons for the decision; and
 - (iii) if the person may appeal under this Act, that the person may appeal against the decision to the Supreme Court and the day by which the appeal must be started.
 - (2) A provision under this Act may provide that an information notice relevant to the provision must include other stated information.
 - (3) If a person may apply for a review, or appeal, within a number of days after the day the information notice is given to the person, a defect in the notice does not affect the person's right to apply for review or to appeal in relation to the matters dealt with in the information notice."
- [7] Chapter 2 is headed General requirements for engaging in legal practice. Its Part 2.3 deals with the admission of local lawyers. Included in its main purposes are:

"in the interests of the administration of justice and for the protection of consumers of legal services, to provide a system under which only applicants who have appropriate academic qualifications and practical legal training and who are otherwise fit and proper persons to be admitted to the legal profession are qualified for admission to the legal profession under this Act": s 28(a).

- [8] Part 2.3 Div 2 deals with eligibility and suitability for admission and relevantly provides:

"31 Suitability for admission

- (1) A person is suitable for admission to the legal profession under this Act only if the person is a fit and proper person to be admitted.
- (2) In deciding if the person is a fit and proper person to be admitted, the Supreme Court must consider—
 - (a) each of the suitability matters in relation to the person to the extent a suitability matter is appropriate; and
 - (b) other matters that the Supreme Court considers relevant.
- (3) However, the Supreme Court may consider a person to be a fit and proper person to be admitted to the legal profession under this Act despite a suitability matter because of the circumstances relating to the matter.

32 Early consideration of suitability

- (1) This section applies if a person considers a matter may adversely affect an assessment as to whether the

person is a fit and proper person to be admitted to the legal profession under this Act.

- (2) The person may apply, in the approved form, to the board for a declaration that a matter stated in the application, including, for example, a suitability matter, will not, without more, adversely affect the board's assessment as to whether the person is a fit and proper person to be admitted to the legal profession under this Act.
- (3) The board must consider the application and do 1 of the following—
 - (a) make the declaration;
 - (b) refer the application to the tribunal^[1] for a direction if the board considers a direction would be appropriate;
 - (c) refuse to make the declaration.
- (4) A declaration made under subsection (3)(a), or under a direction mentioned in subsection (3)(b), is binding on the board unless the applicant failed to make a full and fair disclosure of all matters relevant to the declaration sought.
- (5) If the board decides to refuse to make the declaration sought—
 - (a) the board must give the applicant an information notice about the refusal; and
 - (b) the applicant may appeal to the Supreme Court against the refusal within 28 days after the day the information notice is given to the applicant.

33 Involvement of tribunal and Supreme Court

- (1) If an application under section 32(2) is referred to the tribunal as mentioned in section 32(3)(b), the tribunal may give a direction to the board as the tribunal considers appropriate.
- (2) If the applicant appeals to the Supreme Court against the decision of the board to refuse to make the declaration, the appeal is to be by way of rehearing, and fresh evidence or evidence in addition to or in substitution for the evidence before the board may be given on the appeal.
- (3) On an appeal under this section, the Supreme Court may make an order as it considers appropriate."

¹ That is, the Queensland Civil and Administrative Tribunal (QCAT).

- [9] Chapter 2 Pt 2.3 Div 3 deals with admission to the legal profession under the Act. A person may apply to the Supreme Court to be admitted to the legal profession: s 34. Under s 35:

- "(2) Without limiting subsection (1), the court^[2] may—
- (a) make an order admitting the applicant to the legal profession as a lawyer if the court is satisfied the applicant for admission is—
 - (i) eligible for admission to the legal profession under this Act; and
 - (ii) a fit and proper person to be admitted to the legal profession under this Act; or
 - (b) refuse the application if the court is not satisfied as mentioned in paragraph (a).
- (3) The court's order as mentioned in subsection (2)(a) may be made unconditionally or on conditions the court considers appropriate.
- (4) In deciding the application, the court may rely on a recommendation of the board under section 39."

- [10] A contravention of a condition imposed under s 35(3) is capable of constituting unsatisfactory conduct or professional misconduct: s 36(3).

- [11] Chapter 2 Pt 2.3 Div 4 sets out the powers and functions of the Board and relevantly includes:

"39 Role of the board relating to application for admission

- (1) The board's role is to help the Supreme Court by making a recommendation about each application for admission.
- (2) The board must consider each application and, in particular, whether or not...
 - (c) the applicant is a fit and proper person for admission to the legal profession under this Act, including having regard to all suitability matters in relation to the applicant to the extent appropriate; ...
- (3) The board makes a recommendation to the Supreme Court about the application by giving the recommendation to the Brisbane registrar and a copy of it to the applicant.

40 Consideration of applicant's eligibility and suitability

- (1) To help the board to consider an application for admission, the board may, by notice to the applicant for admission, require the applicant—
 - (a) to give the board stated documents or information; or

² That is, the Supreme Court of Queensland.

- (b) to cooperate with any inquiries by the board that it considers appropriate.
- (2) An applicant's failure to comply with a notice under subsection (1) by the date stated in, and in the way required by, the notice is a ground for recommending to the Supreme Court that the applicant not be admitted to the legal profession under this Act."

The Board's refusal of the appellant's application

- [12] The Board met and considered the appellant's most recent application for a declaration under s 32(2)(a) on 8 December 2011. The Board has provided this Court with the agenda papers for that meeting dealing with the application.³ In the present circumstances, this Court can and should receive that material under s 33(2).⁴ The agenda papers summarised the history of the matter and the competing views of the various treating and examining psychiatrists. They concluded with a summary of the most recent psychiatric report which was from Dr Alcorn and dated 6 December 2011, two days before the Board meeting. In Dr Alcorn's opinion:

"the best provision of expert evidence requires that a fact-determining and law-finding tribunal be provided with an expert's 'report' (and, where necessary, oral evidence) containing a fulsome clinical history from [the appellant] (including important 'negatives' and direct questioning concerning issues germane to the referral question), mental state examination, the most likely diagnosis and rationale for that diagnosis, with detailed explanation of aetiology, prognosis, likely future functional impairment (if any), further treatment recommendations and any specific vocational rehabilitation recommendations".

It is sufficient for present purposes to note that the various psychiatrists expressed differing opinions as to the precise nature of the appellant's mental illness and its likely effect on his ability to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner.

- [13] On 19 December 2011 the Board wrote to the appellant in these terms:

"Re: APPLICATION FOR EARLY CONSIDERATION OF SUITABILITY – SECTION 32 OF THE LEGAL PROFESSION ACT 2007 (QLD)

...

It is with considerable regret that the Board, having considered the material available to it, reached a decision that it must refuse to make a declaration of suitability. The principal reason behind the Board's decision is the impossibility, and even the potential inappropriateness, of the Board's determining which of the conflicting medical opinions is preferable to another, and which is more likely to be correct. Ultimately, the Board considers that the

³ Affidavit of Melissa Victoria Timmins, ex MTV7.

⁴ Set out at [8] of these reasons.

question of your suitability for admission and those issues concerning the medical evidence will have to be determined by the Supreme Court.

The Board wishes you to know that you are entitled to apply for admission to the legal profession. The Board does not wish to discourage you from making such an application. However, the Board does wish for you to know, to avoid any risk of raising false expectations, that if you do apply for admission then, on the basis of presently available information, it is likely that the Board would oppose your admission. This is not a binding decision but the Board wishes you to understand what is likely to occur.

If the Board opposes your admission it would likely do so only because it is not possible for the Board to form a conclusive view about the correctness of conflicting medical evidence. The Board's opposition would not be based on any positive, entrenched opposition to your case. To the contrary, the members of the Board have considerable sympathy for your situation.

Accordingly, if you were to apply for admission and if the Board were to it [sic], on the basis set out above, the Board would make clear to the Court the reason why it opposed your application.

It would then be for the Court to determine your suitability for admission. This could possibly invoke the Court's hearing evidence from medical practitioners who have reported on your condition, depending upon the Court's approach. The Board obviously cannot give you legal advice but wished you to understand that you do have the right to apply for admission and at least to foreshadow the likely events that would ensue."

Ground 1

- [14] In ground 1, the appellant contended, albeit without much enthusiasm, that the Board's letter of 19 December 2011 was not an information notice under the Act so that the decision was a nullity.
- [15] For the following reasons, that contention must be rejected. The term information notice is defined in s 10(1).⁵ Section 10(1)(a) of the Act did not apply. The Board's letter was a written notice to the appellant about a decision relating to him stating the reasons for the decision and complied with s 10(1)(b)(i) and (ii). It is true that the letter did not tell him that he could appeal under the Act to the Supreme Court and the day by which the appeal should be started as required by s 10(1)(b)(iii). The Board's letter of 19 December 2011 therefore did not strictly comply with the definition of information notice in s 10(1) and with the requirements of s 32(5)⁶ in that it did not contain information about how to appeal. But the appellant lodged this appeal within time. He has suffered no prejudice from the non-compliance. It has not caused any injustice and is certainly not such as to warrant making the Board's decision a nullity. This ground of appeal is not made out.

⁵ Set out at [6] of these reasons.

⁶ Set out at [8] of these reasons.

Grounds 2 to 6

- [16] In these grounds of appeal the appellant argued that this Court should review the various psychiatric reports considered by the Board and make the declaration he seeks. The difficulty with those contentions is that, as the Board rightly identified, it is not possible to do this without hearing evidence from the psychiatrists, including cross-examination, so that findings of fact may be made on disputed issues. The Board was entitled to consider that this was not its function. And nor is this appeal a suitable vehicle in which to undertake that exercise. These grounds of appeal are not made out.

Ground 7

- [17] In ground 7, the appellant contended the Board denied him natural justice by refusing him access to personal medical information and in refusing to meet with him.
- [18] I do not accept this contention for the following reasons. The appellant had the opportunity to put before the Board any material upon which he relied. He also had the opportunity to make submissions to the Board. There is no evidence that the Board refused to meet with him. The Board has not denied the appellant access to personal medical information since 2006 other than by complying with requests from examining psychiatrists that the Board provide their reports to the appellant's treating psychiatrist rather than to him directly. This responsible course was so that his treating psychiatrist could ensure the reports did not detrimentally affect his health. He has not established any denial of natural justice. This ground of appeal is not made out.

Ground 8

- [19] The appellant contended in ground 8 that the Board should have referred the matter to QCAT under s 32(3)(b) of the Act.
- [20] There is considerable merit in this contention. The Board in its letter of 19 December 2011 identified its difficulty in reaching a conclusion about the appellant's suitability for admission in so far as he is able to satisfactorily carry out the inherent requirements of an Australian legal practitioner (s 9(1)(m)) in light of conflicting medical evidence. That is why it suggested to the appellant that this issue might be determined by the Supreme Court. This Court at the appeal hearing, with the concurrence of the Board, invited the appellant to apply to this Court for admission as a legal practitioner subject to conditions, with a view to referring the issue of his suitability for determination by a judge of the Trial Division. The appellant stated that he did not wish to apply to this Court for admission without first having the general approval of the Board because of the expense involved in costs and advertising. Counsel for the Board helpfully pointed out that the appellant could apply to this Court for admission without initially paying those fees and costs so that the question of his suitability for admission, with or without conditions, could be determined as a preliminary issue. The appellant, however, for reasons which I do not apprehend, remained adamant that he did not wish to adopt this apparently sensible course. Instead, he maintained that the Board should not have refused to make the declaration but referred his application to QCAT to have these issues determined under s 32(3)(b).

- [21] Like the Board, this Court has considerable sympathy for the appellant's dilemma. He is academically qualified for admission as a legal practitioner and has completed his practical training. The hurdle to his admission is whether, through no fault of his, ill health will render him unable to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner. In determining that issue the Court's primary concern is not the best interests of the appellant but the interests of the administration of justice and the protection of the public generally, especially consumers of legal professional services.⁷ It is not convenient for this Court, an appellate court, to determine that issue. The appellant has stated his strong preference to have the issue determined by QCAT rather than by a judge of the Trial Division, although it may be that the QCAT member determining that issue will be a judge of the Trial Division.
- [22] Under s 33(3) this Court may make any order it considers appropriate, even without finding error on the part of the Board. I am persuaded that the interests of justice including, primarily, the interests of the public (especially those who are consumers of legal professional services), as well as the appellant's interests, will be best served by an order under s 32(3)(b)⁸ referring the appellant's original application to QCAT for a direction as to whether, in light of his mental health, he is able to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner, with or without conditions, and, if so, the nature of those conditions. Without in any way pre-empting the findings of QCAT, potential conditions might include consultations at specified regular intervals with a treating psychiatrist who must report to the Board if the appellant's health deteriorates to the point where he is unable to carry out the inherent requirements of an Australian legal practitioner. Unless the parties can agree as to the crucial relevant facts and the best way to proceed, the QCAT determination is likely to involve a hearing before the Tribunal with cross-examination, perhaps preceded by a directions hearing. Of course, as the Board has always appreciated, the question whether the appellant is able to satisfactorily carry out the inherent requirements of practice can ultimately be answered only by the court to which he applies for admission: s 35. But no doubt that court would be greatly assisted by any QCAT findings and direction to the Board.

Ground 9

- [23] The appellant asserted in ground 9 that the respondent has been uncooperative and has caused him considerable hardship and financial loss. He has made no further oral or written submissions to support this ground.
- [24] Whilst this Court sympathises with the financial hardship the appellant has suffered through his inability to be admitted as a legal practitioner since 2006, this has not been the fault of the Board. It is because the appellant has had the misfortune to suffer from poor health. The Board has not been uncooperative. On the contrary, it made genuine efforts to assist him in making progress with his application for admission. This ground of appeal is not made out.

Conclusion

- [25] I would therefore make the following orders:

⁷ See the Act, s 3(a) and s 28(a) discussed in [5] and [7] of these reasons.

⁸ This Court, under s 33(3) of the Act, has power to make orders which the Board could have made under s 32(3).

1. The appeal is allowed.
2. The Board's refusal to make the declaration sought by the appellant is set aside.
3. The appellant's application is referred to QCAT under s 32(3)(b) for a direction as to:
 - (a) (i) whether, in light of the appellant's mental health, he is currently able to satisfactorily carry out the inherent requirements of practice as an Australian legal practitioner, with or without conditions attached to his admission as a legal practitioner; and
(ii) if with conditions, their nature; and
 - (b) whether the declaration sought by the appellant under s 32 should be made.
4. No order as to costs.

[26] **FRASER JA:** I have had the advantage of reading the reasons for judgment of McMurdo P. I agree with those reasons and with the orders proposed by her Honour.

[27] **GOTTERSON JA:** I agree with the orders proposed by McMurdo P and with the reasons given by her Honour.