SUPREME COURT OF QUEENSLAND

CITATION:	*Malcolmson v Legal Practitioners Admissions Board* [2008] QCA 230
PARTIES:	**SCOTT DAVID MALCOLMSON** (applicant) **v** **LEGAL PRACTITIONERS ADMISSIONS BOARD** (respondent)
FILE NO/S:	Appeal No 3279 of 2008 SC No 4793 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	Application for Admission
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 August 2008
DELIVERED AT:	Brisbane
HEARING DATE:	16 June 2008
JUDGES:	de Jersey CJ, Mackenzie AJA and Fryberg J Judgment of the Court
ORDER:	**That the application be adjourned to a date to be fixed**
CATCHWORDS:	QUALIFICATIONS AND ADMISSION – QUEENSLAND – GENERAL MATTERS – where the applicant has completed a recognised academic course – where the applicant has completed over 10 years service as a Judge's Associate and started his service before the commencement of the *Supreme Court (Admission) Rules* 2004 (Qld) – whether the applicant is to be regarded as having completed the requisite practical legal training QUALIFICATIONS AND ADMISSION – QUEENSLAND – GENERAL MATTERS – where if the applicant were required to undertake a practical legal training course, it would cost him more than $6,000 and delay his admission until after February 2009 – whether special circumstances exist that warrant exempting the applicant from the need to undertake a practical legal training course *Barristers' Admission Rules* 1975 (Qld), r 15(c), r 34, r 20 *Legal Profession Act* 2007 (Qld), s 29, s 30 *Solicitors' Admission Rules* 1968 (Qld), r 17(2), r 17(3), r 18(3) *Supreme Court (Admission) Rules* 2004 (Qld), r 6, r 7, r 7A,

rr 32-37

In the Matter of an Application for Admission as Legal Practitioner by Marcus Charles Katter, unreported, Queensland Court of Appeal, Qld, 5 November 2007
In the Matter of an Application for Admission as Legal Practitioner by Nadine Fay Daisy Morley-Drabble, unreported, Queensland Court of Appeal, Qld, 20 March 2006
In the Matter of an Application for Admission as Legal Practitioner by Scott Neaves, unreported, Queensland Court of Appeal, Qld, 13 December 2007

COUNSEL: P H Morrison QC, with P J Hay, for the applicant
M Timmins for the respondent

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

[1] **THE COURT:** Admission to the legal profession in Queensland is now regulated by the *Legal Profession Act* 2007 (Qld). Under that Act a person is eligible for admission only if he or she:

> "(a) is a natural person aged 18 years or more; and
> (b) has attained approved academic qualifications or corresponding academic qualifications; and
> (c) has satisfactorily completed approved practical legal training requirements or corresponding practical legal training requirements."[1]

Mr Malcolmson's application for admission which is now before this Court relies upon approved qualifications and requirements, not corresponding ones. Approval is given under rules for admission to the legal profession made under s 118 of the *Supreme Court of Queensland Act* 1991 (Qld).[2]

[2] Those rules, now called the *Supreme Court (Admission) Rules* 2004 (Qld) ("the 2004 Rules") commenced on 1 July 2004. Relevantly, they identify approved academic qualifications as those obtained by the satisfactory completion of a tertiary course approved by the Chief Justice and the Legal Practitioners Admissions Board, conducted in Australia and requiring the equivalent of at least three years full-time study of law and a satisfactory level of understanding and competence in the areas of knowledge mentioned in Appendix A to the Law Admissions Consultative Committee Report.[3] They relevantly identify approved practical legal training requirements as those of a course approved by the Chief Justice and the Board, conducted in Australia and requiring understanding and competence in the skills, values and practice areas set out in Appendix B to that report[4] or completion of supervised workplace experience requiring such an understanding.[5]

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1 Section 30.

2 Section 29 of the *Legal Profession Act* 2007 (Qld)

3 Rule 6.

4 Rule 7.

5 Rule 7A.

The transitional provisions

[3] Mr Malcolmson is not qualified under any of those provisions. However the rules contain transitional provisions designed to apply to those who had begun the process of qualifying for admission to the profession under the rules which existed before 1 July 2004. Until that time there were two ways of becoming a legal practitioner in Queensland: admission as a barrister and admission as a solicitor. The former was regulated by the *Barristers' Admission Rules* 1975 (Qld) ("the Barristers' Rules") and the latter by the *Solicitors' Admission Rules* 1968 (Qld) ("the Solicitors' Rules"). Both sets of rules were repealed by the 2004 Rules. The transitional provisions have the effect of continuing the repealed rules (or some of them) in certain cases.

[4] Mr Malcolmson is in a category of persons for whom the transitional provisions were designed. He wished (and still wishes) to become a barrister and had begun the process of qualifying for admission under the Barristers' Rules. As at 30 June 2004 (and in 2001) the former required (relevantly) that every person applying to be admitted as a barrister should "have complied with all the conditions of these Rules applicable to him".[6] Put simply, that required Mr Malcolmson to become a student-at-law, to pass examinations in the five stages described in the rules, to attend a substantial part of the hearing of ten proceedings of various types, to submit satisfactory reports of those proceedings and to satisfactorily complete the Bar Practice Course.

[5] In 2001 Mr Malcolmson became a student-at-law under r 34 and successfully applied to the Barristers' Board to commence studies for its examinations. He was deemed to have passed all stage two subjects[7] by virtue of credit for subjects passed at the University of Queensland before 2001. He has now successfully completed all of those examinations or is deemed to have done so. He passed the last examination in May this year.[8] It is unclear how many subjects he had passed before 1 July 2004. He has not submitted any reports of proceedings. He satisfactorily completed the Bar Practice Course in mid-2002. How it came about that he was permitted to undertake that course (which was and is designed for persons about to commence practice as barristers) does not appear from the evidence.

[6] The transitional provisions are contained in Part 5 of the 2004 Rules. That part has a number of divisions. Division 4 (rr 32-35), entitled "Existing students-at-law", applies in the present case because Mr Malcolmson passed at least one of the stage two subjects before 11 March 2005.[9] By virtue of rr 33(1) and 33(6), Mr Malcolmson is taken to have attained academic qualifications. Mr Malcolmson's problem is that there is no relevant provision in Division 4 permitting satisfactory completion of the Bar Practice Course (with or without the

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6 Rule 15(c).

7 Rule 20.

8 The prohibition on the Board conducting examinations after 31 December 2007 (r 34(2)) was overcome when Mr Malcolmson obtained an order from the Queensland Court of Appeal on 1 May 2008.

9 Rule 32.

submission of reports of proceedings attended) to count as completion of approved practical legal training requirements for the purposes of s 30 of the Act.[10]

Division 5 of Part 5 of the 2004 Rules

[7] To overcome that problem Mr Malcolmson seeks to rely upon some of the provisions of Division 5 of the 2004 Rules. That division is entitled "Existing articled clerks or judges' associates continuing under articles or as associate". The application of that division is controlled by r 36:

> "(1) This division applies to a person who, before the commencement, has started service under articles of clerkship, or as a judge's associate, under any of the following rules (a ***relevant rule***) but not been admitted to the legal profession—
>
> (a) the repealed solicitors rules, rule 17(2)(a)(i), 17(2)(a)(ii) or 17(2)(a)(iii);
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> (b) the repealed solicitors rules, rule 17(3) to the extent it applies the *Solicitors' Admission Rules 1968*, rule 18(3)(a), (b) or (d).
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> (2) For subrule (1), a reference to rule 18(3)(a), (b) or (d) is a reference to the *Solicitors' Admission Rules 1968*, rule 18(3)(a), (b) or (d) as in force immediately before 1 July 2004."

Mr Malcolmson submits that Division 5 applies to him because he was at all material times a judge's associate. He became an associate to a District Court judge on 2 February 1998 and he remains in that office. He further submits that such service constitutes completion of the training mentioned in the rules referred to in r 36, thus satisfying the requirements of r 37(3). He relies upon r 17(2)(a)(ii) of the Solicitors' Rules, the terms of which are "(ii) Service for a period of two years subject to the conditions prescribed as a Judge's Associate".

[8] The first question arising out of those submissions is whether Mr Malcolmson started service as a judge's associate "under" any of the nominated rules, so as to satisfy the requirements of r 36(1). In one sense it cannot be said that any associate started service under those rules, for they do not govern service as a judge's associate. For that reason, that sense is nonsense. But "under" is not a word of precise denotation. In the present context it could mean "as described in" the listed rules; or it could mean "in connection with" or "within the framework of" the listed rules.

[9] The latter meaning is to be preferred. It is the meaning which is suggested by the wider context of Part 5 of the 2004 Rules. Before 1 July 2004 service as a judge's associate did not count as practical training under the Barristers' Rules. Passing stages 2-5 of those rules did not count as academic training for the purposes of the Solicitors' Rules. Mr Malcolmson's is a mix-and-match approach, taking the academic qualification from the former and the practical training from the latter. That was not previously a permissible approach. It would be odd if transitional provisions enacted as part of a set of rules designed to raise standards should result in a lowering of them. Moreover the wider context of the Part suggests that

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[10] Rule 33(4) permits the course to count only for students-at-law who have completed a recognized academic course and who satisfy some other requirements.

Division 4 is intended to be self-contained and to operate independently of Division 5 and the other operational divisions. Each relates to a specific method of admission under the old rules and is complete within itself.

Conclusion

[10] So interpreted, the rules do not permit a finding of eligibility for admission. Mr Malcolmson does not satisfy the requirements without calling Part 5 in aid. If he seeks to rely on Division 4 of that part he is unable to demonstrate satisfactory completion of the approved practical legal training requirements. If he seeks to rely on Division 5 he is unable to demonstrate that he had started service as a judge's associate in connection with the Solicitors' Rules, with the result that Division 5 does not apply to him.

Alternative approach

[11] If, contrary to that conclusion, r 36 is interpreted as meaning "as described in" it may be assumed that Division 5 of the 2004 Rules applies to Mr Malcolmson.[11] The operative provision in Division 5 is r 37, which relevantly enacts:

> "(3) Completion of the training mentioned in a relevant rule is, for the person, approved practical legal training requirements for admission to the legal profession under the *Legal Profession Act 2007*."

Any of the repealed Solicitors' Rules in r 36 is "a relevant rule" for the purposes of r 37(3).[12] The question then becomes, what is meant by "the training mentioned in [r 36]"?

Rule 17(2) of the (repealed) Solicitors Admission Rules 1968

[12] On behalf of Mr Malcolmson, Mr Morrison QC submitted in effect that in answering that question, one focuses only on the words of sub-para (ii) in r 17(2)(a)(ii) of the Solicitors' Rules, disregarding the opening words contained in para (a). That submission disregards the important qualities implicit in those opening words which were common to the four types of service described in the four subparagraphs of the rule:

> "**(2)** The practical training that qualifies a person for admission is –
>
> (a) for a person who is enrolled in, or has completed, an approved degree in law at a tertiary institution in Queensland – starting and completing to the satisfaction of the Board, within the three years before applying for admission any of the following periods of practical training.
>
> (i) Service for a period of two years subject to the conditions prescribed under articles of clerkship;

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11 The Board did not submit that service for a period of 10 years would take the case outside r 17(2)(a)(ii) of the Solicitor's Rules.

12 Rule 37(6).

(ii) Service for a period of two years subject to the conditions prescribed as a Judge's Associate;

(iii) Service for a period of two years subject to the conditions prescribed partly under articles of clerkship and partly as a Judge's Associate;

(iv) Service for a period of one year subject to the conditions prescribed under articles of clerkship followed by bona fide employment as a law clerk or managing clerk for a period of twelve calendar months immediately following the expiration of the period of one year …."

The four types of service each involved on-the-job training. In each the training took two years and was required to be started and completed within the three years before application for admission. It was also required to be undertaken either after the person had completed a law degree at a tertiary institution in Queensland or while the person was enrolled in such a degree. The obvious policy behind the rule was to ensure that the person had the necessary theoretical knowledge, or was at least in the course of acquiring it, to understand what was happening in the course of the training. The opening words of para (a) were mirrored in paras (b) and (c), which also provided for on-the-job training. By contrast, the training made acceptable by para (d), "practical legal training conducted by the Queensland University of Technology or such other course in practical training approved by the Board", not being on-the-job training, was not subject to any similar requirement.

[13] Another feature of the practical training prescribed by rr 17(2)(a), (b) and (c) was that it had to be completed in the years either immediately before applying for admission or within that period plus one year. That probably reflected the view that the nature of the training was such that its lessons needed to be applied promptly, lest its benefit be lost. Regard must be had to that aspect of the rules in the present case. It is true that one could reasonably conclude that the training provided for in r 17(2)(d) also needed to be applied promptly, for the same reason, yet there is no time limit in that case. The probable reason for that omission is that those who drafted the rules considered it likely that a person who paid the substantial fees required to complete the course referred to in that rule would apply for admission promptly. The same could not be said in respect of the other parts of r 17(2).

[14] Mr Malcolmson enrolled in a combined arts/law degree at the University of Queensland at the beginning of 1990. He remained enrolled for each semester until the end of 1994. During those five years he passed 13 subjects. He was not enrolled during 1995. He was again enrolled for all semesters during 1996 and 1997, but passed no law subjects in that period. He commenced work as a judge's associate at the beginning of 1998 and was enrolled in the first semester of that year, but he did not enrol for the second semester, nor for the first semester in 1999. He was enrolled for the second semester in 1999. He passed no law subjects in 1998 but passed two in 1999. He was enrolled for both semesters in 2000 but passed no law subjects. In 2001 the university excluded him from the Bachelor of Laws degree due to poor results.

[15] In summary, at no time during his employment as an associate has Mr Malcolmson been enrolled at the University of Queensland for a continuous period of two years; and in the three years immediately before his application he was not so enrolled at all. It follows that he has not completed the training described in r 36(1)(a) of the 2004 Rules.

Rule 17(3) of the (repealed) Solicitors' Admission Rules 1968 (Qld)

[16] Mr Malcolmson relied separately on r 17(3) of the Solicitors' Rules, which provides:

> "A candidate who is pursuing an approved Degree in Law may comply with sub-Rule (2) by completing concurrently with his obtaining that Degree a period of practical legal training of a kind referred to in sub-Rule (3) of Rule 18".

Rule 18(3) refers to five years service as a judge's associate. Rule 36 of the 2004 Rules refers to rule 17(3) as a 'relevant rule, 'to the extent it applies to the Solicitors' Admission Rules 1968, rule 18(3)(a), (b) or (d).' But r 17(3) expressly requires that the practical training be undertaken concurrently with the degree course, which did not occur.

Conclusion on the alternative approach

[17] It follows that Mr Malcolmson has not completed the training described in r 36(1)(b) of the 2004 Rules. From that conclusion and the conclusion in para [15] it follows that he cannot successfully rely on r 37(3) of those rules.

Discretion

[18] The issue then arising is whether the Court should exempt Mr Malcolmson from the need to comply with the rules as to practical legal training, because of the existence of "special circumstances".[13]

[19] Attachment 2 to the 2004 Rules is Appendix B to the Law Admissions Consultative Committee Report setting out "competency standards for entry-level lawyers" in relation to practical legal training. Under r 7(3) of those rules, a practical legal training course "must require understanding and competence in the skills, values and practice areas set out in Appendix B". Rule 7(4) says that "regard must be had to the matters set out in the preface to Appendix B".

[20] Appendix B is comprehensive in its reach. Notwithstanding the experience to which the applicant has been exposed during his Associateship over the last 10 years, it was not established before us that all areas of competence prescribed by Appendix B have been covered. Indeed, there was no particular attempt made to establish those competencies were met.

[21] The evidence showed that were the applicant required to undertake a practical legal training course now, it would cost him more than $6,000 and delay his admission until 2009. Under the present regime, costs of that order must be met by applicants

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13 See r 27 of the 2004 Rules.

pursuing such a course. The complaint of delay is weakened by the circumstance the applicant has taken so long to reach this point.

[22] Mr Morrison submitted that to require the applicant to undertake the course would amount to an unwarranted imposition, in light of the applicant's training and experience, said to be "far in excess" of that which the Rules still accept as sufficient for those who come under the transitional rules, such as *Katter* and *Neaves*; his continuous service as an Associate; that he was told that Associates would be able to continue to rely on their service to qualify as legal training; and that he finds himself in his present position because he happened to move from a degree course to the Bar Board course.

[23] In relation to what he was told, he refers to Board advice that:

> "Under the transitional provision, the current Rules would continue to apply in respect of service as a Judge's Associate for service commenced by an Associate before 1 July 2005 (and any subsequent service as an Associate by that Associate). For an Associate under that transitional provision, after 1 July 2005 work-based practical legal training would not be required to satisfy the national competency standards."

That advice was generally published in mid-February 2005. But it must be read as assuming conformity otherwise with the requirements of the Rules, a conformity lacking in this case.

[24] It is to be noted that the cases of *Katter* and *Neaves* to which Mr Morrison referred involved applicants who had undertaken degree courses. It may finally be mentioned that the case of *Morley-Drabble*, to which reference was made at the hearing, was decided on a different point. The point which arose actively in the present case was not agitated in *Morley-Drabble*. The Court's attention having been drawn to this aspect now, we are obliged to determine it in accordance with the law.

[25] There are in this case no special circumstances warranting exempting the applicant from the need to undertake a practical training course considered appropriate to satisfy reasonable community expectations for contemporary lawyers, as reflected in the 2004 Rules.

[26] In the result, the applicant must, in order to qualify for his admission, undertake a practical legal training course in the usual way.

Order

[27] The court will order that the application be adjourned to a date to be fixed.