SUPREME COURT OF QUEENSLAND

CITATION:	*KMB v Legal Practitioners Admissions Board (Queensland)* [2017] QCA 146
PARTIES:	**KMB** **(appellant)** **v** **LEGAL PRACTITIONERS ADMISSIONS BOARD (QUEENSLAND)** (respondent)
FILE NO:	Appeal No 11729 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
DELIVERED ON:	Judgment delivered 28 April 2017 Further Order delivered 27 June 2017
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Sofronoff P and Gotterson JA and Douglas J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**No order as to the costs of the appeal.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – QUALIFICATIONS AND ADMISSIONS – JURISDICTION OF SUPREME COURTS – where the appellant sought a declaration that certain matters would not affect the Board's assessment as to whether he is a fit and proper person for admission – where the Board refused to grant such a declaration – where the appellant successfully appealed to the Court of Appeal and the Court granted that declaration – where the appellant made further submissions seeking the costs of the appeal – where the Board enjoys an immunity from civil liability conferred by s 707 of the *Legal Profession Act* 2007 – where the respondent disputed the appellant's submission that the Board should be liable for the costs of the appeal *Barristers' Admission Act* 1848 (NSW), s 1, s 2, s 3 *Civil Proceedings Act* 2011 (Qld), s 15 *Legal Profession Act* 2003 (Qld), s 10, s 26, s 28, s 29, s 305 *Legal Profession Act* 2007 (Qld), 13, s 32, s 32(5)(b), s 33, s 34, s 35, s 39, s 42, s 659, s 662, s 707 *Supreme Court Act* 1867 (Qld), s 58 *Foots v Southern Cross Mine Management Pty Ltd* (2007) 234 CLR 52; [2007] HCA 56, applied

In re S (A Barrister) [1970] 1 QB 160, cited
Knight v FP Special Assets Ltd (Knight's case) (1992) 174 CLR 178; [1992] HCA 28, applied
R v Gray's Inn (1780) 1 Doug 353; 99 ER 227; [1780] EngR 40, cited

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: No appearance for the appellant
No appearance for the respondent

[1] **SOFRONOFF P:** The appellant made an application to the Legal Practitioners Admissions Board pursuant to s 32(2) of the *Legal Profession Act* 2007 for a declaration that a particular matter concerning him would 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. The Board refused to make the declaration and the appellant then appealed to this Court against that refusal pursuant to s 32(5)(b) of the same Act.

[2] At the conclusion of argument in this matter the Court invited the parties to make submissions about costs. The Board submitted that it would not ask for costs in either event. The appellant submitted that the Court should order the Board to pay his costs if the appeal were to be allowed. The Court has allowed the appeal and has published its reasons for that decision. This judgment concerns the appellant's application for an order that the Board pay his costs of the appeal.

[3] In order to explain why the Board should not be ordered to pay the appellant's costs it is necessary to refer to some of the history of the profession of barristers so that the place of the Legal Practitioners Admissions Board in the Act can be understood and so that its liability to be ordered to pay costs can properly be considered.

[4] The exact origin of the profession can only be traced imperfectly. However, by the thirteenth century the English Common Law Courts commonly came to accept the appearance of professional pleaders or "narrators" as they were termed, who conducted the oral pleadings and argued questions of law on behalf of clients.[1] These narrators were distinct from attorneys, whose role was to represent their principals not only in litigious matters but also in other legal affairs. Originally, such attorneys could only be appointed by means of a royal writ. In due course they came to be appointed without such a writ. However, the court still asserted control over such attorneys and they were regarded as officers of the court. The pleaders were not regarded as officers of the court and, to this day, modern barristers in England are also not so regarded.[2]

[5] The growth in numbers of pleaders led, in due course, to the establishment of the Inns of Court as places where senior pleaders educated their apprentices.

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1 Teece, *The Law and Conduct of the Legal Profession in New South Wales* (1963), p 1.
2 *Ibid* 2.

[6] By the reign of Queen Elizabeth (1558-1603) it was possible for Lord Coke to describe the Inner Temple, Gray's Inn, Lincoln's Inn and the Middle Temple as:

> "foure famous and renowned Colleges or houses of Court … all these … [are] not farre distant one from another, and all together doe make the most famous Universitie for profession of law onely, or of any one humane science, that is in the world, an advance of itself above all others. In which houses of Court and Chancery the readings and other exercises of the lawes therein continually used are most excellent, and behooveful for attaining to the knowledge of these lawes."[3]

[7] Pupils' education consisted initially of observing senior apprentices arguing moots. Students who were promoted to the rank of those entitled to argue in moots were "called to the Bar".[4] The significance of this call to the Bar was that the resulting "barrister" would be able, after a period of probation, to appear in court on behalf of litigants.[5] No further sanction of the court itself was required.

[8] In this sense the Bar was an institution that was truly independent even of the Court and English barristers were not regarded as officers of the court. The relationship between Bench and Bar was nevertheless a very close one. The members of the bench were invariably appointed from the ranks of serjeants-at-law, at that time the highest rank in the legal profession. They considered themselves as belonging to an order and addressed each other as "brother". Appointment to the bench did not mean any cessation of membership of the order; on the contrary, because it was regarded as essential that a member of the bench be appointed from this order, it became common in later days to appoint a barrister as a serjeant-at-law merely as a precursor to an immediate appointment to the bench. It is why until recent times judges commonly addressed each other as "brother".

[9] These senior barristers, the serjeants-at-law, constituted the governors of each of the Inns of Court, the so called "Benchers" of the respective Inns. The Benchers had disciplinary power over members of their respective Inns.

[10] The status of the Inns of Court as institutions whose members controlled admission of barristers should not, however, be regarded as justifying a conclusion that the High Court did not regard itself as holding ultimate power in respect of such matters. In *R v Gray's Inn*[6] a person whom the Benchers of Gray's Inn had refused to call to the Bar sought a writ of *mandamus* to be directed to the Benchers to compel them to call him "to the degree of a barrister at law". Lord Mansfield concluded that *mandamus* would not lie to compel a decision in the applicant's favour. He said:

> "The original institution of the Inns of Court no where precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown. They are voluntary societies, which, for ages, have submitted to government analogous to that of other seminaries of learning. But all the power they have concerning the admission to the Bar, is delegated to them from the

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3 Dillon, *The Education and Discipline of the English Bar* (1894), p 50.
4 *Ibid* 3.
5 *Ibid* 3-4.
6 (1780) 1 Doug 353; 99 ER 227.

> Judges, and, in every instance, their conduct is subject to their control as visitors."[7]

[11] As late as 1970, in *In re S (A Barrister)* [8] an appeal was brought from a disciplinary decision of the Benchers of an Inn to five High Court judges sitting as "Visitors" and not to the Court of Appeal or to a judge of that court.

[12] Paull J, one of these Visitors, quoted in his decision from Chapter 55 of *Dugdale's Origines Juridiciales* as follows:

> "… King Edward I in 1292 'did especially appoint … the Lord Chief Justice of the Court of Common Pleas and the rest of his fellow justices … that they, according to their discretions, should provide and ordain, from every county, certain attorneys and lawyers, of the best and most apt for their learning and skill, who might do service to his court and people; and that those so chosen only and no other, should follow his court and transact the affairs therein; the said King and his council then deeming the number of seven score to be sufficient for that employment; but it was left to the discretion of the said justices, to add to that number or diminish as they should see fit.'"[9]

[13] As to the function of the Benchers of the Inns in the exercise of this delegated authority, Paull J said:

> "They did so with the "grave advice" of, and sometimes subject to interference by, the judges. The judges eventually accepted the work of the Inns as machinery enabling the judges to be satisfied as to the fitness of a person to have right of audience in the courts. The work of the Inns gave rise to a duty on their part to admit to the bar only fit and proper persons and to suspend or prohibit from practice any member of the Inns who after call to the Bar of the Inn ceased to be a fit and proper person to have right of audience. No long usage or custom was necessary to establish or make effective this duty. It arose as an element of the performance of the work.
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> The nature of this duty of the Inns is akin to a judicial one. The exercise of the duty is by a highly responsible and specially qualified body. It is for the purpose of establishing the status of and disciplining a member of a profession in the qualification for which, and the integrity of which, the public have a vital interest, and the judges have an overriding supervisory jurisdiction. The exercise of the duty may mean professional life or death for the individual. This duty has now been exercised by the Inns for centuries and for that reason alone the Inns could not by themselves rid themselves of their duty. …
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> The judges remain under the same duty unimpaired, the machinery by which they exercise their judicial duty has been changed. The

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7 (1780) 1 Doug 353; 99 ER 227.

8 [1970] 1 QB 160.

9 *Ibid* 168-169 quoting Dugalde, *Origines Juridiciales*, 2nd ed (1671), ch 55.

> judges also retain unimpaired their wholly different powers as visitors."[10]

[14] The colonial history of Australia meant that the control over the admission of barristers and control over their discipline had to take a new path. Originally, the *Charter of Justice* of 13 October 1823 authorised the Supreme Court of New South Wales to admit fit and proper persons to appear and act as barristers according to such general rules and qualifications as the Court should make.[11] Initially, of course, Australian practicing barristers had all been admitted in England or Ireland but in due course, systems of admission were set up pursuant to statute in Victoria and New South Wales. Section 1 of the *Barristers' Admission Act* 1848 (NSW) established a Barristers' Admission Board which consisted of all of the judges of the Supreme Court, the Attorney-General and two barristers. That Board was to promulgate rules for the examination of candidates for admission to the Bar. Section 2 of the Act provided:

> "**No candidate to be admitted unless of good character**. [N]o candidate however qualified in other respects shall be admitted to be a Barrister of the said Supreme Court unless the said Board shall be satisfied that he is a person of good fame and character."

[15] Section 3 provided:

> "**Candidates approved by the Board to be admitted as barristers**. Every candidate whom the said Board shall approve as a fit and proper person to be made Barrister shall be admitted as a Barrister of the said Supreme Court by the Judges in open Court on such day as shall be appointed for that purpose any law or usage to the contrary notwithstanding."[12]

[16] The assumption of English judges that the Court held the ultimate power over admission of practitioners was the same assumption that grounded the provisions of the *Charter of Justice* of 1828 and which placed absolute control over the profession in the hands of Australian Judges. That assumption has never been doubted in Australia and, as shall be seen, has been reinforced by statute.

[17] In Queensland, after its separation from New South Wales, a Barristers' Board was constituted under the *Barristers' Admission Act* 1848 (NSW). The reliance upon this New South Wales Act in Queensland was supported by s 36 of the *Supreme Court Act* 1867.[13]

[18] In 1896 the judges of the Supreme Court of Queensland for the first time published their own Rules for the admission of barristers. Rule 3 of those rules constituted a Queensland Barristers' Board. Rule 4 provided that the members of the Board

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10 *Ibid* 174-175.

11 "…the said Supreme Court of New South Wales shall and is hereby authorized to admit as many other fit and proper persons to appear and act as Barristers Advocates Proctors Attornies (*sic.*) and Solicitors as may be necessary according to such general rules and qualifications as the said Court shall for that purpose make and establish provided that the said Court shall not admit any person to act in any or either of the characters aforesaid who bath been by due course of Law convicted of any crime which according to any law now in force in England would disqualify him from appearing and acting in any of our Courts of Record at Westminster…".

12 By the *Legal Practitioners Act* of 1905 (Qld), women became entitled to be admitted as barristers in the same way as men.

13 Johnston, *History of the Queensland Bar* (1978), p 7.

would be, *ex officio,* the Attorney-General, the Solicitor-General (if any) together with all of Her Majesty's counsel learned in the law resident and practicing in Queensland. In addition, the Board was to include five practicing barristers of at least five years' standing. Three of these were to be elected by the barristers themselves[14] and the other two would be nominated by the Judges.

[19] Rule 16 of the Rules provided that every person applying to be admitted as a barrister "must be of good fame". Rule 47 obliged the Board to deliver to a candidate for admission a certificate in Form 1 "if satisfied of the fitness of such person to be admitted to practise". Rule 55 provided that when any allegation as to the moral unfitness of any person applying to practice as a barrister is made to the Board, the Board had to take steps to enquire into the matter. If satisfied that the allegation was proved, the Board could refuse to grant a certificate in Form 1. A dissatisfied applicant who had been refused a certificate of the Board could appeal against that decision to the Court or a Judge. Rule 56, which made provision for such an appeal, also provided:

> "The Court or Judge may dismiss or allow such appeal or make such order as seems just, and may order the appellant to pay a fixed sum for costs of the appeal."

[20] There was no provision authorising an order for costs to be made against any other person.

[21] The making of the 1896 Rules was an exercise by the judges of their power to control admission. However, because the Courts are not equipped themselves, by their lack of necessary administrative infrastructure, to make the necessary enquiries to ensure that each person admitted has the necessary qualifications, the relevant tasks were delegated to a Board created by the Court for its purposes and comprising persons determined to serve *ex officio* by the Court, selected by the Court or, in the case of three of the members, chosen by election by barristers with the consent of the Court. In England the judicial function in this respect was regarded as having been delegated to the Benchers. In Queensland the Court expressly established and constituted the Barristers' Board to perform that function for it.

[22] The positions on the Board were honorary positions. The *ex officio* members, the most senior members of the profession, were compelled by their status to attend to the Court's business. The remaining barristers, three elected by the Bar and two nominated by the Judges, were volunteers who were prepared to fulfil these duties *pro bono publico*.

[23] New rules in a form similar to the 1896 Rules were promulgated by the Judges in 1975. They remained in place, in substance unchanged, until the enactment of the *Legal Profession Act* 2003[15]. Section 26 of that Act provided:

> "**26 Suitability for admission**
>
> (1) An individual is suitable for admission as a legal practitioner only if the individual is a fit and proper person to be admitted as a legal practitioner.

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14 The Bar Association of Queensland would not be formed until 1903.

15 The relevant provisions in this Act were never proclaimed – Queensland, Legislative Assembly, *Legal Profession Bill 2004*, Explanatory Notes at 2.

(2) In deciding if the individual is a fit and proper person to be admitted as a legal practitioner, the Supreme Court must consider –

(a) each of the suitability matters in relation to the individual to the extent a suitability matter is appropriate; and

(b) any other matter it considers relevant.

(3) However, the Supreme Court may consider an individual suitable for admission despite a suitability matter because of the circumstances relating to the matter."

[24] Section 10 of the *Legal Profession Act* 2003 provided:

"**10 Meaning of "suitability matter"**

(1) Each of the following is a **"suitability matter"** in relation to an individual—

(a) whether the individual is currently of good fame and character;

(b) whether the individual is or has been an insolvent under administration;

(c) whether the individual has been convicted of an offence in Australia or a foreign country, and if so—

(i) the nature of the offence; and

(ii) how long ago the offence was committed; and

(iii) the individual's age when the offence was committed;

(d) whether the individual engaged in legal practice in Australia—

(i) when not admitted, or not holding a practising certificate, as required under a relevant law or a corresponding law; or

(ii) if admitted, in contravention of a condition on which admission was granted; or

(iii) while the individual's practising certificate is or was suspended or in contravention of a condition applicable to the certificate;

(e) whether the individual has practised law in a foreign country—

(i) when not permitted under a law of that country to do so; or

(ii) if permitted to do so, in contravention of a condition applicable to the permission;

(f) whether the individual is currently subject to an unresolved complaint, investigation, charge or order under any of the following—

(i) a relevant law as in force at any time before or after the commencement of this section;

(ii) a corresponding law or a foreign law about persons engaging in legal practice;

(g) whether the individual—

(i) is the subject of current disciplinary action, however expressed, in another profession or occupation in Australia or a foreign country; or

(ii) has been the subject of disciplinary action, however expressed, relating to the other profession or occupation that involved a finding of guilt;

(h) whether the individual's name has been removed from—

(i) the roll of barristers or the roll of solicitors, but has not been restored to the roll of barristers or the roll of solicitors; or

(ii) the roll of barristers or the roll of solicitors, but has not been relocated to the roll of solicitors or the roll of barristers; or

(iii) an interstate roll, but has not been restored; or

(iv) a foreign roll;

(i) whether the individual's right to engage in legal practice has been cancelled or suspended in Australia or a foreign country;

(j) whether the individual has contravened, in Australia or a foreign country, a law about trust money or trust accounts;

(k) whether, under a relevant law, a law of the Commonwealth or a corresponding law, a supervisor, manager or receiver, however described, is or has been appointed in relation to any legal practice engaged in by the individual;

(l) whether the individual is or has been subject to an order under a relevant law, a law of the Commonwealth or a corresponding law, disqualifying the applicant from being employed by, or a partner of, an Australian lawyer or from managing a corporation that is an incorporated legal practice;

(m) whether the individual currently has a material physical or mental infirmity.

(2) A matter is a suitability matter even if it happened before the commencement of this section."

[25] Section 28 provided that an individual could apply to the Supreme Court to be admitted as a legal practitioner.

[26] Section 305 established a Legal Practitioners' Admission Board. It was to consist of two solicitors, two barristers, a solicitor and a barrister nominated respectively by the Law Society and the Bar Association, the Brisbane registrar and a person nominated by the Minister. Other than the latter two members, each other member, including the nominees of the Society and the Association, had to be appointed by the Chief Justice who could, of course, in an appropriate case refuse to appoint.

[27] Section 29 provided as follows:

> "**29 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—
>
> (a) the application is made under the admission rules; and
>
> (b) the applicant is eligible for admission; and
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> (c) the applicant is suitable for admission, including having regard to all suitability matters in relation to the applicant to the extent appropriate; and
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> (d) there are other matters the Supreme Court may consider relevant.
>
> (3) As part of considering the application, the board may, by notice to the applicant, require—
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> (a) the applicant to give it stated documents or information; or
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> (b) the applicant to cooperate with any inquiries by the board that it considers appropriate.
>
> (4) An applicant's failure to comply with a notice under subsection (3) by the date stated in the notice and in the way required by the notice is a ground for recommending to the Supreme Court that the applicant not be admitted.
>
> (5) 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.
>
> (6) However, if the board considers it appropriate to apply to the Supreme Court for a direction about a matter concerning an application, the board may do so."

[28] It can be seen from these provisions that the 2003 Act was based upon the same fundamental assumptions concerning the inherent power of the Supreme Court to control admission.

[29] In this respect there has been no relevant change in the authority of the Court since 1823, an authority derived ultimately from English customary and constitutional practices.

[30] There being no ancient guilds in the form of the English Inns of Courts in Australia, the administrative role of deciding in the first instance upon the question of qualifications was, from the earliest stages of colonisation, conferred upon a Board created solely for that purpose by the Judges of the Supreme Court.

[31] The 2003 Act was replaced by the *Legal Profession Act* 2004. That Act was repealed and replaced by the *Legal Profession Act* 2007 under which the present application for costs has been brought.

[32] Section 13 of the *Legal Profession Act* 2007 provides:

> "**13 Inherent jurisdiction of Supreme Court**
>
> (1) The inherent jurisdiction and power of the Supreme Court in relation to the control and discipline of local lawyers and local legal practitioners is not affected by anything in this Act.
>
> (2) The inherent jurisdiction and power—
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> (a) extends to an interstate legal practitioner as mentioned in section 78; and
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> (b) may be exercised by making—
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> (i) any order the committee may make under this Act; or
>
> (ii) any order or direction the tribunal may make under this Act or the QCAT Act."

[33] Sections 34 and 35 provide for the role of the Supreme Court in admitting practitioners. They provide as follows:

> "**34 Application for admission to the legal profession**
>
> (1) A person may apply to the Supreme Court to be admitted to the legal profession under this Act.
>
> (2) The application must be made in the approved form and under the admission rules.
>
> **35 Role of Supreme Court relating to application for admission**
>
> (1) The Supreme Court must hear and decide each application for admission in the way the court considers appropriate.
>
> (2) Without limiting subsection (1), the court 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."

[34] Section 659 continues the existence of the Legal Practitioners' Admissions Board which had been established under the *Legal Profession Act* 2003 and continued under the 2004 Act.

[35] Section 662 obliges the Law Society to provide administrative support for the Board, including secretariat support. The Board must pay for these services. Evidently, the source of the monies to pay for such services are the fees payable to the Board under s 42 of the Act. There are no other statutory sources of money to support the Board.

[36] Relevantly for the purposes of the present case, s 39 of the Act provides:

"**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—

(a) the application is made under the admission rules; and

(b) the applicant is eligible for admission to the legal profession under this Act; and

(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; and

(d) there are other matters the Supreme Court may consider relevant.

(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."

[37] The Supreme Court of Queensland has a constitutional significance and its continued existence as a superior court of record is constitutionally guaranteed.[16]

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16 See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 109-110, 137-139.

[38] The characteristics of the Supreme Court which are essential to its continued existence as such may be identified but are incapable of being definitively catalogued. However, it is uncontroversial that one of these characteristics is the power of a State Supreme Court to control its own processes. In that sense the existence of the Court's inherent jurisdiction to control the admission of lawyers can easily be understood as inherent in the Court's control over its own functions and processes. Section 13, in declaring that nothing in the *Legal Profession Act* 2007 is to be regarded as affecting the Court's inherent jurisdiction and power in relation to the control and discipline of local lawyers is, therefore, an unsurprising provision and, in my opinion, is merely declarative. The position could not be otherwise. Nor is it surprising that, whatever machinery might be provided by statute, or at the initiative of the Judges themselves, to deal with matters preliminary to admission, it is the Court to which application must in the end be made for admission as a legal practitioner pursuant to s 34.

[39] It is not, therefore, the role of the Board to decide the fate of applications for admission or even to decide in any determinative way whether or not an applicant for admission is or is not a fit and proper person to be admitted. Its role is, and can only be, as s 39 declares, to help the Supreme Court. In fulfilling this role, the Board may form an opinion about the character of an applicant for admission and communicate that opinion to the Court in order to assist it.

[40] In so doing, pursuant to s 41 the Board is entitled to appear before and to be heard by the Supreme Court at a hearing about any application.

[41] Against this historical and current background of fundamental principle, it is possible to consider the nature of an appeal to the Court pursuant to s 32(5)(b).

[42] In days past, when numerous applications for admission were heard by the Court, the progress of the majority of such applications which were uncontested was not uncommonly interrupted by the occasional contested application for admission. Often such contested applications required the Court to hear argument, and sometimes lengthy argument or even evidence, and also to determine sometimes difficult or complicated issues about an applicant's fitness to be admitted.

[43] Section 32 of the Act was enacted to make provision for early determination of such issues so that such inconvenient interruptions of a largely formal ceremony could be avoided and so that, for a particular applicant whose admission was opposed, unnecessary uncertainty on the actual day of an application for admission could be eliminated. Pursuant to s 32, an intending applicant for admission can apply to the Board for a declaration that a particular matter, which is capable of being the basis for a conclusion that the applicant is not a fit or proper person to be admitted, will not be regarded by the Board in that way. Such an application, made in anticipation of a later application for admission, requires the Board to consider the materials available to it, including materials obtained by its own investigations, before deciding whether to make a declaration that the matter in issue "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".[17]

[44] Having considered such an application the Board may make the declaration sought, may refer the application to the Queensland Civil and Administrative Tribunal for

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17 *Legal Profession Act* 2007 (Qld), s 32(2).

a direction or it may refuse to make the declaration.[18] There is a "right of appeal" to the Supreme Court against a refusal.[19] The appellant in this case exercised that right of appeal and was successful.

[45] Pursuant to s 33 such an appeal is 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.[20]

[46] The Board's function in determining whether to make a declaration under s 32 is *quasi-judicial* in some respects. Ordinarily, a body performing a function of that kind ought not appear before a Court which is to decide a challenge to one of its decisions.[21] However, the Legal Practitioners' Admissions Board is special. It is a statutory adjunct to the Court in the sense that it performs for the Court the function of determining, among other things, whether an applicant is a fit and proper person to be admitted. It has been given a statutory right to appear before the Court and to be heard by the Supreme Court by way of assistance. It is a genuine *amicus curiae*.

[47] An application to the Board does not create a *lis inter partes* and the Board's determination does not give rise to such a *lis* should a disappointed applicant decide to appeal. Such an appeal is a proceeding *sui generis* in which the Court must decide a question in the exercise of its power to decide who may and who may not be admitted as one of its legal practitioners. Such a proceeding does not involve a determination of existing rights in a dispute between two parties. Rather, it is an inquiry by the Court itself into a particular issue that the Court must determine in the course of controlling entry into the profession so as to limit such entry only to those who meet the necessary standards of character.

[48] Accordingly, it would be incongruous if the Act were to provide for an award of costs to be made against the Board when the Board is present to "help" the Court. The Board is not in any sense whatsoever a party to litigation. It appears by reason of its statutory entitlement to appear and to be heard upon a question in which the Court is interested for its own purposes. It neither wins nor loses, whatever the Court decides.

[49] The Act makes no provision for awarding costs in any proceedings brought under it and, with a single exception, it makes no reference at all to costs of proceedings. Rather, s 707 provides that the Board, among other entities, "is not civilly liable to someone for an act done, or omission made, honestly and without negligence under this Act". A rider to s 707 provides:

> "***civil liability*** includes a liability for the payment of costs ordered to be paid in a proceeding for an offence against this Act."

[50] The question is whether an order that the Board pay the appellant's costs would render it "civilly liable to someone" so that the immunity conferred by s 707 is engaged.

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18 *Ibid* s 32(3).
19 *Ibid* s 32(5)(b).
20 *Legal Profession Act* 2007 (Qld), s 33(2).
21 *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13.

[51] In *Foots v Southern Cross Mine Management Pty Ltd*[22] the High Court had to consider whether an order that the appellant, who was a bankrupt, had to pay the respondent's costs of a trial created a debt or liability provable in the appellant's bankruptcy. In his reasons in the Queensland Court of Appeal, from which the appellant appealed to the High Court, Jerrard JA referred to "the liability created by the costs order".[23] In the High Court the issue raised by the appellant was whether the liability constituted by the costs order against him arose from an "obligation" which he had incurred prior to his bankruptcy. The reasoning of the Court of Appeal, whose decision was affirmed, and of the High Court proceeded upon the obvious basis that an order for costs creates a liability in the obligor.

[52] In my view, the immunity against civil liability conferred by s 707 renders the Board immune against an order for costs of a proceeding at which the Board appears before the Court as part of its function provided the order sought is not based upon the Board's dishonesty or negligence. The function of the Board as the Court's helper, and the status of the Board's members as honorary members fulfilling a professional duty, strongly favours a construction of s 707 which would immunise the members of the Board against an order for costs in such cases. The absence of any statutory right of indemnity in the Board members, serving in their honorary capacity, to have recourse against the Board's funds or any other funds to meet such liability also tells in favour of such a construction.

[53] The rider to s 707 is also indicative of the same conclusion. The present proceedings are in the Court's civil jurisdiction. The rider makes it expressly clear that that immunity extends to any liability for costs in the criminal jurisdiction also. A liability to pay costs in that jurisdiction is to be taken to be included in the expression "civil liability". That express inclusion within the immunity of costs awarded in the criminal jurisdiction implies that costs awarded in the civil jurisdiction are already included within the expression "civil liability".

[54] Under s 15 of the *Civil Proceedings Act* 2011, the Court may award costs in all proceedings unless otherwise provided. The decision of the High Court in *Knight v FP Special Assets Ltd (Knight's case)*[24] is authority for the proposition that s 58 of the *Supreme Court Act* 1867, the predecessor of s 15 of the *Civil Proceedings Act* 2011, was expressed in terms that were wide enough to permit an order for costs to be made against a non-party. It is therefore wide enough to encompass a power to order the Board to pay costs and, absent the statutory immunity, would have furnished a source of power for the order that the appellant seeks. However, in my view s 707 is clear in its terms. In the absence of dishonesty or negligence, the Board is immune against an order to pay costs.

[55] The present application was argued upon the assumption that costs could be ordered in the usual way. If I am wrong in my construction of the Act, in my opinion the present is not a case in which the discretion to order the Board to pay costs should be exercised.

[56] The members of the Board made a professional judgment about the significance of the suitability matter that the appellant had placed before it for decision. There is no suggestion in this case that the Board, in coming to its decision, did anything that

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22 (2007) 234 CLR 52.

23 *Southern Cross Mine Management PL v Ensham Resources & Ors* [2006] QCA 531.

24 (1992) 174 CLR 178.

was worthy of criticism. Its refusal to make the declaration is the result of the combined professional judgment of the Board's members. It cannot be said, in the terms of a conventional appeal, that the Board "erred". Nor can it be said that the Board proceeded upon some misconception of the facts or the law. All that has happened is that, upon a matter of professional judgment about the character of the appellant, three judges of this Court have come to a different view from that formed by the members of the Board.

[57] Moreover, while this proceeding is styled an "appeal", it lacks all of the hallmarks of an ordinary proceeding by that name. As has been said above, it is not a *lis inter partes*.

[58] Nor is the subject matter of the appeal a merely private affair. Although the appeal concerns the personal interests of the appellant, at its heart the appeal raises for the Court's consideration an issue that the Court must decide in the public interest.

[59] Moreover, the whole proceeding under s 32, before the Board and before this Court, exists as a matter of convenience. It suits the convenience of the appellant to have this matter determined in a preliminary way without having to wait until the day that he makes his application to the Court, against the Board's opposition, for his admission as a legal practitioner. It also suits the convenience of the Court to determine the matter in this way rather than as a contested application for admission. But in the absence of the procedure created by s 32, the matter would have been argued upon the day of the appellant's application for admission and, had he been admitted despite the Board's opposition, he could not possibly have sought his costs. That he was able to make an early, interlocutory, application of this kind does not alter the substance of that position.

[60] The statutory status of the Board as decision-maker and contradictor does not transform it into a party in the ordinary sense. Its function remains, even when appearing before the court, "to help the Supreme Court by making a recommendation about each application for admission" in terms of s 39(1) of the Act. There is, therefore, no "event" upon the occurrence of which the Court should make its "usual order". The Board neither wins nor loses an appeal such as this. Nor does the appellant.

[61] Further, in this case the Board was not only entitled to appear but it was of the greatest assistance to the Court that it did appear. It will also be of assistance if the Board continues to appear in future cases when it thinks it is right for it to do so. The absence of a contradictor would severely hamper the ability of the Court to make the right decision in such cases. The Board should appear in such cases and thereby fulfil its statutory duty to help the Court without fear of its members being made liable for costs in the event that a mere majority of the Court, or even a unanimous Court, might take a different view about the matter.

[62] For these reasons I would make no order as to the costs of the appeal.

[63] **GOTTERSON JA:** I agree with the order proposed by Sofronoff P and with the reasons given by his Honour.

[64] **DOUGLAS J:** I agree with the President's reasons.