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IN THE HIGH COURT OF NEW ZEALAND
GREYMOUTH REGISTRY

M.1/83

IN THE MATTER of an application pursuant to Section 55(3) of the Law Practitioners Act 1952

BETWEEN NEIL FRANCIS JOSEPH THINN of Greymouth, Barrister

Applicant

AND THE WESTLAND DISTRICT LAW SOCIETY being a District Law Society duly constituted under the provisions of the Law Practitioners Act 1982

Respondent

UNIVERSITY
26 SEP 1984
LAW

Hearing: 3 July 1984

Counsel: N.W. Williamson for Applicant
H.J. Smith for Respondent

Judgment: 16 JULY 1984

JUDGMENT OF HARDIE BOYS J.

Mr Thinn was admitted as a barrister and solicitor on 11 August 1980. He has recently been practising in Greymouth as a barrister and now wishes to commence practice as a solicitor on his own account. The Council of the Westland District Law Society is not satisfied as to his suitability to

so practise and he has therefore applied to the Court in accordance with s 55(3) of the Law Practitioners Act 1982. His application is opposed by the Society, not only on the basis of his suitability, but also because of doubts as to whether he satisfies the other two criteria for the commencement of practice.

There are three such criteria and they are set out in subs.(2) of s 55 which reads:

> " Except with the leave of the Court given under this section, no practitioner shall commence practice as a solicitor on his own account, whether in partnership or otherwise, unless--
>
> (a) During the 8 years immediately preceding the date of his so commencing practice, he has had not less than 3 years' legal experience in New Zealand; and
>
> (b) He has satisfied the District Council that, having regard to the matters referred to in subsection (6) of this section, he is a suitable person to practise on his own account; and
>
> (c) He has received (whether before or after the commencement of this Act), during the 3 years immediately preceding the date of his so commencing practice, adequate instruction and examination to the satisfaction of the District Council in the duties of a solicitor under this Act, and under any regulations or rules for the time being in force, relating to the audit of solicitors' trust accounts or to the receipt of money."

Subsection (3) is as follows:

> " A practitioner may apply to the Court for leave to commence practice on his own account in either of the following cases:
>
> (a) Where, during the 8 years immediately preceding the date of the application, he has had less than 3 years' legal experience in New Zealand but otherwise meets the

requirements of subsection (2) of this section; or

(b) Where he has failed to satisfy the District Council that he is a suitable person to practise on his own account but otherwise meets the requirements of subsection(2) of this section."

The Court's power is contained in subs (5) and the considerations relevant to its exercise are in subs (6):

" (5) If, on an application under subsection (3) of this section, the Court is satisfied that, having regard to the matters referred to in subsection (6) of this section, the applicant is a suitable person to practise on his own account, it may grant leave accordingly, subject to such conditions (if any) as in the circumstances it thinks proper.

(6) The matters to which the District Council or the Court shall have regard for the purposes of subsection (2)(c) or subsection (5) of this section are -

(a) The applicant's age:
(b) His experience:
(c) Whether or not he intends to commence practice as a member of a firm:
(d) The fields in which he intends to practise:
(e) Such other matters as the District Council or the Court thinks fit."

The reference in subs (6) to para (c) of subs (2) is clearly an error, and should be to para (b).

I must accept Mr Smith's submission that the Court may grant leave only if the applicant already satisfies the requirements of both para (c) of subs (2) and also of either para (a) or para (b). Subsection (3) postulates only two cases: first where paragraphs (b) and (c) are satisfied (subs (3)(a)); and secondly where paragraphs (a) and (c) are satisfied (subs (3)(b)). The Court cannot grant leave where

neither para (a) nor para (b) is satisfied: and this notwithstanding that under subs (5) suitability, determined in accordance with subs (6), is the determining factor whether the application is brought under subs (3)(a) or subs (3)(b). Mr Thinn's application is brought, as it must be, under the second of these and he must therefore show that he qualifies under both subs (2)(a) and subs (2)(c).

The doubt as to whether para (c) of subs (2) is satisfied in Mr Thinn's case occurred to Mr Smith as he prepared his argument. The Council of the Society has not considered the matter, which is of course one solely within its jurisdiction. It arises from the fact that Mr Thinn, in accordance with what was certainly the normal procedure under the 1955 Act (s 22(1) of which had a requirement substantially the same as that in s 55(2)(c)), and presumably still is under the new Act, produced a certificate dated 1 December 1982 from a firm of chartered accountants, nominated I assume by the Wanganui District Law Society (Mr Thinn was then working in that district) that he had been successful in passing the practical examination "pursuant to Section 22 of the Law Practitioners Act 1955". The point of concern to Mr Smith is whether that certificate may be regarded as confirmatory of the receipt of instruction and examination "in the duties of a solicitor under this [the 1982] Act". It clearly is with respect to duties imposed by regulations or rules, even though the wording of the section is slightly different from that of the former Act, unless those rules and regulations have been changed since the new Act came into force on 1 April 1983. And unless the new Act imposes different duties from those

imposed by that of 1955, which does not appear to be so except perhaps to the minor extent of the new s 90(3). I would have thought that the certificate given with respect to the earlier Act must necessarily be sufficient with respect to the later. But that is a matter for the Society, not for me. The Society must determine what weight it gives to the certificate. However I must add that I cannot accept Mr Smith's suggestion that the legislative intention is that everyone who passed the examination but did not commence practice under the old Act must necessarily undergo fresh instruction and sit another examination under the new Act.

I turn now to consider whether in terms of subs (2)(a) Mr Thinn has, during the past eight years, had not less than three years' legal experience in New Zealand. "Legal experience" is defined in subs (1) as any one or more of the following:

> " (a) Experience of legal work in the office of a barrister or solicitor or firm of solicitors in active practice on his or their own account:
>
> (b) Experience of legal work in any of the State services (as defined in section 2 of the State Services Act 1962):
>
> (c) Experience of legal work in the office of a local authority or in the employ of a company or other body whether incorporated or unincorporated:
>
> (d) Experience of full-time law teaching in a university:
>
> (e) Experience as a member of the House of Representatives;-
>
> and includes any such experience before the commencement of this Act."

Between 26 November 1979 and 16 December 1982 Mr Thinn worked as a solicitor for three different solicitors or firms of solicitors, in Christchurch, Whangarei and Wanganui, for a total of slightly less than two years and five months. On about 17 December 1982 he commenced employment in Greymouth as a solicitor for the principals of a number of mining companies. On 15 January 1983 he married and his wife, a nurse, arranged a transfer to Greymouth. On 1 February 1983, he filed an application in the Court for leave to commence practice on his own account as a barrister and solicitor. The 1955 Act was then still in force. It contained no provision such as the present s 55(2)(b) requiring an applicant to establish his suitability. The Society became concerned at allegations that Mr Thinn had already been accepting instructions direct from the public and at a meeting between him and its representatives on 22 March 1983 his application was discussed in the light of those concerns. He decided not to proceed with the application and this left him with two options, the particular requirements of each being explained by the Society's representatives. One was to continue in full time employment as a solicitor, and the other was to practise as a barrister. He chose the latter and commenced practice on 15 April 1983. He has set up Chambers, acquired a basic library and has made himself available to undertake such work as has been offered to him, mainly legal aid assignments in the District Court. Now however the Society finds itself obliged to submit that his experience in practice as a barrister may

not be taken into account in calculating the length of his legal experience. Without it, he clearly does not qualify under s 55(2)(a).

The kind of experience recognised by s 55(1) is considerably wider than that recognised by s 22(1) of the 1955 Act (as amended in 1975), which was "legal experience .... either in the office of a barrister or solicitor or firm of solicitors in active practice on his or their own account or in the legal branch of a Government Department". That earlier provision was considered by Vautier J in a case similar to the present, Illingworth v The Law Society of the District of Auckland (Auckland, A.1070/77, 8 December 1977). Mr Illingworth had been in practice as a barrister, and sought to have that experience taken into account for the purposes of s 22(1). His argument was much the same as that advanced by Mr Williamson on behalf of Mr Thinn, namely that the words then appearing in the statute, "legal experience in the office of a barrister" meant not only experience as the employee of a barrister, but experience as a barrister working as such in his own office: for the Act contained no requirement of general instruction, training or tutelage as a prerequisite to practice; and any alternative construction would lead to absurdity, such as that the experience of an employee of a barrister would qualify whilst that of his employer would not. Vautier J accepted the absurdity but thought the possibility of its occurrence somewhat hypothetical (referring to Maxwell Interpretation of Statutes 12 Ed 208) and in any event pointed out that the employer's position was capable of being dealt with by the Court on application to dispense with

strict compliance with the three year requirement. He considered that it would do violence to the language of the statute to read the words "experience in the office of a barrister or solicitor or firm of solicitors" as though they were "experience as a barrister or solicitor". He pointed out the important relevant difference between a barrister and a solicitor, in that the former has no lay clients whilst the latter "is engaged by any member of the public who happens to walk into his office". And he concluded that the legislative objective was clear:

> " I think that the mischief sought to be remedied was obviously that without such a provision, a person could practise as a solicitor without having seen the example being set by more experienced people, without having the opportunity of hearing matters discussed by more experienced people as a transaction went along and the difficulties and pitfalls arose and without any of the other benefits that are clearly to be secured by seeing how others with the experience deal with a particular situation. That sort of experience is clearly not to be gained by a barrister practising on his own account. It may be gained in some cases, but in the great majority of cases I do not think that it would be...."

I respectfully agree with that view of the 1955 Act and the question therefore becomes whether a different interpretation should be adopted because of the changes brought about by the 1982 Act. It was not suggested that there is significance in the additional words "experience of legal work", but Mr Williamson submitted that the introduction of additional categories of legal experience adds to the anomalies and raises doubt as to the current legislative objective. It may seem strange that three years' experience as a member of

the House of Representatives qualifies as "legal experience" whereas that of a barrister in full-time practice does not. And a full-time law teacher or the sole house solicitor of an insurance company is unlikely to gain the kind of practical experience by example and precept which Vautier J saw as the purpose behind the exclusion of experience of barristerial practice. However, the changes introduced in 1982 went much further than extend the categories of "legal experience", for they introduced the criterion of suitability, spelt out in s 55(6) to include actual experience, and the manner and areas in which the applicant intends to practise. Further, the Court has power under subs(5) to impose conditions. Thus there are ample controls over undesirable reliance on subs. (1). So when s 55 is considered as a whole, I think it apparent that the further apparent anomalies are no less hypothetical than they were under the earlier Act, and that the legislative objective has not been altered. There has on the contrary been a stiffening of the requirements for practice on one's own account.

It is also of considerable significance that in re-enacting that category of legal experience which is obtained in a lawyer's office, the Legislature has chosen to retain the same words as were used previously and as then used had been interpreted by this Court. Had it been desired to achieve a different result from that determined in the Illingworth case, it would have been a simple matter. To take the simplest possibility, the provision could have been worded "Experience of legal work as a barrister or in the office of a barrister or solicitor....". That this was not done means that the Court

must presume that Parliament intended to retain the meaning given to the words used by the earlier decision: Craies on Statute Law 7th Ed. 141.

I therefore conclude that Mr Thinn cannot satisfy s 55(2)(a). That on its own need not necessarily be an insurmountable obstacle, for it may well be that on an application properly before it the Court would grant him a dispensation from the three year period by reason of the experience he has actually had. But I cannot do that now, because he has not been able to satisfy s 55(2)(b). And I cannot consider his application in respect to s 55(2)(b) because s 55(2)(a) is not satisfied.

Nonetheless, it may be helpful for me to comment upon the question of suitability, because as matters stand, Mr Thinn is, to use a word adopted by both counsel, trapped; trapped because although the Society considers he needs further experience as an employee, or even a partner of a solicitor, he has not been able to obtain a position of that kind; and trapped too as the result of acting in one rather than the other of the two options put to him on behalf of the Society, for had he remained with his mining company employers for a further four months, he would have satisfied s 55(2)(a). And unless he gives up his practice as a barrister, and takes legal employment either on the Coast or elsewhere, he will remain unable to satisfy it, and, unless he can persuade the Council as to his suitability, he will remain unable to apply to the Court for a dispensation from it.

Despite somewhat veiled suggestions in correspondence, an affidavit by the Society's Secretary shows that there were

really five matters, in addition to that of experience, which prompted the Council to reach its conclusion, expressed in a resolution of 20 March 1984, "that the Council is not prepared to take the responsibility of certifying that Mr Thinn is a suitable person to practise on his own account". I am now informed that the Council accepts that one of these reasons was irrelevant to the application. Another appears to have arisen from a misunderstanding which I gather has now been cleared up. The third relates to events which occurred prior to the meeting on 22 March 1983, while the remaining two arise from correspondence received from Mr Thinn's previous solicitor employers. Mr Thinn was not given the opportunity to comment on some of these matters before they were considered by the Council. Some of the material before the Council was not disclosed until the Secretary's affidavit was filed on 21 June 1984. Nonetheless, Mr Williamson invited me to examine them now, rather than on an application for a review.

It is clear that both whilst working for the mining company owners and after commencing practice as a barrister, Mr Thinn had difficulty with the ethical requirement that he could not take instructions from members of the public. This kind of difficulty is faced by many solicitors employed by commercial firms or non-legal organisations, and by many young barristers, anxious and needing to obtain work and being approached by members of the public who are not greatly interested in the niceties of professional ethics. It is a delicate area, readily open to misunderstanding and inappropriate handling. Mr Thinn's attempts to deal with it do not appear to have been particularly appropriate, although

it is impossible on the material before me to determine exactly what occurred. However, I would have thought that the incidents in February 1983 had been sufficiently dealt with at the meeting in March, whilst one of those that occurred subsequently has in part at least been answered by the client concerned; and the others are vague to a degree. These matters all occurred over a year ago and I myself would place much greater weight on the manner in which Mr Thinn has conducted himself more recently since he has settled into his barrister's practice.

When Mr Thinn first applied to the Court, he submitted references from two of the solicitors by whom he had been employed. They were both positive and commendatory. As the Society notes, they did not affirmatively state that Mr Thinn was suitable to practise on his own account. But they were clearly not provided with that point particularly in mind. They were written at the time Mr Thinn left his job, one in October 1981 and the other in December 1982. The Society then made its own approaches asking whether any reason was known why his application to practise should not be granted. One of those who had given Mr Thinn a reference replied in quite different terms from those he had used earlier, and in a manner that would obviously give some cause for concern: but his reply did contain the statement that the writer "was not aware of anything that he did that would stop him practising on his own account". That solicitor has sworn an affidavit to much the same effect. The employer who had not earlier provided a reference also said that he had "no direct knowledge as to why his application should not be granted" but went on to say that

Mr Thinn had been dismissed as a result of information received from the Canterbury District Law Society. It transpires that there was nothing adverse to Mr Thinn in that matter, but the letter must obviously have had some effect on the minds of the Council. The other solicitor who had earlier given Mr Thinn a reference had written to the Canterbury Society and a copy of that was also before the Council. It was an angry letter, prompted by a suggestion that this solicitor had been a party to Mr Thinn's direct dealings with clients but it did not otherwise reflect on his suitability to practise.

Whilst this material is far from encouraging it needs to be kept in the proper perspective of the time at which and the circumstances in which it was written. And whilst it is true, as Mr Smith pointed out, that, apart from the initial references, subsequently qualified, Mr Thinn's application is supported by no other practitioner, and no person in a position reliably to assess his professional qualities, it needs to be recognised that there may be other reasons for that. He does have the support of six people with whom he has had professional or business dealings and who have sworn affidavits on his behalf. He has practised now as a barrister for over a year and his professional suitability may be better able to be assessed in an objective way from his performance in that time than from impressions created by events of the past.

Therefore although this motion must be, and is, dismissed, I invite the Council to look afresh at the question of suitability when Mr Thinn considers it appropriate to make a further application.

I do not think it appropriate to make any order as to costs.

Solicitors:

Raymond, Donnelly & Co, CHRISTCHURCH, for Applicant
Hunter, Smith & Co, NELSON, for Respondent.

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