SUPREME COURT OF QUEENSLAND

CITATION:	*KMB v Legal Practitioners Admissions Board (Queensland)* [2017] QCA 76
PARTIES:	**KMB** (appellant) **v** **LEGAL PRACTITIONERS ADMISSIONS BOARD (QUEENSLAND)** (respondent)
FILE NO/S:	Appeal No 11729 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
DELIVERED ON:	28 April 2017
DELIVERED AT:	Brisbane
HEARING DATE:	11 April 2017
JUDGES:	Sofronoff P and Gotterson JA and Douglas J Judgment of the Court
ORDERS:	**1. Appeal allowed.** **2. Decision of the Legal Practitioners Admissions Board dated 4 October 2016 be set aside.** **3. Declare that the matters contained in the applicant's application to the Board do not, without more, adversely affect an assessment as to whether the appellant is a fit and proper person to be admitted to the legal profession under the *Legal Profession Act* 2007 (Qld).**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – QUALIFICATIONS AND ADMISSIONS – SUITABILITY FOR ADMISSION – where the appellant seeks a declaration that certain matters will not affect the Board's assessment as to whether he is a fit and proper person for admission – where the appellant had previously plead guilty to two counts of unlawful sodomy and two counts of indecent treatment of a child under 16 – whether the appellant's prior offences adversely affect an assessment as to whether he is a fit and proper person for admission *Criminal Code* (Qld), s 229B *Health and Other Legislation Amendment Act* 2016 (Qld), s 9 *Legal Profession Act* 2007 (Qld), s 9, s 31, s 32, s 33
COUNSEL:	S J Keim SC, with R J Lynch, for the appellant P F Mylne for the respondent
SOLICITORS:	Alex Mackay & Co for the appellant Legal Practitioner's Admissions Board for the respondent

[1] **THE COURT:** The appellant made an application to the Legal Practitioners Admissions Board pursuant to s 32(2) of the *Legal Profession Act* 2007 (Qld). By letter dated 17 October 2016 the Board notified the appellant that it had resolved to refuse to make the declaration which he sought. The appellant now appeals to this Court against that refusal.

[2] Section 32 of the Act is in the following terms:

> "**32 Early consideration of suitability**
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> (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.
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> (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.
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> (3) The board must consider the application and do 1 of the following –
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> 1. make the declaration;
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> 2. refer the application to the tribunal for a direction if the board considers a direction would be appropriate;
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> 3. refuse to make the declaration.
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> (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.
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> (5) If the board decides to refuse to make the declaration sought –
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> (a) the board must give the applicant an information notice about the refusal; and
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> (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."

[3] An appeal against a decision of the Board to refuse to make a declaration is by way of rehearing and "fresh evidence or evidence in addition to or in substitution for" the evidence before the Board may be tendered.[1] Section 33(3) confers power upon the Court to make such order as it considers appropriate.

[4] Section 9(1) of the Act defines "suitability matters" relevantly, as follows:

> "(a) whether the person is currently of good fame and character;
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> …
>
> (c) whether the person has been convicted of an offence in Australia … and if so–

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1 s 33(2).

(i) the nature of the offence; and

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

(iii) the person's age when the offence was committed."

[5] In his application to the Board the appellant disclosed that on 5 November 2008 he had pleaded guilty to two counts of unlawful sodomy and to two counts of indecent treatment of a child under 16. He also disclosed that he had been dealt with for certain minor summary offences; these latter matters the Board has rightly stated are not matters that impinged upon any consideration about the appellant's fitness to be admitted and they need not be considered further.

[6] The offences arose in the following circumstances.

[7] The appellant was born on 5 September 1982. He is therefore currently 34 years old. When he was 20 years old the appellant lived in Sydney. He began to work as a male escort. He embarked upon this occupation, as we understand his evidence, because he was sexually curious and was eager to widen his sexual experience. His clients were always adult males. The appellant moved to Queensland in 2005. He was then 23 years old. He continued to work as an escort. He advertised for clients in newspapers.

[8] On 19 March 2007, the appellant received a telephone call from a person who was responding to one of his advertisements. The appellant says, and his evidence is not challenged in this respect, that the caller's voice sounded like that of an adult and there was no reason to think that he was not. An appointment was made and the appellant met his client on 19 March 2007 and they engaged in various sexual acts together. In fact the client was a 15 year old boy. He called the appellant again and a further appointment was made. They met again on 21 March 2007 and, once more, they engaged in various sexual acts together. The boy continued to contact the appellant by text messages seeking further meetings. The appellant ignored these overtures and they had no further similar encounters.

[9] The appellant recalls that during his first or the second meeting with the boy the latter referred to a recent birthday he had celebrated on which, he said, he had turned 16 years of age. He was a short person and he told the appellant that he had suffered from an illness as a young child which had stunted his growth.

[10] The appellant has said, and this too is not challenged, that he believed that the age of consent for homosexual acts between consenting adults was 16. That is to say, he believed that he was not committing any offence by engaging in sexual acts with this particular person if he was indeed 16 years old as the appellant believed him to be. In fact, the age of consent in Queensland was 18 years old. The legislation was changed in 2016 so that the age of consent for such acts is now 16.[2]

[11] On the day of the second encounter, or perhaps on the day following that encounter, the appellant received a telephone call from a person who, he later learned, was the boy's stepfather. The caller asked his name and age which the appellant revealed candidly. The caller then verbally abused and scolded the appellant for having engaged in sexual acts with his 15 year old stepson. The appellant later learned that

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[2] The *Criminal Code* (Qld) was amended by s 9(1) of the *Health and Other Legislation Amendment Act* 2016 (Qld). The effect of the amendment was to omit "prescribed aged" and to insert "age of 16 years" in s 229B (Maintaining a sexual relationship with a child), subsections (1) and (5).

the boy's stepfather had made enquiries about his son's activities on the days in question and, having inspected the boy's mobile phone, had found the numbers that he had called and, in that way, had tracked down the appellant.

[12] A few days later police officers came to the appellant's house and questioned him. The appellant was cooperative and candid and revealed the truth about his meetings with the boy. As a result of these matters the appellant was charged with the offences of which he was convicted. On 5 November 2008 he appeared before a Magistrate, pleaded guilty and was convicted.

[13] Relevantly, in her sentencing remarks, the learned Magistrate said:

> "I note that the complainant child was 15 years old at the time of these offences and that the circumstances of these offences arose after you placed an advertisement in a personal column in a newspaper, and the complainant responded to that newspaper advertisement. I note that the offences arose out of a consensual encounter on two separate occasions. However, I note that you made no inquiry as to the complainant's age, notwithstanding discussions on the first occasion about the complainant's attendance at school.
>
> I have taken into account the plea, and in my view, it is a valid grounds (sic) to mitigate sentence, the fact that you have avoided the necessity for a trial and saved the complainant the distress and pain of a trial in this hearing. I note that you have no criminal history and that you have attained a high level of proficiency in tertiary studies of music …
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> In sentencing, I note there is a need for general deterrence, given the nature of these offences, and in balance, I have been satisfied, given the further inquiries made of Dr McCulloch that there is genuine remorse demonstrated not only by a plea of guilty but through your discussions with your psychologist and that you have expressed concern for the complainant's welfare and, further, that you are receiving ongoing psychological counselling."

[14] For these reasons, the learned Magistrate decided not to record a conviction. She placed the appellant on a community service order to perform 240 hours of community service and placed him on probation for two years. The appellant carried out these obligations satisfactorily. He never worked as a male prostitute again.

[15] The appellant sought out psychological counselling almost immediately after he was charged and continued with his therapy for almost a year thereafter. His psychologist, Dr McCulloch, explained the appellant's preparedness to engage in the occupation of male escort by reference to facets of his personality that, to the lay mind, might be described as immaturity. In a report dated 3 July 2008, that is to say, over a year after the offences were committed, Dr McCulloch expressed the opinion that the consequences of his offending, the benefits of the appellant's self-examination by way of psychological therapy and his own insights into these matters, meant that he was "highly unlikely to re-offend in the future".

[16] The appellant was also seen by Dr Grant, a consultant forensic psychiatrist, who provided a report for the purposes of the appellant's application to the Board. Dr Grant was of the opinion that the appellant was "very remorseful about his offending". He

perceived that the appellant recognised that, although the boy had solicited the encounters and had consented to the sexual acts, the appellant should have made more enquiries about the boy's age and realised that it would be inappropriate to engage in sexual acts with him. Dr Grant was of the view that the appellant was sorry for the complainant having to suffer the effects of their encounter as well as its *sequelae*. Dr Grant expressed the opinion that the appellant was not suffering, and is not suffering, any major mental illness or psychopathic personality disorder. He was of the opinion that the appellant "represents a negligible risk of any future sexual offending". Dr Grant was further of the opinion that the appellant "clearly had poor judgment in participating in the behaviour giving rise to his charges but he has learnt from that experience and now appears to have sound insight and judgment".

[17] Finally, Dr Grant was of the opinion that the appellant had "demonstrated strong commitment to work, career and community activities, particularly over the last eight years, and is strongly focused on living a productive and successful life, hopefully as a lawyer".

[18] This last opinion has, in our respectful view, a sound foundation in the facts. It is 10 years since the offences were committed. The appellant did not engage in any further work as a male prostitute after he was charged. Instead, he completed a Bachelor of Music degree at Griffith University, Queensland Conservatorium, and a Master of Music Studies from the same university. He has now completed the degree of Bachelor of Laws at Queensland University of Technology with first class honours. His grade point average for his Master of Music Studies was over 6, and his grade point average in his Bachelor of Laws studies was greater than 6. He has worked extensively both on a paid and on a pro bono basis as a professional musician at a very high level. He has worked as a paralegal at a large Brisbane solicitors' firm and as an assistant to a practising barrister.

[19] He has sworn, in his affidavit, that the psychological counselling he has undergone has allowed him to reflect upon his offences, the reasons for his behaviour and to understand the seriousness of the offences which he had committed. In our opinion, both in his affidavit evidence and in his oral testimony he has not sought to minimise the character of the conduct in which he engaged or to forego responsibility for it. He has shown a thorough insight into his behaviour in his early twenties and exhibits a mature understanding about the significance to him and to his life of that behaviour.

[20] In our opinion the evidence shows that in the years since the offences were committed, the appellant has matured considerably. He has changed from a confused young man to a mature adult who has demonstrated proficiency in his studies as a musician and as a budding lawyer.

[21] The appellant was cross examined at the hearing of the appeal. None of the factual matters which we have set out were weakened or, indeed, challenged in any way by his oral evidence.

[22] Section 31(2) requires the Court to consider, *inter alia*, whether the appellant has been convicted of an offence and, if so, the nature of that offence, how long ago the offence was committed and the appellant's age when he committed the offences. Section 31(3) provides that the Court may consider a person to be a fit and proper person to be admitted to the legal profession despite the existence of a suitability matter, such as the commission of these offences, "because of the circumstances relating to the matter".

The circumstances as we have related them do not, in our view, render the appellant not a fit and proper person to be admitted. The appellant was young and callow when he committed these offences. It is clear that he was immature insofar as he was confused about his place in the world and about the significance of his sexuality. The offences were serious and the appellant was, at the time, deserving of punishment for his failure to pay attention to the age of his intending new client. It is not contended by the Board, nor could it be contended, that these offences demonstrate such an ongoing flaw in the appellant's character that he could not be considered a fit and proper person to be admitted. Rather, the commission of these offences should properly be regarded as aberrant behaviour on the part of an otherwise decent young man. Certainly, at the present date, 10 years after the relevant conduct, there is no basis upon which either the conduct which constituted the offences or the fact of his guilt of a criminal offence should affect a judgment that the appellant is a fit and proper person to be admitted to the legal profession.

[23] We would, therefore, allow the appeal and make the declaration sought.

Orders:

(1) Appeal allowed.

(2) Decision of the Legal Practitioners Admissions Board dated 4 October 2016 be set aside.

(3) Declare that the matters contained in the applicant's application to the Board do not, without more, adversely affect an assessment as to whether the appellant is a fit and proper person to be admitted to the legal profession under the *Legal Profession Act* 2007 (Qld).