[2015 Gib LR 236]

IN THE MATTER OF DALMEDO

SUPREME COURT (Dudley, C.J.): June 30th, 2015

Legal Profession—admission of English solicitor—in-house legal adviser—to allow admission of English solicitor in Gibraltar, Supreme Court Act 1960, s.29(1)(c) requires intention to engage in independent legal practice in Gibraltar or join legal partnership—employment as salaried in-house legal adviser with six-month secondment to law firm insufficient fixed intention to practise

The petitioner petitioned to be approved, admitted and enrolled as a solicitor of the Supreme Court of Gibraltar.

The petitioner was employed by a firm of accountants in Gibraltar as a salaried in-house legal adviser. He was intending to undertake a six-month secondment to a law firm in Gibraltar and he applied to be approved, admitted and enrolled as a solicitor of the Supreme Court of Gibraltar under s.29(1) of the Supreme Court Act 1960. The question to be decided was whether he satisfied the requirement of an intention "to practise in Gibraltar either alone or in partnership with another barrister or solicitor" for the purposes of s.29(1)(c).

He submitted that s.29(1)(c) should be interpreted as merely requiring an intention to practise in Gibraltar rather than in other jurisdictions and that "partnership" should be interpreted as referring to the carrying on of business by two or more individuals sharing profits and losses rather than an informal association.

Held, dismissing the petition:

(1) The petitioner did not satisfy s.29(1)(c) and he could not therefore be admitted as a solicitor of the Supreme Court of Gibraltar. In order to satisfy s.29(1)(c), he was required to evidence an intention to engage in independent legal practice holding himself out to the public in Gibraltar, or to work as a member of a legal partnership. His intention to work as a salaried in-house legal adviser employed by a single non-legal enterprise and providing legal advice only to that enterprise failed to satisfy s.29(1)(c). It could be desirable for salaried in-house legal advisers to be admitted as solicitors or barristers because this would bring them within the regulatory regime of the Supreme Court Act 1960, but s.29(1)(c) did not permit it (para. 10; para. 12).

(2) Further, his intention to undertake a six-month secondment to a law firm in Gibraltar did not satisfy s.29(1)(c) as this intention to practise

through a legal partnership was merely a transient, short-term intention (paras. 14–15).

Cases cited:
(1) *Alfred Crompton Amusement Machines Ltd.* v. *Customs & Excise Commrs. (No. 2)*, [1972] 2 Q.B. 102; [1972] 2 W.L.R. 835; [1972] 2 All E.R. 353, considered.
(2) *Downey* v. *O'Connell*, [1951] VLR 117, referred to.
(3) *Pepper (Inspector of Taxes)* v. *Hart*, [1993] A.C. 593; [1992] 3 W.L.R. 1032; [1993] 1 All E.R. 42; [1993] I.C.R. 291; [1993] I.R.L.R. 33, distinguished.

Legislation construed:
Supreme Court Act 1960, s.29(1)(c): The relevant terms of this paragraph are set out at para. 2.

E. Phillips for the petitioner.

1 **DUDLEY C.J.:** The petitioner, Mr. Dalmedo, seeks to be approved, admitted and enrolled as a solicitor of the Supreme Court of Gibraltar.

2 The main issue that arises in this matter turns on a question of interpretation. Section 29(1) of the Supreme Court Act provided as follows:

> "The Chief Justice may approve admit and enroll as solicitors of the Supreme Court of Gibraltar any person who satisfies the following requirements, that is to say—
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> (a) he has been admitted as a solicitor of the Supreme Court of Judicature in England, or in any court of record in Northern Ireland or the Republic of Ireland, or as a solicitor admitted to practice in Scotland;
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> (b) he is not at the time of his application for admission struck off the rolls or suspended from practice as a solicitor; and
>
> (c) he intends on admission to practise in Gibraltar either alone or in partnership with another barrister or solicitor."

In relation to the admission of barristers, the qualification criteria is different but s.28(1)(d) is in identical terms to s.29(1)(c).

3 The matter first came before me on May 21st, 2015. Mr. Dalmedo satisfied the requirements of s.29(1)(a) and (b) and also produced the requisite certificate from the Admissions and Disciplinary Committee ("the A&DC"), as required by r.5 of the Barristers and Solicitors Rules, confirming that, in the Committee's opinion, Mr. Dalmedo is a fit and proper person to be admitted as a solicitor in Gibraltar. Having expressed my concern that Mr. Dalmedo might not satisfy the requirement found in

s.29(1)(c), I adjourned the hearing to afford Mr. Dalmedo's counsel the opportunity to consider the matter and make full submissions. I also invited the A&DC to clarify the basis upon which it had been satisfied that it was proper for Mr. Dalmedo to be admitted.

4 By letter dated June 22nd, 2015, the A&DC expressed the following view:

> "In relation to s.29(1)(c), namely that 'he intends on admission to practise in Gibraltar either alone or in partnership with another barrister or solicitor,' the A&DC took the view, after due consideration, that this can be said to be met if the applicant, albeit employed by private business, will be so employed to provide legal advice and legal services in and to that private business, for example as in-house counsel. The A&DC was also of the view that this was so even if the areas of advice and services were limited, in other words and for example, limited to tax law and practice and no other area.
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> The A&DC also took the view that this would further the aim of ensuring the legal profession in private employment would be subject to the same regulatory regime, in the interests of the public and the profession itself. In this regard it was noted that that aim is embodied in the draft legislation for the intended reform of the profession and its regulation.
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> . . .
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> On reviewing s.29(1)(c), which it is fair to say the A&DC has in the past interpreted narrowly, we took the view that, since lawyers entering practice generally did not immediately enter into partnership and therefore 'partnership' was interpreted liberally, that the same liberal approach should be applied to 'alone' so as to enable lawyers intending to practise alone but in private employment or within multi-disciplinary firms or as in-house counsel to be admitted."

The change of approach by the A&DC has coincided with a Government Bill, presently before Parliament, to amend the Supreme Court Act which, if passed, will impose additional requirements upon those seeking to be admitted as barristers or solicitors. That Bill has led to an unusually high number of petitions being issued. Given that my determination could impact upon some of those petitioners, they were invited to attend the adjourned hearing and afforded the opportunity to make representations. In the event, 10 such petitioners appeared either in person or through counsel.

5 Having had the benefit of submissions on behalf of the other petitioners, it became evident that two distinct issues arise in relation to s.29(1)(c). First, how practise "either alone or in partnership with another

barrister or solicitor" is to be construed, and secondly, what is necessary to establish the intention to start practising on admission. Only the first affects Mr. Dalmedo's petition.

6 The second issue potentially affects a number of petitioners but it seems to me that how the court resolves that issue is fact sensitive and will depend on the circumstances of each case. At one end of the spectrum, one can have a petitioner who has a place in a firm of lawyers and attests that he intends to start to practise immediately upon being called. Towards the other end of the spectrum, a petitioner may have no offer of a place in a firm and no discernible intention to seek such a place with any degree of immediacy.

7 On the first issue, Mr. Phillips's primary submission is that s.29(1)(c) is to be interpreted as merely imposing an intention to practise in Gibraltar as opposed to practising from offices in other jurisdictions. He also submits that, in the absence of a capital "P," partnership is not to be interpreted as amounting to an informal association rather than the carrying on of business by two or more individuals sharing profits and losses. It is instructive that, in the Partnership Act, the word appears without a capital "P." Adopting a similar approach, it is said on behalf of one of the other petitioners that "alone" encompasses working alone as an employed lawyer.

8 Mr. Phillips also relies upon the legislative history of the section and passages from Gibraltar's *Hansard* (1986) when the provision was enacted by the then House of Assembly in 1986. The legislative history is of some assistance, and can properly be relied upon in interpreting the existing provision. Before January 1st, 1987, s.29 read:

> "The Chief Justice may approve admit and enrol as solicitors of the court any persons who have been admitted as solicitors of the Supreme Court of Judicature in England or in any court of record in Northern Ireland or the Republic of Ireland or as solicitors admitted to practice in Scotland and all persons duly approved, admitted and enrolled as solicitors of the court shall be at liberty to act also as barristers."

9 In my view, it is clear that, before 1987, there was no requirement that a petitioner have an intention to practise. The 1986 amendment changed that and imposed the requirement that there be such an intention, in the absence of which a petition must fail. However, s.29(1)(c) goes further in that it requires such practise to be "either alone or in partnership with another barrister or solicitor."

10 In 3 *Words & Phrases Legally Defined*, 3rd ed. (1988), relying upon the Australian case of *Downey* v. *O'Connell* (2), "Practise" is explained on the following terms:

> ". . . The common conception of a practising barrister or solicitor is that of a legally qualified barrister and solicitor who holds himself out to the public in general as willing to act as a direct and responsible personal confidential legal adviser, and to do, and be directly responsible for, legal work generally and who has clients for whom he does legal work in that way . . . We think that it is not fatal to that conception that the barrister and solicitor holds a position under the public service for which he is paid as such and that the only person for whom he acts are either the Crown or State instrumentalities, or a fellow servant of the Crown . . . There are a number of things which are marks or characteristics of a practising solicitor. The most important of these is an independence of any superior control in the conduct of his professional work and a direct responsibility to the client or person who stands in an analogous relationship to that of client . . ."

A similar approach is to be found in the judgment of Lord Denning, M.R. in *Alfred Crompton Amusement Machines Ltd.* v. *Customs & Excise Commrs. (No. 2)* (1), who in the context of discovery said this about salaried legal advisers:

> "The law relating to discovery was developed by the Chancery Courts in the first half of the 19th century. At that time nearly all legal advisers were in independent practice on their own account. Nowadays it is very different. Many barristers and solicitors are employed as legal advisers, whole time, by a single employer. Sometimes the employer is a great commercial concern. At other times it is a government department or a local authority. It may even be the government itself, like the Treasury Solicitor and his staff. In every case these legal advisers do legal work for their employer and for no one else. They are paid, not by fees for each piece of work, but by a fixed annual salary. They are, no doubt, servants or agents of the employer . . . They are regarded by the law as in every respect in the same position as those who practise on their own account. The only difference is that they act for one client only, and not for several clients. They must uphold the same standards of honour and of etiquette. They are subject to the same duties to their client and to the court. They must respect the same confidences. They and their clients have the same privileges."

In my view, the authorities highlight that, although in other jurisdictions the rights and obligations may be identical, there is a factual distinction between independent practice and being a salaried legal adviser. There would no doubt be great merit in allowing salaried legal advisers to be admitted as barristers or solicitors, not least because, as the A&DC suggests, it would bring them within the regulatory regime of the Supreme Court Act, but that is not what the House of Assembly, as it then was,

intended. It may be that, at the time, the concept of in-house lawyers was not sufficiently prevalent for the House of Assembly to consider the impact of the amendment upon that body of professionals, particularly as s.28(3) of the Supreme Court Act gives Crown Counsel rights of audience without having to be admitted. In my view, the plain meaning of the requirement is self-evident: to be called, a petitioner must evidence an intention to practise in the more traditional sense of holding himself out to the public in general.

11 The general rule of practice is that, in interpreting an Act of Parliament, reports of proceedings cannot be used as an aid to its construction. That, of course, is subject to the rule in *Pepper (Inspector of Taxes)* v. *Hart* (3). As summarized in *Bennion on Statutory Interpretation*, 5th ed., at 616 (2008), the rule can only be applied where "in the opinion of the court construing the enactment, it is ambiguous or obscure, or its literal meaning leads to an absurdity." I am of the view that the provision is not capable of being categorized as either ambiguous, obscure or absurd. But even if I were persuaded to rely upon the rule in *Pepper* v. *Hart*, the statements made by the promoter of the Bill, the then Attorney-General, the Hon. E. Thistlethwaite, in my view support my construction:

> "Mr. Speaker, with regard to the intent to practise in Gibraltar, all applicants for admission to the Bar in Gibraltar are interviewed by the Admissions and Disciplinary Committee who have to certify that they are fit and proper people to be admitted and called to the Bar in Gibraltar and this Committee has myself as Chairman … and the idea being that they will have to satisfy us with some sort of evidence that they intend to practise in Gibraltar, have they negotiated office space, where, and if they are going to practise on their own or with somebody else, and it is a question that these applicants who are called to the Bar satisfy the Admissions and Disciplinary Committee that they do intend to practise in Gibraltar."

12 It is accurate to say that, in the past, one or more individuals may have been called to the Bar in circumstances in which, had this provision been considered in detail, they may not have been admitted. It is also true to say that the section does not take account of how the legal profession has evolved. There is an ever-increasing number of in-house lawyers; there are a number of barristers and solicitors that remain approved, admitted and enrolled despite not practising alone or in partnership because there is no provision to remove them from the roll and some individuals joining firms of lawyers do so as employees rather than as self-employed members of a set of chambers/firm of solicitors, as used to be the norm. Undoubtedly, the profession has moved on and it may be desirable to bring about legislative change allowing for in-house lawyers to be admitted, but that is not what the legislation says, and the role of this court is to interpret legislation and not to usurp the role of Parliament.

However, the final evolutionary issue I have identified can be overcome. In my view, it is open to me is to interpret the section in a manner that is compatible with what Parliament intended, namely limiting admission to those intending to hold out themselves to the public in Gibraltar as legal advisers, whilst avoiding an inconvenient result, and I construe "in partnership" to include working for a partnership.

13 I now turn to the particular facts of this petition.

14 In his first affidavit, Mr. Dalmedo did not evince an intention to practise. Before the adjourned hearing, he filed a second affidavit in which he stated: "I intend to start practising on admission in Gibraltar in partnership with another barrister or solicitor upon commencing my secondment at ISOLAS on June 8th, 2015." The letter by ISOLAS offering secondment shows that this would be for a period of some six months and that, during that period, Mr. Dalmedo's employer, Grant Thornton (Gibraltar) Ltd., which is a firm of accountants, would continue to be responsible for payment of his salary. After the hearing but before the handing down of this ruling, Mr. Dalmedo filed a third affidavit in which he stated: "I hereby confirm to this honourable court that my intention is to start practising on admission in Gibraltar at ISOLAS law firm."

15 I am of the view that the secondment to a firm of lawyers of an individual who may work as an in-house lawyer in a firm of accountants does not properly come within the concept of an intention to practise, it being a transient short-term intention. However, it appears from the latest affidavit that Mr. Dalmedo's intention has further evolved and I shall seek clarification in that regard before making a determination.

Orders accordingly.