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RE HANDLEY

[SUPREME COURT, 1974 (Tuivaga Ag. C.J.), 19th July]

Civil Jurisdiction

Law practitioners—admission to practise on a temporary basis as barrister and solicitor—complete discretion to admit or refuse such admission vested in Chief Justice personally—Legal Practitioners Ordinance (Cap. 228) ss.4, 8.

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The applicant, a member of the Bar of New South Wales, applied for temporary admission to practise as a barrister and solicitor, in order to appear in one civil case on behalf of the plaintiff. His application was opposed by the President on behalf of the Fiji Law Society who contended that overseas counsel should only be admitted where the case in which he was to be concerned, involved constitutional or political issues, or required expertise which was not available in Fiji.

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It was held that, provided the applicant satisfied the provisions of the Legal Practitioners Ordinance, the Chief Justice had a complete discretion as to admission and that the three fold principle stated by the Society might be treated as a guideline, but it did not affect or restrict this discretion.

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In view of the special nature of the case, the application was granted.

Application under the Legal Practitioners Ordinance s.8 for temporary admission to practise as a barrister and solicitor.

H. A. L. Marquardt-Gray for the applicant.

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F. M. K. Sherani for the Fiji Law Society.

TUIVAGA Ag. C.J. : [19th July 1974]—

This is an application by way of petition under section 8 of the Legal Practitioners Ordinance for temporary admission to practise as a Barrister and Solicitor. It is to enable the petitioner to appear in Civil Action No. 11 of 1974 between South Pacific Food Pty. Ltd. as Plaintiff and Tropic Isles Ltd. as Defendant which action has been set down for hearing on Tuesday 23rd July 1974. The application is opposed by the Fiji Law Society.

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The applicant is a British subject and has attained the age of 21 years. He has practised as a Barrister of the Supreme Court of New South Wales since the 2nd day of February 1960. He has had the necessary legal experience to qualify for admission to practise in Fiji. The applicant is one of Her Majesty's Counsel.

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The President of the Fiji Law Society appeared on behalf of the Society at the hearing and amplified his Society's objection to this application. He says that there are no reciprocal arrangements of rights and privileges concerning admission between the Fiji Law Society and the Bar to which the applicant belongs. He says that the provisions under section 8 are a special enactment. He says special circumstances must be shown before a temporary admission may be made. According to him section 8 provides for two safeguards against undesirable admissions. Firstly, there is the discretion which is vested

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A in the Chief Justice on the question of temporary admission and secondly, that the Council of the Fiji Law Society must be consulted for advice in the matter. In this case the Fiji Law Society strongly opposes the temporary admission of the applicant because for many years now it has adopted the policy of opposing temporary admissions except in three distinct classes of cases. These are constitutional or political cases or those requiring special expertise on the part of counsel and which expertise is not available in this country. This particular petition does not qualify under any of those heads.

B With regard to cases requiring special expertise he gave as examples cases relating to town planning and taxation matters. In overseas countries there are special counsel practising taxation or town planning matters only. He says that there are no local counsel practising exclusively with respect to these matters. He says that the case in question involves an ordinary tort and does not require the services of an overseas counsel.

C An affidavit sworn to by Mr Donald Malcolm Noel McFarlane, a senior member of the local Bar, was filed in Court during the course of the hearing of this petition. Because it fully describes the background of the case for which temporary admission is sought I think it pertinent and convenient to set out in full the terms of such affidavit :

D " 1. I am the Solicitor for the present applicant and am the Solicitor on the record for South Pacific Foods Pty. Ltd. the Plaintiff in Action No. 11 of 1974 which is pending in this Court, and which has been fixed for trial on Monday 22nd July next. The petition herein has been presented in order that Mr Handley's services may be available to the Plaintiff in that Action.

E 2. When my firm was first retained in this case Mr Max Airey, a Barrister and Solicitor of this Court employed by my firm was briefed to do the Court work and he appeared before His Lordship Mr Justice Mishra on an application for an interim injunction in the Action. After that Mr Airey informed me that the pressure of work he was under prevented him from undertaking the trial of this action. Mr Chiman Jamnadas my partner was then approached by me but he informed me that he too was too busy in July with other cases in the Supreme Court and the Court of Appeal to take on the trial of this action, even as a second counsel. I have not been well lately, and I can no longer undertake a heavy trial such as this one would be.

F 3. I have been informed by Mr A. B. Harrison the Managing Director of South Pacific Foods Pty. Ltd. and verily believe that prior to my firm being retained in connection with the disputes giving rise to the pending action the Plaintiff had retained Mr Raman Kapadia for some months in 1973 but that he asked to be relieved of the retainer because of the heavy burden of his other professional and parliamentary commitments, and that thereafter for a short time the Plaintiff retained Mrs Walsh of Cromptons in connection with this dispute. When she left that firm, Mr Harrison asked Mr Ian Bond to take over the case but he declined to do so on the ground of the pressures of his existing work load. At that point of time Mr Harrison consulted me. Since ascertaining that my partner Mr Jamnadas was not available no further attempts were made to obtain a second local counsel to lead at the hearing of this action, but it was then decided that Mr Handley would be briefed if possible.

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4. Mr Kuver Barrister and Solicitor of Sigatoka was retained some time ago to appear as the second counsel for the Plaintiff before this Honourable Court, but he has informed me that the case is too onerous for him to appear in alone without the assistance of a senior Counsel. **A**
5. I am informed by Mr R. G. Kermode Counsel for the Defendant in the subject action that the Defendant intends to call approximately 15 witnesses. In connection with the application for an interim injunction in this action the Plaintiff filed affidavits from a total of 12 witnesses who are likely to be called to give evidence at the trial. The action is therefore a heavy one on the facts alone. In addition the tort involved—inducement of breach of Contract is, in my experience, a tort that has rarely, if at all, come before this Court. In my long experience I have never personally had a case involving this tort nor have I known a case of this type to come before this Court. The Plaintiff claims damages and a final injunction in the action. **B**
6. I respectfully submit that the action in question is a heavy one on questions of both fact and law, and that it is also an unusual one. I further respectfully submit that the circumstances of this case are therefore special, and are such that it is reasonable for the Plaintiff to wish to brief overseas counsel to lead at the trial. ” **C**

I must say at once that this application has caused me some difficulty. It is the first of its kind to which objection has been raised by the Fiji Law Society. There is no precedent to assist me in exercising my discretion in the matter. It has been submitted that my discretion under section 8 of the Legal Practitioners Ordinance should be exercised in the manner which the President has indicated. The object of course is to protect the interests and welfare of the local Bar. It is said that there are no existing reciprocal arrangements for admission between the local Bar and that to which the petitioner belongs. It is urged that a petition for temporary admission should not be granted unless the case in question involves an important constitutional or political issue or requires special expertise on the part of counsel and which expertise is not available in this country. **D**

I can quite appreciate the concern of the Fiji Law Society regarding the possible threat to the local Bar from uncontrolled admissions on temporary basis of overseas counsel. This concern has been expressed to me most vigorously. In this matter, of course, one must be guided by the words of the legislature. Section 8 which is the governing enactment provides as follows : **E**

“ 8. Notwithstanding the other provisions of this Ordinance the Chief Justice may, after consulting the Council, admit to practice, subject to such conditions as the Chief Justice may see fit to impose and to the payment of such fee as may be prescribed by rules, as a barrister and solicitor, for the purpose of any specific cause or matter, any person of the classes of persons mentioned in paragraph (c) of section 4 of this Ordinance or included in any order made thereunder, who has come or intends to come to Fiji for the purpose of appearing in such cause or matter : **F**

Provided that— **G**

- (a) any such person shall only be entitled to appear or act— **H**
- (i) in the cause or matter for the purpose of which he is admitted ;
and

- A** (ii) if he is instructed by, and if when appearing in any court in the conduct of the cause or matter he appears together with, a barrister and solicitor admitted to practise in Fiji ;
- (b) any such person shall be subject to the provisions of Part VIII of this Ordinance. ”

In my view these provisions require the Chief Justice to be satisfied that the person to be admitted is qualified in terms of section 4(c) of the Ordinance and that he is a fit and proper person to be admitted as a Barrister and Solicitor on a temporary basis and in addition compliance with the provisos to section 8 has been made. It is clear that the present petitioner seeks to appear only in one specific case namely Civil Action No. 11 of 1974 between South Pacific Foods Pty. Ltd. as Plaintiff and Tropic Isles Ltd. as Defendant and that he is being instructed in the matter by a local Barrister and Solicitor. It seems to me that when those matters have been satisfied I would be perfectly justified as a matter of discretion notwithstanding any contrary advice from the Council of the Law Society to admit a petitioner on a temporary basis. As I see it the safeguard to the local Bar is given in proviso (a) (ii) to section 8 which reads :

“ Provided that—

- (a) Any such person shall only be entitled to appear or act—
- (i)
- D** (ii) If he is instructed by, and if when appearing in any court in the conduct of a cause or matter he appears together with, a barrister and solicitor admitted to practise in Fiji ; ”

As I understand the matter an instructing Solicitor under this proviso would generally be a member of the Fiji Law Society and so would a Barrister appearing with the petitioner. If such a Barrister and Solicitor considers it necessary in the interests of his client to engage an experienced counsel from overseas I would be most reluctant to say that such a course was not necessary. I must of course assume that he knew what he was about. Thus it lies within the powers of the members of the Society themselves to restrict the admission of overseas counsel to the local Bar.

However, counsel for the Society goes further than this. He says that because of the very wide discretion vested in the Chief Justice under section 8, the Chief Justice could refuse an application for temporary admission on any ground he thinks fit. He pointed out that it has been the policy of the Society for many years to oppose temporary admissions unless the case concerned involves an important constitutional or political issue or requires special expertise on the part of counsel and which expertise is not available in this country. It is clear that this policy has been motivated by the fact that there are no reciprocal arrangements for admission between the Fiji Law Society and the Bar to which these applicants belong. The three-fold principle has been advanced as an element in the exercise of the Chief Justice's discretion because of the lack of such reciprocity. In my view this would be tantamount to judicial legislation to which the courts have not always been favourably disposed. In the absence from the relevant enactment of any specific reference to the matters raised by the Society as affecting the Chief Justice's discretion,

H I do not think I should without further consideration lay down any rules about the matter. It may well be that the Fiji Law Society in its corporate capacity is right in that the three-fold principle stated above should be the paramount guideline in the exercise of the Chief Justice's discretion. In view

of the conclusion I have reached I need not pursue the matter any further. Accepting for the purpose of this application that I can properly take into consideration in the exercise of my discretion the special nature of the case for which admission is sought, I think it has been sufficiently demonstrated that the employment of the services of counsel with the calibre of the applicant is necessary. The affidavit sworn to by Mr McFarlane seems conclusive of the matter. Mr McFarlane is a very senior and eminent member of the local Bar. It is not for me to impugn his action, not at any rate in the particular circumstances of this application. The applicant has the necessary experience and legal skill required for the case in question. The applicant is a Queen's Counsel of the New South Wales Bar in the Commonwealth of Australia and has had wide experience in advocacy and in the branch of law to be adjudicated upon. Counsel for the Society has requested that because of the late filing of Mr McFarlane's affidavit the hearing of this application be adjourned to another date to enable his Council to consider the affidavit and make further submissions. With respect I cannot see what purpose this would serve other than to embarrass the litigants concerned whose case is due to be heard on Tuesday 23rd July 1974. It may be observed that I am also as much concerned with the interests of litigants in a case. In any event I do not think I should go behind Mr McFarlane's assurance regarding the special nature and circumstances of the case in which he himself is the instructing solicitor. I find it more prudent to rely on counsel's sworn assurance on the matter.

For the foregoing reasons I am satisfied that the petition should be granted. It is ordered accordingly.

Petition granted.