IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

I TE KŌTI MATUA O AOTEAROA
TE WHANGANUI-A-TARA ROHE

CIV-2015-485-000223
[2018] NZHC 3211

UNDER	the Judicature Amendment Act 1972
IN THE MATTER OF	an Application for Judicial Review
BETWEEN	ATTORNEY-GENERAL Plaintiff
AND	INSTITUTION OF PROFESSIONAL ENGINEERS NEW ZEALAND INCORPORATED First Defendant
	ALAN MICHAEL REAY Second Defendant

Hearing:	19-20 November 2018
Counsel:	K G Stephen and I M G Clarke for Plaintiff M J Neill for First Defendant W J Palmer and O D Peers for Second Defendant
Judgment:	7 December 2018 at 10.00 am

JUDGMENT OF COLLINS J

PART I

INTRODUCTION

[1] The Attorney-General applies for judicial review of a decision of the Institution of Professional Engineers New Zealand Incorporated (the Institution).[1] In its decision,

[1] The Institution now uses the name "Engineering New Zealand".

the Institution dismissed a disciplinary complaint against Dr Reay. At the time the complaint was lodged, Dr Reay was a member of the Institution. He, however, resigned from the Institution before the Institution's disciplinary processes could be completed. The Institution proceeded on the basis that Dr Reay's resignation left it with no option other than to dismiss the complaint.

[2] Three broad issues are addressed in this judgment, namely:

(1) Does the Attorney-General have standing to seek judicial review of the Institution's decision?

(2) If so, did the Institution make a reviewable error of law when it dismissed the complaint against Dr Reay?

(3) If so, should relief be granted?

[3] In summary, I have concluded that the Attorney-General does have standing to seek judicial review and that the Institution erred in law when it dismissed the complaint against Dr Reay. I have granted the declarations and order sought by the Attorney-General. In doing so, I emphasise that it will be for the Institution to decide whether or not the complaint against Dr Reay proceeds to a disciplinary hearing.

PART II

BACKGROUND

The CTV building

[4] On 22 February 2011, a devastating earthquake struck Canterbury causing widespread damage and the deaths of 185 people in Christchurch. One hundred and fifteen died when the Canterbury Television (CTV) Building collapsed.

[5] The CTV Building was a six storey structure that was designed in 1986 by Alan M Reay Consulting Engineer (the firm). The founder of the firm was Dr Reay, a structural engineer with a PhD in civil engineering. The firm employed a number of

structural engineers including Mr Harding, who completed most of the structural design work for the CTV Building.

[6] A Royal Commission of Inquiry into a number of aspects of the Canterbury earthquakes (Commission of Inquiry) found there were significant defects in the structural design of the CTV Building. The Commission of Inquiry also criticised Dr Reay, when it concluded that he knew Mr Harding lacked the requisite experience to design a challenging multi-storey building and that he failed to adequately supervise Mr Harding.[2]

Dr Reay and Mr Harding

[7] In 1970, Dr Reay registered as an engineer under the Engineers Registration Act 1924. That Act was replaced by the Chartered Professional Engineers of New Zealand Act 2002 (the Act). However, Dr Reay did not register as a chartered professional engineer (chartered engineer) under the Act until 2011. Dr Reay only registered as a chartered engineer in 2011 when changes were put in place following the Canterbury earthquakes that required specific engineering services associated with the reconstruction of Christchurch to be undertaken by chartered engineers. Dr Reay's registration as a chartered engineer lapsed on 13 February 2017.

[8] Dr Reay also joined the Institution in 1970. He resigned from the Institution on 28 February 2014, in circumstances that are explained in further detail later in this judgment. During the course of his membership, Dr Reay was elevated to the status of a Fellow of the Institution.

[9] Dr Reay was also a member of several other professional associations for engineers, such as the Structural Engineering Society New Zealand Inc and the New Zealand Society for Earthquake Engineering Inc.

[10] The disciplinary proceeding against Dr Reay to which this proceeding relates concerned his alleged acts and omissions in relation to the design of the CTV Building in 1986. Because, at that time, Dr Reay was a member of the Institution, but not

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2 *Final Report Volume 6: Canterbury Television Building (CTV)* (Canterbury Earthquakes Royal Commission of Inquiry, December 2012) at [2.1.4.6] and [9.2].

registered as a chartered engineer under the Act, the disciplinary proceedings were commenced under the Institution's Rules and Regulations and not under the Act.

[11] Mr Harding became a member of the Institution in 1976 and became registered as a chartered engineer under the Act in 2006. Mr Harding left the firm in 1988, two years after working on the design of the CTV Building.

The registration and disciplining of engineers

Chartered engineers

[12] The Act creates a register for chartered engineers (the register). The requirements for registration include satisfying the minimum standards for registration contained in rules made under the Act, and the agreement of the chartered engineer to be bound by those rules, including a code of ethics.[3]

[13] The Act sets out a process for receiving and considering complaints against chartered engineers.[4] The grounds for disciplining a chartered engineer, include having performed engineering services in a negligent or incompetent manner and failing to comply with the code of ethics.[5] The disciplinary penalties prescribed under the Act range from a fine not exceeding $5,000 to removal of the engineer from the register.[6] The Act protects the title of "chartered professional engineer" by making it an offence for any person to use that title in circumstances where they are not authorised to do so.[7]

[14] A person who styles themselves as an "engineer" does not have to be registered under the Act in order to practise as an engineer. There are, however, restrictions contained in the Building Act 2004 that require certain professional functions in relation to the construction of buildings in New Zealand to be completed by a chartered engineer.

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3 Chartered Professional Engineers of New Zealand Act 2002, s 8.
4 Section 20.
5 Section 21(1)(b) and (c).
6 Section 22(1).
7 Section 7.

The Institution

[15] The Institution is defined as the Registration Authority under the Act.[8] It is charged with making decisions relating to, amongst other matters, "the registration of chartered professional engineers" and "complaints and disciplinary processes for chartered professional engineers".[9] These functions are amplified further in s 39 of the Act, which provides:

> **39 Functions of Registration Authority**
>
> The functions of the Registration Authority under this Act are to—
>
> (a) make, and always have, rules relating to chartered professional engineers that are prepared and approved …
>
> (b) register persons, issue registration certificates, assess continued registration, and carry out the other functions relating to registration …
>
> (c) keep and maintain the register and carry out the other functions relating to the register …
>
> (d) receive, investigate, and hear complaints about, inquire into the conduct of, and discipline, chartered professional engineers …

[16] The Institution was founded in 1912 to, amongst other objectives, promote and uphold the professional standards of its members. It is registered under the Incorporated Societies Act 1908. Membership of the Institution is voluntary.

[17] The Institution adopted a Code of Ethics and Rules (the Rules) for its members. The Institution also promulgated Disciplinary Regulations (the Regulations) pursuant to Rule 11.1 of the Rules.

[18] The Institution accommodates a wide range of members, who may or may not be registered as chartered engineers under the Act. The Institution's approximately 22,500 members include, for example, students studying for a qualification recognised by the Institution. The classes of membership are set out in Rule 6. The most prestigious classes of membership are the three categories of fellows, namely

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8 Chartered Professional Engineers of New Zealand Act 2002, s 4.
9 Section 24(1).

Honorary Fellow, Distinguished Fellow and Fellow. A Fellow is entitled to use the initials FIPENZ after his or her name. Most members of the Institution are registered as Professional Members, who are distinguished by the initials MIPENZ after their name.[10]

Code of Ethics

[19] The Code of Ethics in force in 1986 required each member of the Institution to "so conduct himself [or herself] as to uphold the dignity, standing and reputation of the Institution and of the profession". The Code of Ethics prescribed in a number of ways how a member should discharge this obligation. Two of those measures provided:

> 1. Each member shall exercise his [or her] professional and technical skill and judgement to the best of his [or her] ability and shall discharge his [or her] professional and technical responsibilities with integrity.
>
> …
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> 8. However engaged, he [or she] shall at all times recognise his [or her] responsibilities to his [or her] employer or client, others associated with his [or her] work, the public interest and his [or her] profession.
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> …

Institution's Rules

[20] A "Member" of the Institution is defined in Rule 2.1(b) as "a person who holds any current class of membership as defined in Rule 6, unless a contrary interpretation is specified". As noted at [18], those classes include Fellows, Professional Members and Student Members of the Institution.

[21] Rule 3 sets out the Object of the Institution, which is "the advancement of the professions of engineering in New Zealand". The stated means of fulfilling that Object are:

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[10] In addition to the Institution, there are a number of smaller bodies that cater for the interests of some engineers. Examples include the Structural Engineering Society New Zealand Inc, Concrete New Zealand, the New Zealand Society for Earthquake Engineering Inc, the Heavy Engineering Educational Research Foundation, Steel Construction New Zealand Inc and the New Zealand Geotechnical Society Inc. The Institution provides administrative assistance to some of these bodies. Membership of these bodies is also voluntary.

(a) developing and sharing advances in engineering and technological knowledge;

(b) developing technological skills to improve the well-being of society;

(c) representing the engineering professions;

(d) contributing to the development and recognition of good engineering practice;

(e) recognising, regulating and supporting those demonstrating competence in the engineering professions;

(f) supporting engineers in their career development; and

(g) contributing to meeting the needs of the community.

[22] Rule 4 sets out the obligations placed upon members of the Institution, which include complying with the Institution's Code of Ethics and the Rules and Regulations, maintaining the "competence obligation" imposed upon members and adhering to the obligation of "good character" also required of members. Rule 4 provides:

4.1 MEMBERSHIP OBLIGATION

Each candidate for election to any class of Membership must undertake to abide by the Rules and Regulations of the Institution and future revisions thereof (the "**Membership obligation**"). This undertaking will be regarded as continuing until the person resigns or is removed from the roll of Members.

4.2 ETHICAL OBLIGATION

The Board must prescribe a Code of Ethics. The Code has the force of Regulations as set out in Rule 22. The Code of Ethics must recognise, among other things, the following five fundamental ethical values upon which it is based:

- Protection of Life and Safeguarding People;
- Sustainable Management and Care for the Environment;
- Commitment to Community Well-being;
- Professionalism, Integrity and Competence;
- Sustaining Engineering Knowledge.

All Members must comply with the provisions of the Code of Ethics (the **"ethical obligation"**).

4.3 COMPETENCE OBLIGATION

Members in the classes Distinguished Fellow, Fellow, Professional Member, Technical Member, Associate Member and Graduate Member must perform their engineering activities in a careful and competent manner, commensurate with their Membership class within the Institution (the **'competence obligation"**).

4.4 GOOD CHARACTER OBLIGATION

Members must conduct themselves at all times in a manner consistent with being a fit and proper person to be a Member of the Institution (the **"good character"** obligation).

[23] Under Rule 8.17.1, as that rule was framed in 2014, a member could resign from the Institution at any time by forwarding their resignation in writing to the Chief Executive of the Institution.

Disciplinary regime

[24] Rule 11(1) states:

11 COMPLAINTS ON CONDUCT OF MEMBERS AND DISCIPLINE

11.1 The Board [of the Institution] must prescribe Regulations (the "Disciplinary Regulations") that:

a. Set out the procedures for the investigation, hearing and determination of complaints against Members in respect of Rule 4.

b. Appoint and set out the powers of Complaints Research Officers, Investigating Committees, Disciplinary Committees, Appeal Committees and Chairs of these Committees of the Institution.

c. Allow that the Chair of the Disciplinary Committee may rule that a complaint be dealt with immediately by a Disciplinary Committee provided that in relation to the complaint one or more of the following grounds applies:

(i) The Member concerned has been convicted by a competent Court or Tribunal of an offence punishable by a sentence of imprisonment or a fine exceeding $2,000.

(ii) The Member concerned has been disciplined under Section 21 of the Chartered Professional Engineers of New Zealand Act 2002 or subsequent amendments thereof.

d. Set out the orders which may be made by any Disciplinary Committee or Appeal Committee.

[25] The disciplinary penalties prescribed in Rule 11.5 in relation to a "Member" include expulsion, suspension, the imposition of a fine, reprimand or admonishment, and an order to pay costs. Rule 11.5 states:

> If a Disciplinary Committee appointed under Rule 11.1 decides that a Member whose conduct is the subject of the investigation has acted in breach of Rule 4, the Committee may make one or more of the following orders:
>
> a. That such Member be expelled from Membership of the Institution.
>
> b. That such Member be suspended from Membership for any period.
>
> c. That such Member be suspended from the Membership until such time as the Member has fulfilled requirements for professional development as have been specified by the Committee.
>
> d. That if by a prescribed date the Member fails to fulfil requirements for professional development as have been specified by the Committee such Member be suspended from Membership for a specified period of time.
>
> e. That a fine not exceeding an amount determined from time to time by the Board and duly punished in the official journal of the Institution be imposed on such Member.
>
> f. That such Member be reprimanded or admonished.
>
> g. That such Member pay a sum not exceeding an amount determined from time to time by the Board and duly published in the official journal of the Institution towards such costs incurred by the Institution and/or the complainant as are directly attributable to the investigation, hearing and/or determination of the complaint.
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> h. That upon completion of consideration of the complaint according to the procedures under the Disciplinary Regulations, the Member be named, the order made against the Member be stated, the nature of the breach described in the official journal of the Institution, the matter publicised in any other manner as may be prescribed by the Committee, or any combination of these possibilities as the Committee might prescribe.

[26] The Regulations adopted by the Institution contain a staged process for considering complaints against a member. The relevant steps can be summarised in the following way:

(1) Upon receiving a complaint against a member, the Institution must either refer the matter straight to a Disciplinary Committee or carry out an initial investigation.[11]

(2) Where a complaint is referred for an initial investigation, the Institution must notify the member of the general nature of the complaint.[12]

(3) A Complaints Research Officer must carry out the initial investigation and recommend to the Chairperson of the Investigating Committees whether the complaint should proceed to an Investigating Committee or be dismissed on one of the grounds in cl 8 of the Regulations,[13] which sets out the following seven grounds upon which a complaint may be dismissed:

> (a) There is no applicable ground of discipline under Rule 11 of the Institution; or
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> (b) The subject matter of the complaint is trivial; or
>
> (c) The alleged breach of Rule 4 is insufficiently grave to warrant further investigation; or
>
> (d) The complaint is frivolous or vexatious or is not made in good faith; or
>
> (e) The person alleged to be aggrieved does not wish action to be taken or continued; or
>
> (f) The complainant does not have a sufficient personal interest in the subject matter of the complaint; or
>
> (g) An investigation of the complaint is no longer practicable or desirable given the time elapsed since the matter giving rise to the complaint.

(4) The Chairperson of the Investigating Committees must decide whether the complaint should be referred to an Investigating Committee or dismissed on one of the grounds in cl 8.[14]

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11 Disciplinary Regulations, cl 5.
12 Clause 9(a).
13 Clause 9(b).
14 Clause 9(e).

(5) The Institution must notify the member of the outcome of the initial investigation and give reasons for the decision.[15]

(6) Unless the Chairperson deems the complaint should be dismissed, the Institution must appoint an Investigating Committee and refer the complaint to that Committee for consideration.[16]

(7) Upon completion of its investigation, the Investigating Committee must either refer the complaint to a Disciplinary Committee or dismiss the complaint on one of the grounds in cl 8.[17]

(8) If the complaint is referred to a Disciplinary Committee, the Committee must hear the complaint and determine if there are "grounds for disciplining the Member". If there are no grounds for disciplining the member, the complaint must be dismissed.[18] If there are grounds for disciplining the member the Disciplinary Committee must decide whether and how to exercise the Institution's disciplinary powers set out in Rule 11.5.

[27] Thus, the Act and the Rules of the Institution provide parallel routes for a structural engineer to engage with his or her profession.[19] Significantly, neither regime is compulsory save for the requirement mentioned above that certain types of engineering services may only be performed by a chartered engineer. The two regimes also contain separate processes for considering complaints and for disciplining members. There is also, however, a convergence of the regimes in that it is the Institution that has responsibility under the Act for maintaining the register of chartered engineers and for conducting disciplinary proceedings under the Act.

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15 Disciplinary Regulations, cl 10(a).
16 Clause 10(b).
17 Clause 11.
18 Clause 17(2).
19 The opportunities for engineers to join the Institution or to become registered as chartered engineers under the Act are in addition to the opportunities they may have to join smaller professional bodies such as those set out in footnote 10.

The complaints

[28] Two complaints were made to the Institution against Dr Reay about his role in the collapse of the CTV Building. The first was made in October 2012 by Mr Elms, whose daughter was killed when the CTV Building collapsed.[20] The second complaint was lodged in December 2012 by Mr Stannard, who at the time was the Chief Engineer at the Ministry of Business, Innovation and Employment. This proceeding has been brought in relation to the complaint lodged by Mr Stannard.

Progress of the complaints

[29] In his affidavit, Mr Stannard explains he made his complaint following the release of the findings of the Commission of Inquiry, believing he had a leadership role within the engineering profession and that a complaint was necessary in order for the Institution to undertake disciplinary action against Dr Reay. The material part of the complaint from Mr Stannard said:

> Dr Alan Reay's company provided the structural design for the CTV building, which collapsed in the February 2011 Canterbury earthquake, killing 115 people. The Canterbury Earthquakes Royal Commission found that the structural design of the building was seriously deficient in multiple ways. The employee engaged by Dr Reay to perform the design work (Mr David Harding) lacked the necessary experience to design buildings of this type. Dr Reay knew this, but failed to adequately supervise Mr Harding.
>
> Further, the Royal Commission found that Dr Reay exerted inappropriate pressure on the Christchurch City Council to approve the building, when the Commission found this should not have been done in view of its serious design deficiencies.
>
> …

[30] During his oral submissions, Mr Stephen, senior counsel for the Attorney-General, explained that Mr Stannard's complaint should be construed as an allegation that Dr Reay was amenable to disciplinary action for breaching Rule 4, on the basis he had breached the Institution's Code of Ethics. Mr Stephen said the complaint was that Dr Reay had failed to comply with those parts of the Code of Ethics that required him to:

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[20] This complaint was made on behalf of himself and 53 others whose relatives also died in the collapse of the CTV Building.

(1) conduct himself so as to uphold the dignity, standing and reputation of the Institution and of the profession;

(2) exercise his professional skill and judgement to the best of his ability and to discharge his professional responsibilities with integrity; and

(3) at all times recognise his responsibility to his employer or client, others associated with his work, the public interest and his profession.

[31] The following steps were taken by the Institution upon receiving Mr Stannard's complaint:

(1) In December 2012, the Institution's complaints research officer commenced his initial investigation into the complaint.

(2) Dr Reay provided written responses to the complaint in late 2012 and February and March 2013.

(3) On 3 April 2013, the complaints research officer recommended both complaints proceed to an Investigating Committee.

(4) On 30 April 2013, the Chairperson of the Investigating Committees accepted the recommendation of the complaints research officer.

(5) On 3 May 2013, an Investigating Committee was appointed. Thereafter followed a dispute in which Dr Reay challenged the composition of the Investigating Committee. That dispute was resolved when a member of the Investigating Committee resigned.

(6) On 14 August 2013, Dr Reay appeared before the Investigating Committee.

(7) On 28 February 2014, the Investigating Committee completed a draft determination that the complaints against Dr Reay be referred to a Disciplinary Committee.

[32] Also on 28 February, but before the draft recommendations of the Investigating Committee could be circulated, Dr Reay resigned from the Institution. In his comprehensive letter of resignation, Dr Reay said that he was not resigning from the Institution out of fear of the disciplinary processes that had commenced. Rather, according to Dr Reay, his resignation was motivated by his dissatisfaction with the way the Institution had responded to a number of issues that need not be canvassed in this judgment.

[33] The Chief Executive accepted Dr Reay's resignation, operating under the view that the Rules at the time provided no discretion to refuse a resignation. For completeness, it is to be noted that in March 2015 the Institution changed its Rules to allow the Chief Executive not to accept a notice of resignation where disciplinary proceedings are pending or are in train against a member.[21] At the time this change was made to the Rules, the Chief Executive said the amendment was "to ensure, beyond doubt, that members cannot avoid responsibility by resigning".

[34] The Institution then sought advice as to what it should do about the complaints against Dr Reay. The essence of that advice was that once Dr Reay ceased to be a member of the Institution, there was "no applicable ground of discipline under Rule 11", in terms of cl 8 of the Regulations, such that the Investigating Committee "may" dismiss the complaints if it so desired. The advice was that "ground of discipline" referred to the phrase "a Member has acted in breach of Rule 4", which is contained in each of the provisions dealing with the initiation of a complaint,[22] and Dr Reay was no longer a "Member". The advice was also that while the Investigating Committee had jurisdiction to either dismiss the complaints or refer them to a Disciplinary Committee, the latter course would be futile because the Disciplinary Committee would have no option other than to dismiss the complaints, and as such the

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21 The Rules of the Institution now provide:

8.17.1 Each Member may by notice in writing to the Chief Executive request to resign from the Membership.

8.17.2 The Chief Executive may refuse to permit the resignation of a member if:

(a) The Chief Executive believes, on reasonable grounds, that the Member is, or may soon be, subject to a complaint made under Rule 11, that he or she has breached Rule 4, in which case the request must not be actioned until the determination of the complaint is completed; and/or

(b) The Member has failed to pay or sums due in respect of subscriptions, or otherwise, in which case the request must not be actioned until payment in full is received.

22 See Rules 11.2, 11.3 and 11.4.

Investigating Committee should exercise its discretion to dismiss the complaints. This was because cl 17(2) of the Regulations used the word "must" rather than "may".[23] A potential distinction was raised between "grounds for disciplining" and "ground of discipline", with the suggestion that the former required that the allegation be made out and that an order be available under Rule 11.5. As the orders under Rule 11.5 could only be imposed on a "Member", the advice was that, on any interpretation, the Disciplinary Committee would have no choice but to dismiss the complaints.

[35] On 9 April 2014, the Institution issued its determination explaining the reasons why it was dismissing the complaint. The Institution said:

> With [Dr Reay's resignation], the role that the [Institution] and the [Investigating Committee] have had in pursuing its enquiries with regard to Dr Reay's conduct in respect of his professional involvement with the CTV building is at an end.
>
> …
>
> With Dr Reay having resigned his membership, no remaining applicable ground of discipline can be applied.
>
> Consequently, the determination of the investigating committee is that both of the complaints be dismissed under the provisions of [cl 8(a) of the Regulations], that there is no applicable ground of discipline under Rule 11 of the Institution.

Disciplinary proceeding against Mr Harding

[36] In the meantime, the Institution had also received two complaints against Mr Harding. Those complaints were also from Mr Stannard and Mr Elms. In April 2014, an Investigating Committee referred the complaints against Mr Harding to a Disciplinary Committee. Thereafter, he also resigned from the Institution. Mr Harding maintained that his resignation from the Institution meant the Disciplinary Committee lacked jurisdiction to discipline him. When the Institution declined to accept this argument, Mr Harding applied to the High Court for judicial review. That application was dismissed by Mander J on 17 September 2014, who concluded that Mr Harding's resignation did not mandate the discontinuance of the disciplinary proceedings against him.[24]

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23 Refer [26](8).

24 *Harding v Institute of Professional Engineers New Zealand Inc* [2014] NZHC 2251, [2014] NZAR 1252.

[37] In his judgment, Mander J found that, in the context of a complaint made against a person who had at the time of the complaint agreed to be subject to the Rules of the Institution, jurisdiction would be "triggered by force of the contractual relationship that existed at the time of the conduct and at the time of the complaint".[25] Mander J was satisfied that disciplinary action did not terminate with a member's resignation.[26] The judgment records a comment from counsel for the Institution that "the sanction of publication" still remained and had the potential to be punitive in its own right.[27] Mander J agreed, noting that Mr Harding's resignation merely reduced the range of disciplinary measures that were available against him.

[38] In his judgment, Mander J quoted a portion of a textbook on judicial review, in which the author said:[28]

> A voluntary organisation can deal only with its members or those bringing themselves within jurisdiction, such as by participating in an activity governed by an organisation. But a person within such a jurisdiction cannot escape it by resigning, so far as actions while a member are concerned, though resignation may well limit the types of actions which can be taken against the former member.

Support for this statement of the law was said to be found in *R v Wilson, ex parte Robinson*, a decision of the Full Court of the Supreme Court of Queensland.[29] That case will be examined when I deal with criticisms advanced on behalf of Dr Reay about the judgment of Mander J.

[39] On 23 October 2014, the Disciplinary Committee released its decision in which it determined that "Mr Harding breached the … Code of Ethics … and that this breach constitutes grounds for discipline under Rule 11". The Disciplinary Committee published its decision on the Institution's website, but imposed no other penalties upon Mr Harding.

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25 *Harding v Institute of Professional Engineers New Zealand Inc*, above n 24, at [25].
26 At [29].
27 At [28].
28 G Taylor *Judicial Review: A New Zealand Perspective* (3rd ed, LexisNexis, Wellington, 2014) at [14.06].
29 *R v Wilson, ex parte Robinson* [1982] Qd R 642 (QSC).

[40] Following the decision of Mander J, the Attorney-General requested that the Institution reconsider the Investigating Committee's decision of 9 April 2014 in relation to Mr Stannard's complaint against Dr Reay. The Institution, however, considered itself and the Investigating Committee to be *functus officio* in relation to the complaints against Dr Reay and therefore unable to reconsider its decision.

Other proceedings

[41] On 11 December 2012, the Institution commenced a complaint under the Act against Dr Reay. The essence of that complaint was that Dr Reay had made a false or misleading declaration when making his application for registration under the Act by failing to refer to his role in the design and construction of the CTV Building. On 16 May 2015, a Disciplinary Committee established under the Act concluded "Dr Reay's failure to disclose his firm's role in the design of the CTV Building did not constitute a false or misleading representation".

[42] In another High Court proceeding, Dr Reay sought a declaration that the Institution did not have jurisdiction to discipline him under historic Rules and Regulations that had since been replaced. That proceeding was, however, discontinued by consent following Dr Reay's resignation from the Institution.[30]

[43] For completeness, I record that the New Zealand Police announced in November 2017 that, after conducting inquiries and investigations, it had concluded no criminal charges could be brought against Dr Reay or others for their roles in relation to the collapse of the CTV Building.

The application for judicial review

[44] On 19 March 2015, the Attorney-General commenced the present proceeding "on behalf of [Mr] Stannard". The delays in the application for judicial review being

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[30] *Reay v Institute of Professional Engineers New Zealand Inc* HC Christchurch CIV-2013-409-1316.

brought to a hearing have been due, at least in part, to a series of interlocutory disputes and appeals.[31]

Summary of Attorney-General's case

[45] The Attorney-General's pleading can be distilled to five key propositions:

(1) "Member" in the Rules and Regulations includes a member who has resigned after a complaint has been lodged but before the completion of the Institution's disciplinary processes.

(2) Dr Reay was a member of the Institution at the time of his involvement in the design of the CTV Building and at the time of the complaints.

(3) The Institution has jurisdiction to investigate, hear, and determine complaints made when Dr Reay was a member of the Institution in relation to his conduct whilst a member of the Institution.

(4) The Institution had jurisdiction to investigate, hear and determine Mr Stannard's complaint.

(5) The Investigating Committee was wrong in law to dismiss Mr Stannard's complaint.

[46] By way of relief, the Attorney-General seeks:

(1) A declaration that the Institution has jurisdiction to investigate, hear and determine Mr Stannard's complaint.

(2) A declaration that the Investigating Committee was wrong in law to dismiss Mr Stannard's complaint.

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[31] *Attorney-General v Institution of Professional Engineers New Zealand Inc* [2015] NZHC 3136; *Reay v Attorney-General* [2016] NZCA 519, [2016] NZAR 1672; and *Attorney-General v Institution of Professional Engineers New Zealand Inc* [2018] NZHC 74, [2018] NZAR 275.

(3) An order setting aside the decision of the Investigating Committee to dismiss Mr Stannard's complaint.

The Institution's position

[47] The Institution abides this Court's decision.

Summary of Dr Reay's case

[48] Dr Reay's case can be summarised in the following way:

(1) The Attorney-General "has no litigable right or standing" in relation to this proceeding.

(2) The duties and obligations of Dr Reay and the Institution were governed by the contract contained in the Code of Ethics, Rules and Regulations. When Dr Reay resigned from the Institution, that contract came to an end. Applying orthodox principles of contractual interpretation leads invariably to the conclusion that there was no applicable ground of discipline following Dr Reay's resignation, and that the Investigating Committee therefore made no reviewable error of law when it dismissed Mr Stannard's complaint against Dr Reay.

(3) It was also submitted that even if the Institution made a reviewable error of law, this was not a case that justified the Court exercising its discretion to grant relief to the Attorney-General.

PART III

PROFESSIONAL ASSOCIATIONS AND THE DISCIPLINING OF PROFESSIONALS

The value of professional associations

[49] As membership of the Institution is voluntary, it is appropriate to explain why an engineer would see advantages to becoming a member.

[50] One of the reasons why an engineer might wish to belong to the Institution can be found in Dr Reay's affidavit, where he said that he joined the Institution in 1970 because "it was the only learned professional association of high standing that represented engineers in New Zealand". Dr Reay no longer believes the Institution reflects those values; nevertheless, his statement provides an insight into some of the advantages that can be gained through membership of voluntary professional bodies, such as the Institution. Those advantages may be summarised in the following four ways.

[51] First, as Dr Reay acknowledged, membership of the Institution provides an engineer with the opportunity to learn and develop his or her professional knowledge and skills through participating in study, training and development programmes offered through the Institution. This value has been widely acknowledged in academic literature. For example, it has been said:[32]

> … the institutions of professionalism are grounded not only in an economy but also in a social enterprise of learning, advancing, and practising a body of specialized knowledge and skill. The institutions of professionalism organize and advance disciplines by controlling training, certification and practice on the one hand, and by supporting and organizing creation and refinement of knowledge and skill on the other.

[52] Second, the role of accreditation may be particularly significant as a means of promoting members of the Institution over other engineers who lack the credentials of such membership. Whilst accreditation is not a perfect means of assuring quality, it is generally regarded as superior to non-accreditation, particularly in spheres where the public lacks the information to distinguish between providers of services.[33] Thus, an engineer with the letters FIPENZ after his or her name is likely to be viewed by members of the public as being superior to an engineer without those credentials. This in turn can lead to an economic benefit, as members of the Institution are likely to attract more clients and work than engineers who are not accredited by the Institution.

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32 Eliot Freidson *Professionalism: The Third Logic* (University of Chicago Press, Chicago, 2001) at 198. See also Eyun-Jung Ki and Yuan Wang "Membership Benefits Matter: Exploring the Factors Influencing Members' Behaviour Intentions in Professional Associations" (2016) 27 Nonprofit Management & Leadership 199 at 202.

33 Freidson, above n 32, at 205.

[53] Third, membership of a body of like-minded persons provides the member with a social benefit, namely collegiality from which may evolve greater acknowledgement and accolades:[34]

> The development of a specialized body of formal knowledge and skill requires a group of like-minded people who learn and practice it, identify with it, distinguish it from other disciplines, recognize each other as colleagues by virtue of their common training and experience with some common set of tasks, techniques, concepts, and working problems, and are inclined to seek out each other's company …

[54] Fourth, is the advocacy role that the Institution can perform on behalf of its members in shaping and influencing government policies that impact upon the profession.[35]

[55] Fifth, is that membership of a professional body, such as the Institution, can confer a status that signals trustworthiness to the public. This status reflects the value that society places upon the training and skill acquired by members and upon the Institution's ability to maintain the standards of its members through ongoing education, training and disciplinary processes.

[56] There is, however, a counterbalance to the public trust that is reposed in members of professional bodies such as the Institution. That counterbalance is the public expectation that the Institution will tightly regulate admission into its ranks and ensure members maintain high professional standards. The public expects that if a person is to be afforded the status of membership of the Institution, then those individuals will maintain professional standards and that those standards will be enforced by the Institution through, if necessary, disciplinary proceedings. If a professional body, such as the Institution, wishes to maintain that public trust, and the value associated with membership status, then it must act in accordance with this expectation.[36]

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34 Freidson, above n 32, at 202. See also Ki and Wang, above n 32.
35 Ki and Wang, above n 32, at 203.
36 Freidson, above n 32, at 214.

[57] This expectation has long been recognised by the Institution. In a message published in the Institution's monthly newsletter in June 2002, the then President of the Institution said:

> In earlier articles, I discussed briefly the growing importance of the roles of [the Institution] in regulating and representing the engineering professions in New Zealand. A profession that was not trusted by the community to regulate itself would find it hard to represent the interests and capacities of its members to that community …

[58] That same newsletter also contained a section reflecting on the Rules and Regulations following the enactment of the Act. That section recorded the following observation:

> It is the mark of a profession that it has a code of ethics and is prepared to take disciplinary action if that code is breached. Taking such action helps us to retain the high regard of the general public.

[59] In her memorandum providing assistance to the Court on behalf of the Institution, Ms Neill said that the Institution "is recognised and trusted by the public to regulate and uphold standards within the engineering profession". In a memorandum dated 5 December 2018, counsel for Dr Reay objected to much of Ms Neil's memorandum. However, those objections do not detract from the reasons why I have quoted from Ms Neil's memorandum, namely, to demonstrate that the Institution places some importance on maintaining the public's trust.

[60] It is also notable that one of the provisions of the Rules dealing with how complaints can be lodged is prefaced in the following way:[37]

> *In fulfilling his or her obligation as a Member for upholding professional standards of behaviour by engineers*, should any Member make a complaint alleging that another Member has acted in breach of Rule 4, the Chief Executive must initiate action to deal with such complaint in accordance with the Regulations prescribed by the Board in pursuance of Rule 11.1. (emphasis added)

The role of professional disciplinary proceedings

[61] Closely related to the Institution's need to maintain public trust is the role and purpose of its professional disciplinary proceedings, which are reflective of

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[37] Rule 11.2.

disciplinary proceedings generally. While such proceedings may result in punishment,[38] there are also non-punitive aspects to professional disciplinary proceedings that aim to maintain the public trust. Those factors may be summarised in the following way:

(1) First, professional disciplinary hearings are primarily designed to ensure that a member of a profession is competent and fit to practise his or her chosen profession. This objective is anchored firmly on the aim of protecting the public from practitioners whose skills fall below those expected of a member of the profession in question. Voluntary professional bodies share this aim because of the incentive to avoid the damage those practitioners could do to the reputation of the profession. This point was made in the following way, although in the context of a statutory regime, by Eichelbaum CJ in *Dentice v Valuers Registration Board*:[39]

> [Disciplinary procedures] exist to enforce a high standard of propriety and professional conduct; to ensure that no person unfitted because of his or her conduct should be allowed to practise the profession in question; to protect both the public and the profession itself against persons unfit to practise; and to enable the profession or calling, as a body, to ensure that the conduct of members conforms to the standards generally expected of them.

(2) Second, disciplinary proceedings may be rehabilitative. Rehabilitation may be an important consideration in a disciplinary hearing because the professional person, their professional body and society as a whole are each likely to have made considerable investment in the training and development of a professional person. Where appropriate, a professional disciplinary tribunal should endeavour to ensure these investments are not permanently lost, provided of course the person concerned is truly capable of being rehabilitated and reintegrated into their profession.[40]

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38 See for example *Roberts v A Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354.

39 *Dentice v Valuers Registration Board* [1992] 1 NZLR 720 (HC) at 724.

40 *B v B* HC Auckland HC4/92, 6 April 1993; and *Roberts v A Professional Conduct Committee of the New Zealand Council of Nursing*, above n 38, at [47].

(3) Third, a disciplinary hearing may provide a forum for inquiring into a tragic event. That inquiry may in turn provide an opportunity for lessons to be learnt for the profession as to how to avoid such tragedies in the future. This function of a disciplinary process can be achieved without imposing a disciplinary penalty, or by imposing a nominal penalty on the person who is the subject of the hearing. An illustration of how disciplinary proceedings can be used as a forum for the profession to learn from tragic events occurred in one of the disciplinary hearings that arose from the Cartwright Inquiry into unethical research at National Women's Hospital in which Professor Bonham was found to have breached professional standards by failing to adequately supervise Dr Green, the principal researcher.[41] Professor Bonham, who had retired from practising medicine, but remained on the Register of Medical Practitioners, was censured and ordered to pay $1,000.[42]

PART IV

STANDING OF THE ATTORNEY-GENERAL

Role of the Attorney-General

[62] The Attorney-General has stated in his pleadings that the application for judicial review is brought on Mr Stannard's behalf.

[63] It was not necessary, however, for the Attorney-General to bring this proceeding on behalf of Mr Stannard. The Attorney-General could bring this proceeding in his own capacity as the principal law officer of the Crown. As noted by the late Sir John McGrath QC, the Attorney-General has a "responsibility to represent the public interest on behalf of the general community by enforcing the law as an end in itself".[43] This role may be discharged in one of three ways. The Attorney-General

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41 *The Report of the Cervical Cancer Inquiry* (Committee of Inquiry into Allegations Concerning the Treatment of Cervical Cancer at National Women's Hospital and into Other Related Matters, July 1998).

42 See *Medical Council Charges Professor Bonham* (1990) 103 NZ Med J 547.

43 John McGrath "Principles for Sharing Law Officer Power: The Role of the New Zealand Solicitor-General" (1988) 18 NZULR 197 at 204.

may bring an action in his or her own capacity to enforce public rights, he may authorise relator proceedings to enforce public rights, or he may seek to intervene in private litigation to protect the public interest.[44]

[64] In *Gouriet v Union of Post Office Workers*, Mr Gouriet had wanted the Attorney-General of England and Wales to authorise the commencement of proceedings aimed at preventing members of the Union of Post Office Workers interfering with mail to South Africa in protest against the apartheid regime.[45] After the Attorney-General refused to authorise a relator action, Mr Gouriet sought an injunction in his own name. An interim injunction and a later declaration were granted by the Court of Appeal. In allowing an appeal by the Attorney-General on the basis that Mr Gouriet had no standing to seek such relief, the House of Lords reaffirmed the long-established position of the Attorney-General as the "guardian of the public interest". In the words of Lord Wilberforce:[46]

> … it is the exclusive right of the Attorney-General to represent the public interest—even where individuals might be interested in a larger view of the matter—is not technical, not procedural, not fictional. It is constitutional.

[65] While aspects of *Gouriet v Union of Post Office Workers* have been superseded by the wider approach to public interest standing taken by the courts in subsequent cases,[47] the proposition that it is part of the role of the Attorney-General to protect the public interest is beyond question.

[66] Thus, if there is a genuine public interest element to the Attorney-General's application for judicial review, then he has standing to bring the proceeding in his own right on behalf of the general community, and not simply on behalf of Mr Stannard.

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44 See JLIJ Edwards *The Law Officers of the Crown* (Sweet & Maxwell, London, 1964) at 286–287. Relator proceedings, while still permitted by r 4.28 of the High Court Rules 2016, are rarely necessary as courts have adopted a broad approach to granting standing to individuals to bring public interest litigation. There have only been two relator proceedings in the past 40 years. See *Attorney-General ex rel Benfield v Wellington City Council* [1979] 2 NZLR 385 (SC); and *Thorndon Antiques and Fine China Ltd v Telecom Corp of New Zealand Ltd* (1999) 13 PRNZ 405 (HC).

45 *Gouriet v Union of Post Officer Workers* [1978] AC 435 (HL).

46 At 481.

47 See *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159 (CA).

The public interest

[67] The "public interest" was once described by the Court of Appeal as a "yardstick of indeterminate length".[48] It is a term often referred to in legislation and judicial decisions, but it remains an elusive concept.[49] Efforts to define "the public interest" include references to the fundamental values of society, the consensus of the majority and those interests people have in common as members of the public in contrast to those interests that are purely private.[50]

[68] In assessing whether a particular case engages the public interest, care must be taken to distinguish between what is genuinely in the public interest and matters that some members of the public might find interesting. As has been said in a different context, "[t]here is a world of difference between what is in the public interest and what is of interest to the public".[51]

[69] In the present case, there are three factors that lead to the conclusion the Attorney-General's application engages issues of genuine public interest.

[70] First, there is significant public interest in ensuring professional disciplinary procedures are discharged in accordance with the law. If, as is alleged, the Institution erroneously believed it was legally bound to dismiss the charges against Dr Reay, then that would be a matter of public interest notwithstanding that the Institution's Rules have since been changed. Correcting any error of law would also ensure consistency of approach in relation to the way the Institution dealt with Mr Harding.

[71] Examples of cases in which the Attorney-General has taken steps to ensure professional disciplinary procedures are carried out in accordance with the law include

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48 *Attorney-General v Car Haulaways (NZ) Ltd* [1974] 2 NZLR 331 (CA) at 335.

49 A search of the www.legislation.govt.nz website reveals that 221 Acts of Parliament use the phrase "public interest", while searches of Westlaw NZ reveal that in the past 10 years the Supreme Court has used the phrase in 101 cases, and the Court of Appeal has used it in 669 cases.

50 E McLay "The Public Interest in New Zealand" in M Francis and J Tully (eds) *In the Public Interest: Essays in Honour of Professor Keith Jackson* (Canterbury University Press, Christchurch, 2009) at 25–33; and B Barry *Political Argument* (Routledge & Kegan Paul Ltd, London, 1965) at 190.

51 *Lion Laboratories Ltd v Evans* [1985] QB 526 (CA) at 553.

the role taken by the Attorney-General for England and Wales, albeit as an intervener, in *Meadow v General Medical Council*.[52]

[72] Second, the collapse of the CTV Building was a major national disaster. It resulted in many people losing their lives. The causes of that collapse have been examined by the Commission of Inquiry. There have also been police investigations and a Disciplinary Committee's findings in relation to Mr Harding. To date, however, there has been no direct assessment of what, if any, professional accountability should be apportioned to Dr Reay for the collapse of the CTV Building.

[73] Third, the allegation that Dr Reay breached the Code of Ethics engages the public interest, particularly the obligation in the Code of Ethics that required Dr Reay to "at all times" recognise his responsibilities to the "public interest", "others associated with his work" and "his profession". Part of those obligations could include his responsibility to adequately supervise his employees, including Mr Harding.

[74] For these reasons, I am satisfied there is a genuine public interest in the proceedings and, thus, the Attorney-General has standing to bring the present application for judicial review.

PART V

DID THE INSTITUTION MISCONSTRUE ITS RULES AND REGULATIONS?

The correct approach to interpreting the Rules and Regulations

[75] Although the Institution discharges a statutory role in relation to the registration and disciplining of chartered engineers, the relationship between the Institution and its members is primarily governed by contract, the relevant terms of which can be found in the Rules, the Regulations and the Code of Ethics.

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52 *Meadow v General Medical Council* [2006] EWCA Civ 1390, [2007] QB 462.

[76] This does not mean the relationship between the Institution and its members is governed exclusively by contract law. There is scope for judicial review in circumstances where, for example, it is alleged the Institution has breached its obligations to comply with the principles of natural justice when conducting disciplinary proceedings or inquiring into a member's professional competence.[53]

[77] Generally, however, courts are reluctant to invoke judicial review when the law of contract provides an adequate remedy in a dispute between a society and one of its members. Thus, in *Stratford Racing Club Inc v Adlam*, the Court of Appeal noted that:[54]

> … the courts' traditional reluctance to intervene in the running of clubs by way of judicial review is that members who consider their club or society is breaching the rules have a remedy under the law of contract …

[78] The Court of Appeal agreed with the conclusion reached by the High Court in the same proceeding. In the High Court judgment, Miller J helpfully summarised the law in the following way:[55]

> It is well established that the Court will exercise restraint. The legislature cannot have intended that a domestic body should have its operations subject to constant judicial review (*New Zealand Stock Exchange v Listed Companies Association Inc* [1984] 1 NZLR 699 (CA) at p 707). More recently, in *Hopper v North Shore Aero Club Inc* [2007] NZAR 354, the Court of Appeal, while finding it unnecessary to determine the point, questioned the amenability of an incorporated society's decisions to judicial review in circumstances where it was not exercising a quasi-public function and did not breach the rules of natural justice. The Court held that the internal workings of incorporated societies are primarily reviewable under the law of contract; even then the Courts have acted with restraint, confining themselves to ensuring compliance with the rules and requiring decisions to be arrived at honestly and in good faith …

[79] This case concerns disciplinary proceedings, which are instances in which the courts have been willing to intervene in the affairs of societies.[56] It also turns on a narrow issue of legal interpretation, which the Court is competent to determine. Accordingly, the Institution's decision is amenable to judicial review. The scope of

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53 See for example *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513 (PC).

54 *Stratford Racing Club Inc v Adlam* [2008] NZCA 92, [2008] NZAR 329 at [55]. See also *Hopper v North Shore Aero Club Inc* [2007] NZAR 354 (CA) at [11], citing *Peters v Collinge* [1993] 2 NZLR 554 (HC) at 566

55 *Adlam v Stratford Racing Club Inc* [2007] NZAR 544 (HC) at [80].

56 *Hopper v North Shore Aero Club Inc*, above n 54, at [11].

that review is, however, confined by the law of contract, as no issue of natural justice or other ground of judicial review is engaged. The parties therefore advanced their respective cases by examining the meaning of the terms of the contract between Dr Reay and the Institution.

Principles of contractual interpretation

[80] The general principles for interpreting a contract are those identified by Lord Hoffmann in *Investors Compensation Scheme Ltd v West Bromich Building Society*,[57] and adopted by the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*.[58] Some of the principles articulated by Lord Hoffmann in *Investors' Compensation Scheme Ltd v West Bromich Building Society*, particularly his observations about the admissibility of extrinsic evidence, have been "explained" in subsequent cases.[59] Nevertheless, it is appropriate to set out exactly what Lord Hoffmann said rather than risk subtle distortions that can arise through attempts to summarise his words. The relevant principles stated by Lord Hoffmann are:[60]

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would have been available to the parties in the situation in which they were at the time of the contract.
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> (2) The background was famously referred to by Lord Wilberforce as the "matrix of fact", but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> …
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have

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57 *Investors' Compensation Scheme Ltd v West Bromich Building Society* [1998] 1 WLR 896 (HL) at 912–913 per Lord Hoffmann.

58 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

59 *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 at [39]; *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 58, at [19].

60 *Investors' Compensation Scheme Ltd v West Bromich Building Society*, above n 57, at 912–913 per Lord Hoffmann.

been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax …

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the commonsense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios* [1984] 3 All ER 229 at 233, [1985] AC 191 at 201:

> … if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

[81] The principles of contractual interpretation have more recently been summarised by the Supreme Court in *Firm PI 1 Ltd v Zurich Australian Insurance Ltd*, which confirmed that the proper approach is an objective one, the aim being to ascertain the meaning the document would convey to a reasonable person having all background knowledge that would reasonably have been available to the parties in the situation they were in at the time of the contract.[61] McGrath, Glazebrook and Arnold JJ said:[62]

> While context is a necessary element of the interpretive process and the focus is on interpreting the document rather than particular words, the text remains centrally important. If the language at issue, construed in the context of the contract as a whole, has an ordinary and natural meaning, that will be a powerful, albeit not conclusive, indicator of what the parties meant. But the wider context may point to some interpretation other than the most obvious one and may also assist in determining the meaning intended in cases of ambiguity or uncertainty.

[82] Those comments reflect the modern approach to contractual interpretation, which considers text and context together to arrive at the intended meaning. The

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61 *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]–[63], [77]–[79] and [88]–[93] per McGrath, Glazebrook and Arnold JJ.

62 At [63].

position was outlined by Tipping J in *Vector Gas Ltd v Bay of Plenty Energy Ltd* in the following way:[63]

> Nor does the objective approach require there to be an embargo on going outside the terms of the written instrument when the words in issue appear to have a plain and unambiguous meaning. This is because a meaning that may appear to the court to be plain and unambiguous, devoid of external context, may not ultimately, in context, be what a reasonable person aware of all the relevant circumstances would consider the parties intended their words to mean. An example of that situation is when plain words, read contextually, lead to a result which does not make sense, whether commercially or otherwise: a meaning that flouts business commonsense must yield to one that accords with business commonsense. The appropriate contextual meaning, if disputed, will, almost invariably, involve consideration of facts and circumstances not apparent solely from the written contract. While displacement of an apparently plain and unambiguous meaning may well be difficult as a matter of proof, an absolute rule precluding any attempt would not be consistent either with principle or with modern authority.
>
> The proposition that a party may not refer to extrinsic evidence "to create an ambiguity" is at least potentially misleading. It does not mean context is irrelevant unless there is a patent ambiguity. Context is always a necessary ingredient in ascertaining meaning. You cannot claim to have identified the intended meaning without reference to context. Hence it is always permissible to go outside the written words for the purpose of identifying the context in which the contract was made and its objective purpose. While there are no necessary preconditions which must be satisfied before going outside the words of the contract, the exercise is and remains one of interpretation. Subject to the private dictionary and estoppel exceptions to be mentioned below, it is fundamental that words can never be *construed* as having a meaning they cannot reasonably bear. This is an important control on the raising of implausible interpretation arguments. Furthermore, the plainer the words, the more improbable it is that the parties intended them to be understood in any sense other than what they plainly say.

The interpretation issue

[83] The contractual interpretation dispute in this case may be reduced to the following question:

> Does the term "Member" in the relevant parts of the Rules and Regulations include a person who was a member of the Institution when disciplinary proceedings were commenced, but who resigns from the Institution before those disciplinary proceedings are completed?

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63 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 58, at [22]–[23] (citations omitted).

[84] The essence of Mr Palmer's submission was that the Rules and Regulations are very plain. The disciplinary regime can only apply to a current member, as defined in Rule 2.1(b), namely a person who holds any current class of membership.

[85] Mr Palmer submitted that the disciplinary regime set out in the Regulations is replete with references to "a Member". Similarly, the provisions of Rule 11, including the orders that may be made under Rule 11.15, apply only to "a Member". Mr Palmer said it was axiomatic that, for example, a former member cannot be expelled or suspended from the Institution. As a consequence, all references to "a Member" in Rule 11 can only refer to a person who is a member of the Institution throughout the disciplinary process.

[86] Ms Clarke, who argued this aspect of the case for the Attorney-General, pointed to examples in the Rules and Regulations that she said clearly demonstrated the term "Member" sometimes included a former member. In particular, Ms Clarke submitted that Rule 11.5(h), which concerns the publication of a disciplinary finding, would not work if it were limited to current members. The gravamen of Ms Clarke's argument was that if a member were expelled or suspended following a disciplinary hearing, then it would be absurd if the Institution could not publish that fact simply because the person concerned was no longer a member of the Institution. Similar arguments were advanced in relation to other orders that can be made under Rule 11.5.

[87] Mr Palmer responded to this submission by pointing out that cl 32 of the Regulations expressly states that "[a]ny fine or costs ordered to be paid … continues to apply whether or not a Member is suspended or expelled under these regulations, or resigns after the order is made." He therefore submitted that there was no absurdity, as the situation had been explicitly provided for.

[88] Other Rules that Ms Clarke submitted were examples of "Member" encompassing a former member included:

(1) Rule 8.15, which deals with deferred membership status for those who intend to temporarily suspend their normal career as an engineer. Ms Clarke submitted that a deferred member was not a member

because they did not have to pay membership fees and were not eligible for the rights of membership, such as using an honorific like FIPENZ. In particular, Rule 8.15.3 refers to "Members" who wish to "restore their membership to the normal status", which Ms Clarke submitted must refer to a former member.

(2) Rule 8.17.2, which allows the Institution to sue a member that had resigned for the return of a "certificate of membership issued to such Member". Ms Clarke submitted that as the member had already resigned, the reference to "Member" had to refer to a former member.

(3) Rule 8.17.4, which provides that upon death "of a Member, the Member's name" shall be removed from the register. Ms Clarke submitted that as the member would already be dead, the references to "Member" must refer to a former member.

(4) Rule 9.3.2, which provides that a "Member shall remain liable for any subscription, which was due prior to the date of resignation or expulsion." Ms Clarke submitted that as the member had already resigned or been expelled, the reference to "Member" must refer to a former member.

[89] Mr Palmer's response to each of these instances was that the word "Member" was being used to refer to a particular situation in which a Member was no longer a member. As such, he submitted that these were instances where a contrary interpretation had been "specified". He submitted, however, that there was no basis to conclude that a contrary interpretation had been specified in Rule 11.

Approach and analysis

[90] Consistent with the authorities examined at [80] to [82] I shall analyse the interpretation issue posed by this case by examining the text used in the Rules and Regulations in light of the surrounding circumstances. In particular, I shall consider the significance of the fact that the interpretation issue arises in the context of a professional disciplinary environment.

Textual analysis

[91] I accept that, when read in a contextual vacuum, the definition of "Member" in Rule 2.1(b) appears to be limited to persons who currently hold one of the classes of membership specified in the Rules. However, the presence of the qualification "unless a contrary interpretation is specified" in the definition of a "Member" in Rule 2.1(b) leaves open the possibility that a different meaning might apply in certain circumstances. The Rules do not explain when a different interpretation will be "specified".

[92] While I do not accept all of Ms Clarke's arguments about the use of the word "Member" in the Rules and Regulations, some of them undoubtedly raise problematic questions about the definition in Rule 2.1(b) that must be accommodated if the Rules and Regulations are to be given proper effect. I address each in turn before returning to consider the overall implication for this case.

[93] I find no difficulty with the orders that can be made under Rule 11.5. Ms Clarke's arguments in this respect focused on the particular wording of each of the orders listed, and operated on the assumption that an expelled member would no longer be a "Member" at the time the publication would occur or the fine or costs would be paid. The answer to this submission rests in the structure of Rule 11.5. The references to "Member" in Rule 11.5 are part of the wording of orders that can be made at the conclusion of the Disciplinary Committee's determination. All disciplinary orders are made concurrently. Thus, at the time the orders identified by Ms Clarke are made the person would still be a member of the Institution.

[94] Equally, I am unconvinced by Ms Clarke's argument in relation to Rule 8.15, which deals with deferred membership status. This argument presupposes that a deferred member is not a member. I do not accept that assumption. The very phrasing "restore their membership to the normal status" contemplates that they have a membership status in the first place, albeit not a "normal" status. The absence of fees and rights of membership are merely the features that make this status abnormal. The same observations also apply to a suspended membership.

[95] Ms Clarke was on stronger ground in relation to Rules 8.17.2, 8.17.4 and 9.3.2. and cl 32 of the Regulations. These each deal with particular circumstances, such as death, expulsion and resignation. The references to "Member" in those instances necessitate the inclusion of a person who is no longer a member for those provisions to make sense, albeit the particular reason for non-currency of membership is clear from the provision in each case. It is not obvious how this is achieved. There are only two possibilities; namely, the defined meaning in Rule 2.1(b) is not generally limited to current members, or a contrary interpretation has been "specified" in the relevant Rules. It is unnecessary to reach a firm view on this, as the proper interpretation of those provisions is not in issue in this case. What this demonstrates, however, is that the Rules and Regulations were not drafted in crystalline terms that exclude any possibility of a former member being included within the meaning of "Member" in certain circumstances.

[96] Similar to the way those provisions use "Member" as a shorthand to refer to a particular individual that was at one stage a member of the Institution, there is also an argument that the references to "Member" in Rule 11 are a shorthand to refer to the particular individual that is the subject of the disciplinary proceedings.

[97] For instance, Rule 11.5 refers to "a Member whose conduct is the subject of the investigation". The orders listed under Rule 11.5 mostly refer back to this expression by using the phrase "such Member" or "the Member". These expressions make it clear that not just any member is being referred to, but the particular individual that is subject to the disciplinary proceedings. Similarly, various provisions in the Regulations that govern procedural steps after a complaint has been initiated refer to "the Member complained about".[64]

[98] The references to "Member" in Rules 11.2 to 11.4, which govern how a complaint is initiated, are not limited in that way. They instead refer to "a Member" or "another Member". This is presumably because the disciplinary procedure is not yet underway at the stage covered by Rules 11.2 to 11.4. Similarly, general wording

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[64] See Regulations, cls 9(a), 10(a), 12(c) and (e), 13, 14, 16(a), 17, 18(c), (f) and (j), 19 and 21(a).

can be found in cls 3 and 4 of the Regulations, which also deal with the initiation of complaints.

[99] This suggests that timing might be important in interpreting the various reference to "Member" in relation to disciplinary proceedings. There might, for instance, be a requirement in order to initiate a complaint that the person complained about is a member of the Institution at that time. It does not necessarily follow from this that the person must thereafter remain a member of the Institution in order for the disciplinary process to be pursued, given the different ways the term "Member" is used throughout the Rules and Regulations.

[100] Thus, the Attorney-General's pleaded meaning, that the relevant uses of the word "Member" include a person that was a member of the Institution at the time the complaint against them was made but has since resigned, is one that the words can reasonable bear. There is also some support for the proposition that the relevant timing of membership contemplated by the Rules and Regulations for the purposes of the Institution's disciplinary procedures is when the complaint is initiated. Thus, this is a case where it is necessary to look at the context in order to determine the intended meaning.

Contextual inquiry

[101] As has been emphasised throughout this judgment, the interpretation issue is set in the context of disciplinary proceedings against a professional person. Accordingly, the role and purpose of professional disciplinary proceedings to a voluntary professional association, explained in Part III, form part of the relevant context in which the parties were contracting.

[102] A reasonable person, in possession of that background knowledge, reading the relevant provisions of the Rules and Regulations would have certainly appreciated that the procedures were being put in place to ensure that the Institution, and the profession generally, would maintain the public's trust. Understood in that light, the reasonable person would be reluctant to reach the conclusion that the parties intended that a member could escape professional disciplinary proceedings by simply resigning. That person would recognise the importance of professional disciplinary proceedings being

allowed to proceed to a conclusion so as to ensure that the profession, and the public, benefit from a full and proper analysis of the way in which the member discharged his or her professional responsibilities. Allowing disciplinary proceedings to be brought to a premature end by the resignation of a member would flout the trust society places on professionals, and bodies such as the Institution, to ensure disciplinary proceedings are conducted in a way that produces a reasoned conclusion about the merits of the complaint. Such a consequence would be contrary to the aim of maintaining the public trust, which underpins a voluntary professional body implementing disciplinary procedures. For these reasons, the consequences advocated by Dr Reay "lead to a result that does not make sense".[65]

[103] It is also significant that cl 8 of the Code of Ethics placed an obligation on members to "at all times recognise [their] responsibility to … the public interest and [their] profession". This obligation would be frustrated by allowing a member of the Institution to terminate disciplinary proceedings by resigning from the Institution at any time prior to the conclusion of the disciplinary process. Allowing a member to, in effect, circumvent a disciplinary hearing could be seen as flouting the obligations of a professional person to ensure that proper inquiries into alleged professional failings are carried out, particularly in circumstances where lives may have been lost as a result of professional shortcomings. Again, the consequence of flouting this obligation would be to undermine the public's trust in the profession and the Institution and produce an outcome that would be the antithesis of the rationale for voluntary disciplinary procedures. A reasonable person reading the text of the Rules and Regulations would have this in mind when determining the intended meaning.

Interpretation conclusion

[104] Applying the principles of contractual interpretation set out above leads to the conclusion that, when viewed objectively, the term "Member", as used in the relevant parts of the Rules and Regulations, encompasses a person who was a member of the Institution at the time disciplinary proceedings were instituted but who resigns from the Institution before those disciplinary proceedings are completed. This is in part because the text of those provisions emphasise the requirement of membership at the

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65 *Vector Gas Ltd v Bay of Plenty Energy Ltd*, above n 57, at [22].

time of the complaint, but are equivocal about the subsequent period. That equivocation should be resolved in favour of disciplinary proceedings continuing because the parties cannot have intended to undermine the public's trust in the profession, contrary to the purpose of the disciplinary procedures. It follows from the contextual analysis that a reasonable person, appraised of the relevant background, would have understood that the Rules and Regulations were not intended to permit disciplinary proceedings to be brought to a premature end by a member, resigning from the Institution before those disciplinary proceedings are concluded.

[105] Accordingly, I am satisfied the Institution erred in law when its Investigating Committee dismissed Mr Stannard's complaint on the basis of its incorrect interpretation of the word "Member" in the relevant parts of the Rules and Regulations.

Other authorities

[106] I am fortified in this conclusion knowing that, albeit for slightly different reasons, Mander J reached the same conclusion in *Harding v Institution of Professional Engineers New Zealand Inc*.[66]

[107] In his submissions, Mr Palmer respectfully criticised both the approach and outcome in the judgment of Mander J. For completeness, I will address some of Mr Palmer's concerns.

[108] First, Mr Palmer submitted that, in effect, Mander J approached the task before him as though he were engaged in an exercise of statutory interpretation by focusing on the purposes that he said underpinned the Rules and Regulations. I have, however, endeavoured to reach my decision through the application of orthodox principles of contractual interpretation.

[109] Second, Mr Palmer was critical of the reliance that Mander J placed on the extract from *Judicial Review: A New Zealand Perspective* that I have quoted at [38].

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66 *Harding v Institution of Professional Engineers New Zealand Inc*, above n 24.

Mr Palmer said the extract was an incorrect statement of the law and that the authorities referred to by the author of that text were either wrong or not applicable.

[110] The main authority cited by the author of *Judicial Review: A New Zealand Perspective* is *R v Wilson, ex parte Robinson*.[67] That case concerned an architect who resigned from the Queensland Chapter of the Royal Australian Institute of Architects before disciplinary proceedings against him could be concluded. A Full Court of the Queensland Supreme Court held that the architect could not escape the disciplinary process by resigning his membership. Connolly J said:[68]

> It is clear in my judgement that a person who is a member when the report which initiates the disciplinary machinery is received by the Institute has contracted that he will submit to the progressive steps provided for by the [disciplinary rules] and that his subsequent resignation can have no effect upon that contractual submission.

[111] The approach taken in *R v Wilson, ex parte Robinson* has, however, been criticised by a Full Court of the Supreme Court of South Australia in *McLachlan v Australian Stock Exchange Ltd*.[69] There it was said that, absent a specific contractual power, disciplinary proceedings could not continue against a member of a professional body after he or she had resigned from that body.

[112] Mr Palmer submitted that the reasoning in *McLachlan v Australian Stock Exchange Ltd* was correct and should be preferred over that contained in *Robinson*. Ultimately, however, I have interpreted the relevant provisions of the Institution's Rules and Regulations. I have treated both cases from Australia as helpful but not persuasive. In particular, I could find nothing in *McLachlan v Australian Stock Exchange Ltd* that specifically engaged with the public trust dimension that has been a feature of the case before me.

[113] Mr Palmer also criticised other authorities cited in *Judicial Review: A New Zealand Perspective* in support of the passage cited by Mander J, namely *Kerr v New Zealand Teachers Council*.[70] In that case, Wild J held that the New Zealand Teachers

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67 *R v Wilson, ex parte Robinson*, above n 29.
68 At 647.
69 *McLachlan v Australian Stock Exchange Ltd (No 2)* [1999] SASC 284, (1999) 32 ACSR 524.
70 *Kerr v New Zealand Teachers Council* HC Wellington CIV-2002-485-860, 6 April 2004.

Council continued to have jurisdiction over a teacher who had applied for and obtained deregistration before disciplinary action could be concluded. That decision hinged upon the interpretation of provisions of the Education Act 1989 that were then in force.

[114] I accept that care must be taken before placing reliance on decisions that have allowed disciplinary proceedings to continue against a professional person in circumstances where the interpretation of statutory provisions governs the disciplinary process in question. I have reached my decision on the basis of the particular contract between the Institution and Dr Reay, contained in the Rules and Regulations.

[115] It should be emphasised that, to the extent any authority purports to pronounce a general rule that a member of a voluntary society cannot escape disciplinary procedures by resigning, for public policy reasons or otherwise, then that authority should be viewed with caution. There is no rule of judicial review, or of contract, that requires the result arrived at in this case. If the Rules had a provision that stated that disciplinary proceedings cease once a member resigns, then a different result would have been reached. Voluntary societies are free to contract with their members on whatever basis they see fit. Of course, unless the terms of those contracts are explicit, the Court will interpret them in light of their text and in the context of professional disciplinary proceedings that I have canvassed in this judgment. In other cases, such as for example where a member resigns from a sports or social club bringing disciplinary proceedings to an end, a Court may well reach a different conclusion from that contained in this judgment.

[116] It should also be observed that while this case has been decided through the application of principles of contractual interpretation, there is a public dimension that flows from the fact that Dr Reay resigned from his professional body during the course of a disciplinary inquiry into his role in relation to a major national disaster. It should not be thought that this case has involved a conflict between private and public law. On the contrary, the public interest dimension compliments the interpretation of the contract in this case.

PART VI

RELIEF

[117] In the present case, the Institution erred in law when its Investigating Committee dismissed Mr Stannard's complaint against Dr Reay.

[118] While it is trite law that judicial review remedies are discretionary, the Court of Appeal has explained that it would be rare to refuse relief where an error of law has been established.[71]

[119] If the declarations and orders sought are granted, then the effect of this Court's decision will be to relieve the Institution of its *functus officio* status, by undoing its erroneous determination to dismiss Mr Stannard's complaint. That is to say, the Institution will be able to reconsider whether or not it wishes to proceed with Mr Stannard's complaint against Dr Reay.

[120] Mr Peers, who argued the relief aspect of the case for Dr Reay, stressed a number of factors that he submitted weighed against the appropriateness of relief being granted in this case. Those factors included:

(1) The delay that has already occurred. While it is a concern that it has taken more than three years for the present application to be heard, most of the reasons for that delay relate to interlocutory applications and appeals for which both sides have been responsible.

(2) Given the period of delay, Dr Reay no longer possesses a number of documents. This also may be a matter of concern but, without explicit details, I cannot give much weight to this consideration.

(3) Dr Reay's age. He is now 76 and in the twilight of his professional career. This may also be a matter of concern but, as has been

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[71] *GXL Royalties Ltd v Minister of Energy* [2002] NZCA 185, [2010] NZAR 518 at [67]; *Survey Nelson Ltd v Maritime New Zealand* [2010] NZCA 629 at [52]; and *Air Nelson Ltd v Minister of Transport* [2008] NZCA 26, [2008] NZAR 139 at [60].

demonstrated in relation to other high-profile professional disciplinary proceedings, the age of the professional person is rarely a factor that weighs against the conduct of disciplinary proceedings.[72]

(4) The practical challenges for the Institution of having to decide whether to commence the disciplinary process afresh or continue the disciplinary process that was underway prior to Dr Reay's resignation. I acknowledge there may be some issues of this kind for the Institution to resolve. This is not, however, a factor that weighs against relief being granted.

(5) It was Dr Reay's case that none of the orders set out in Rule 11.5 can be imposed in his case. It was said this weighs against relief being granted. A Disciplinary Committee could, however, impose any penalty that was practicably available and which was merited. Obviously, it would no longer be possible to remove or suspend Dr Reay's membership of the Institution, as a matter of reality, but, if my interpretation of the meaning of "Member" in Rule 11.5 is correct, all other penalties would be available.

[121] In my judgement, the factor that is overwhelmingly in favour of granting the relief sought by the Attorney-General is the public interest in allowing the Institution to determine whether or not it wishes to proceed with Mr Stannard's complaint against Dr Reay. Whilst it would not be possible to expel or suspend Dr Reay from the Institution, that is not determinative. There may be valuable lessons to be learnt from an assessment of Dr Reay's professional responsibilities in relation to the collapse of the CTV Building that can only be resolved through a disciplinary process. That is a factor, however, for the Institution to consider. This judgment is not a direction that the disciplinary proceeding against Dr Reay must continue.

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[72] See for example *Bonham v Medical Council of New Zealand* HC Wellington CP797/90, 21 September 1990.

Result

[122] The following declarations are made:

(1) The Institution has jurisdiction to investigate, hear and determine Mr Stannard's complaint.

(2) The Investigating Committee was wrong in law to dismiss Mr Stannard's complaint.

[123] I also make an order setting aside the decision of the Investigating Committee to dismiss Mr Stannard's complaint.

Costs

[124] The Attorney-General is entitled to costs on a scale 2B basis. This is a case that warranted second counsel. The costs are to be paid by Dr Reay.

D B Collins J

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