IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA414/2021
[2021] NZCA 514

BETWEEN	IMRAN MOHAMMED KAMAL Appellant
AND	RESTRUCTURING INSOLVENCY AND TURNAROUND ASSOCIATION OF NEW ZEALAND INCORPORATED Respondent

Hearing:	25 August 2021
Court:	French, Mander and Palmer JJ
Counsel:	M S Smith for Appellant S M Hunter QC and E B Moran for Respondent
Judgment:	30 August 2021 at 2.00 pm
Reasons:	7 October 2021

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The cross-appeal is upheld and the declarations of the High Court are quashed.

C Costs are awarded to the respondent for a standard appeal on a band A basis for the appeal and cross-appeal, and reasonable disbursements.

REASONS OF THE COURT

(Given by Palmer J)

Summary

[1] Mr Imran Kamal was subject to disciplinary sanctions by the New Zealand Institute of Chartered Accountants (NZICA) in 2009, 2010, and 2011 and was convicted of six criminal tax offences in 2013. He would have been removed from membership of NZICA if he had not resigned. In 2013, Mr Kamal started practising as a liquidator. In 2015, the High Court ordered him to pay costs personally because of his conduct in a liquidation.[1] Now, the Insolvency Practitioners Regulation Act 2019 (the Act) effectively requires that Mr Kamal either be a member of NZICA or of the Restructuring Insolvency and Turnaround Association of New Zealand (RITANZ) to continue to practise as a liquidator. In 2020, NZICA declined his application for readmission to membership. In 2021, RITANZ declined Mr Kamal's application for membership on the basis he was not of good character.[2] Mr Kamal challenged the decision by judicial review. The High Court upheld RITANZ's decision.[3] But it issued two declarations: that RITANZ erred in law by not making its good character assessment in a forward-looking way in three respects and that a statement in its report about Mr Kamal was not put to him so was unfair and a breach of natural justice.

[2] Mr Kamal appeals the High Court's decision to uphold RITANZ's decision. He submits that the Act contemplates that an applicant for a licence can meet the fit and proper standard with appropriate conditions imposed and RITANZ's decision did not take that into account. RITANZ appeals the High Court's decision to grant the two declarations on the basis that no errors of law were established and, even if they were, declarations would not change the outcome. On 30 August 2021, we issued a results judgment dismissing the appeal.[4] This judgment explains our reasons for dismissing the appeal and sets out our decisions on the cross-appeal and costs.

[3] We hold that the conditions which can be imposed on licences issued under the Act do not mitigate the requirement that all licensees meet the statutory fit and proper

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1 *Stojkov v Kamal* [2015] NZHC 2513.

2 Application for membership of RITANZ: Imran Mohammed Kamal, Notice of decision and reasons, 19 February 2021 [RITANZ decision].

3 *Kamal v Restructuring Insolvency and Turnaround Association of New Zealand Inc* [2021] NZHC 1626 [High Court decision].

4 *Kamal v Restructuring Insolvency and Turnaround Association of New Zealand Inc* [2021] NZCA 418.

standard. That is so whether they are applicants under either of the alternative statutory routes of being a member of NZICA or of RITANZ. Parliament's purpose in subjecting all licensees to the fit and proper standard was to maintain minimum standards related to expertise, skills and character whichever route is pursued. There was more than enough evidence on which RITANZ was entitled to decide Mr Kamal's application did not meet the good character requirement, just as it did not meet the standard for NZICA membership. Accordingly, the appeal fails. We uphold the cross-appeal, because we do not consider any of the issues raised were errors of law.

What happened?

[4] We gratefully rely on Gordon J's comprehensive account of the facts in her judgment of 2 July 2021.

Mr Kamal and NZICA

[5] Mr Kamal is a former chartered accountant. He was a member of NZICA for 11 years, until 2012, and attracted nine complaints. Three of them led to disciplinary sanctions being imposed on him in 2009, 2010 and 2011 for: lack of technical competence in undertaking audit, insolvency and taxation engagements; providing services without being instructed, making offensive comments, and not releasing files in a timely manner; and breaching the relevant Code of Ethics while falling just short of conduct unbecoming of an accountant.

[6] In 2013 Mr Kamal was convicted of six offences of providing false and misleading information to the Commissioner of Inland Revenue with the intent to unlawfully obtain GST and income tax refunds of $55,737.50 in 2006 and 2007. He was sentenced to three months' home detention and 150 hours of community service.[5] Judge D R W Barry stated that:[6]

> At the cold, hard kernel of this offending is the fact that he agreed that invoices for services that were never rendered would be passed to the Commissioner and the reason for doing that was to derive financial benefit from evading legitimate tax payments.

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5 *Inland Revenue Department v Kamal* DC Wellington CRI-2012-085-8280, 15 February 2013.
6 At [27].

[7] Mr Kamal was initially granted name suppression, but that was revoked by the High Court on the basis his evidence could not be relied upon.[7]

[8] Mr Kamal resigned from NZICA in 2012, before being sentenced. An NZICA Disciplinary Tribunal considered a charge that his fitness to practise accountancy had been adversely affected and he had brought the accounting profession into disrepute. Mr Kamal accepted the charge. In June 2014, the Tribunal found that it would have removed him from membership if he had not resigned.[8]

[9] From 2013, Mr Kamal practised as a liquidator with a staff of around five, undertaking mostly small liquidations in Wellington. He is the sole director and majority shareholder of his company, Liquidation Management Ltd. He encountered difficulties in this role too. In 2015, Associate Judge Bell ordered costs of $5,446 against Mr Kamal personally on the basis his conduct as liquidator was unreasonable and out of the ordinary.[9]

The law regulating insolvency practitioners

[10] The Act was passed in June 2019. Section 3 states:

> The purpose of this Act is to regulate insolvency practitioners and to establish an independent oversight system in order to promote—
>
> (a) quality, expertise, and integrity in the profession of insolvency practitioners; and
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> (b) compliance with the statutory duties of insolvency practitioners.

[11] Section 8 requires an insolvency practitioner to hold a licence. Section 9 provides that a natural person may apply to an accredited body for a licence. The only currently accredited body is the NZICA. Section 9(2) requires the accredited body to issue a licence to the applicant if:

> (a) the accredited body is satisfied that the person—
>
> (i) meets the prescribed minimum standards; and

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7 *K v Inland Revenue Department* [2013] NZHC 2426, (2013) 26 NZTC 21-034; and *Inland Revenue Department v Kamal* [2013] NZHC 3474 at [12]–[13] and [31].

8 *Re Kamal* Determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants, 9 June 2014 at 3.

9 *Stojkov v Kamal*, above n 1, at [11]–[12].

(ii) is otherwise a fit and proper person to hold a licence; and

…

(c) either—

(i) the person is a member of the accredited body; or

(ii) section 57 applies in respect of the person.

[12] The fit and proper standard has been the subject of case law. Most relevantly:

(a) In 2016, in *Carroll v Law Society of Ireland*, the Supreme Court of Ireland considered the fit and proper standard in relation to solicitors:[10]

> In broad terms, "fitness", which covers the necessary academic qualifications and practical experience, also relates to matters such as knowledge, skill, understanding, expertise, competence and the like, all of which impact on one's capacity to appropriately discharge the obligations which the practice of his profession imposes. The second aspect of the term 'being a proper person' is much more directly related to character and suitability. Critical in this respect are matters such as honesty, integrity and trustworthiness: a person of principled standards, of honest nature and of ethical disposition; a person who understands, appreciates and takes seriously his responsibilities to the public, to the administration of justice, to individual colleagues and to the profession as a whole.

(b) In 2020, in *New Zealand Law Society v Stanley*, a majority of the Supreme Court summarised the principles relating to the fit and proper standard in relation to the legal profession:[11]

> (a) The purpose of the fit and proper person standard is to ensure that those admitted to the profession are persons who can be entrusted to meet the duties and obligations imposed on those who practise as lawyers.
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> (b) Reflecting the statutory scheme, the assessment focusses on the need to protect the public and to maintain public confidence in the profession.
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> (c) The evaluation of whether an applicant meets the standard is a forward looking exercise. The Court

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10 *Carroll v Law Society of Ireland* [2016] IESC 49, [2016] 1 IR 676 at [66].

11 *New Zealand Law Society v Stanley* [2020] NZSC 83, [2020] 1 NZLR 50 at [54]. The minority agreed on these principles: at [105].

must assess at the time of the application the risk of future misconduct or of harm to the profession. The evaluation is accordingly a protective one. Punishment for past conduct has no place.

(d) The concept of a fit and proper person in s 55 involves consideration of whether the applicant is honest, trustworthy and a person of integrity.

(e) When assessing past convictions, the Court must consider whether that past conduct remains relevant. The inquiry is a fact-specific one and the Court must look at all of the evidence in the round and make a judgement as to the present ability of the applicant to meet his or her duties and obligations as a lawyer.

(f) The fit and proper person standard is necessarily a high one, although the Court should not lightly deprive someone who is otherwise qualified from the opportunity to practise law.

(g) Finally, the onus of showing that the standard is met is on the applicant. Applications are unlikely to turn on fine questions of onus.

(c) Later in 2020, in *Grant v Restructuring Insolvency & Turnaround Association New Zealand Inc*, Muir J applied the principles in *Stanley* to a challenge to a RITANZ membership decision.[12] He accepted that the Act at issue here has the purposes of protecting the public and maintaining public confidence in the profession.[13] He held it was consciously introduced to lift levels of professionalism and public confidence in the insolvency profession.[14] He accepted the evaluation required is a forward-looking exercise and the relevance of past conduct depends on whether it goes to the present ability of an applicant to meet his or her duties.[15] He held that perfection (on the part of the applicant) is not required in RITANZ's decision-making.[16] We endorse these points.

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12 *Grant v Restructuring Insolvency & Turnaround Association New Zealand Inc* [2020] NZHC 2876, [2021] 2 NZLR 65.
13 At [65(a)].
14 At [14(a)].
15 At [65(b) and (i)].
16 At [65(j)].

(d) In 2021, in *Registrar of the Real Estate Agents Authority v Cavanagh*, Fitzgerald J applied the principles in *Stanley* and *Grant* to the fit and proper test in the real estate agents' regime.[17] Relevantly, she held that schemes, agreements or undertakings entered into by an applicant and their proposed employer are not generally relevant to application of the fit and proper test.[18] She held an applicant is either a fit and proper person to be granted a licence or they are not, and the Real Estate Agents Act 2008 does not contemplate or enable a half-way house such as imposing conditions on a licence.[19]

[13] Section 12(1) of the Act subjects licences issued by an accredited body to conditions of general or specific application prescribed by the Registrar of Companies under s 22, including: minimum standards a person must meet to be licensed; conditions to which licences must be subject or which an accredited body may impose; requirements for ongoing competence; and minimum standards for accreditation of accredited bodies. Under s 12(3), the accredited body or Registrar may add or modify conditions after a licence is issued, but only after providing a licensee an opportunity to comment pursuant to s 12(4).

[14] Section 17 empowers a relevant authority to cancel a licence on grounds including that the person has failed to comply with a condition of the licence or is not otherwise a fit and proper person to hold a licence. Section 18 allows a relevant authority to suspend a licence on the former ground, but not the latter. Under s 16, a relevant authority includes both an accredited body such as NZICA or, as explained next, a recognised body such as RITANZ.

[15] Sections 57 and 58 provide, relevantly:

> **57 Exemption from membership requirement for certain overseas practitioners, members of recognised bodies, and members of religious societies and orders**
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> (1) This section applies in respect of a person (**P**) if—

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17 *Registrar of the Real Estate Agents Authority v Cavanagh* [2021] NZHC 680 at [105].
18 At [110].
19 At [111].

(a) the accredited body is satisfied that P is—

(i) an overseas insolvency practitioner; or

(ii) a member of a recognised body; or

(iii) a practising member of a religious society or order whose doctrines or beliefs preclude membership of any organisation or body other than the religious society or order of which P is a member; and

(b) the accredited body has entered into a written arrangement with P that complies with section 58; and

(c) the accredited body is satisfied that P—

(i) has satisfactory competence, qualifications, and experience to act as an insolvency practitioner; and

(ii) is otherwise a fit and proper person to be an insolvency practitioner.

(2) In this section, a **recognised body** is a person (for example, an incorporated professional body or industry group) that is recognised, by notice in the *Gazette*, by the Registrar for the purposes of this section.

58 Requirements for arrangement

(1) For the purposes of section 57, the arrangement must—

(a) state that the arrangement is entered into for the purposes of this section; and

(b) include a binding agreement by P to be subject to the rules of the accredited body that are described in section 36(1).

(2) The arrangement may provide for any other matters that the accredited body thinks fit, including matters relating to—

(a) ongoing competence requirements:

(b) reports and access to information:

(c) the promotion of compliance with the requirements imposed by or under any enactment that relate to the carrying out of insolvency engagements:

(d) the promotion of compliance with any relevant standards relating to insolvency engagements:

(e) the promotion of reasonable care, diligence, and skill in the carrying out of insolvency engagements:

(f) the payment of fees:

(g) the term of the arrangement.

(3) Without limiting the means of enforcing the arrangement, the arrangement is binding on P as if P were a member of the accredited body.

[16] So, the Act currently provides for two membership pathways by which an insolvency practitioner can be licensed to practise:

(a) First, under s 9(2)(c)(i), an applicant must be a member of an accredited body, currently NZICA.

(b) Second, under s 9(2)(c)(ii) and ss 57 and 58, an applicant may be an overseas insolvency practitioner, a member of a recognised body, or a member of a religious organisation whose beliefs preclude membership of other organisations. RITANZ is the only currently recognised body under s 57(2).

[17] NZICA has issued a standard form template for the arrangements it expects to make under s 58. Clause 5 of the template requires compliance with continuing professional development requirements, notification and declaration requirements, the engagement standard, practise review requirements, and any conditions or restrictions to which the licence may be subject.

[18] Under the transitional provisions in sch 1 of the Act, Mr Kamal could act on his existing appointments as liquidator until 1 September 2021, though he was not allowed to take on new appointments. If he did not qualify under either pathway by 1 September 2021, he was required to resign.

Mr Kamal and RITANZ

[19] In 2019, Mr Kamal applied to NZICA for readmission as a member. The NZICA Disciplinary Tribunal recommended he not be readmitted. It referred to the sanctions imposed on him when a member, five 2013 charges by NZICA for improper use of terms implying membership of NZICA, evidence that he was still implying he was a chartered accountant in 2017 and 2018 when he was not, and a finding in March 2017 that he told prospective clients he was a chartered accountant when he

was not. The Tribunal was not satisfied Mr Kamal had shown that he was currently a fit and proper person to be readmitted. But, before the NZICA could make a decision, Mr Kamal withdrew his application. In February 2020, Mr Kamal applied again for readmission to NZICA. In June 2020, the Disciplinary Tribunal again recommended the application be declined and it was.

[20] Accordingly, in August 2020, Mr Kamal applied for membership of RITANZ. RITANZ is an incorporated society. Its criteria for membership in r 5 include that a candidate "be of good character (as determined by the Board in its absolute discretion)".[20] Rules 5.5 and 5.6 provide that the Board may make the decision at its sole discretion and it is not required to provide reasons. But RITANZ accepts, as it must, that its discretion is not absolute and it must act in accordance with the law, including the principles of natural justice.

[21] Mr Kamal considers he can satisfy the fit and proper and good character tests if his application is considered along with potential conditions. To that end, his application included:

(a) A report of 17 August 2020 by Mr Bryan Williams. Mr Williams peer reviewed 15 of Mr Kamal's liquidation matters, though these files were selected by Mr Kamal. Mr Williams offered to act as Mr Kamal's supervisor and mentor. The report concluded:

> When held up against the standard affirmed by Middleton J in ASIC v Dunner, a conclusion can be reached that the liquidator is genuinely endeavouring to provide a service that is valuable to the community and in respect of which he has an entitlement to be paid. Nothing that I have seen suggests that the standard, or any fitness standard for that matter, is flagrantly disregarded.
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> There are however shortcomings and practices that will need to be addressed within the mentoring process. Fortunately, Mr [Kamal] has adamantly and genuinely agreed to face any findings I may have and, as a result, submit to a process of mentoring that would see such matters addressed. If there is an adherence to the mentoring process, there is no reason to assume that fitness to practice will be a problem.

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[20] Rules of Restructuring Insolvency & Turnaround Association of New Zealand Inc, r 5.2(d).

(b) A report of 17 August 2020 by Ms Lomas, a clinical psychologist. In her opinion, "in order for Mr Kamal to progress much further in his application for registration with [the Chartered Accountants Association of New Zealand] he would need to engage in a number of actions that would demonstrate his ongoing transparent, honest and ethical processes". Those actions were to develop an open and honest contract with Mr Williams, openly discuss his work process and seek ethical dialogue with Mr Williams, and benefit from clinical input from an experienced therapist to review his past decision-making processes to avoid such outcomes in the future.

[22] From September 2020 to February 2021, a panel of the Board of RITANZ considered Mr Kamal's application. On the basis of medical advice, Mr Kamal declined to attend a hearing but interacted with the Panel through an iterative written process, generating several hundred pages of written material.

The decisions under challenge and appeal

[23] On 19 February 2021, the Panel issued its 13-page decision.[21] It canvassed the regulatory regime, the process of considering the complaint, the facts regarding Mr Kamal and the good character requirement. In declining the application, it concluded:

> 5.11 While Mr Kamal has acknowledged much of his wrongdoing, he has not demonstrated to our satisfaction that he engages meaningfully with misleading behaviour, is prepared to take responsibility for that behaviour and that such behaviour is not likely to recur. Mr Kamal has in several circumstances deflected blame to others on matters that are his responsibility, for example, the false statements on the website, the late filings referred to in the Williams report, and the draft deed sent to Mr Thomas.
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> 5.12 In summary, we are satisfied that the evidence of misconduct and unsatisfactory behaviour set out in the factual findings remains relevant such that in our assessment Mr Kamal has not met the standard of "good character" in the Rules.

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21 RITANZ decision, above n 2.

[24] Mr Kamal applied for judicial review of the Panel's decision. On 2 July 2021, Gordon J issued her judgment.[22] The Judge considered the Panel's decision had correctly set out the relevant principles of law, including that "the focus of the assessment must be on whether the applicant is of good character now and that this is a forward-looking exercise".[23] The Judge held:

(a) Sections 57 and 58 of the Act do not contemplate a candidate can be fit and proper only because of an arrangement made under those sections.[24] Rather, s 58 is necessary to enable NZICA to ensure that a non-member will be subject to the requirements of NZICA rules, code of ethics and disciplinary processes.[25] The Panel did not fail to consider mandatory relevant considerations or adopt an improper purpose, and its decision was not unreasonable because it was based on that view of the Act.[26]

(b) The Judge rejected a number of challenges to the Panel's decision and decision-making. But she held the Panel erred in its treatment of three matters and made one finding that there was procedural unfairness.[27] We explain these issues in more depth in relation to the cross-appeal below. The Judge issued two declarations regarding these four errors, but declined to quash RITANZ's decision.[28]

[25] Mr Kamal appeals the upholding of RITANZ's decision. RITANZ cross-appeals the granting of the declarations.

Intensity of judicial review

[26] Mr Hunter QC, for RITANZ, accepts RITANZ's membership decisions must accord with natural justice, adopt a fair process and accompanied by reasons. But he submits that the extent of the obligations on RITANZ must be viewed in light of its

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22 High Court decision, above n 3.
23 At [49]. See RITANZ decision, above n 2, at [5.1(d)].
24 At [71].
25 At [69].
26 At [77].
27 At [87], [90], [101] and [136].
28 At [162]–[163].

nature and function. He relies on observations in United Kingdom case law, by Lords Steyn and Cooke, and on observations in New Zealand case law.[29]

[27] Mr Smith, for Mr Kamal, submits that variable standards of review should not be endorsed as a concept because they are misleading and a distraction. He submits legality is an objectively constant standard of review. He submits deference to a decision-maker is wrong in principle and constitutionally dangerous, and there should be no leeway for a decision-maker to be unfair. He relies on New Zealand case law and criticises "tortured" standards of review jurisprudence in North American case law.[30]

[28] We acknowledge that New Zealand courts have been reluctant to engage in the academic debate over standards of review, usually because of scepticism as to whether different approaches make a difference to the practical outcomes of cases. There are cases in which courts, including this Court, have endorsed relatively intense review in cases involving issues of fundamental human rights.[31] We take that to be a signal of the attention and care with which courts should approach such issues.[32]

[29] This case is not the place to resolve the wider academic debate, if that is possible.[33] Suffice to say that we do not regard a professional disciplinary context to require any greater or lesser intensity of review than usual, consistent with other case

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29 *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26, [2001] 2 AC 532 at [28] per Lord Steyn and at [32] per Lord Cooke; *Lab Tests Auckland Ltd v Auckland District Health Board* [2008] NZCA 385, [2009] 1 NZLR 776 at [85] per Arnold and Ellen France JJ; *Taylor v Chief Executive of Department of Corrections* [2015] NZCA 477, [2015] NZAR 1648 at [88] per Randerson J; *Awatere Huata v Prebble* [2005] 1 NZLR 289 (SC) at [37] per Elias CJ; *Tracey v Speedway Control Board of New Zealand Inc* HC Hamilton A179/86, 3 February 1988 at 2 per Doogue J; *Adlam v Stratford Racing Club Inc* [2007] NZAR 543 (HC) at [80] per Miller J; and *Daewoo Automotive Australia Pty Ltd v Motor Vehicle Dealers Institute Inc* HC Wellington AP18/99, 1 September 1999 at 19 per Wild J.

30 *Mercury NZ Ltd v Waitangi Tribunal* [2021] NZHC 654 at [65]–[67] per Cooke J; *New Zealand Council of Licensed Firearms Owners Inc v Minister of Police* [2020] NZHC 1456 at [81]–[85] per Cooke J; *Financial Services Complaints Ltd v Chief Parliamentary Ombudsman* [2021] NZHC 307 at [70]–[71] per Grice J; and *O'Keeffe v New Plymouth District Council* [2021] NZCA 55, (2021) 22 ELRNZ 506 at [60] per Goddard J. As to the North American position, see *Canada (Attorney-General) v Best Buy Canada Ltd* 2021 FCA 161, [2021] FCJ No 848 per D G Near JA.

31 *Kim v Minister of Justice of New Zealand* [2019] NZCA 209, [2019] 3 NZLR 173 at [45]–[47].

32 *Hauraki Coromandel Climate Action Inc v Thames-Coromandel District Council* [2020] NZHC 3228, [2021] NZRMA 22 at [49].

33 See, in general, Dean R Knight *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge, Cambridge University Press, 2018).

law in such contexts.[34] The interests at stake, namely professional reputations and livelihoods, are keenly felt by the participants. The courts will interpret the meaning of the relevant statute carefully from its text and in light of its purpose and context, as they do all statutes. The courts will apply common law principles such as natural justice in light of the context, as they do in all cases. There is no question of deference. The question is whether a decision under challenge is consistent with the resulting standard or not.

The appeal: Did RITANZ err in rejecting the application?

Submissions

[30] Mr Smith submits:

(a) The select committee which considered what became the Act noted the advantage of retaining a range of insolvency practitioners to service a wide variety of insolvency processes.

(b) The fit and proper test is forward-looking. Section 58(2) contemplates that individuals might meet the standards but nonetheless need to be supervised or monitored, including through bespoke requirements for "ongoing competence matters". On that basis, not meeting the fit and proper standard on an unconditional basis does not preclude conditional approval.

(c) RITANZ's decision did not engage with the recommendations by Mr Williams for mentoring and by Ms Lomas for ongoing therapy.

(d) RITANZ's approach to conditions as irrelevant is contrary to the text and scheme of the Act and thwarts Parliament's intention to allow the NZICA to impose bespoke licensing conditions through s 58(2). RITANZ should have taken into account a proper interpretation of NZICA's powers to impose conditions. It did not.

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[34] *Deliu v Connell* [2016] NZHC 361, [2016] NZAR 475 at [5]–[9].

(e) Accordingly, the decision should be quashed and remitted to RITANZ for reconsideration.

[31] Mr Hunter supports RITANZ's and Gordon J's interpretation of the Act and opposes the relief sought.

Fit and proper

[32] In his report, Mr Williams quoted Australian case law on the standards against which liquidators should be judged:[35]

> The extensive powers vested exclusively in the liquidator entail a corresponding vulnerability in the creditors, members, and the public. The liquidator is a fiduciary on whom high standards of honesty, impartiality and probity are imposed both by the Act and the general law. As an officer of the company, the liquidator has a statutory duty of care, diligence and good faith.

[33] We agree that liquidators have a special position of power over others and their competence and character will bear heavily on their use and potential abuse of that power. Accordingly, the purpose of the Act emphasises the promotion of quality, expertise and integrity of insolvency practitioners. That, in turn, informs the purpose of the licensing regime.

[34] Section 9(2)(a) of the Act requires that NZICA must be satisfied that a person meets the prescribed minimum standards and "is otherwise a fit and proper person to hold a licence" for that person to be eligible to be licensed. That applies to all persons who can be licensed, whether they are licensed as a member of NZICA under s 9(2)(c)(i) or as a member of RITANZ under ss 9(2)(c)(ii) and 57. The conditions which can be imposed on licences issued under the s 9(2)(c)(i) route, under s 12, do not mitigate the requirement to meet the fit and proper standard. Neither does anything in ss 57 or 58, in addition to s 12, mitigate that requirement for licences issued under the s 9(2)(c)(ii) route. Indeed, s 57(1)(c)(ii) reinforces the application of the fit and proper standard for insolvency practitioners' licences under that route, which applies in addition to the fit and proper standard required to hold a licence under s 9(2)(a)(ii).

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[35] *Australian Securities and Investments Commission v Dunner* [2013] FCA 872, (2013) 303 ALR 98 at [22], quoting *Australian Securities and Investments Commission v Edge* [2007] VSC 170, (2007) 211 FLR 137 at [44].

[35] Section 57(1)(b) requires a written arrangement to be entered into between NZICA and a person licensed under the s 9(2)(c)(ii) route. The purpose of that, as revealed by reading ss 57 and 58 together, is to make those qualifying under this route subject to NZICA rules and requirements in the same way members of NZICA are, who are licensed through the s 9(2)(c)(i) route. Section 58 is not a route by which NZICA can diminish the application of the fit and proper standard through bespoke conditions, even if it empowers the imposition of more bespoke conditions than those available under s 12, which we doubt.[36] As Fitzgerald J said in *Registrar of the Real Estate Agents Authority v Cavanagh* in relation to a different statutory regime, an applicant is either a fit and proper person to be granted a licence or they are not.[37]

[36] The conditionality advocated by Mr Kamal would erode the fit and proper standard to such an extent that it would undermine the purposes of the licensing regime. In passing the Act, Parliament saw the benefit of allowing a range of persons to act in the market of insolvency practise. However, its purpose in subjecting all licensees to the fit and proper standard was also to maintain minimum standards related to expertise, skills and character, whichever route is pursued.

[37] We agree with Mr Hunter that, if Mr Kamal's arguments were correct, there would be a fundamental inconsistency in compliance with the fit and proper standard depending on which route to membership is taken. It would be surprising if an application could meet one standard but not the other. In this regard, RITANZ's membership criteria is one of the factors on which the regulatory scheme relies. In deciding on its membership, RITANZ provides a safeguard on the alternative route to qualify as an insolvency practitioner. Its membership decisions must be made accordingly. We consider this decision was made properly, in light of that responsibility.

[38] RITANZ is entitled to make its own assessment of applicants for membership. But, as it acknowledges, RITANZ must have regard to the statutory context in which

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36 This conclusion depends on interpretation of the statute at issue here. That is why it is a different conclusion than that of the United Kingdom Supreme Court about a statute which was explicit about conditions in *R (OWD Ltd (in liq)) v Revenue and Customs Commissioners* [2019] UKSC 30, [2019] 1 WLR 4020.

37 *Registrar of the Real Estate Agents Authority v Cavanagh*, above n 17, at [111].

its decisions sit. It must have particular regard to the statutory fit and proper standard, which informs the good character requirement in its own rules. Mr Kamal's history speaks to his character. There was more than enough evidence on the basis of which RITANZ was entitled to decide his application did not meet the good character requirement, just as it did not meet the standard for NZICA membership.

[39] We consider the Judge and RITANZ were correct. We dismiss the appeal. Accordingly, we decline to quash RITANZ's decision.

The cross-appeal: was the High Court wrong to make declarations?

[40] Mr Hunter submits the High Court's two declarations about four errors should be set aside because no errors of law were established and, even if they were, declarations would not change the outcome. He says, while apparently minor, these issues are important in setting a precedent for RITANZ's procedures when considering future applications. Mr Smith submits RITANZ materially erred by not properly assessing the relevant risk in a forward-looking manner and, accordingly, the first declaration was properly made. He submits the second declaration was properly made because the finding was made in breach of natural justice.

[41] We treat the declarations in relation to each error in turn. For ease of reference, the first declaration was:[38]

> (a) The panel erred in law in its decision by not referring to and assessing the significance of the following matters in making its "good character" assessment in a forward-looking way;
>
> (i) Mitigating features of the tax offending identified in the District Court Judge's sentencing decision;
>
> (ii) Mr Kamal's acknowledgment of his error in his conduct referred to by Associate Judge Bell and Mr Kamal's acknowledgment that he would not make that same mistake again;
>
> (iii) Mr Kamal's responses to the 2020 NZICA decision;

[38] High Court decision, above n 3, at [163].

Mitigating features of tax offending

[42] In sentencing Mr Kamal for his tax offending in 2013, the District Court Judge identified some personal mitigating features. These were the absence of previous convictions, payment of reparation in full, cooperation with the authorities, medical issues and community-mindedness.[39] The High Court accepted that RITANZ's decision did not refer to mitigating factors, that it should have done so, and should have taken them into account.[40]

[43] Mr Hunter points to the evidence of Mr Matthew Kersey, of the RITANZ Panel, that the Panel carefully considered all the material. He submits that this evidence was not challenged by Mr Kamal, nor rejected by the High Court Judge. He submits RITANZ was not required to refer, in its decision, to the mitigating factors in the sentencing decision because it was not unduly focussed on the aggravating factors. Mr Smith submits RITANZ did emphasise the aggravating factors, inconsistently with the sentencing.

[44] The RITANZ Panel described Mr Kamal's tax offending briefly in four paragraphs of its report.[41] Its assessment of the offending was limited to noting that it occurred when Mr Kamal was "well into adulthood and his practising career" and as "relatively complex and premeditated".[42] It was one of several factors leading to the Panel's conclusion that, "[w]hile Mr Kamal has acknowledged much of his wrongdoing, he has not demonstrated to our satisfaction that he engages meaningfully with misleading behaviour, is prepared to take responsibility for that behaviour and that such behaviour is not likely to recur".[43]

[45] The Panel did not refer to the mitigating factors identified in the sentencing of Mr Kamal for tax offending. It could have done so. But the District Court judgment itself did not dwell significantly on the mitigating factors. In the context of the evidence before it, the Panel was not required to do so either. The Panel was not

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39 *Inland Revenue Department v Kamal*, above n 5, at [32]–[35].
40 High Court decision, above n 3, at [87].
41 RITANZ decision, above n 2, at [4.3]–[4.6].
42 At [5.4].
43 At [5.11].

required to refer explicitly to all information before it. The Panel's characterisation of the offending was accurate and relevant. The Panel noted Mr Kamal has acknowledged much of his wrongdoing. The mitigating factors in that case do not make a material difference to the use made of the offending as one of the factors sustaining the Panel's conclusion. That is reflected in the fact that the Judge, correctly, did not consider that failing to refer to the mitigating factors impugned the validity of the decision. We do not consider failing to refer to the mitigating factors was an error of law.

Acknowledgement of error identified by Associate Judge Bell

[46] In his first statement to the Panel, Mr Kamal referred to the decision of Associate Judge Bell in 2015 to order costs of $5,446 against him personally. The reason was that Mr Kamal did not call a creditor's meeting and opposed an application to call such a meeting. Mr Kamal acknowledged to the Panel that he made a mistake, explained it was early in his insolvency career, he was acting on legal advice to negotiate with the other parties to avoid the cost of a creditor's meeting, and said he would not make that mistake again. Gordon J accepted there is a degree of consistency between Mr Kamal's explanation to the Panel and his explanation to Associate Judge Bell that the cost of the meeting was not justified.[44]

[47] The RITANZ Panel did not record Mr Kamal's acknowledgement in its report. It explained and quoted Associate Judge Bell's observations about Mr Kamal's conduct and his rejection of the proposition that it was a simple error of judgment.[45] In its assessment the Panel noted that "Mr Kamal has been found to have knowingly breached the law in 2015, with regard to holding a creditors' meeting".[46] The High Court Judge considered the Panel should have identified the acknowledgement and included it in its assessment.[47]

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44 High Court judgment, above n 3, at [89].
45 RITANZ decision, above n 2, at [4.24].
46 At [5.5].
47 High Court judgment, above n 3, at [90].

[48] Mr Hunter submits that not referring to this matter did not impact on RITANZ's ultimate decision nor on the explanation to Mr Kamal. Mr Smith submits that RITANZ's failure meant a principal point did not receive proper consideration.

[49] We agree with the Judge that it would have been better for the Panel to have mentioned Mr Kamal's acknowledgement. But, even so, the Panel was entitled to rely on Associate Judge Bell's conclusions about Mr Kamal's behaviour and explanation. As it mentioned, the Panel accepted generally that "Mr Kamal has acknowledged much of his wrongdoing", while still reaching its overall finding quoted above at [44]. And, again, the Judge, correctly, did not consider that the error impugned the validity of the decision. In the context of the circumstances of this decision, we do not consider the failure to refer to the acknowledgement was an error of law.

Response to 2020 NZICA decision

[50] After NZICA declined Mr Kamal's application for membership in 2020, Mr Kamal requested that the Disciplinary Tribunal reconsider the decision. The three issues he raised were that the Tribunal did not provide him with an opportunity to address its concerns about his financial position, did not tell him what exactly it was about his demeanour the Tribunal found troubling, and wrongly criticised his reliance on letters from his counsellor without mentioning his offer to commission a report from an independent psychologist.

[51] The RITANZ Panel summarised the NZICA Tribunal's 2020 report in one paragraph.[48] It did not refer to Mr Kamal's response. In the first paragraph of its assessment the Panel said.[49]

> There is evidence before the Panel that Mr Kamal has committed dishonesty offences and has at least recklessly, consistently misled the public about his status as a Chartered Accountant, as a "registered" liquidator, and as a member of RITANZ. The misrepresentations of his status have occurred as recently as during this application process. As recently as the middle of last year, an NZICA Disciplinary Tribunal has recommended that Mr Kamal not be re-admitted as a member due to those issues.

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48 RITANZ decision, above n 2, at [4.12].
49 At [5.3].

[52] The High Court accepted that the RITANZ Panel did not record Mr Kamal's response to the NZICA decision. The Judge said, although it is not necessary for a decision-maker to refer to every item of evidence before it, the Panel should have assessed Mr Kamal's responses.[50]

[53] Mr Hunter submits it is difficult to see the relevance of the point to RITANZ's decision because RITANZ was not competent to challenge NZICA's decision. Mr Smith submits there is obvious relevance to forward-looking risk and there was cumulative significance to the point.

[54] We agree that the NZICA Tribunal's recommendations, and the reasons for them, were relevant to the forward-looking risk being assessed by the RITANZ Panel. If Mr Kamal's response to the recommendations was relevant to what the Panel drew from those recommendations and reasons, then the Panel should have referred to them. But none of the specific points made by Mr Kamal in his response were relevant to the points for which the Panel relied on the Tribunal's report. Two of the three points concerned process. Neither they, nor the third point, affected the Tribunal's nor the Panel's conclusions. Accordingly, and correctly, the Judge did not consider this impugned the validity of the Panel's decision.

[55] We do not consider the specific errors identified by the High Court were errors of law, for the reasons given above. Neither do we consider that, collectively or individually, they detracted from the forward-looking nature of RITANZ's decision. These sorts of decisions, and the reasoning in reports leading to them, need to be formulated carefully taking into account the relevant considerations, and not irrelevant considerations. But they need not be unduly lengthy or detailed in doing so. Perfection is not required of RITANZ any more than it is of an applicant. RITANZ's report here strikes us as being pitched at the right level of detail.

Breach of natural justice

[56] In its interactions with Mr Kamal leading up to the report, the RITANZ Panel asked him about a draft deed of arrangement in 2020, for taking liquidation

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50 High Court decision, above n 3, at [101].

appointments, that he sent to another insolvency practitioner, Mr David Thomas. The draft deed was drafted by Mr Kamal's solicitor. It was not agreed to by Mr Thomas and never executed. Initially, RITANZ asked Mr Kamal about the circumstances regarding this approach. In his second statement, Mr Kamal said "[n]othing in the draft deed was intended to be in breach of the new licensing regime" and he "assumed that it was consistent with the legislation, which was [his] intention". Later, RITANZ put 10 detailed questions to Mr Kamal about aspects of the proposal. In his fourth statement, Mr Kamal said:

> As I explained in my Second Statement (paragraph 33), the proposed deed was drafted by my lawyer Brent Norling. It was not intended for final use. It was intended to be used to have a conversation; for discussion purposes. The intention was that, if that conversation progressed, which it could only do if there was interest in exploring the proposal, detailed consideration would have been given to the draft terms, including to ensure that all parties were happy that they complied with all legal requirements – which would sensibly have involved all parties seeking regulatory confirmation of that. That consideration was not necessary, as the proposed discussions did not progress.

[57] RITANZ put to Mr Kamal four inferences it drew from the documents. In his sixth and final statement, Mr Kamal repeated a summarised version of his fourth statement.

[58] In its report, the RITANZ Panel outlined in 10 paragraphs its concerns over Mr Kamal's explanations of the draft deed of arrangement.[51] The Panel considered that, on its face, the draft appeared to circumvent the licensing regime. It recorded that Mr Kamal said it was not intended to be in breach of the new licensing regime and he assumed it was consistent with it. The Panel identified the four adverse inferences it had drawn:[52]

> (a) Mr Kamal forwarded the draft Deed of Arrangement to Mr Thomas on the eve of insolvency practitioner regulation coming into force;
>
> (b) Mr Kamal was seeking essentially to practice as an insolvency practitioner in a manner inconsistent with the new regulatory environment, and despite his lack of approval to act as an insolvency practitioner;

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51 RITANZ decision, above n 21, at [4.25]–[4.34].

52 At [4.33] (emphasis original). These were the same as the inferences put to Mr Kamal, except the second was reworded to make clear the Panel considered he was seeking to practice in a manner inconsistent with the new regulatory environment.

(c) Mr Kamal pursued this opportunity with Mr Thomas after being told that Mr Thomas could not help;

(d) Mr Kamal, after receiving Mr Thomas' written views (including that what was being proposed was *"not in the spirit of the law"*), implored him to agree to the arrangement, saying: *"I'm counting on you mate. I sent you the draft agreement. It's only for a [few] weeks or months."*

[59] The Panel concluded:[53]

> Mr Kamal has not satisfied us that he would have sought regulatory approval for the form of the agreement. It is concerning to us that Mr Kamal was comfortable enough with the draft deed to propose it to Mr Thomas despite its apparent inconsistency with the regulatory regime, which should have been apparent to such an experienced practitioner. Mr Kamal demonstrated an unwillingness to engage with us on the ethical issues which were evident in the draft deed. He did not appear to us to be willing to take responsibility for the content of the draft deed.

[60] In its overall assessment, the Panel stated "[t]he evidence from 2020 of the draft deed from … Mr Thomas and Mr Kamal's responses to our questions about it show in our view that Mr Kamal did not understand the gravity of being party in any way to an arrangement that would circumvent the effect of the [Act]".[54]

[61] The High Court observed that Mr Kamal was not asked whether he would have sought approval from either RITANZ or NZICA if the arrangement had proceeded from a first draft.[55] The Judge held that RITANZ had made the finding in the face of a clear statement by Mr Kamal to the Panel that he would have sought regulatory approval for the draft deed.[56] She accepted that the finding was important and "is unfair in circumstances where RITANZ did not directly ask Mr Kamal the relevant question".[57] The Judge declared that:[58]

> (b) The panel erred in stating that Mr Kamal had not satisfied the panel that he would have sought regulatory approval for an arrangement between himself and Mr Thomas. The finding was unfair and was a breach of natural justice.

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53 At [4.34].
54 At [5.5].
55 High Court decision, above n 3, at [134].
56 At [135].
57 At [136].
58 At [163].

[62] Mr Hunter submits RITANZ was obliged to warn Mr Kamal of the risk of adverse findings, which it did, but had no obligation to put this finding to Mr Kamal. He submits it was open to RITANZ to reach the finding it did and there was no reviewable error. Mr Smith submits this was an important adverse finding which was highly material to whether Mr Kamal met the good character test. He submits the finding was unsupportable on the evidence and was never put directly to Mr Kamal, which was the least that was required.

[63] In his fourth statement to the Panel, Mr Kamal said the intention was that detailed consideration would be given to the draft terms including to ensure all parties were happy they had complied with legal requirements, "which would sensibly have involved all parties seeking regulatory confirmation of that". The Panel gave him an opportunity to respond to the adverse inferences it drew and he responded in almost the same terms. The Judge is correct that the Panel did not put to Mr Kamal the precise question of whether he would have sought regulatory approval for the agreement. But we consider his statements effectively proffered to the Panel the inference that he would have done so. The Panel's statement that Mr Kamal had not satisfied it that he would have sought regulatory approval represents its evaluative conclusion about the information he gave it, twice. We consider the evidence justifies that conclusion.

[64] So the Panel gave Mr Kamal several opportunities to provide information to it about the issue of the proposed agreement. It put to him four adverse inferences it drew. It reported its conclusion about his explanations. That conclusion was not a finding of fact but a statement about its own lack of satisfaction with his explanations. The text that follows the conclusion indicates it was part of the Panel's wider conclusions about Mr Kamal's attitudes to the proposed agreement, the essence of which the Panel had put to Mr Kamal for comment. The principles of natural justice did not require any more fine-grained an approach by the Panel than that. We do not consider this constituted an error of law.

Making declarations

[65] In general, Mr Hunter submits the making of declarations was disproportionate and unfair and has no great vindicatory value here. Mr Smith supports the making of the declarations, in the interests of the rule of law.

[66] Remedies in judicial review are discretionary. But it is well-established that "courts today will generally consider it appropriate to grant some form of relief where they find reviewable error".[59] Declarations are, of course, an important remedy for the vindication of rights consistent with the rule of law.[60]

[67] We have concluded that the High Court erred in finding aspects of the RITANZ decision were errors of law. There is therefore no occasion for the declarations to be made, and we quash them.

Costs

[68] Both parties submitted costs should follow the event. Accordingly, we award costs for a standard appeal on a band A basis and reasonable disbursements to RITANZ on the appeal and the cross-appeal. We do not certify for second counsel.

Result

[69] The appeal is dismissed.

[70] The cross-appeal is upheld and the declarations of the High Court are quashed.

[71] Costs are awarded to the respondent for a standard appeal on a band A basis for the appeal and cross-appeal, and reasonable disbursements.

Solicitors:
Langford Law, Wellington for Appellant
DLA Piper, Wellington for Respondent

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59 *Ririnui v Landcorp Farming Ltd* [2016] NZSC 62, [2016] 1 NZLR 1056 at [112] per Elias CJ and Arnold J. See also *Canterbury Regional Council v Independent Fisheries Ltd* [2012] NZCA 601, [2013] 2 NZLR 57 at [155]; and Matthew Smith *New Zealand Judicial Review Handbook* (2nd ed, Thomson Reuters, Wellington, 2016) at [74.2.2].

60 *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462 at [1] per Elias CJ.