IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2020-404-1367
[2020] NZHC 2876

UNDER	the Judicial Review Procedure Act 2016 and Part 30 of the High Court Rules 2016
BETWEEN	DAMIEN MITCHELL GRANT Applicant
AND	RESTRUCTURING INSOLVENCY & TURNAROUND ASSOCIATION NEW ZEALAND INCORPORATED Respondent

Hearing:	21 October 2010
Appearances:	R J Hollyman QC, J K Grimmer and N G Lawrence for the Applicant S M Hunter QC and R M Stewart for the Respondent
Judgment:	3 November 2020

JUDGMENT OF MUIR J

This judgment was delivered by me on Tuesday 3 November 2020 at 2.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

Counsel:
R J Hollyman QC, Auckland
J K Grimmer, Auckland
N G Lawrence, Auckland
S M Hunter QC, Auckland

Solicitors:
Waterstone Insolvency, Auckland
Fee Langstone, Auckland

Introduction

[1] Mr Damien Grant, a well-known Auckland-based liquidator with a high media profile, seeks judicial review of a decision by the respondent (RITANZ) declining to admit him as a member of that Association.[1] Such decision was based on an assessment that Mr Grant had not satisfied the "good character" requirements of admission. In turn, that conclusion was reached having regard to serious dishonesty offending by Mr Grant during the period 1987 – 1994, when he was aged between 22 and 27.

[2] Mr Grant is now in his mid-fifties. He points to an exemplary life since service of his sentences and says that, in making its assessment, RITANZ did not apply the correct legal test, took into account irrelevant matters, failed to take into account relevant matters, and reached a decision which was unreasonable in an administrative law sense. He also takes issue with aspects of its process – resulting, he says, in an unfair hearing. In particular, he says the decision is tainted by apparent bias.

[3] Mr Grant does not pursue membership of RITANZ for purely social, educative or related reasons. Recent legislative changes mean that, failing admission to membership, he will be unable to continue to practise as a liquidator – his chosen and successful profession over the last 14 years.

[4] Although it is not the role of this Court on review of a membership decision by RITANZ to itself make an assessment of Mr Grant's "good character", he says the case is of such an exceptional nature that, if satisfied RITANZ made one or more reviewable errors, the Court should make orders admitting him to membership now. Alternatively, he seeks remission of his application for rehearing, in accordance with the observations of this Court.

The legislative background

[5] Although the Companies Act 1993 and its predecessors have, for many years, imposed extensive obligations on liquidators, receivers and administrators there has

---

[1] The decision was made by the Board of RITANZ which empanelled five members. I will hereafter refer to it as the Panel's decision.

not, until recently, been any legislative regime prescribing who may be subject to appointment.

[6] Over time, isolated instances of unscrupulous and, in some cases, illegal behaviour by appointees, resulted in increasing public pressure to introduce such a regime. In the result, the Insolvency Practitioners Regulation Act 2019 (IPR Act) was enacted. Its purpose is "to promote … quality, expertise and integrity in the profession of insolvency practitioners…".[2] It introduces a co-regulatory model under which accredited professional bodies are responsible for licensing.

[7] Currently the only accredited body under the IPR Act is the New Zealand Institute of Chartered Accounts (NZICA). To become a licensed insolvency practitioner, a person must be a member of NZICA or fall within one of the three exceptions created by s 57.[3] This structure reflects the fact that, historically, most insolvency practitioners have been chartered accountants.

[8] The exceptions created by s 57 are for:

(a) Overseas insolvency practitioners;

(b) Members of a "recognised body"; and

(c) Members of certain religious orders.

[9] RITANZ is a recognised body. Mr Grant is not a chartered accountant and his only realistic path to accreditation as a licensed insolvency practitioner is therefore through membership of RITANZ.

[10] RITANZ does not issue the relevant licence, as suggested by Mr Grant in his submissions. That function is performed by NZICA. Membership of RITANZ is, however, one way in which an applicant can fulfil one of the criteria relevantly invoked by NZICA.[4]

---

2 Insolvency Practitioners Regulation Act 2019, s 3(a).
3 Section 9(2)(c).
4 Refer ss 9 and 57 of the Act.

RITANZ

[11] RITANZ is an incorporated society which was established in 2014. Its purposes include promoting standards in the insolvency profession and fostering cooperation and collaboration between its members. Membership decisions are made by empanelled members of an elected board (the Panel) and in accordance with procedures set out in Section 5 of the Association's Rules. Rule 5.2 states that:

> In order to qualify for membership, an applicant must, among other things:
>
> …
>
> (d) Be of good character (as determined by the Board in its absolute discretion).

[12] Clause 5.5 reiterates that decisions of the Board are in its sole discretion and r 5.6 records that the Board is "not required to give any reason for determining not to admit an applicant to membership".

[13] Despite references to "absolute" and "sole" discretion, RITANZ accepts that it must, nevertheless, act in accordance with the principles of natural justice and in accordance with law, that decisions declining admission to membership involve an evaluative assessment and that they are potentially reviewable by this Court.

[14] By way of high-level commentary on this new statutory regime, RITANZ makes three points with which I am in agreement:

(a) The Act was consciously introduced to lift the levels of professionalism and public reputation of the insolvency profession. Parliament also contemplated the possibility that some existing practitioners would not be licensed.[5] The good character requirement in RITANZ's Rules is mirrored in a fit and proper requirement within the legislation itself.[6]

---

5 At the first reading of the Insolvency Practitioners Bill in 2010, the Honourable Judith Collins stated that there was "a small minority of individuals practising as insolvency practitioners who simply should not be" (24 August 2010) 666 NZPD 13543.

6 See s 57(1)(c)(ii).

(b) In providing for NZICA and RITANZ to make their own membership decisions, Parliament chose a different regulatory approach to that which exists for lawyers. Under the Lawyers and Conveyancers Act 2006, the High Court itself carries out the assessment of character which is a precondition to admission. In the typical case, it will rely on the Law Society for certification to that effect. Where the Society declines to certify, then the High Court will, on application, conduct its own inquiry. By contrast, the relevant character assessment in this case was one for RITANZ to make.[7]

For present purposes, the most important consequence of this distinction is to emphasise that the legislation does not envisage this Court deciding whether Mr Grant can now (despite his previous criminal history) be considered of sufficiently good character to be licensed as an insolvency practitioner. Its focus must determinedly be whether the entity responsible for that enquiry undertook it in accordance with its administrative law obligations. While therefore the case presents against a backdrop of the redemption themes which have, since time immemorial, been the mainstay of novelists, playwrights, librettists, song and (latterly) screenplay writers and which ultimately have their origin in religion and philosophy,[8] these are issues which the legislative framework ultimately requires RITANZ and not this Court to grapple with. In saying that, I acknowledge at the outset that the task is not an easy one. In circumstances where courts are required to make an assessment of fit and proper status, as in the context of legal practitioners, its decisions are often characterised by a divergence among reasonable and even eminent minds. The Supreme Court's recent decision in *New Zealand Law Society v Stanley*[9] where it divided

---

7 Assuming the application for a licence is made pursuant to s 57(1)(a)(ii) of the Act, the applicant must not only meet the criteria for membership of RITANZ but must also satisfy NZICA that he is a "fit and proper person" (IPR Act 2019, s 9(2)(a)(ii)). There has not yet been any instance whereby NZICA has declined to recognise as fit and proper, a person who RITANZ accepts as being of sufficiently "good character".

8 For an erudite discussion, see Kirby P in *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408 (CA) at 419.

9 *New Zealand Law Society v Stanley* [2020] NZSC 83.

three – two in circumstances where the applicant for admission to the bar had four prior breath/blood alcohol convictions, exemplifies the point.

(c) The involvement of other industry professionals (even, in a literal sense, competitors) in the decision-making process is an inevitable consequence of the statutory regime. Under the IPR Act, "recognised bodies" for the purposes of s 57, must be approved by the Registrar of Companies. RITANZ has been so approved – its approval having been given on the basis of rules which had been in place since 2014. These rules provide for membership decisions to be made by the Board who are themselves industry participants. This represents important context to any suggestion that good character adjudication by a panel of potential "competitors" is tainted by apparent bias.[10]

Mr Grant's criminal history

[15] Mr Grant has 34 convictions for dishonesty offences. These occurred in two clusters.

[16] The first involved offending for which he was sentenced in December 1987 and February 1988, at which point he was 22 years old. The Panel identified this offending as the "credit card frauds", although on the face of his criminal record other related dishonesty offending appears to have been involved.[11] Mr Grant was sentenced to a period of non-residential periodic detention. The sentencing notes are no longer available.

[17] The second tranche of offending occurred approximately six years later. The decision under review describes it as the "share theft frauds". It involved more serious

---

[10] In the present case, the Panel which considered Mr Grant's application was, on the evidence, broadly reflective of the professional composition of RITANZ in that it comprised two accountants, two lawyers and a banker. Only a minority of the Panel (Mr Fisk and Ms Johnstone) where themselves insolvency practitioners. Their evidence was that, professionally, their paths seldom crossed those of Mr Grant.

[11] The charges for which he was convicted included: take credit card for pecuniary advantage, take/obtain/use document for pecuniary advantage and theft.

offending with the total value of the frauds in the hundreds of thousands of dollars.[12] It resulted in convictions for theft, forgery, personification by fraud, altering a document with intent to defraud, taking/obtaining/using a document for pecuniary advantage, conspiracy to defraud and related charges. The sentence imposed was 30 months' imprisonment of which Mr Grant appears to have served 16 before being paroled, apparently on a second application.

[18] Although, again, no sentencing notes are available, some insight into the nature of the offending, Mr Grant's stated role and whether he attempted to minimise the same is, however, available from the Court of Appeal's decision in respect of Mr R Paton who, along with Mr L Zalkalnins was charged as a co-offender. It described the share theft frauds as characterised by a "complicated scheme which used stolen investment records, fraudulent declarations of loss of script and interference with postal boxes, in order to obtain duplicate stock certificates which were then sold and the proceeds converted into gold bullion".[13]

[19] Unlike Mr Grant and Mr Zalkalnins, Mr Paton pleaded not guilty to the charges. At his trial, Mr Grant gave evidence for the Crown. The Court of Appeal's decision records that:

> [Mr Grant] said that [Mr Paton] was the originator and brains behind the stock frauds, which were [Mr Paton's] concept and plan, and for that reason he was to receive the lion's share of the proceeds although he, Grant, and Zalkalnins had carried out the physical steps necessary to obtain and then sell the duplicate script.

[20] By contrast, Mr Zalkalnins, who gave evidence for the defence, said that Mr Grant was a principal party in the stock frauds and that Mr Paton was not involved at all.

[21] Subsequent to Mr Paton's conviction, the Crown Solicitor at Auckland was told by police that they held an outstanding file relating to an earlier and smaller stock fraud which had been carried out using the same complex scheme and in which

---

12 Mr Grant says something in the range of $400,000 to $600,000 plus the value of gold bullion ultimately recovered.

13 *R v Paton* CA354/94, 2 November 1994, to which I will return subsequently in this judgment.

Mr Grant and Mr Zalkalnins were implicated but not Mr Paton. This information was provided to Mr Paton's defence and formed the basis of his appeal against conviction.

[22] The Court of Appeal held:[14]

> However, we are satisfied that the appellant's conviction on the fraud charges must now be considered unsafe. Grant's evidence was central to the Crown case against the appellant and the Crown concedes that the new information must affect the credibility of his claim that the appellant was the planner and instigator of those frauds.

[23] The Panel's decision records that, while it had referred this judgment to Mr Grant, he did not comment on it and that in his affidavit in support of admission to RITANZ he deposed that Mr Paton taught both him and Mr Zalkalnins how they could take advantage of the minimal security around the issuing and transfer of shares in listed entities. Significantly however, although Mr Grant was questioned extensively at the hearing in relation to other matters, no specific questions were asked in respect of the Court of Appeal's decision.

[24] For completeness I note that no subsequent charges were brought against Mr Grant for the earlier alleged share fraud referred to in the *Paton* judgment.

[25] I also note the Panel's observation, that at no stage did Mr Grant suggest that the offending for which he was prosecuted and convicted in 1987, 1988 and 1994 represented the totality of his criminal activities over that period. On his own admission he lived "a criminal lifestyle" for a period of five to six years between the ages of approximately 22 and 27.

[26] In summary the position is, therefore, that Mr Grant has a serious history for dishonesty offending, albeit that the last such offences occurred 27 years ago. There were real victims and the losses were substantial. Although Mr Grant pleaded guilty with the acknowledgement of implicit wrongdoing in such a plea, the credibility of both his historic and contemporary claims that Mr Paton was "the mastermind" or "principal player" in respect of the share theft frauds remains in dispute. Mr Paton

---

14 *R v Paton* CA354/94, 2 November 1994 at 3.

died before any retrial of his charges could take place, so that credibility issue is not now likely to be capable of definitive resolution.

Mr Grant's reform

[27] Mr Grant has not re-offended since 1994. Indeed he presents as something of a "poster boy" for reform. In prison, he recommitted himself to earlier academic studies, enrolling with the Open Polytechnic. On release, he completed his Bachelor of Commerce Degree and Honours Degree in Economics. He then worked in the gas industry. In 2006, while a consultant to that industry, he accepted his first appointment as a liquidator. He then undertook extensive private study in respect of insolvency law and practice. That is the genesis of what is now Waterstone Insolvency – a firm of which he is the principal and sole director and which has now grown to in excess of 20 employees. Mr Grant has himself been appointed to over 800 insolvencies (i.e. liquidations, receiverships and voluntary administrations). His current appointments number approximately 200.[15] He says that over the last three years he has been appointed in respect of approximately three per cent of all insolvency applications in New Zealand and approximately five per cent of all non-IRD appointments.

[28] He deposes that his approach as a liquidator is "very pro-active … to creditor rights". Cases in which he has been involved have made a significant contribution to New Zealand insolvency law.

[29] In addition he has developed a significant media profile based on his libertarian political philosophy. His writings have included discussion of his criminal past. He describes prison as something that "does not change you. It is not a laboratory for crime and it offers no paths for redemption for people who do not alter their life's trajectory". True to the tenets of his political philosophy, therefore, he considers reform is ultimately a matter of personal responsibility. Mr Grant is now married and has a seven-year old son. All outward indicia are therefore of a person who has successfully put his criminal past behind him and who now contributes to society at its highest commercial and other levels.

---

[15] Under transitional arrangements Mr Grant may continue in respect of existing appointments despite the non-admission to RITANZ until 1 September 2021.

The path to this application

[30] Mr Grant made his initial application for RITANZ's membership on 12 February 2020. It was supported by seven character references.

[31] There was no substantive response until 14 May when Mr Richard Gordon on behalf of the RITANZ Board offered Mr Grant an opportunity to comment on information that had "come to [the Board's] attention" from outside sources and which it saw as being relevant to his extant application. Mr Grant's solicitor responded on 26 May 2020 providing certain additional information and questioning the relevance of some of the material which had come to the Board's attention. Mr Grant also objected to three of the Board members who would be on the Panel that had been tasked with consideration of his application. Two of those members subsequently recused themselves.

[32] On 2 June RITANZ advised Mr Grant that it had declined his membership application. It gave no reasons for its decision.

[33] Mr Grant then commenced judicial review proceedings for which the Court allocated a priority fixture on 17 August 2020. These proceedings were resolved by way of agreement on the part of RITANZ to conduct a rehearing of the application before 31 July 2020. As part of the agreement Mr Grant was invited to attend the rehearing in person with counsel and RITANZ agreed to provide a written decision with reasons within 14 days. In the result, RITANZ withdrew its June decision and Mr Grant discontinued his judicial review proceedings with no issue as to costs.

[34] The rehearing took place on 27 July 2020. On 24 July RITANZ advised Mr Grant that the Board members hearing his application would be John Fisk (Chair), Matt Kersey, Mornet van der Merwe, Kare Johnstone and Jennifer Tunna. It also provided him with copies of judgments in respect of both Mr Paton and Mr Zalkalnins. It observed that it wished "to discuss these with Mr Grant and to hear [his] comments on them" at the hearing.

[35] For the purposes of the hearing Mr Grant provided a total of 20 affidavits in support from a variety of senior and respected business and professional people. These

included Dr Don Brash, former governor of the Reserve Bank of New Zealand and leader of the opposition, Mr Roger Partridge, former chairman of Bell Gully, Mr Bruce Shepherd, a well-known shareholders' rights advocate, Mr Michael Dineen, a longstanding former partner of Buddle Findlay and many others.

[36] The rehearing took approximately three hours. Mr Grant was represented by counsel, Mr Hollyman QC who presented oral and written submissions. Mr Grant read from an affidavit sworn for the rehearing, becoming emotional at the point he recounted aspects of his criminal past. He was questioned at length. I consider a fair reading of the transcript indicates significantly greater focus on Mr Grant's past, including the genesis of his offending, aspects relating to his apprehension and plea, the extent of any amends etcetera, than on his subsequent history as a successful member of New Zealand's commercial community.

RITANZ's decision

[37] At the outset of its decision the Panel acknowledged that although RITANZ's rules provided for membership admission to be at the "sole discretion" of the Board, the good character requirement in the rules imposed an objective test necessitating an evaluative judgment rather than exercise of pure discretion. The Panel was correct in that approach. It said that its consideration was informed by the objects of RITANZ because the focus of the inquiry was to determine whether Mr Grant had sufficiently good character to be a member of the organisation and therefore an accredited insolvency practitioner.

[38] In a key paragraph it then stated that:

> 3.3 In evaluating "good character" where there are prior convictions of a serious nature, we seek to consider and weigh the aggravating factors associated with them against evidence of insight into them, remorse and reform from those acts and present positive qualities that demonstrate integrity, probity and trustworthiness"

[39] Mr Hollyman takes issue with this formulation of the test. Whether he is correct in that submission is probably the most critical issue in the proceedings.

[40] The Panel considered that the good character assessment permitted it to take into account wider public interest considerations, such as whether admission would risk damage to the reputation of the insolvency profession. It said its assessment of good character was informed by authorities relating to the admission of lawyers, although accepting the professions were different. Again Mr Hollyman takes issue with that proposition.

[41] The Panel referred to the approach of the Court of Appeal in *Re Owen*[16] a case involving admission of a legal practitioner – in terms that it "would need to be satisfied that the frailty or defect of character indicated by the convictions can now be regarded as entirely spent". Put another way, that the applicant had achieved such a complete turnaround or reformation that the convictions could be safely ignored".[17]

[42] The Panel then set out at length what it regarded as the evidence in relation to both the convictions and Mr Grant's reform. It noted, in respect of the share theft frauds, that Mr Grant had initially absconded but later pleaded guilty. It said that it was unable to establish the precise quantum of the sums dishonestly obtained in the course of either tranche of offending and implicitly criticised Mr Grant for not providing it with further details in respect of any other offending for which he was not charged or convicted. It noted that one commentator had suggested the share theft frauds were in the "multi-million dollar" category but in a 2018 interview by the National Business Review Mr Grant said the approximate range was between $400,000 and $600,000 plus the value of five kilograms of gold which was recovered. It referred to the *Paton*[18] decision which it said "implicated" Mr Grant "in a second fraud 'using the same complex scheme' for which he was apparently not charged". It assumed that "in at least some cases Mr Grant has not disclosed the full extent of his criminal history to those who provided affidavits in support". It noted that no medical or psychological evidence had been submitted in support of his application nor probation reports provided. It recorded the fact of Mr Grant's previous criminal history was now a matter of some "notoriety" in the insolvency industry, and perhaps

---

16 *Re Owen* [2005] 2 NZLR 536 (HC).
17 *Re Owen* [2005] 2 NZLR 536 (HC) at [35].
18 *R v Paton* CA354/94, 2 November 1994.

more widely, pointing out that he had engaged with the press pro-actively, albeit after he was aware the press had been investigating his past.

[43] As to evidence of reform, it noted the now historic nature of the offending, Mr Grant's public demonstrations of remorse on many occasions, what it regarded as "a sincere" demonstration of emotion at the hearing when reflecting on his prior transgressions, the fact he was now a husband and father with a young son and that he had built a successful business and writing career. It recorded that he produced affidavits from a number of deponents who had deposed that he had acted with integrity and honesty in his dealings with them and that two of his legal employees had supported him at the rehearing.

[44] In its analysis section, comprising a little over two close-typed pages, the Panel then set about the "weighing" exercise which it had predicated in [3.3] of its decision. In respect of the convictions it said that there were "a number of aggravating aspects" which were of particular concern, namely:

(a) the offending was serious, prolonged and premeditated;

(b) in respect of the credit card frauds, Mr Grant had initially declined to co-operate but when presented with a plea bargain changed his mind;

(c) in respect of the share theft fraud, he had initially absconded before finally co-operating;

(d) there were questions about whether he had given honest evidence about the extent of his role in the share theft fraud – citing the Court of Appeal's observations in *R v Paton*;[19]

(e) the offences were all relatively complex;

(f) they were premeditated, and in the case of the credit card frauds there was also involvement in the criminal market to sell the stolen goods;

---

19 *R v Paton* CA354/94, 2 November 1994.

(g) the offending involved sustained dishonesty over a period of five to six years during which Mr Grant clearly knew what he was doing was wrong;

(h) there was significant value in the property stolen;

(i) Mr Grant was an adult throughout the offending and relatively mature by the time of the share theft fraud;

(j) the second tranche of the offending invited a sentence of imprisonment; and

(k) other than the proceeds of the gold recovered and monies held by Mr Grant at the time of arrest, he had made no "effort at restitution".

[45] Weighed against these aggravating factors the Panel noted:

(a) his guilty pleas (although again referencing the comments of the Court of Appeal in *Paton*);[20]

(b) the "very long time" since he was last convicted – 27 years;

(c) his many demonstrations of remorse, although noting that Mr Grant did not appear to have "been interested in acknowledging his offending in public until the media threatened to expose him";

(d) his public profile as a result of a well-developed writing career (but noting the corollary that his convictions now have "a higher prospect of drawing public attention" if he was to become an accredited insolvency practitioner);

---

[20] *R v Paton* CA354/94, 2 November 1994.

(e) the emotion expressed at the hearing which appeared to the Panel to confirm "genuine guilt or shame" in relation to his prior "self-destructive path";

(f) the very significant number of affidavits from senior members of the business and legal community (noting, however, that only one of the affidavits was from an accredited insolvency practitioner and that it was "not clear how many had actually been informed of the full extent of Mr Grant's offending or criminal past"); and

(g) Mr Grant's acknowledgement that although as a liquidator there were many opportunities for him to act dishonestly, that was not the life he now intended to live.

[46] It then concluded:[21]

> 5.4 We understand that the purpose of applying the "good character" requirement in the Rules is not to punish for past misconduct or perceived personal flaws, but to protect the public and to promote the integrity of the profession as a whole and public confidence in it. We have been unable to identify any examples from New Zealand or overseas of a person with as significant relevant criminal offending as Mr Grant being admitted as either a lawyer or insolvency practitioner.
>
> 5.5 Overall, we are left with significant doubt about the extent of Mr Grant's offending, his insight into it and the degree to which he has been open about it. We are therefore not satisfied that grant can confidently be regarded as a person of good character under the Rules.

[47] It therefore declined his application for admission.

Mr Grant's case

[48] Mr Grant advances three grounds in support of his application for review:

(a) the decision was made in error of law;

---

[21] Hearing of application for membership of RITANZ: Damien Grant. Notice of decision and reasons 10 August 2020.

(b) the decision took into account irrelevant matters and failed to take into account those that were relevant and, as a result, was "unreasonable and unlawful"; and

(c) alleged procedural impropriety involving an unfair process, apparent bias and predetermination.

[49] As to the first ground, Mr Hollyman's principal submission is that in purporting to "weigh" the aggravating factors in Mr Grant's three decade old offending against the evidence of reform and his positive qualities, the Panel misstated the appropriate test in a way which led to an unduly retrospective focus on the detail of the offending rather than the prospective focus required by law (including the obvious evidence of his reform).

[50] He submits that there were a number of further and subsidiary errors of law including that:

(a) the Panel's emphasis on its stated inability to ascertain exactly what the offending had involved, almost 30 years ago, invited a retrial of Mr Grant contrary to the observations of the Full Court of the High Court in *Leary v New Zealand Law Practitioners Disciplinary Tribunal*;[22]

(b) the Panel's suggestion that Mr Grant lacked "insight" into his offending,[23] indicated that it had fallen into the same error corrected in *Leary* where it was observed that Mr Leary's "inability to discern the wellsprings of his past inexplicable and wrongful behaviour should not be confused with an inability to know it occurred and now recognise it as wrong";[24]

---

22 *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) at [51].

23 A proposition which Panel member Ms Tunna explained in her affidavit was an allusion to his unwillingness "to go into significant detail about his life circumstances at a time when his criminality prevailed".

24 *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) at [43] – [51].

(c) the Panel erred in failing to identify material differences between lawyers and insolvency practitioners and that, as a result, an unnecessarily stringent approach to the good character requirement was imposed; and

(d) that it failed to identify that Mr Grant was not a new entrant into the insolvency profession and the fact that the Panel's decision therefore amounted to a de facto striking off for well-known matters that long predated his involvement in the profession.

[51] In respect of the second ground of review, Mr Hollyman submits that the Panel took into account irrelevant considerations in the following respects:

(a) By drawing an adverse inference from the Court of Appeal's observations in *R v Paton*,[25] when in fact Mr Grant gave honest evidence at Mr Paton's original trial and would have repeated that evidence had Mr Paton's ill-health and subsequent death not prevented a retrial. He emphasises that Mr Grant was not charged for any related offending and the evidence given about the totality of losses and the extent of recoveries made related to the totality of all share theft offending.

(b) By regarding as an aggravating factor "of particular concern" Mr Grant's initial failure to co-operate with police in respect of the credit card frauds in circumstances where he ultimately pleaded guilty. Mr Hollyman submits that this converts what is properly a mitigating factor into an aggravating factor and reinforces the conclusion that the Panel adopted an unduly retrospective approach.

(c) By improperly minimising expressions of remorse on account of the fact that Mr Grant had only publicly acknowledged his criminal past when presented with likely press exposure. Mr Hollyman submits that a person can be genuinely remorseful without public purgation. Indeed

[25] *R v Paton* CA354/94, 2 November 1994.

he suggests it is a "nonsense" that a person seeking to rehabilitate themselves would adopt such a course when they were seeking to put their past behind them. He further submits that this again shows an unduly retrospective emphasis and that RITANZ's concern should have been to assess whether Mr Grant was, as he presented to the Panel in 2020, genuinely remorseful. He also criticises the fact that the matter of Mr Grant's alleged reticence in acknowledging his criminal past was not clearly put to him in the course of the hearing and that there was no basis therefore for the Panel to have concluded that he appears "not to have been interested" in any acknowledgment prior to media inquiry.

(d) By dismissing or minimising Mr Grant's character references on the basis that none of the deponents had "conducted a thorough investigation and nor do they apply the legal test for good character when providing their opinions". Mr Hollyman says that the referees were not required to have had that level of background detail and that this further demonstrates RITANZ's improper fixation on historical events and limited interest in the forward looking exercise mandated by the authorities. He also submits that most of the referees were, in any event, well aware of at least the general tenor of Mr Grant's previous convictions and the fact that he had been imprisoned but that nevertheless they were able to attest to his current good character. He describes the approach of the Panel as one which incorrectly acquired an "adjudicative" role whereby the referees conducted their own fact-finding inquiry and then applied the "legal test" for good character. He submits that this fundamentally misstates their role which is to help a decision maker assess the current attributes of an applicant including their reputation within the community. He submits that, as a result, the Panel gave insufficient weight to the references of numerous eminent and responsible people whose confidence in Mr Grant's current good character should have assuaged the Panel's concerns that his admission to the Association would create an unacceptable risk to the reputation of the insolvency profession. Finally, he submits that the Panel's reference to only one of the referees being an accredited insolvency

practitioner again incorrectly minimised the relevant evidence. He says that Mr Grant was never told that references from accredited insolvency practitioners would carry any particular premium and that there is no reason to suggest that such practitioners were any better qualified than other prominent members of the commercial and professional community to depose on issues of character.

[52] In respect of the third ground of review Mr Grant alleges that RITANZ acted unfairly by, respectively, under and over-emphasising the matters previously referred to. He says also that its decision was affected by apparent bias in that:

(a) Members of the Panel were competitors in the insolvency industry.

(b) RITANZ had, during the infancy of the legislation, sought to have any person with a previous conviction disqualified as an insolvency practitioner.

(c) Undue emphasis was placed during the course of the hearing on the convictions and Mr Grant's historic conduct.

(d) The Panel adopted a "dismissive" approach to the overwhelming weight of the referee's evidence and their "gravitas".

(e) There were indications in the recording of a discussion between Panel members at the morning tea adjournment that they regarded Mr Grant's display of emotion during his evidence as inappropriate or even a matter of humour.

[53] In summary, he submits in respect of the third ground, that the approach adopted in the decision was in each case to focus on the most negative aspects and most negative interpretation possible and to minimise the overwhelming body of evidence indicating reform and thus present good character. He submits that this is indicative of apparent bias, the origins for which may ultimately lie in the fact that Mr Grant was in direct and sometimes adversarial competition with some of the

decision makers – both those involved in the initial decision and those empanelled for the rehearing.

[54] In terms of relief, Mr Hollyman submits that the Court's first response must be to quash the decision. That much is uncontentious if appropriate grounds are made out. He goes on, however, to say that this is one of those rare cases where the Court should substitute its own decision and admit Mr Grant to the Association. He acknowledges that it is only rarely that the Court is persuaded to adopt such a course and that it will only do so if it is a "clear case". But he says that no further factual findings are necessary, Mr Grant has already been held out of membership for over eight months since his initial application and the delay associated with any rehearing would inevitably be costly to him in terms of interim inability to accept further appointments and in terms of reputational damage. He submits that this Court is in as good a position to make the decision as RITANZ but that if the Court is unpersuaded to follow this approach it may be appropriate for it to require that the matter be considered entirely afresh by a newly constituted Panel.

What was the legal test the Panel was required to apply? – The principles applicable to assessment of good character

[55] Because of the novelty of the relevant legislation the Panel did not (and neither does this Court) have the assistance of any decisions specific to it. Nor were counsel able to identify any decisions from foreign jurisdictions which would directly assist.

[56] At the outset I adopt the Supreme Court's observation in *Stanley v New Zealand Law Society,*[26] that the content of a good character requirement may vary according to context. The context here is not simply admission to a voluntary organisation for cultural, educational or community purposes. Under the relevant legislation RITANZ now has a gateway function in terms of ability to conduct the business of an insolvency practitioner. It was entitled to make an assessment of good character premised on an intended application by Mr Grant to NZICA to be licenced in that respect and on the assumption that its assessment of good character would likely inform the outcome of that application. It was also entitled to take into account its

[26] *Stanley v New Zealand Law Society* [2020] NZSC 83.

own purposes in promoting the standards of the insolvency profession and the extent to which there was any legitimate reputational damage to the organisation from Mr Grant's admission.

[57] There are a wide range of professions which have good character and competence requirements for entry. In the absence of authority specific to insolvency practitioners, the Panel considered its assessment "informed by the legal authorities relating to admission of lawyers". Mr Hollyman submits that although it was entitled to be so "informed", the Panel erred in failing to identify material differences inherent in the good character test for lawyers as opposed to insolvency practitioners. Simultaneously, however, he relies on several authorities relating to legal practitioners for the proposition that the Panel erred in its approach. I address this issue now because, in a landscape dominated by decisions concerning legal practitioners, it is important to understand whether the approach to good character assessment in those cases is fairly referable to the present.

[58] There is no doubt that there are significant differences between practice as a lawyer and a liquidator. Insolvency practitioners do not take an oath of office like lawyers do. In particularly contentious or complicated matters they will invariably engage lawyers to act on their behalf. Although insolvency practitioners do act as fiduciaries in some respects, the exercise of their statutory rights under the Companies Act are subject to significant levels of Court supervision. I accept that they do not typically have as close and confidential a relationship with their clients as lawyers do.

[59] The Panel recognised that this was the case. It said, "we accept that the professions are different". However, it also highlighted some similarities, including the fact that both lawyers and insolvency practitioners routinely handled money and property belonging to others. It correctly noted that liquidators have significant control over the results flowing to creditors and other vulnerable parties in failed companies and other entities.

[60] At least on the facts of this case, I consider such distinctions as exist between the professions to be irrelevant. Mr Grant was declined admission to RITANZ for the reason only of prior criminal offending involving dishonesty. It is axiomatic that,

given the extent of control that insolvency practitioners have over others' financial affairs, they be trustworthy. It has been the failure of some to meet that basic requirement which can be seen as part of the catalyst for the current legislation. As Mr Grant himself acknowledged in his evidence "the opportunities that you get to act dishonestly as an insolvency practitioner are enormous".

[61] I accept that given one of the purposes of the Act was to promote integrity among insolvency practitioners, it would be wrong to suggest that any lesser standard of honesty and trustworthiness was appropriate to insolvency practitioners than to lawyers. It can be no more appropriate to admit to practice a potential liquidator formerly convicted of complex fraud than it can be a lawyer with similar convictions. However, the case law in respect of lawyers suggests there is no immutable bar in that respect and likewise there should be no immutable bar for insolvency practitioners. The Panel did not suggest that there was. Nor on the hearing of this application did Mr Hunter QC submit that Mr Grant was *never* entitled to be admitted to membership and could thus permanently be precluded from pursuing his chosen vocation.

[62] I therefore revert to the principles which would be applicable to a lawyer seeking admission in such circumstances.

[63] The most recent and definitive discussion of these occurs in the Supreme Court's decision in *Stanley*.[27] Regrettably this was released a week after the Panel's decision declining Mr Grant's admission. The Panel would have no doubt greatly benefitted from it.

[64] Mr Stanley sought admission as a barrister and solicitor despite four breath/blood alcohol convictions over the period 1978 to 2004. The Law Society decided that he was not a fit and proper person.[28] In the Supreme Court the majority decision includes a discussion at [35] – [54] of the approach to be taken to the fit and proper person standard. The minority was in "general agreement" with this exposition of principle,[29] although differing in terms of outcome.

---

27 *Stanley v New Zealand Law Society* [2020] NZSC 83.

28 As the Supreme Court observed at [13], under the current Law Practitioners Act good character is a subset of the fit and proper person standard.

29 At [105] and [106].

[65] The following points emerge from the majority discussion:[30]

(a) The fit and proper person test has both a prophylactic purpose, in terms of protecting the public, and a reputational aspect reflecting the need to maintain public confidence in the legal profession. I note at this stage that I accept these purposes apply equally to the present case.

(b) The evaluation is a "forward looking exercise" because the decision maker is required to make a judgment at the time of undertaking the evaluation in terms either of risks to the public and/or damage to the reputation of the profession if the applicant is admitted.

(c) The evaluation is objective – it should not in any way be influenced by sympathy for the position of the applicant.

(d) The approach is not punitive – it is to be based exclusively on the need for public protection or the maintenance of public confidence in the profession. The applicant must be honest, trustworthy and a person of integrity. Again that accurately captures the character requirements in my view necessary for any insolvency practitioner.

(e) Where the potential barrier to admission is the existence of prior convictions three aspects will be particularly relevant – the nature of the offence, the time that has elapsed since the offending and the applicant's age when the offence was committed.

(f) The nature of the offending is an important consideration and some convictions will inevitably be problematic by their very nature. The Court identified dishonesty offences in that category because of the direct connection to legal practice. As I have already accepted, exactly the same connection exists in respect of insolvency practitioners. The Court did not, however, suggest that prior dishonesty convictions,

---

[30] The minority did not take issue with this analysis. It diverged from the majority on application of the principles to the facts of Mr Stanley's applications.

however historic, would be a permanent bar. It cited this Court's decision in *Re Owen*[31] where the Court was satisfied that despite very serious dishonesty offending for theft and burglary (coupled with convictions for wilfully setting fire to property, drug possession and driving offences), the applicant for admission to the bar had undertaken such a complete reformation that he could now be regarded as of good character and a fit and proper person.[32] In reference to that case, the Supreme Court noted commentary by Webb, Dalziel and Cook[33] to the effect that:[34]

> While the wrongdoing was in many ways of the most serious kind and wholly inconsistent with the status of a barrister and solicitor, the Court was convinced the [applicant] was a "new man" in a real and not trivial sense.

(g) Cases like *Owen* were to be contrasted with those like *Layne v Attorney General of Grenada*[35] where the offending was so serious – in that case involving conviction for murder – that (as the Privy Council held) an applicant could never effectively meet good character criteria.

(h) Some convictions will be in the trivial category, or be so dated as to lose any significance, or may simply stem from youthful immaturity.

(i) The inquiry reflected in the previous authorities in terms of whether the "frailties" or "defects in character" reflected in the convictions can now be regarded as "entirely spent", is appropriately updated in terms of whether and to what extent the conduct remains *relevant* at the time of the current inquiry. Whether past conduct remains relevant is a fact specific inquiry in respect of which "the Court must look at all of the evidence in the round and make a judgment as the present ability of the applicant to meet his or her duties and obligations as a lawyer".[36]

---

31 *Re Owen* [2005] 2 NZLR 536 (HC).
32 At [37] – [39].
33 Duncan Webb, Kathryn Dalziel and Kerry Cook *Ethics, Professional Responsibility and the Lawyer* (3rd ed, LexisNexis, Wellington, 2016) at 143.
34 *Stanley v New Zealand Law Society* [2020] NZSC 83 at footnote 99.
35 *Layne v Attorney General of Grenada* [2019] UKPC 11, [2019] 3 LRC 459 at [36].
36 *Stanley v New Zealand Law Society* [2020] NZSC 83 at [54(e)].

(j) The standard is necessarily a high one but the Court should not "lightly deprive someone who has otherwise met the qualifications of the opportunity of practising as a lawyer".[37] Perfection is not required.

(k) The onus is on the applicant. However, applications are unlikely to turn on fine questions of onus.

Discussion

Reviewable error?

[66] I start with Mr Hollyman's lead submission that the Panel "mangled" the relevant legal test by stating that it involved a process of "weighing" the aggravating factors of the offending against matters of insight, remorse and reform and "present positive qualities".

[67] I note at the outset that, having stated the test in these terms, the Panel went on to invoke the standard pre-*Stanley* language in terms of whether the convictions "can now be regarded as entirely spent" or "can be safely ignored". But in its analysis section it adhered closely to the "weighing" or "balancing" formula by first enumerating at length what it said were aggravating aspects of the offending and then identifying matters said to "support his reform". This tabulation was then followed by the brief conclusion that, overall, the Panel was left with "significant doubt about the extent of Mr Grant's offending, his insight into it and the degree to which he had been open about it". Significantly all three of these so-called significant doubts have a retrospective focus. At no stage did the Panel say that it had significant, or even any, doubts Mr Grant has truly moved on from his criminal past to become the "new man" predicated in *Owen*.

[68] I do not need to go as far as Mr Hollyman invites me to,[38] but I am satisfied the Panel did apply an incorrect test.

---

[37] *Stanley v New Zealand Law Society* [2020] NZSC 83 at [52] citing *Lincoln v New Zealand Law Society* [2019] NZCA 442, [2019] NZAR 1931.

[38] Some cases, for example *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) at [55], refer to the decision under review/appeal as placing "overmuch weight" on retrospective factors and "too little weight" on reformative efforts, but that expresses the consequences of error; the test itself is not premised on a "weighing" approach.

[69] I do not ultimately see the relevant inquiry as involving a "weighing" or "balancing" exercise because that presupposes a *relevancy* in respect of the previous convictions which may no longer be the case. In expressing the test in the way it did, I consider the Panel sowed the seeds for an approach which unduly focused on the historic position and insufficiently on:

(a) evidence of reform;

(b) the very extended period since the offending;

(c) Mr Grant's significant contributions to the commercial and media worlds in the intervening period; and

(d) the substantial number of prominent New Zealanders who considered that his admission to the Association would, in light of the completeness of his redemption, bring no ill-repute to it.

[70] As the Supreme Court emphasised in *Stanley*[39] the ultimate test in any case involving past convictions is whether the conduct remains *relevant*, not whether the offending was so egregious, or the "aggravating" factors associated with it are so serious, that the conduct outweighs the evidence that Mr Grant is, 27 years later, someone who can be considered a person of sufficiently good character to be admitted to membership.

[71] The danger, as I see it, in the Panel's approach is that in the case of serious dishonesty offending, as for example in this case and likewise in *Owen*,[40] a balancing approach may leave the scales permanently weighted against admission. That is not to say that the nature of the offending is not important. Conspicuously it is. And, as the Supreme Court acknowledged, dishonesty offending, will always be "problematic" in the case of admission to a profession or vocation where honesty is essential. The Court of Appeal in *Stanley* went further and suggested that "dishonesty leading to imprisonment will generally be viewed as disqualifying a person from admission,

---

39 *Stanley v New Zealand Law Society* [2020] NZSC 83 at [106].
40 *Re Owen* [2005] 2 NZLR 536 (HC).

particularly if the applicant was an adult at the time of offending"[41]. But what is "generally" the position or what might be regarded as a "problematic" case does not mean to say that the door is permanently closed. The Supreme Court acknowledged as much in stating that convictions may, for example, be so dated as to lose any significance.[42] And as Kirby P noted in *Law Society of New South Wales v Foreman (No 2)*:[43]

> For cultural and historical reasons redemption and forgiveness are important attributes of the shared morality of our society… In part it derives from the self-interest which any community has to encourage the rehabilitation of those who lapse and hold out to them the hope that by diligent and honourable efforts over a period, their past may be forgiven and they may be restored to the good opinion of their family, friends, colleagues and society.

[72] I note also the Supreme Court's emphasis in *Stanley* on the fact that the focus of the evaluation exercise must be resolutely forward looking. A "weighing" or "balancing" exercise does not have that perspective and carries the inherent danger that applicants for admission are further punished for their past conduct. When a test is framed in terms of whether the previous convictions remain relevant, inevitably the primary focus turns from the past to the present. In that sense nuance is important and if, as Mr Hunter acknowledges, the door cannot be considered permanently closed to Mr Grant and he is free to apply again in the future, the question must inevitably arise, if not now, when? Is 35 or 40 years of honest commercial and media endeavour really any different in this sense to 27 years? Is, as I inquired in argument, Mr Grant only to be admitted to (perhaps) honorary membership in his dotage? In that context the fact that he is now 54 years of age with probably only 10 to 15 years of frontline commercial activity still ahead of him must be a consideration.

[73] Summarising to this point, I consider the Panel erred in approaching the task by weighing aggravating factors against evidence of reform because inherently such an approach diverts attention from the prospective focus which is necessary – both in terms of whether the public can be expected to be adequately protected for the future and in terms of any wider ongoing risk of danger to the reputation to the profession. Its proper inquiry was into whether the previous offending remained "relevant".

---

41 *Stanley v New Zealand Law Society* [2019] NZCA 119,[2019] NZAR 1001.
42 *Stanley v New Zealand Law Society* [2020] NZSC 83 at [43].
43 *Law Society of New South Wales v Foreman (No 2)* (1994) 34 NSWLR 408 (CA) at 419.

[74] The "fall-out" from its error is evident both on a fair reading of the hearing transcript, which, as I have indicated, shows a significant focus on the genesis of the offending, and from the decision itself. For example, the decision emphasises the fact that, in respect of the earlier credit card offending, a guilty plea did not occur at the earliest opportunity and a "plea bargain" may have been reached. In my view identification of this level of minutiae in respect of offending which occurred now more than 30 years ago by an offender then 22 years of age is indicative of an unduly retrospective focus. As the authorities recognise, inquiries into the actions which led to a conviction or (as features in many of the cases) a "striking off", is necessary, but primarily in the context of assessing whether the applicant accepts those actions occurred and that they transgressed societal norms or relevant legal or ethical standards.[44] As the Full Court recognised in *Leary*, without recognition that actions breached applicable standards and the consequences of the breaches, it would be difficult to conclude the same actions would not be repeated should similar circumstances arise in the future. But recognition of the wrongness of the acts should be sufficient.[45]

[75] A related point – the Panel placed emphasis on the fact that Mr Grant had not "repaid his victims (other than losing any remaining proceeds available at the time of his imprisonment) nor made any effort at restitution". Mr Grant's evidence was that significant recoveries had been made as a result of recovery of the bullion which had been purchased with the proceeds of the share theft. There was also, apparently, some recovery of cash still in accounts at the time of arrest. Mr Grant accepted, however, that there had been a shortfall for which reparation had not been provided. However, that too must be placed in context. Mr Grant served a custodial sentence. He has in that sense paid his debt to society. The sentence would undoubtedly have been reduced if full reparation had been possible. As the Full Court in *Leary* pointed out:[46]

> [45] … requiring demonstration of "atonement" or "purgation" invites re-trying the earlier matters, even though all authorities agree that should be eschewed. Recognition of wrongness of the acts which led to the striking-off should be sufficient.

---

44 *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) at [43] and [44].

45 At [45].

46 At [45].

[76] On a fair reading of all of the evidence, supported by Mr Grant's long history of having "owned" his past it would, in my view, be difficult to suggest that he had not fully and completely accepted the wrongness of his acts.

[77] The Panel placed significant emphasis on the fact that, although at the hearing Mr Grant alluded to events in his past which may have set him on a path of criminality, it was left with "significant doubt" in respect of his level of "insight". This risks the same error into which the Law Practitioners Disciplinary Tribunal fell in *Leary*. As the Full Court noted:[47]

> [A] fair reading of the transcript of Mr Leary's cross-examination suggests it focuses significantly on the circumstances of the incidence which led to his striking off and unfairly drew inferences from his inability, even now, to explain why he undertook those actions. His inability to discern the wellsprings of his past inexplicable and wrongful behaviour should not be confused with an inability to know it occurred and now recognise it as wrong.

[78] That must be especially so in respect of offending which in some cases is now more than 30 years old. Mr Grant would not be the first adult not to fully understand why, in comparative youth, he or she had acted as they did.

[79] Nor do I consider the Panel correct, again adopting its retrospective lens, in criticising Mr Grant for his apparent "[un]interest in acknowledging the offending in public until the media threatened to expose him". I accept Mr Hollyman's submission that there is no logical connection between Mr Grant's present remorse and the fact that his public acknowledgements occurred in the context of developing media interest. A person can be genuinely remorseful for their actions without expressing it in public and it was, in my view, an error to discount or minimise his remorse for that reason. I also accept Mr Hollyman's point that any person seeking to rehabilitate themselves and to build a new and honest life is unlikely to wish to broadcast their earlier offending "from the roof tops". Some discretion can be expected at least until the point at which the reformed individual has sufficient confidence in his or her new standing in society that they can appropriately claim "that was then, this is now". Again the Panel's focus should have been prospective, not retrospective. Its concern was to assess the extent and genuineness of his *present* remorsefulness as an indicator

---

47 *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) at [51].

of the good character necessary for future protection both of the public and the profession's reputation.

[80] These several examples confirm me in my belief that the error in articulation of test has set the Panel off in a direction which has resulted in it overemphasising the retrospective position.[48] In assessing that position it has also given undue emphasis to issues such as purgation, reparation, and the psychological origins of the offending which the authorities indicate should have little, if any, impact on the evaluation.

[81] As in *Leary* and *Stanley*,[49] the corollary is also true. Although the Panel acknowledged Mr Grant's reform as part of the equation, its approach, in my view, underemphasises the point.

[82] Mr Hollyman relies in particular on the Panel's treatment of Mr Grant's character references. These totalled 19. Most were from people of significant stature in the New Zealand community. Some were from individuals who had dealt with Mr Grant in a professional context, others were people who knew him in a social setting. They attested to Mr Grant's current integrity and good character.

[83] I accept Mr Hollyman's submission that the Panel gave only relative cursory consideration to this substantial body of evidence and indeed that it minimised it to an extent. It did so on the grounds that:

(a) "in at least some cases" Mr Grant had not disclosed the full extent of his criminal history to those who had provided affidavits in support;

(b) the individuals concerned had not "conducted a thorough investigation"; and

(c) they did not apply the legal test of good character when providing their opinions.

---

48 The expression used in *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) at [53].

49 *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) and *Stanley v New Zealand Law Society* [2020] NZSC 83.

[84] I agree with Mr Hollyman that the approach again betrays an improper focus on historic events at the expense of Mr Grant's current character as required by the "forward looking exercise" mandated in *Stanley* and other authorities.

[85] I do not consider it appropriate that referees should have been required to conduct an essentially adjudicative process against the "legal test" for good character. Mr Hollyman submits that this fundamentally misunderstands the nature of references, personal or professional. I agree. References are not generally intended to be "investigatory". Properly approached they are evidential. They help a decision maker by informing it about the current attributes of the applicant, including his or her reputation with people of standing in the community. I accept Mr Hollyman's submission that, viewed in this way, references allow a decision maker to make a value judgment about an applicant's present character (albeit one which takes into account relevant evidence about an applicant's past).

[86] As to knowledge of Mr Grant's criminal history, most of the referees expressly deposed that they were either aware of this including that he had been imprisoned. They were nevertheless able to attest to his current attributes and character. In his affidavit in opposition to the present application, the Panel's Chair, Mr Fisk, refers to the fact that one of the referees (Mr Brenton Hunt) subsequently emailed him stating he was not fully aware of the extent of the offending which he assumed had been a "singular offence in relation to gold being smuggled out of the country". However, in a subsequent email to Mr Grant, Mr Hunt acknowledged an element of "covering my arse" given the fact that his own licensing application was unresolved and "they have already asked some questions I am surprised about". In my view the Panel was incorrect in minimising the impact of the references on account of the absence of detailed knowledge on the part of the deponents about all facets of the previous offending. The important point is that in almost all cases the referees deposed to the knowledge of serious criminal offending resulting in imprisonment (unsurprising given the extent to which that information is now in the public domain as a result of Mr Grant's own media articles) and yet considered themselves able to attest to his current good character.

[87] Cumulatively these errors led, in my view, to the Panel understating the weight properly attached to the references. There can be no doubt about the stature of many of those attesting to Mr Grant's current character. Notably they did so by way of sworn affidavit. Again, *Leary* provides direction in terms of how the references should have been treated:[50]

> … the eminence and responsible nature of those who gave testimonials was such that they would be cautious before putting pen to paper, careful in their assessment of the applicant and at pains to ensure what they said was accurate and not inflated.

[88] The references should also have gone at least some way towards allaying the reputational concerns expressed by the Panel.

[89] As Dr Brash said in his affidavit:

> I find it difficult to accept that given Mr Grant's openness about his past convictions and the way he continues to conduct himself in the public sphere, there would be many, indeed any in the commercial community who would feel that his being an accredited or licenced insolvency practitioner would create a negative impact on the reputation of the profession.

[90] Indeed it would have been appropriate for the Panel to consider the extent to which the profession's reputation might, at least in the eyes of some, be considered enhanced by recognition of what Kirby P referred to in *Foreman* as "diligent and honourable efforts over a period" to redeem a person's reputation in society.

[91] Finally in this respect, the approach of Tribunal gives rise to process concerns. At no stage did it identify in advance of the hearing that Mr Grant's referees would need either to have a granular understanding of his historic offending, conduct their own investigation into it or then apply the "legal test" for good character. Since Mr Hollyman is correct that neither previous authority nor practice required as much, the Panel's approach was (apart from other objections) in breach of natural justice.

[92] Nor do I consider it correct to minimise the overall impact of the references by virtue of the fact that "only one of those who provided affidavits is an accredited

---

50 *Leary v New Zealand Law Practitioners Disciplinary Tribunal* [2008] NZAR 57 (HC) at [15].

insolvency practitioner".[51] Again RITANZ never told Mr Grant that they considered it necessary to obtain references from accredited insolvency practitioners. If there was some particular premium attached to references from this source then, in my view, that should have been telegraphed. However, more fundamentally, I agree with Mr Hollyman there is no logical basis to suggest insolvency practitioners have any unique or better ability to assess good character than other eminent members of the legal, commercial, business and media community. It may have been otherwise if the issue before the Panel was Mr Grant's professional competence. But it was not.

[93] Again, summarising to this point, I am therefore left in the position, as in *Leary*, where I consider the Panel adopted an approach which focused overly on the historic position and gave too little emphasis on Mr Grant's reformative efforts over 27 years. This is not, in my view, an error into which the Panel would have fallen if it had formulated the relevant legal test with the precision required. On these grounds alone the Panel's decision must be quashed.

[94] For completeness, however, and particularly in light of the form of relief granted at the conclusion of this judgment, I make the following brief additional observations:

(a) I would not have been prepared to quash the decision on the grounds of apparent bias arising out of the professional status of the Panel members. I have already indicated the statutory regime precludes challenge on the grounds that those adjudicating the application (or at least some of them) may (in the broadest sense) be considered competitors in Mr Grant.

(b) Nor does the fact that his initial application was declined and a new committee empanelled as a result of Mr Grant's first application for review raise any necessary suspicion about the objectivity of the second Panel. Applying the relevant legal test, I would not consider a fair-minded lay observer reasonably apprehensive that the second Panel did

[51] Hearing of application for membership of RITANZ: Damien Grant. Notice of decision and reasons, 10 August 2020, at [5.3(f)].

not bring an impartial mind to its deliberations. My own assessment is that new Panel applied itself conscientiously to a difficult task with an open mind, albeit that its approach was in error.

(c) I have considered in that context the "morning tea" exchange, evidence which was admitted de bene esse. I do not ultimately consider this establishes any element of apparent (or indeed actual) bias. The recording of the exchange is not clear. I am not satisfied that the "chortling" referred to in the transcript was in any sense laughter at Mr Grant's expense. I consider it more likely that it was in response to a good humoured exchange with Mr Grant's counsel. I am reinforced in that conclusion by the fact that the Panel's decision confirms on two occasions[52] that it regarded Mr Grant's expressions of emotion at the hearing as sincere and consistent with genuine guilt and shame.

(d) In affidavit evidence filed in opposition to the application, Panel member and senior solicitor Ms Tunna indicates that, during the course of the Panel's deliberations, it discussed concerns which had not been raised with Mr Grant at any point, including:

(i) how he managed conflicts of interest which could arise between his role as an insolvency practitioner and owner of factoring and litigation funding businesses;

(ii) a number of judicial decisions which had criticised Mr Grant's conduct as an insolvency practitioner; and

(iii) the appropriateness or otherwise of some of his comments in the media.

(e) Panel Chairman, Mr Fisk, also states that during the initial consideration of the application "anecdotal accounts and concerns were

---

[52] Hearing of application for membership of RITANZ: Damien Grant. Notice of decision and reasons, 10 August 2020, at [4.3(e)] and [4.6(e)].

raised by the membership committee in relation to Mr Grant's actions when carrying out formal insolvency appointments".

(f) In her evidence Ms Tunna goes on to say that, as the deliberations progressed, "we felt it unnecessary to investigate, rely on, or refer in our decision to any of these matters".

(g) There was a danger in the Panel's approach. As Brennan J observed in the High Court of Australia's decision in *Kioa v Minister of Immigration and Ethnic Affairs*,[53] approved by Kós J in *Zhao v New Zealand Law Society*,[54] there is always the risk that adverse information can subconsciously affect a decision maker:

> … in the ordinary case where no problem of confidentiality arises an opportunity should be given to deal with adverse information that is credible, relevant and significant to the decision to be made. It is not sufficient for the repository of the power to endeavour to shut information of that kind out of his mind and to reach a decision without reference to it. Information of that kind creates a real risk of prejudice, albeit subconscious, and it is unfair to deny a person whose interests are likely to be affected by the decision an opportunity to deal with the information.

(h) Any information which had a "real risk" of influencing the Panel should have been disclosed and, at a minimum, comment invited.

(i) Likewise I have concerns about how the Panel dealt with the *Paton* judgment.[55] It is correct that late on the Friday afternoon before the Monday hearing it provided Mr Grant with copies of both that and the *Zalkalnins* judgments[56] and invited comment. It did not specifically identify in what respects such comment was sought. Nor were any questions asked about the judgments during the course of the hearing, even though there was adequate time to do so.[57] Although it is correct

---

53 *Kioa v Minister of Immigration and Ethnic Affairs* (1985) 159 CLR 550 at 628 and 629.
54 *Zhao v New Zealand Law Society* [2012] NZHC 2169, [2012] NZAR 894 at [81].
55 *R v Paton* CA354/94, 2 November 1994.
56 I assume in respect of Mr Zalkalnins that this was the admissibility judgment cited as *R v Zalkalnins* HC Auckland T84/94, 20 July 1994.
57 The hearing concluded at approximately midday.

the Court of Appeal raised issues about Mr Grant's credibility in the *Paton* case, he was not a party to those proceedings and there is no ultimate credibility finding against him. In this context particular care was required before identifying the Court of Appeal's concerns as "an aggravating aspect of Mr Grant's convictions and other criminality", as the Panel did. In the circumstances there was, in my view an obligation to go further than simply the provision of the decision. Doubt as to credibility (even by the Court of Appeal) should not have been elevated to "aggravating" status absent the Panel's own conclusion Mr Grant had been untruthful. Inevitably careful interrogation of him and a reasoned approach would have been necessary before coming to such a conclusion.

(j) Mr Hollyman is also critical of the Panel's observation that Mr Grant had not provided any medical or psychological evidence to RITANZ in support of its application. He says that its approach was characterised by "unhelpful silence" in this respect. He says that in *Stanley*[58] the Supreme Court criticised the Law Society for failing to inform the applicant that he should have provided expert evidence as to his relationship with alcohol.

(k) That submission goes further than the relevant observation in *Stanley*. At [74] the majority observed that Mr Stanley "should have provided the High Court with such evidence". Footnote 125 then states:

> Mr Stanley did not receive a great deal of assistance from the Law Society in this respect. He asked twice whether further information was required but was advised to consult his lawyer.

(l) There are fine margins in this respect between what is a minimum requirement of procedural fairness — that the decision maker inform an applicant of the standard they are required to meet — and the fact that ultimately, an applicant in this context carries the onus to establish

---

58 *Stanley v New Zealand Law Society* [2020] NZSC 83.

> good character and to call evidence accordingly. It would certainly have been helpful if the Panel had indicated that it regarded psychological evidence as important and, in a difficult case such as this, evidence of such "helpfulness" may have better insulated the Panel's decision from attack. However, on the basis of my earlier findings in this judgment it is unnecessary for me to go further. I note also that in the context of the relief which I intend to give, the matter tends to the academic.

Relief

[95] Although it follows from what I have said the Panel's decision is appropriately quashed I am not persuaded that I should substitute my own decision and make an order admitting Mr Grant to membership of RITANZ. The Court's reluctance to impose its own decision over that of the body with the statutory power to do so derives ultimately from its concern about the usurpation of power reserved to others.[59] Fundamentally judicial review is not concerned with the decision itself but with the decision-making process. And if, with appropriate guidance, the decision making body can be expected to revisit its decision, whether that be against the appropriate legal test or perhaps better focused on relevant considerations, then that is the default position. Only in what Williams J described in *Ellis v Legal Complaints Review Officer*[60] as a "clear case" will this High Court substitute its own decision. In *Edwards v Attorney-General* the same Judge noted that such substitution was "only ever rarely done"[61].

[96] This could never be described as a clear case. I have already indicated that I consider honesty as much a prerequisite for practice as an insolvency practitioner as for practice as a lawyer. I have also referred to the Court of Appeal's observations in *Stanley* and that dishonesty, leading to imprisonment, will generally be viewed as disqualifying a person from admission to legal practice. The Supreme Court likewise

---

59 *Mercury Energy Limited v Electricity Corporation of New Zealand Ltd* [1994] 2 NZLR 385 (PC) at 389 per Lord Templeman citing *Chief Constable of North Wales Police v Evans* [1982] 1 WLR 1155 (HL) at 1173, per Lord Brightman.

60 *Ellis v Legal Complaints Review Officer* [2013] NZHC 3514, [2014] NZAR 220.

61 *Edwards v Attorney-General* [2017] NZHC 3180 at [118].

acknowledged such convictions as "inevitably … problematic" because of the direct connection with the qualities expected of any admittee to the Bar. The hurdle Mr Grant was required to cross was always therefore high, but not necessarily insuperable because, as the Supreme Court went on to observe, convictions may be of such antiquity as to lose *relevance* in terms of the ultimate inquiry.

[97] As I said at the outset of this judgment the question of whether Mr Grant is admitted to membership is and always was a difficult one. It is far from the clear-cut case the authorities require before the Court should substitute its own decision on the "headline" issue.

[98] It follows that the correct response is remission of Mr Grant's application for admission to membership for reconsideration by RITANZ. I do not consider it appropriate to be unduly proscriptive in that context. I do not, for example, know whether there are currently sufficient members of the Board, apart from those who have already participated in decision making relating to Mr Grant, who can be empanelled for the purposes of a rehearing. I am not prepared to say at this stage that any one or more of the previous Panel members are necessarily disentitled from sitting again. The question will be whether they can bring the necessary objectivity and independence to the role. Certainly the opportunity for subsequent attack on the grounds of apparent bias must be considered much diminished for constitution of a new Panel.

[99] For the purposes of the review application, Mr Grant tendered 12 additional affidavits as to good character. They were admitted de bene esse over RITANZ's objection (based on the fact this Court's focus is on process and that they were therefore irrelevant to the application). I envisage that all such information will be before RITANZ at the further rehearing, and likewise the psychological evidence Mr Grant has now obtained.[62] Mr Hunter does not contend otherwise. The corollary is that Mr Grant may have to face other matters, apart from those identified in the existing decision, potentially bearing on his good character. These will need to be

---

[62] Section 17(3) of the Judicial Review Procedure Act provides that a court may direct reconsideration "generally" of the whole of any matter to which the application relates. Such reconsideration is appropriate.

clearly identified in advance if RITANZ regards them as potentially relevant to its inquiry.

[100] There is an obvious premium on prompt reconsideration of the application. Mr Grant is currently unable to accept further professional appointments. Within 10 months he will not be able to continue to act in respect of existing appointments. There remains the possibility that any future adverse decision in respect of admission will itself result in further judicial review proceedings.

[101] I also note that this may well be a case where the Board would benefit from the appointment of senior counsel assisting.

The evidential challenges

[102] As indicated, RITANZ challenged:

(a) evidence of the "morning tea" exchange on the basis a transcript thereof was never intended to be provided and that the exchange was subject to "deliberative privilege"; and

(b) Mr Grant's additional affidavits as to good character.

[103] Having regard to the basis on which this decision proceeds, it is unnecessary for me to resolve these challenges. As indicated, RITANZ chose to meet the suggestion that Mr Grant's demonstrations of emotion elicited laughter and I am not satisfied that what Mr Grant has said represents a correct interpretation of the events. The question of whether the material is appropriately admitted or not is not ultimately therefore decisive. In any event, my decision proceeds on grounds other than proof of actual or apparent bias.

[104] Nor are the additional character references germane to the result. My expectation is, in any event, that each of these will be before RITANZ on reconsideration of Mr Grant's application.

Result

[105] I quash the decision of the respondent dated 10 August 2020 declining the applicant admission to RITANZ and direct reconsideration and determination of the application on the basis of such evidence as the applicant choses to submit and in accordance with the legal test stated in this judgment. I do so with the further guidance and directions referred to.

Costs

[106] I have not been addressed on costs. Provisionally, I consider these appropriately payable to Mr Grant on a 2B basis. If counsel are unable to resolve these, memoranda may be filed (maximum five pages plus any schedules).

Muir J