

**SEARCH OF COURT FILE PROHIBITED WITHOUT LEAVE OF A JUDGE**

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2005-404-2642**

BETWEEN

P K BEATON  
Plaintiff

AND

INSTITUTE OF CHARTERED  
ACCOUNTANTS OF NEW ZEALAND  
Defendant

Hearing: 29 July 2005

Appearances: M Muir and C Baker for the Plaintiff  
M P Reed QC and P A Morten for the Defendant

Judgment: 17 November 2005

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**JUDGMENT OF ALLAN J**

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*Solicitors: Price Baker Berridge, PO Box 21463, Henderson, Auckland  
Kensington Swan, PO Box 10246, The Terrace, Wellington*

[1] Body Corporate Administration (BCA) offers secretarial services to bodies corporate and participants in cross-lease developments. It has been doing so since 1985.

[2] In 1990, the plaintiff became a 50% shareholder in BCA, and in 1996 the sole director and shareholder. Subsequently, her shareholding was transferred to a trust.

[3] With effect from 1 April 2005, the trust sold its shareholding and the plaintiff resigned as a director but she remains involved in BCA as its general manager.

[4] Since 1984, the plaintiff has been a member of the Institute of Chartered Accountants of New Zealand (the Institute). Membership of the Institute is voluntary in that it is possible to offer accounting services to the public without membership, but there are significant advantages of membership. They include a degree of quality assurance which the public associates with members of the Institute and which the Institute itself works hard to perpetuate.

[5] The rules of the Institute (r 18.2) require that every member who offers accounting services to the public must hold a Certificate of Public Practice. The plaintiff does not have a Certificate of Public Practice.

[6] In 2003, a question arose as to whether she was offering accounting services to the public and after detailed correspondence between the plaintiff (and her solicitors) and the Institute, the latter commenced an investigation into the plaintiff's practice, aimed at determining whether she was offering accounting services to the public and thus required a Certificate of Public Practice.

[7] In the course of that investigation, the Institute personnel identified several matters which concerned them and which ultimately formed the basis of a complaint made to the Institute's Professional Conduct Committee, a body which has the power to investigate complaints and to refer them, if appropriate, to the Institute's Disciplinary Tribunal for hearing. The Professional Conduct Committee may,

instead of so referring the matter, admonish a member or impose, with the written agreement of the member, one or more of a limited range of sanctions.

[8] The plaintiff has launched this judicial review proceeding in order to challenge the validity of certain steps taken to date by the Institute through its delegates. The plaintiff claims that the Institute has acted otherwise than in good faith, that those involved in the investigation of her practice acted in excess of jurisdiction, that there have been breaches of natural justice, that the Institute has failed to act in accordance with the plaintiff's legitimate expectations as to process, that those processes are unreasonable and/or unfair, and that the Institute has acted in breach of the provisions of the New Zealand Bill of Rights Act 1990.

[9] The plaintiff seeks declaratory and injunctive relief, together with orders quashing the decisions to initiate the investigation and to lodge the complaint referred to earlier.

[10] The plaintiff's amended statement of claim dated 22 July 2005 includes as a seventh cause of action an allegation that at all material times the services offered by the plaintiff and/or BCA to its clients were not "accounting services" within the terms of the Institute r 18.1. A declaration to that effect is sought. The issue so raised is, of course, the very same issue as that which lay at the heart of the Institute's investigation. No argument was addressed to the court on this seventh cause of action by either counsel and I accordingly put it to one side. The arguments advanced at the hearing related to matters of process rather than substance.

### **The Institute Rules**

[11] It is convenient before turning to a consideration of the relevant factual matrix to set out those of the Institute's rules which are relevant to the matters for determination. It is not in dispute that both parties are bound by the provisions of the rules and of the Institute of Chartered Accountants of New Zealand Act 1996 (the Act), which established the Institute and which provided the statutory framework for the enactment of the rules.

[12] Section 4 of the Act declares the Institute to be a body corporate with perpetual succession and a common seal. It may exercise all the rights, powers and privileges and may incur all the liabilities and obligations of a natural person with full age and capacity.

[13] Section 5 provides that the functions of the Institute are:

- a) To promote quality, expertise, and integrity in the profession of accountancy by its members in New Zealand;
- b) To promote, control, and regulate the profession of accountancy by its members in New Zealand;
- c) To promote the training, education, and examination of persons practising, or intending to practise, the profession of accountancy in New Zealand or elsewhere;
- d) Any other functions that are conferred on it by the rules.

[14] Section 6 requires the Institute to have rules that provide for:

- a) A Council and for the powers of the Council; and
- b) The admission of members of ICANZ and the cessation of membership; and
- ...
- e) An Executive Board of the Institute; and
- f) A Professional Conduct Committee to investigate complaints against members and former members of ICANZ and the powers and procedure of that Committee; and

- g) A Disciplinary Tribunal to hear complaints and matters referred to it by the Professional Conduct Committee and the powers and procedure of that Tribunal; and
- h) An Appeals Council to hear appeals from decisions of the Disciplinary Tribunal and the powers and procedure of that Council; and
- i) The kinds of conduct, including criminal offences, professional misconduct, and financial misconduct, for which a member or former member may be disciplined; and
- j) The actions that may be taken in respect of, and the penalties that may be imposed on, a member or former member by the Professional Conduct Committee or the Disciplinary Tribunal for such conduct.

[15] Section 7 requires the Institute to maintain a code of ethics governing the professional conduct of its members and to be in terms prescribed by the Council.

[16] Section 9 provides that in the exercise of their functions and powers the Professional Conduct Committee and each disciplinary body shall observe the rules of natural justice.

[17] Sections 10 to 13 make further provision for the detail of the conduct of disciplinary proceedings but it is unnecessary to consider them having regard to the limited progress made by the Institute to date in the course of the investigation now under challenge.

[18] I turn now to the relevant provisions in the rules. Rule 7 establishes a Council which carries primary responsibility for carrying out the functions of the Institute, including setting strategic objectives and managing and controlling the affairs of the Institute.

[19] Rule 7.2 provides that the Council shall elect an Executive Board from its membership and may delegate to the Board any of its functions and powers.

[20] Rule 9.1(a) provides that the Executive Board is to act as the Executive Body of the Institute, implementing the policy decisions of the Council and carrying out the functions delegated to it.

[21] Rule 11.1 provides that the Executive Board shall, at its first meeting after a general meeting, appoint members to a number of permanent bodies including the Practice Review Board, the Professional Conduct Committee, and the Disciplinary Tribunal.

[22] At the heart of this proceeding are certain of the matters provided for in rr 18, 20 and 21 respectively.

[23] Rule 18.1 provides:

- a) “Accounting services” shall be deemed to be services relating to –
  - i) the preparation of financial information;
  - ii) auditing;
  - iii) taxation;
  - iv) insolvency.
- b) “Offering accounting services to the public” shall include any conduct from which it may be reasonably inferred that the member is offering or providing accounting services to, or accepting assignments from, the public.

[24] Rule 18.2 requires that every member who offers accounting services to the public shall hold a Certificate of Public Practice.

[25] Importantly, r 18.9 provides that “The Executive Board may instruct the Practice Review Board to investigate and report on whether a member is offering accounting services to the public in circumstances which require the member to hold

a Certificate of Public Practice”. Where required to do so by the Executive Board or the Practice Review Board, a member is required by r 18.10 to produce any evidence either Board may specify to enable it to determine whether the member is offering accounting services to the public in circumstances which require the member to hold a Certificate of Public Practice.

[26] Rule 18.11 empowers the Executive Board where it has determined that a member is offering accounting services to the public in circumstances which require the member to hold a Certificate of Public Practice, to issue a Certificate of Public Practice or to lodge a complaint with the Professional Conduct Committee, or both.

[27] Rule 20 deals with practice reviews. So far as is material, r 20 provides:

20.1 The Practice Review Board shall review the operation of a member’s practice from time to time to ensure that professional standards are being maintained.

20.2 The Council may from time to time set out the professional standards and the procedures in a manual of procedure to be followed by the Practice Review Board.

20.3 The Practice Review Board shall also perform any other functions set out in these Rules or that the Council may direct from time to time.

20.4 The Practice Review Board may:

- (a) Require the production of any document or other material in the member’s possession or power which may be required for a practice review.
- (b) Interview any member and examine any document or other material or undertake any other form of enquiry which may be required for a practice review.
- (c) Employ any person to undertake a practice review, on the Board’s behalf.
- (d) Charge the member a fee for the review of their practice.
- (e) Delegate any functions and powers it thinks fit.

20.5 Where required by the Practice Review Board under r 20.4, a member shall produce documents or other material in the member’s possession or power and shall co-operate in any interview.

20.6 On completion of a practice review, the Practice Review Board may do one or more of the following:

- (a) Determine that no further action is required.
- (b) Determine that further action should be taken in accordance with the powers given, and the procedures set, by the Council from time to time.
- (c) Lodge a complaint with the Professional Conduct Committee where it considers that a member (irrespective of whether that member is the person whose practice is under review) has failed to maintain professional standards or has breached the Institute's Act, Rules or Code of Ethics.
- (d) Direct the member or the members practice not to undertake specified assignments (such as audits or receiverships) except under the supervision of a member approved by the Board and/or after having undertaken a period of training as specified by the Board.

[28] It will be observed that rr 18 and 20, while each aimed at overall quality assurance, fulfil quite different functions. Rule 18 deals with Certificates of Public Practice and makes provision for the circumstances in which such Certificates may be issued and the enquiries which may be undertaken in circumstances where the need for a member to hold a Certificate of Public Practice may be in question.

[29] Rule 20, on the other hand, is of much wider application and is an important vehicle by which the Institute may review individual practices for the purpose of ensuring that professional standards are being maintained. It applies to all members and the evidence is that all members are in fact from time to time reviewed. As Mr Reed put it: "the good and the great" are subjected to review in just the same way as all other members.

[30] There appears to be no reason why a practice review under r 20 could not, in an appropriate case, be combined with an investigation under r 18.9.

[31] It will be observed that rr 18 and 20 each provide for the lodging of complaints where matters of concern are identified but the procedure to be followed in respect of such complaints varies according to the rule under which the complaint is lodged.

[32] Rule 18.11 empowers the Executive Board, where it determines that a member is offering accounting services to the public in circumstances which require the member to hold a Certificate of Public Practice, to lodge a complaint with the



Professional Conduct Committee. That sub-rule is confined to a complaint arising out of the conduct of a member who is offering accounting services to the public without an appropriate Certificate. It does not authorise the Executive Board to lodge a complaint about other matters.

[33] Rule 20.6(c) empowers the Practice Review Board (not the Executive Board as in r 18.11) to lodge a complaint with the Professional Conduct Committee on completion of a practice review in respect of the alleged failure of a member to maintain professional standards or to comply with the Institute's Act, rules or code of ethics. The scope of the Professional Conduct Committee's power to lodge a complaint under r 20.6(c) is broad and indeed would appear wide enough to cover all matters which might call for disciplinary action. But the powers of the Professional Conduct Committee under r 20 may be exercised only upon completion of a practice review.

[34] Rule 21 provides for the proceedings of the Professional Conduct Committee which is primarily an investigative body having the responsibility of managing and, to some extent, filtering complaints. Serious matters are to be referred to the Disciplinary Tribunal for hearing. Less serious matters may result in a member being admonished or in a range of lesser sanctions being imposed, but only with the written agreement of the member.

[35] Relevant provisions of r 21 are as follows:

**Lodging a complaint**

21.1 Any person may lodge a complaint with the Institute concerning a member. Every complaint shall be:

- (a) In writing.
- (b) Supported by any statutory declaration or additional information the Professional Conduct Committee may require.

**Initial investigation and decision**

21.2 On receipt of a complaint, the Professional Conduct Committee shall, unless the complaint is frivolous, vexatious, and/or of an insufficient nature to warrant being referred to the member and is able to be resolved without being so referred:

- (a) send to the member concerned copies of:
  - (i) the complaint;
  - (ii) any supporting statutory declaration;
  - (iii) any supporting additional information;
- (b) require the member within 14 days to respond in writing to all matters raised in the complaint and any other matters required by the Professional Conduct Committee.

21.3 The Professional Conduct Committee shall investigate the complaint and make a decision and adopt one or more of the following courses of action:

- (a) Decide that no further action be taken.
- (b) Require the member, subject to the agreement of the complainant, to submit any fee dispute to the Fees Resolution Service.
- (c) Informally admonish the member, whether or not they have breached the Act, Rules and the Code of Ethics.
- (d) Set the matter down for final determination, and decide whether the Professional Conduct Committee requires the member to attend at the final determination.
- (e) Where the matter is not set down for final determination, order the member to pay costs to the complainant and/or the Institute of such amount (if any), as the Professional Conduct Committee thinks fit.
- (f) Investigate and make a decision in regard to any other matter arising out of the complaint or the Professional Conduct Committee's investigation of the complaint.

21.4 For the purposes of any investigation, the Professional Conduct Committee may:

- (a) make, or employ any person to make, such preliminary inquiries as the Professional Conduct Committee considers necessary; and
- (b) require any member or former member of the Institute or the New Zealand Society of Accountants to whom the investigation relates to provide the Professional Conduct Committee or any person so employed within 14 days or such longer period of time as the Professional Conduct Committee thinks fit any documents, things or information that are in the possession or under the control of that member or former member and that relate to the subject matter of the investigation; and
- (c) take copies of any documents that are provided to the Professional Conduct Committee; and

- (d) require the member at the member's own cost to attend before the Professional Conduct Committee on at least 14 days notice to confer regarding the complaint; and
- (e) request the complainant at the complainant's own cost to attend before the Professional Conduct Committee on at least 14 days notice to confer regarding the complaint.

### **Final determination**

21.5 If the Professional Conduct Committee decides that the complaint or any matter arising out of the complaint or the Professional Conduct Committee's investigation of the complaint be set down for final determination, it shall send a notice of the decision to the member concerned:

- (a) setting out the reasons why the complaint has been set down for final determination;
- (b) advising (if the Professional Conduct Committee has so decided under r 21.3(d)) that the member is required to attend the final determination;
- (c) advising (if the Professional Conduct Committee has not decided to require the member to attend the final determination) that the member has 14 days to notify the Committee if the member wishes to attend and be heard at the final determination.

21.6 In making the final determination in respect of a complaint, the Professional Conduct Committee shall adopt one of the following causes [sic] of action:

- (a) Determine that no further action should be taken.
- (b) Admonish the member and enter the details of the admonishment on the member's record held by the Institute.
- (c) When a complaint would otherwise warrant being referred to the Disciplinary Tribunal, with the written agreement of the member, make one or more of the following orders:
  - (i) the member shall waive the whole or part of any fee agreed to or invoiced;
  - (ii) the member shall return the whole or part of any fee already paid;
  - (iii) appointing another member to undertake or complete work that the member had been engaged to perform;
  - (iv) the member shall be reprimanded;
  - (v) the member shall be severely reprimanded;

- (vi) the member shall pay to the Institute a sum as may be determined;
  - (vii) the member shall pay costs to the complainant and/or the Institute;
  - (viii) the member shall complete any professional development course or the member shall engage an adviser or tutor at the member's own expense.
- (d) Refer the matter to the Disciplinary Tribunal for hearing.
- (e) Where the matter has not been referred to the Disciplinary Tribunal for hearing, order the member to pay costs to the complainant and/or the Institute of such amount (if any), as the Professional Conduct Committee thinks fit (which amount may include part or all of the costs to the complainant of attending before the Professional Conduct Committee pursuant to r 21.4).

[36] Rule 21 goes on to make detailed provision for further disciplinary proceedings including the proceedings of the Disciplinary Tribunal. It is unnecessary, however, to consider those later provisions because in this proceeding the Court is concerned only with the progress of a complaint up to the point at which it is received by the Professional Conduct Committee. It is sufficient simply to note that the Disciplinary Tribunal is required to convene a hearing and that, if a complaint is proved, it may impose one or more of a range of penalties, including removal of a member's name from the register, or suspension from membership.

### **Events prior to the investigation**

[37] It is necessary to commence by referring briefly to discussions which occurred between the plaintiff and the New Zealand Society of Accountants (as the Institute was then known), in 1993. On 9 July 1993 the Society wrote to the plaintiff suggesting that she was in breach of r 60 of the Society's Rules as they then were, and asking for the plaintiff's comments on the suggestion that BCA offered services consistent with those offered in the chartered accounting profession. If that was indeed the case then the plaintiff required a Public Practice Certificate.

[38] Correspondence ensued between the plaintiff's solicitors and the Society, but ultimately the Society accepted that in light of the rules as they then stood, the plaintiff was not obliged to hold a Public Practice Certificate.

[39] There matters stood until 29 January 2003 when the issue was revived by way of a letter written by the Institute to the plaintiff, in which the plaintiff was advised that it had come to the attention of the Institute that she “may be offering accounting services to the public through a company that manages body corporate entities”.

[40] The plaintiff was warned that she appeared to be in breach of the Rules and could face disciplinary action. She was accordingly asked to provide details of the nature of the services she provided, the vehicle through which they were provided and the level of annual fees derived from her activities. The letter was signed by Mr Mark Shennan, who held the post at the Institute of director (professional assurance/head of practice review). The letter was the first communication received by Ms Beaton on this topic for some 10 years.

[41] Although the letter came to her without prior warning, it is a reasonable inference that Mr Shennan’s decision to write was prompted by an inquiry made by a member of the public about a week earlier, of Mr T H L Davies, who is director (professional support) at the Institute. His file note, produced in evidence and dated 22 January 2003, discloses that on that day he had received an inquiry from a person who had been engaged in a dispute with BCA, as to whether a levy in respect of a body corporate administered by BCA had or had not been paid. Mr Davies’ work sheet reveals that, having received the complaint on that day, he checked the plaintiff’s file and noted that an issue, ultimately resolved, had arisen the previous year. A further note in the work sheet indicates that Mr Davies reviewed that old complaint file and the plaintiff’s file on 29 January 2003. That is the date of Mr Shennan’s letter to the plaintiff. The juxtaposition of these activities within the Institute suggests that it is a proper inference that Mr Shennan’s letter was generated in the light of Mr Davies’ investigations.

[42] Understandably enough, the plaintiff took the initial view that the matters raised in Mr Shennan’s letter simply revisited an issue which had been settled some 10 years earlier. She referred the letter to her solicitors who wrote to the Institute to remind it of the resolution achieved on 12 February 1993.

[43] On 26 March 2003, the Institute wrote again to the plaintiff. This letter is signed by Mr Davies, rather than Mr Shennan. It commences by acknowledging receipt of the letter from the plaintiff's solicitors, but says simply that:

The present inquiry by Mr Shennan has no connection with that earlier complaint, but relates to information recently received which gives reasonable cause for the Institute to inquire as to the services offered by your company, and to consider these in terms of the current Rules of the Institute and their interpretation in today's business environment.

[44] The letter concludes with a renewal of the request made by Mr Shennan in his earlier letter for the information set out in that letter. The "information recently received" referred to by Mr Davies would appear to consist of the complaint to which I have earlier referred. That of course related to a dispute about payment of a levy, and did not relate in any way to the extent of the services being provided by BCA. There is no evidence from the Institute as to there being any other basis upon which Mr Davies was able to say that the Institute was acting upon "information recently received".

[45] This is borne out by Mr Davies' work sheet which plainly relates the course of correspondence with the plaintiff and her solicitors to the complaint received by him, and indeed, there is a note to the effect that he e-mailed the complainant at the end of March 2003 reminding her that he was still seeking information from the plaintiff. So at least in Mr Davies' mind the inquiries the Institute was making of the plaintiff were related to the complaint the Institute had received.

[46] On 17 April 2003 the plaintiff's solicitors responded to Mr Davies. They asked that the Institute correspond with them, the plaintiff having instructed them to receive and respond to such correspondence. The solicitors expressly asked what information had been "recently received" by the Institute, in order that they may provide the information sought by the Institute.

[47] On 29 April 2003, the Institute responded to the plaintiff's solicitors by way of a letter signed by Mr Shennan. It commences by expressing bemusement at the plaintiff's willingness to incur legal costs in response to the Institute's inquiry, a comment which is perhaps somewhat surprising. The correspondence from the

Institute to date had raised matters of some importance, and the plaintiff was undoubtedly entitled, if she wished, to take legal advice and to have her solicitors correspond with the Institute on her behalf.

[48] The 29 April letter from the Institute then refers to “discussion of another matter”, in the course of which it had come to the Institute attention that the plaintiff might require a Certificate of Public Practice, although the other matter was not identified. The letter notes also that BCA described itself in its literature as New Zealand’s largest body corporate secretariat. If that is so, then it is understandable that the Institute would regard the issue as one of real importance. By the same token, the plaintiff’s decision to instruct solicitors is readily understandable on that score alone.

[49] The letter then sets out a number of activities which the Institute understood were of the type which an entity providing body corporate services would undertake, and indicates that the Institute regarded such activities as falling within those commonly carried on by chartered accountants in public practice. The letter expresses the view that the fact the services might be provided only to a narrow segment of the public, such as body corporates, was not relevant to the determination of whether a Certificate of Public Practice was required. The letter concludes by indicating that the rules had changed since 1993 to the extent that it was appropriate to revisit the matter now, and by once more seeking relevant information from the plaintiff.

[50] Importantly the letter included the following assurance which has assumed some importance in the litigation. Mr Shennan said:

It is not our intention, despite the wording of an earlier letter, to initiate disciplinary proceedings against Ms Beaton for failing to have a certificate up to now.

[51] The plaintiff was asked for confirmation or otherwise that she and/or BCA provided services of the nature listed earlier in the letter, and was advised that if such services were provided, then the Institute would require the plaintiff to obtain a Certificate of Public Practice. There was then something of a hiatus. Neither the

plaintiff nor her solicitor replied immediately to the Institute's letter of 29 April 2003.

[52] On 16 July 2003 Mr Davies received another inquiry from a member of the public. The inquirer sought advice as to whether it was appropriate that body corporate financial statements prepared by BCA and presented to a body corporate AGM, should be accompanied by an audit report which related to a period earlier than that under review.

[53] Mr Davies' work sheet indicates that, over a period of about a week in July 2003, he made a number of inquiries culminating in his advice to the first inquirer, to the effect that the Institute had a "jurisdictional problem" in that the plaintiff did not have a Certificate of Public Practice. His note indicates that he told that inquirer that the Institute was giving the plaintiff until the end of August to obtain one. That such was the intention of the Institute had not at that time been notified to the plaintiff.

[54] On 28 July 2003 Mr Shennan wrote again to the plaintiff's solicitors, pointing out that no reply had been received to his letter of 29 April 2003, that the Institute proposed to proceed on the basis that the plaintiff was in public practice, but not the holder of a Certificate of Public Practice, and that the plaintiff was required to seek a Certificate immediately. This letter contained the following paragraph:

We said in our earlier letter that it was not the Institute's intention to initiate disciplinary proceedings against Ms Beaton for failing to have a certificate up to now, but clearly that position cannot hold into the future. Accordingly, we expect Ms Beaton to apply for a Certificate of Public Practice by 31 August 2003, failing which the Institute will consider disciplinary proceedings.

[55] On 29 August 2003, the plaintiff's solicitors responded in writing. They advised that the plaintiff wished to apply for a Certificate of Public Practice and sought assistance as to the appropriate form of application. The letter concludes by indicating that:

We wish to now pursue this to a conclusion as soon as possible.

[56] There followed an e-mail correspondence between the Institute and the plaintiff's solicitors over a period of some months. The necessity for the provision



of references was identified, but there was apparently a delay in obtaining one reference. It seems from the documentary material before the Court, that the delay arose at least largely in the office of the plaintiff's solicitors.

[57] By early February 2004, it appears that the Institute had had enough, because on 11 February 2004, the Chief Executive of the Institute, Mr Muriwai, wrote direct to the plaintiff as follows:

Dear Ms Beaton

CERTIFICATE OF PUBLIC PRACTICE

You will recall correspondence last year between the Institute and you and with your solicitor, Clinton Baker, regarding the nature of the services offered by your company, Body Corporate Administration Limited, and whether they were such that you should hold a certificate of public practice (CPP). the Institute was concerned that your activities were such that you should hold a CPP, and your solicitor indicated on 29 August that you wished to apply for a CPP. Michael Algar of the Institute advised Mr Baker on 2 September how you should do this.

To date, five months on, we have not heard further from you, and accordingly the Institute's Executive Board has decided, under the terms of r 18.9, to instruct the Institute's Practice Review Board to investigate and report on the services you are providing via your company.

A member of the Institute's practice review team will contact you shortly, and I ask that you provide whatever information and access to records that that person requires to complete the investigation.

Yours sincerely,

'Garry Muriwai'

Chief Executive

[58] On 18 February 2004 the plaintiff's solicitors responded to the effect the delay had arisen by reason of the solicitor's inadvertence in not chasing up one of the referees who was to supply a document accompanying the plaintiff's application for a certificate, and promising expedition. On the same date, the solicitors separately sent the plaintiff's application to the Institute.

[59] On 24 February 2004, Mr Muriwai wrote to the plaintiff's solicitors acknowledging that progress was being made in respect of the plaintiff's application for a Certificate of Public Practice but advising that:

In the circumstances, the Institute still considers it appropriate that a review be undertaken as advised in our letter of 11 February 2004.

[60] Thereafter, there appears to have been no communication between the plaintiff and the Institute until early August 2004 when contact was made with the plaintiff by an investigator appointed by the Institute.

[61] Presently I will turn to deal with the detail of the investigation. In the meantime it is necessary to refer briefly to the formal arrangements made within the Institute in respect of the proposed review of the scope of the plaintiff's practice. The letter of 11 February 2004 from the Institute to the plaintiff recorded the decision of the Executive Board of the Institute "under the terms of r 18.9" to instruct the Practice Review Board to investigate and report on the services provided by the plaintiff through BCA. That was a decision only the Executive Board could make.

[62] The Institute is unable to locate the relevant resolution. Mr Keith Wedlock, then a member of the Executive Board, has produced a copy of a resolution he signed on 10 February 2004, and which was returned by him by facsimile to the Institute. That resolution reads as follows:

That under r 18.9 the Board instructs the Practice Review Board to investigate and report on whether member Paula Beaton (Membership No. 20542) is offering accounting services to the public in circumstances which require the member to hold a Certificate of Public Practice.

[63] Mr Wedlock further says that in his experience on the Executive Board no investigator would have been appointed unless a resolution had been passed by the Executive Board.

[64] The Administrative Officer of the Institute responsible for procuring the resolution is now overseas and has no independent recollection of the matter apart from the records of the Institute. Before the Court, there is an e-mail from the person concerned dated 15 July 2005, confirming that all Executive Board members, save for one who did not reply, approved the appointment of the investigator. While the e-mail is not strictly admissible evidence, I am satisfied in any event on the basis of Mr Wedlock's evidence that the Institute did indeed prepare a resolution and that it

would not have proceeded as it did had the resolution not been approved by the requisite number of members of the Executive Board.

[65] At this point it is appropriate to note that the proposed investigation was to be conducted in terms of r 18.9. That is the way in which the Institute approached the matter internally, by procuring a resolution of the Executive Board expressed to invoke the powers contained in r 18.9, and the basis upon which the investigation was notified to the plaintiff. Accordingly, the investigation which followed was both intended by the Institute to be a r 18.9 investigation, and understood by the plaintiff to be so. It was therefore, in terms of that sub-rule, an investigation into whether the plaintiff was offering accounting services to the public, in circumstances which required her to hold a Certificate of Public Practice.

### **The Investigation**

[66] Oddly enough, as noted above, the flurry of activity which produced the resolution of the Executive Board, and the letter to the plaintiff of 11 February 2004, was followed by a period of some six months during which no progress whatever was made. Ultimately, the plaintiff was contacted by an investigator appointed by the Institute, Ms Tracy Grant. On 13 August 2004, Ms Grant, along with a colleague, visited the plaintiff at BCA's offices. There was a further attendance by Ms Grant alone on 6 September 2004.

[67] Ms Grant herself was not a member of the Practice Review Board. She was appointed by the Board to conduct the investigation on its behalf. She says her instructions came from Mr Shennan (presumably orally), and they were to investigate the operations of the plaintiff and BCA in order to determine whether or not accounting services were being provided to the public. Ms Grant is a member of the Institute and holds a Certificate of Public Practice, has a Bachelor of Commerce from Auckland University, has been a member of the Institute since 1988, and has gained significant experience since that time working in New Zealand and overseas. She has worked for the Practice Review Unit since October 2000. She says that the investigation she conducted accorded with that notified to the plaintiff by Mr Muriwai in his letter to her of 11 February 2004.

[68] There is a measure of agreement between Ms Grant and the plaintiff, in that both confirm that Ms Grant sought access to a wide range of documents relating to BCA's business and asked for explanations about aspects of BCA's systems and procedures. Both documents and explanations were readily provided by the plaintiff.

[69] Ms Grant explains in her affidavits that, in order to determine the nature of the services provided by BCA, she was required to investigate precisely what BCA did, how its services were carried out and whether they were performed in accordance with the documented procedures explained to her by the plaintiff. She says she simply followed the same process as she normally followed when required to carry out such an investigation by the Practice Review Board. Ms Grant says she received no instructions whatever from Mr Davies in relation to her investigation, had no preconceived ideas about what to look for, and had no views about what she might find at any stage of her investigation. In particular, she says she had not been briefed to undertake an undisclosed practice review; that is, she understood from the outset that she was conducting a r 18.9 review and not a practice review properly so-called. Having said that, it is worth noting that her evidence is to the effect that the procedures she undertook were materially the same as those she would undertake in the course of a practice review.

[70] For her part, the plaintiff says that she readily co-operated with Ms Grant and took no further legal advice (although she had had extensive legal assistance up to that point), because she regarded the investigation as confined to that mandated by r 18.9, in respect of which she already had assurances to the effect that the Institute would not take disciplinary action under r 18. Further, the plaintiff says, she had taken steps to obtain a Certificate of Public Practice, and that was another factor which justified her as regarding the investigation as routine.

[71] On 23 September 2004, Ms Grant wrote to the plaintiff setting out her findings and inviting the plaintiff to provide written comments thereon. The findings were contained in a schedule of some 13 pages.

[72] It is relevant to note at this point that the plaintiff was charged a fee for the investigation. the Institute is authorised to charge a fee in respect of a practice

review (r 20.4(d)) but there is no equivalent power to charge for an investigation conducted under r 18.9.

[73] The 13 page schedule reviewed the plaintiff's practice in copious detail and commented on a significant number of issues identified by Ms Grant. The question of whether the plaintiff was providing accounting services to the public – the issue to which the plaintiff believed the investigation was confined – is the very last matter discussed in the report, and receives only brief mention on the last page. The plaintiff provided a detailed response by letter dated 21 October 2004.

### **The complaint**

[74] On 25 November 2004, Mr Gray (the acting head of practice review) wrote to the Practice Review Board setting out his view that there appeared to be instances of breaches by the plaintiff of certain of the Institute's professional standards. It is unnecessary in this judgment to set out the detail of that complaint. It is sufficient merely to say there are differences of opinion between the plaintiff and the Institute as to the way in which interest has been accounted for, as to the operation of certain client trust accounts and in respect of the manner in which accounting for professional fees was undertaken.

[75] On 9 December 2004, the Practice Review Board conducted a telephone conference in which Ms Grant and others participated. The Board recommended that a complaint be laid with the Professional Conduct Committee.

[76] On 19 January 2005, the Practice Review Board laid a written complaint, expressed to be in accordance with r 20.6(c). That sub-rule authorises the Board to lay a complaint but only, of course, in the context of a practice review conducted under the provisions of r 20. It is not apposite where r 18.9 is relied upon.

[77] In addition to the topics of concern mentioned above, the complaint referred expressly to the offering of services that would qualify as accounting services to the public without holding a Certificate of Public Practice (the issue which had generated the Institute's initial interest in the plaintiff), and the alleged operation of

the plaintiff's business through a corporate structure without approved company status.

[78] On 31 January 2005, the plaintiff was advised of the complaint laid by the Professional Conduct Committee, and was required to respond within 14 days. On 14 February 2005, the plaintiff's legal advisers provided a detailed written response which in addition to addressing the substantive issues arising from the complaint, gave notice of challenge on administrative law grounds. Further correspondence ensued.

[79] On 13 April 2005, solicitors acting for BCA (not the plaintiff's solicitors), wrote to the Institute advising that the plaintiff's shareholding in BCA had been acquired by their client, a Mr G H Kwok, formerly the general manager of the company and now its Executive Director, and that the plaintiff had resigned her directorship. Mr Kwok was not a member of the Institute. The solicitors sought the return of documents which had been supplied by the plaintiff to Ms Grant, arguing both that the Institute had had no power to take copies of the documents in the first place, and that without prejudice to that contention, the change in shareholding deprived the Institute of any further jurisdiction in the matter.

[80] The Director/Professional Conduct of the Institute replied on 20 April 2005, returning the original documents but retaining photocopies. Correspondence during May 2005 between the plaintiff, BCA's new solicitors and the Institute firmly established BCA's future position: it was not prepared to co-operate in any way with the Institute's investigation and would not supply any further information or documents to that body.

[81] The complaint to the Professional Conduct Committee has made little progress. This proceeding was commenced on 19 May 2005. the Institute has undertaken to the Court that the Professional Conduct Committee will not advance its investigation or utilise the documents obtained from the plaintiff, pending the outcome of the proceeding.

### **Threshold issue: the motives of the Institute**

[82] At this point it is appropriate to consider an argument which underpinned much of the plaintiff's case. It lay at the heart of the plaintiff's third cause of action and was at least a factor in certain other arguments advanced for the plaintiff. The issue in question is whether in launching and pursuing its investigation, the Institute was acting in good faith. Because the issue is pivotal to some aspects of the plaintiff's argument, it is convenient to deal with it at the outset, and in so doing, to consider in particular the plaintiff's third cause of action.

[83] The plaintiff pleads that the Institute's decision to initiate a r 18.9 investigation was simply a pretext to conduct a general practice review in the light of the two inquiries from BCA clients to which I have earlier referred, with a view to lodging a complaint not necessarily related to the question arising under r 18.9. The plaintiff claims that, in so doing, the Institute exercised its powers unreasonably and/or for an improper purpose. Accordingly, the plaintiff seeks an order quashing the decision of the Executive Board to initiate a r 18.9 investigation into the plaintiff, a further order quashing the decision of the Practice Review Board to lodge the complaint laid under r 20.6(c), and an injunction restraining the Professional Conduct Committee from further inquiring into and adjudicating upon the complaint of the Practice Review Board.

[84] There is no doubt that a decision reached fraudulently, in bad faith or otherwise improperly, may be held to be exercised invalidly: see for example *R v Leigh (Lord)* [1897] 1 QB 132, and *New Zealand Wool Board v Commissioner of Inland Revenue*, (1999) 19 NZTC 15,082 at 15,108-15,110. Even where a decision-making entity acts responsibly in the sense that its motives are proper, it is not entitled to adopt a particular procedure when there exists an alternative procedure which is designed to accommodate the real objectives of that entity: *Poananga v State Services Commission* [1985] 2 NZLR 385, 394-5 per Cooke J. It is necessary to distinguish between alternative powers where they differ in their purpose and the occasions upon which each is exercisable: per Somers J at p 397.

[85] Here, Mr Muir submits that the purported objective of the Executive Board was to conduct an investigation into whether the plaintiff was providing accounting services to the public, but that its real and self confessed objective was to conduct a review of the plaintiff's practice with a view to preferring a complaint against her, if its suspicions, aroused by the inquiries received from two of her clients, were thought to be confirmed by the results of the investigation. The inquiries concerned were made to Mr Davies, and they were largely unrelated to the issue of whether the plaintiff through BCA was practising in breach of r 18. One inquiry related to BCA's claim to a levy said by the client to have already been paid. The other related to the currency of an audit report which was annexed by BCA to a statement of receipts and payments.

[86] In advancing this argument, Mr Muir relies heavily on the role of Mr Davies, and in particular upon Mr Davies' memorandum of 9 February 2004, in which, having referred to the two informal complaints mentioned above, he says:

I was concerned that the Institute look into the informal complaints as they had undertones of dishonesty on the part of Ms Beaton.

Later in the same memorandum he says:

I believe the Institute should look into Ms Beaton's operations as soon as possible. Under r 18.9 the Executive Board can instruct the Practice Review Board to investigate and report on whether a member is offering services to the public. If the member is found to be doing so without a CPP the Board can either issue a CPP or lodge a complaint.

If the Board wants to request an investigation to confirm that Ms Beaton's activities required a CPP, a practice reviewer could be sent to examine her activities, including the state of her trust account. If this was found not to comply with the requirements of PS-2, then a complaint could be lodged by the Institute itself, and the matter fully looked into.

[87] The memorandum concludes with a request that, because the Executive Board was not to meet again until March, the Board delegate to the Chief Executive the authority to request an investigation. It concludes:

If this could be put in place quickly, the operations of Ms Beaton's trust account could be examined more speedily.



[88] The Executive Board did indeed move with considerable speed. Its members signed a resolution authorising the Chief Executive to request an investigation, and all was accomplished within 48 hours of Mr Davies' memorandum. Curiously, as I have earlier observed, nothing was thereafter done for some six months.

[89] Mr Muir is highly critical of Mr Davies' memorandum and the steps which immediately followed it. He points out that the plaintiff was neither informed of the suspicions of dishonesty already entertained by Mr Davies, nor what he claimed to be the "collateral purpose" of the r 18.9 investigation. He further submits that the plaintiff co-operated fully in what she believed was a r 18.9 investigation, on the basis that:

- a) It was necessary for her to afford full access to BCA's records because that was a corollary of the r 18.9 investigation which was to precede the grant of a Certificate of Public Practice;
- b) The investigation was taking place against the background of previous assurances that no disciplinary consequences would follow from a finding that BCA was indeed offering accounting services to the public.

[90] Mr Muir argues that Ms Grant simply embarked on a practice review from the outset, paying no more than lip service to the nominal terms of the Executive Board's r 18.9 appointment. That much is plain he submitted, from Ms Grant's report, which speaks of her "review of your [ie the plaintiff's] practice", and he says that Ms Beaton was simply "set up" - the Institute purported to act for one purpose (to determine whether the plaintiff required a Certificate of Public Practice), when its real purpose was to conduct a full practice review, and to lay a complaint if deficiencies were identified.

[91] The need, or possible need, for the plaintiff to have a Certificate of Public Practice was first revived by Mr Shennan in his letter to the plaintiff of 21 January 2003. Correspondence followed, and on 28 July 2003 a deadline was imposed of 31 August 2003. The plaintiff was notified that an inquiry could be commenced if she

had not applied by the latter date for a Certificate. The plaintiff elected to make an application but was dilatory in proceeding with it so that, five months having elapsed after the deadline, the Executive Board determined to appoint an investigator and to proceed under r 18.

[92] The immediate trigger for that decision was, clearly enough, Mr Davies' memorandum. Mr Davies' interest in the plaintiff plainly had its genesis in the inquiries received from the plaintiff's clients.

[93] It is important that the Court does not automatically impute to the Executive Board the motives or objectives of Mr Davies who is not a member of the Executive Board, nor of the Practice Review Board. He is an Institute employee whose role appears to be to field and screen initial inquiries from clients of the Institute's members. While Mr Davies' memorandum of 9 February 2004 is before the Court, there is little to indicate the precise steps taken within the Institute which led to the making of a decision by the Executive Board to conduct an investigation into the plaintiff's practice. It is not known whether Mr Davies' memorandum was provided to members of the Executive Board, nor indeed is it known whether any of the material appearing in the memorandum was otherwise made known to members of the Board. What is known is that in July 2003, the plaintiff was put on notice that an investigation under r 18 would be commenced if she did not make application for a Certificate of Public Practice by 31 August 2003, and although she notified an intention by that date to make an application, the formalities surrounding it had still not been completed on her part by February 2004.

[94] Mr Muir asks me to draw an inference that the Executive Board authorised a r 18 investigation with the real purpose of conducting a full scale practice review, which might result in a complaint to the Institute if matters of concern were revealed. That is not an inference I am prepared to draw, for three reasons. First there is little to support the suggestion that Mr Davies' concerns ought to be regarded as those of members of the Executive Board.

[95] Second, the Executive Board is the executive body of the Institute. It carries into effect the policy decisions of the Council, is elected by the Council of the

Institute at every national conference, and comprises the President, the First Vice President, the Second Vice President, the Chief Executive Officer and six other members. So it is a senior body, comprising, it is to be assumed, experienced members of the Institute who have the confidence of the profession. An improper motive such as that for which the plaintiff argues, is not lightly to be attributed to such a group.

[96] Third, there is evidence which strongly suggests it would not be right to find that the Executive Board was acting duplicitously. Despite the celerity with which the Institute employees acted in procuring a resolution of the Executive Board authorising the investigation, nothing occurred thereafter for a full six months. Had the Executive Board shared Mr Davies' concerns, then it is reasonable to assume it would have ensured that the investigation would be undertaken with some speed. That did not occur. The delay is consistent with a proposed investigation which was thought to be of a routine nature.

[97] I do not overlook the fact that members of the Board were asked to assent to a resolution by return facsimile, rather than wait until the Board's regular monthly meeting in March, but in the circumstances already known to the Institute – a correspondence extending over more than a year – it is not unnatural that, a decision having been taken by the Institute officers to seek an authorising resolution from the Executive Board, the paperwork would be attended to without delay.

[98] Even more compelling however, is the evidence of Ms Grant. It appears that she is an investigator employed by the Institute to undertake assignments such as arose here. She is not a member of the Executive Board, or the Practice Review Board. Her undisputed evidence is that she had never seen Mr Davies' memorandum before this litigation was commenced, and had never been advised of its contents. She received her instructions from Mr Shennan. Those instructions presumably were oral, because no relevant document has been produced to the Court. Neither is there any explanation for the delay in the commencement of the investigation. Ms Grant says she took no instructions from Mr Davies.

[99] In her detailed affidavits, Ms Grant says her instructions were simply to carry out an investigation under r 18.9 in order to assist the Executive Board to determine whether the plaintiff was carrying on a practice which required her to hold a Certificate of Public Practice. She received no detailed instructions as to how she should embark upon her task, and had no preconceptions about what she might find. She says she was obliged to look at the financial records of BCA in detail, in order to assess whether or not the plaintiff was supplying accounting services to the public. That involved, for example, a detailed examination of the relevant trust accounts. In the course of undertaking that exercise she identified matters of possible concern, which she included in her report.

[100] There is nothing in Ms Grant's evidence which in any way suggests she was under orders from the Executive Board to carry out her investigation in such fashion as to identify deficiencies in the plaintiff's practice. Had the Board intended from the outset that she conduct a wide-ranging review with a possible disciplinary outcome, then a reasonable inference is there would have been at least some communication to Ms Grant of the Board's purposes.

[101] It is relevant to note Ms Grant's evidence to the effect that the investigation she undertook was not materially different from a practice review which she would undertake under r 20 where the Practice Review Board determines to conduct a review in respect of a member's practice. That is an issue to which it is necessary to return later in this judgment. But for present purposes it does not follow at all that Ms Grant's apparently common approach to both r 18 investigations and r 20 practice reviews suggests impropriety of purpose on the part of the Executive Board.

[102] In order to accept the plaintiff's argument that the Institute, through the Executive Board, has acted unreasonably and/or for an improper purpose, it is necessary for me to reject Ms Grant's account of the instructions she received from Mr Shennan and her account of the manner in which she undertook her investigation. Her evidence is unchallenged and I am not prepared to reject it.

[103] The third cause of action is not supported by the evidence and therefore fails. My view of the evidence is relevant also to certain of the plaintiff's other causes of action to which I now turn.

#### **Allegedly unauthorised investigation**

[104] As a first cause of action the plaintiff pleads that there was no Executive Board resolution by which the Practice Review Board was authorised to conduct an investigation under r 18.9. It is further pleaded that there was no valid delegation in place pursuant to which an investigation could be commenced by any individual in the employ of the Institute or any of its bodies or committees.

[105] I have held on the evidence that, there was indeed a resolution of the Executive Board which authorised the Chief Executive to commence an investigation under r 18.9. That factual finding disposes of the first cause of action.

#### **Alleged absence of jurisdiction**

[106] The investigation authorised by the Executive Board and as undertaken by Ms Grant was under r 18.9. The r 18 procedure mandates a report by the Practice Review Board to the Executive Board, which may then, in terms of r 18.11, issue a Certificate of Public Practice and/or lodge a complaint with the Professional Conduct Committee. On its face, r 18 confines the role of the Practice Review Board, post investigation, to reporting to the Executive Board.

[107] Given the limited scope of r 18, complaints under r 18.11 by the Executive Board, are likewise confined to matters coming to the attention of the Executive Board by means of a report from the Practice Review Board. In other words, a r 18.11 complaint by the Executive Board will necessarily be to the effect that the member investigated has been offering accounting services to the public without a Certificate of Public Practice. Rule 18.11 does not authorise a complaint couched in wider terms.

[108] The restrictions imposed by the r 18 procedure no doubt lay behind the decision of the Practice Review Board, in lodging its complaint, to invoke r 20.6(c) which authorises the Practice Review Board (rather than the Executive Board), to lay a complaint at the completion of a practice review. Such a complaint may be lodged with the Professional Conduct Committee following completion of a practice review, wherever the Practice Review Board considers that a member has "... failed to maintain professional standards or has breached the Institute's Act, Rules or Code of Ethics". So the scope of a r 20 complaint may be much wider than that available under r 18. Moreover, it may be laid by the Practice Review Board itself. But r 20.6(c) may be invoked only where a practice review has been undertaken and completed.

[109] In her second cause of action the plaintiff pleads that, having been empowered to conduct a r 18.9 investigation and report thereon to the Executive Board, the Practice Review Board instead invoked r 20.6(c) which it had no entitlement to do. The plaintiff accordingly claims that the Practice Review Board acted outside the jurisdiction conferred by its appointment under r 18.9, and seeks an order quashing the decision of the Practice Review Board to lodge a complaint under r 20.6(c).

[110] It is not in dispute that the powers exercisable by the Practice Review Board are statutory powers, and that the exercise of those powers constitutes the exercise of statutory powers of decision in terms of the Judicature Amendment Act 1972: *Institute of Chartered Accountants of New Zealand v Bevan* [2003] 1 NZLR 154 (CA). The decision to conduct the investigation and the subsequent decision to lay a complaint under r 20.6(c), although steps precedent to possible disciplinary proceedings (which may of course never ensue), nevertheless fall under the umbrella of the jurisdiction to review conferred by the Judicature Amendment Act: see *Polynesian Spa Limited v Osborne* [2005] NZAR 408 [53]-[54] and [58]-[60].

[111] It is trite to observe that the Institute has an obligation to act in accordance with its own rules; and if it fails to do so, that failure may be reviewable.

[112] There is no detailed evidence as to the ordinary practice of the Institute with respect to the procedures adopted when initiating a practice review. Ms Grant simply deposes to adopting, in relation to her investigation under r 18.9, the same procedures as she would ordinarily undertake in respect of a practice review. Mr Reed told me from the bar that such reviews are often undertaken without warning. But even with unheralded reviews, it must logically be the case that those who are subjected to review will be aware of it, even if only at the time at which investigators present themselves at the offices of the practitioners concerned. In other words, as a matter of common sense, those who are subjected to a practice review will be aware the review is being undertaken, and the requirements of procedural fairness of themselves dictate that such notice must be given.

[113] A practice review may lead to the lodging of a complaint under r 20.6(c). Further, a practitioner whose practice is reviewed under r 20 is required to comply with r 20.4(a) which relates to the production of documents or other material in the member's possession or power, and with r 20.4(b) which requires a member to submit to an interview by the Institute investigators if required. Rule 20.5 imposes on members a positive obligation to co-operate generally in a practice review. It follows that a member upon whom such obligations are imposed must be made aware that a review is under way, before he or she can be expected to comply with those r 20 requirements.

[114] Mr Reed submitted that r 20 did not, of itself, require that the Institute give formal notice to a member of a practice review, and urged me not to place a "gloss" upon the rules. While there may be no formal provision for notice, the rules will simply not work if in practice a member is not entitled to notice of a practice review. No such notice was given, and indeed that is not surprising, because the Practice Review Board did not purport to conduct a practice review. Instead it understood itself to be acting upon an authorisation from the Executive Board to conduct a r 18 investigation, confined to the issue of whether the plaintiff was offering accounting services to the public without a Certificate of Public Practice. That was also how Ms Grant understood her task.

[115] While, as submitted by Mr Reed, it may well be that a r 18 investigation in a particular case might be conveniently carried on in conjunction with a r 20 practice review, the evidence does not suggest that that is what occurred here.

[116] Having said that, Ms Grant undertook a wide ranging investigation. It will be recalled that she approached her task on precisely the same basis as she would have approached a practice review itself. She said in evidence that it was necessary to do that in order properly to conduct her task under r 18. For example, she said the question of whether, and to what extent, BCA was acting for private clients required a detailed examination of BCA's trust account and the operation of that account.

[117] Mr Muir argued that that approach was not supportable. The difficulty for the plaintiff, however, is that there is no evidence to contradict what Ms Grant says. She has worked for the Practice Review Board since 2000 and will doubtless have acquired a good deal of experience since then. More widely, she has more than 15 years experience as a member of the Institute and has worked both here and overseas as a chartered accountant. In the absence of evidence to the contrary I am bound to accept what she says, namely that her task under r 18 necessarily involved a detailed examination of the plaintiff's practice, including in particular the state of the trust accounts maintained by her and by BCA.

[118] Ms Grant duly reported to the Practice Review Board but that Board, rather than reporting to the Executive Board as it was required to do under r 18.11, laid a complaint by letter dated 19 January 2005, with the Professional Conduct Committee. That complaint expressly invoked r 20.6(c), and commenced by advising that:

- a) A practice review of BCA had been conducted as the result of an inquiry into BCA by a member of the public;
- b) The matter of operating without a Certificate of Public Practice became secondary after a number of other issues were identified (in the course of the practice review investigation).



[119] Earlier, on 23 September 2004 Ms Grant had written direct to the plaintiff, advising “practice review has completed a review of your practice”, attaching a copy of the report, seeking the plaintiff’s written comments and enclosing an interim account for the cost of the review time to date. Such costs are payable in terms of r 20 where a practice review is undertaken. There is no equivalent provision under r 18.

[120] In the result, an investigation which commenced life under the umbrella of r 18.9, had apparently become transmuted into a r 20 practice review. That seems to be the only explanation for:

- a) The apparent failure of the Practice Review Board to report under r 18.11 to the Executive Board;
- b) Ms Grant’s reference in her covering letter of 23 September 2004 to the plaintiff, to the completion of a practice review;
- c) The charging of a fee by the Institute to the plaintiff in respect of the work undertaken by Ms Grant;
- d) The express reference in the complaint lodged by the Practice Review Board with the Professional Conduct Committee to r 20.6(c) and to the fact that a practice review had been conducted;
- e) The scope of the complaint which goes well beyond matters falling within r 18, and expressly refers to r 18 matters as having become “secondary after a number of other issues were identified”.

[121] While the Practice Review Board undoubtedly has jurisdiction to initiate and conduct practice reviews, there is no evidence that a formal review under r 20 was ever contemplated or authorised by that Board. Mr Reed did not contend otherwise. Instead, he submitted that the Court ought to construe rr 18 and 20 in a manner which gave effect to the clear purpose of the Act, namely to protect the public and the profession. In developing that argument he contended that the complaint ought

to be treated as being laid under r 21.1, and if the Court should hold that the Practice Review Board had no specific power to lay such a complaint, then it should find that the Board had incidental or implied powers to do so.

[122] In order to deal with the first of these two arguments it is necessary to consider first the scope of r 21 and then to determine whether the complaint in issue may be brought within it. Rule 21 provides that “Any person may lodge a complaint with the Institute concerning a member”. There follows a detailed procedure which involves a preliminary assessment of such complaints by the Professional Conduct Committee and then if necessary a determination by the Disciplinary Committee. The relevant portion of r 21 has been set out earlier in this judgment.

[123] Mr Muir submitted that r 21 is directed to external complaints by natural persons (including natural persons acting on behalf of corporate entities), and not by committees or boards of the Institute itself. He accepted however that the Practice Review Board may lodge a complaint pursuant to r 20.6(c) following completion of a practice review, and that such a complaint may relate to virtually any aspect of the member’s practice. The Executive Board likewise has a right to lodge a complaint, but it is confined to the r 18.11(b) procedure in respect of Certificates of Public Practice.

[124] Mr Muir pointed to the careful distinction made in the rules between the phrase “any person” and references elsewhere in the rules to the various boards and committees of the Institute, and argued that the choice of the phrase “any person” necessarily excluded the boards and committees of the Institute from the class of complainant who may lodge a complaint under r 21.1, in that they are simply creatures of the Institute and are not “any person” for the purposes of r 21. He further referred to the provision in r 21.1 for the lodging of statutory declarations, a requirement he claimed to be inappropriate where an entity within the Institute is the complainant. He drew the Court’s attention to the form of complaint provided by the Institute, which expressly refers to complaints by persons against “your chartered accountants”, and other references in the complaint form to the question of whether there had been a discussion with the chartered accountant and to the acceptability of

mediation. None of that, he argued, fits the case of a complaint by the Practice Review Board in the circumstances existing here.

[125] Mr Reed pointed out that the Institute is a body corporate, entitled to exercise all the rights, powers and privileges of a natural person: s 4 of the Act. He argued that a complaint lodged with the Professional Conduct Committee by the Practice Review Board is lodged by the Institute itself acting by a properly appointed Board. He said that given its entitlement to exercise all the rights, powers and privileges of a natural person, the Institute must be entitled to act under r 21 by lodging a complaint through a properly authorised board.

[126] In advancing that argument he relied generally on *The Auckland District Law Society v Leary* HC AK, M1471/84 12 November 1985, in which Hardie Boys J referred to a general principle applicable in disciplinary proceedings against law practitioners (and by implication as I understood Mr Reed, to similar proceedings against accountants). The principle is that persons being investigated were obliged properly to answer the substance of the charge against them and not simply to take shelter behind the burden of proof or to engage in a battle of tactics; the interests of justice, said Hardie Boys J, extend far beyond the interests of the practitioner concerned.

[127] While that is certainly a proper consideration it does not authorise the Court to declare to be valid, a complaint which otherwise does not fit within the Institute's rules. I accept however, that where a doubt arises as to the proper construction of the rules, then the Court should adopt that construction which gives effect to the evident purpose of the rules, and which advances the public interest in an effective complaints procedure. That was an approach adopted by Randerson J in *B v Canterbury District Law Society* [2002] 3 NZLR 113.

[128] It cannot be doubted that any natural person may lodge a complaint under r 21.1 and indeed I was informed from the bar by Mr Reed, that in practice the Chief Executive of the Institute regularly lays complaints in his own name, but in circumstances where the complaint is in truth that of the Institute itself. Such a

procedure is adopted, for example, in cases where a member of the Institute has been convicted of a criminal offence, but there is no available independent complainant.

[129] But the rules, read as a whole, do not on their face authorise bodies such as the Executive Board and the Practice Review Board to lodge complaints under r 21.1. They are unincorporated bodies, appointed by the Council of the Institute, for the purpose of undertaking specific tasks within the administration of the Institute.

[130] Although the term “person” is defined in s 29 of the Interpretation Act 1999 as including an unincorporated body for the purposes of statutory construction, the structure of the rules leads to the conclusion that the jurisdiction of the various administrative bodies within the Institute to lay a complaint is limited. The Executive Board may lodge a complaint under r 18.11(b), but the Practice Review Board may not do so. On the other hand, the Practice Review Board may lodge a complaint under r 20.6(c), following completion of a practice review. If either body had a general entitlement to lodge a complaint under r 21.1, the elaborate procedure laid down by rr 18 and 20 would be unnecessary.

[131] I conclude that the rules do not intend that either the Executive Board or the Practice Review Board have unrestricted power to lodge a complaint under r 21, but of course any member of either Board may do so since such a member would be “any person” for the purposes of r 21. I do not accept, as argued by Mr Muir, that the complaint form and information on the Institute web site suggest that the Institute itself and its members are precluded from making a complaint under r 21. That sort of argument was put forward in *B v Canterbury District Law Society* and rejected as a matter of construction of the Law Practitioners Act and the Rules of Professional Conduct relating to the legal profession. In his analysis of the Act and the Rules, Randerson J took into account the manifest objectives of the relevant provisions and satisfied himself that a construction which included practitioners within the phrase “members of the public” would give effect both to the statutory scheme and to the relevant complaints procedure.

[132] Similar considerations apply here. It is inevitable that many complaints received under r 21 will be from members of the Institute itself. Mr Muir’s argument

would exclude such complaints from consideration under r 21, and would leave an undesirable lacuna in the Institute's rules.

[133] I therefore conclude that neither the Executive Board nor the Practice Review Board has a general power to lay a complaint under r 21, and indeed, it is appropriate to observe that the Practice Review Board does not purport to have done so. Instead, it has relied upon its powers under r 20.6(c). The difficulty about that reliance is that, as discussed above, there has been no properly authorised and notified r 20 practice review.

[134] Mr Reed argued that if the Court should find that the Practice Review Board has no express power to lodge a complaint under r 21, the Court should nevertheless imply such a power. There is no doubt that, as a general rule, a power will be held to have been conferred by implication where its exercise is incidental to, or consequential upon, the proper exercise of a power expressly conferred upon a public body: see eg *Attorney General v Great Eastern Railway Co* (1880) 5 App Cas 473 (HL), *Commerce Commission v Telecom (NZ) Ltd* [1994] 2 NZLR 421, 430.

[135] Mr Reed submitted that a liberal interpretation of the rules was called for, to enable the Court properly give effect to the legislative scheme of the Act and the rules, including the objectives set out in s 5 of the Act, and in r 1. Those objectives include those of promoting, controlling and regulating the profession of accountancy by the Institute members.

[136] But to imply a consequential power of the Practice Review Board to lay a r 21 complaint, in the context of a r 18 investigation, would in my view simply render otiose the carefully constructed scheme of r 18. The Practice Review Board is, where authorised by the Executive Committee, empowered to conduct an investigation, and then to report to the Executive Board. It is for the Executive Board and not for the Practice Review Board to lay such complaint as may then be authorised by r 18.11. To imply the power for which Mr Reed contends, would simply be to fly in the face of the scheme of r 18.

[137] Mr Reed submitted that unless such an incidental power was confirmed by the Court, the profession's disciplinary process would be brought into disrepute. I do not accept that. A complaint might properly be laid by, for example, the Chief Executive of the Institute, if it was thought necessary to lay a r 21 complaint, as the result of matters arising out of a r 18 investigation. Of course, the Executive Board itself might lay a complaint under r 18.11 where the complaint was confined to issues arising out of the failure of the member concerned to hold a Certificate of Public Practice.

[138] Moreover, the Practice Review Board could simply resolve to initiate a practice review under r 20. Following the completion of such a review, the Practice Review Board itself would enjoy the wide powers of complaint contained in r 20.6(c). As a matter of practice, no doubt, a r 20 practice inquiry could be engrafted upon an existing r 18 investigation, but that did not occur here.

[139] I return to the plaintiff's pleading. In her second cause of action the plaintiff alleges that in purporting to lodge a complaint pursuant to r 20.6(c), the Practice Review Board acted outside the jurisdiction conferred on it by its appointment under r 18.9. In my view, the plaintiff has made out her case to that effect.

### **Legitimate expectations/natural justice**

[140] The plaintiff pleads as her fourth cause of action that, having regard to the advice contained in the Institute's letters of 29 April 2003 and 11 February 2004, she entertained the legitimate expectation that:

- a) The sole purpose of the Practice Review Board's investigation was to determine whether the plaintiff and/or BCA was offering accounting services to the public;
- b) All documents requested and uplifted by the Practice Review Board during the course of its investigation would be used in furtherance of that inquiry and no other;

- c) Provided that the plaintiff applied for a Certificate of Public Practice no disciplinary proceedings would be initiated against her in the event of a finding that she and/or BCA were offering accounting services to the public.

[141] The plaintiff further pleads that neither the Institute nor the Practice Review Board put her on notice that it was conducting a general practice review pursuant to r 20, or that the documents or information sought to be obtained were to be used for any purpose other than that specifically identified in the Institute's letter of 11 February 2004. The plaintiff pleads that the Institute's failure to do so amounts to a breach of an obligation to the plaintiff to observe the requirements of the principles of natural justice.

[142] In argument Mr Muir was inclined to expand the range of legitimate expectations held by the plaintiff beyond those pleaded. In carrying this part of the argument for the Institute, Mr Morten as he was entitled to, argued that the plaintiff was bound by her pleadings and that the Court ought not to entertain arguments which were not founded on the statement of claim.

[143] There is force in Mr Morten's complaint. In any event, much of the material discussed by Mr Muir in argument was subsumed in the legitimate expectation grounds pleaded. Accordingly, I propose to focus upon the pleadings.

[144] Both counsel relied upon judgment of Randerson J in *New Zealand Association for Migration and Investments Inc. v Attorney General* HC AK M1700/02 16 May 2003. At paragraph [139] of his judgment, His Honour said:

[139] Having said that, there are at least some principles in this field which may, with reasonable confidence, be regarded as settled. The general principle was formulated by the Privy Council in *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 All ER 346, 351:

... when a public authority has promised to follow a certain procedure, it is in the interests of good administration that it should act fairly and should implement its promise, so long as it does not interfere with its statutory duty. ... The principle [is] that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty. ...

[145] As His Honour observed (paragraph [158]), the intensity of the Court's scrutiny of an impugned decision may vary. Where a very specific promise is made the Court is likely closely to examine a decision to ensure that legitimate expectations are not unfairly thwarted. To amount to a legitimate expectation, it must in the circumstances be reasonable for the affected person to rely on the expectation (paragraph [143]). While it is not settled whether detrimental reliance by the affected party is required, the presence or absence of such reliance is undoubtedly a relevant factor (paragraph [144]). The first question will be the extent to which a public authority has committed itself, whether by practice or by promise (paragraph [146]). Overall, the concept of legitimate expectation is an aspect of the administrative law principle which requires governments and public authorities to act fairly and reasonably (paragraph [141]).

[146] In the present case, the plaintiff says that by promulgating its rules, the Institute has created a legitimate expectation that the Institute itself will observe the provisions of the rules and act in accordance with their requirements, and that those expectations have not been met in the respects pleaded in her statement of claim.

[147] I turn to consider the detail of her pleading immediately below, but pause to observe that in some cases, notably those involving a significant element of public policy, difficult questions can arise in respect of the nature of the appropriate relief, even if a plaintiff's claim is made out: see for example the discussion in *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 and *R (Bibi) v Newham London Borough Council* [2002] 1 WLR 237.

[148] In the present case however, if the plaintiff is able to establish a breach of legitimate expectation based upon the Institute's failure to follow the procedures prescribed by its own rules, then the issue of relief may perhaps not present difficulties of the sort discussed in these and other cases. Rather, the Court's task would be to formulate relief designed to ensure that the legitimate expectations of the plaintiff were fulfilled.

[149] The first pleaded legitimate expectation relates to the purpose of the Practice Review Board's investigation. The plaintiff pleads that she was entitled to expect



that the sole purpose of that investigation was to determine whether she and/or BCA were offering accounting services to the public. The focus is upon the purpose of the Practice Review Board's investigation, which harks back to the motives of the Institute, and so to the discussion which I undertook earlier in this judgment. I then held that there was no duplicity on the part of the Institute, and that the investigation was undertaken for the bona fide purpose of determining whether or not the plaintiff was offering accounting services to the public, and so required a Certificate of Public Practice. On the facts, the first legitimate expectation pleaded is met by the Institute.

[150] The second pleaded ground is that the plaintiff had a legitimate expectation that documents requested and uplifted from the plaintiff during the investigation would be used in furtherance of that inquiry and no other. That pleaded expectation is likewise legitimate in the sense that the Practice Review Board was confined, at least in the first instance, to seeking and obtaining copies of documents related to the question of whether the plaintiff was offering accounting services to the public.

[151] But if in the course of so doing the Practice Review Board's investigator identified documents which gave rise to concerns outside the confines of the r 18.9 inquiry, it cannot reasonably be contended that the investigator was bound to set those documents to one side and simply to ignore these concerns thereafter. To take an example having no application to this case at all, suppose that documents were discovered which revealed criminal activity within a member's practice, it cannot be contended that those documents could not be deployed by the Institute for the purposes of maintaining discipline and standards within the profession, and indeed, in pursuance of the proper administration of the criminal law. Of course, a fishing expedition (of the type Mr Muir argued that Mr Davies wanted to pursue) cannot be justified, but I have held that no such thing occurred here.

[152] So if an investigator develops in the course of a r 18.9 investigation, a concern regarding some aspects of the conduct of a member's practice not directly related to the purpose of that investigation, it cannot sensibly be suggested that the investigator is bound simply to ignore the material concerned. It will be appropriate for her, as Ms Grant did in this case, to report both to the Practice Review Board and

to the plaintiff, and for such further steps consistent with the rules to be taken as may be appropriate.

[153] In the light of that analysis, it cannot be said the plaintiff was entitled to expect all of the documents uplifted by the Practice Review Board during the investigation would be used only in respect of the r 18.9 inquiry. Where wider issues arguably arose, as here, the plaintiff must have understood that the investigator would be entitled to deal with the documents, and to raise her concerns, in such manner as the rules permit.

[154] Accordingly, the legitimate expectation pleaded by the plaintiff must be regarded as framed too widely. If upheld it would tend to stultify the proper investigation processes of the Institute.

[155] Finally, the plaintiff claims that she entertained a legitimate expectation that by reason of the correspondence that had passed between the Institute and the plaintiff/her solicitors, there would be no disciplinary proceedings against her, even in the event that she was found to be offering accounting services to the public. In my view, she cannot have legitimately entertained any such expectation for two quite separate reasons.

[156] First, irrespective of what had gone before, the terms of the Institute's letter to Price Baker of 28 July 2003 provided a clear indication for the future of the Institute's position. Ms Beaton was advised that the earlier indication given by the Institute to the effect that it was not its intention to initiate disciplinary proceedings against the plaintiff for failing to hold a Certificate of Public Practice, would not apply "into the future". The plaintiff was put on notice in that letter that she must "apply for a Certificate of Public Practice by 31 August 2003 ... failing which the Institute will consider disciplinary proceedings".

[157] Just prior to 31 August 2003, the plaintiff's solicitors took certain steps with a view to making application for a Certificate of Public Practice, but the matter was not followed through. It appears that the plaintiff's solicitors may have been responsible, at least in part, for that.

[158] Almost six months elapsed before the Institute brought the delay to the attention of the plaintiff's solicitors. While the Institute did not formally withdraw the assurance earlier given, the plaintiff cannot legitimately have entertained the continuing belief that the Institute was prepared to stand by its initial assurances. The letter of 28 July 2003 provided a clear indication that the Institute's patience was exhausted. The subsequent delays can only have exacerbated the situation, so far as the Institute was concerned.

[159] There is a second reason for rejecting the third claim of legitimate expectation. It arises from a matter discussed earlier in this judgment. Ms Grant's evidence is to the effect that in order to undertake an investigation under r 18.9, it was necessary for her to obtain and review a substantial number of documents, including those relating to the operation of the plaintiff's trust account. That evidence is challenged by Mr Muir, but there is no expert evidence to the contrary, and I am bound to accept it.

[160] Moreover, it seems to me substantially in accordance with the requirements of practical reality that an investigator appointed to determine whether a member of the Institute is offering accounting services to the public, will need to consider both the scope of the services provided and the persons to whom they were being provided. On the face of it, that would entail an inquiry that would necessarily include at least a partial review of trust account operations.

[161] In the course of undertaking her investigation Ms Grant identified a number of matters not directly associated with the r 18.9 issue, which raised concerns in her mind. Accordingly, she included those matters in her detailed and lengthy report. The matters concerned came to her notice, not because she widened her investigation beyond its authorised scope, but simply because they came to light in the course of her r 18.9 investigation. It cannot have been a legitimate expectation of the plaintiff that matters so identified by Ms Grant would not be the subject of her report, and of consequential action by the appropriate the Institute body if that was thought to be warranted.

[162] In summary, the plaintiff's claim based upon breach of legitimate expectation is that she was entitled to expect the Institute investigator to conduct her investigation solely under r 18.9, not to use the documents in the furtherance of any inquiry other than under r 18.9, and to be free of disciplinary proceedings at the conclusion of the investigation.

[163] I hold that Ms Grant did indeed investigate the plaintiff under r 18.9, but such an investigation was of necessity largely co-extensive with that which would be conducted in the course of a practice review, and that the plaintiff was not justified in expecting that no disciplinary proceedings would be initiated against her in the event of a finding that she and/or BCA were offering accounting services to the public.

[164] This case is quite different from *University of Auckland v Tertiary Education Commission* [2004] 2 NZLR 668, upon which Mr Muir relied by way of comparison. There, the use to which the commission proposed to put the data in question was different from that which the University had understood would be the case, following consultation. Here, the plaintiff ought to have been aware that further steps might be taken by the Institute if, in the course of its investigation under r 18.9, matters of concern were identified.

[165] The cause of action based on legitimate expectation and/or natural justice accordingly fails.

## **Section 27: New Zealand Bill of Rights Act**

[166] While the plaintiff's statement of claim pleaded breaches of s 27 of the New Zealand Bill of Rights Act 1990 (BORA) Mr Muir accepted in argument that s 27 was, at least for present purposes, co-extensive with the plaintiff's common law entitlement to natural justice. It therefore requires no separate discussion.

## **Section 21: New Zealand Bill of Rights Act**

[167] Section 21 of the BORA provides:

## **21. Unreasonable search and seizure**

Everyone has the right to be secure against unreasonable search or seizure, whether of the person, property, or correspondence or otherwise.

[168] Section 3 of the BORA provides:

### **3. Application**

This Bill of Rights applies only to acts done—

- (a) By the legislative, executive, or judicial branches of the government of New Zealand; or
- (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[169] Section 3(b) is addressed to bodies or persons who perform a public function, power or duty conferred by or pursuant to law. The BORA will apply only to acts done in the performance of those functions. Acts in the performance of non-public functions are not covered. Guidance as to the circumstances in which s 3(b) may be applicable is provided in the judgment of Randerson J in *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233, 247-248, where a significant number of non-exhaustive considerations are listed. Randerson J concludes his analysis by commenting that the matters listed amount to no more than a range of possible considerations and that a flexible and generous approach is required. To the same effect is *R v N* [1999] 1 NZLR 713, 721 (CA).

[170] While the Institute is a private body, privately funded by levies, the source of both its powers and functions is statutory. The government has prescribed the broad functions of the Institute by statute, and accordingly the Institute performs a regulatory function without which direct government involvement would have been required. Those regulatory functions are performed in the broader public interest and in the interests of the profession as a whole. the Institute has coercive powers under the rules including the powers to summon witnesses and to require the production of documents. It has a monopoly over regulation in the profession, although not all accountants must be members to practise.

[171] Of course, not all acts done by the Institute in the performance of its functions will attract the application of s 3(b), but rr 18 and 20 are regulatory in nature and therefore relate to the performance by the Institute of a public function. Both are inherently part of the disciplinary or coercive function of the Institute. These conclusions lead to the view that in exercising its powers under rr 18 and 20, the Institute will be subject to the BORA by reason of s 3(b) of that Act.

[172] In assessing unreasonableness for the purposes of s 21, a Court will ordinarily conclude that a search conducted pursuant to a valid consent will be reasonable: *R v Bradley* (1997) 15 CRNZ 363; *R v Fletcher* (2002) 19 CRNZ 399.

[173] By contrast, if a consent is obtained only by reason of an investigator's misrepresentation as to entitlement, then there is no effective consent: *R v Sanders* [1994] 3 NZLR 450, 474 (CA).

[174] The leading case on unreasonableness is *R v Shaheed* [2002] 2 NZLR 337 which mandates a two stage process: first an inquiry as to reasonableness and then if there is a finding of unreasonableness, separate consideration of whether documents or things seized should be admitted in evidence.

[175] Here, Mr Muir argues that the most compelling features which suggest unreasonableness in this case are the alleged absence of good faith on the part of the Institute in appearing to conduct a r 18.9 investigation when in truth it had embarked upon a r 20 practice review, and the consequent misleading of the plaintiff as to the basis upon which she was providing documents.

[176] In considering that argument, I bear in mind the assistance to be derived from the decision of the Court of Appeal in *R v Grayson and Taylor* [1997] 1 NZLR 399, in which a number of non-exhaustive factors were set out as a guide to the assessment of potential breaches of s 21.

[177] The difficulty here for the plaintiff is that I have found the Institute to have acted in good faith in commencing and pursuing its r 18.9 investigation. Moreover, I have accepted as I am bound to do, the evidence of Ms Grant to the effect that the

inquiry which necessitated such an investigation, is similar to that which would be conducted in the course of a r 20 practice review. The plaintiff may have taken the view that the scope of a r 18.9 investigation ought to be limited, but there is nothing in the evidence that suggests she was misled by the Institute or by Ms Grant as to that scope. Indeed, it must have been obvious to the plaintiff as the investigation proceeded, that Ms Grant was casting her net widely. The plaintiff was actively involved in assisting Ms Grant by identifying and producing documents and records. It is not right to say that the plaintiff was misled as to the basis upon which the documents were being provided.

[178] There is a further consideration. The rules bind the plaintiff to provide documents to an Institute investigator, whether the investigation was being conducted under r 18 (where r 18.10 applies), or under r 20 (by way of practice review where rr 20.4 and 20.5 apply). So the obligation of the plaintiffs to supply documents was to be found in the rules themselves and did not arise simply by virtue of a demand made by the investigator. That being so, what occurred here cannot have amounted to an unreasonable search and seizure. The plaintiff, who appears to be an astute businesswoman, was no doubt aware of her obligation to provide documents to the investigator and there is no suggestion that she did so otherwise than willingly. Indeed, it is common ground between the parties that the plaintiff provided the utmost assistance to Ms Grant.

[179] The factual circumstances are simply not consistent with a claim to unreasonable search and seizure. This cause of action fails.

## **Remedies**

[180] I have held that the Practice Review Board lacked jurisdiction to lay a complaint with the Professional Conduct Committee because r 20 had not previously been invoked, and no practice review conducted. Further, the Practice Review Board had no jurisdiction to lay a complaint under r 18 (because only the Executive Board could do so) or under s 21 (because the Practice Review Board does not fall within the description “any person” in r 21.1).

[181] The complaint in its current form is therefore invalid. But that is not the end of the matter. It is common ground between the parties that judicial review is a discretionary remedy. Counsel were agreed that the factors listed in *McGechan on Procedure* (JA 4.03) accurately record the factors which are customarily taken into account in the exercise of the Court's discretion.

[182] At the outset it is convenient to dispose of a point raised by Mr Reed and argued by him to be relevant to the exercise of the Court's discretion against the plaintiff. As noted earlier, the plaintiff has relinquished her directorship of BCA consequent on the sale by a trust associated with her interests of the shares in BCA to the company's former general manager. The plaintiff's only role now in BCA is that of manager.

[183] Under its new owner BCA has declined to co-operate with the Institute's investigation, and in particular has declined to provide any further documents to the Institute. Indeed, it has demanded the return of those already supplied by the plaintiff.

[184] Change of ownership in BCA was effected earlier this year, prior to the commencement of this proceeding, but some months after Ms Grant's report was provided to the plaintiff in September 2004. Mr Reed asked me to infer that the sale is connected to the present investigation, and that its primary aim is that of preventing the Institute from carrying its investigations any further. He implied that the intransigent stance adopted by BCA carries (at least) the tacit approval of the plaintiff.

[185] The plaintiff strongly denies the suggestion that the sale of her interest in the company and her consequent resignation as a director is associated in any way with the investigation. She says that the sale had been under discussion for some time and was certainly mooted before Ms Grant's report was prepared. I am not prepared to draw the inference against the plaintiff for which Mr Reed contends. It is strongly disputed by the plaintiff.



[186] In effect, the Institute argues that the plaintiff is not acting in good faith. That is a serious claim which if made out might well affect the exercise of the Court's discretion, but because it is serious the Court will need cogent evidence before acting upon it. At best the evidence is equivocal. Accordingly, I put the matter to one side.

[187] Mr Muir put at the forefront of his argument as to discretion, the intertwined issues of the gravity of the error and the degree of prejudice to the plaintiff. If a plaintiff has suffered substantial prejudice, then that will be a factor pointing to the necessity for substantive relief: *Murdoch v New Zealand Milk Board* [1982] 2 NZLR 108, 122. But the over-riding general principle is the need to achieve a fair result in all the circumstances of the case: *Phipps v Royal Australasian College of Surgeons* [2000] 2 NZLR 513, 521 (PC).

[188] As mounted by the plaintiff, her case if upheld in its entirety would have revealed a troubling failure on the part of the Institute to act in accordance with its own rules, and indeed, to act in good faith. But in the result I have simply determined that there has been an error as to jurisdiction in that the complaint to the Professional Conduct Committee ought not to have been lodged by the Practice Review Board, nor could it be founded on r 20.6(c).

[189] I have found also that a complaint may be lodged by "any person" who may for example include the Chief Executive of the Institute, or indeed, any individual member of the Practice Review Board, under r 21 in respect of any matter properly arising on an investigation conducted under r 18.9. That being so, the error is not of such gravity as to constitute of itself a powerful factor pointing to the grant of a remedy. Rather the reverse is the case. The error is somewhat technical in character. Matters identified by Ms Grant in the course of her r 18 investigation have properly been brought before the Professional Conduct Committee by way of complaint. The error lies simply in the identity of the complainant and the rule invoked in the complaint itself.

[190] Neither do I believe the plaintiff to have suffered any significant prejudice. The case is wholly different for example, from *Doherty v Judicial Committee of the*

*Veterinary Council of New Zealand* [2001] NZAR 729, relied upon by Mr Muir. In that case there had been a wholesale failure by the disciplinary body to observe the rules of natural justice.

[191] Mr Muir submitted that in the “sanguine belief” that the Institute was conducting a r 18.9 investigation with no disciplinary consequences, the plaintiff offered unrestricted access to all documents and staff. He further submitted that had she known that a practice review was being conducted, she would have instructed her solicitors who were already engaged in the matter. Questions would have arisen, Mr Muir argued, as to the mismatch between the advice contained in the letter of 11 February 2004 and the investigation now being conducted. Advice could have been taken by the plaintiff from her solicitors as to what documents she was obliged to provide and in what context. She might even have elected there and then to resign her membership of the Institute which would have foreclosed the review process. Mr Muir claimed there was then no matter before the Professional Conduct Committee or the Disciplinary Tribunal which would have justified a refusal to accept a resignation in terms of r 2.12(b).

[192] Mr Reed’s response to that submission is to express dismay on the part of the Institute at the suggestion that the plaintiff might have sought legal advice with a view to restricting the availability of documents to the investigator. He pointed out that whether under a r 18 investigation or a r 20 practice review the plaintiff is obliged by the rules which bind her, to provide the fullest co-operation to the investigator, and to produce such documents and records as may be required. He also argued that by reason of the provisions of r 2.12 the plaintiff would have been unable to resign her membership without the consent of the Institute. I put the question of her entitlement to resign to one side for present purposes. It does not seem to weigh heavily in comparison with other discretionary factors. Moreover, I note that in evidence the plaintiff described herself as being a “proud member” of the Institute for many years. Whether or not she was entitled to resign, there must be a question as to whether ultimately she would have done so.

[193] Given the limited and somewhat technical character of the error which has been made in this case, I am not satisfied that any significant prejudice has resulted to the plaintiff thereby.

[194] Another question, always of some significance, is whether it is necessary to grant a remedy in order to send an appropriate deterrent message to professional bodies, and to the Institute in particular. That was a factor expressly referred to in *Chiu v Minister of Immigration* [1994] 2 NZLR 541, 553. I do not regard that as weighing heavily against the Institute. It is true that, for reasons largely unexplained, the r 18 investigation appears to have culminated in a report couched in language appropriate for a practice review report and the subsequent complaint perpetuates the anomaly, but given Ms Grant's evidence that there is a considerable correspondence between a r 18.9 inquiry and a practice review, it is perhaps understandable that such an error may have crept in. That is not to say the error is to be condoned. It is to be expected that the Institute will know and apply its own rules properly through its duly appointed boards and committees.

[195] This is not a case where a sanction is called for. Matters identified in the complaint arose in the course of a properly commenced and conducted r 18.9 investigation, and are deserving of consideration on their merits.

[196] Then there is the consideration that the Court will often exercise caution in declining a remedy, on the ground that, had the correct procedure been adopted from the start, the result would nevertheless been the same: see for example the judgment of Cooke J in *Reid v Rowley* [1977] 2 NZLR 472, 484, and the observations of the Court of Appeal in *Chiu v Minister of Immigration*.

[197] Here however, it is possible with some confidence to say that the outcome must necessarily have been the same if the correct procedure had been followed. The error consists simply in invoking r 20, and in choosing to have the Practice Review Board make the complaint in its own right.

[198] There is the further factor that the matter has not progressed significantly through the relevant Institute's procedures. The focus in this case has been upon the

complaint document which is lodged with the Professional Conduct Committee. That body has the task of considering whether the complaint can be dealt with in summary fashion, or whether it should be passed on to the Disciplinary Tribunal for its consideration and action if thought fit.

[199] The plaintiff has the right to appear before and be heard by both the Professional Conduct Committee and the Disciplinary Tribunal, if the matter should proceed that far. Many of the authorities on discretion concern cases in which the plaintiff has been heard, and (the usually disciplinary) procedures completed. In those cases it is often easy to point to prejudice arising from identified breaches.

[200] Here, all of the Institute's formal procedures lie ahead of the plaintiff. The preliminary nature of the steps taken by the Institute to date tells against the grant of a remedy to the plaintiff. In *Just One Life Limited v Queenstown Lakes District Council* [2003] 2 NZLR 411, Panckhurst J observed that the modern approach to the remedial discretion is to look at substance rather than form. The nature of the statutory requirement in issue, the degree of non-compliance and the effect of non-compliance, are all highly relevant factors in the assessment.

[201] Adopting that approach and in the light of the other factors to which I have referred, I have concluded it is not appropriate to grant relief to the plaintiff.

[202] The effect of this decision is that the procedures prescribed by the Institute's rules may be resumed. It is however, not appropriate that the complaint lodged by the Practice Review Board be relied upon in its present form. The complaint should be relaid. It should omit the reference to r 20.6(c) and to the conduct of a practice review. Further, it should be laid, not by the Practice Review Board but by a natural person, who might be the Chief Executive of the Institute or a member of the Executive Board, or of the Practice Review Board. That is a matter for the Institute.

## **Decision**

[203] For the foregoing reasons, even though I have upheld the plaintiff's claim in some limited respects, I decline to grant any of the relief sought in the plaintiff's amended statement of claim.

## **Costs**

[204] Costs are reserved. Counsel may file memoranda if the parties cannot agree.

## **Search of Court file**

[205] This proceeding deals with matters currently before the Professional Conduct Committee of the Institute. The matter may or may not fall at a later point in time under the jurisdiction of the Institute's Disciplinary Tribunal. There is material in the affidavits filed which is confidential in the sense that it relates to the private business affairs of the business conducted by the plaintiff at relevant times, and other material relating to the course of the Institute's investigations to date, which I am satisfied ought not for the time being to be available for public search.

[206] At the commencement of the hearing counsel joined in seeking an order under r 66 directing the Court file not be searched without leave of the Judge. I made that order pending the release of this judgment, and now renew it. The Court file is not to be searched, save by the persons referred to in r 66(2) without leave of the Judge. This order is to apply until further order of the Court.

**C J Allan J**