VERGARA v CHARTERED ACCOUNTANTS AUSTRALIA AND NEW ZEALAND

Ierodiaconou AsJ

22 November, 20 December 2018

[2018] VSC 811

Administrative law — Judicial review — Domestic body — Professional association created by Royal Charter — Refusal of readmission to membership — Whether decision amenable to judicial review — Whether *Datafin* principle applicable in Victoria — Civil Procedure Act 2010 (Vic) ss 62, 63, 64.

Associations and clubs — Membership — Professional association of accountants created by Royal Charter — Refusal of readmission application — Whether decision amenable to judicial review.

The defendant professional association cancelled the plaintiff's membership of the organisation. The defendant was created by Royal Charter and its by-laws approved by the Governor-General. The plaintiff applied for readmission and submitted references from referees, none of whom were members of the defendant. The defendant required that an application for readmission be supported by three references from members of the defendant. The defendant refused readmission.

The plaintiff commenced proceedings for judicial review of the decision to refuse readmission.

The defendant applied for summary dismissal of the proceedings pursuant to s 63 of the *Civil Procedure Act 2010* (Vic), and asserted that it was not a body amenable to judicial review.

Held, dismissing the defendant's application:

The defendant had not established that the plaintiff had no real prospect of success in the proceedings. Alternately, the proceedings raised complex questions of law more appropriately determined at trial, pursuant to the Court's discretion under s 64 of the *Civil Procedure Act 2010* (Vic). [4], [75]–[76].

Manderson M & F Consulting v Incitec Pivot Ltd (2011) 35 VR 98, 108 [33]–[34] referred to.

(a) Whether the decisions of a private body could be amenable to judicial review and whether the principles in *Datafin* were applicable in Victoria were issues more appropriately determined at trial, but the proposition that *Datafin* had been rejected as incorrect could not be accepted. [36], [38].

CECA Institute Pty Ltd v Australian Council for Private Education and Training (2010) 30 VR 555 applied.

R v Panel on Take-overs and Mergers; ex parte Datafin plc [1987] QB 815 considered.

Mickovski v Financial Ombudsman Service [2011] VSC 257 referred to.

(b) Whether decisions of a private body were amenable to judicial review would require consideration of the powers exercised by the body, not its identity. [39].

Andreou v Institute of Chartered Accountants in England and Wales [1998] 1 All ER 14; *CECA Institute Pty Ltd v Australian Council for Private Education and Training* (2010) 30 VR 555, 569–70 [74]–[75]; *Mickovski v Financial Ombudsman*

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Service [2011] VSC 257 [10] referred to.

(c) In light of powers granted under its Royal Charter and the recognition bestowed on the defendant by various legislation, there was a real prospect that the defendant exercised public powers in respect of the accounting profession. [42].

(d) Whether the defendant's lack of monopoly over professional association membership for accountants meant that its decisions lacked public consequences was an issue more appropriately determined at trial. [51].

(e) Whether a body created by Royal Charter and whose rules were approved by the Commonwealth Governor-General could be subject to judicial review by a state court was an issue more appropriately determined at trial. [55].

(f) In the same proceeding, a party may seek judicial review with other remedies, including a declaration. The defendant had not established that the plaintiff had no real prospect of obtaining a declaration. [62]–[66].

McIlraith v Institute of Chartered Accountants [2003] NSWSC 208 [28]–[29] referred to.

Application for summary dismissal

This was an application by the defendant for summary dismissal of the proceedings on the basis that the plaintiff had no real prospects of success. The facts are stated in the judgment.

A R Wilson for the plaintiff.

L G De Ferrari SC for the defendant.

Reserved judgment.

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1 This proceeding arises from a decision by Chartered Accountants Australia and New Zealand (**Chartered Accountants ANZ**) to decline Mr Claudio Vergara's application for readmission to membership. Mr Vergara seeks to have the decision quashed or declared invalid, and an injunction that his application for readmission be determined according to law.

2 Chartered Accountants ANZ says Mr Vergara has no real prospect of succeeding in his claim and applies for summary judgment pursuant to s 62 of the *Civil Procedure Act 2010* (Vic) (**CPA**). In order for there to be summary judgment, Chartered Accountants ANZ must establish that Mr Vergara has no real prospect of success pursuant to s 63 of the CPA.

Summary

3 Chartered Accountants ANZ says that Mr Vergara has no real prospect of success in this proceeding because:

(a) it is not a body amenable to judicial review;

(b) the decision is not judicially reviewable;

(c) the decision is not reviewable by this Court; or

(d) declaratory relief is not available.

4 I find that Chartered Accountants ANZ has failed to establish that Mr Vergara has *no real prospect of success* on those grounds. Alternatively, I find that s 64 of the CPA is applicable. This proceeding raises complex legal issues which are more appropriately determined at trial.

5 The application for summary judgment is disallowed.

Background

6 Mr Vergara was a member of Chartered Accountants ANZ from 2001 until 2 March 2015. His membership was cancelled on 2 March 2015 for a period of two years after adverse findings were made against him by the Professional Conduct Tribunal of Chartered Accountants ANZ. Chartered Accountants ANZ made reference to adverse findings against Mr Vergara in the Federal Court of Australia by Bromberg J and subsequently the Full Court of the Federal Court of Australia.[1]

7 Mr Vergara applied for readmission to membership of Chartered Accountants ANZ on 26 June 2017. He included three references from members of CPA Australia and an additional reference from another person in his application.

8 Chartered Accountants ANZ declined Mr Vergara's application for readmission by letter dated 25 May 2018 (**the decision**). The substance of the letter follows:

> The Membership Committee and the Head of Members (as the Board's representative) have considered your application for readmission and have decided to decline your application at this time.
>
> The requirements for readmission are set out in Regulations CR 1.10 to CR 1.21. In declining the application the Committee was bound by CR 1.17 – References which requires that an applicant for readmission provide references from three individual members of Chartered Accountants ANZ. As a business policy (and as noted on the Readmission application form) we will also accept references from a recognised reciprocal body. Recognised reciprocal bodies include the following organisations:
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> - The American Institute of Certified Public Accountants
> - Chartered Professional Accountants Canada
> - Chartered Accountants Ireland
> - The South African Institute of Chartered Accountants
> - The Institute of Chartered Accountants in England and Wales
> - Institute of Chartered Accountants of Scotland
> - Hong Kong Institute of Certified Public Accountants
> - Institute of Chartered Accountants Zimbabwe
>
> References from members of other professional associations (who are not also

[1] *Ewin v Vergara (No 3)* [2013] FCA 1311; *Ewin v Vergara (No 4)* [2014] FCA 1409; *Vergara v Ewin* [2014] FCAFC 100.

> members of Chartered Accountants ANZ or a recognised reciprocal body) do not meet the requirements for referees. Further, CR 1.12 – Additional criteria for all applicants for Readmission provides that the Board may also impose other requirements (CR 1.12 (a) (v)), in this instance full written references addressing specified issues.
>
> To support your application for readmission you must provide three written references from current members of Chartered Accountants ANZ (or a recognised reciprocal body), who are not related to you and who have been full Chartered Accountants ANZ members (or full members of the recognised for [sic] reciprocal body) for three years. One of these referees must have known and had contact with you for the whole of the period since cessation of your membership, the other two referees should have known you for at least three years. The referees should, in their references, specifically acknowledge the adverse circumstances resulting in your suspension from membership of Chartered Accountants ANZ, their belief that you are now rehabilitated and that you are a fit and proper person for membership of Chartered Accountants ANZ. The references must be recent, that is dated within three months of the date of application.
>
> The Committee also noted that, depending on the content of the references, they may have further inquiries to make in relation to your application.

9 The letter refers to CR 1.17 which is a reference to regulation 1.17 of the Chartered Accountants ANZ regulations titled Admission and Readmissions:

> **1.17 References**
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> An applicant for readmission as a Chartered Accountant shall provide references from 3 individual Members of [Chartered Accountants ANZ] in support of their readmission, provided that:
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> (a) at least 1 of these individual Members shall have known and had contact with the applicant for the whole of the period since cessation of membership; and
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> (b) the other individual Members shall have known the applicant for at least 3 years.

10 On 25 July 2018, Mr Vergara filed an originating motion for judicial review. The originating motion seeks relief in the nature of certiorari, that is, the quashing of the decision. Mr Vergara also applies for a declaration that the decision is invalid and/or contrary to law and therefore void, and that regulation 1.17 is invalid. Further, he seeks a mandatory injunction, that is, an injunction requiring Chartered Accountants ANZ to consider his application for readmission according to law.

11 Mr Vergara says that the decision is contrary to law on the grounds of a denial of procedural fairness, apprehended bias, taking an irrelevant consideration into account, failure to take a relevant consideration into account and unreasonableness. Mr Vergara also says that the decision places an unlawful restraint of trade upon him. It is unnecessary to traverse these grounds in this ruling because the summary judgment application is brought on more fundamental issues, described in brief above and detailed below.

Summary judgment – applicable principles

12 It was common ground between the parties that the following principles are applicable.

13 Sections 62 and 63 of the CPA provide:

> **62 Defendant may apply for summary judgment in proceeding**
>
> A defendant in a civil proceeding may apply to the court for summary judgment in the proceeding on the ground that a plaintiff's claim or part of that claim has no real prospect of success.
>
> **63 Summary judgment if no real prospect of success**
>
> (1) Subject to section 64, a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success.
>
> (2) A court may give summary judgment in any civil proceeding under subsection (1)—
>
> (a) on the application of a plaintiff in a civil proceeding;
>
> (b) on the application of a defendant in a civil proceeding;
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> (c) on the court's own motion, if satisfied that it is desirable to summarily dispose of the civil proceeding.

14 The Court of Appeal outlined the following tests for summary judgment in *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd*:[2]

a) the test for summary judgment under s 63 of the *Civil Procedure Act 2010* is whether the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success;

b) the test is to be applied by reference to its own language and without paraphrase or comparison with the 'hopeless' or 'bound to fail test' essayed in *General Steel*;

c) it should be understood, however, that the test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test essayed in *General Steel* and, therefore, permits of the possibility that there might be cases, yet to be identified, in which it appears that, although the respondent's case is not hopeless or bound to fail, it does not have a real prospect of success;

d) at the same time, it must be borne in mind that the power to terminate proceedings summarily should be exercised with caution and thus should not be exercised unless it is clear that there is no real question to be tried; and that is so regardless of whether the application for summary judgment is made on the basis that the pleadings fail to disclose a reasonable cause of action (and the defect cannot be cured by amendment) or on the basis that the action is frivolous or vexatious or an abuse of process or where the application is supported by evidence.[3]

15 Turning now to the first ground relied upon by Chartered Accountants ANZ.

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2 [2013] VSCA 158 (***Lysaght***).

3 Ibid [35].

Is Chartered Accountants ANZ a body amenable to judicial review? IERODIACONOU AsJ

16 Chartered Accountants ANZ says that it is a private body and not a statutory body and is therefore not a body amenable to judicial review. Chartered Accountants ANZ says its decisions are made in accordance with its own rules by which it regulates itself as a private body.

17 Chartered Accountants ANZ says certiorari only applies to the exercise of 'governmental powers', not a body that only derives its powers from contract. It is not applicable for members or would-be members because its powers only derive from contract.

18 Chartered Accountants ANZ says mandamus (the injunction sought by Mr Vergara) is not available for the same reasons certiorari is not available—it is only available to enforce the performance of a public duty. As a private body, Chartered Accountants ANZ is under no such duty.

19 On the other hand, Mr Vergara points to English authority that has been applied in Australia, namely *R v Panel on Take-overs and Mergers; ex parte Datafin plc*.[4] He says *Datafin* extends judicial review to decisions of private bodies in circumstances where there is a public element to the body or its powers. Further, that *Datafin* applies in Victoria: *CECA Institute Pty Ltd v Australian Council for Private Education and Training*.[5]

20 Chartered Accountants ANZ disputes the contention that *Datafin* applies in Victoria. It says that *CECA* was wrongly decided to the extent that it stands for the applicability of *Datafin* in Victoria. Chartered Accountants ANZ refers to other Australian authority that suggests *Datafin* is not applicable in Australia.

21 Mr Vergara says that *Datafin* is applicable in the circumstances here. Firstly, there is a public element to Chartered Accountants ANZ because it is incorporated by Royal Charter (**Charter**). There are public purposes in the Charter. The by-laws are approved by the Governor-General of the Commonwealth and published with formal approval in the Government Gazette.

22 Secondly, the decision is made in performance of a 'public duty'. Chartered Accountants ANZ has a role recognised by legislation. In the absence of Chartered Accountants ANZ and like bodies, the government would have to step in to perform the functions of those bodies. The relevant regulatory function performed by Chartered Accountants ANZ is determining membership applications. This provides the community with persons appropriately qualified as public accountants and is a public duty.

23 Thirdly, Mr Vergara says the decision is made in the exercise of a power which has a 'public' element. The decision is of major significance for Mr Vergara. Membership of Chartered Accountants ANZ has statutory

4 [1987] QB 815 (***Datafin***).
5 (2010) 30 VR 555 (Kyrou J) (***CECA*).**

consequences.

24 Mr Vergara submits that 'the fact that the By-Laws contain provisions regarding readmission following a period of termination of membership implies that the contractual relationship survives termination'. If he was in a contractual relationship, Chartered Accountants ANZ must accord him procedural fairness. Alternatively, if there is no contractual relationship, then this would support the availability of judicial review.[6]

Analysis

25 The Institute of Chartered Accountants in Australia (later known as Chartered Accountants ANZ) was incorporated by Royal Charter on 19 June 1928.[7] Following that, there were nine Supplemental Royal Charters.[8] The most recent Supplemental Royal Charter is dated 26 November 2014 (**the 2014 Royal Charter**).

26 Article 3 of the 2014 Royal Charter establishes the principal objects of Chartered Accountants ANZ:

(a) to advance the theory and practice of accountancy in all its aspects;

(b) to recruit, educate and train a body of members skilled in such theory and practice;

(ba) to promote the training and education of persons practicing the profession of accountancy;

(c) to preserve at all times the professional independence of accountants in whatever capacities they may be serving;

(ca) to promote quality, expertise and integrity in the profession of accountancy by its members;

(d) to prescribe high standards of practice and professional conduct for, and to maintain the observance of such standards ...;

(e) to prescribe disciplinary procedures and sanctions, to exercise disciplinary powers and to impose sanctions for the better observance of the standards of practice and professional conduct of [Chartered Accountants ANZ] by members, non-member practice entities and registered graduates;

(f) to do all such things as may advance the profession of accountancy, whether in relation to the practices of public accountants (including the provision by such practices, in addition to public accountancy services, of other services by persons from other professions), or in relation to industry, commerce, education, the public service or otherwise.

27 Article 4 states Chartered Accountants ANZ's ancillary objects and powers. They include the following:

(a) to implement and carry into effect, upon such terms and in such manner as [Chartered Accountants ANZ] may consider appropriate, steps to enable the accountancy profession so far as practicable to speak with an united voice on matters of professional, national and international importance and in this

6 *R v Disciplinary Committee of Jockey Club; Ex parte Aga Khan* [1993] 1 WLR 909 [924].

7 Charter, 16.

8 The first eight Supplemental Royal Charters are referred to in the 2014 Royal Charter.

connection, inter alia, to cooperate and associate with any other institute, society or body of accountants ...;

(b) to prescribe, in circumstances otherwise consistent with law, rules of professional conduct governing the formation and continuance of practice entity members and non-member practice entities, including practice entities which may offer other professional services in addition to public accountancy services, and to prescribe terms and conditions upon which such practice entities may describe themselves as 'Chartered Accountants'; ...

(d) to prescribe, in circumstances otherwise consistent with law, rules of professional conduct governing the participation or service by members in any partnership, trust or body corporate or unincorporate (other than a practice entity member) which, in the opinion of the Board, provides or purports to provide (except as ancillary to some other business) any services ordinarily provided by a member in practice as a public accountant in New Zealand or the Commonwealth of Australia;

(e) to prescribe, in circumstances otherwise consistent with law, rules of professional conduct governing the use of designations and descriptions by members and non-member practice entities;

(f) to prescribe, in circumstances otherwise consistent with law, rules of professional conduct governing the names under which members and non-member practice entities may provide one or more public accountancy services and the use which members may allow any person to make of their names in the provision of any such public accountancy service;

(g) to appoint examiners, to prescribe examinations for natural persons seeking to become members of [Chartered Accountants ANZ] , and to cause such examinations to be held, in each case, whenever in the opinion of the Board it is appropriate to do so, all as may be prescribed from time to time by the By-laws;

(h) to include amongst the sanctions to be prescribed for members pursuant to Article 3(e), and without limitation of the generality of that Article, the sanction of exclusion from membership and the sanction of the suspension of the right to any one or more or all of the benefits and privileges of membership; ...

(o) to organise, finance and maintain schemes for the granting of diplomas, certificates and other awards (with or without prior examination) to members of [Chartered Accountants ANZ] and of other professional bodies in any activities with which the accountancy profession is concerned and to provide for the use of designatory letters by persons granted such diplomas, certificates and awards; provided always that no such scheme shall become operative unless and until it shall have been approved by [Chartered Accountants ANZ] in general meeting; ...

(u) to do within or outside the Commonwealth of Australia, alone or in conjunction with others, the foregoing and all such other lawful things as may be incidental or conducive to promoting, furthering or protecting the interests, usefulness or efficiency of [Chartered Accountants ANZ] or its members or the accountancy profession generally.

28 Article 8 of the 2014 Royal Charter provides that Chartered Accountants ANZ may:

> in accordance with the By-laws provide that any person may be refused admission as a member or any class of member, or advancement to any class of member or may be delayed in such admission or advancement notwithstanding that such person may be otherwise entitled to be so admitted or advanced.

29 Article 16 provides that a 'Chartered Accountant may designate himself or herself as a 'Chartered Accountant' and may use after his or her name the initials 'CA' (representing the words 'Chartered Accountant')'.

30 Article 21 of the 2014 Royal Charter provides that by-laws may be made by Chartered Accountants ANZ from time to time by resolution approved by a ballot conducted in accordance with the by-laws. Article 22 provides the by-laws are not operable until they are approved by the Commonwealth Governor-General. Article 23 requires the board of Chartered Accountants ANZ to cause the by-laws to be published in the Commonwealth Government Gazette once they have been approved by the Governor-General. The by-laws were most recently revised on 28 July 2016. Notice was given of their approval by the Governor-General in the Commonwealth Gazette.[9]

31 Article 25 of the 2014 Royal Charter authorises the board of Chartered Accountants ANZ to 'make such regulations as it thinks fit for the better execution of [the 2014 Royal Charter] or of the By-laws, the furtherance of the objects of [Chartered Accountants ANZ] and generally for regulating the affairs of [Chartered Accountants ANZ]'. The regulations do not require approval by a ballot, nor by the Governor-General.

32 Chartered Accountants ANZ has no delegated authority from any government department or statutory authority.

33 Turning now to the question of whether Chartered Accountants ANZ is amenable to judicial review. The decision of Kyrou J in *CECA* is instructive. Kyrou J described the *Datafin* principle as follows:

> The *Datafin* principle is that a decision of a private body which was not made in the exercise of a statutory power may be amenable to judicial review if the decision is, in a practical sense, made in the performance of a 'public duty' or in the exercise of a power which has a 'public element'.
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> The *Datafin* principle was discussed in the following terms by Lloyd LJ:
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> > I do not agree that the source of the power is the sole test whether a body is subject to judicial review ... Of course the source of the power will often, perhaps usually, be decisive. If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review ...
> >
> > But in between these extremes there is an area in which it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that may ... be sufficient to

9 Commonwealth, *Government Notices Gazette*, No G 2016 G01195, 7 September 2016.

> bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other.[10]

34 Kyrou J then extensively reviewed the authorities considering the *Datafin* principle in Australia, explaining it had 'been referred to with apparent approval in a number of Australian cases'.[11] His Honour observed that the High Court had not yet decided whether the *Datafin* principle was applicable in Australia but that Gleeson CJ had made observations consistent with it.[12] Kyrou J referred to *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd*[13] and obiter by Basten JA, with whom Spigelman CJ agreed, that there was an absence of authority as to whether or not *Datafin* applied in Australia.[14] Kyrou J found that prior to that case,[15] no Australian decisions had doubted *Datafin's* applicability in Australia, but that 'numerous cases have discussed *Datafin* in the process of deciding whether to grant a judicial review remedy.'[16] His Honour stated that 'most of the cases that have referred to *Datafin* with express or implied approval did so in obiter.'[17] It also appears that the *Datafin* principle was the basis for granting a judicial review remedy in only one Australian case, namely *Masu Financial Management Pty Ltd v Financial Industry Complaints Service Ltd (No 2)*.[18] Kyrou J then stated the following:

> In my opinion, the *Datafin* principle represents a natural development in the evolution of the principles of judicial review. Indeed, it is a necessary development to ensure that the principles can adapt to modern government practices. The last 20 years or so have seen a growing tendency by the legislature and the executive to out-source important governmental functions to private organisations. As this trend is unlikely to abate, the *Datafin* principle is essential in enabling superior courts to continue to perform their vital role of protecting citizens from abuses in the exercise of powers which are governmental in nature.
>
> In my opinion, in the absence of High Court authority to the contrary, *Master Builders* is sufficient authority for the applicability of the *Datafin* principle in Victoria.[19]

35 In *Mickovski v Financial Ombudsman Service*,[20] Pagone J stated that he considered *CECA* and *Datafin* 'to be correct and to accord with the fundamental and constitutional role of the Court to ensure that the exercise of public duties is amenable to judicial review.'[21]

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10 *CECA* (2010) 30 VR 555, 570 [77]–[78] (Kyrou J) (citations omitted).
11 Ibid 570 [79].
12 Ibid 573 [89], 574 [92].
13 (2010) 78 NSWLR 393 (***Chase***).
14 *CECA* (2010) 30 VR 555, 575–6 [95]–[96].
15 *Chase* (2010) 78 NSWLR 393.
16 *CECA* (2010) 30 VR 555, 576 [97].
17 Ibid 576 [98].
18 (2004) 50 ACSR 554, 559–60, 576 [98] (Shaw J) (***Masu***).
19 *CECA* (2010) 30 VR 555, 576 [99]–[100].
20 [2011] VSC 257 (Pagone J) (***Mickovski***).
21 Ibid [9].

36 Given that *CECA* remains good authority in Victoria, and no party has identified any High Court authority to the contrary, I cannot accept Chartered Accountants ANZ's proposition that I should reject it because it is incorrect. Indeed, I am bound to follow the principles in *CECA* if they are applicable to the circumstances here.

37 The submission that Mr Vergara has no real prospects of success because Chartered Accountants ANZ is not a body amendable to judicial review must be rejected for the following reasons.

38 First, the question of whether *Datafin* is applicable involves complexities that are more appropriately determined at trial. It would be inappropriate to make a finding that the principles in *CECA* are incorrect on a summary dismissal application.

39 Secondly, the question as to whether *Datafin* applies is not focused on the identity of Chartered Accountants ANZ, but rather the *powers* it exercises. I note that this is not a concept new to *Datafin*. As Kyrou J stated in *CECA*:

> In *Craig v South Australia*,[22] the High Court stated that the writ of certiorari 'went only to an inferior court or to certain tribunals exercising governmental powers.' The test to determine whether a body is a tribunal exercising governmental powers is whether it has 'legal authority to determine questions affecting the common law or statutory rights or obligations of persons or individuals.'
>
> While there is some debate about the precise boundaries of the expression 'legal authority' in this context, it is generally agreed that the exercise of a statutory or prerogative power is amenable to judicial review, whereas the exercise of a power that is derived solely from contract is not.[23]

40 In *Mickovski*, Pagone J explained that:

> The *Datafin* principle was not a judicial assertion of jurisdiction to review private contracts, but, rather, an acknowledgement that public power, properly reviewable in the court's supervisory jurisdiction, might be exercised by a private body. The principle, although described by Kyrou J as an extension, may be seen as the Court ensuring that the traditional and constitutional role of supervising the proper exercise of public duties conforms with the practical reality of public duties being exercised by private entities.[24]

41 There has been judicial review of an equivalent body to Chartered Accountants ANZ in the United Kingdom.[25] In *Andreou* Lord Woolf MR stated:

> In our judgment, in particular having regard to its important responsibilities which are recognised in the *Companies Act 1989* (see section [sic] 25, 30 and 32) the Institute does perform public functions which certainly justify it being regarded as a public body. In relation to certain of its activities it is therefore amenable to judicial review. Here it is not without interest that this was accepted to be

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22 (1995) 184 CLR 163.

23 *CECA* (2010) 30 VR 555, 569–70 [74]–[75] (citations omitted).

24 *Mickovski* [2011] VSC 257 [10] (citations omitted).

25 See, eg, *Andreou v Institute of Chartered Accountants in England and Wales* [1998] 1 All ER 14 (***Andreou***); *R (Coke-Wallis) v Institute of Chartered Accountants in England and Wales* [2008] EWHC 2690 Admin and on appeal [2009] EWCA Civ 730 and further appeal [2011] Ac 146.

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> the position without argument to the contrary by this court in *R v Institute of Chartered Accountants in England and Wales and Others ex-parte Brindle* [1994] BCC 291 and the decision of Sedley J in *R v Institute of Chartered Accountants of England and Wales ex parte Taher Nawaz* [1996] Times Law Reports 624.[26]

42 Whilst Chartered Accountants ANZ is not a statutory body or exercising a statutory power, there is a real prospect that it exercises public powers in respect of the accounting profession. This is based on the articles in the 2014 Royal Charter referred to above concerning its function and powers, and the public consequences of admission (or non-admission) to membership. Some examples follow:

(a) Regulation 2AC of the *Australian Securities and Investments Commission Regulations 2001* (Cth) defines 'professional accounting body' in s 5(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**) to mean Chartered Accountants ANZ, CPA Australia and the Institute of Public Accountants. Section 203 of the ASIC Act stipulates membership of a disciplinary board. Only members of a professional accounting body (or others prescribed by the regulations) are eligible for appointment as an accounting member of the board.

(b) Regulation 5 of the *ASIC Corporations (Qualified Accountant) Instrument*[27] declares qualified accountants for the purpose of the *Corporations Act 2001* (Cth) to be members of Chartered Accountants ANZ, CPA Australia and the Institute of Public Accountants or an eligible foreign professional body.

(c) *ASIC Corporations (Audit Relief) Instrument*[28] defines 'prescribed accountants' to include members of Chartered Accountants ANZ, CPA Australia and the Institute of Public Accountants (and ASIC approved accountants). Regulation 6(r) effectively requires a company's financial reports to be compiled by prescribed accountants for certain purposes.

(d) Regulation 7 of the *Evidence (Affidavits and Statutory Declarations) Regulations 2008* (Vic) prescribes membership of Chartered Accountants ANZ, CPA Australia and the Institute of Public Accountants for the purpose of s 107A(1)(v) of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic). Section 107A(1)(v) lists persons who may witness statutory declarations to include those who hold a prescribed membership of a prescribed accounting body.

43 Thirdly, the issue of whether or not Mr Vergara was in a contractual relationship with Chartered Accountants ANZ was not fully ventilated. Certainly, there was no evidence before me of a current contractual relationship be-

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26 *Andreou* [1998] 1 All ER 14, 19.
27 2016/786, 28 September 2016.
28 2016/784, 28 September 2016, reg 4 (definition of 'prescribed accountant').

tween Mr Vergara and Chartered Accountants ANZ.

44 Turning to the next ground.

Is the decision judicially reviewable?

45 Chartered Accountants ANZ says that even if *Datafin* is applicable the decision is not judicially reviewable. First, it says that jurisdictional error is the organising principle for the grant of certiorari, mandamus and prohibition. For there to be jurisdictional error, the jurisdiction of the decision-maker must be identified. Order 56.01(2)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) (**Rules**) requires that the defendant must be a decision-making body sued on a claim it has made a decision in excess of jurisdiction or a failure or refusal to exercise jurisdiction to make a decision it is under a duty to make. A reference to jurisdiction is a reference to the authority to decide. It argues this is a proceeding brought pursuant to O 56 but does not fall within it.

46 Judicial review is directed only at an act that is an 'exercise of public power'. Chartered Accountants ANZ says that here, there is no monopoly and legislation only confers benefits. It says the decision was not made in the performance of a public law function and has no public law consequences. Consequently, it argues that even if *Datafin* applies, the decision is not reviewable.

47 Mr Vergara referred to his submissions outlined above.

Analysis

48 Rules 56.01(1), (2) and (3) of the Rules state as follows.

> **Judgment or order instead of writ**
>
> (1) Subject to any Act, the jurisdiction of the Court to grant any relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto shall be exercised only by way of judgment or order (including interlocutory order) and in a proceeding commenced in accordance with these Rules.
>
> (2) The proceeding shall be commenced by filing an originating motion … naming as defendant—
>
> (a) a person, if any, having an interest to oppose the claim of the plaintiff; and
>
> (b) the court, tribunal or person in respect of whose exercise of jurisdiction or failure or refusal to exercise jurisdiction the plaintiff brings the proceeding.
>
> (3) A person named as defendant in accordance with paragraph (2)(b) who is sued in the capacity of a judicial or public authority or as the holder of a public office shall be described in the originating motion by the name of that authority or the name of that office.

49 Certiorari quashes the legal consequences of a decision. In *Craig v South Australia*, the High Court stated:

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> Where available, certiorari is a process by which a superior court, in the exercise of original jurisdiction, supervises the acts of inferior court or other tribunal. It is not an appellate procedure enabling either a general review of the order or decision of the inferior court or tribunal or a substitution of the order or decision which the superior court thinks should have been made. Where the writ runs, it merely enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds, most importantly, jurisdictional error, failure to observe some applicable requirement of procedural fairness, fraud and 'error of law on the face of the record'.[29]

50 Here, Chartered Accountants ANZ has been named as the decision-maker and as the defendant. It is not in contention that they are properly named as the defendant. What is in contention is how the power they exercise is to be characterised and whether it is a public power or not.

51 Chartered Accountants ANZ does not hold a monopoly on professional association membership for accountants. There are other professional associations such as CPA Australia and the Institute of Public Accountants. In *CECA*, because membership of the relevant scheme was only one of five options for registration, Kyrou J held that the decision not to approve a membership application was outside the *Datafin* principle. One of those other options was not membership of a scheme at all but rather obtaining a bank guarantee. Therefore 'the legal and financial consequences of a rejection of an application for membership ... are no different from ... a rejection of an application for a bank guarantee.'[30] Whether the fact that Chartered Accountants ANZ does not have a monopoly over professional association membership for accountants means its decision does not have public consequences is an issue more appropriately determined at trial.

52 Turning then to the next issue.

Is the decision reviewable by this Court?

53 Chartered Accountants ANZ submits, in the alternative, that as it is established by Royal Charter, pursuant to the executive power under s 61 of the *Commonwealth Constitution*, and its rules are approved by the Commonwealth Governor-General, if it were a statutory body it would be a Commonwealth one. Therefore, if it exercised a public function it would be at the Commonwealth rather than state level. Chartered Accountants ANZ submits that the decision is not therefore reviewable by this Court.

54 Mr Vergara says the question of whether the decision is amenable to judicial review requires detailed consideration of the nature of Chartered Accountants ANZ and its powers. Accordingly, it is not a question suitable for summary judgment. Mr Vergara says there does not appear to be any authority that has decided the question.

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29 (1995) 184 CLR 163, 175 (citations omitted).

30 *CECA* (2010) 30 VR 555, 578 [111].

Analysis

55 Neither party identified any relevant authority in respect of this issue. That is, whether the decisions of a professional body established by Royal Charter, with rules approved by the Commonwealth Governor-General, may be subject to judicial review by a state superior court. This issue is more appropriate for determination at trial given its complexity.

Is declaratory relief available?

56 Chartered Accountants ANZ submits that the proceeding is not open solely on the basis of the declaratory relief sought. It refers to s 36 of the *Supreme Court Act 1986* (Vic) (**Supreme Court Act**). It says the grounds in the prayer for relief do nothing other than state in declaratory form what the conclusion would be if the Court were to find the decision was vitiated by a jurisdictional error and that certiorari would issue.

57 Chartered Accountants ANZ says that the problems in the originating motion are not curable by amendment. Further, r 4.07 of the Rules (which Mr Vergara relies upon) is not directed to certiorari. Chartered Accountants ANZ says that any attempt by Mr Vergara to plead contract would fall foul of the strike out rules (notably r 23.02).

58 On the other hand, Mr Vergara says the decision is reviewable and that the declaration and mandatory injunction sought are available remedies. He says that Chartered Accountants ANZ is bound by the established principles of administrative law in its functions regardless of whether it is amenable to judicial review.

59 Further, Mr Vergara says he seeks to overturn regulation 1.17 of the Chartered Accountants ANZ regulations and the decision on the basis they were unreasonable restraints of trade. That does not require a contract to be in existence.

60 Finally, Mr Vergara acknowledges that there are some issues in the pleading. He proposes to address them by seeking an order under r 4.07(1) of the Rules that the proceeding continue as if it had been commenced by writ. Chartered Accountants ANZ has not agreed to his proposal. Mr Vergara says the analysis of summary dismissal involves considerations beyond the sufficiency of pleadings.

Analysis

61 Section 36 of the *Supreme Court Act* states:

> **36 Declaratory judgments**
>
> A proceeding is not open to objection on the ground that a merely declaratory judgment is sought, and the Court may make binding declarations of right without granting consequential relief.

62 The Rules do not require procedural exclusivity. As leading administrative

law textbook writers Aronson, Groves and Weeks state, that has never been the rule in Australia.[31] A party may seek judicial review among other remedies in the same proceeding. An example is *CECA*, where judicial review was sought, unsuccessfully, and a declaration was also sought. Ultimately, the declaration was granted. Kyrou J stated he would declare the decision void and make an order requiring the defendant to reconsider the application for membership according to law.[32] Kyrou J outlined the principles for determining the application of the hearing rule to private bodies. His Honour did so after noting that the 'duty to comply with the rules of natural justice is not co-extensive with the availability of certiorari for a breach of those rules.'[33] His Honour stated:

> The courts have struggled, however, to develop coherent principles that provide sufficient guidance on the circumstances in which the hearing rule will apply to decisions that are made by private bodies in relation to persons who are not members and with whom they are not in a contractual relationship.[34]

63 Kyrou J then outlined the following principles:

> [it was] submitted that where a person's reputation is relied upon to attract the hearing rule, it must be established that the impugned decision did in fact affect the person's reputation. I reject this submission. The fundamental purpose of the hearing rule is to compel a body to give notice of matters that it proposes to take into account before making a decision that will, or is likely to, adversely affect a person's rights or interests, including his or her reputation.
>
> The Court has ample jurisdiction to grant an injunction to prevent a denial of natural justice before a body makes a decision that will affect a person's rights and interests, as well as jurisdiction to declare void an adverse decision which has been made in breach of the rules of natural justice. In *Toose*, Mathews J referred to the decision by the Advertising Standards Council as having 'the potential to do considerable damage to the plaintiff's reputation' and concluded that, on that ground alone, the plaintiff was 'entitled to be heard before an adverse finding were to be made against it.' In *Master Builders*, it was held that the hearing rule applied because the dissemination of the blacklist among government departments and agencies was 'likely to damage the commercial reputations of those [building companies] whose names [were] on the list' and to affect adversely their abilities to tender for future government contracts.
>
> In my opinion, the circumstances in which a decision of a private body to refuse an initial application for membership or some other privilege can attract the hearing rule in the absence of an existing contractual relationship include:
>
> (a) where the body has a monopoly or a near monopoly in relation to a particular profession or trade such that a refusal of an application for membership of that body in accordance with its governing documents effectively prevents the applicant from pursuing his or her preferred profession or trade;
>
> (b) where, as in this case, the grounds for a decision to refuse membership under the body's governing documents are likely to affect adversely the applicant's

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31 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 6th ed, 2017) 159 [3.220].

32 *CECA* (2010) 30 VR 555, 587 [159].

33 Ibid 578 [114].

34 Ibid 580 [124].

> individual, business or commercial reputation in the eyes of an official who is exercising, or will exercise, a statutory or executive power in relation to the applicant and who would be expected to take into account the decision and the grounds in the exercise of that power ...[35]

64 Chartered Accountants ANZ has not established that Mr Vergara has no real prospect of successfully obtaining a declaration. Here, there are two issues more appropriately determined at trial. Firstly, whether or not Chartered Accountants ANZ has a monopoly or a near monopoly in relation to the accounting profession that falls into category (a) above. (This issue will also be relevant to Mr Vergara's challenge to the decision on the basis it is a restraint of trade.) Secondly, whether category (b) applies to Mr Vergara. That is, whether the decision to refuse his application for readmission as a member is likely to adversely affect his individual, business or commercial reputation in the eyes of an official under the circumstances set out by Kyrou J.

65 In *McIlraith v Institute of Chartered Accountants*,[36] the plaintiff sought judicial review of proceedings of disciplinary and appeal committees of the defendant (the same defendant in this present proceeding). The decision under challenge was to suspend the plaintiff from membership for two years. The plaintiff sought, and successfully obtained, a declaration the decision was void, and that he had been denied procedural fairness and natural justice. Dowd J held:

> There is no issue that this court may review the decision of a tribunal of a trade or professional association or, indeed, any other domestic tribunal on the ground of denial of procedural fairness ...
>
> The consequences of the determination of a tribunal such as set up by the Institute are the exercise of a very substantial power to preclude or restrict a member from operating at his occupation and must operate under the principles of procedural fairness which are implied from the terms of the contract between the members of the body concerned.[37]

66 As discussed above, there is no evidence before me of a contract here. Nevertheless, Dowd J's observations about the powers of Chartered Accountants ANZ are apt.

67 There are pleading defects. The originating motion does not sufficiently identify the basis upon which the declarations are sought (such as contract or equity), nor the basis for the alleged unreasonable restraint. This is partly because of the form of the originating process, being an originating motion for judicial review.

68 I consider pleading defects in the originating motion are curable by amendment. Rule 4.07 of the Rules provides:

> **4.07 Continuance as writ of proceeding by originating motion**

35 Ibid 581–2 [132]–[133] (citations omitted).
36 [2003] NSWSC 208.
37 Ibid [28]–[29] (citations omitted).

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(1) Where a proceeding in which there is a defendant is commenced by originating motion, but ought by or under any Act or these Rules to have been commenced by writ, or might in the opinion of the Court **more conveniently continue as if commenced by writ—**

(a) the Court may order that the proceeding continue as if it had been commenced by writ and may, in particular, order that any affidavits already filed in the proceeding shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof or that pleadings be served between the parties, and that the parties have discovery of each other; and

(b) by virtue of that order, the proceeding shall be taken to have been duly commenced for all purposes on the day the originating motion was filed.

... (emphasis added)

69 Rule 4.07(1) is appropriate to invoke in this case where both judicial review and other orders are sought and in circumstances where it is agreed that the pleading in the originating motion is insufficient. I will make orders that the proceeding continue as if it had been commenced by writ. I will hear the parties on the precise form of those orders, and whether they consider that affidavits should stand as pleadings or a statement of claim should be filed.

70 In relation to the pleadings, as the power to exercise summary judgment must be exercised with caution, it would be unjust to exercise it in relation to problems with pleadings that are curable by amendment to the originating motion.

71 Turning now to the next issue.

In s 64 of the CPA applicable?

72 Section 64 of the CPA states:

64 Court may allow a matter to proceed to trial

Despite anything to the contrary in this Part or any rules of court, a court may order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because—

(a) it is not in the interests of justice to do so; or

(b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

73 Chartered Accountants ANZ says s 64 is not applicable. Further, it would be contrary to ss 7 and 8 of the CPA for this matter to proceed to trial. In particular, it would be contrary to the efficient administration of justice for s 64 to be applied given that all of the relevant evidence had been heard and submissions had been made.

74 In *Manderson M & F Consulting v Incitec Pivot Ltd*,[38] the Court of Appeal stated:

> **The complexity of the issue between the parties made this proceeding inappropriate for summary dismissal** where the only basis for dismissal relied upon was an analysis of whether the applicant's statement of claim properly defined the confidential information. The real contest was whether what the applicant had advanced as confidential information was of such a character. There will be cases in which cost and complexity may converge as a relevant factor justifying summary dismissal, but this is not such a case.
>
> Finally, in the present case the discretion under s 64 was not invoked, or even considered. That is perhaps explained by the narrow scope of the inquiry undertaken. The introduction of s 63 as a basis for relief, and the claim for summary dismissal, led to an unfortunate conflation of the contest over the adequacy of the pleading to define confidential information and the prospects of success at trial. An analysis of the latter issue may well involve a consideration of the evidentiary foundation, whereas the former does not.[39]

75 This dispute is of such a nature that only a full hearing on the merits is appropriate. In particular, the complexity of the issues between the parties, discussed above, warrants it proceeding to a full hearing. The powers of summary dismissal should be exercised with caution. It would not be in the interests of justice to exercise them here.

76 Further, I reject Chartered Accountants ANZ's submissions that all issues have been ventilated and it is appropriate to dismiss the proceeding at this point. I have referred above to several issues yet to be fully ventilated.

Conclusion

77 The parties are requested to confer as to the appropriate form of orders consequential to this ruling. If they are not agreed, they will be given the opportunity to make submissions.

Application dismissed.

Solicitors for the plaintiff: *Bleyer Lawyers*.
Solicitors for the defendant: *Maddocks*.

T B D GORTON
BARRISTER-AT-LAW

38 (2011) 35 VR 98.
39 Ibid 108 [33]–[34] (emphasis added).