NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

BEFORE THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS APPEALS COUNCIL

IN THE MATTER OF	The New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder
BETWEEN	**DAVID WILLIAM McPHEDRAN,** Chartered Accountant of Dunedin
	Appellant
AND	**THE PROFESSIONAL CONDUCT COMMITTEE OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**

DECISION OF APPEALS COUNCIL

Dated 5 July 2019

Members of the Appeals Council:
Les Taylor QC (Chairman)
Paul Armstrong FCA
John Hagen FCA

Counsel
Richard Moon for the Professional Conduct Committee
Michael Laws for the Appellant

Appeals Council Secretariat:
Janene Hick
Email: janene.hick.nzica@charteredaccountantsanz.com

Refer to the Disciplinary Tribunal decision dated 8 November 2018

Introduction

1. This is an appeal from a determination of the Disciplinary Tribunal dated 8 November 2018.

2. The notice of appeal dated 22 November 2018 appealed the parts of the Disciplinary Tribunal decision relating to penalty, costs and name publication. The appeal was filed on behalf of the member by his then counsel.

Interlocutory issues relating to appeal

3. A hearing date for the appeal was originally allocated for 11 February 2019. However, following a telephone conference with the Chairman, it was decided to use that date for hearing of an application by the member to adduce further evidence pursuant to a formal application dated 9 January 2019.

4. The application to adduce further evidence was heard on 11 February 2019. Our decision dated 15 February 2019 allowed the application to adduce further evidence in part.

5. Dates for hearing of the substantive appeal were allocated of 16 and 17 April 2019 following discussions between (then) counsel for Mr McPhedran and counsel for the PCC. A timetable for filing of evidence and submissions was also agreed between counsel on 18 February 2019.

6. On Friday 1 March 2019, the Institute was advised of a change of counsel for Mr McPhedran. Following the change of counsel the proposed timetable for filing of evidence and submissions was adjusted to enable time for Mr McPhedran's new counsel to meet the timetable.

7. On 8 March 2019, Mr McPhedran's new counsel requested a further extension of the timetable to enable further time (to Wednesday 13 March 2019) for filing of Mr McPhedran's evidence. That application was opposed by the PCC.

8. Mr McPhedran's counsel advised that the reasons for the request was for Mr McPhedran to consider his evidence and that a proposed brief of evidence from an ANZ officer was required to be approved by ANZ Legal. An extension of time was granted for the filing of Mr McPhedran's evidence on Friday, 8 March 2019. Under the revised timetable, the time for filing of further evidence was extended to 13 March 2019.

9. On 1 April 2019, the Institute was advised that Mr McPhedran's new counsel no longer had instructions to act for Mr McPhedran in respect of the appeal.

10. On 4 April 2019, an informal application for adjournment of the proposed hearing of the appeal was received by the Appeals Council. The application was made on behalf of Mr McPhedran by his newly appointed advocate Mr Michael Laws. By our decision dated 5 April 2019, the application for adjournment was declined.

11. On 9 April 2019, an application was received from Mr Laws seeking to extend the grounds of appeal to topics raised in seven bullet points articulated in that letter. The last three of those bullet points related to alleged disadvantage suffered by Mr McPhedran as a result of advice given to him by his previous legal counsel both at the time of the Disciplinary Tribunal hearing and subsequently.

12. By our decision dated 11 April 2019, the Appeals Council allowed the application to allow argument in respect of the matters identified in the first four bullet points of the application. It declined the application to amend the grounds of appeal in respect of the matters relating to advice from counsel raised in the last three bullet points. The Appeals Council also declined the application by Mr McPhedran, through Mr Laws, to have evidence taken by way of video-link.

13. On Sunday, 14 April 2019 (two days before the substantive hearing was due to commence) submissions were received from Mr Laws on behalf of Mr McPhedran. Those submissions, rather than addressing the substantive merits of the appeal, sought to challenge the previous decisions of the Appeals Council referred to above. Mr McPhedran also requested recusal of the Chairman from the designated Appeals Council hearing on the grounds of alleged bias arising from the written decision of the Appeals Council of 5 April 2019.

14. Mr Laws, in his submissions, sought that the hearing of the appeal be in two stages, the first being to hear the parties on "procedural challenges" to the Disciplinary Tribunal determination and the second stage to hear the parties on the issues previously raised by Mr McPhedran's counsel. It was asserted that this would allow Mr Laws sufficient time to familiarise himself with all the evidence and be properly informed ahead of a full Appeals Council hearing.

15. The Appeals Council convened a full hearing of the appeal on 16 April. By that time proposed briefs of evidence had been filed on behalf of Mr McPhedran and response evidence from the PCC had also been provided. The proposed witness for the PCC was present and available to give evidence at the 16 April hearing.

16. At the commencement of that hearing we heard argument from Mr Laws in which he sought adjournment of the appeal to enable him to have time to properly prepare. His application to adjourn the hearing was opposed by the PCC.

17. The main ground upon which Mr Laws sought adjournment was that he did not have the full evidence and documents from the Disciplinary Tribunal until 11 April 2019 (although Mr Laws had not requested the documents from either Mr McPhedran or his previous legal counsel). He requested the documentation from the Institute itself on Tuesday, 9 April 2019.

18. After hearing arguments the Appeals Council indicated that it was prepared to grant an adjournment to enable Mr Laws to have sufficient time to properly prepare for the substantive hearing and to enable attendance of the witnesses proposed to be called by Mr McPhedran at the revised hearing date. After discussion with Mr Laws, in which he confirmed that he would be ready to proceed and that his witnesses would be ready to attend, a new hearing date was set of 7 and 8 May 2019.

19. At the request of counsel for the PCC, written reasons for the decision to adjourn the hearing date to 7 and 8 May 2019 were given by the Appeals Council in its decision dated 18 April 2019. That decision also declined the request by Mr Laws that the Chairman recuse himself from hearing of the substantive appeal.

20. At the hearing on 16 April, and as recorded in the reasons for the decision dated 18 April 2019, the adjournment was granted expressly on the basis that Mr McPhedran and his witnesses were to attend and give evidence at the hearing (and be subject to cross-examination). It was also expressly on the basis that our previous decision, declining to hear evidence or argument relating to the alleged inadequacies of counsel and the circumstances in which the decisions were made as to what evidence would be given before the Disciplinary Tribunal, would not be revisited. The reasons for that were set out in our decision providing reasons for granting the adjournment of 18 April 2019.

21. On Wednesday, 1 May 2019 a letter was received from Mr Laws advising that judicial review proceedings were to be commenced and that interim orders would be sought staying the related proceedings of the Appeals Council scheduled for 7 and 8 May 2019. Mr Laws advised that he "would expect papers relating to the above judicial review to be served upon NZICA on Monday, 6 May or some time sooner."

22. Mr Laws was advised by the Institute that, absent an interim order from the High Court staying the appeal, the appeal would proceed as planned on 7 and 8 May 2019.

23. Judicial review proceedings were served on the Institute on Monday, 6 May 2019 although no application for an interim order was included in the documents served on the Institute. An email was received from Mr Laws at 4.51pm on Monday, 6 May 2019 advising that:

> Given the application lodged in the Wellington High Court today for a JR of decisions made by the Appeal Council and served on NZICA this morning, Mr McPhedran will not be attending the appeal hearing tomorrow, nor his counsel.
>
> Fuller explanation overnight.

24. At 5:30pm on Monday, 6 May 2019 the Institute was advised that the High Court had declined an application for interim orders staying the appeal and that the judgment was expected to be delivered the following day.

25. On Tuesday, 7 May at 8:02am an email was received from Mr Laws confirming that the application for an interim order had been declined. He submitted that it was inappropriate to proceed with the Appeals Council hearing but indicated that he intended to be there to appeal "ONLY" on the procedural issues raised. Mr Laws requested a delayed start of the hearing from 10.00am to enable him to depart Dunedin for Auckland at 9.45am "on the only flight available".

26. The Appeals Council extended the start time for the hearing to 1.00pm to enable Mr Laws to attend.

27. The hearing of the appeal was therefore convened at 1.00pm on 7 May 2019. Mr Laws appeared on behalf of Mr McPhedran. Neither Mr McPhedran nor the witnesses he proposed to call were present.

28. Mr Moon and Ms Stickney appeared on behalf of the PCC. Their proposed witness, who had been called in response to proposed evidence by Mr McPhedran and others, was present and available to give evidence.

29. At the commencement of the hearing it was made clear to Mr Laws that his client had been given the opportunity to call evidence in accordance with the leave to adduce further evidence granted on 15 February 2019. The leave was granted to call evidence in relation to an issue as to whether the ANZ Bank required one of the complainants, Mr Roper, to be removed as a director of his company.

30. Mr Laws accepted that it had been made clear to him that, if Mr McPhedran wished to call evidence pursuant to the leave granted, the witnesses needed to be present at the hearing to give their evidence and be subject to cross examination. Mr Laws confirmed that his client had chosen not to call to those witnesses and "not to pursue that matter".[1]

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[1] Transcript at p.8. Mr Laws advised later in the hearing that his instructions were that, were Mr McPhedran to turn up here with the judgements that had already been made by the Appeals Council as to the kind of evidence that he might be able to offer, he would not receive a fair opportunity to answer the charges or to advance his submissions.—see Transcript at p 177.

31. Mr Moon, on behalf of the PCC, however wished to call Mr Roper who had been present for a second time to give evidence in response to the proposed evidence by Mr McPhedran and his witnesses. It was therefore decided that the proposed briefs of evidence of Mr McPhedran and his witnesses would be admitted to enable Mr Roper to respond to that evidence but that the weight to be given to the evidence of those proposed witnesses, particularly in view of the fact that the witnesses had not been called and had not been subject to cross-examination, would be a matter for the Appeals Council.

32. Mr Roper then proceeded to give evidence and was cross-examined by Mr Laws in respect of that evidence.

Scope of the appeal

33. The appeal was an appeal as to penalty, costs and name publication. The grounds of appeal were those stated in the notice of appeal together with the further grounds of appeal articulated in the first four bullet points of Mr Laws' application to amend the grounds of appeal. Those bullet points were:

- That the Disciplinary Tribunal erred procedurally, by effectively disallowing evidence tendered by way of statutory declaration by the member Mr McPhedran, and his two defence witnesses Messrs Carl Spruyt and Chris Burke;

- That the Disciplinary Tribunal erred procedurally by accepting the "uncontested evidence" of the complainants when it possessed statutory declarations from Messrs McPhedran, Spruyt and Burke that refuted aspects of the complainants' evidence;

- That the Tribunal erred in procedure and in equity by effectively punishing Mr McPhedran for his non-attendance at the Disciplinary Tribunal of 22-23 August 2018;

- That the Disciplinary Tribunal erred in procedure and in equity by not adhering to its own published procedures when considering the non-attendance of member Mr David McPhedran, and by discounting any of his evidence, given by way of statutory declaration, where it contradicted that of the complainants.

Conduct giving rise to charges against Mr McPhedran

34. The charges against Mr McPhedran arose from complaints by his former clients, Mr and Mrs Bell (**"the Bell complaint"**) and Mr Graham Roper (**"the Roper complaint"**).

35. Mr McPhedran, together with a Mr Spruyt, owned (through interests associated with them) and operated two businesses, namely Your Business Team Limited (**"YBT"**) and an advisory and mentoring business owned and operated by CD Limited and trading as "10X" (**"10X"**). In general terms, YBT was a general accounting firm providing accounting, business and advisory services. 10X provided business advisory services, including access to trained coaches with significant experience in the small to medium business arena, to assist small to medium sized businesses.[2]

36. YBT is described as providing full-service business support. Mr McPhedran is described on the website as the person who established the value add service focus that YBT delivers to ensure maximisation of business potential and ultimate sale value which YBT identified as some of the core long-term goals for any SME owner.

37. The two businesses as well as being owned and operated by Mr Spruyt and Mr McPhedran operated from the same premises and used the same staff. They were promoted as being linked[3] and email signatures of the individuals referred to both 10X and YBT.[4]

38. The expert evidence of Mr Rickerby (called by the PCC) before the Disciplinary Tribunal was that the work of 10X was not sufficiently separate or distinct (both in fact and as presented to the public) to fall outside the practice of YBT and the supervision and responsibility provisions[5] of the Code of Ethics.[6] That evidence was agreed with by the expert, Mr Ruscoe, called for Mr McPhedran[7]

The Bell complaint

39. Mr and Mrs Bell had been clients of the 10X business since 2012. As part of their business they had established a local postal delivery business in Oamaru called Whitestone Post. They were looking to franchise that business and had incorporated a company, Whitestone Post Limited (**"WPL"**), of which they were the sole shareholders and directors.

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2 DT 129.
3 DTB 135 and 138.
4 See, for example, DTB 38 or 47.
5 NZ100.5.4
6 Evidence of Paul Gerald Rickerby at paras 15 and 16
7 Evidence of David Ian Ruscoe at para 7

40. Mr Spruyt set up a meeting to introduce the Bells to a potential investor in WPL, Groundworks Limited. In March 2017 the parties met again and it was agreed that both Groundworks and YBT would inject funds in WPL in return for shares and seats on the Board.

41. The purchase price of the shares was established as $40,000 of which approximately $30,000 was to be contributed by Mr Beeby (Groundworks Limited) and $10,000 by Spruyt entities. Subsequent to the meeting the funding model was confirmed with the aim being to provide the new capital by 31 March.[8] The end result of the proposed transactions was that WPL would be owned 50% by Groundworks, 35% by Mr and Mrs Bell, and 15% by YBT.

42. At that time there was a proposed sale of a franchise in Palmerston North, the intent being to have a signed sale and purchase agreement in respect of that sale to hand by 23 March 2017 and for the transaction to be settled by 31 March 2017. The notes of the meeting also indicate that Mr and Mrs Bell agreed to appoint YBT as the WPL accountant with this to be organised by YBT.

43. Soon after that meeting, on 9 March 2017, the Bells executed transfer documents and provided YBT with the Companies Office log-on details for WPL. The following day YBT filed documents at the Companies Office changing the shareholding and appointing Mr Spruyt, Mr McPhedran and a Groundworks representative as directors of WPL.

44. Those changes were made and the new directors appointed prior to the proposed settlement date of 31 March 2017 and notwithstanding that no money had been paid for the shares transferred by Mr and Mrs Bell to the Groundworks and YBT shareholders. The YBT shareholding in WPL was registered in the name of YBT Growth Solutions Limited which was a company jointly owned and directed by Mr Spruyt and Mr McPhedran.[9]

45. At this point in time all of the dealings between Mr and Mrs Bell and Groundworks/ YBT were with Mr Spruyt. As we understand it Mr McPhedran, at that time, was in hospital following a fall which he had suffered in early 2017.

46. No monies were paid by YBT for its shareholding. However, on 18 April 2017, 10X issued an invoice for a sum of $16,250 plus GST and passed on a consulting fee from Deloitte for advice that had been requested by Mr Spruyt in relation to the intellectual property owned by WPL. The total of the invoice was $20,655.73.

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[8] DT 34 and DT 35.
[9] DTB 127.5-17.8.

47. Notwithstanding requests for payment of the promised funds by way of purchase of the YBT shares, no payment for the shares was made by YBT or anyone else. However, on 2 May 2017[10], Mr McPhedran wrote to Mr Spruyt and copied in Mr Beeby of Groundworks, Mr Roper of NZ Safety Brokers, Murray Bell and another person[11]. The email commenced by stating that:

> As Finance Director of YBT Group have just completed a financial/risk overview of both companies. I have identified several "loose ends" in both companies that need urgent attention before committing any additional shareholder funding from YBT.

48. The email went on to state in respect of Whitestone Post that:

> I am currently preparing a Shareholder Agreement for signing by all Shareholders and personally as Directors; the injection of shareholder funds from YBT Global to assist company cash flow will only be advanced once SHA signed by all parties; will have draft to everyone by Thursday.

49. Mr Bell in his evidence stated that, when he questioned Mr McPhedran about the professionalism and ethics of sending this email to both companies (NZ Safety Brokers and WPL were unrelated companies and previously unknown to each other) he stated that it was "to obtain a reaction" and that he was more than happy with the reaction that it had achieved.[12]

50. Mr Bell in his evidence stated that Mr McPhedran further advised him that he did not like Stephen Beeby (of Groundworks) and suggested that Mr McPhedran and Mr Bell should combine as shareholders to force Stephen Beeby from the company and appoint a new manager. In an email to Mr Spruyt sent on 5 May 2017[13] Mr Bell expressed his concerns about the 2nd May email. He stated:

> If the email had been a mistake, I could live with it, but as it was deliberate, I struggle with the ethics of the email and the reaction that it was meant to provoke and I certainly feel disrespected in that I was not advised about any detail regarding the reasons. I had to read the email a number of times to even see what it had to do with me and I was left wondering as I said to you whether Dave may have returned to work too soon.

51. In an email to Stephen Beeby and Simon Fawkes, Mr Bell referred to the 2 May email from Mr McPhedran. Mr Bell stated that:

> I can't stress enough that I believe telling all and sundry that an unrelated company is having difficulties regarding a trademark and that Whitestone Post are having funding issues is beyond unprofessional and I am unsure how the Accountant Society would view the process.

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[10] DT 47
[11] It should be noted that, until receipt of this email Mr Bell, had no knowledge whatsoever of Mr Roper or his company, NZ Safety Brokers.
[12] Bell evidence at para 38
[13] DT 48

52. On 10 May 2017[14] Mr McPhedran wrote to Murray Bell, Stephen Beeby and Simon Fawkes stating that:

> … Carl and myself sat down yesterday to discuss at length if YBT Global Solutions/10X should continue to hold a 15% minority shareholding and retain a seat on the Board; … we both gave this serious consideration before making the decision that regretfully it would be in the company's best interests for us to sell down our shareholding; resign from the Board and have no further role in Management.

53. The email went on to state:

> You all need to carefully consider who will purchase the shares as this will be crucial for effective company "control" on all future major transactions; please give this some serious thought before advising who you enter on the Transfer Document.
>
> It's a shame we can't continue on together; particularly after all the hard work and initiatives of Carl to assist in getting the company to its present state; but professionally we acknowledge our continuing involvement would ultimately not prove beneficial for reasons outlined above.

54. On Thursday, 11 May Mr Beeby, as CEO of Whitestone Post, wrote to Mr Spruyt noting that Whitestone Post Limited had appointed new accountants and requesting that Mr Spruyt pack all the files and when asked forward them to the new accountant. That email was responded to by Mr McPhedran requesting that "all future correspondence is to be sent to me as the Accounting Director".[15] He went on to state that:

> Your request will be considered once my email to the Directors last night is satisfactorily signed off by the Board and all monies outstanding are paid. Only then will professional clearance be given to your new accountants; this is standard ethical practice adhered to by all members of NZICA.
>
> After further consideration I propose the following for the Board to consider [WITHOUT PREJUDICE] YBT Global Solutions to sell the 15% shareholding to a yet to be named purchaser for $20k in return the current outstanding fee invoice would be cancelled; this would be cash neutral and very beneficial to the company as it would reduce set-up costs and more importantly set a "Bench Mark" for company share value; thumbnail estimate of $200k if $20k paid for a minority parcel.
>
> Please consider and advise accordingly.

55. In essence the above email is suggesting that the shares held by YBT, which were to be purchased by YBT for a price of $10,000 (which had not been paid), would be sold by YBT for a sum of $20,000. The amount purportedly owing of approximately $20,000, pursuant to the (disputed) invoice previously issued by 10X, would be

[14] DT 55
[15] DT 57

cancelled with the effect that the transaction would be "cash neutral and very beneficial to the Company".

56. Following receipt of Mr McPhedran's email of 10 May 2017, Mr Bell accessed the Companies Office records and changed the shareholding records. He removed YBT Growth Solutions Limited as a shareholder and allocated those shares between himself and his wife Elizabeth so that they each were shown as owning 25 shares (as opposed to the previously held allocations of 18 shares (Murray Bell) and 17 shares (Elizabeth Bell)). Mr Bell stated in his evidence that in doing so he was acting on an agreement which he alleged he had previously reached with Carl Spruyt that the YBTG shares would be returned to Mr and Mrs Bell and that Mr Spruyt would resign as a director.[16]

57. Upon learning of the change to the shareholding Mr McPhedran wrote to Mr Bell expressing his surprise at the transfer of the shareholding which he described as being "incorrect as we have not sold our shareholding at this point."[17] He went on to state that:

> As stated in a previous email we are prepared to sell our Shareholding for $20k [without prejudice] to whoever wants to purchase them; if you do then gives your interests 50% of company whereas if Groundwork wishes to purchase then will have control of voting rights.

58. Mr McPhedran subsequently requested Mr Bell to sign a share transfer transferring the shares previously held by YBTG to YBT Nominees Limited for a consideration of $20,000. In addition on 14 July 2017 a statutory demand was issued by solicitors acting for 10X. Ultimately, given the ongoing issues with Mr McPhedran and Mr Beeby, Mr and Mrs Bell decided to cut their losses and get out of WPL. Mr Bell ceased being a director of WPL in August 2018 although this was not registered in the Companies Office until January 2019. He now has nothing to do with the company.[18]

59. In the meantime, Mr McPhedran commenced a chain of correspondence with the Companies Office requesting an investigation into the transfer of the YBTG shareholding to Mr and Mrs Bell. He asserted that Mr Bell transferring the shares was a gross breach of his statutory director's responsibilities "as YBT Global Solutions never wished to dispose of its shareholding and no share transfer was completed. It appears commercial self-interest was the catalyst for Mr Bell's actions".[19]

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16 Bell evidence at para 44.
17 DT – 67.
18 Bell evidence at 55
19 DT 92

Mr McPhedran described the actions of Mr Bell as "tantamount to 'attempted theft'" and asserted that in forty years of professional practice he had never encountered

> …such a blatant self-serving and illegal action by a company director. As such on behalf of my company I lodge an official complaint against Mr Bell and request that correct shareholding details be reinstated at the Companies Office.[20]

In an email to the Companies Office of 15 June 2017 requesting urgent advice on progress to date, Mr McPhedran asserted:

> We have potential purchasers urgently pushing to buy our 15% Shareholding but will not do so until full transparency is established. Should this illegal act by Bell as a company director not be immediately rectified and cause us economic loss as a result, we will be instructing our solicitors to deal with matters going forward and claim Damages against Whitestone Post and its directors.[21]

60. There is no evidence of anyone at that time wishing to purchase the shares purportedly owned by YBTG.

61. The Companies Office ultimately decided to take no action in respect of the complaint by Mr McPhedran because "there is a clear dispute between the parties with regard to what occurred at the meeting on 6 March 2017 and subsequent events."[22]

62. We note that, notwithstanding the conduct of Mr McPhedran and Mr Spruyt in relation to this matter, Mr and Mrs Bell continued to pay monthly payments to 10X which they had been paying throughout the period from September 2012 until 8 May 2017.[23] The monthly payments made ranged from $575 per month for the period to 9 September 2013 to $670.83 per month from 8 October 2013 until payment ceased on 8 May 2017.

63. As a result of the conduct described above, Mr McPhedran was charged as being guilty of:

    (a) Misconduct in a professional capacity; and/or

    (b) Conduct unbecoming an accountant; and/or

    (c) Negligence or incompetence in a professional capacity and that this is of such a degree and/or so frequent so as to bring the profession into disrepute; and/or

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[20] Email to Registry's Integrity and Enforcement Team dated 30 may 2017 – DT 92.
[21] DT-91.
[22] DT 104.
[23] Para 49 Bell evidence and DT30-DT32.

(d) Breaching the Institute's Code of Ethics.

64. The particulars of the charges were that Mr McPhedran:

(a) Failed to properly oversee the work of his practice entity, Your Business Team Limited's (YBT) other director, Mr Carl Spruyt and/or to supervise the staff of the practice, in particular:

(i) the failure to identify and manage conflicts of interest arising from the proposed investment by your practice YBT, or its associated entities, in Whitestone Post Limited (WPL); and/or

(ii) the use of a WPL's Companies Office log-on details without authority; and/or

(iii) the transfer of WPL shares to YBT Growth Solutions Limited (YBTG) without authority; and/or

(iv) the failure to make payment to WPL of around $10,000, as agreed, at or about the time of the transfer of its shares to YBTG.

…

(b) Failed to identify and/or manage conflicts of interest and/or threats to your objectivity arising from the involvement of your practice, or associated entities, with WPL including the roles of business advisor to WPL and those of shareholder and/or director of WPL in breach of the fundamental principle of objectivity of the Code (including ss 220 and 280); and/or

(c) Disclosed by email dated 2 May 2017, confidential client information outside your firm when there was no legal or professional right or duty to do so, in breach of fundamental principle of confidentiality of the Code (s 140.1); and/or

(d) Rendered an invoice (invoice CD10X183) in circumstances where there was no right to charge the fee sought, and/or where no explanation of the fee was provided once requested, in breach of the Fundamental Principle of Professional Behaviour of the Code (s 150.1); and/or

(e) Without a proper basis:

(i) failed or refused to pay for the shares WPL transferred to YBTG on 16 March 2017; and/or

(ii) asserted ownership of the shares; and/or

(iii) failed or refused to return the shares to the Bells; and/or

(iv) demanded payment for the shares in WPL;

in breach of the fundamental principles of integrity (s 110.1) and/or Professional Behaviour (150.1) of the Code.

65. In a formal response to the charges dated 15 August 2018, the particulars (a)(i) and (iv), (b), (c), (d), (e)(i) were admitted. The particulars of the charges (a)(ii) and (iii) and (e)(ii)-(iv) were disputed.

66. The Disciplinary Tribunal found that the particulars of the charges which were admitted were proved on the evidence. It found that particulars (a)(ii) and (a)(iii) (which related to the initial transfer of WPL shares to YBT Growth Solutions Limited, allegedly without authority) were not proved.

67. The Tribunal found that Mr Bell had provided the log-on details to a YBT employee and had signed the necessary transfer forms. It held that Mr Bell had not made clear his expectation (that the transfers would not be implemented until payment had been made) and that expectation had not been communicated to those directly involved. The Tribunal accepted that, in any event, at the time of these events Mr McPhedran was hospitalised and that "any failure on Mr McPhedran's part to supervise or oversee these (in a sense procedural) matters does not warrant disciplinary action".

68. In relation to the remaining particulars which were disputed (e)(ii)-(iv) the Tribunal found the particulars proved on the balance of probabilities.

69. The Disciplinary Tribunal, for the reasons articulated at pages 5 and 6 of its decision, found that Mr McPhedran was guilty of charges 1, 2, 3, and 4.

70. There is no appeal against those findings of guilt.

The Roper complaint

71. Mr Roper owned and operated a business through a company named New Zealand Safety Brokers Limited (**NZSB**). He was the sole director and a 50% shareholder of that company. The other shareholder, Mr Thompson, had left the company in acrimonious circumstances.

72. Towards the end of 2015 Mr Roper was suffering some personal financial difficulties and was needing expert assistance in developing his business. As he stated, at

paragraph 12 of his evidence, his strengths had always been on the consultancy/client side but he needed help with the business aspects which were never his forte.

73. He approached the 10X business and completed a 10X "business health check".[24] It was explained to him that 10X was part of "Your Business Team" operated by YBT and its related entities. They also had the same premises, the same reception and the email sign-offs referred to both businesses.

74. Mr Roper was introduced to Mr McPhedran as a "partner" in 10X and YBT and an experienced business person who could help grow NZSB.

75. Mr Roper met with both Mr Spruyt and Mr McPhedran on a couple of occasions to review the business and its plans for the future. They were both positive about the business. They believed it had real potential to grow and was well suited to the franchise model Mr Roper had in mind.

76. Mr Roper was offered an office to work from and a car park at the YBT premises. In April 2016 Mr McPhedran offered to "join forces" with Mr Roper. In an email from Mr McPhedran dated 14 April 2016[25] Mr McPhedran said:

> Both Carl and myself have indicated a willingness to join forces with you and ensure everything is ready to proceed as you intend both now and going forward; we both have considerable expertise in this area from recent personal experience with 10X. To this end can you please supply the following information/documentation to enable us to assess the integrity and robustness of the Franchise Model as launch day is fast approaching and no second chances are given. …
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> Graham; I request these details in your best interests as we have first-hand been involved in a Franchise that literally "destroyed itself" by not delivering the legal expectations the franchisees had signed up to.

77. Mr Roper signed up for the "10X Coaching Club" for the period commencing 1 April 2016. The overall cost of the programme to Mr Roper was $10,995 plus GST spread over the year less a sum of $1,375 plus GST which had been funded by the Otago Chamber of Commerce. Mr Roper attended three or four "coaching club" sessions.[26]

78. In April and May 2016 Mr Roper and Mr McPhedran had discussions regarding the NZSB business. Mr McPhedran advised Mr Roper that, because of Mr Roper's financial difficulties, it would be advisable for Mr Roper to transfer his shares in NZSB to one

[24] DT 3-19.
[25] DT 46
[26] Roper evidence, para 23.

of the YBT companies, YBT Nominees (No. 2) Limited, to be held in trust until his personal financial issues were over.

79. Mr McPhedran also gave advice in relation to the then ongoing dispute with Mr Roper's partner (Mr Thompson). Mr Thompson was refusing to participate in the business or sell his shares. As a result of Mr McPhedran's advice it was decided that NZSB would issue more capital and allow existing shareholders to subscribe for those shares at a price. Mr Roper understood that this would dilute the shareholding of Mr Thompson to the point where YBTN could buy them and remove Mr Thompson as a shareholder.[27]

80. As a result of that advice Mr Roper executed a transfer of his shares in NZSB to YBT Nominees (No. 2) Limited and, on 28 June 2016, signed an NZSB Board resolution whereby the company resolved to issue 40,000 further shares at $1 per share (although in fact, to the best of Mr Roper's knowledge, only 20,000 further shares were issued).[28]

81. On 22 July 2016 a subscription agreement was signed whereby YBTN would purchase 20,000 at $1 per share and, on 27 July 2016, a notice of issue of shares confirming the issue of 20,000 shares was given.

82. On 27 July 2016 Mr Spruyt and Mr McPhedran also appointed themselves directors of NZSB.[29]

83. Mr Roper said in his evidence that he did not fully understand the ins and outs of the documentation that was prepared, just that it was designed to insulate him from personal debts that might affect NZSB and to get Mr Thompson out of the company. He said that he was aware that there was some form of "debt for equity swap" that was also part of it but always understood that he would own half of the company.[30]

84. At paragraph 35 of his evidence, Mr Roper confirmed that he received no written advice regarding the strategy being adopted nor were the arrangements between himself and 10X/YBT ever documented. He said that he was not given any advice of any actual or potential conflict that Mr Spruyt, Mr McPhedran, 10X or YBT might have by taking shares in his company or becoming directors of NZSB.

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27 Roper evidence, para 30.
28 Roper evidence, para 31(b) and Exhibit DT 50.
29 DT 191-194.
30 Roper evidence at 33 and 34

85. On 1 August 2016 Mr Thompson transferred his 50 shares in NZSB to YBTN thus putting all 20,100 shares in NZSB in YBTN's name.[31]

86. A meeting was held with the solicitors for NZSB (Grace Douglas Burke) (**"GDB"**) on 10 August 2016. The meeting was attended by Mr McPhedran, Mr Spruyt, Mr Gray (who was a lawyer acting for Mr Roper) and Mr Chris Burke of GDB.

87. Following that meeting a lengthy letter (in draft) was written by Mr Burke recording GDB's understanding of agreements reached between Messrs Spruyt, McPhedran and Roper. The letter notes that, by 31 May 2016, GDB, Brett Gray and 10X, had rendered invoices to NZSB and Graham Roper (and related entities). It stated that the parties reached an accord with NZSB and Graham in order to maintain NZSB's solvency and cash flow and to assist NZSB with its business operations so the business did not fail resulting in NZSB's liquidation and quite possibly Graham's bankruptcy.[32]

88. At paragraph 13 of the letter, it was stated that 10X was prepared to effectively swap its $20,000 plus GST business coaching fee for the balance of the remaining 50% share in NZSB. It noted that 10X would be able to provide the office administration, accounting, strategic planning and commercial experience that NZSB lacked at that time and Graham would be able to provide NZSB expertise in health and safety.[33]

89. It then notes that "NZSB paid 10X's invoice of $20,000 plus GST and 20,000 ordinary shares were issued to YBT for $1 each thereby making YBT effectively the shareholder in NZSB." It was asserted that NZSB issued the 20,000 ordinary shares to YBT on the basis that YBT would distribute any profits equally between YBT (as to 50%) and Graham Roper (as to the remaining 50%).

90. Mr Roper in his evidence stated that he was not aware of any invoices rendered by 10X for $20,000 or how that amount would be made up. He said he had only signed the engagement with 10X in April 2016 for a monthly fee subsidised by the Otago Chamber of Commerce. He also stated that the assertion at paragraph 15 of the letter that the YBT/(10X) invoice for $20,000 had been paid and that YBT received the issued shares could not be correct.[34]

91. The letter also made reference at paragraph 24 to an interlocking guarantee between NZSB, Paramedical Consultancy Limited and Graham Roper personally whereby all three of those parties guaranteed the payment of Brett Gray's invoices for legal

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[31] Roper evidence at para 36 and Exhibit DT 199.
[32] DT 65, para 6.
[33] DT 65 at [13].
[34] Roper evidence at para 38

services rendered to any of those three parties. Mr McPhedran in a comment on this paragraph stated that:

> NZSB however considers that this guarantee is almost certainly legally voidable under the Companies Act and equity. … The current Board of NZSB finds it unacceptable that the sole director (at the time the guarantee was given) after having initiated a share issue to recapitalise the company and ensure the Solvency Test was being met offered a company guarantee …[35]

92. There is a further version of the draft letter from GDB. At paragraph 17 of the draft the letter states:

> Graham would not personally hold any shares in NZSB until the threat of his personal bankruptcy was removed.

93. There then follows an annotated comment in red type that "the eventual transfer of the 50% shareholding to Graham will be for a consideration of $10k as a result of the forced recapitalisation as a result of the Thomson problem." Mr Roper states, at paragraph 39 of his evidence, that he had "no idea where that suggestion (that he would pay $10,000 for the return of his shares) came from – it is nonsense".

94. We note that, in a further version of the draft letter containing annotations, there is an amendment to paragraph 17 of the draft letter which deletes the words "the eventual transfer of the 50% shareholding acquired from Thomson by recapitalisation to Graham will be for a consideration of $20k as a result of the forced recapitalisation as a result of the Thomson problem".[36]

95. Finally we note that, at paragraph 21 of the GDB draft letter, a statement is made that the Board of NZSB would comprise of Carl, Dave and Graham but that "Graham will defer to Carl and Dave in relation to all commercial decisions and strategic planning; Dave and Carl will defer to Graham in regards to health and safety matters". There is then a notation in red type added, presumably, by Mr McPhedran or Mr Spruyt, which states:

> A phone call from the ANZ this morning informed us Graham is not acceptable to them as a Director as a result of past history that Graham is aware of and has discussed with us; as such Graham will resign as a Director, left a message for Brett to call to inform him of this unfortunate development but have not heard back at this stage.

96. In his evidence before the Tribunal, Mr Roper confirmed that, on 11 August 2016, he resigned as a director of NZSB. At paragraph 40 of his evidence, he stated:

> I signed the relevant forms because Mr McPhedran convinced me it was necessary to enable NZSB to change bankers to ANZ (who were also

[35] DT 67, para 24.
[36] DT 70 at para 17.

> YBT's bankers). Again, me not being a director was supposed to be temporary.

97. At paragraph 41 of his evidence, Mr Roper acknowledged that he had a previous issue with the National Bank but said that NZSB's account was with Westpac and to his knowledge they were happy for it to stay. He said he "later learned that no request had been made by ANZ to remove me as a director."[37]

98. This evidence assumes some importance because it was the subject of strong comment by the Disciplinary Tribunal in respect of the conduct of Mr McPhedran in relation to the removal of Mr Roper as a director of his own company. We discuss this further below in the context of the further evidence which was adduced on this issue before the Appeals Council.

99. Finally, Mr Roper asserted that:

> At no time was there any agreement for YBT, its related entities or any individual to own more than 50% of NZSB (and even that was on a temporary basis). Since August 2016 various discussion had ensued about what was happening to NZSB and what my role should be, without any clear resolution. [38]

100. In November 2016 there were discussions between Mr McPhedran and Mr Roper about his ongoing role in the NZSB business. Following those discussions Mr McPhedran emailed Mr Roper and Mr Spruyt stating that there were "two options, an (a) and a (b)".[39] The email states:

> Basically discussions centred around Graham's future role in the company with the two choices being:
>
> [A] Equity participation of 50%; with the understanding that these shares would only be transferred once any "real or perceived risks" to Graham personally were eliminated. 10X to retain control of both the Board and voting shares at all times.
>
> [B] Graham to purchase the Dunedin Franchise for consideration of $1 and operate the business under the standard franchise agreement signed up by the other franchisees; income apportioned 80/20 in favour of the franchisee. Graham to then apply 20% of his 80% share to gradually repay his current account of $45k [see attachment 1]; thus cash flow resulting in 60% Graham, 20% NZSB and 20% debt repayment.
>
> Once the $45k has been repaid then company share would revert to 20% with the excess 20% being applied to debts outstanding to RDS and BG Law [estimated in total to be $32k].
>
> The other historic current account debt of $37k [see attachment 1] to be satisfied over time by the Company contracting Graham to perform franchisor requirements on a national basis; i.e. vetting of new

[37] Roper evidence at paras 40 and 41.
[38] Roper evidence at para 42
[39] DT 82-83.

> franchisees, initial training and providing specialist H&S advice if and when required.

101. The letter then went on to discuss the pros and cons of the suggested "choices". One of the pros suggested of Option [B] was:

> Emotionally accepting the Company Graham founded no longer "his baby" and being managed by new shareholders and businessmen as opposed to pure H&S."

102. The email ends by stating:

> Gentlemen; again I stress that the above has been proposed in good faith after hearing from everyone at last week's meeting and further discussions with Graham after Chris and Brett had left.
>
> We believe [B] is the only commercial option open to us all but will be guided by the valued opinions of all concerned before proceeding.
>
> Graham was also happy for me to circulate the above to everyone simultaneously without "running past him first". For all of us to go forward with confidence total transparency is vital to ensure future success for all involved.

103. Following receipt of that email from Mr McPhedran there is no evidence to suggest that either of the options put forward by Mr McPhedran were agreed to. At that point, however, it seems that Mr Roper regarded his involvement with Mr McPhedran and Mr Spruyt as being important in terms of the expertise that they could bring to the NZSB business. In an email to Mr Spruyt and to various NZSB franchisees which was copied to Mr McPhedran, Mr Roper stated:

> As the founder and developer of NZSB it was certainly one of my better decisions to bring Dave and Carl on board to ensure NZSB grows into the original dream.

104. Mr McPhedran responded to that email "thanks Graham; we all firmly believe 2017 will be a "go forward year".[40]

105. In February 2017 Mr McPhedran suffered a fall and was hospitalised as a result.

106. On his return to work Mr McPhedran, in his email of 2 May addressed to the owners of NZSB and Whitestone Post, and written in his capacity as "finance director of YBT Group", stated in relation to NZSB:

> There still appears to be some confusion as to just where the Company Trademark ownership stands. As such no further commitments to marketing spend and confirmation of Otago franchise ownership/potential sale will be authorised/agreed to until the TM is officially registered in the name of New Zealand Safety Brokers (NZ) Limited which is 100% owned by YBT Growth Solutions Limited.[41]

[40] DT 86.
[41] DT 96

107. Mr Roper responded to that email in an email to Mr Spruyt[42]. He stated in relation to the 2nd May email from Mr McPhedran:

> Dave was well aware of the May 7th deadline for the bank and to state what he has in the email is completely at odds with the meeting the three of us (had) the week before.
>
> It also felt like blackmail due to the May 7th deadline.

He also noted in relation to the email that the email:

> Also breached confidentiality, professional boundaries by having Whitestone people also included. I feel very embarrassed by these people knowing NZSB company issues (no explanation given).

108. In his evidence at paragraph 53, Mr Roper stated that in a previous meeting the week before the 7th of May Mr McPhedran had informed him:

> It will be his way or the highway for me' and that 'I don't own anything' and to give him ownership of the NZSB trademarks.

109. In an email dated 14 May 2017 Mr McPhedran sent an email concerning Mr Roper's role in the business noting that:

> 10X, YBT and NZSB were now "all interrelated".[43]

110. On 18 May 2017 Mr McPhedran produced an email recording his understanding of the arrangements between the parties in relation to NZSB.[44] At point 7 of that email Mr McPhedran states:

> Ownership of 100% of shares in NZSB (20,100) agreed as listed at Companies Office [YBT Global Solutions Limited] past discussions on Shares being held in trust for Graham [or nominee] now agreed to be null and void.

111. Mr Roper replied to that email by an email dated 23 May 2017.[45] In relation to the point 7, Mr Roper made the notation "AGREE". At paragraph 55 of his evidence, however, Mr Roper stated that he understood the reference to the share arrangements being "null and void" as being an indication that he would have his shares returned to him.

112. On 24 May 2017 Mr Roper wrote to Mr Spruyt and Mr McPhedran telling them that he had passed on their email to his lawyer, Brett Gray and asked him to respond in a formal letter for discussions and the way forward. He stated that:

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42 DT 98-99
43 DT 104.
44 DT 116-117.
45 DT 123-124.

> I expect that an agreement will be finalised and signed on or before 1 June 2017.[46]

113. In an email to Mr Roper dated 1 June 2017[47] Mr McPhedran wrote to Mr Roper stating:

> Graham; I am making ALL calls on NZSB matters so if need to discuss anything please see me; stop involving Carl as he has other areas to deal with.
>
> Just to clarify things as they stand, my email to you of 23 May was a Without Prejudice offer of 9 points as discussed on how the way forward could proceed; you have subsequently agreed to 8 of them with number 4 still to be confirmed as involves Brett.

114. On 2 June 2017 Mr Roper wrote to Carl Spruyt[48] advising that:

> Unfortunately, due to Dave's continual bullying and abusive behaviour to me, I can no longer maintain a presence at the office.
>
> I am working from home until such time I source a new office space.

115. On 16 June 2017 Mr Spruyt wrote to Mr Roper stating that:

> We have completed a review of outstanding issues detailed below and that resulting from this review we have made the following decisions:
>
> 1. **Role within the company**
>
> Effective immediately, your role within the Company in any capacity is terminated. All involvement and responsibilities your role held within the company no longer exist and we will remove all reference to your role within the company within the week.
>
> With particular reference to the email on Friday, all offers of future involvement are permanently withdrawn and no further negotiation will be entered into.[49]

116. The letter also noted that:

> The Company financial records over the period previous two plus years detail funds advanced to yourself estimated to be $80,000 with interest accruing daily.
>
> Within the coming weeks the 31 March 2017 annual accounts will be prepared and once signed off by the Board of Directors the company shall require full settlement of these funds. The timeframe for settlement shall be advised.
>
> We wish you well for your future endeavours.

117. Mr Roper was ultimately locked out of the computer system and in effect ejected from the office. That was the end of Mr Roper's involvement with NZSB.[50]

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46 DT 125.
47 DT 133
48 DT 134
49 DT 149-151.
50 Roper evidence at para 58

118. On 17 July 2017 a company named "Health and Safety Coaching" was incorporated with its registered office at YBT and with directors Daniel Irvine, Mr Spruyt and Mr McPhedran. Mr Roper asserts, at paragraph 60 of his evidence, that the company apparently undertakes health and safety consultancy. NZSB and its franchisees were in the same business of providing health and safety advice.

119. On 11 September 2017 a liquidator was appointed to NZSB by shareholder resolution.[51] Mr Roper had no involvement in any special resolution appointing a liquidator. That was done by Mr McPhedran as a director of the sole registered shareholder YBT Nominees (No. 2) Limited. The liquidator is now pursuing Mr Roper for an alleged shareholder debt owed to NZSB. Mr Roper is challenging the appointment of the liquidator in the High Court.

120. Mr Roper, on 5 September 2017, made a complaint to NZICA regarding the conduct of Mr McPhedran. At paragraph 65 of his brief of evidence he stated that:

> I feel I was conned by Mr McPhedran into giving up control of my company. In my opinion he took advantage of a vulnerable person with limited business skills who was in difficult financial circumstances and sought to profit from that.

121. In his evidence before us, Mr Roper gave evidence as to his making enquiry of the ANZ branch in Mosgiel regarding an NZSB credit card which he had been using and which had stopped working. He received a printout showing various transactions on the account.[52] He was subsequently told in a telephone conversation with another officer of the bank that he had no entitlement to query the transactions. Mr Roper also received an email from Mr Elliott of the ANZ bank directing any queries to Mr McPhedran.

122. At paragraph 21 of his evidence before us Mr Roper stated that he was called by Mr McPhedran to his office. He states that Mr McPhedran was angry and asked why Mr Roper had talked to the bank manager as he had "no rights to anything". Mr Roper responded that he was a 50/50 owner and had every right to which Mr McPhedran responded "you don't own anything so you can fuck off".

123. In his evidence before us, Mr Roper stated that:

> At that point our relationship broke down completely. The credit card was cancelled, I was locked out of the NZSB IT system and, on 16 June

[51] DT 201-202.
[52] DT 142.

> 2017, my role within the company was terminated in an email from Mr Spruyt.[53]

124. The conduct described above formed part of the basis for the charges against Mr McPhedran. The particulars of the charges insofar as they related to the Roper complaint were:

> (f) Failing to identify and/or manage conflicts of interest arising and/or threats to your objectivity from the involvement of your practice YBT, or associated entities, with NZ Safety Brokers New Zealand Limited ("NZSB") including the roles of advisor to NZSBL and those of shareholder and/or director of NZSBL, in breach of the Fundamental Principle of Objectivity of the Code (including ss 220 and 280); and/or
>
> (g) In breach of trust and/or without proper authority:
>
> (i) asserted ownership over the NZSB shares held by YBT Nominees (No. 2) Limited on trust for Mr Roper; and/or
>
> (ii) excluded Mr Roper from the affairs of NZSB; and/or
>
> (iii) appointed a liquidator to NZSB.
>
> In breach of the Fundamental Principles of Integrity (s 110.1) and/or Professional Behaviour (s 150.1) of the Code; and/or
>
> (h) Disclosed by your email dated 2 May 2017, confidential client information outside your firm when there was no legal or professional right or duty to do so, in breach of Fundamental Principle of Confidentiality of the Code (s 140.1).

125. In the notice of response to charges dated 15 August 2018 the above particulars of the charges in respect of the complaint by Mr Roper were admitted. Mr Roper gave evidence at the hearing before the Disciplinary Tribunal but was not cross examined.

126. The Tribunal in its decision found that the particulars admitted were made out by the evidence called by the PCC in support of those particulars.[54] As noted above the Disciplinary tribunal found the charges against Mr McPhedran were proved.

Further evidence before Appeals Council in relation to removal of Mr Roper as a director of NZSB

127. Following the grant of leave to adduce further evidence before the Appeals Council in relation to the circumstances of Mr Roper's removal as a director of NZSB, briefs of evidence were provided by Mr McPhedran, Mr Spruyt and Mr Matthew Elliott (the latter was a relationship manager at the ANZ bank). A brief of evidence in reply by Mr Roper was also filed on behalf of the PCC.

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[53] Brief of evidence of Graham Roper dated 28 March 2019 at para 22.
[54] DT decision at p4.

128. As noted above, in our decision granting an adjournment of the hearing of the appeal to 7 and 8 May 2019 it was made clear that those witnesses were to attend and give evidence *viva voce* and be subject to cross-examination.[55]Mr McPhedran and his proposed witnesses chose not to appear.[56]

129. As noted above, when the hearing of the appeal was convened on 7 May 2019, neither Mr McPhedran nor the other witnesses for whom briefs had been filed on behalf of Mr McPhedran were present. Mr Laws, on behalf of Mr McPhedran advised that Mr Laws and his client had chosen not to call those witnesses and "not to pursue that matter".[57]

130. Notwithstanding that position, Mr Moon for the PCC, confirmed that he wished to call Mr Roper who was present and available to give evidence. In order for that to occur the Appeals Council decided to admit the unsworn briefs of Messrs McPhedran, Spruyt and Elliott on the basis that the evidence and exhibits to that evidence would be given such weight as the Appeals Council thought fit. Mr Roper was then called by the PCC and gave evidence. He was also cross-examined by Mr Laws.

131. The significance of the evidence in relation to the removal of Mr Roper as a director of NZSB arises from the finding by the Disciplinary Tribunal at p6 of its decision as follows:

> The uncontested evidence of Mr Roper was that you convinced him to resign as a director of NZSB because that was a requirement of ANZ if it were to offer banking services to the company. He later learned that no request or requirement had been made by ANZ that he be removed as a director.
>
> In the Tribunal's view this misleading and deceptive conduct is reprehensible. The Tribunal concludes that your purpose was to marginalise Mr Roper and prevent him from accessing information about the company's affairs – requests which Mr Roper (who had a 50% beneficial interest in the company) subsequently made for information about performance of the company were refused.

132. The basis for that conclusion was contained in Mr Roper's sworn evidence before the Tribunal which was not contested (by way of cross-examination or rebuttal evidence) at the hearing before the Disciplinary Tribunal. However, for the reasons given in our decision on the application for leave to adduce further evidence, we allowed further evidence to be called on that issue.

133. It appears from the evidence contained in the briefs of Mr McPhedran, Mr Spruyt and Mr Elliott that, at the time Mr McPhedran requested an account to be opened with the ANZ bank, the ANZ bank (through its relationship manager Mr Elliott) resisted

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55 Reasons for decision granting adjournment dated 18 April 2019.
56 See paras 30 and 31 above and above n 1.
57 Transcript at p7.

opening an account for NZSB because of Mr Roper's involvement in the company.[58] The email correspondence between the Bank and Mr McPhedran/Mr Spruyt (annexed to the brief of evidence of Mr Spruyt) provides some support for that evidence. In an email dated 5 August 2016 Mr McPhedran wrote to Mr Elliott at the ANZ as follows:

> … We have just purchased a health and safety company with potential for a nationwide franchise, nine out of twenty franchises operating at present. Urgently need to open up a banking facility, cheque account and deposit account to tidy up and control finances. Will close existing Westpac accounts as soon as ANZ in place. Can you coordinate someone to email through the appropriate documentation required please, call any queries.

134. In an email from Sue Swain at ANZ to Lisa Wooltorton of YBT and copied to Mr McPhedran, information was requested as to the details of NZ Safety Brokers Limited and the proposed signatories to the accounts. The response in respect of proposed signatories was stated to be "Dave McPhedran and Carl Spruyt are to be the only two signatories (you have their details on file already) and the accounts will require two bi-signatures to sign off on any transactions". That information was provided by Lisa Wooltorton of YBT by email dated 8 August 2016 which was copied to Mr McPhedran and Mr Spruyt.

135. By email dated 9 August 2016 Francesca Cameron of the ANZ wrote stating:

> I do require the following from Graham Roper:
>
> Identification – a New Zealand passport or a New Zealand driver's licence and an embossed credit/debit card, verification of address – a utility bill or bank statement.

136. That information was provided by Liz Wooltorton by email dated 9 August 2016. The next correspondence is an email from Mr Spruyt to the ANZ on 11 August 2016 at 2.42pm. That email attached the signed resignation authorities of Graham Roper as a director of NZ Safety Brokers NZ Limited and stated:

> Please could you confirm the following:
>
> 1. Do documents now satisfy the bank's requirements to enable appropriate account opening mandates to be issued for our execution?
>
> 2. When these documents can be sent to us for signing – we can have them back to you today?
>
> 3. When will the account be operational upon return of these documents assuming today?
>
> Not a pleasant saga to go through for us both but we do appreciate your assistance in this matter.

[58] Spruyt brief of evidence paras 4 and 5, Elliott brief of evidence para 5 and McPhedran brief of evidence para 7.

137. Finally by an email dated 11 August 2016 at 3.04pm Francesca Cameron of ANZ wrote to Lynette Hall (of ANZ) and copied Matthew Elliott of ANZ:

> After discussions with the clients, Graham Roper has resigned from the company NZ Safety Brokers NZ Limited as per the attached.
>
> I have checked the Companies Office however it is not yet showing on the site.
>
> After discussing with Matt he has approved the opening of the new RM and accounts today so that we can organise the new mandate and linking to ADO.
>
> In addition to David McPhedran and Carl Spruyt signing on the mandate as the directors, we also require a nominated signatory Abby Napier RM72073697. Access is info – severally, transact – director jointly with Nom.Sig. or directors jointly.
>
> Matt
>
> Please confirm approval to Lynette to open new RM and accounts as noted above.

138. In his sworn evidence before us Mr Roper gave evidence that, in discussions in early August 2016 both Mr Spruyt and Mr McPhedran raised, at different times, the need to move NZSB's bank accounts to ANZ (because ANZ was YBT's banker). He stated that he queried this given that NZSB had no issues with its then banker, Westpac. He said that he received assurances that his role would not change.

139. Mr Roper attached to his evidence an email sent by Mr Spruyt to NZSB franchisees on 9 August 2016 advising of a proposed change of bank to the ANZ "as that is where all our other business entities all bank with". The email states that this:

> Will greatly streamline company financial management for us and certainly provide even better leverage from our perspective with the company's Banker than we could expect otherwise as a standalone relationship with Westpac.

140. The email is signed off by Mr Spruyt as managing director, NZ Safety Brokers NZ Limited.

141. Mr Roper stated in his evidence before us that, on 11 August 2016 he had a discussion with Mr Spruyt and Mr McPhedran in the offices of YBT in the area just by the photocopy machine outside the board/meeting room. He gave evidence that Mr McPhedran did most of the talking. "He informed me that ANZ would not accept me as a named director on the account and this was due to my previous history with the ANZ/National Bank."[59]

[59] Roper evidence at para 9.

142. Mr Roper stated that his immediate response was to suggest staying at Westpac as per previous discussions. However, Mr McPhedran was firmly of the view the account should change reiterating 'we have all our accounts at ANZ and know them well' or words to that effect. Mr Roper said that Mr McPhedran was "insistent I should resign as a director of NZSB to make the move happen, a suggestion Mr Spruyt supported.' Mr Roper then states that he "reluctantly" agreed to resign as a director and signed the relevant forms that day.[60]

143. Mr Roper's resignation as a director was communicated in a memorandum to NZSB franchisees on 11 August 2016 signed by Mr Spruyt as Managing Director and by Mr McPhedran as "Director-Finance". The memorandum states that:

> He (Mr Roper) has also accepted proactively that his role as a Director of the Company for the time being is not feasible and today has resigned as a Director of the Company. We cannot stress enough this has been a positive step to allow him to focus on what he does best and Dave and I assure you Graham is very much part of the company's future plans and this is NOT an exit action.

144. Mr Roper, following receipt of that memorandum, wrote to Mr Spruyt[61]:

> If a client of yours told you that they had relinquished their shares then resigned as a director of a company they foundered [sic], what would your reaction be?
>
> As of now I only have your and David's word as to my ownership of part in NZSB. I don't even have an employment agreement, I just need you both to know how much trust I have put in you both, especially given my past experiences.

145. Mr Spruyt in an email to Mr Roper and copied to Mr McPhedran at YBT responded saying:

> Appreciate your comments and we are painfully aware of the impression this gives. Only alternative was to allude to the true reasons for necessitating this and would have a worse reaction.
>
> Remember your risk with us is fully covered by the memorandum of understanding that is being/will be signed off by all parties to secure your relationship with us and the Company. That is the best we could ever do in the situation facing us all.
>
> Again we totally appreciate your past experiences (ours too) make this a huge leap of faith – we don't intend to disappoint and nor do you.
>
> Your role is integral to the future of the business – don't see why that should change. …[62]

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60 Roper evidence at paras 10 and 11
61 Exhibit GR-3 to Roper evidence
62 Exhibits GR 1, GR 2, GR 3 and GR 4 to Roper evidence.

146. At paragraphs 13-20 of his evidence, Mr Roper described the circumstances leading up to advice given to him by the ANZ that it was not the bank's request that he not be a director. Mr Roper gave evidence that, in early June 2017, he had made enquiry at the ANZ branch regarding his company credit card which had stopped working. He also wished to query certain transactions which had been brought to his attention by the teller at the ANZ to whom he spoke.

147. When he made enquiry he was passed on to someone in Dunedin who he understood to be the NZSB account manager. He explained that he was a 50% shareholder in the company and needed further details about the transfers which had been disclosed to him. He was advised by the person to whom he spoke that he was not listed as a shareholder or director and could not be provided with any information.

148. At paragraph 19 of his evidence he stated that:

> During that conversation I asked why I was not allowed to be a director. He advised "it wasn't the bank's request that you not be a director".

149. Mr Roper received an email from Mr Elliott of ANZ Bank on 7 June 2017 which referred to a statement request and directed any queries to Mr McPhedran at YBT.

150. The email from Mr Elliott states:

> Hi Graham
>
> I tried ringing your phone but the call was disconnected. Regarding your statement request I am unable to provide this information as you do not have any signing authority on the account. You will need to go through either Carl or Dave for this. Regarding your business card not working can you please contact Dave McPhedran on this.

151. Mr Roper, at paragraph 20 of his evidence before us, says that the receipt of that email from Mr Elliott suggests that it was Mr Elliott he may have spoken to. We think that is a reasonable inference to draw but, because Mr Elliott did not appear and give evidence, he was not able to be questioned as to whether it was him who provided that advice to Mr Roper. We accept, however, Mr Roper's evidence that he was told by an officer of the bank that it was not the bank which had requested that he not be a director.

Finding on the basis of the further evidence

152. Mr Roper's evidence before the Disciplinary Tribunal was that he had been convinced by Mr McPhedran that it was necessary to resign as a director to enable NZSB to change bankers to ANZ.[63] He also stated at paragraph 41 of his evidence that "I

[63] Para 40 McPhedran brief of evidence before Disciplinary Tribunal.

later learned that no request had been made by ANZ to remove me as a director." That evidence was confirmed in the evidence given by Mr Roper before us.

153. We accept Mr Roper's evidence before us that he was convinced by Mr McPhedran that it was necessary for him to resign as a director to enable the change to ANZ to occur. We also accept that he was subsequently told by someone within the ANZ (probably Mr Elliott) that his resignation as a director was not a requirement of the bank.

154. The inference drawn by the Disciplinary Tribunal from that unchallenged evidence before it was that there had in fact been no request or requirement from the ANZ that Mr Roper be removed as a director. The Disciplinary Tribunal then reached a conclusion that Mr McPhedran's misleading and deceptive conduct in that regard was reprehensible. The Tribunal concluded that the purpose of persuading Mr Roper to resign as a director was to marginalise Mr Roper and prevent him from accessing information about the company's affairs.

155. We are satisfied, on the balance of probabilities based on the evidence before us, that there was in fact a request or requirement by the ANZ bank that it would not open an account for NZSB with the ANZ if Mr Roper was a director of the company. In light of that evidence, the conclusion reached by the Disciplinary Tribunal that Mr McPhedran deliberately misled and deceived Mr Roper as to there being a request from the ANZ that Mr Roper not be involved, cannot stand.

156. In our view, however, the evidence relating to the removal of Mr Roper as a director is disturbing. Mr Roper confirmed before us that he was not given any advice by Mr McPhedran as to the significance of his resigning as a director. On the contrary, he was persuaded by Mr McPhedran that he would remain integral to the business, that he developed it and he owned it and remained a half owner of it and a shareholder. Mr Roper stated that:

> It was almost like a sales pitch on you know stick with us and we'll see you right. You don't really need to worry about being a director, because you're remember, you're always a half owner of the company.

157. Mr Roper confirmed that he was assured by Mr McPhedran/Mr Spruyt that he did not need to be concerned about resigning as a director because his interests would always be properly protected. He stated:

> I had invested everything into it, all of my heart and my soul into what I believe we were doing. I had been, and excuse my French, I had been convinced many times by Mr McPhedran that I was a shit businessman, and didn't know my way around various bits and pieces, and that I needed them for this to grow, and become a very lucrative business. I accepted that he was probably correct and around my business acumen,

> from that point of view, that's why I went to him in the first place to fill that gap in my skillset.

158. We can understand that, in circumstances where Mr McPhedran and Mr Spruyt were proposing to take an interest in the company, there was an element of convenience and possible benefit in transferring the bank accounts to the ANZ (with whom YBT and 10X banked and apparently had a good relationship). We have seen no evidence, however, that any supposed advantages of changing banks could justify the risks to Mr Roper of relinquishing his role as a director of the company which he had founded and which he was seeking to grow with the expert assistance of Mr McPhedran and Mr Spruyt.

159. In our view there was a clear conflict between the interests of Mr Spruyt and Mr McPhedran as potential shareholders and directors of NZSB and the interests of Mr Roper, as the (at least) 50% shareholder and director of NZSB, in protecting his interests in the company by remaining as a director with full involvement in the decision-making and control of the company and access to the banks accounts.

160. In our view the failure of Mr McPhedran to recognise that conflict and, instead, to actively persuade Mr Roper to resign as a director was a serious breach of his duties to Mr Roper and of the Code of Ethics. He should have fully explained both the conflict and the implications to Mr Roper of resigning as a director. He should have advised Mr Roper to obtain independent advice. That is especially so in circumstances where the result was to leave Mr McPhedran and Mr Spruyt in control of the shares in the company, the directorships of the company and the bank accounts of the company.

161. Instead, Mr McPhedran actively persuaded Mr Roper to resign as a director thus leaving Mr McPhedran and Mr Spruyt with control of the company and its bank accounts. Mr Roper was left with nothing but his trust in Mr McPhedran and Mr Spruyt to protect his interests both as a shareholder and as a client of YBT/10X. That trust, as events turned out, was breached in a manner which we consider to be reprehensible.

162. Although, in light of our finding on the further evidence before us, the finding by the Disciplinary Tribunal that Mr McPhedran misled and deceived Mr Roper (as to the request by the ANZ Bank that Mr Roper not be involved in the company) cannot stand, we regard the circumstances in which Mr Roper came to be removed as a director as a self-serving and serious breach of by Mr McPhedran of his duties to Mr Roper and of the Code of Ethics. Mr McPhedran clearly failed to recognise the inherent conflict between his position as a shareholder and director of the company

and his duties as a chartered accountant to provide objective and independent advice to Mr Roper and to act solely in Mr Roper's best interests.

Appeal as to penalty

163. Because of our findings following the further evidence before us referred to above, we have set out the evidence in support of the charges against Mr McPhedran in some detail. That is because, in reaching its decision on the charges and its decision as to penalty, the Disciplinary Tribunal was influenced by its findings that Mr McPhedran had deliberately misled Mr Roper as to the ANZ requesting that Mr Roper be removed as a Director.

164. In considering the appeal against penalty we must consider whether, in light of our findings following the further evidence before us, the penalty imposed by the Disciplinary Tribunal (removal from the Register of Members of the Institute) is appropriate or whether a lesser penalty should be imposed. We must form our own view, based on all of the evidence before us, as to what the appropriate penalty should be.

Alleged procedural errors

165. Mr Laws did not address us in any detail as to the appropriate penalty. He chose to confine his arguments on the appeal primarily to alleged "procedural errors" by the Disciplinary Tribunal which, he submitted, mean that the decision by the Disciplinary Tribunal should be overturned or "voided".

166. Mr Laws stated that, although the decision of the Disciplinary Tribunal as to penalty was understandable, the procedural errors by the Disciplinary Tribunal meant that they were not best informed to make the best decision.[64] He argued that the determination of the Disciplinary Tribunal should be voided and Mr McPhedran should be given the opportunity to present his case unexpurgated now that he is medically competent.[65]

167. The procedural errors argued for by Mr Laws relate to the four bullet points referred to at para 33 above which we allowed to be added as grounds of appeal.

168. The thrust of the arguments in support of Mr Laws' submissions can be summarised as follows:

[64] Transcript at p 62
[65] Transcript at p 68

(i) That Mr McPhedran was "punished" by the Tribunal because, for medical reasons, he did not attend and give evidence before the Tribunal.

(ii) Mr McPhedran was not warned by the Institute or the Disciplinary Tribunal of the possible negative implications of his not attending to give evidence and not being subject to cross examination.

(iii) The Disciplinary Tribunal was under an overriding duty to ensure a fair trial and should not have proceeded to address penalty on the basis of redacted versions of statutory declarations which were admitted by consent (following discussions between counsel for Mr McPhedran and the PCC) for the purpose of submissions as to penalty. Mr Laws submitted that the Disciplinary Tribunal should have adjourned the hearing or, at least, not allowed penalty to be addressed on the basis of the redacted statutory declarations which were admitted for that purpose by consent.

169. In order to address the arguments it is necessary to understand the procedural background which gave rise to determination of issues as to penalty on the basis of redacted versions of statutory declarations by Mr McPhedran and two of his witnesses. The statutory declarations were provided on the day before the hearing before the Disciplinary Tribunal (although the statutory declaration of Mr McPhedran was largely the same as a brief of evidence which had been served previously).

Procedural Background to Disciplinary Tribunal decision

170. On 15 August 2018 a "Response to Charges" document was provided by counsel for Mr McPhedran which admitted most of the particulars of the charges against Mr McPhedran and notified that some of the particulars were disputed. The response stated that Mr McPhedran would attend the hearing in person and would be represented by counsel. It said that "evidence will be filed by the following witnesses: David McPhedran and David Ruscoe."[66] On 16 August 2018, counsel for Mr McPhedran filed an unsigned brief of Mr McPhedran and a brief of evidence of Mr Ruscoe.

171. Notwithstanding the indications that Mr McPhedran would be attending to give evidence the PCC was notified, by an email from counsel for Mr McPhedran on 20 August 2019, that Mr McPhedran would not be attending the hearing because he was medically unfit to do so and that a certificate would follow. The email stated

[66] David Ruscoe was an expert witness who was called to give evidence at the hearing.

that Mr McPhedran "is very stressed by these proceedings and we wish to minimise the impact on him as much as possible."

172. Mr Moon, counsel for the PCC, responded soon after asking whether an adjournment would be required. Counsel responded:

> No adjournment – simply that he will not appear.
>
> For the reasons previously explained, we do not consider his evidence is necessary to refute the disputed charges.

173. Mr Moon responded approximately two hours later stating that:

> Whilst it is, of course, your client's prerogative it is very unusual for a member to attempt to defend serious charges in absentia.
>
> Subject to receipt of the medical information, evidence by telephone or VC has been arranged in other cases. Should that option be explored here? I doubt my client would object if you sought leave to adopt that course.

174. Counsel for Mr McPhedran responded half an hour later stating that:

> Mr McPhedran's circumstances are unusual. It is fair to say that the stress of these proceedings is a contributor to his poor health and therefore telephone/VC evidence will not assist.

175. On the following day, Tuesday 21 August 2018 (the day before the hearing was due to commence on 22 August 2018), counsel for Mr McPhedran wrote enclosing a letter from Mr McPhedran's general practitioner, Dr Maya MacFarlane, and also attaching statutory declarations "which will be relied upon in mitigation" of:

> - Carl Spruyt
> - Christopher Burke
> - David McPhedran (in place of his brief of evidence, as he will not be appearing). The only material changes to his brief are from paragraph 46 onwards, where he discusses his medical condition. We have not forwarded his annexures, other than one new one, DM3).
>
> Sworn versions will be filed this afternoon.
>
> Finally, we attach the character reference of Robin Russell.

176. Mr Moon responded at 2.11pm on 21 August advising that, given the late service of the material, the new evidence it contained and the need for both witnesses to attend, that his instructions were to apply for an adjournment of the hearing due to commence the following day. He indicated that the adjournment should be at Mr McPhedran's cost and that "it may also be possible for Mr McPhedran to attend the new date".

177. Attempts were made to convene a telephone conference with the Chairman of the Disciplinary Tribunal. The Chairman advised the Institute that the Disciplinary Tribunal would deal with the issues at the hearing the following morning.

178. Counsel for Mr McPhedran advised that they were en route to Wellington and that they were content to have the matter dealt with the following day. At 5.47pm on 21 August 2018 they sent a further email recommending that the Tribunal be instructed not to read the statutory declarations of Mr Burke and Mr Spruyt until argument had been heard in the morning.

179. At the hearing the following day there was considerable debate as to the admissibility of the statutory declarations. Advice was taken from the legal assessor assisting the Disciplinary Tribunal, Mr Casey QC.

180. Following that advice counsel for Mr McPhedran suggested a possible compromise, namely redaction of aspects of the proposed statutory declarations which were objected to by counsel for the PCC, with a view to providing redacted versions of the statutory declarations by consent for the purposes of the hearing as to penalty. In the meantime the hearing would proceed on liability issues with the witnesses for the PCC giving evidence and being available for cross-examination and Mr Ruscoe giving evidence (and being available for cross-examination).

181. We are informed by Mr Moon that, on the evening of the first day of the hearing (after the evidence as to liability had been heard) redacted versions of the statutory declarations were provided by counsel for Mr McPhedran in furtherance of the proposed compromise solution to the admissibility issues. After discussions between counsel, redactions of the statutory declarations were agreed apart from three matters which were in dispute but which the PCC ultimately allowed to remain unredacted.

182. At the commencement of the hearing the following day the Disciplinary Tribunal gave its oral decision (with reasons to follow) as to liability. It found that two of the disputed particulars were not proved and that two of the disputed particulars were proved. It found Mr McPhedran guilty of all charges.[67]

183. Following that ruling, the hearing was adjourned to enable the agreed redacted versions of the statutory declarations to be provided to the Disciplinary Tribunal and to give the members time to read the statutory declarations before hearing submissions as to penalty, costs and publication. The hearing was adjourned at

[67] Disciplinary Tribunal transcript at 135.

10.40am until 12pm.The hearing recommenced with submissions from Mr Moon at 12.30pm on 22 August.

Discussion

184. Given the above background we now consider whether there is any substance to the submissions by Mr Laws that, because of alleged procedural errors by the Disciplinary Tribunal, the decision of the Disciplinary Tribunal as to penalty, costs and publication should be set aside or voided.

185. In making his submissions Mr Laws was critical of a document published on the Institute's website "Procedure to be followed at Hearings of the Disciplinary Tribunal" (**Procedure document**). He pointed to clauses 3 and 8 of the Procedure document which deal with non-attendance or non-representation at a Disciplinary Tribunal hearing and clauses 9, 13, 14-19 and 24. Mr Laws pointed out that there was nothing in the Procedure document which:

> …states or implies that an NZICA member would be disadvantaged, or in any way have their case adversely affected, by their non-attendance at the Disciplinary Tribunal, nor would they face Tribunal criticism and adverse findings as a director or in direct consequence of their non-attendance.[68]

186. Mr Laws argued in his written submission that:

> The combined effect of these provisions was that a member would not be in any way punished for their non-attendance at a Disciplinary Tribunal (especially where good cause was provided as to their non-attendance), and further that any and all written evidence provided by the member would be examined and reviewed by the Tribunal membership, prior to deliberation and judgment.[69]

187. Mr Laws relied on the Procedure document in support of his argument that the Institute and the Disciplinary Tribunal had erred in failing to warn Mr McPhedran that he might be "punished" by his non-attendance at the hearing. By "punished" we understand Mr Laws to mean that Mr McPhedran might be disadvantaged by not attending because his evidence might be given less weight, or that the Tribunal may draw inferences or conclusions from the facts which were not disputed on the evidence before it.

188. We consider this argument to be misconceived. The Procedure document is not, and does not purport to be, providing advice as to the advantages or disadvantages of a member giving evidence. The Procedure document, as its name suggests, is intended to give a guide to members as to the procedure at hearings before the

[68] Para 44 submissions of the appellant dated 17 April 2019 and Appeals Council transcript at p37.
[69] Para 49 appellant's submissions dated 17 April 2019.

Disciplinary Tribunal including the procedure to be followed in circumstances where the member does not attend and/or is not represented by counsel.

189. It is wrong to read into those procedural guidelines any suggestion as to the evidential consequences of not attending and giving evidence. Those are matters upon which the member should, and apparently did in this case, take legal advice. They are not matters which can properly be, or should be, addressed in the Procedure document.

190. The weight to be given to such evidence and the inferences (positive or negative) to be drawn from such evidence is entirely a matter for the Disciplinary Tribunal to assess based on all the evidence before it. It would be undesirable in our view for procedural guidelines of this nature to attempt to provide advice on the implications of a member who is facing disciplinary charges not giving evidence. We therefore reject Mr Laws' arguments on this ground.

191. Nor do we consider that the Disciplinary Tribunal was under any obligation to warn Mr McPhedran or provide advice as to the possible consequences of not giving evidence. Mr McPhedran was represented at the hearing by experienced counsel who were entitled to (and did) cross-examine some of the PCC witnesses. The Disciplinary Tribunal was told by counsel for Mr McPhedran that the proposed evidence was intended to provide context and was not intended to contradict the admitted particulars of the charges.[70]

192. The Disciplinary Tribunal was fully entitled to assess all of the evidence before it and make its decision based on that evidence. It was not required to give any advice or warning as to the possible evidential consequences of Mr McPhedran not attending to give evidence. There was no procedural error by the Disciplinary Tribunal in failing to advise or warn Mr McPhedran.[71]

193. Mr Laws sought to argue that the Disciplinary Tribunal in its decision had "punished" Mr McPhedran for his non-attendance because it did not believe he had genuine medical reasons for his not attending. Mr Laws could not identify anything in the Disciplinary Tribunal decision which supported that submission. He pointed to the recital of the procedural background at p5 of the Disciplinary Tribunal decision but that does not support his submission. Nor is there any finding by the Tribunal that the medical reasons given by Mr McPhedran were not genuine.

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[70] Disciplinary transcript at p 17

[71] We also note that Mr Moon, in his submissions to the Disciplinary Tribunal, outlined the possible implications of Mr McPhedran not attending to give evidence—see Disciplinary Tribunal transcript at pp 6 and 7.

194. Mr Laws asserted that the belief of the Tribunal as to the genuineness of the reasons for Mr McPhedran's non-attendance was apparent from his reading of the Disciplinary Tribunal hearing transcript. Whilst it is clear from the transcript that submissions were made by counsel for the PCC that Mr McPhedran's non-attendance was, at least in part, for tactical reasons there was no finding to that effect by the Disciplinary Tribunal. Nor is there anything in the transcript which could justify a finding by us that the Disciplinary Tribunal did not accept the medical evidence at face value or believe that it was not genuine.

195. The submissions by Mr Laws that the Disciplinary Tribunal erred procedurally by breaching an alleged overriding duty to ensure a fair hearing is unsupported by the facts. Mr Laws' submission that the Disciplinary Tribunal should have known that the agreed redactions of the statutory declarations were not authorised by Mr McPhedran, and should have adjourned the hearing or ensured that unredacted versions of the declarations were before it, has no merit.

196. Given the procedural background described above there is no plausible basis for a submission that the Disciplinary Tribunal should have adjourned the hearing. The opportunity for adjournment was offered to Mr McPhedran and was declined. No application for adjournment was made to the Disciplinary Tribunal. The Disciplinary Tribunal was under no obligation to require adjournment.

197. The Disciplinary Tribunal was entitled to accept an agreed basis upon which the evidence as to penalty was to be provided to the Disciplinary Tribunal. It is not required to double guess or enquire as to the authority of counsel to proceed on the agreed basis for producing that evidence. On the contrary, the Disciplinary Tribunal was entitled to assume that that counsel had authority to agree the basis upon which the evidence would be produced in circumstances where the late admission of the statutory declarations had been challenged.

Conclusion on alleged procedural errors

198. For the reasons discussed above, we reject the submissions by Mr Laws that the Disciplinary Tribunal made procedural errors and that the decision of the Disciplinary Tribunal should therefore be overturned or voided.

Appropriate penalty

199. Mr McPhedran was found guilty of all charges against him including the most serious charge of misconduct in a professional capacity. There is no appeal against the

findings of guilt. The evidence, which we have canvassed above, fully supports the findings of guilt and in particular the finding of misconduct in a professional capacity.

200. In our view, the facts in relation to both the Bell and Roper complaints show a disturbing similarity. They involved clients who were seeking expert assistance from professionals of the kind which chartered accountants provide as part of their core business.

201. In both cases, the member and his associates proposed taking an equity interest in the businesses of the clients and had agreed to pay for that interest. In both instances invoices appear to have been issued for which there was no written authority or agreement, for amounts which covered at least the proposed purchase price of the shares to be offered. In both cases, payment was never made for the shares but transfers of the shares to Mr McPhedran or related interests was achieved at the instigation of Mr McPhedran or Mr Spruyt (for whom Mr McPhedran was responsible). Similarly both Mr McPhedran and Mr Spruyt were appointed as directors of their client companies.

202. In both cases, when Mr McPhedran and his clients fell out, Mr McPhedran used his/YBT's purported ownership of shares in the business to further his own interests and to deliberately act against the interests of his clients.

203. In the case of the Bells, the correspondence with the Companies Office, in circumstances where Mr McPhedran knew that the shareholding of his related entities was disputed and had not been paid for, demonstrates conduct which in our view was deceitful and reprehensible. Against a background where Mr McPhedran was promoting sale of the shares held by his related entities for $20,000 ($10,000 more than the amount that YBT/10X had agreed to pay for them) his conduct in denigrating Mr Bell in the correspondence to the Companies Office, (and asserting ownership of the shares when he knew that ownership was disputed and no payment had been made for the shares), was in the words of the Disciplinary Tribunal "unjustified, self-serving and totally unprofessional".[72]

204. The conduct of Mr McPhedran in relation to Mr Roper was disgraceful. Mr McPhedran and Mr Spruyt acquired total control of the shares, bank accounts and business of Mr Roper in circumstances which constituted clear breaches of Mr McPhedran's duties to Mr Roper and the Code of Ethics.

205. Mr McPhedran abused the trust which had been placed in him by Mr Roper. He excluded Mr Roper from the business and effectively forced him out. He refused him

[72] DT decision at p10.

any access to the bank accounts. In breach of trust and without any proper authority, Mr McPhedran passed a shareholders' resolution liquidating Mr Roper's company in circumstances where 50% of the shareholding was held in trust and the other 50% had not been paid for.

206. Mr McPhedran's actions in putting NZSB into liquidation were self-serving and appear to have been made with a view to pursuing Mr Roper for the alleged shareholder current account deficit[73]. The breach of trust in first, obtaining control of the shares and directorship of NZSB in breach of trust, and then breaching the trust Mr Roper placed in him to act against Mr Roper's interests and in pursuance of Mr McPhedran's interests, is reprehensible.

207. Mr McPhedran's conduct in relation to Mr Roper fully supports the findings of guilt on all charges by the Disciplinary tribunal. It also demonstrates a complete failure by Mr McPhedran to recognise and comply with his legal and ethical obligations.

208. Following appointment of the liquidator, Mr Roper is now being pursued by the liquidator for the alleged shareholder current account deficit. That is a result of the liquidation process instigated by Mr McPhedran in breach of trust and without proper authority.

209. We were advised in the course of these proceedings that Mr Roper wished to provide the decision of the Disciplinary Tribunal to the courts in opposition to a summary judgment application against him brought by the liquidator and in support of an application by Mr Roper for removal of the liquidator. We ultimately ordered that the decision of the Disciplinary Tribunal be made available to the court on a confidential basis. Mr McPhedran did not consent to that order being made.

210. It is clear that Mr McPhedran was hopelessly conflicted in both cases but no steps were taken by him to properly advise the complainants of the conflict or to properly manage the conflicts. On the contrary, having gained the trust of the complainants, Mr McPhedran acted against their interests in order to further his own.

211. Mr McPhedran's conduct, as established on the evidence, was in clear breach of his duties to his client and in breach of his obligations to act in accordance with the fundamental principles of objectivity, integrity and confidentiality. The evidence in this case demonstrates the importance of those fundamental principles and the reasons why they must be complied with.

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[73] An intention to pursue Mr Roper for the alleged current account deficit was clearly signalled in Mr Spruyt's email to Mr Roper of 16 June 2018 –see para 116 above and DT 149-151.

Penalty

212. In our view the only material issue in the appeal as to penalty is whether, in light of our findings regarding the circumstances in which Mr Roper came to be removed as a director of his company, a penalty of suspension should be imposed rather than the sanction imposed by the Disciplinary Tribunal of removal from the Register.

213. Applying the factors set out in the decision of the High Court in *Roberts*,[74] a penalty of anything less than suspension would not be appropriate. As noted in the decision of the Appeals Council in *Lee,*[75] where a finding of misconduct in a professional capacity is made that will normally result in the member being struck off or suspended. That reflects the fact that misconduct in a professional capacity is the most serious charge a member can face. Where, as here, self-interest is a factor and there is evidence of conduct which is both deceitful and self-serving a penalty of striking off will be indicated.[76]

214. Although, based on the evidence put before us on appeal, we are unable to agree with the Disciplinary Tribunal finding that Mr McPhedran deliberately misled Mr Roper as to a request by the ANZ that he be removed as a director, we regard the circumstances of his removal as being a result of serious breaches by Mr McPhedran to act solely in the best interests of his client, to properly advise him of the conflict of interest and to provide independent and objective advice as to the proposed change of bank accounts.

215. We note that, in Mr McPhedran's request to the ANZ to open a bank account, only Mr Spruyt and Mr McPhedran were to be signatories on the account (with one of the YBT employees added as a signatory at the request of the bank). Whilst the change of bank accounts may have been convenient for the purposes of Mr McPhedran and Mr Spruyt, there was no necessity for that change to be made.

216. In circumstances where Mr McPhedran should have clearly spelt out the implications of losing complete control of the bank account and Mr Roper's removal as a director, Mr McPhedran actively convinced Mr Roper to make the change and to resign as a director in order to facilitate the change. In doing so Mr McPhedran appears to have been acting so as to facilitate his objective of having control of the bank accounts of the company.

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[74] *Roberts v Professional Conduct Committee of Nursing Council of New Zealand* [2012] NZHC 3354.
[75] *NZICA v J Lee* (AC 19 July 2013).
[76] See *NZICA v RJ Power* (AC 2 December 2016) and *NZICA v NJ Gormack* (DT 14 November 2016).

217. The significance of that was not lost on Mr Roper as evidenced by his email to Mr Spruyt and Mr McPhedran the following day.[77] Mr Roper was left in the position of having to place his complete faith and trust in Mr McPhedran and Mr Spruyt to properly and fully protect his interests. Mr McPhedran's conduct in relation to the company, excluding Mr Roper from access to the bank accounts, appointing a liquidator and forcing Mr Roper out of the company were grievous examples of Mr McPhedran's breach of that trust.

218. We do not consider that a penalty of suspension is appropriate in this case. There is no evidence of any insight of Mr McPhedran into the seriousness of his conduct nor is there any evidence or proposal for rehabilitation which might justify a lengthy period of suspension as opposed to removal from the Register. On the contrary statements made by Mr McPhedran during the complaints investigation process were dismissive of the complaints and abusive of his clients who he described as "crooks", "liars" and "commercial frauds"[78].

219. Both of Mr McPhedran's clients came to him seeking objective, independent and professional advice. Both of them ended up losing their businesses altogether. The conduct of Mr McPhedran in relation to these clients shows a serious lack of insight by Mr McPhedran and serious failure to comply with his ethical and professional obligations.

220. Applying the principles in *Roberts*, we consider that the only appropriate penalty in this case is that Mr McPhedran be removed as a member of the Institute. In our view that penalty appropriately protects the public, promotes the maintenance of professional standards and punishes the practitioner. Given the serious nature of the conduct, and the apparently repetitive nature of it, we consider that protection of the public and the maintenance of professional standards demands that Mr McPhedran be removed from the Register.

Conclusion as to penalty

221. For the reasons discussed above, the appeal as to penalty is dismissed. The order of the Disciplinary Tribunal is to stand. Mr McPhedran is to be removed from the Register of Members.

Appeal against costs order

222. In considering the appeal against the order for costs made against Mr McPhedran, we are considering the exercise of a discretion by the Disciplinary Tribunal. The onus

[77] Exhibit GR-3 To Roper evidence quoted at para 144 above
[78] Bell Bundle of Exhibits at DT 187

is on the appellant to establish that the decision of the Tribunal as to costs should be set aside because the Tribunal failed to take into account relevant considerations, took into account irrelevant considerations, acted on a wrong principle or was plainly wrong.

223. Mr Laws made no submissions in support of the appeal as to costs except to say that the costs ordered should be set aside because of the alleged procedural errors of the Disciplinary Tribunal.

224. The Disciplinary Tribunal in making its order as to costs has not been shown to follow any wrong principle. It has had regard to its practice note as to costs and made a small deduction from actual costs. There is no indication in its decision on costs that it has taken into account irrelevant considerations, or failed to take into account relevant considerations. Nor can it be said that the decision was plainly wrong.

225. We therefore dismiss the appeal against the costs order made by the Tribunal.

Appeal against publication orders

226. We adopt the same *May v May* approach to the appeal as to publication as we have to the issue of costs.

227. It is clear from the decision of the Tribunal that it has not adopted a wrong principle. The threshold is a high one.

228. The evidence in support of the application does not demonstrate sufficiently grave consequences of publication which might justify departing from the strong presumption in favour of publication. Nor has the Disciplinary Tribunal taken into account irrelevant considerations or failed to take into account relevant considerations.

229. Given the seriousness of the charges and the conduct of Mr McPhedran which gave rise to them, we think it is necessary in the public interest that publication of the name and details of the member should take place. Rather than being persuaded that the decision of the Tribunal as to publication was plainly wrong, we agree with it and consider that the public interest in publication far outweighs any effects on Mr McPhedran's health.

230. Such evidence as there was as to Mr McPhedran's health indicates that it is the stress of the proceedings and his anxiety arising from those proceedings which has caused him to seek treatment for anxiety and depression. There is no evidence that such mental health issues as he had arising from the stress of the proceedings cannot be treated or, once the proceedings are determined, will be more than transitory. Nor

does the evidence establish a level of possible harm resulting from publication sufficient to justify non publication.

231. The Tribunal was, in our view, clearly right to conclude that the high threshold necessary to justify non-publication had not been reached.

232. Finally, although Mr Laws made no submissions on the appeal against publication, we agree with the decision of the Disciplinary Tribunal to order publication in the website, in Acuity magazine and in the Otago Daily Times. The conduct of Mr McPhedran in relation to complainants in this case, gives us serious concern that both his present and prospective clients should be made aware of the conduct which has given rise to the charges against him and of his removal from the Register of Chartered Accountants. In that regard, the public interest and protection of members of the public justifies publication in the Otago Daily Times as well as on the Institute's website and magazine.

233. The appeal against publication is dismissed.

Costs of the appeal

234. We did not hear submissions from either party as to costs of the appeal. We consider that costs should follow the event and be paid by Mr McPhedran.

235. We leave it to the parties to agree the amount of costs. If they are unable to reach agreement submissions in support of an order for costs should be made by the PCC within 21 days of the date of this decision. Any submissions in reply by Mr McPhedran should be made within 14 days of the submissions by the PCC.

Dated this 5th day of July 2019.

L J Taylor QC
Chairman
Appeals Council