

**NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS ACT 1996**

**IN THE MATTER** of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder

**AND**

**IN THE MATTER** of **Mark Philip Brown**, Chartered Accountant, of **Nelson**

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**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE  
OF CHARTERED ACCOUNTANTS  
3 December 2020**

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**Hearing:** 23 November 2020

**Location:** via Zoom videoconference

**Tribunal:** Mr MJ Whale FCA (Chairman)  
Mr N De Frere CA  
Dr R Janes (Lay member)

**Legal Assessor:** Mr Matthew Casey QC

**Counsel:** Mr Richard Moon for the prosecution  
Mr Alistair Darroch and Ms Zoe Caughey for the Member

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At a hearing of the Disciplinary Tribunal held via Zoom videoconference at which the Member was in attendance and represented by counsel the Member admitted the amended Particulars and pleaded guilty to the amended Charge.

The amended Charge and amended Particulars are as follows:

## **CHARGES**

**THAT** in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 13.50 the member is guilty of:

1. *withdrawn*
2. Conduct unbecoming an accountant.
3. *withdrawn*
4. *withdrawn*

## **PARTICULARS**

### **IN THAT**

In his role as a Chartered Accountant in public practice and in relation to a complaint by Mr and Mrs X, the Member:

1. Failed to identify, and/or put in place appropriate safeguards to manage, conflicts of interest and/or threats to his objectivity that arose by virtue of his differing roles and interests as:
  - (a) accountant for the Complainants and their business the Mr and Mrs X Partnership;
  - (b) trustee and accountant for the X Family Trust;
  - (c) accountant for the Complainants' son and business partner (Mr X junior) and his associated entities;
  - (d) accountant for the XYZ partnership;
  - (e) trustee and accountant for the XYZ trust;
  - (f) accountant and director of XYZ Limited;
  - (g) accountant for the Complainants' daughter and business partner (Ms W) and her company, L Limited, a partner in the ABC Partnership; and
  - (h) financial partner in, and accountant for, the ABC Partnership together with the Complainants and Mr X junior; and/or
  - (i) reviewer of competing claims by family members against the XYZ trust,

in breach of the Fundamental Principle of Objectivity and/or sections 120 and/or 200 and/or 220 and/or 280 of the Code of Ethics (2014)<sup>1</sup> (the **Code**); and/or
2. *Withdrawn.*

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<sup>1</sup> And, as applicable, the equivalent provisions of the Code of Ethics (1995) and/or the Code of Ethics (2003) and/or the Code of Ethics (2017).

3. Failed to have due regard to the Income Equalisation Scheme withdrawal paid to the X Family Trust in November 2016 when determining its provisional tax payments for financial year ending 31 March 2017, which resulted in its underpayment of provisional tax and it incurring use of money interest penalties from the Inland Revenue of approximately \$12,000.00, in breach of the Fundamental Principle of Professional Competence and Due Care and/or section 130 of the Code; and/or
4. Paid approximately \$11,500 from the ABC Partnership's bank account into the X Family Trust's bank account on 31 May 2018 without any further explanation to the Complainants regarding the basis for any such distribution or its effect on partnership finances (and having previously advised them no partnership funds would be distributed until all disputed partnership matters were resolved), in breach of the Fundamental Principle of Objectivity and/or sections 120 and/or 200 and/or 220 and/or 280 and/or the Fundamental Principle of Professional Behaviour and/or section 150.1 of the Code.

## **DECISION**

The Tribunal was provided with a set of Agreed Facts, which took the form of a Brief of Evidence by one of the Complainants produced by consent, a decision of the High Court of Dobson J dated 15 February 2017 relating to the first Particular, and an email from the Member dated 7 August 2017 which appears to be a generic email to a number of his clients dealing with conflicts of interest.

The Tribunal finds on the evidence before it that the Particulars, which the Member admitted, are made out and those particulars substantiate the Charge to which the Member pleaded guilty.

Conduct unbecoming an accountant is conduct which departs from acceptable professional standards in a way significant enough to attract sanction for the purposes of protecting the public. The test is whether the Member's conduct was an acceptable discharge of their professional obligations, and the threshold is inevitably one of degree. The best guide to what is acceptable professional conduct is the standards applied by competent, ethical and responsible practitioners.

As to Particular 1, the Member undertook a very significant number of roles in relation to the affairs of two generations of a family and entities associated with them. The Member also had a financial interest in one of those entities.

Potential conflicts of interest arose from the outset of the Member's professional relationship with the family, at the time he drafted two Trust Deeds – some of the provisions of one of those deeds, particularly the power of appointment, and actions taken by a member of the family pursuant to them were the subject of the High Court hearing. It seems that at the time the Trust Deeds were prepared, family members were not given any, or at least any appropriate, advice about the Deeds or the possible ramifications of provisions dealing with appointment and removal of trustees and beneficiaries.

To the extent that they had not already done so, the potential conflicts of interest became actual when some members of the family fell out with another family member in January 2015. Despite that, the Member continued to act in most of his roles and as late as November 2017, the Member undertook a review of various disputed claims made by the trustees of one of the trusts (of which he was also a trustee).

Appropriate management of conflicts of interest is an essential aspect of maintaining the public's trust in the profession – here the Member was significantly conflicted and appeared not to have

identified the conflicts nor responded to them in a manner consistent with how a competent, ethical and responsible practitioner would be expected to respond.

The email to clients in August 2017 is also concerning. It refers to the fact that a practice review had brought to the Member's attention that he had not fulfilled his obligations in relation "potential" conflicts of interest that can arise when he or entities associated with him have a financial interest in a client. It would appear that following the issue of that email the Member took no particular steps to address with the Complainants the conflicts that could or did arise in relation to his investment in a partnership with them and other members of the family.

In the Tribunal's view, the Member's conduct described in Particular 1 fell well below the standards expected of a chartered accountant and constitutes conduct unbecoming an accountant.

As to Particular 2, the Tribunal finds that although the Member was negligent there is no suggestion that this was anything other than an isolated incident. It does not in itself warrant disciplinary sanction at this level.

As to Particular 3, the Member acted contrary to statements he had previously made to the Complainants. Clients expect that chartered accountants as professionals will act in accordance with statements they make. Failure to do so is unacceptable, although it may not have been intentional as it appears a year had elapsed since the statements were made. Here the position was exacerbated as there was an element of self-interest – whilst not improper (except in the sense that they were actioned contrary to the Member's statement) the transactions indirectly resulted in a family entity paying fees to his firm, a payment which might not have otherwise taken place for some considerable time.

This conduct again falls well below the standards expected, and constitutes conduct unbecoming an accountant.

## **PENALTY**

The PCC submitted that the conflicts of interest on the part of the Member were serious and sustained, although the offending itself was 'mid-range' as there was no evidence of direct personal financial gain on the part of the Member. The Tribunal agrees.

The parties were aligned on the penalty which they considered should be imposed – a censure, a fine in the region of \$7,000 to \$9,000 and an order that, with effect from 23 May 2021, Mr Brown not undertake any engagements as a professional trustee.

The PCC drew the Tribunal's attention to *Commerce Commission v New Zealand Milk Corporation Limited* [1994] 2 NZLR 730 – there a full high Court held that where the parties have reached a consensus on penalty, the Court is likely to provide its approval if it accepts that the agreed penalty is proportionate to the evidence available, and the defendant's conduct. That approach has since been applied in disciplinary proceedings against medical practitioners and vets and by this Tribunal.

The Tribunal has also had regard to the decision in *Commerce Commission v PGG Wrightson Limited* [2015 NZHC 3360 at [30]-[32] where it was said at [32]:

*" ... when a Court is presented by the parties with a proposed penalty, it is still essential that the Court perform its own assessment of the approximate range of penalty. If the penalty is not within the proper range, the Court must intervene and impose what it assesses as the appropriate penalty".*

The PCC drew the Tribunal's attention to three of its previous decisions (*JG Butterfield*, 27 June 2018; *BJ Drumm*, 15 April 2014; and *JB Hennessey*, 17 December 2012) in support of its submission that the penalty was in the appropriate range.

Having reviewed those decisions and the evidence, the Tribunal is satisfied that in the circumstances of this case the proposed penalty is within the range which the Tribunal considers appropriately protects the public, facilitates the Tribunal's important role in setting and maintaining professional standards, deters others, reflects the seriousness of the misconduct, can be regarded as the least restrictive penalty and is fair, reasonable and proportionate – factors which the Courts have determined are relevant where a Tribunal such as this is determining an appropriate penalty.

The Tribunal notes that Mr Brown has been sanctioned before, primarily for undertaking engagements as an "occasional auditor" (*Brown*, 17 January 2019). The PCC has advised the Tribunal that some of the conduct the subject of this complaint pre-dates that decision. It appears to the Tribunal that much if not all of the conduct occurred before that original complaint was made. The PCC submitted that the fact that this is the Member's second appearance should be addressed through a more significant fine and the practice restriction that has been sought.

In reaching its decision, the Tribunal has also taken into account the following factors:

- The Member's guilty plea and co-operation with the investigative process;
- His belated insight of the risks associated with conflicts of interest and threats to objectivity and his acceptance that it is appropriate to remove himself from professional trusteeships;
- Apart from the limited self-interest factor the Tribunal has identified in relation to Particular 3, there is no suggestion that the Member acted for any improper purpose or for personal financial gain.

As to the fine to be imposed, in light of the seriousness of the Member's conduct, its consequences on the Complainants and the fact that this is the second time the Member has appeared before it, the Tribunal considers that the proportionate response is a fine of \$9,000 (just less than half of the maximum amount of \$20,000 the Tribunal is able to impose).

#### **The Tribunal Orders:**

**Pursuant to Rule 13.51(m) of the Rules of the New Zealand Institute of Chartered Accountants, the Member be censured.**

**Pursuant to Rule 13.51(c) (or the applicable equivalent previous rule), the Member be fined \$9,000.**

**Pursuant to Rule 13.51(p), the Member not directly or indirectly undertake any new engagement as a professional trustee and, before 23 May 2021, withdraw, retire or resign from all professional trusteeships - if for reasons beyond his control he has been unable to do so by that date the Member must provide the Professional Conduct Committee with details of the trusts of which he is still a trustee, the reasons why that is so and the steps that he is endeavouring to take to comply with this order.**

#### **COSTS**

The PCC seeks full costs of \$13,828.

The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the cost of abandoned investigations and costs up to the PCC's decision to hold a Case Conference.

The Member had no issue with the payment of full costs. The Tribunal notes that the Member's early guilty plea and co-operation in the disciplinary process, including agreeing a summary of facts, is already reflected in the costs the PCC is seeking. It considers a full costs award to be fair and reasonable in the circumstances.

**Pursuant to Rule 13.53 of the Rules of the New Zealand Institute of Chartered Accountants, the Tribunal orders that the Member pay to the Institute the sum of \$13,828 in respect of the costs and expenses of the hearing before the Tribunal and the investigation by the PCC. No GST is payable.**

## **PUBLICATION**

The PCC seeks publication of this decision on the CAANZ website and in the official publication *Acuity*, with mention of the Member's name and location. The Rules of the New Zealand Institute of Chartered Accountants now require the Tribunal to make such a direction, unless in its view there are exceptional circumstances for not doing so. The Member has no objection.

**In accordance with Rule 13.55 of the Rules of the New Zealand Institute of Chartered Accountants, the decision of the Tribunal shall be published on Chartered Accountants Australia and New Zealand's website and in the official publication *Acuity*, with mention of the Member's name and location.**

**Pursuant to Rule 13.78(b), the Tribunal orders that the names of the Member's clients, including the Complainants, and any other third parties and any information that might identify them, be suppressed.**

## **RIGHT OF APPEAL**

Pursuant to Rule 13.63 of the Rules of the New Zealand Institute of Chartered Accountants, the parties may, not later than 21 days after the notification to the parties of this Tribunal's decision, appeal in writing to the Appeals Council of the Institute against the decision.

No decision other than the direction as to publicity and the suppression order shall take effect while the parties remain entitled to appeal, or while any such appeal awaits determination by the Appeals Council.



MJ Whale FCA  
**Chairman**  
**Disciplinary Tribunal**