



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 **Richard James Power**, Chartered Accountant, of Christchurch

**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
9 December 2013**

Hearing: 22 October 2013 and 9 December 2013

Tribunal: Mr RJO Hoare FCA (Chairman)
Mr GR Leech FCA
Mr MJ Whale FCA
Ms A Hauk-Willis (Lay member)

Legal Assessor: Mr Bruce Corkill QC

Counsel: Mr Richard Moon for the prosecution
Ms Helen Smith for the Member (9 December penalty hearing)

At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and not represented by counsel, the Member denied all the particulars and pleaded not guilty to the five charges.

The charges and particulars as laid were 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 21.30 the Member is guilty of:

- (1) Breaching the Code of Ethics, in particular:
 - (a) The Fundamental Principle of Professional Behaviour [particular(s) (a) and/or (d)]; and/or
 - (b) Paragraph 72 [particular (b)]; and/or
 - (c) Paragraph 149 [particular (c)(a)]; and/or
 - (d) Rule 10 – *Timeliness* [particular (c)(b)]; and/or
 - (e) Rule 14- *Professional Conduct* [particular (d)].

Particulars

IN THAT

In his role as a Chartered Accountant in public practice the Member:

- (a) Undertook work for a Partnership without obtaining the complainant Mr X's prior authorisation, despite being on notice that this was required; and/or
- (b) Acted for the Partnership in relation to the sale of the farm where he knew that the two partners' interests may not be aligned, without obtaining, in writing, informed consent from both parties to act; and/or
- (c) In respect of invoice 2877, failed to:
 - a. Provide adequate additional information when requested by Mr X; and/or
 - b. Respond to the request in paragraph (c)(a) in a timely manner; and/or
- (d) Has failed to act with the level of courtesy and professionalism expected of a Chartered Accountant in public practice:
 - a. In his verbal communications with Mr X; and/or
 - b. By adopting an unnecessarily obstructive approach to the complaints process.

DECISION

The Member was the accountant for a farming partnership and the husband and wife partners for more than 20 years. The marriage ended some months before the events giving rise to the

charges. Those charges arose because in the Professional Conduct Committee's view the Member failed to recognise the conflict of interest in continuing to act for the partnership and one of the partners with respect to relationship property matters including the sale of the farm and the consequential winding up of the partnership.

As to particular (a) the Member acknowledged during the hearing that Mr X had instructed him that he wanted to pre-approve any work for the partnership. One of the Member's explanations for ignoring this instruction was that he considered Mr X to be unwell and irrational. The Tribunal finds this particular explanation astonishing.

As to particular (b) the Tribunal finds that in the circumstances the Member had significant and clearly apparent conflicts of interest that he failed to recognise and address at the time, notwithstanding that Mr X, at an early stage, advised the Member that he considered that the Member was conflicted and he failed throughout the hearing to acknowledge those conflicts. An obvious example of a conflict of interest was that one of the two partners had instructed the Member on more than one occasion that he wanted to pre-approve any work the Member undertook for the partnership whereas the other partner wished the Member to continue to act for her and the partnership.

The Member justified his conduct on the basis that he was acting in the best interests of both partners and that the Member achieved what he considered to be a very good result for them. However, the end does not justify the means.

Of most concern is the fact that there were numerous examples in evidence that the Member was hopelessly, repeatedly and significantly conflicted. Despite this the Member continued to insist throughout the hearing that no conflicts existed.

As to particular (c) the Code of Ethics is very specific about the requirement of a member to comply with any reasonable request from a client to provide specific details of work performed and fees charged.

Paragraph 149 of the Code states that where the fees charged are based primarily on time engaged, a request for a detailed time and cost summary (as was the case here) is considered a reasonable request. The Tribunal is satisfied on the evidence that the Member failed to comply with paragraph 149 of the Code and the particular is proved.

In relation to particular (d) the Tribunal finds that there is insufficient evidence to establish particular (d) a.

As to particular (d) b the Member has taken issue with the process adopted by the professional conduct staff of the Institute. However, the Tribunal finds that the processes followed by the Institute and the Professional Conduct Committee from the inception of the complaint comply with the rules and the requirements of natural justice and that the charges have been properly placed before the Tribunal. On more than one occasion the Member questioned the fairness of the process and, unjustifiably, the competence of the staff involved. The Member also failed to respond adequately to requests for information made by the Institute. The Member's attitude to the Institute's representatives amounted to hectoring. The Tribunal finds the particular proved.

Accordingly, the Tribunal finds the Member guilty of all five charges.

PENALTY

The parties mutually agree that a censure, attendance at an ethics course and the engagement of a mentor are an appropriate penalty in these circumstances. As the PCC put it in their submissions *“although [the Member] appeared unable to grasp the significance of the conflict (both before and during the disciplinary process), this failing should be capable of remedy through retraining and guidance and, on balance, an opportunity to do so should be provided.”*

The PCC also sought a refund of fees charged under invoice 2877 for work done which the Tribunal has found the Member had no authority to do. The Member submitted that the fee should not be refunded as he was instrumental in obtaining a very good price for the farm and the person who paid the fee, who the Tribunal understands was Mr X's wife and partner in the farm, has not complained or sought a refund. However, the Tribunal considers that there should be a financial consequence to the Member of acting contrary to the instructions of one of the partners.

Pursuant to Rule 21.31 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders:

- That the Member be censured (21.31 (k))
- That the Member attend at his own cost an ethics course approved by the Institute (21.31 (g))
- That within 21 days of the Tribunal's decision the Member engages a mentor acceptable to the Institute who shall promptly and then at least quarterly for the next 12 months review the Member's open files to identify any actual or potential conflict of interest and assist the Member to manage his conflicts. The mentor is to report to the Institute following each visit as to his or her findings including an assessment of the Member's attitude to the findings and learnings gained by the Member and the level of the Member's cooperation with the process (21.31 (g))
- That the Member is to refund to the person who paid it 50% of invoice 2877 (21.31 (j))
- That the Member is not to seek recovery of the refunded half of invoice 2877 from any other person (21.31 (i)).

The Tribunal considers that these penalties are an appropriate proportionate response to the Member's conduct and should achieve the purposes of protecting the public interest and maintaining professional standards, and also provide an opportunity for the Member's rehabilitation.

COSTS

The Professional Conduct Committee seeks full costs of \$31,792.

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 Professional Conduct Committee's decision to hold a Final Determination. This approach is a long standing one and the subject of a publicly available Practice Note. As stated in the Practice Note, the costs award must be fair and reasonable in the circumstances. The Tribunal accepts that costs must not be used as a punishment. However it does not accept the Member's submission that a requirement to reimburse 100% of costs incurred by the Institute in itself constitutes any form of punishment.

In this case the Member pleaded not guilty and defended all charges and particulars. However with one minor exception the Tribunal found the particulars proved, and found the Member guilty of the charges. The particular not proved would not have added to the costs.

A very significant contributor to the costs incurred was the manner in which the Member responded to the complaint.

The Tribunal notes the Member's acknowledgement that he could not identify any excessive or unnecessary costs. The Member questioned the hourly charge out rates used to calculate the costs of Institute staff that were allocated to these proceedings. We have been assured by the Institute that the rates used are a fair reflection of the actual costs incurred by it. The Tribunal considers use of these rates is a reasonable method of allocating costs to hearings such as this.

The Member also questioned the use of estimates for some expenses. In the Tribunal's view the use of estimates is a fair and reasonable method of determining certain costs given the Institute's extensive historical experience. Recovery of costs in excess of estimates is not sought and material overestimates are deducted or refunded to a member.

The Tribunal is satisfied that the costs being sought have been properly attributed to these proceedings. It further notes that, even though the Member's attendance was not required at the adjournment, costs of the adjournment would have been incurred anyway as the Tribunal needed to meet to consider penalty submissions.

The Member made no submissions in relation to inability to pay, although he indicated that he wished to have time to pay.

Pursuant to Rule 21.33 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that **Richard James Power** pay to the Institute the sum of \$30,000 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal and the investigation by the Professional Conduct Committee. No GST is payable. Any deferred payment arrangements will need to be negotiated with the Institute.

SUPPRESSION ORDERS

Pursuant to Rule 21.52 (b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders the permanent suppression of the identity of the clients, any details that might lead to their identification and any references to medical circumstances of Mr X's former wife.

PUBLICATION

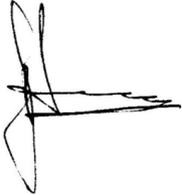
In accordance with Rule 21.35 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on the Institute's website and in the *Chartered Accountants' Journal* with mention of the Member's name and locality.

RIGHT OF APPEAL

Pursuant to Rule 21.41 of the Rules of the New Zealand Institute of Chartered Accountants which were in force at the time of the original notice of complaint, the Member may, not later than

14 days after the notification to the Member of this Tribunal's exercise of its powers, 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 orders shall take effect while the Member remains entitled to appeal, or while any such appeal by the Member awaits determination by the Appeals Council.

A handwritten signature in black ink, appearing to read 'R J O Hoare', written over a horizontal line.

R J O Hoare FCA
Chairman
Disciplinary Tribunal