NEW ZEALAND
INSTITUTE OF
CHARTERED
ACCOUNTANTS

BEFORE THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS APPEALS COUNCIL

IN THE MATTER OF	an appeal against a determination of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants dated 4 November 2013
BETWEEN	**LYNN ROBERTSON**, Accounting Technician (suspended) of Dunedin
	Appellant
AND	**THE PROFESSIONAL CONDUCT COMMITTEE OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**

INTERIM DECISION OF APPEALS COUNCIL

Dated 29 August 2014

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

Counsel:
Richard Moon for the Professional Conduct Committee
Judith Ablett-Kerr QC for Lynn Robertson

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Introduction

1. This appeal arises from a decision of the Disciplinary Tribunal dated 4 November 2013 directing publication of the appellant's name and locality in the Chartered Accountants Journal and on the New Zealand Institute of Chartered Accountants ("NZICA") website. That order was made pursuant to Rules 21.20 and 21.21 of the Rules of NZICA ("the Rules") following a decision to order interim suspension of the appellant's membership of NZICA. This appeal is brought pursuant to Rule 21.22.

2. The order for interim suspension arose from an ex parte application by the Professional Conduct Committee ("PCC") following investigations into alleged misappropriation of funds by the appellant. Although the order for interim suspension was the subject of an application for revocation, that application was abandoned.

3. It is common ground that, since the order for interim suspension was made, the appellant has pleaded guilty to various charges involving the misappropriation of funds from organisations in which she had been involved. The convictions of the appellant arose from pleas of guilty to most of the charges laid by the Police against the appellant.

4. Although pleading guilty to most of the charges the appellant sought name suppression in the District Court and, following refusal of that application by the District Court, the appellant lodged an appeal to the High Court against the refusal of the District Court to order name suppression. The appeal to the High Court was unsuccessful.

5. The appellant has, however, sought leave to appeal the decision of the High Court refusing name suppression to the Court of Appeal. As at the date of this decision there has been no hearing of, or decision by, the Court of Appeal in respect of that application for leave. In the interim, however, the High Court has made an interim order for name suppression pending determination of the application for leave to appeal to the Court of Appeal. There is, therefore, an existing suppression order in place.

6. The appellant argues that no order for publication should have been made whilst the interim suppression order by the High Court remained in place. The appellant further argues that name suppression should in any event have been granted because of the possible effects of publication on the appellant, the appellant's immediate family and the appellant's employer.

Approach to the appeal

7. The appeal is, essentially, an appeal from an exercise of a discretion by the Disciplinary Tribunal (although the Disciplinary Tribunal must be satisfied that the order is "necessary or desirable"). In those circumstances the Appeals Council should only interfere with the decision if satisfied that the Disciplinary Tribunal has failed to take into account relevant considerations, or has taken into account irrelevant considerations or the decision is plainly wrong.

8. In this case, however, a strict adoption of that approach is not appropriate. That is for several reasons:

   (i) The decision of the Disciplinary Tribunal is conclusory in nature and gives little indication of what factors it took into account, or failed to take into account, in reaching its decision. The Appeals Council, therefore, is unable to determine with any precision what factors were taken into account by the Disciplinary Tribunal.

   (ii) The appellant provided updating evidence which was not before the Disciplinary Tribunal and which we allowed the appellant to introduce. We must consider that evidence in reaching our decision on the appeal.

   (iii) There is a legal issue as to whether, in light of the High Court suppression order, the Disciplinary Tribunal can exercise its powers under Rule 21.20/21 to order publication.

   (iv) Because the order in this case arises from a decision of the Disciplinary Tribunal ordering interim suspension under Rule 21.20, there is a threshold question as to whether publication is necessary or desirable having regard to the interests of the public or to the financial interests of any person.

9. In reaching this decision, therefore, we have formed our own views based on all of the material before us.

Issues on appeal

10. The primary issues on appeal are:

   (i) In light of the interim suppression order by the High Court, is the Disciplinary Tribunal precluded from ordering (limited) publication of the applicant's name and locality and the fact that the appellant has been suspended from membership?

(ii) If the Disciplinary Tribunal can make the (limited) order for publication, is it necessary and desirable to do so having regard to the possible impact on the appellant and/or the appellant's family and employer and the interests of the public?

Would publication ordered by the Disciplinary Tribunal be in breach of the interim suppression order by the High Court?

11. The order for suppression made by the High Court was made pursuant to section 200 of the Criminal Procedure Act 2011 ("the CPA"). It prohibits publication of the name, address, or occupation of a person who is charged with, or convicted ... of, an offence. It is common ground, however, that for the purposes of an order made under section 200 "publication":

> means publication in the context of any report or account relating to the proceeding in respect of which the section applies or the order was made (as the case may be), and "publish" has a corresponding meaning.

12. The legal assessor to the Tribunal, Mr Corkill QC, advised the Tribunal that the limited publication proposed makes no connection between the criminal proceedings and the appellant and that publication would not, therefore, be in breach of the High Court suppression order. Counsel for the PCC on appeal supported that advice and argued that the limited publication proposed in this case was clearly not "in the context of any report or account relating to the (criminal) proceeding." Counsel for the PCC referred us to cases such as *Police v Slater*[1] and *Karam v Solicitor-General*[2] which involved instances where, although there was no express reference to the criminal proceedings, the circumstances of the publication drew a clear connection between the person named and the criminal proceedings.

13. Counsel for the appellant made no reference to this issue in her written submissions on appeal but, in her submissions to the Disciplinary Tribunal and in her oral submissions before the Appeals Council, she submitted that the proposed publication would be in breach of the High Court interim suppression order. Counsel for the appellant accepted that the definition of "publication" and "publish" in section 195 of the CPA applied but submitted that publication by the Institute would be in breach of the suppression order.

14. As we understood it the argument was that persons who knew that the appellant had been the subject of criminal proceedings (including in particular the Otago Daily Times) could make the connection and this could lead to others being able to make the connection between the appellant and the criminal proceedings. It was therefore argued that the proposed publication of the appellant's suspension would be in

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1 [2011] DCR 6
2 HC Auckland, AP50/98, 20 August 1999

breach of the suppression order because it could lead to a connection being made by members of the public between the appellant and the criminal proceedings.

15. In particular, counsel for the appellant was concerned that the Otago Daily Times would learn of the publication of the appellant's interim suspension and would publicise that in a way that would lead to a connection being made between the appellant and the criminal proceedings. It was submitted that, because the appellant was well known in the Otago community, publication by the ODT of the appellant's "fall from grace" in connection with the suspension would likely lead to inferences being drawn by the public that the appellant was the person who was the subject of the criminal proceedings.

16. We have given careful consideration to this issue. It is obvious that no order for publication should be made if to do so would be in breach of a suppression order made by a court under section 200 of the CPA.

17. We are satisfied, however, that the limited form of publication proposed in this case would not in itself be in breach of the High Court interim suppression order. Although the interim suspension arises out of matters which have been the subject of criminal proceedings and the conviction of the appellant, the publication makes no reference whatsoever to those proceedings and makes no connection with them. Nor does it make any reference to the conduct which has given rise to the suspension (although we accept that an inference can be drawn that the conduct must be sufficiently serious to warrant suspension).

18. The fact that others, who have knowledge of the appellant and her offending, may make the connection does not mean that the publication is in breach. If others, such as the ODT, were to publish the fact of the appellant's interim suspension in a manner which drew a connection between the appellant and the criminal proceeding that may well be a breach of the suppression order. In our view, however, such conduct by a third party is not something for which the NZICA is responsible in a way which means that publication of the appellant's name and her suspension would be in breach of the High Court interim suppression order.

19. We do not, therefore, consider that the proposed publication would be in breach of the High Court suppression order. It follows that, in our view, there is no legal impediment to making an order for publication. As discussed below, however, we have taken the existence of that order into account in determining whether an order for publication should be made.

Should the order for publication be made?

20. The question of whether an order for publication should be made following interim suspension essentially involved weighing public interest factors which favour publication against other factors which may, in the particular circumstances, compel a conclusion that publication should not be made. In that regard we approach the matter on the basis that, even if there are grounds for reaching a conclusion that publication is necessary or desirable, there remains a discretion as to whether, in all the circumstances, an order for publication should be made.

21. If there are circumstances which exist which warrant interim suspension of a member, the publication of the member's name and detail and the fact of that interim suspension, would normally be necessary or desirable. That is because, as counsel for the PCC pointed out, interim suspension without publication would to a significant extent render the interim suspension nugatory in its effect.

22. The grounds for interim suspension of a member are directed at the public interest in protecting the profession and members of the public including employers, clients and other members of the public who may have dealings with the member. Allowing a person who has been suspended to continue dealing with the public without those persons knowing of the suspension would largely defeat a primary purpose of the interim suspension.

23. In saying that we are not saying that there is, in cases of interim suspension, a presumption in favour of publication. We consider, however, that in most instances of interim suspension, publication of the name of the person suspended is likely to be necessary or desirable in order to protect the public interest.

24. That is particularly so where, as here, the conduct which gave rise to the interim suspension (and which has subsequently been admitted by the appellant and convictions entered) involved very serious dishonesty offences involving misappropriation of funds over which the appellant had control. It also appears from the evidence that the appellant had a gambling addiction which led to the misappropriation of funds and that, although the appellant has received some treatment for that addiction, there is no certainty that the addiction is under control.

25. There are also other important public interest factors in play. These include the public interest in openness and transparency of the Institute's disciplinary processes and the public interest in accountability (in particular the Institute being seen to take action in respect of members whose conduct appears to have fallen below accepted professional standards).

26. One factor which might, in an interim suspension situation, weigh against publication is the fact that, at the interim suspension stage, the allegations against a member may not have been proven or admitted. There may, therefore, be prejudice arising from publication in circumstances where, ultimately, the conduct may not be proven. In this case, however, that is not a factor weighing against publication. Since the interim suspension order has been made the appellant has been convicted on a number of offences of dishonesty.

27. We are satisfied that the public interest factors outlined above would normally mean that publication of the appellant's name and locality in this case is both necessary and desirable. There are, however, a number of factors which have been raised by the appellant which counsel for the appellant submits outweigh the public interest in publication of the appellant's name and locality and the fact of her suspension.

28. In summary those factors are:

(i) The appellant is at risk of suicide if publication is made.

(ii) Publication would cause hardship to members of the appellant's family including in particular the appellant's spouse and children.

(iii) Any risk to the public is substantially mitigated or avoided by undertakings of the appellant to advise persons for whom work has been done of the fact of the suspension. In addition the appellant's employer has full knowledge of the convictions and the conduct which has given rise to the interim suspension.

(iv) Publication, even if it is not in breach of the High Court suppression orders, is likely to defeat the intention of those orders which is to protect the appellant from name publication pending the appeal.

(v) The proposed publication would risk breaching a permanent order for suppression

(vi) of the name of the appellant's employer and/or could detrimentally affect the employers business.

Risk of suicide

29. Evidence of a risk of suicide from publication was provided in a report by a consultant psychiatrist, dated August 2013 and a subsequent report provided (which was not before the Disciplinary Tribunal). The subsequent report was undated but it was provided for the purpose of the High Court appeal and was probably prepared on or about 18 March 2014.

30. The first report describes various health conditions of the appellant and the appellant's spouse. With reference to the potential impact of name publication (in respect of the criminal proceedings) it observes that the appellant appeared to be "catastrophising the situation" by reference to the impact it would have on the children, spouse and current employer.

31. REDACTED

32. REDACTED

33. REDACTED

34. The report noted that the appellant was not on anti-depressants. The psychiatrist "had the sense that (the appellant) is less at risk of suicide than I judged (the appellant) to be last year". The report concluded, however, that given the appellant's "catastrophic" (but possibly partly realistic) view of the consequences of public naming and the appellant's belief that the appellant's family would cope with the appellant's suicide, the appellant should be considered "at risk".

35. Counsel for the appellant made it clear that the risk of suicide, and the way in which the courts should approach that risk in terms of name suppression, was the primary ground of the application for leave to appeal. In our view, of the grounds put forward in support of the appeal, the risk of suicide is one which deserves very careful consideration.

36. The existence of a risk of suicide has been considered by the Courts on previous occasions. It is implicit from the decisions of the High Court and the District Court in this case, in which permanent name suppression was refused, that the risk of suicide was not considered by those courts to be sufficient to justify an order for permanent name suppression. That issue, however, is subject to appeal and, for that reason, we place little weight on the fact that orders for permanent name suppression have not been made by the District Court and the High Court in this case.

37. In *BL v R*[3] Winkelman J considered the issue of whether a risk of suicide was a sufficient ground to justify name suppression under section 200 of the CPA. Her Honour stated[4] that:

> Where there is a risk of suicide, the court must consider the medical evidence before it. Where a risk of suicide is established, name suppression

[3] [2013] NZHC 2878
[4] At para [23]

> does not automatically follow; the existence of a suicide risk is a relevant, but not determinative, factor.

38. In that case the court decided that, in light of evidence that the offender was at a high risk of suicide due to a major depressive episode and post-traumatic stress disorder and that high risk of suicide would be elevated by publication of his name, the risk of suicide outweighed the public interest in knowing about the operation of the justice system and the identity of the offender.

39. In the present case there is no evidence that the appellant is at a high risk of suicide or that the limited publication ordered would aggravate an already high risk of suicide. On the contrary, the evidence suggests that the risk of suicide does not arise from any existing depressive illness but from a "catastrophising" belief on the part of the appellant that the appellant's family, employer and possibly others might be better off without the appellant.

40. There is no suggestion, however, that the appellant is receiving ongoing treatment or counselling in respect of that belief and the psychiatrist, in his latest report, suggests that the risk of suicide is reduced from what he previously judged to be the case although he assessed that the appellant was still "at risk". For our part we are not satisfied on the evidence that there is a sufficient risk of suicide which would outweigh the public interest in the limited form of publication ordered by the Disciplinary Tribunal.

41. The evidence in relation to the risk of suicide is little more than observations based on what the appellant believes will be the effects of publication of the fact of the offending. We also note that the evidence was directed at the risk of suicide arising from publication of the offending. Such publication is not proposed in this case. The evidence was not directed at the limited publication of the suspension and both name and locality.

42. There is no detailed assessment of risk factors which would support the conclusions of the psychiatrist as to his assessment of the risk of suicide. The risk does not arise from any serious depressive illness which is likely to be exacerbated by publication.

43. The evidence suggests that the risk of suicide, such as it is, stems primarily from the appellant's catastrophising and unrealistic belief that the consequences of publication may mean that those affected would be better off without the appellant. In any event we consider that the reduced risk of suicide identified in the subsequent report is not sufficient to outweigh the public interest in publication.

Effect on appellant's family

44. The evidence as to possible effects of publication on the appellant's family stems primarily from the appellant's beliefs as to possible effects rather than any direct evidence of risk to those family members. As the psychiatrist noted in his report the beliefs of the appellant appear to be "catastrophised" and, at best, only partially realistic.

45. REDACTED

46. REDACTED. We do not accept, on the evidence, that the impact of the proposed publication would have serious effects on the appellant or the appellant's family which would outweigh the public interest in limited publication as ordered by the Disciplinary Tribunal. REDACTED.

Effects on employer

47. The appellant was employed by the current employer with full knowledge of the allegations made against the appellant. To its credit the appellant's employer has continued to employ the appellant following the appellant's convictions for dishonesty.

48. The appellant has suggested in statements made to the psychiatrist and others that publication of any criminal offending could have disastrous effects on the employer to the extent that it may have to close down its business. We place little weight on those assertions which, in our view, stem primarily from the catastrophising mind-set of the appellant and are both speculative and unlikely to occur.

49. The employer, in a letter which was written while the criminal proceedings were still pending, suggested that if the offending was published then it could possibly spell the end of their small growing business. There was, however, no evidence to explain or substantiate that assertion.

50. There is no evidence that such a disastrous result is likely in the event that the offending is published and such evidence as there is was directed at publication of the offending rather than the limited publication proposed here. We also note that, if the criminal offending was such as to have the effect that clients of the employer would no longer wish to do business with that company, that would suggest that the offending is of such concern to clients of the business that they ought to know of it and to be able to make their decisions with that knowledge.

51. In our view publication of the suspension is very much in the public interest. We are not at all satisfied on the evidence that the limited publication proposed here is likely

to have the disastrous consequences asserted by the appellant. Even if we thought there was a serious risk of the appellant losing current employment as a result of publication we would not have seen that as outweighing the public interest in publication.

52. It was also asserted that the proposed publication would breach the permanent order for name suppression made by the District Court which prohibited publication of the employer's name. We do not accept that publication of the appellant's name would constitute a breach of the suppression order made in respect of the employer.

53. The fallacy in that argument is that the District Court, whilst making a permanent order for name suppression of the employer, declined to make an order for suppression of the appellant's name. If the argument were correct, the fact that publication of the appellant's name might lead to identification of the employer who employs the appellant would effectively mean that suppression of the employer's name gave de facto suppression of the appellant's name. That is clearly not the case. In our view the existence of the permanent suppression order in respect of the employer's name is no bar to publication of the appellant's name in this case.

Current interim suppression order pending appeal to the Court of Appeal

54. Counsel for the appellant strongly urged on us that, even if publication would not, itself, constitute a breach of the interim suppression order made by the High Court the effect of such publication would be to defeat the intention of that suppression order. It was therefore submitted that, even if an order for publication was otherwise "necessary or desirable" an order should not be made in circumstances where, to order publication, risked defeating the intention behind the interim order for suppression.

55. The primary basis for that submission is the submission by counsel for the appellant that the Otago Daily Times newspaper has taken an active role in opposing the appellant's application for name suppression. That has included making submissions to the High Court in respect of the appeal from the District Court's refusal to order name suppression and, presumably, participation by the Otago Daily Times in the appeal if leave to appeal is granted to appeal.

56. The appellant's concern is that the Otago Daily times will use the publication of the appellant's name by the Institute to publicise the "fall from grace" of the appellant who is, apparently, well known in the Otago area. The submission is, that the very risk (of suicide) which is central to the appeal, will be defeated by newspaper publicity which it is said will be likely to follow once the Otago Daily Times becomes aware of publication of the appellant's suspension.

57. Of the grounds put forward by the appellant for allowing the appeal and declining publication, this is ground has given us the most serious concern. The obvious purpose of the suppression order made by the High Court is to ensure that publication of the appellant's name in connection with the criminal proceeding does not render the appeal nugatory (in the sense that publication pending the appeal would likely defeat the main grounds for the appeal, i.e. primarily, the risk of suicide arising from such publication).

58. We would be concerned if in fact publication of the interim suspension was used in a way which might defeat the intention behind the interim suppression order made by the High Court. That is why, in this case, a proposed order for publication of the appellant's interim suspension in the Otago Daily Times was not made.

59. We consider, however, that although there is some risk that the Otago Daily Times might publicise the appellant's suspension in a way that links the appellant to the criminal proceedings (and thus defeat the intention behind the interim order for suppression) to do so would likely breach the terms of the suppression order. We do not think that a responsible newspaper, such as the Otago Daily Times, is likely to act in a way that may amount to a breach of the suppression order. Nor do we consider that the Institute would be responsible if in fact the Otago Daily Times acted in a way which had the effect of defeating the purpose of the suppression order.

60. We do not, therefore, consider that the risk of publication defeating the intention or purpose of the High Court interim suppression order is a sufficient reason to justify non publication in this case.

Risk to the public

61. Counsel for the appellant placed considerable emphasis on what was submitted to be a limited risk to the public of reoffending and the undertaking given by the appellant to advise clients for whom work is done independently of the convictions. It was also pointed out that in any event, there has been a lengthy period since the interim suspension in which the appellant's name has been suppressed (because of this appeal and the various appeals in the courts and the pending appeal to the Court of Appeal). In these circumstances it was submitted that continuing suppression of the appellant's name pending the Court of Appeal proceedings being resolved was not necessary or desirable because of possible risk to the public in allowing continued name suppression.

62. There is considerable force in that submission. Against that submission, however, there are the following factors:

(i) Although an undertaking has been given by the appellant to inform each of the current or future clients and any employer or future employer of the fact that membership of the New Zealand Institute of Chartered Accountants has been suspended, as counsel for the PCC points out, the Institute has no means of enforcing that undertaking. Nor has there been any evidence (for instance in the form of an affidavit attaching correspondence to employers or clients) evidencing compliance with the undertaking. We did, however, receive an assurance by counsel that it had been complied with.

(ii) It was also pointed out by counsel for the PCC that the appellant appears to carrying on a business of providing services to members of the public which, in itself, is in breach of the Institute's Rules. Although that is not a matter that is before the Appeals Council, it was put forward as a further matter of concern to the Institute in relation to dealings the appellant might have with members of the public in circumstances where there is no certainty that such persons will have knowledge of the appellant's interim suspension.

(iii) We note that there was some (hearsay and indirect evidence) that at least in one instance a prospective client may not have been informed of the interim suspension. We put no weight on that, however, because the evidence was far from specific and would not have been sufficient to establish that there had been a breach of the undertaking.

(iv) Although there is no evidence of any reoffending (and we therefore proceed on the basis that there has been no repetition of the conduct which gave rise to the interim suspension), that does not mean that there is no risk to the public in the appellant continuing to deal with the public without knowledge of the interim suspension. In particular, there is some suggestion in the reports of the psychiatrist that some gambling behaviour may have occurred although counsel for the appellant told us that the appellant denies any such gambling behaviour.

(v) We accept that the appellant has, for a lengthy period of time since the interim suspension, had de facto suppression of name. We do not think that is a proper ground, in itself, for allowing the appeal.

63. The fact that the appellant has had de facto suppression of name as a result of the exercise of a right to appeal the decision of the Disciplinary Tribunal and the decisions of the courts is because of the legitimate interest in protecting appeal rights so as not to render them nugatory where the appeal is in relation to a decision ordering name suppression. Although the delay in resolving the appeal is regrettable (and we

place no blame on anyone in respect of that delay) we do not see it as a reason, in itself, for allowing the appeal.

Interim Decision

64. In our view the decision of the Disciplinary Tribunal to order limited publication was fully justified. We are therefore minded to dismiss the appeal.

65. We have decided, however, that in light of:

(i) the lengthy period of name suppression since the interim suspension order was made;

(ii) the undertaking to advise present and future clients or employers of the suspension and what appears to be a relatively low risk of repeat offending;

(iii) the current High Court suppression order and;

(iv) the fact that the appeal to the Court of Appeal is close to being heard

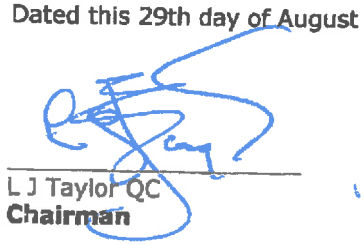
the prudent course is to defer making a final decision on the appeal until the outcome of the Court of Appeal hearing is known. Pending a final decision the publication order made by the Disciplinary Tribunal is to remain delayed (in accordance with Rule 21.33).

66. This interim decision is made on the basis that the hearing of the appeal to the Court of Appeal is to be prosecuted with urgency and that there is no change in circumstances or new evidence which would increase the risk to the public interest of continued deferral of the publication. Leave is therefore granted to the PCC to request that a final decision be made at any time.

67. Once the decision of the Court of Appeal has been made the Appeals Council is to be notified immediately and a final decision will be made in light of that decision. If any decision is made not to prosecute the appeal the Appeals council is to be advised immediately.

68. We also make an order that this interim decision is not to be published until a final decision is made. Although we have drafted this decision in a way that does not identify the appellant we think it is best to defer publication of this interim decision in case the matters discussed in this decision identify the appellant as being the person involved in the criminal proceedings to which the interim suppression order relates.

Dated this 29th day of August 2014.



L J Taylor QC
Chairman