



**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** a Member

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**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND  
INSTITUTE OF CHARTERED ACCOUNTANTS  
11 June 2014**

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**Hearing:** 10-11 June 2014

**Location:** New Zealand Institute of Chartered Accountants, Level 1,  
12-16 Nicholls Lane, Parnell, Auckland, New Zealand

**Tribunal:** Mr RJO Hoare FCA (Chairman)  
Mr JD Naylor FCA  
Mr DP Scott FCA (retired)  
Mr MJ Whale FCA  
Ms A Hauk-Willis (Lay member)

**Legal Assessor:** Mr Matthew Casey QC

**Counsel:** Mr Richard Moon for the prosecution  
Mr Stephen Bryers for the Member

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

The charge and particulars as laid were as follows:

### **Charge**

**THAT** in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 21.30 (f) the Member has breached the Institute's Code of Ethics.

### **Particulars**

#### **IN THAT**

In the Member's role as a Chartered Accountant in public practice and in relation to a complaint, the Member:

(1) Has, through X Chartered Accountants Limited (and/or X Y Chartered Accountants Limited), continued to provide professional services to:

(a) A Limited whilst a director and shareholder of that company; and/or

(b) B Partnership whilst a director and shareholder of both entities that comprise that partnership; and/or

(c) the C Trust when a trustee of that trust and with an indirect financial interest in its assets; where

in relation to each of those entities, his governance roles, direct and indirect financial interests, and close family relationships gave rise to a conflict of interest and, having regard to the dispute raised by the Complainant as a co-director, shareholder and family member, the refusal to discontinue the professional engagements concerned breached the Fundamental Principle of Objectivity and Independence and in particular paragraphs 43, 44, 45, 47 and 65 of the Code of Ethics; and/or

(2) Failed to give due regard to the Professional Conduct Committee's minute of 18 July 2012 stating that the accounting work for the entities at 1(a) to (c) above should be passed to an independent person, in breach of the Fundamental Principle of Professional Behaviour of the Code of Ethics.

### **DECISION**

This matter has come before the Tribunal as a result of the breakdown in a family and professional relationship which has existed for 40 years, the first 25 of which were harmonious. The relationship had deteriorated to such an extent that the Complainant initiated a derivative action by A Limited against the Member and his wife and his accounting firm in 2011 (the matter has been heard and judgment reserved). The complaints essentially arose as a result of a commercial dispute involving only family members which in the Tribunal's view should have been resolved between the parties some time ago, and certainly without the need to invoke the Institute's disciplinary process.

There are two particulars supporting the charge, one relating to the Member's failure to properly deal with conflicts of interest and the other a failure to give due regard to the Professional Conduct Committee's (PCC) minute following a hearing to consider an allegation that the Member had failed to take appropriate steps to manage conflicts of interest in relation to the same entities.

The PCC advised the Tribunal that it was not seeking to hold the Member to account for conduct before July 2012 as the PCC had already sanctioned him for that conduct by cautioning him in its decision of 8 July 2012. The PCC also was not relying on any assertion that the Member's accounting work was below an acceptable standard or involved overcharging.

### **Particular 1 – Conflicts of Interest**

The Institute's Code of Ethics (*Code*) does not define the expression *conflict of interest*. Although the Courts have refrained from attempting to provide a single definition they have given some guidance. For example, would right minded people with reasonable knowledge of the circumstances consider that a member's involvement in various capacities gives rise to a risk that their interests were in conflict with the interests of the client – would a reasonable person looking at the circumstances of the particular case think that there was a real possibility of conflict.

The Code has specific provisions relating to conflicts of interest in the section dealing with the fundamental principle of objectivity and independence. Those provisions include:

43. Members must remain conscious of the need to remain objective in the performance of all professional work, and **must continuously review and manage** the risk to their objectivity. In addition, members must ensure that they comply with the requirements of the Code in relation to [among other matters] disclosure of conflicts of interest.
45. For a member in public practice, ... situations where there is a need to carefully manage and **continually review** the risk to the member's objectivity from financial involvement [include] where the member, or their immediate family... has a financial interest in a client.
47. Family, business and personal relationships may put the objectivity of a member at risk. There is a particular need to ensure that an objective approach to any assignment is not endangered as a consequence of any relationship.
63. ...Members must be able to demonstrate to new and existing clients that any conflict of interest can be managed with appropriate safeguards.
64. Where there is, or is likely to be, a conflict between the interests of a member, or a member's firm, and a client then the appropriate safeguards include:
  - (a) Disclosure in writing of the circumstances of the conflict;
  - (b) Advising the client in writing that, in the particular circumstances, the client may wish to seek alternative independent advice; **and**
  - (c) Obtaining in writing the informed consent of the client to act.
65. In those circumstances where effective safeguards are not available to reduce the risk to a member's actual **or perceived** objectivity, then the member must... discontinue the existing engagement.

(Emphasis is the Tribunal's)

Paragraph 8 of the Code states that members should be bound not merely by the terms but also by the spirit of the Code. It is for the member to demonstrate at all times that their actions and conduct comply with the Code (paragraph 5).

The Member, his wife and the Complainant were the three directors of A Limited, a commercial property owning company. That company and a company owned and controlled by the Member or his interests were equal partners in the partnership which also owned commercial property. The Member, the Complainant and a solicitor who acknowledged he was not independent as he acted for the Member and his family interests were Trustees of the Trust.

The Member's firm provided a range of professional services to the entities including accounting services and property management and project management services, and also charged the company for work the Member did in his capacity as a director.

The Member's firm was also a tenant of a commercial property owned by the partnership.

The Member and his wife had effective control of the company and partnership and significant financial interests in both.

In the Tribunal's view it is beyond doubt that the Member had and continues to have actual conflicts of interest as a result of his financial interest and his various roles. Examples of such conflicts are:

- determining which services his firm should provide such as accounting services, property management services and lease and rental negotiation services and, if so, on what terms; and
- determining the terms of his firm's lease of the partnership's premises.

It is clear from the evidence that these conflicts of interest have existed for decades. Until late 1999 no issues arose. However, following the breakdown in the personal relationship, the need to address and properly manage the conflicts became very real.

The next issue to be addressed is whether the Member has properly managed those conflicts since July 2012. In the Tribunal's view, the Member has not.

Mr Bryers submitted that in relation to the fees paid for accountancy services, and we presume also fees paid for the other types of service provided to the entities by the Member's firm, ways of managing the conflict would include obtaining comparative quotes for the work involved and, if necessary, having the fees reviewed under the Institute's rules. He further submitted that ultimately the best way of managing the conflict was to carry out all work free of any influences of conflicts of interest or otherwise and to actually charge fees that are fair or reasonable. In relation to the landlord tenant conflict, he submitted that could be managed by obtaining independent expert opinions as to the amount the firm should be paying for its occupation of the building.

In the Tribunal's view it is not an answer to managing conflicts that the Member's fees are fair and reasonable. It is possible that the entities could get a better deal and better terms as to timing of payment if the work was competitively tendered. Whether the work was actually carried out free of any influences of conflicts of interest or otherwise would need to be objectively determined, not determined by what the member thought. As to the landlord tenant position,

more would be required than obtaining valuations - issues arise in relation to the term of the lease, renewal period and make good obligations (among others).

Mr Bryers also submitted that the major shareholding or ownership position held by the Member and his interests in the entities meant that any potential or actual conflict between the Member's interests and the clients is minimal. Mr Casey QC directed the Tribunal that whether a conflict of interest arises (and in the Tribunal's view how those conflicts are managed) is not answered by who is at most risk of financial loss or other loss if objectivity isn't observed. The law is quite clear that the fact that something or other might result in more detriment to the member or benefit to the member is not determinative of whether there was a conflict. If there is potential for financial benefit or financial detriment there is a conflict.

Mr Bryers submitted that paragraph 33 of the Code was particularly significant in applying the fundamental principle of objectivity. That provision states that a member should test their decisions and actions against the following criteria – would another equally experienced member have come to the same decision with access to the same information, but without the other relationships or influences that have put their objectivity at risk, and have they in fact retained their objectivity? However, the opening words of that paragraph state that that approach is to be used in the absence of specific rules, standards or guidance - as the Code contains express rules and guidance relating to conflicts of interest and managing those conflicts (in particular paragraphs 64 and 65) those specific rules and guidance apply.

In the Tribunal's view, where:

- there are clear conflicts of the type referred to in this decision; and
- those in control of the client, other than a member and those closely associated with the member, consider (or perceive) that the member's conduct is not objective and have lost trust and confidence in the member,

effective safeguards are not available to manage the conflict of interest and the member must discontinue the existing engagements – as required by paragraph 65.

In case we are wrong that the applicable provision is paragraph 65, the Tribunal considers that appropriate safeguards have not been put in place since July 2012 to manage the conflicts.

Paragraph 64 gives clear guidance as to what appropriate safeguards include. Although there has not been comprehensive written disclosure of the circumstances of the conflicts, it is clear that the clients understood the conflicts and there is evidence that particularly in the case of the company, disclosure of the Member's interests were made. However, at no stage has the Member advised the clients in writing that they may wish to seek alternative independent advice.

In the Tribunal's view, in these situations the management of the conflicts arising in relation to the provision of the various services would have included:

- formally putting proposals as to terms of engagement for day to day accountancy and administration services and compliance work to the clients;
- formally putting proposals relating to the property management services and project management services to the clients;
- advising the clients in writing that they may wish to seek independent advice in relation to those proposals;
- depending on what advice was obtained and any subsequent negotiations, obtaining in writing the informed consent of the clients to act.

The Member in his capacity as a director and/or part owner of the partnership could not be involved in those clients' decision making. One cannot in effect give oneself informed consent. Although the company's constitution provides that an interested director can vote on matters in which they are interested, the Member as a member of the Institute must still comply with the Code. If the Member is interested, there is a conflict of interest which must be managed. The only way that conflict can be managed in this context, reflecting the spirit if not the letter of the Code, is for the Member not to be involved in those decisions or at least not act in such a way as to frustrate the effect of the Code.

The Tribunal notes that the Complainant as a director of the company agreed to the Member's firm continuing to prepare management accounts and to the company obtaining quotes from other accounting firms for the compliance work, and accepts the explanation for the delay in obtaining those quotes (until the determination of the Court hearing referred to earlier in this decision, the extent of the compliance work required is not known). However these do not constitute effective management of all the conflicts, particularly in respect of the property management and project management services.

The Tribunal finds Particular (1) proved.

#### ***Particular 2 – Failure to give due regard to the PCC's minute***

This particular does not accurately reflect the statement made in the PCC's minute. The minute states that the accounting work **should have** been passed to an independent person. The Tribunal accepts the Member's submission that the minute cannot reasonably be read as a direction by the PCC that he must immediately pass on the accounting work. The Rules provide for a particular procedure to be followed if the PCC considers it appropriate to relieve a member of an engagement (Rule 21.6(d)(iii)) and the PCC did not adopt that procedure.

Further, the Member's evidence was that had that procedure been adopted he would have given his consent.

The Tribunal also notes that the board of the company (including the Complainant) have agreed that quotes are to be obtained from other firms for all but the day to day routine accounting work.

The Tribunal finds that the PCC has not proved on the balance of probabilities that the Member has failed to have due regard to the terms of the actual minute. It is therefore unnecessary for the Tribunal to consider whether any failure breached the Fundamental Principle of Professional Behaviour of the Code of Ethics.

Accordingly Particular (2) is not proved.

#### ***Finding***

As Particular (1) is proved, the Tribunal finds the Member guilty of the Charge.

#### **PENALTY**

The Tribunal has had regard to the Member's 40 year career as a chartered accountant, his age, the fact that he intended to resign as a member, the background and circumstances giving rise to the complaint and the fact that he had since July 2012 taken some steps to address aspects of

his conflicts of interest. We also understand that matters the subject of the hearing are the only ones in respect of which the Member has been subject to the Institute's disciplinary process.

The Member gave undertakings to the Tribunal pursuant to Rule 21.54A of the Rules of the New Zealand Institute of Chartered Accountants that:

1. He will immediately resign his membership of the Institute.
2. He will not prepare the end of year financial statements for A Limited, the B Partnership and the C Trust for 31 March 2013 and future years and the Member will procure that Z and X Y Chartered Accountants Limited will not do so either.
3. He will continue to do routine accounting and administration work for those three entities without charge for the next 24 months.
4. The accountant engaged in the future for the three entities will be appointed by the Board, the partners and the trustees respectively.

In reliance on those undertakings, the Tribunal determined that the following penalty is the appropriate response for the purpose of protecting the public and maintaining professional standards.

Pursuant to Rule 21.31 (k) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member be censured.

Pursuant to Rule 21.31 (m) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member reimburse the \$776.25 incurred by the Complainant.

The Tribunal notes that the PCC sought an order under Rule 21.31(h) that the Tribunal appoint another member to undertake or complete work that the Member had been engaged to perform. However, the Tribunal in the circumstances of this case considered that making such an order was impractical as it was possible that the clients might not accept such an appointment and the Tribunal has no jurisdiction to require them to accept. The Tribunal considers the undertakings the Member has given are a pragmatic way of dealing with at least some of the concerns of the Complainant.

## **COSTS**

The Professional Conduct Committee seeks full costs of \$40,830.

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.

In this case one of two particulars was not proved.

There are no other mitigating factors such as excessive or unnecessary expenses incurred or demonstrated evidence of hardship (inability to pay).

Pursuant to Rule 21.33 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member 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.

## **PUBLICATION**

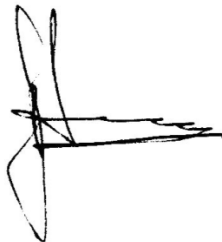
In the Member's closing submissions he sought suppression of the identity of himself, his family members and the three entities involved. However, at the commencement of the hearing the Member indicated he would not be seeking suppression of his identity. The hearing was held over two days as a public hearing and the media were present for part of it. Given the nature of the offending which relates to what is essentially a family dispute the Tribunal is willing to order non-publication of the Member's name and the names of the entities involved, but not to suppress them.

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 Institute's official publication without 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 including publication 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**