NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

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 **Phillip Leon Christey,** Chartered Accountant, of **Christchurch**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS AS TO PENALTY, COSTS AND PUBLICATION
1 December 2020
(the determination of the Tribunal on liability dated 15 September 2020 is attached)

Hearing:	12-14 August 2020
Location:	Golden Fleece Room, Level 1, Crowne Plaza Hotel, 764 Colombo Street, Christchurch
Determination as to Liability:	15 September 2020
Tribunal:	Mr MJ Whale FCA (Chairman) Mr DJH Barker FCA Mr J Naylor FCA Ms B Gibson (Lay member)
Legal Assessor:	Mr Matthew Casey QC
Counsel:	Mr Richard Moon for the prosecution
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsanz.com

BACKGROUND

In its Determination as to Liability issued 15 September 2020, the Tribunal found the Member guilty of four charges:

1) Misconduct in a professional capacity;
2) Conduct unbecoming an accountant;
3) Negligence or incompetence in a professional capacity that was of such a degree and/or so frequent as to reflect on his fitness to practise as an accountant and/or tends to bring the profession into disrepute; and
4) Breaching the Rules and/or the Code of Ethics of the New Zealand Institute of Chartered Accountants.

The Tribunal also set a timetable for the parties to make submissions in relation to penalty, cost and publication. The Professional Conduct Committee (*PCC*) complied with that timetable. On 20 October 2020, the day on which he was required to file his submissions, the Member provided a submission and documents in support of an application for permanent name and location suppression. He also applied for an extension of time to file his submissions on penalty and costs on the basis that he had just filed with the Tribunal an Official Information Act request for information and was seeking that extension to enable him to review and respond to the requested information, once provided.

In a Minute dated 21 October 2020, the Chair of the Tribunal declined the application for extension of time for the reasons set out in that Minute. However he granted a short extension to 27 October 2020. On that date the Member advised the Tribunal that he would not be making any further submissions.

In reaching its decision in this Determination, the Tribunal has carefully reviewed and had regard to the application and supporting material which the Member filed on 20 October 2020 referred to above, the Member's Brief of Evidence dated 5 August 2020 (to the extent that it contains information or submissions relevant to penalty, costs and publication), a letter from the Member to the PCC dated 11 August 2020 and the documents referred to by the Member as DT1 - DT58.

BREACHES OF EARLIER TIMETABLE ORDERS

In its Determination as to Liability, the Tribunal dismissed the Member's application to waive breaches of earlier timetable orders and noted that if it had power to do so, the Tribunal proposed to censure and fine the Member for his failure to comply with the orders. The Tribunal's legal assessor has directed that the Tribunal does not have that power unless further process is followed. That is a shortcoming which the Tribunal recommends be addressed at the time the Rules of the New Zealand Institute of Chartered Accountants are next revised. In light of its decisions and orders in this Determination, the Tribunal does not propose to take the matter further.

PENALTY

The PCC's Submissions

The PCC sought the removal of the Member's name from the Register. It drew the Tribunal's attention to the Appeal's Council decision in *Lee* (AC 19 July 2013) in which the Council held that misconduct in a professional capacity will normally result in the Member being struck off or

suspended. This reflects the fact that professional misconduct is the most serious charge a member can face.

The PCC referred to the factors identified by the High Court in *Roberts v Professional Conduct Committee of the Medical Council of New Zealand* [2012] NZHC 354 as being relevant where tribunals are determining penalty. They are, which penalty:

- Most appropriately protects the public and deters others;
- Facilitates the Tribunal's important role in setting and maintaining professional standards;
- Reflects the seriousness of the misconduct;
- Allows for the rehabilitation of the practitioner, where appropriate;
- Promotes consistency with penalties in similar cases;
- Punishes the practitioner (although subsequently the Courts have taken the view that punishment is more a by-product of the other factors);
- Is the least restrictive penalty appropriate in the circumscribes; and
- Looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

The PCC also referred to the Appeals Council's decision in *Power* (AC 2 December 2016) where, when considering whether the proportionate penalty was suspension or strike-off, the Council stated, at [107]:

> "*On the one hand, there is no evidence of dishonesty, or financial self-interest or incompetence which would normally strongly indicate a penalty of removal from the Register. On the other hand, there is strong evidence of a lack of insight by Mr Power into his offending and an inability to properly recognise and deal with situations of conflict. That would suggest that, even though the conduct is not at the most serious level, protection of the public and maintenance of professional standards require removal of Mr Power's name from the Register*".

Mr Power faced and was found guilty of the same charges as the Member faced, except misconduct in a professional capacity. His conduct involved failing to act appropriately or at all on clients' instructions, failing to carry out his professional roles objectively or professionally, unacceptable billing practices (many similar to those conducted by the Member), disclosing client information without proper authority and acting inappropriately when the client wished to discontinue his services. He also had a very poor disciplinary record, having been disciplined six times in six years, including for conduct similar to some of the complaints in his latest hearing.

Notwithstanding its comments at [107] cited above, the Appeals Council overturned the Disciplinary Tribunal's decision to order removal of the Member's name from the Register and instead imposed a period of 12 months suspension - solely because the Council considered there was a real prospect that Mr Power could be rehabilitated and he should be given a "last chance" to undertake a comprehensive rehabilitation proposal, supported by significant monitoring and supervision, which he had put forward.

The PCC also referred the Tribunal to a number of its previous decisions including *O'Reilly* (28 November 2017), *Gormack* (14 November 2016) and *McPhedran* (8 November 2018) – the strike off decisions – and *Moffatt* (19 December 2014), *Hennessy* (28 July 2015), *Chan* (5 February and 28 March 2018) and *Horrell* (17 January 2019) – cases in which the member was suspended.

The PCC noted that the conduct at issue occurred several years ago. It submitted that the Member's interactions with the Institute and the Tribunal confirm that his behaviour has not changed – he also continues to offer accounting services to the public despite assertions of incapacity and ongoing mental health concerns. He has continued to claim payment on disputed invoices despite clear (and undisputed) evidence that it is he who owes the complainants money.

The PCC submitted that in these circumstances:

- The Tribunal cannot be satisfied that the Member will develop the insight necessary to successfully rehabilitate.
- Based on the evidence currently before the Tribunal, the only penalty that reflects due application of the *Roberts*' factors is a strike off. The number of and combination of breaches of the Code of Ethics cannot be appropriately sanctioned through suspension – they simply go beyond that in terms of seriousness.

The Strike Off Decisions

In *O'Reilly*, there was outright misappropriation of client funds. The Tribunal has held on numerous occasions that the Fundamental Principle of Integrity is the cornerstone of professional ethics, and a breach of that principle constitutes very serious misconduct. Further, misappropriation of clients' funds is incompatible with membership of the Institute. The Member was struck off.

In *Gormack*, the member was found guilty of misconduct in a professional capacity. The conduct involved failing to identify and appropriately manage actual or perceived conflicts of interest and threats to his objectivity, and failure to provide clients with information material to their investment which had been promoted directly by the Member.

The Tribunal found that the member had or took effective control of the investment entities involved and all the transactions in issue, was conflicted from the outset and later became hopelessly conflicted and the lack of disclosure to clients was deliberate and in some cases was designed to mislead. The accounting treatment of certain key transactions in financial statements did not reflect the substance of those transactions. The member was struck off.

That decision was upheld by the Appeals Council (AC 29 March 2017).

In *McPhedran*, the member was also found guilty of misconduct in a professional capacity. This case also entailed a member becoming involved in their clients' business affairs, failing to identify and manage conflicts of interest and threats to their objectivity, becoming hopelessly conflicted and furthering their own interests at the expense of their clients. This included the member and his business partner obtaining effective control of a client's company without any regard for identifying and managing the conflicts of interest that that presented.

The member was struck off. The penalty decision (there was no appeal against the finding of misconduct in a professional capacity) was upheld by the Appeals Council (AC 5 July 2019). The Appeals Council stated at [218]:

> *"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…*"

And at [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 … shows a serious lack of insight… and serious failure to comply with his ethical and professional obligations*]

The Suspension Cases

In *Moffatt* the member was found guilty of misconduct in a professional capacity. He knowingly prepared inaccurate financial statements, and filed income tax returns knowing them to be false – cash payments received were not declared. There were also conflicts of interests and issues arising from a co-investment with the client in two companies. The conduct was ongoing for a number of years and involved an element of dishonest behaviour. In part because the Tribunal considered that the member was well-advanced in rehabilitation, it held that a striking off order would be an excessive response – the member was suspended for 2 years.

In *Hennessy*, the member failed to identify or manage conflicts of interest, and withdrew his funds from a company in which his client was a shareholder and significant investor before and to the detriment of his client's interests. The Tribunal found that the latter conduct constituted misconduct in a professional capacity. The Tribunal, having regard to the mitigating circumstances in that case, determined that the proportionate penalty was a two year suspension.

In *Chan* (5 February 2018 and 28 March 2018), the member was found guilty of misconduct in a professional capacity (among other charges). There were integrity breaches relating to the handling of client monies (but not for personal gain), the provision of false or misleading information to the Institute, and some self interest. The member had cooperated with the Institute and admitted a large majority of the conduct at an early point. He had expressed remorse and regret for his professional failings. The Tribunal imposed a 2 year suspension.

And finally *Horrell*, where the most serious charge was that of conduct unbecoming an accountant. The member failed to identify and put in place appropriate safeguards to manage conflicts of interest and threats to her objectivity, and in relation to business dealings with her clients put her interest before those of her clients in a number of respects. The self-interest was significant. The Tribunal considered the conduct was at the serious end of the scale involving a number of breaches of the Fundamental Principle of Integrity (the obligation to be straight forward and honest in all professional and business relationships, and deal fairly and truthfully with others). The Tribunal suspended the member for four years.

Decision

In reaching its decision as to penalty the Tribunal has had regard to the following mitigating factors:

- the Member's previously unblemished record.
- the years that the Member has mentored students in accountancy and administration; and
- the Member's involvement in the community.

In this case although there were no findings of permanent personal gain at the expense of the Member's clients, there were findings that the Member:

- misused the Audit Shield process for his own temporary personal gain.
- borrowed from his clients and has refused to repay those loans in full claiming a setoff against fees owed which the Tribunal has deemed to be excessive.
- abused the relationship between client and chartered accountant;
- fabricated part of the text of an email sent in the name of the client;
- deliberately misled the Van Zyls' that the fees the Member charged would be covered by insurance;
- charged fees that far exceeded the value of the services the Member provided to his clients;
- denigrated his clients' other advisor in communications with both his clients and the Inland Revenue Department, potentially to the prejudice of his clients' interests.

There was also evidence of incompetence (in the sense of failing to meet standards) and a lack of insight into the Member's offending (just one example being his inability before or during the hearing to recognise that fabricating information in an email sent in the name of his client was both wrong and completely unacceptable conduct from a chartered accountant). There was also a failure to recognise and properly deal with situations of conflict (such as the loans).

Whilst there was no outright misappropriation of client funds as in *O'Reilly*, and no particular aspect of the Member's conduct was as egregious as that in *Gormack* or *McPhedran*, assessed overall the Tribunal considers that the Member's conduct falls so far short of the standards expected of a chartered accountant that in order to protect the public, deter others, maintain professional standards and reflect the seriousness of the misconduct, the proportionate response in this case must be removal from the Register – subject to the Tribunal's findings on rehabilitation set out below.

There is nothing in the Suspension Cases which would cause the Tribunal to depart from that conclusion, for the following reasons.

It appears that in *Moffatt* that member would have been struck off but for the Tribunal's view that the steps he had taken to date to deal with his shortcomings indicated that the member was well advanced in rehabilitation.

In *Hennessey*, although the conduct was serious and involved the member preferring his own interests over his clients, the Tribunal determined that given the particular mitigating circumstances and, it would seem, the content of numerous character and professional testimonials, striking off would have been disproportionate.

Chan has some similarities with this case. However, in the Tribunal's view the mitigating factors in that case were much more compelling than in this case when assessed against the nature and extent of the misconduct.

As to *Horrell*, the most serious charge faced was conduct unbecoming an accountant. In the present case the Tribunal has found the Member guilty of misconduct in a professional capacity and, in the Tribunal's view, the nature and extent of his offending was more widespread.

No two cases are the same. However, the Tribunal considers that the conclusion it has reached, subject to its decision on rehabilitation, is not inconsistent with the cases referred to.

A key factor for the Tribunal to consider is whether the Member can be rehabilitated and, if so, whether the prospect of rehabilitation would result in the least restrictive and most proportionate response being a suspension (in this case for a substantial period) rather than removal from the Register.

In the Tribunal's view, successful rehabilitation is unlikely.

The conduct, the subject of the charges, took place in 2016 and 2017. It appears that the Member has been seeking the assistance of a number of mental health professionals over an extended period of time. Seeking such assistance is to be encouraged. However, the Member has admitted that in 2016 as a result of stress and other health issues and family and work pressures he was not able to perform to acceptable standards. According to medical reports that was also the case in October and December 2019 and in March 2020. Notwithstanding the Member's assertion to the PCC in August 2020 that he had had no more residual symptoms since the end of March 2020, during the Tribunal hearing the Member had difficulty in prioritising information and in following instructions. It was very apparent to the Tribunal over the course of the hearing and from reviewing the Member's written material that he had great difficulty focussing on relevant issues and presenting his arguments in a logical way. Although the Tribunal appreciates that the hearing was a very challenging experience for him, based on our experience of members appearing before us on very many occasions, that would only partly explain his difficulties.

In a detailed report in March 2020 the specialist who assessed the Member opined that the Member's symptoms were likely to improve gradually to the point that he could resume full usual duties, but this would take at least several more months - his functioning was likely to continue to fluctuate for the foreseeable future. However, at the hearing more than five months later he was still exhibiting the symptoms described by the specialist, to a significant degree. The way in which he dealt with providing submissions on penalty, costs and publication as recently as October 2020 - making a very late request for information based on legislation which did not apply, almost all of which was irrelevant to the matters he should have been making submissions on, and applying for yet another extension of time so he could consider that information - also gives the Tribunal cause for concern about his ability to overcome his health and other issues that impact his ability to perform, and the time that might take. This, particularly as the focus of his practice has changed to consultancy rather than compliance work.

Although there is reference in some of the Member's correspondence with the Institute in January 2020, and in his brief of evidence, to extra mentoring and support from a CA member, there is little detail of what that entails – what supporting information there is appears to relate to another firm providing contracting services to the Member's clients and not formal mentoring. There is certainly no proposal like the comprehensive mentoring and peer review proposal (also involving the mentor reporting to the Institute) put forward by the member in *Power* (referred to above) – the proposed mentor, an experienced chartered accountant, also addressed the Tribunal in that case (see *Power* (DT 21 July/30 August 2016)). The Member's January communications with the Institute about mentoring pre-date the specialist's specific recommendation in March 2020 – the Tribunal infers that in March there was no formal programme in place.

Even with the significant external support he has received over an extended period of time, it appears that the Member has been unable to change his behaviours or become sufficiently aware of the extent of his failings - and, more importantly, the impact of those on his clients of which there

appears to be a complete lack of insight. There has also been no discernible shift in his ability to follow instructions or accept recommendations, including those made by the Tribunal.

If the situation and the Member's condition could be improved or was able to be managed on a consistent basis, the Tribunal would have thought that there would be clear evidence of progress having been made. It has no confidence that, even with support, the Member would be able to discharge his professional duties to an acceptable standard.

In the Tribunal's view, there are too many uncertainties about the prospects and timing of any rehabilitation for that to outweigh the need to protect the public and ensure the maintenance of professional standards - in these circumstances, those objectives can only be achieved by removal from the Register.

Pursuant to Rule 13.51(a) of the Rules of the New Zealand Institute of Chartered Accountants, the Tribunal orders that the Member's membership be terminated and that the Member's name be removed from the Register of Members.

FURTHER ORDERS

In this section of the Determination, all sums referred to are inclusive of GST (if any)

The PCC also seeks orders that any outstanding invoices issued by the Member's practice (including any interest claimed) be waived. It submits that an order should be made because the Tribunal has found that both Complainants were overcharged by the Member (in relation to the Van Zyl complaint to a substantial degree, including paying higher fees to the expert as a result of duplication) - given their experience to date, it would be unfair for the Complainants to pay any further fee or engage in any additional process with the Member to resolve such issues.

Based on the analysis compiled by the PCC's investigator, the accuracy of which was acknowledged by the Member, those fees totalled $37,060 before interest.

The Tribunal is satisfied that there is a direct connection between most of these fees and the Particulars. However, fees totalling $4,313 appear to have been rendered to entities not involved in the complaints, and fees totalling $5,211 were rendered to Gingernut Ventures Limited where the Tribunal has found that the Particular relating to unnecessary costs was not made out. On the other hand, an amount paid by the Van Zyls on 9 June 2017 has been set-off against unpaid fees when the Tribunal has found that it should not have been. After making those adjustments to the schedule the total is reduced to $30,986.

Subject to that adjustment, the Tribunal agrees with the PCC's submission, and considers an order to be fair and reasonable in the circumstances. Although the applicable Rule does not expressly refer to interest, it adopts a purposive interpretation of the Rule and finds that 'fees' does include default interest.

Pursuant to Rule 13.51(k) of the Rules of the New Zealand Institute of Chartered Accountants, the Tribunal orders that the Member procure the Member's practice to waive $30,986 of outstanding fees as particularised above, (and any accrued interest on those fees).

The PCC also seeks an order that the Member return fees totalling $13,012, to address the amount the Member agrees is owing to the Complainants ($8,234 in loans on account of fees and $4,778 in relation to Audit Shield proceeds not remitted). The PCC, quite properly, notes that the Tribunal does not have jurisdiction to order remittance of these sums directly. However, the Tribunal's Legal Assessor has directed that where the sums owing to the Complainants are indirectly the result of overcharging (and/or duplication or unnecessary work), the Tribunal has jurisdiction under Rule 13.51(l) to order their return.

Taking into account the amount of $3,450 (referred to above) which should have been repaid from Audit Shield proceeds, findings of overcharging of fees which was not particularised but which the Tribunal identified as significant, the fees which the Tribunal has ordered be waived, and the finding that the professional costs relating to the Van Zyl tax audit very substantially exceeded any potential exposure of the Van Zyls to tax, the Tribunal considers it a proportionate response to order that the Member return fees to the Booths and Van Zyls totalling $13,012.

Pursuant to Rule 13.51(l) of the Rules of the New Zealand Institute of Chartered Accountants, the Tribunal orders accordingly.

The clear expectation of the Tribunal is that the Complainant's relevant entities who currently owe fees not covered by the Rule 13.51(k) order above will pay the outstanding fees to the Member on receipt by the Complainants of the $13,012, and that the Member will take no steps to enforce payment of those fees in the meantime.

COSTS

The Tribunal was provided with a Cost Schedule totalling $124,738.

The PCC seeks an order that the Member pay 90% of the costs of the investigation and determination of the complaints, and full costs of the adjournment hearing in January 2020. Those amounts total approximately $115,000. The proposed reduction makes some allowance for the PCC's failure to prove several of the sub-Particulars alleged in the Notice of Charges but the substantial figure also reflects the Member's regular failure to meet deadlines, including those prescribed by the Tribunal, the Member's provision of very large volumes of (mostly irrelevant) material and the way in which the Member conducted his defence.

The PCC submitted that the Member has not filed any information concerning financial position so there is no evidence of inability to pay the award of costs.

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. However, and as set out in the Tribunal's Practice Note on Costs, factors such as the PCC's failure to prove particulars or charges, unnecessary or excessive charges and financial hardship resulting in inability to pay can result in the award of a lesser amount..

The Tribunal notes that the Costs Schedule total is a comparatively large sum but agrees that in significant respects it reflects choices the Member made in relation to the conduct of his case.

He sought an adjournment of the main hearing on the day of the proposed hearing. The factors giving rise to the adjournment application could have been brought to the Tribunal's attention well before the scheduled hearing date. Although the application was successful, in the Tribunal's view

the circumstances in which it was required left the Tribunal with no option but to grant it in the interests of justice - it would not be fair or reasonable here to allow a discount on those costs. At the Member's request, the Tribunal convened the disciplinary hearing in Christchurch, his home town - this substantially increased travel and accommodation costs. Where practicable the Tribunal is prepared to accommodate a member's requests but if the Member is found guilty that must come at a cost to the Member, not to the profession. Despite the Tribunal's recommendation that he be represented by legal counsel at the hearing, the Member represented himself, which resulted in the hearing taking at least a third longer than would otherwise have been the case. It also resulted in the written decisions being very significantly longer than would otherwise have been necessary.

Against this background, the Tribunal has carefully reviewed the Costs Schedule and does not consider that there have been any excessive or unnecessary charges. The Member, who at his request was provided with information supporting charges in the Schedule, has taken no issue with the Schedule.

In the Tribunal's view there is substance in the PCC's submission that any reduction to the costs payable as a result of it failing to prove several of the sub-Particulars should be modest. The Tribunal considers that the thrust of all Particulars (with one exception) was established, and notes that all Charges were proved.

The Member has advised the Tribunal that due to his health conditions it has been necessary to reduce his hours of work, and this and the impact of the Covid 19 lockdowns has caused a loss of earnings resulting in financial hardship for his family. There is little other information about the Member's financial position and he has made no formal submissions in relation to costs. The Tribunal is unable to conclude on the evidence before it that hardship is a factor to be taken into account. It notes that the Institute is generally prepared to enter into instalment arrangements in relation to costs awarded against a Member.

That leaves the issue of what, if any, adjustment should be made for the Member's flagrant breaches of the Tribunal's timetabling orders. As previously stated, the Tribunal treats such misconduct seriously. Any deduction to the costs figure that the Tribunal may have made absent those breaches is offset by a similar amount of costs it intends to order as a result of the breaches.

Having regard to all the circumstances the Tribunal considers that an award of costs of $120,000 is fair and reasonable.

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 New Zealand Institute of Chartered Accountants the sum of $120,000 in respect of the costs and expenses of the hearings before the Tribunal and the investigation by the PCC. No GST is payable.

PUBLICATION AND NAME SUPPRESSION

The PCC seeks publication of the Tribunal's determinations in *Acuity* magazine, on the Chartered Accountants Australia and New Zealand website and in the *Christchurch Press*, with mention of the Member's name and location.

The Member seeks to have his name and location suppressed on the grounds of his ongoing health issues and those of a close family member. He has provided a number of medical reports and assessments relating to his health, and a report from the close family member's GP, in support of the application.

The PCC has no issue with the suppression of any sensitive medical or health related information submitted by the Member. However it submits that the medical evidence provided falls below the

required threshold of “exceptional circumstances” necessary for the Tribunal to depart from the default provision contemplated by Rule 13.55(a) (publication with name and location). It submits that the medical evidence related to the Member:

- is not current, consisting primarily of a report issued in March 2020; and
- is not directed at the effect of publication on the Member’s health or well-being; and that
- the overall prognosis is the Member’s condition can be managed provided the correct support structures are in place.

The PCC says that the evidence relating to the close family member has not been provided by the specialist that person has been seeing and does not sufficiently address the nature and extent of the impact publication might have on that person’s health.

The PCC also submits that the Member has been found guilty of a serious charge and will face a severe sanction. That sanction, and the reasons it has been imposed, should be available to the public as existing and future clients.

The “exceptional circumstances” requirement was incorporated in the Rules of the Institute which came into effect on 30 May 2019. That post-dates both the conduct for which the Member is being sanctioned and, by some 18 months, the date on which the complaints resulting in this hearing were filed.

The old Rule 13.44 stated that unless the Tribunal directs otherwise the decision will be published with name and location. The new Rule mandates publication unless the Tribunal determines there are exceptional circumstances for not doing so. Under both sets of Rules, the Tribunal may suppress the name of, or any matter that may identify, a sanctioned member or any other person *if the Tribunal considers it is appropriate to do so, having regard to the interests of any person or to the public interest*.

This Tribunal has had the practice of applying whichever rules are more favourable to the member – in this case the rules that were in force before May 2019.

General Principles

In order to provide for the public interest in open justice and transparency, freedom of speech and the maintenance of confidence in the professional disciplinary process, publication will be required in most cases – particularly where the case is sufficiently serious. This position was strongly reflected in the Institute’s then Rules (Rule 13.44(1)(a)).

Public interest includes the interest in knowing the identity of a person found to have been guilty of a disciplinary offence, and avoiding impugning the reputation of other members.

As the Courts have stated in the disciplinary context, following an adverse disciplinary finding the probability must be that public interest considerations will require that the name of the practitioner be published in the preponderance of cases (*T v Director of Proceedings* (HC Christchurch CIV-2005-409-2244, Pankhurst J, 21.2.2006 at [42], cited with approval by the full High Court in *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 2 NZLR 850).

While the principle of open justice is fundamental, there will be circumstances in which the interests of justice require the general principle to be departed from, to the extent necessary to serve the ends of justice.

As previously stated, the Rules give the Tribunal a discretion as to whether suppression should occur.

As to where the threshold applicable to *appropriate* lies, the Tribunal finds guidance from the decision of the Appeals Council in *Qiu* (21 May 2018). There the member pleaded guilty to a

charge of negligence or incompetence in a professional capacity, as well as failing to respond promptly to communications from the Institute – much less serious charges than here. The negligence related purely to a client-facing issue. Among the grounds on which *Qiu* sought non-publication of her name was that publication would bring shame to her, particularly within the Chinese community, and might cause damage to her reputation, her mental health would be affected, she had learned from her mistakes and there was little likelihood of re-offending.

The Appeals Council held that:

- Publication of name inevitably has an effect on reputation but that is not in itself a reason for not ordering publication.
- There would need to be compelling evidence of a highly prejudicial effect of publication on a member's health (physical or mental) in considering whether the prejudicial effect outweighs the public interest.
- Remorse and genuine learning from mistakes may well go to issues of penalty but, absent special circumstances, are of little relevance to the question of whether the member's name and location should be published.

As noted in *Daniels*, the Tribunal must balance public interest considerations against those of the Member's private interests and, in this case, the interests of a close family member.

The Appeals Council has also recently confirmed that the threshold for departing from the presumption in favour of publication is high and, although there is no onus or burden on the person seeking suppression, requires supporting evidence (though not necessarily expert evidence). The standard is closer to that in the criminal jurisdiction (extreme hardship) than the civil jurisdiction due to the public interest factors of transparency, accountability and public protection. It confirmed the Tribunal's approach in a recent case that there needs to be compelling evidence of a highly prejudicial effect of publication on a member's health (physical or mental) in considering whether the prejudicial effect outweighed the public interest.

The High Court has upheld the Appeals Council's recent analysis (*J v The New Zealand Institute of Chartered Accountants Appeals Council and Another* [2020] NZHC 1566, at [77] – [80] and [84]). The Court also noted (at [95]) that it is possible that the impact of publication on multiple affected parties could cumulatively warrant a suppression order, where impact on each of those parties individually might not.

The Tribunal proceeds on the basis that there needs to be special (not exceptional) circumstances, or highly prejudicial effect (something significantly more than the normal consequences) of publication, particularly on physical or mental health, if the private interests of the Member and his family are to displace the public interest considerations referred to above.

The Tribunal also accepts that in conducting the balancing exercise regard should be had to the seriousness of the offending.

Application of the Principles

Here, the Member has been found guilty of the most serious charge (misconduct in a professional capacity). That conduct was both client-facing and, to the extent that the Member was dealing with Inland Revenue, public-facing.

As to the effect of publication on the Member the information before the Tribunal does not in its view reach the special circumstances or the highly prejudicial effect threshold, for the reasons stated by the PCC as set out above. Also, any damage to the Member's reputation or reduction in income from the provision of services the Member is currently providing are consequences the Member has brought upon himself - as there is no evidence that those consequences would be

out of the ordinary, in themselves they cannot form the basis on which an order for name suppression can be made.

As to the effects of publication on the close family member, again the evidence before the Tribunal does not in its view, meet the threshold. So far as it relates to effect on health, there is opinion by a non-specialist that publication would have a negative impact but does not explain what that might be and there is no suggestion the impact would be highly prejudicial. The health issues of that person appear to have been reasonably successfully managed in the past and there was no suggestion that this would not continue. As to the submission that publication would potentially affect that person's future aspirations, such a submission is speculative and is not of the calibre of evidence that enables the Tribunal to conclude special circumstances or a highly prejudicial effect exist. The Member's surname is not uncommon. It is not clear to the Tribunal, and no evidence was produced, as to how those with whom the family member may associate or to whom that person may apply for employment would become aware of the publicity or associate that person with it.

The Tribunal's findings also generally apply to submissions relating to the impact of publication on another close family member – a matter which the Member raised in his brief of evidence but not his later application.

The Tribunal finds the circumstances of the Member and close family members, both individually and cumulatively, do not meet the required threshold for considering whether their private interests outweigh the public interest considerations.

The Application for name and location suppression is declined.

The PCC seek that, in addition to the default publication position, the determinations be published in the *Christchurch Press.* The charges are serious. In all the circumstances the Tribunal considers that the protection of the public would not be adequately served if publication occurred only on the CAANZ website and in *Acuity*. It grants the PCC's request.

Pursuant to the Rules of the New Zealand Institute of Chartered Accountants, the Tribunal directs that its determinations shall be published on the Chartered Accountants Australia and New Zealand website, in the official publication *Acuity* and in the *Christchurch Press*, with mention of the Member's name and locality.

Pursuant to Rule 13.62(b) of the Rules of the New Zealand Institute of Chartered Accountants, the Tribunal orders that the names of the Member's clients, other than the Complainants, and of third parties (other than the Complainants' advisor, Mr Jeff Owens), and any information or documents that may identify them, and, except as set out in the Tribunal's determinations, all information relating to the Member's health and all information relating to or which might identify the close family members, be suppressed.

RIGHT OF APPEAL

The PCC submitted that if the Tribunal declined the Member's application for permanent name suppression, it should direct that publication take effect now for the following reasons:

- The Charges and Particulars are at the most serious end of the spectrum, occurring in a client-facing context;
- There have already been considerable delays in bringing this matter to a conclusion. An appeal, if it were to be filed, may not be heard for six or more months.

- The Member seemingly wishes to continue in public practice. The public must be allowed to make an informed decision as to whether to engage his services.

The Tribunal sees considerable force in those submissions. It considers that the evidence provided in support of the application for name suppression falls far below the threshold and that there is no prospect of a successful appeal from the Tribunal's decision on that point. The course of action the PCC proposes is also the default position under Rule 13.59.

Pursuant to Rule 13.59 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 decisions, appeal in writing to the Appeals Council of the Institute against the decisions.

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

MJ Whale FCA
Chairman
Disciplinary Tribunal

NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

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 **Phillip Leon Christey,** Chartered Accountant, of **Christchurch**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS AS TO LIABILITY
15 September 2020

Hearing:	12-14 August 2020
Location:	Golden Fleece Room, Level 1, Crowne Plaza Hotel, 764 Colombo Street, Christchurch
Tribunal:	Mr MJ Whale FCA (Chairman) Mr DJH Barker FCA Mr J Naylor FCA Ms B Gibson (Lay member)
Legal Assessor:	Mr Matthew Casey QC
Counsel:	Mr Richard Moon for the prosecution
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsanz.com

At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance (together with a support person for much of the second and third days) and not represented by counsel, the Member:

- admitted Particulars 2d, 3, 4c, 5a and 5b, 7a – c and 7d(i), 9, 11a, 12c and 12f in relation to the Booth complaint;
- admitted Particular 1c in relation to the Van Zyl complaint;
- admitted Particular 1 of the Institute's complaint, and Particular 2 of that complaint to the extent he acknowledged that he failed to take timely action;
- denied the other Particulars; and
- pleaded guilty to Charge 4 but not guilty to Charges 1 – 3.

The Charges and Particulars 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 13.50[1] the Member is guilty of:

1) Misconduct in a professional capacity; and/or

2) Conduct unbecoming an accountant; and/or

3) Negligence or incompetence in a professional capacity and that this is of such a degree and/or so frequent as to reflect on his fitness to practise as an accountant and/or tends to bring the profession into disrepute; and/or

4) Breaching the Rules and/or the Code of Ethics of the New Zealand Institute of Chartered Accountants.

PARTICULARS

IN THAT

In his role as a Chartered Accountant in public practice and in regards to a complaint from Mr David Booth, the Member:

1. In respect of the his advice in or around June 2016 that Mr Booth establish a company, G Limited[2], to hold the title of a long term rental property that he was building (a "structure"), the Member:

    a. recommended a structure that was unduly complex relative to Mr Booth's needs and/or did not advise Mr Booth of the GST implications of that structure prior to recommending it to him; and/or

[1] Formerly Rule 13.39 of the Rule in force until 30 May 2019

[2] Now called GB Limited

b. did not respond and/or respond adequately to Mr Booth's subsequent queries about the Member's advice regarding the structure and/or the tax implications of it should the property be sold in the future; and/or

c. caused Mr Booth to incur unnecessary costs and/or fees to initially have the company set up and/or subsequently to have it wound down and the title transferred to Mr Booth's family trust;

in breach of the Fundamental Principles of Professional Behaviour and/or Professional Competence and Due Care of the Code of Ethics[3]; and/or

2. In respect of his advice that Mr Booth required a written tax opinion from the Member on the application of Inland Revenue's 10 year rule applicable to dealers, builders and/or developers, in relation to the prospective sale of a property at Y Crescent, the Member:

   a. provided misleading and/or unnecessary advice to Mr Booth regarding the necessity for such an opinion, when the property had been owned for almost 10 years at the time of the Member's advice; and/or

   b. failed to perform and/or complete the opinion within a reasonable time, and/or

   c. issued an invoice to Mr Booth of $1,988.74 on or about 22 December 2016 and/or accepted payment of that invoice, despite not completing the engagement; and/or

   d. gave repeated assurances to Mr Booth that the opinion would be completed which the Member did not uphold and/or failed to respond and/or respond professionally to Mr Booth's queries about the timing and/or completion of the engagement,

   in breach of the Fundamental Principles of Integrity and/or Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics; and/or

3. Failed to complete the 2015 and/or 2016 tax returns for Mr Booth and/or his wife Sarah Booth and/or their company B Limited in a timely manner, in that the 2015 returns were not filed until on or about 21 January 2017 and/or the 2016 returns were not filed until 17 July 2017 for the personal returns and/or 21 July 2017 for B Limited's returns, in breach of the Fundamental Principle of Professional Competence and Due Care and/or paragraph 130.4 of the Code of Ethics; and/or

4. In respect of an engagement to assist Mr and/or Mrs Booth and/or their entities with a tax audit, the Member:

   a. accepted the engagement when he did not have the necessary professional competence and/or experience and/or skill to properly carry out such an engagement; and/or

   b. in assisting Mr Booth with a voluntary disclosure, did not obtain appropriate evidence to support his advice that subcontractor costs for painting and brickwork completed at Y Crescent as part of EQC repairs were tax deductible; and/or

   c. disregarded Mr Booth's instructions to him on or about 25 May 2017 to accept Inland Revenue's position that the subcontractor costs referred to in particular (4)(b) above were non-deductible, in that after receiving Mr Booth's instruction, he

[3] The 2014 Code of Ethics applies to conduct occurring between 1 January 2014 to 15 July 2017. The 2017 Code of Ethics applies for periods from 15 July 2017. The amendments to the code in 2017 were minor and all reference referred to in these charges and particulars are extant in both versions of the Code of Ethics

continued and/or commenced work to contest Inland Revenue's assessment of the tax treatment; and/or

d. overcomplicated the audit by failing to communicate with Inland Revenue in a succinct and/or clear manner and/or by failing to respond to Inland Revenue's questions directly and/or by providing information which was irrelevant and/or immaterial;

in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour and/or paragraphs 130.1 and/or 130.4 and/or 210.5 and/or 150.1 of the Code of Ethics; and/or

5. In respect to insurance claims lodged with Audit Shield to cover professional fees arising from the tax audit and/or monies from Audit Shield under the policy, the Member:

   a. provided incomplete and/or misleading advice to Mr and/or Mrs Booth regarding the amount of cover available under the policy; and/or

   b. did not respond appropriately to Mr and/or Mrs Booth's requests for information regarding the monies received from Audit Shield and/or how these had been monies had been allocated; and/or

   c. failed to advise Audit Shield that he had received loans from Mr and/or Mrs Booth which were used as pre-payment of his fees, when the Audit Shield policy did not permit pre-payment of professional fees,

   in breach of the Fundamental Principles of Integrity and/or Professional Behaviour and/or Professional Competence and Due Care of the Code of Ethics; and/or

6. Failed to comply with PS-2 *Client Monies,* in that having agreed that Mr and/or Mrs Booth's loans to the Member would be repaid from monies received from Audit Shield, the Member:

   a. failed to bank monies received from Audit Shield into a trust account, in breach of by paragraph 30 of *PS-2*; and/or

   b. deducted his professional fees from funds received from Audit Shield without Mr and/or Mrs Booth's prior written authority, in breach of paragraph 50 of PS-2, and/or

   c. did not keep proper accounting records including a reconciliation of monies received from Audit Shield, in breach of paragraphs 63 and/or 64 and/or 67 of PS-2,

   in breach of the PS-2 and/or the Fundamental Principle of Professional Competence and Due Care and/or paragraph 130.1 of the Code of Ethics; and/or

7. In respect of loans advanced from Mr and/or Mrs Booth and/or their entities to the Member and/or his entities between February 2016 and June 2017, the Member:

   a. failed to agree the written terms of each loan with Mr and/or Mrs Booth prior to the loans being advanced, to ensure there was clarity of the sum being borrowed and/or the repayment terms and/or any other conditions; and/or

b. failed to maintain adequate accounting records of the loans he received including records of each sum received and/or to what extent loans have been offset against his accounting fees and/or any repayments made; and/or

c. failed to properly account to Mr and/or Mrs Booth to enable them to understand how much money he has repaid and/or what loans have been used to offset his professional fees and/or what loans remain outstanding; and/or

d. accepted the loans from Mr and/or Mrs Booth, some of which the member advised them would be repaid once the Audit Shield insurance policy had been paid out, when:

i. he knew or ought to have known the repayment would not be covered by the insurance claim; and/or

ii. he did not intend to repay the loans and/or did not have the means to repay the loans; and/or

iii. he did not discuss with the clients what would occur if the Audit Shield claim was unsuccessful and/or and was insufficient to cover the sums borrowed;

in breach of the Fundamental Principles of Integrity and/or Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics; and/or

8. Asserted undue influence on Mr and/or Mrs Booth to loan him monies in circumstances where the clients were undergoing a significant tax audit and required the Member's assistance to complete that audit, in breach of the Fundamental Principles of Integrity and/or Professional Behaviour of the Code of Ethics; and/or

9. Failed to put in place appropriate safeguards to manage threats to the Member's objectivity and/or conflicts between the interests of himself and his clients Mr and/or Mrs Booth and/or the threat of undue influence by virtue of borrowing monies from clients, in breach of the Fundamental Principle of Objectivity and/or paragraphs 120.1 and/or 220.5 and/or NZ220.10.1 and/or 280.1 and/or 280.4 of the Code of Ethics; and/or

10. On or about 4 July 2017, without Mr Booth's consent, sent an email in his name and/or from his email account and/or which the Member had amended without his knowledge, to Mr X, the professional trustee for the David and Sarah Booth Family Trust, in breach of the Fundamental Principles of Integrity and/or Professional Behaviour and/or Professional Competence and Due Care of the Code of Ethics; and/or

11. Improperly asserted a possessory lien over Mr and/or Mrs Booth and/or their entities' records, when the Member:

a. did not have a proper legal basis to withhold the records and/or he had not sought legal advice to ensure a possessory lien could be validly exercised; and/or

b. he was aware that Mr and/or Mrs Booth disputed his fees and/or he did not take professional and/or timely steps to attempt to resolve the dispute;

in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics; and/or

12. Failed to act with integrity and/or professionalism in his billing and/or handling of Mr and/or Mrs Booths' monies and/or loans, in that the Member:

a. has charged excessive and/or unreasonable fees in circumstances where he has undertaken work which was unnecessary and/or untimely and/or without and/or contrary to client instruction; and/or

b. has billed for work which was not completed; and/or

c. has failed to provide appropriate information and/or explanation to Mr and/or Mrs Booth to enable them to understand and/or assess the reasonableness of the professional fees charged and/or the work the Member has performed and/or the reason for the work; and/or;

d. has failed to remit monies which he received from Audit Shield to Mr and/or Mrs Booth and/or their entities; and/or

e. has failed to repay monies advanced to him as loans; and/or

f. has used loans and/or Audit Shield monies to offset his professional fees without authority from Mr and/or Booth and/or contrary to their instructions; and/or

g. has charged interest on outstanding fees when there is a genuine dispute over the Member's fees and he has not supplied sufficient information to Mr and/or Mrs Booth to enable them to understand and/or assess the reasonableness of his fees,

in breach of the Fundamental Principles of Integrity and/or Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics; and/or

AND

In relation to a complaint from Mrs Clare Van Zyl in regards to the Member's role as a Chartered Accountant in public practice, the Member:

1. In respect of an engagement to assist Mrs Van Zyl and/or her husband Chas Van Zyl and/or their entities with a tax audit, the Member:

    a. accepted the engagement when he did not have the necessary professional competence and/or experience and/or skill to properly carry out such an engagement; and/or

    b. failed to progress the engagement in a timely manner, in that having received notice of the audit on or about 26 January 2016 and sending an initial response to Inland Revenue in March 2016, he did not progress the engagement again until October 2016 and/or did not engage Jeff Owens, an external tax specialist, to assist Mr and/or Mrs Van Zyl until on or about 12 December 2016; and/or

    c. overcomplicated the audit by failing to communicate with Inland Revenue in a succinct and/or clear manner and/or by failing to respond to Inland Revenue's questions directly and/or by providing information which was irrelevant and/or immaterial;

    d. failed to act in a competent and/or professional and/or courteous manner in relation to Mr Owens' engagement to assist the Van Zyls with the audit, by:

        i. criticising Mr Owens' work in correspondence with Mr and/or Mrs Van Zyl and/or Inland Revenue; and/or

ii. not providing Mr Owens with necessary information in a timely manner and/or providing him with copious and/or irrelevant information; and/or

iii. fettering Mr Owens ability to assist the Van Zyls resolve the audit in a timely manner; and/or

iv. failing to act with professional courtesy and/or respect in his communications with Mr Owens; and/or

v. continuing to be involved in the tax audit and/or correspond on the Van Zyls behalf with Inland Revenue and/or others when it was inappropriate to do so, and/or

vi. causing the Van Zyls to incur unnecessary fees and/or costs,

in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour and/or paragraphs 130.1 and/or 130.4 and/or 210.5 and/or 150.1 of the Code of Ethics; and/or

2. Provided incomplete and/or misleading information to Mr and/or Mrs Van Zyl and/or Mr Owens regarding the amount of cover available to the Van Zyls under the Audit Shield policy and/or failed to advise them the policy limit of $25,300 had been almost exhausted on fees arising from the Booths' tax audit and/or that there would be limited funds available to cover the cost of professional fees for the Van Zyls audit, in breach of the Fundamental Principles of Integrity and/or Professional Behaviour and/or Professional Competence and Due Care of the Code of Ethics; and/or

3. In respect of loans advanced by and/or on behalf of Mr and/or Mrs Van Zyl to the Member and/or his entities on or about 10 January 2017 and/or 9 June 2017, the Member:

    a. failed to agree the written terms of each loan with Mr and/or Mrs Van Zyl prior to the loans being advanced to ensure there was clarity of the sum being borrowed and/or the repayment terms and/or any other conditions; and/or

    b. failed to maintain adequate accounting records of the loans the Member received including records of each sum received and/or any repayments made; and/or

    c. in respect of the loan of $3,450 advanced to cover fees owing by Soar Limited to Mr Owens, the Member advised Mr and/or Mrs Van Zyl that the loan would be repaid from the Audit Shield insurance claim, when

        i. the Member knew or ought to have known the repayment would not be covered by the insurance claim; and/or

        ii. the Member did not intend to repay the loans and/or did not have the means to repay the loans; and/or

        iii. the Member did not discuss with the clients what would occur if the Audit Shield claim was unsuccessful and/or and was insufficient to cover the sums borrowed;

    in breach of the Fundamental Principles of Integrity and/or Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics; and/or

4. Asserted undue influence on Mr and/or Mrs Van Zyl to loan him monies in circumstances where the clients were undergoing a significant tax audit and required the Member's

assistance to complete that audit, in breach of the Fundamental Principles of Integrity and/or Professional Behaviour of the Code of Ethics; and/or

5. Failed to put in place appropriate safeguards to manage threats to his objectivity and/or conflicts between the interests of himself and his clients Mr and/or Mrs Van Zyl and/or the threat of undue influence by virtue of borrowing monies from clients, in breach of the Fundamental Principle of Objectivity and/or paragraphs 120.1 and/or 220.5 and/or NZ220.10.1 and/or 280.1 and/or 280.4 of the Code of Ethics; and/or

6. Failed to act with integrity and/or professionalism in his billing and/or handling of Mr and/or Mrs Van Zyls' monies and/or loans, in that the Member:

    a. failed to issue invoices to Mr and/or Mrs Van Zyl in a timely manner; and/or

    b. failed to provide appropriate information and/or explanation to Mr and/or Mrs Van Zyl to enable them to understand and/or assess the reasonableness of the professional fees charged and/or the work he has performed and/or the reason for the work; and/or

    c. charged excessive and/or unreasonable fees in circumstances where he has undertaken work which was unnecessary and/or untimely and/or resulted from his failure to engage appropriately with Mr Owens and/or was undertaken without and/or contrary to client instruction; and/or

    d. has charged interest on outstanding fees when there is a genuine dispute over his fees and he has not supplied sufficient information to Mr and/or Mrs Van Zyl to enable them to understand and/or assess the reasonableness of his fees, and/or

    e. has failed to repay the loan particularised at (3)(c) above;

    in breach of the Fundamental Principles of Integrity and/or Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics; and/or

AND

In relation to other matters identified during the Professional Conduct Committee's investigation of the complaints regarding his role as a Chartered Accountant in public practice, the Member:

1. Has failed to comply with his personal and/or practice tax obligations for Soar Limited including failing to file tax returns since 2012, in breach of the Fundamental Principles of Quality Performance and/or Professional Behaviour and/or Rules 9 and/or 10 of the Code of Ethics (2003)[4] and/or the Fundamental Principles of Professional Competence and Due Care and Professional Behaviour of the Code of Ethics (2014 and/or 2017); and/or

2. Having lost his tax agency Extension of Time ("EOT") with the Inland Revenue has failed to take timely and/or appropriate action to mitigate the impact of the loss of his EOT on his clients, in breach of the Fundamental Principle of Professional Competence and Due Care of the Code of Ethics.

[4] Being the Code of Ethics applicable for conduct occurring from 1 July 2003 until 1 January 2014

BREACH OF TRIBUNAL'S ORDERS AND ADMISSION OF MEMBER'S EVIDENCE

At the Hearing on 29 January 2020 at which the Member successfully applied for the adjournment of the substantive hearing, the Tribunal made a number of timetable orders intended to facilitate the efficient conduct of the Hearing when it occurred. Two of those timetable orders were subsequently varied by consent.

One of those orders required the Member to file his evidence and any supporting documentation by 13 March, and the Tribunal expressly recorded that the Member would not be able to call any evidence at the Hearing that had not been provided to the PCC by that date.

The Member failed to comply with any of the Tribunal's orders by due date. He only filed his pleas and his brief of evidence on 5 August 2020, a week before the Hearing commenced.

The Tribunal was required to decide whether, in light of its clear direction on 29 January 2020, it would permit the Member to give evidence at the Hearing. The PCC advised that it did not object to the evidence being received but that it wished to seek to address any issues of prejudice through brief adjournments (to confer with witnesses) or specific objections. In reaching its decision the Tribunal also had regard to the advice of its legal assessor. In the circumstances the Tribunal concluded that the interests of justice dictated that the evidence be received, and ordered accordingly.

On 10 August, the Member applied for a waiver from the Tribunal of his breaches of the timetabling and related orders. The Tribunal agreed to consider the application on the basis that by 5.00pm on 28 August 2020, the Member filed cogent submissions and any supporting evidence in relation to each of the orders that the Member had breached. The Tribunal made clear to the Member that it would not be interested in historic matters, any side issues, or any unsubstantiated allegations of conflicts of interest.

Submissions were filed on the member's behalf by the stipulated date. The Application is dealt with at the end of this decision.

BACKGROUND

This case has a long history.

Most of the complaints, the subject of the charges, were made in November 2017 and relate to events which occurred in 2016 and 2017.

Since May 2019 there have been a number of adjournments of this hearing, most by consent and the last by order of the Tribunal. Unfortunately, the COVID-19 pandemic resulted in yet further delays.

The Tribunal has been provided with more than 2000 pages of documentation relating to the 20 particulars the Member faces.

At the beginning of the Hearing, the Member indicated that he would be applying for name suppression. The Tribunal ordered that his name and any details which might identify him be

suppressed, pending further order of the Tribunal. The issue of name suppression will be considered further at the time the Tribunal considers penalty, cost, and publication orders.

DECISION

The Tribunal finds both complainants to be credible witnesses. They gave their evidence forthrightly, and under cross examination made concessions when they should have but remained consistent in their version of events on the key issues. Their demeanour reflected their credibility. The Member found it difficult to give clear and concise responses to questions during cross examination. On occasion he misrepresented the evidence one of the PCC's witnesses had given and in the Tribunal's view he sometimes found it difficult or impossible to make concessions which the documentary evidence against him clearly required. Some of the responses he gave were vague and occasionally not on point.

Where there has been conflicting evidence, resolution of which cannot be assisted by documentary evidence, the Tribunal prefers the evidence of the complainants. In reaching that decision the Tribunal has not had regard to the Member's demeanour or presentation of his case, it being apparent to the Tribunal that the Member found the Hearing to be a traumatic experience.

The Tribunal records that, at the beginning of his cross examination of Mr Selwyn Smith - the PCC witness who investigated the complaints - the Member acknowledged that the report the witness had prepared in September 2018 was very thorough and well represented. That view was apparently reflected by the extent of the Member's cross examination of the witness which, compared with his cross examination of the complainants, was very limited. It should therefore come as no surprise to the Member that the Tribunal's conclusions on the evidence before it were not dissimilar to many of the findings in that report.

In relation to the Particulars, the Tribunal finds as follows:

Booth Complaint

Particular 1

The Tribunal does not consider Particular 1a has been made out. It notes that much of the evidence about the appropriateness or otherwise of the recommended structure was hearsay. Whilst the Tribunal has a discretion to receive hearsay evidence, it must do so with care particularly where it is the main relevant evidence. In this case it does not place much weight on it. In the Tribunal's experience the type of structure recommended is not uncommon, and in this context would not be regarded as unduly complex. Also, in the Tribunal's view there was sufficient doubt as to whether the factual position on which the Member based his original advice later changed without the Member's knowledge - this may have also affected the GST position.

Although the complainant asserted in an email to the Member later in the piece that the Member had admitted that "this was wrong", it is not clear what was wrong. It follows that the Tribunal finds that Particular 1c is also not made out.

However, the Tribunal finds Particular 1b established. In its view, the Member did not respond adequately to the complainant's subsequent queries regarding the structure, or at least did not do so in a timely manner, and that constitutes a breach of the Fundamental Principles of the Code of

Ethics which were alleged. The Tribunal would have expected the Member to clearly explain why the original advice was no longer applicable because of the (apparently) changed factual position. His communications were by no means clear.

Particular 2

The Tribunal do not consider Particular 2a to be made out. In its view the Member was acting responsibly in suggesting that an opinion be provided. The 10 year rule is not a finite rule and the originally expected period may well have been extended depending on the nature and timing of development on the property.

The Tribunal also considers that Particular 2c is not made out. The invoice expressly states that it is an interim invoice, it is supported by work in progress sheets and the narration is not inconsistent with the Member's communications with the complainant earlier in the month. It appears to be a fee for work completed up to that point.

However, Particulars 2b and d are made out on the evidence. The Member acknowledged that he did not finalise and provide the opinion, asserting that the complainant's wife (who was also his client), acting on behalf of the complainant, agreed that no further action was required. However, that assertion is at odds with both the complainant's evidence and subsequent documented communications between the Member and the complainant in which the Member gave repeated assurances that the opinion would be completed. In the Tribunal's view the Member's conduct constitutes a breach of the Fundamental Principles which were pleaded, including that of Integrity as the Member failed to be straight forward and truthful in his dealings with the complainant.

Particular 3

Admitted by the Member.

Particular 4

The Tribunal does not consider Particular 4a to be made out on the evidence to the requisite standard of proof. The Member's evidence was that he had been involved in three other tax audits, all of which, like the complainant's, had a successful outcome for his clients. This was the only one involving a property construction business. The Tribunal also takes into account that on at least one occasion in the past, when the Member considered he did not have the necessary competence or experience or skill to deal with a specific tax matter, he sought external advice for the client. Although the Member acknowledged that due to stress and other health issues at the time, he was not able to act competently, that is not the allegation here (competence, in the sense of ability to perform to acceptable standards, is addressed below).

The Tribunal finds Particular 4b established. The Tribunal agrees with the view of the PCC's investigator that the Member's professional obligation was to take care that any deduction claimed in a voluntary disclosure was supported by appropriate evidence. The Member acknowledged that he had not done that – his reasons for not doing so in the Tribunal's view are unacceptable.

The Member admitted Particular 4c. The Tribunal is concerned that it appears from the evidence that the Member began drafting his response to the Inland Revenue immediately after he received the complainant's second instruction not to pursue the matter, but gave the complainant the impression that he had drafted it before receiving that instruction.

The Tribunal finds Particular 4d established. The Member's communications to the Inland Revenue during the second half of 2016 lacked structure, did not provide the information requested, on occasions appeared to contain irrelevant information and were often difficult to follow.

The Tribunal is satisfied that the conduct established constitutes breaches of the pleaded Fundamental Principles.

Particular 5

The Member admitted Particulars 5a and b, and under cross examination agreed with the facts alleged in Particular 5c but not that that conduct breached the pleaded Fundamental Principles, including that of Integrity.

The Member's argument was that there was no obligation to advise Audit Shield of the loans or their purpose. Although in the Tribunal's view there is nothing in the insurance policy or related documentation expressly imposing an obligation, the Member acknowledged that the transactions were against Audit Shield's expectations or requirements. Nevertheless, he pursued that process. In the Tribunal's view that was unprofessional and did not amount to straight forward or fair dealing as mandated by the Fundamental Principle of Integrity.

The policy appears to provide for payment of progress claims against receipt of copies of invoices issued to the client. For some reason the Member chose not to regularly invoice for this work – his reasons for not doing so lacked logic and were unconvincing. The Tribunal finds Particular 5c proved.

Particular 6

The Member denied this particular but admitted that he did not keep proper accounting records in relation to the loans and claims made to or monies received from Audit Shield. He did not operate a trust account. During his cross examination he admitted that if the monies received from Audit Shield were client monies, this particular was established.

The PCC's position was that whether this particular was made out stands and falls on the definition of client monies. Under PS2 *client monies* means any money (with stated exceptions which do not apply here) coming into a Member or firm's control which is the property of a client.

The Tribunal is satisfied that the Member had agreed with the complainant that loans made to him would be repaid from monies received from Audit Shield. The PCC say that because of that agreement and the fact that the loans were in effect prepayment of fees, the complainant had a property right in the proceeds of the insurance claim (which were payment for the same fees) and that the proceeds were therefore client monies.

In our view the complainant is a beneficiary under the Audit Shield policy. As stated in the policy, the insurer invoices the premium to the complainant and the complainant has disclosure obligations under the policy. The complainant is the insured party and the firm may or may not also be (depending how many of its clients are insured). Although the policy provides that the client must claim through the firm, the insurer deals with the firm and the proceeds of a claim are to be paid to the firm, the better view is that the firm is acting as agent of the client the beneficiary

of the policy. Adopting a purposive interpretation of PS2, the proceeds of the insurance claim are the property of the client – at least where the firm has already in effect been paid for the work.

If the Tribunal is wrong in that analysis and the monies were not client monies within the definition of PS2, we adopt the legal assessor's alternative analysis that the Member's obligation in relation to the proceeds was to repay them to the complainant pursuant to the express agreement to do so. The Member breached that obligation, and that is a clear breach of the pleaded Fundamental Principles.

Particular 7

The Member admitted this Particular expect for 7d(ii) and (iii).

As to Particular 7d (ii) the Tribunal is satisfied on the evidence that on the balance of probabilities the Member and his firm did not have the means to repay the Loans. But it does not consider that the allegation that the Member did not intend to repay the loans has been made out.

As to means, there is evidence of the Member requesting a loan to enable him to pay bills the following day as his firm was a bit short, and of a request on 28 December 2016 that the complainant pay an invoice issued on 22 December so that the Member could purchase some gas for his vehicle that evening. During the Hearing, the Member gave evidence that at the time he had personal funds of more than $40,000 which he could have used for the firm but preferred not to. The Tribunal does not accept that explanation in the absence of any corroborating evidence. Even if it was true, it demonstrates unprofessional conduct in using his clients as bankers in circumstances where he did not need to and, as he has admitted (Particular 9), he had failed to put in place appropriate safeguards to manage the conflict of interest. The Tribunal also notes that despite it ordering the Member to do so, he has failed to provide information about his firm sought by the PCC to enable it to assess the firm's solvency – while not in itself significant, the Tribunal infers that providing the information may not have been helpful to the Member.

As to Particular 7d (iii), the complainant was clear in his evidence that the Member did not discuss the issue with him. The Tribunal prefers the complainant's evidence to the explanations the Member gave, and finds this Particular established.

Particular 8

The complainant was very firm in his evidence that the Member took advantage of him in the circumstances and that he felt under pressure to lend the Member money. The Tribunal is satisfied this allegation is made out.

Particular 9

Admitted by the Member.

Particular 10

The Member's evidence was that he did send the email in the complainant's name and from the complainant's email account, but that he had been instructed to do so by the complainant. The complainant's evidence was that the email was sent without authority and that the member had

added information that was not discussed, and which moreover was untrue and potentially damaging to the complainant.

The Tribunal accepts the complainant's evidence. It notes that it appears to be corroborated by the fact that the same evening, after discovering what had occurred, he sent an email to the Member to convey his concern and the next day sent an email to the recipient of the original clarifying the position. The Tribunal also notes the evidence of the PCC's investigator that the Member acknowledged to him that he added the extra paragraph and the complainant had not approved the final email before it was sent, but offered no explanation. The conduct is a serious breach of the Fundamental Principles of Integrity and Professional Behaviour – the Tribunal finds the particular established.

Particular 11

The Member admitted Particular 11a in that he had not sought legal advice.

The Tribunal is also satisfied from a review of the Member's firm's terms of engagement that he did not have a proper legal basis to withhold a number of documents, and certain information belonging to the complainant.

As to Particular 11b, the Member failed to provide copies of his timesheets on request but instead lodged a claim with the Disputes Tribunal. The Tribunal considers this Particular is made out and that the member's conduct breached the pleaded Fundamental Principles. The Tribunal notes that the member's admission of Particular 12c supports its conclusion on this particular.

Particular 12

The Tribunal finds Particular 12a established. Whilst it appears the Member had timesheets supporting each of the invoices, it does not follow (as the Member persistently asserted) that fair and reasonable fees were charged. It is clear from other findings of the Tribunal in this matter and evidence that the member has charged for work which was unnecessary or untimely or without or contrary to client instruction.

However, for the reasons that are set out under Particular 2c, and in the next sentence, we find the allegation in Particular 12b not proved. The Tribunal notes that the complainant ultimately, some seven months after originally requesting it, instructed the Member not to finish the tax opinion.

As to Particulars 12d and e, reconciliations of fees issued, loans made and repaid, and amounts received from Audit Shield prepared by the PCC's investigator in September 2018, which the member acknowledged are correct, support the allegations made – the Tribunal finds the Particulars proved.

The Tribunal notes that the Member has admitted Particular 12f and finds Particular 12g made out on the evidence before it.

Van Zyl Complaint

Particular 1

The Tribunal does not consider that Particular 1a has been made out, essentially for the same reasons it formed the view that particular 4a of the Booth complaint was not made out.

The Tribunal also considers that Particular 1b has not been made out. It would appear from the evidence that neither Inland Revenue nor the Member did anything to progress the audit between March and October 2016, but this was in the context that the audit of the Booths and some of their entities, parties related to the Van Zyls, was being progressed for part of that time. A request from Inland Revenue for additional information on 26 October 2016 resulted in the information being provided to it on 31 October 2016. It appears that Inland Revenue did not respond until early December, shortly after which the external tax specialist was engaged. Whilst it could be said that the Member should have been more pro-active in dealing with the Department, in the Tribunal's view his failure to do so is not such as to attract disciplinary sanction.

The Member has admitted Particular 1c – his evidence was that as a result of growing mental health issues and work and family pressures, he had difficulty in articulating himself in a succinct manner during the period in question.

The Tribunal finds Particular 1d established. It is clear from the complainants' evidence, which the Tribunal accepts, and the report of the PCC's investigator referring to documentary evidence (particularly the documents referred to in Appendix 4), that all aspects of the particular are made out. The Tribunal agrees with the PCC's investigator that the Member did not act with due care in performing the engagement, and acted contrary to the Fundamental Principle of Professional Behaviour in carrying on a dispute with Mr Owens, exacerbated by copying some of the relevant communications to his clients and in making statements to the Inland Revenue investigator about Mr Owens which risked prejudicing the clients' interests. Although the Member asserted that there were errors in Mr Owens' initial report, in the Tribunal's view those errors and other issues the Member had with the report could have been very quickly and efficiently addressed between the two professionals, but they were not.

The Tribunal notes that at one stage, the complainants were forced to step in and resolve the dispute between their advisors. For a Chartered Accountant to put themself in that position is both unprofessional and unacceptable.

The Member's evidence that delays subsequent to December 2016 in providing Inland Revenue with additional information and records were due to the client, is not accepted – that evidence contradicts the evidence given by the complainants which the Tribunal prefers

As to the Member causing the Van Zyls to incur unnecessary costs, in the Tribunal's view on a review of the evidence many of the fees charged by the Member for the period from when Mr Owens was first involved was either unnecessary or duplication of effort. it would appear from the comments by the Inland Revenue officer that once Mr Owens took over sole responsibility for the tax audit, it took about a month to arrive at a satisfactory outcome.

Particular 2

The Member admitted that he had provided incomplete and unintentionally misleading information to the complainants regarding the extent of cover for them under the Audit Shield policy. As it was common ground that the Member had not even attempted to reconcile the client loans and repayments, fees issued, claims made on Audit Shield and receipts from Audit Shield until late in piece, his comments about the cover were at best reckless.

However, there is evidence that the Member deliberately misled the complainants. On 24 January 2017, the Member was advised, and he advised the complainants, that their claim had been accepted by Audit Shield. The next day the Member was advised by Audit Shield that the remaining cover across both claims was $1,382.36. In the Tribunal's view, the Member's subsequent communications with the complainants and Mr Owens about Audit Shield coverage for Mr Owens' and his own fee were intentionally misleading.

As to the Member's assertions that he did provide the complainants with information about Audit Shield coverage, he references an email of 24 January 2017. However, this email was not sent to the complainants (it was sent to the Booths). In the Tribunal's view it gives less than a complete picture even to them.

Particular 3

The Tribunal records that although the Member initially denied Particular 3a, under cross examination he admitted this particular in all material respects.

The Tribunal finds Particular 3b proved. The Member admitted under cross examination that he did not have systems in place to enable him to record the transactions. He accepted that he had not maintained records or reconciliations of the loans or their repayment. The first detailed analysis and reconciliation of fees, loans, and amounts received from Audit Shield was that completed by the PCC's investigator as part of his report in September 2018, which the Member acknowledged was accurate.

The Tribunal also considers Particular 3c made out. The Tribunal is satisfied that at the time of the transaction (on 9 June 2017) both parties had described it as a loan. The Tribunal accepts the evidence of the complainant (supported by such contemporaneous documentary evidence as there was) that the Member had given her to understand that the loan would be repaid from the Audit Shield insurance. For reasons previously stated in this decision, the Tribunal has determined that by this time the Member must have known that the repayment would not be covered by the insurance claim and that he did not have the means to repay the loan. The Tribunal considers there is some merit in the PCC's submission that the Member's subsequent characterisation of the payment as a pre-payment for an invoice issued a few days later is self-serving - the complainant expected to be repaid that amount from the proceeds of the Audit Shield insurance so would not have considered it a prepayment in the literal sense.

The Tribunal is also satisfied on the complainant's evidence that there was no discussion as to what would occur if the Audit Shield was insufficient to cover this loan.

Particular 4

The Tribunal finds that this particular is established on the evidence of the complainants, which it accepts.

Particular 5

Although the Member denied this particular, the allegations are substantially the same as in the first complaint, which the Member admitted. There is no substantive difference in the fact situation applying here which would justify a different conclusion. The particular is established on the evidence.

Particular 6

The Tribunal considers Particular 6a established. It notes that the Member issued an invoice for $11,120 to one of the complainants in August 2017 (after the complainants had disengaged as clients), for work done between December 2016 and 30 March 2017. An invoice covering much the same period had been issued to the other complainant on 2 March 2017. A further invoice was issued in November 2017 for services almost all of which were provided before 30 June 2017. The Tribunal considers this conduct unprofessional. The Member's reasons for the delay in issuing the "late" invoices were less than convincing.

The Tribunal accepts the evidence of the complainants in relation to Particular 6b – the Member did not draw the Tribunal's attention to evidence of explanations or information, other than the narration on invoices in many cases received months after the work was done.

As to Particular 6c, having reviewed the PCC investigator's report and the communications referred to in it regarding the Member's dealings with both Inland Revenue and Mr Owens and the evidence of the complainants, it is clear to the Tribunal that much of the work undertaken by the Member after December 2016 was unnecessary (duplication of tasks Mr Owens was engaged to do, engaging in unprofessional and unnecessary arguments with Mr Owens and the length and nature of a number of emails and phone calls to the complainants). The Tribunal has not sought to undertake an analysis of the extent of unreasonable charging but it is clear from the evidence that it is significant. This matter is further addressed when considering the Charges.

Particular 6d has also been established.

In relation to Particular 6e, it is clear from the PCC's investigator's reconciliation that this loan has not been repaid but it appears to have been credited against the fees in relation to which it was advanced (as Audit Shield proceeds had been exhausted). In light of the Tribunal's finding that both parties initially treated it as a loan, this Particular is made out.

Breaches of the pleaded Fundamental Principles are established. As to integrity, the Member has not been straight forward in his dealings with the complainants nor, in the Tribunal's view, has he dealt with them fairly.

Other Allegations

During the PCC's investigation of the complaints it identified two other matters.

The Member has admitted failing to file tax returns for his practice and himself since 2012 (at the date of the PCC's investigation). He acknowledged during the hearing that returns for both the Member and his practice have yet to be filed for periods from 2013, although he stated he had recently come to an arrangement with Inland Revenue about filing the returns.

The Member also admitted that he failed to take timely action to mitigate the impact of the loss of his Extension of Time with Inland Revenue. The Tribunal finds it unnecessary to decide whether he ultimately took appropriate action. The Tribunal agrees with the observations of the PCC's investigator that his failure to take appropriate action (as identified by the investigator) at the time may have put his clients at risk of breaching their tax obligations.

Charges

The PCC submitted that the Member's conduct, the subject of Particulars 2c, 5c and 7d of the Booth complaint and Particulars 2 and 3 of the Van Zyl complaint constituted serious breaches of the Fundamental Principle of Integrity and either individually, but certainly in combination, constituted misconduct in a professional capacity. The Tribunal notes that it has found Particular 2c is not established.

The PCC noted that the complainants were among the Member's largest clients and submitted that the evidence supported a conclusion that the Member deliberately overcomplicated matters so that he could charge higher fees in circumstances where his practice clearly had liquidity issues.

The PCC also submitted that in many of his dealings with his clients and third parties the Member was not transparent, did not act with appropriate candour and was misleading and deceitful. In relation to much of his other conduct, it fell well below the appropriate standards for a chartered accountant and constituted either conduct unbecoming an accountant or the type of negligence and incompetence that fell within Charge 3.

The Tribunal has had regard to the submissions of both parties when considering which of the Particulars constitutes conduct that falls within each Charge.

In relation to Particulars the Member has admitted or which the Tribunal has found established by the evidence before it, it follows that he is guilty of Charge 4. As to the other charges:

Charge 1

Misconduct in a professional capacity covers intentional wrongdoing or conduct which is a deliberate departure from acceptable standards. It is more than professional incompetence or deficiencies in the practice of the profession. Whether any conduct constitutes professional misconduct is to be determined from the nature of the conduct and not from its consequences (although the consequences may have a bearing on penalty). The question the Tribunal has to consider is whether the Member so behaved in a professional capacity that the conduct under scrutiny would be reasonably regarded by other chartered accountants as constituting professional misconduct. The test is an objective one.

As the Appeals Council has said in *Re KS Gill* (27 February 2020) at [33], the rules and ethics of the Institute require a high level of integrity, honesty and transparency in all dealings by its members whether in relation to their clients, the Institute or third parties.

The Tribunal have formed the view that overcomplicating the tax audits and some of the other conduct of the Member was not carried out with the intention of increasing the amount of fees that could be charged. The more likely explanation is the Member simply finds it difficult to communicate in a clear, concise and organised way.

Having said that, in the Tribunal's view there have been serious breaches of the Fundamental Principle of Integrity (failure to act with candour, honesty and transparency and lack of fair dealing), some of which on their own would constitute professional misconduct but together clearly do. They are:

- *Particulars 5 – 8 of the Booth complaint:* The Member has accepted that of the loans made by all the complainants, $8,234.18 has not been repaid and of the funds received from Audit Shield $4,778 does not seem to have been allocated against fees. Against the background of these unusual circumstances, negotiating loans from clients to in effect supplement practice cashflow is in the Tribunal's view highly irregular and an abuse of the relationship between client and chartered accountant. The Member's explanation for not carrying out an analysis and reconciliation of loans received and repaid, Audit Shield proceeds received and fees issued was that he 'did not have control of the situation' as he did not have proper systems to record everything. That in itself is concerning – it is a basic competency of a chartered accountant that they do have systems in place to record and be able to reconcile and report on financial transactions. The Tribunal was also concerned at the Member's comments that he had personal funds available to assist the firm's cashflow but was not prepared to use them.

- *Particular 10 of the Booth Complaint:* Fabricating part of the text of an email without the knowledge of the client and then sending the email to a third party in the name of the client is in the Tribunal's view serious misconduct.

- *Particulars 12d and e of the Booth Complaint*, although these particulars to a significant extent duplicate referred to immediately above.

- *Particulars 2 – 4 of the Van Zyl complaint:* The circumstances are not dissimilar to particulars 5 – 8 of the Booth complaint. The misleading of the client in this case was more serious as the Tribunal has found that it must have been clear to the Member that very little of the fees to be charged by him and Mr Owens would be covered by Audit Shield.

- *Particulars 6b-d of the Van Zyl complaint:* The Tribunal is satisfied from the evidence that the maximum exposure of the complainant to tax if their position was wrong was around $13,000 although, depending on the extent of deductions they could validly claim, it may have been significantly less. Based on the PCC's investigator's reconciliation which the Member accepted as correct, the Member charged fees of $22,300 (GST inclusive) - almost as much as the tax expert. Only $4,000 of that amount was covered by the Audit Shield claims. That is a completely unacceptable outcome. There is no evidence the Member conducted a cost/benefit analysis at the outset. Even if the outcome was unintentional it shows reckless disregard for his clients' interests.

Charge 2

The charge of conduct unbecoming an accountant involves something different to and less serious than misconduct in a professional capacity. It 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 for professional conduct is the standards applied by competent, ethical and responsible practitioners.

In the Tribunal's view the following conduct constitutes conduct unbecoming an accountant:

- *Particular 4c of the Booth complaint:* Not only did the Member override his client's instructions, in the Tribunal's view he misled the Member about what he had done (discussed above).

- Particular 11 of the Booth complaint – by a fine margin.

- Particulars 12a, c, f and g of the Booth complaint and Particulars 6a and e of the Van Zyl complaint.

- The Particulars constituting the PCC's complaint. The public expect a chartered accountant conducting a tax compliance practice to file their own tax returns in a timely manner. The Member has consistently failed to do so over an extended period and has also lost the Extension of Time for client's tax returns, conduct which falls far below the requisite standard.

Charge 3

In the Tribunal's view the following particulars constitute conduct the subject of this charge.

- *Particular 2d of the Booth complaint*: Clients are entitled to expect their chartered accountant to respond in a timely way and to honour assurances or undertakings given. Persistently failing to do so reflects a lack of competence (failing to maintain standards) and tends to bring the profession into disrepute.

- *Particular 3 of the Booth complaint*: Failure to file tax returns in a timely manner is conduct which falls significantly below that expected of a chartered accountant and tends to bring the profession into disrepute, particularly when clients are following up and indications are given that they will be filed promptly. The Member's explanation of the reason for the delay is inconsistent with other evidence.

- *Particular 4d of the Booth Complaint and Particular 1c of the Van Zyl complaint*: The quality of some of the communications with Inland Revenue was such as to tend to bring the profession into disrepute.

- *Particular 9 of the Booth complaint and Particular 5 of the Van Zyl complaint*. There is no evidence that the Member even considered the issue of conflicts of interest when requesting loans to be made to him. Failing to consider and address such a conflict of

interest is a significant departure from standards and again in the Tribunal's view tends to bring the Institute into disrepute.

The Tribunal finds the Member guilty of all charges.

PENALTY, COSTS AND PUBLICATION

The PCC is to file and serve submissions as to penalty, costs and publication within 10 working days of the date of receipt of this determination.

The Member is to file any submissions in reply within 15 working days of service of the PCC's submissions.

As the Member has signalled that he wishes to apply for suppression of his name, the PCC may file and serve any submissions strictly in reply (to all matters raised) within 5 working days of service of his reply.

The Tribunal requests the legal assessor to provide directions in relation to penalty, costs and publication within 15 working days following receipt of the Member's reply.

In light of the way in which these proceedings have progressed and the fact that the Member is unrepresented, if he wishes to address the Tribunal by video conference in support of his submissions and the PCC's response, he will have the opportunity to do so - provided he advises the Tribunal of his wish to do so within 5 working days of receipt of the PCC's reply. The PCC may also request to address the Tribunal by videoconference. Otherwise the Tribunal will deal with the matter of penalty, costs and publication on the papers following receipt of the legal assessor's directions.

The charges of which the Member has been found guilty (in particular Charge 1) are very serious. The Tribunal strongly suggests that the Member seek legal advice in the preparation of his submission on these matters.

APPLICATION TO WAIVE BREACHES OF TIMETABLE ORDERS

The submissions filed by the Member in support of his Application to waive breaches of the Tribunal's timetabling orders of January and February 2020 are misconceived. They rely on legal principles which apply to a consideration of whether evidence should be admitted following a breach of a timetable order where the judicial body has previously made it clear that evidence filed late will not be admitted.

Putting the technicalities aside, the Member relies primarily on a letter from his general practitioner, who is not a psychiatrist or psychologist, which refers to a gradual partial improvement in his condition since January 2020. That diagnosis does not sit comfortably with a clear statement by the Member to the PCC immediately before the Hearing that he had had no more residual symptoms since the end of March 2020.

In material the Member provided immediately before this Hearing in support of this application, he referred to his inability to comply with the orders as a result of the onset of the COVID-19 pandemic and lockdown. However, New Zealand was community free of COVID-19 and not in lockdown for more than three months until very shortly before this Hearing. It also appears from that material

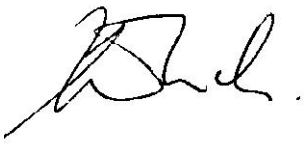
that yet again the Member chose to prioritise work and other matters ahead of his professional obligations to the Institute and compliance with the orders of this Tribunal. He also chose not to make any application after the middle of February to extend the time limits and has failed to explain why.

The Tribunal considers that failure of Members to comply with its orders is a serious matter. The Member has demonstrated a concerning disregard for the Institute's disciplinary processes

The Application is dismissed. If it has the power to do so, the Tribunal proposes to censure and fine the Member for his failure to comply with its orders. It requests the legal assessor to provide directions on that point when providing his directions on penalty, costs and publication.

INTERIM NAME SUPRESSION

The Tribunal's interim order suppressing the Member's name and any information that might identify him remains in force. For the avoidance of doubt, that does not prevent a copy of this determination being provided to the Complainants on the basis that it is not to be distributed further or disclosed to anyone else.



MJ Whale FCA
Chairman
Disciplinary Tribunal