

**NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
NOTICE OF DECISION AND ORDER OF THE PROFESSIONAL CONDUCT COMMITTEE**

At a meeting of the Professional Conduct Committee of the New Zealand Institute of Chartered Accountants ("NZICA") held in private on 27 November 2017 in respect of a Chartered Accountant ("the Member"), the Committee found that the following matters would otherwise warrant being referred to the Disciplinary Tribunal:

In their role as a Chartered Accountant in public practice and in relation to a complaint by their client ("the Complainant"), the Member:

- (1) In continuing to act for the Complainant and/or her former husband and/or their related companies and/or trusts, the Member failed to appropriately manage conflicts of interest and/or threats to their objectivity that arose when the couple separated, in that they:
 - (a) did not offer the parties the opportunity to take independent advice; and/or
 - (b) having written to both the parties on or about 11 April 2013 disclosing a potential conflict of interest and requesting written authority to continue acting, the Member did not ensure that the written consent was returned by both parties; and/or
 - (c) did not implement appropriate safeguards to ensure the interests of both parties would not be prejudiced by their continued engagement, including ensuring:
 - (i) both parties were adequately informed and/or consulted regarding the work the Member undertook on their behalf; and/or
 - (ii) that there was equal access to information the Member held in respect of their joint interests,

in breach of the Fundamental Principle of Objectivity and Independence and/or Rule 3 and/or paragraph 43 and/or Rule 5 and/or paragraphs 63 and/or 66 and/or 68 and/or 72 and/or 74 of the Code of Ethics (2003)¹ and/or the Fundamental Principle of Objectivity and/or paragraphs 220.1 and/or 220.5 and/or NZ220.10.1 of the Code of Ethics (2014)²; and/or

- (2) Failed to exercise professional competence and/or due care in making changes, and/or permitting their staff to make changes in their name, to Companies Office records, in that:
 - (a) on or about 3 October 2013 the Member and/or their staff member removed the Complainant's shareholding in Companies Office Register in respect of X Limited without her consent and/or without taking appropriate steps to verify that the shares had been appropriately transferred in accordance with the Companies Act 1993; and/or
 - (b) on or about 25 June 2014, having agreed to reinstate the Complainant's interest in X Limited, the Member incorrectly allocated 50% of the shares to the Complainant's former husband and the Complainant individually rather than allocating 100% of the shares to them jointly; and/or
 - (c) the Member failed to implement appropriate quality control processes and/or procedures within their practice regarding amendments to companies records and/or

¹ Being the Code of Ethics applicable to conduct that occurred prior to 1 January 2014.

² Being the Code of Ethics applicable to conduct that occurred after 1 January 2014.



ensure that staff undertaking such work on their behalf were appropriately trained and/or supervised,

in breach of the Fundamental Principle of Quality Performance and/or Rule 9 of the Code of Ethics (2003) and/or the Fundamental Principle of Professional Competence and Due Care and/or paragraphs 130.1 of the Code of Ethics (2014) and/or paragraphs 19 and/or 20 and/or 79(a) of PS-1 *Quality Control*; and/or

- (3) Breached the Complainant's confidentiality by forwarding a copy of her email to the Member dated 24 June 2014 to the Complainant's former husband without her consent and/or a legal and/or professional right and/or duty to disclose the information, in breach of the Fundamental Principle of Confidentiality and/or paragraph 140.1(a) of the Code of Ethics (2014); and/or
- (4) Failed to respond in a timely and/or professional manner to the Complainant's request for an explanation as to the amendments to her shareholding, in particular her email to them dated 10 June 2016, in breach of the Fundamental Principle of Professional Behaviour and/or paragraph NZ150.3 of the Code of Ethics (2014).

Committee's Decision

The Committee noted that the Member had accepted all of the particulars.

It was of the view that the complaint was serious and had the hallmarks of a bad conflict of interest where the Member was caught between the interests of two clients who were in a matrimonial separation. It notes that these types of situations need to be carefully managed by practitioners, which had not occurred in this instance.

In accordance with the Code of Ethics members are obliged to manage not only actual conflicts of interest and threats to the member's objectivity, but also the perception of such threats. In this case the Committee noted that from the moment the Member learned the couple were separating there was a risk of such threats and the Member was obliged to take reasonable steps through the implementation of safeguards to mitigate the risk of non-compliance with the Code of Ethics. Where such threats cannot be managed the member must consider ceasing to act.

The Committee noted that the Member appeared to have sent a letter disclosing the potential conflict of interest to the clients and seeking their consent to act, shortly after becoming aware of their separation, which is commendable. The Complainant said she had not received the letter. In the Committee's view the Member should have insisted on the signed consents being returned from both parties prior to carrying on with the engagement. It was not sufficient to just send the letters. The Committee also considered the letter should have offered the clients the opportunity to take independent advice.

The Committee was concerned that the Member's conflict of interest and loss of objectivity went further than an appearance. It noted that the Complainant's ex-husband had been the Member's primary contact in the client engagement. The Member failed to ensure the Complainant was kept appropriately informed or consulted about work undertaken, or was given equal access to information. It considered there was a risk that the Member had taken sides or had failed to act with sufficient objectivity to ensure the Complainant's interests were appropriately safeguarded.

In the Committee's view, the situation was exacerbated by the unauthorised amendment to the Complainant's shareholding in the Companies Office in relation to the couple's trustee

company. While the Committee could not determine why the original amendment took place and did not consider it necessary to determine the intent behind the amendment, the conduct was a breach of the requirement to act with due care and diligence. In particular the Member should have ensured that their practice had appropriate processes to ensure that any amendments to Companies Office records were supported by the relevant resolutions or minutes and that no changes were made in the absence of these. As the Certificate of Public Practice holder, the Member is responsible for the quality control processes in their firm and ensuring that work undertaken by the Member's staff, including in the Member's own name, is done so competently. It was concerned that the conduct here may have breached the Companies Act 1993.

After the removal of the Complainant's shares were discovered, the Member's failure to properly reinstate the Complainant's shareholding as a 100% joint shareholder with her husband, versus a 50% shareholder in her own right, only compounded matters. The Committee was of the view that the Member had not taken sufficient care in undertaking the further amendment.

The Committee noted that the Complainant was concerned that the amendments may have been motivated by malice or at the behest of her former husband. In the Committee's view there was no evidence before it that substantiated that contention or that the Member had colluded with him or acted without integrity. It was of the opinion that the breaches arose via a failure to take care and act diligently. If the Complainant wishes to try and recover monies from the proceeds of the sale of X Limited's interest in Y Limited, the Committee noted that she would need to pursue the matter in the courts against her former husband.

The Committee considered that the breaches of the Code of Ethics detailed in particulars (3) (breach of confidentiality) and (4) (failure to respond in a timely manner) correlated with the Member's loss of objectivity in this engagement.

In regards to particular (3), the Committee was of the view the Member ought to have gone back directly to the Complainant to check the veracity of her request and that by contacting the Complainant's husband in the first instance, the Complainant's confidentiality had been breached.

With regard to particular (4), while the Committee accepted that the Member may have struggled with what to specifically tell the Complainant to explain the unauthorised transfer of shares, it considered they were bound to provide a reasonable explanation in a timely manner and had not done so.

On balance the Committee was of the view that the particulars were established and were *prima facie* serious enough to warrant referral to the Disciplinary Tribunal. It determined that the complaint could be appropriately resolved with a consent order with terms that:

- the Member be reprimanded;
- pay a sum to NZICA of \$2,000 by way of a fine;
- pay costs to NZICA of \$2,625 in respect of the final determination before the Committee; and
- the Member be required to engage a mentor, approved by NZICA, at their own expense, for a period of 12 months, with the mentor to provide quarterly reports to the Committee.

The Committee's expectation is that the mentoring should at minimum cover the Member's internal and quality control procedures and documentation; review conflict of interest handling

policies and disclosure documentation; and review the Member's client engagements to ensure any potential conflicts are disclosed and being managed in accordance with the Code of Ethics.

The Committee determined that notice of its decision and orders made shall be published in CA ANZ's official publication *Acuity* and on its website, without the Member's name and location. The Committee considers that the complaint is serious and it is important that the public and the membership be given notice of the types of issues raised in this complaint and to understand how they are resolved by the Committee. While the Committee noted that the public interest factors in this case were strong, they were ameliorated by a lack of public risk. It noted the Member had acknowledged the shortcomings from the outset of the Committee's investigation and had taken steps to address the shortcomings in their internal processes. It also noted that it was the Member's first complaint in an otherwise unblemished career of some 30 years of membership. In the circumstances, it was of the view that publication of the Member's name would be a disproportionate consequence to the ethical breaches established.

The terms of the consent and publicity orders were explained to the Member and their legal advisor by the Committee's own legal advisor. The Member was given the right to take 15 days to consider the orders and to take any advice in accordance with Rule 13.8. The Member refused that opportunity, and after consulting with their lawyer, signed the consent order at the final determination.

Rob Pascoe FCA
Chairman
Professional Conduct Committee