

**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 **Bryce Graham Moffat**, Chartered Accountant, of **Whangarei**

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**DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND  
INSTITUTE OF CHARTERED ACCOUNTANTS  
19 December 2014**

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**Hearing:** 18 December 2014

**Location:** The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50 Customhouse Quay, Wellington, New Zealand

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

**Legal Assessor:** Mr Paul Radich QC

**Counsel:** Mr Richard Moon for the prosecution  
Mr Wayne Peters for the Member

**Tribunal Secretariat:** Janene Hick  
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At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and represented by counsel the Member pleaded guilty to charges 1, 2 and 3 and admitted all particulars with the exception of 3a.

The charges and particulars as laid were as follows:

**CHARGES:**

**THAT** in terms of the New Zealand Institute of Chartered Accountants Act 1996 and the Rules made thereunder, and in particular Rule 21.30 the Member is guilty of:

- (1) Misconduct in a professional capacity [particular 1]; and/or
- (2) Conduct unbecoming an accountant [particular 2]; and/or
- (3) Breaching the Institute's Code of Ethics (2003) [particulars 2 and/or 3 and/or 4].

**PARTICULARS:**

**IN THAT**

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

1. Breached the Fundamental Principles of Integrity and/or Professional Behaviour and/or Rule 2 *False and Misleading Statements* and/or paragraph 27 of the Code of Ethics (2003) in that:
  - a. The Member prepared financial statements for X Limited (formerly Y Limited) between 2008-2012 which did not accurately include cash payments that he knew had been received by X Limited; and/or
  - b. Between 2008 and 2012 the Member filed income tax and GST returns for X Limited knowing them to be false or misleading; and/or
2. Breached the Fundamental Principle of Objectivity and Independence and/or Rule 3 *Objectivity* and/or paragraphs 44 and/or 64 of the Code of Ethics (2003) in that the Member did not review and/or manage through the application of appropriate safeguards, the risks to his objectivity which arose by virtue of his financial interest in X Limited and/or Z Limited in that the Member:
  - a. Failed to disclose in writing the circumstances of the Member's conflict of interest and advise the Complainant that he may wish to seek independent advice and/or obtain the Complainant's informed consent to act in writing; and/or
  - b. Approved on behalf of X Limited and/or Z Limited payment of invoices for services provided by Spire Chartered Accountants Limited; and/or
3. Breached the Fundamental Principle of Quality Performance and Rule 9 *Due Care and Diligence* of the Code of Ethics (2003) in that:

- a. The Member failed to ensure that the Complainant understood that for the period he was receiving a shareholder salary and X Limited was paying the Complainant's tax, that this would be reflected in his shareholder's current account; and/or
  - b. The Member failed to ensure that the financial statements for X Limited and/or Z Limited adequately disclosed all transactions with shareholders, including transactions with related parties; and/or
  - c. The Member failed to prepare financial statements for Z Limited and/or M Limited that accurately and/or adequately disclosed Z Limited's investment in M Limited; and/or
4. Breached Rule 11 *Compliance with Technical and Professional Standards* of the Code of Ethics (2003) by failing to prepare the financial statements for X Limited and/or Z Limited and/or M Limited in accordance with technical standards, in that the Member inappropriately disclaimed responsibility for the compilation of financial information for these entities in breach of paragraph 69 of SES-2.

## **DECISION**

The charges relate to the Member's co-investment with the complainant in X Limited and Z Limited (Z Limited in turn having an investment in M Limited). Over a period of years both the Member and the complainant took cash from X Limited's operations without recording it as company income. X Limited and Z Limited were involved in a number of transactions in which the Member had a direct or indirect financial interest.

The Tribunal finds that the Professional Conduct Committee (PCC) have failed to establish on the balance of probabilities particular 3a and that the particulars other than 3a support the charges to which the Member has pleaded guilty.

## **PENALTY**

The PCC sought an order that the Member either be struck off the register or suspended from membership. It submitted that the Member's misconduct strikes at the heart of membership, that the Member's offending related to the core business of most Chartered Accountants – compilation of financial statements and preparation of tax returns – and that the Fundamental Principle of Integrity cannot be compromised in this context.

The Member submitted that:

- His lapses occurred in a singular set of circumstances where he failed to behave to his usual high standard;
- He did not maliciously deceive anyone or act with the intention of securing gain for himself to the detriment of the complainant; and accordingly
- The appropriate penalty was a censure.

The Member produced a number of character and professional testimonials from people who the Member stated were aware of the charges he was facing. The Tribunal also notes the Member's previously unblemished professional reputation since he became a Chartered Accountant in 1996, his community work, his acceptance of most of the charges and particulars at an early

stage, the steps he has since taken to manage conflicts in what is a large and busy practice and his subsequent voluntary disclosures to Inland Revenue. The Tribunal has also had regard to the other submissions made on the Member's behalf.

However, although the misconduct with which the Member was charged related to only one client, it was on-going for a number of years and his conflict of interest – financial involvement in his client – related to a number of transactions over time, some of them substantial.

Charge 1 involves dishonest behaviour – the Member was personally receiving cash payments from X Limited's operations which he knew should have been recorded as company income and were not. The Member then prepared financial statements and filed tax returns which he knew were false and misleading, on behalf of a client in which he had a financial interest.

In support of the Member's submission that a censure is the appropriate penalty the Member referred to the Tribunal's decision in *Carey* (9 August 2010). *Carey* had been convicted and discharged of knowingly failing to file her own income tax returns for six years, and her corporate practice was convicted of similar offences and for failing to file nine GST returns. The Tribunal found that that conduct tends to bring the profession into disrepute and censured her.

In the Tribunal's view that case is distinguishable from the present. Whereas *Carey* omitted to file her own returns, the Member knowingly filed misleading and false returns on behalf of a client – positive, dishonest conduct.

It is incumbent on a member to obtain a client's informed consent in writing to any investment or material transaction recommended by the member. Further, where the member has an interest in an investment or transaction, the member needs to recommend in writing that the client be independently advised.

In relation to Charges 2 and 3 the Tribunal is not satisfied that the Member adequately explained to the complainant the nature of those transactions with the Member's client in which he directly or indirectly has a financial interest, much less obtaining his informed consent to the relevant transactions. The Member conceded that many of these transactions (some involving very substantial sums) were not documented and that the only written evidence of advice to the complainant about them was some internal file notes which the Member did not produce to the Tribunal. This goes to the seriousness of the Member's conduct which in the Tribunal's view fell well short of the standard expected of a senior accountant in public practice.

The Member's evidence in part was that the complainant was not financially disadvantaged by transactions in which the Member had a self interest, and in fact the complainant has ended up with a significant interest in a company investment for no financial outlay – but even if that is the case, it does not justify the Member's failure to comply with his significant responsibilities to properly manage conflicts of interest in the manner required by the Code of Ethics.

In *Professional Conduct Committee v Lee* (19 July 2013), a decision of the Appeals Council of the Institute, the Tribunal had found Lee guilty of knowingly making a false declaration when applying to be a licensed auditor and knowingly providing incorrect information to the Institute in an attempt to justify the statement in the declaration. The Tribunal had censured Lee and ordered that he pay a monetary penalty, considering (by a fine margin) that the prospect of his rehabilitation was preferable to removing his name from the register.

The Appeals Council found that Lee's conduct:

*amount[s] to seriously dishonest behaviour and show[s] a lack of integrity on the part of [Lee]. That kind of conduct reflects very badly on the profession which jealously guards its reputation for honesty and integrity. The penalty imposed needs to reflect the seriousness of the misconduct involved. [60]*

And went on to say:

*Previous decisions of the Tribunal ... show that normally a finding of misconduct or conduct unbecoming will result in a penalty of striking off or suspension. [61]*

The Appeals Council then referred to a number of decisions of the Tribunal where knowingly supplying false information (to the Institute, the client's bank and the client's franchisor) resulted in strike off or suspension. After analysing these cases, the Appeals Council decided that:

*... while it is important to consider the rehabilitation of [Lee], and to recognise that he is a young man with no previous disciplinary offences, we think this is a case where the seriousness of the misconduct, the importance of maintaining professional standards and consistency with other cases requires, at the very least, a period of suspension. [68]*

The Appeals Council suspended Lee from membership for 12 months.

In light of the Appeal Council's decision it is clear that censure is an inadequate penalty in this case.

Also, knowingly supplying false information is only one of the charges here.

Given the steps the Member has taken to date to deal with this matter which indicate that he is well advanced in rehabilitation, an order striking the Member off the register would in the Tribunal's view be an excessive response. The Tribunal considers that protection of the public, the maintenance of professional standards and safeguarding the reputation of the profession can be sufficiently met in this case by an order suspending the Member from membership for two years.

The Member submitted that a suspension or strike off would have severe economic consequences for the Member. However, the suspension or strike off of any member will inevitably have potentially severe economic consequences but this is not of itself a reason to support a lesser penalty being imposed.

Pursuant to Rule 21.31(b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders **Bryce Graham Moffat** be suspended from membership of the Institute for a period of two years.

## **COSTS**

The Professional Conduct Committee seeks full costs of \$32,482.

The Tribunal's general approach is that the starting point is 100% of costs, noting that the Institute already bears the cost of abandoned investigations and costs up to the Professional Conduct Committee's decision to hold a Final Determination.

There are no mitigating factors such as excessive or unnecessary expenses incurred or demonstrated evidence of hardship (inability to pay). The Tribunal notes that you accepted that it is only proper that you meet the costs of the hearing in the circumstances.

Pursuant to Rule 21.33 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that **Bryce Graham Moffat** pay to the Institute the sum of \$32,482 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal, the investigation by the Professional Conduct Committee and the cost of publicity. No GST is payable.

## **PUBLICATION AND SUPPRESSION ORDERS**

The PCC sought publication of the decision on the Institute's website, in the Institute's official publication and in the local newspaper with mention of the Member's name and locality. The Member sought suppression of his name and locality.

The starting point is that the public interest in open justice and transparency creates a presumption in favour of full publication. It will only be in exceptional circumstances where the public interest will be outweighed by private interests of the Member or their family or others associated with them. The Tribunal has considered carefully the submissions the Member has made about the effect the publication will have on the Member including his concern that publication will effectively end his career. However, the Tribunal considers that any impact on the Member personally will only be the normal impact that a person who has conducted himself in the way you have could reasonably expect.

The Member gave evidence that rumours are circulating in Whangarei that he has stolen money from clients. It was submitted on the Member's behalf that publication without name and locality of the decision would put paid to those rumours. The Tribunal does not agree. It considers that publication of the decision with name and locality, disclosing that the charges do not include stealing from clients, would best serve that purpose.

Pursuant to Rule 21.52 (b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the name of the complainant and the companies named in the particulars are suppressed.

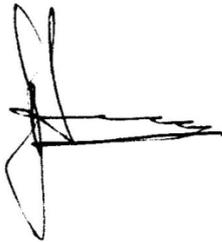
In accordance with Rule 21.35 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on the Institute's website and in the Institute's official publication *Acuity* and the *Northern Advocate* with mention of the Member's name and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

## **RIGHT OF APPEAL**

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

14 days after the notification to the parties of this Tribunal's exercise of its powers, appeal in writing to the Appeals Council of the Institute against the decision.

The suppression orders shall take effect immediately. The interim suppression order as to the Member's identity shall remain in force, and no other decision including publication of the decision shall take effect, while the parties remain entitled to appeal, or while any such appeal by the parties awaits determination by the Appeals Council.

A handwritten signature in black ink, consisting of a vertical line on the left, a horizontal line extending to the right, and a large, stylized loop on the left side.

RJO Hoare FCA  
**Chairman**  
**Disciplinary Tribunal**