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 **David William McPhedran,** Chartered Accountant, of **Dunedin**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
8 November 2018

Hearing:	22-23 August 2018
Teleconference:	4 October 2018
Location:	The offices of Chartered Accountants Australia and New Zealand, Level 7, Chartered Accountants House, 50-64 Customhouse Quay, Wellington, New Zealand
Tribunal:	Mr MJ Whale FCA (Chairman) Mr A Newman FCA Mr DP Scott FCA Ms B Gibson (Lay member)
Legal Assessor:	Mr Matthew Casey QC
Counsel:	Mr Richard Moon for the prosecution Mr Michael Parker and Ms Juliet Eckford for the Member
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsanz.com

Refer to the Appeals Council decision dated 5 July 2019

At a hearing of the Disciplinary Tribunal held in public at which the Member was not in attendance but represented by counsel the Member admitted particulars a (i) and (iv), b, c, d, e (i), f, g and h and denied particulars a (ii) and (iii) and e (ii) to (iv). The Member pleaded guilty to charge 4 and, in effect, not guilty to charges 1, 2 and 3.

The charges and particular 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 13.39 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 so as to bring the profession into disrepute; and/or

4. breaching the Institute's Code of Ethics.

PARTICULARS

IN THAT

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

(a) Failed to properly oversee the work of his practice entity, Your Business Team Limited's (**YBT**) other director, Mr Carl Spruyt, and/or to supervise the staff of the practice, in particular:

   (i) the failure to identify and manage conflicts of interest arising from the proposed investment by the Member's practice YBT, or its associated entities, in Company A Limited (Company A); and/or

   (ii) the use of a Company A's Companies Office log-on details without authority; and/or

   (iii) the transfer of Company A shares to YBT Growth Solutions Limited (**YBTG**) without authority; and/or

   (iv) the failure to make payment to Company A of around $10,000, as agreed, at or about the time of the transfer of its shares to YBTG,

   being breaches of Fundamental Principles of Objectivity, Professional Competence and Due Care and/or Professional Behaviour for which the Member is responsible under section 100.5.4 Code of Ethics 2014 (the **Code**), alternatively, in breach of the Fundamental Principle of Professional Competence and Due Care (paragraph 100.5(c)) of the Code; and/or

(b) Failed to identify and/or manage conflicts of interest and/or threats to the Member's objectivity arising from the involvement of his practice, or associated entities, with Company A including the roles of business adviser to Company A and those of shareholder and/or director of Company A, in breach of the Fundamental Principle of Objectivity of the Code (including sections 220 and 280); and/or

(c) Disclosed, by email dated 2 May 2017, confidential client information outside the Member's firm when there was no legal or professional right or duty to do so, in breach of Fundamental Principle of Confidentiality of the Code (section 140.1); and/or

(d) Rendered an invoice (InvCD10X183) in circumstances where there was no right to charge the fee sought, and/or where no explanation of the fee was provided once requested, in breach of the Fundamental Principle of Professional Behaviour of the Code (section 150.1); and/or

(e) Without a proper basis:

(i) failed or refused to pay for the shares Company A transferred to YBTG on 16 March 2017; and/or

(ii) asserted ownership of the shares; and/or

(iii) failed or refused to return the shares to the Bell's; and/or

(iv) demanded payment for the shares in Company A,

in breach of the Fundamental Principles of Integrity (section 110.1) and/or Professional Behaviour (150.1) of the Code; and/or

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

(f) Failed to identify and/or manage conflicts of interest arising and/or threats to his objectivity from the involvement of his practice YBT, or associated entities, with Company B Limited (Company B) including the roles of adviser to Company B and those of shareholder and/or director of Company B, in breach of the Fundamental Principle of Objectivity of the Code (including sections 220 and 280); and/or

(g) In breach of trust and/or without proper authority:

(i) asserted ownership over the Company B shares held by YBT Nominees (No 2.) Limited on trust for Mr Roper; and/or

(ii) excluded Mr Roper from the affairs of Company B; and/or

(iii) appointed a liquidator to Company B,

in breach of the Fundamental Principles of Integrity (section 110.1) and/or Professional Behaviour (section 150.1) of the Code; and/or

(h) Disclosed, by his email dated 2 May 2017, confidential client information outside his firm when there was no legal or professional right or duty to do so, in breach of Fundamental Principle of Confidentiality of the Code (section 140.1).

BACKGROUND

This case is an example of a member becoming involved in their clients' business affairs, failing to identify and/or manage conflicts of interest and threats to their objectivity, and (in this case) becoming hopelessly conflicted and furthering their own interests at the expense of their clients'.

Mr and Mrs Bell had two businesses and owned shares in a company. As a result of the Member's actions, or those of the Member's business partner who under the Code of Ethics the Member had an obligation to supervise and ensure his compliance with the Code of Ethics, they ended up with one less business and company than what they began with.

In Mr Roper's case he began his relationship with the Member owning shares in a company. At the time he sought the Member's firm's services he was in a difficult and vulnerable position. He ended up being shut out of the company and his business. Ultimately the company was put into liquidation at the instigation of the Member's interests.

By agreement between the Professional Conduct Committee (**PCC**) and the Member's counsel, the Tribunal had been provided with signed briefs of evidence of both complainants, the parties' respective experts and the Member before the hearing. As the Member did not attend the hearing, following submissions by the parties and the receipt of directions from the Tribunal's legal assessor, the Tribunal determined that it would have no regard to the Member's brief of evidence when reaching its determination on the issue of liability.

At the start of the hearing, the Tribunal was advised that the day before the hearing the Member had filed a statutory declaration (substantially in the same terms as his brief of evidence) together with statutory declarations from his business partner Mr Spruyt and the solicitor for Mr Roper. The Member's counsel clarified that it was not the intention that that "evidence" be considered at the liability stage of the hearing but it was intended that the declarations be tendered in support of submissions in relation to penalty. The Member's counsel accepted that to the extent that the declarations contained "evidence" which conflicted with uncontested evidence that supported the particulars and charges, they would be given little or no weight because those people who made the declarations would not be available for cross examination.

The Tribunal's legal assessor confirmed the Tribunal's view that where any evidence contained in those declarations purports to contradict or is contrary to evidence it has heard and accepted and which forms the basis of its findings on the particulars and charges, the Tribunal is in fact unable to accept the evidence in the declarations. It was noted that matters put forward in mitigation that do not challenge the evidence that went to the finding of guilt could also be disputed. The Tribunal advised the parties that its expectation was that counsel would endeavour to reach agreement on what evidence could be provided to the Tribunal in relation to penalty and to identify any areas of disagreement.

The hearing proceeded on that basis.

DECISION

Particulars

The Tribunal finds that the particulars which the Member admitted are made out by the evidence before it.

The Tribunal agrees with the opinion of Mr Rickerby, an expert witness and chartered accountant called by the PCC, that for the reasons set out in paragraphs 11-15 of his brief of evidence the business advisory company (CD Limited/10X) in which the Member was one of two directors and his interests were a 50% shareholder was not sufficiently separate or distinct (both in fact and as presented to the public, including Mr and Mrs Bell and Mr Roper) to fall outside the Member's corporate chartered accountancy practice and the requirement for supervision of his non-member co-director of both companies. Mr Ruscoe, an expert witness and chartered accountant called by the Member, also considered the 10X business to be part of the Member's corporate chartered accountancy practice. In substance both businesses were operating as one.

As to Particulars (a)(ii) and (a(iii), the Tribunal finds that the PCC has failed on the balance of probabilities to prove the requisite facts. Mr Bell had provided the log on details to an employee of 10X (it is not clear for what purpose). Mr and Mrs Bell had signed and provided to that employee a share transfer and a director's resolution which on their face authorised the transfer of shares at that time. Mr Bell's expectations about what was to occur after that were not communicated to those directly involved.

From an ethical point of view the Tribunal considers it was Mr Spruyt's responsibility to ensure the transactions had been properly documented and the timing clarified, and the Member's responsibility to supervise – assuming the conflicts of interest could be and were being properly managed.

However, even if the Tribunal's finding of lack of proof is wrong, it considers that any failure on the Member's part to supervise or oversee these (in a sense procedural) matters does not warrant disciplinary sanction. The Tribunal accepts that, although in its view the Member probably knew of the proposed transaction, the Member was hospitalised and at the time of these events was significantly incapacitated – the Member could not be expected to supervise to this level of detail and any systems that should have been in place, such as the appointment of a member holding a Certificate of Public Practice to conduct the practice in the event of incapacity, were unlikely to identify any irregularity until after the events.

In relation to Particulars (e)(ii) to (iv), the Tribunal finds the particulars proved on the balance of probabilities. The uncontested evidence of Mr Bell, who was cross-examined on a number of matters and who the Tribunal considered a credible witness, was that 15% of the shares in his family's company Company A were to be transferred to entities in which the Member was associated (though he initially understood they were the Member's business partner's entities) for a shareholder capital injection of $10,000. The shares were transferred but that amount was not paid. Mr Bell later agreed with the Member's business partner that the transaction was to be unwound but the Member required payment of $20,000 (initially in return for cancellation of a $20,000 fees invoice from a different related party which would make the transactions cash neutral – the Member has since admitted that the invoice should not have been issued as there was no right to charge the fee.)

The Member's counsel made much of the fact that there was no demand but simply a proposal for consideration by the board. But it is clear from the overall circumstances that the shares would be returned only if $20,000 was 'paid' – there was in effect a demand for 'payment', 'demand' being defined in the *Oxford Dictionary* as a peremptory request or a requirement.

The conduct in Particulars (e)(ii) to (iv) in the Tribunal's view clearly breaches the Fundamental Principles of Integrity and Professional Behaviour set out in the Code.

Charges

If follows from the Member's admissions, his plea and the Tribunal's findings in relation to the particulars that the Member is guilty of Charge 4.

For the reasons that follow, the Tribunal also finds the Member guilty of Charges 1, 2 and 3.

Professional Misconduct (Charge 1)

Misconduct in a professional capacity covers intentional wrongdoing or conduct which is a deliberate departure from acceptable standards. It is something 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.

YBTG taking a shareholding interest in Mr and Mrs Bell's company (Company A) created a fundamental conflict between that company and the entities in which the Member was involved. The result of the conflict is evidenced in the disputes about payment for the shareholding and the validity of the invoice. The Tribunal agrees with Mr Rickerby's assessment that the Member's position as an adviser to Company A became untenable as a result of his personal financial interest in these matters. There was no evidence of any attempt by the Member to manage or resolve the various conflicts of interest following the Member's return to work. The Member should have taken

steps to remediate the issues but he continued to put the interests of himself and the companies he was involved in ahead of those of his client, Company A.

The Member represented YBTG to Mr Bell and the Companies Office as the legitimate owner of the shares 'registered' in its name, when it was not. The Member's professional ethical obligations do not permit him to rely on technical legal points at the expense of his clients' interests.

In relation to the complaint by Mr Roper, it is clear from the evidence before the Tribunal that the Member was hopelessly conflicted. The Member or entities associated with him were acting as business adviser and trustee for Mr Roper and took a shareholding in Mr Roper's company. The Member and Mr Spruyt also became directors of his company. The uncontested evidence of Mr Roper was that at the time of the original transactions (May-July 2016) he received no written advice regarding the strategy being adopted to assist him and his business, nor were those arrangements between him and the Member and his interests ever documented. He was not advised of any actual or potential conflict.

Although on some subsequent occasions Mr Roper had the benefit of legal advice, there were other occasions when the Member carried out significant negotiations involving his own interests with Mr Roper directly. Further, the Member and his business partner obtained effective control of Mr Roper's company (Company B) without any regard for identifying and managing the conflicts of interest that entailed.

The uncontested evidence of Mr Roper was that the Member convinced him to resign as a director of Company B because that was a requirement of ANZ if it were to offer banking services to the company. He later learnt that no request or requirement had been made by ANZ that he be removed as a director. In the Tribunal's view this misleading and deceptive conduct is reprehensible. The Tribunal concludes that the Member's purpose was to marginalise Mr Roper and prevent him from accessing information about the company's affairs - requests which Mr Roper (who had a 50% beneficial interest in the company) subsequently made for information about the performance of the company were refused. Mr Roper did not agree with aspects of proposals the Member made about his ongoing role in the business. Ultimately the Member locked him out of the computer system. And, as the Member has admitted, in breach of trust and/or without proper authority the Member appointed a liquidator to Company B.

The Tribunal finds some of the conduct the subject of Particulars (f) and (g) to be dishonest. In the Tribunal's view, all of the conduct in Particulars (b), (e), (f) and (g) was deliberate, much of it was self-serving and it was a very significant departure from acceptable professional standards. It constitutes misconduct in a professional capacity.

Conduct Unbecoming (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.

The Tribunal finds that the Member's conduct in Particulars (c), (d) and (h) constitutes conduct unbecoming an accountant.

The evidence of Mr Bell, which the Tribunal accepts, was that when he questioned the Member about the professionalism and ethics of sending the 2 May 2017 email to both Company A and Company B the Member stated that the purpose was to obtain a reaction and the Member was more than happy with the reaction that it had achieved. Deliberate breaches of the Member's respective clients' confidentiality is a serious matter.

Likewise rendering an invoice when on the evidence before the Tribunal the Member either knew there was no basis or the Member was reckless as to whether there was in fact any basis for the charging of the fees. This was more than lack of care.

The attitude the Member displayed towards Mr Bell at the time was unacceptable.

Negligence (Charge 3)

In the Tribunal's view the member's failure to act diligently and in accordance with ethical standards relating to conflicts of interest is also negligence (and arguably incompetence) in a professional capacity of such a degree as to bring the profession into disrepute.

PENALTY

Procedural Matters

Following consultations between the parties' counsel, the PCC was content for the statutory declarations referred to in the introduction to this Determination with agreed redactions to be admitted –except for certain statements on which agreement could not be reached (referred to below as disputed material). It however submitted that the statements in the declarations must be given less force and weight than if the evidence had been given on oath (and was subject to cross-examination) and less weight than the documentation before the Tribunal which was contemporaneous. That submission reflects the Tribunal's views. The Tribunal records that no explanation was provided as to why Mr Spruyt and Mr Burke were not present.

The Tribunal:

- Has not had regard to the disputed material in Mr Burke's statutory declaration as it appears to have no bearing on the penalty; and

- Gives no weight to the disputed statement in the Member's declaration as it appears to be contradicted by an email a copy of which is attached to Mr Spruyt's declaration and another contemporaneous document.

As a result of findings the Tribunal has made on the particulars (a)(i)-(ii) and the fact that most of the events the subject of Mr Roper's complaint occurred before the Member's hospitalisation and after April 2017, the Tribunal has found it unnecessary to consider the objection to statements in Mr Spruyt's declaration about the extent of the Member's involvement in matters during his hospitalisation.

For completeness, the Tribunal records that it was provided with a character reference, and with the Member's medical records (attached to his declaration).

Principles

The PCC referred to *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 where the Judge identified the following factors 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 professional standards;
- Reflects the seriousness of the misconduct;
- Punishes the practitioner;
- Allows for the rehabilitation of the practitioner;
- Promotes consistency with penalties in similar cases;
- Is the least restrictive penalty appropriate in the circumstances; and
- Looked at overall, is the penalty which is fair, reasonable and proportionate in the circumstances.

In *Daniels v Complaints Committee 2 of the Wellington District Law Society* [2011] 3 NZLR 850, the Court said that Tribunals are required to carefully consider alternatives to striking off a practitioner. The Court held that:

> *…If the purpose of imposing disciplinary sanctions can be achieved short of striking off then it is the lesser alternative that should be adopted as the proportionate response. That is the "least restrictive outcome" principle applicable in criminal sentencing. In the end…the test is whether a practitioner is a fit and proper person to continue in practice. If not, striking off should follow. If striking off is not required but the misconduct is serious, then it may be that suspension from practicing for a fixed period will be required.* [22]

Previous decisions referred to by the PCC

The PCC also referred the Tribunal to:

- The Appeals Council decisions in *Lee* (19 July 2013), which held that as a general rule the finding of professional misconduct will normally result in the member being struck off or at least suspended, and *Power* (2 December 2016); and

- Its previous decisions in *Hennessy* (28 July 2015), *Moffatt* (19 December 2014), *Miller* (18 September 2017), *Power* (12 July 2016) and *Gormack* (14 November 2016), cases involving misconduct in a professional capacity and/or conduct unbecoming an accountant.

In *Gormack*, the Appeals Council upheld the Tribunal's order that the member be struck off following findings of professional misconduct and conduct unbecoming an accountant. He had misled clients and had sought to make a personal gain from this (although ultimately that may not have happened). He also showed little insight into the seriousness of the misconduct.

In *Hennessy*, the member was found guilty of misconduct in a professional capacity as a result of failing to identify and/or manage conflicts of interest, withdrawing his own funds from an investment when the investment was about to go under, putting his interest ahead of the interests of his clients and failing to advise his client of the possibility of enforcement of its security interests. He was suspended from membership for a period of two years.

In *Power*, the Tribunal had ordered that the member be struck off, having been found guilty of conduct unbecoming an accountant for numerous breaches of the Fundamental Principles of Competence, Objectivity and Professional Behaviour, including failure to identify conflicts of interest and to address or manage those. Previous measures to assist the member's rehabilitation following earlier disciplinary hearings had been put in place but had not worked.

The Appeals Council commented on the member's conduct as follows:

> *On the one hand there is no evidence of dishonesty, 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.* [107]

But the Appeals Council took a different view on the prospect of the members' rehabilitation. It substituted a period of two years' suspension. It decided that he should be given a last chance to undertake a comprehensive rehabilitation proposal which he had volunteered, involving weekly professional mentoring and supervisions, and counselling, supported by detailed undertakings he had offered.

In *Moffatt*, the member was found guilty of misconduct in a professional capacity for preparing financial statements over four years which did not accurately include cash payments he knew had been received by his client company, and filed and misleading income tax and GST returns, and

for failing to disclose a conflict of interest. The member was suspended for two years – the member had accepted most of the charges and particulars at an early stage, had subsequently made voluntary disclosures to Inland Revenue and had taken steps to manage conflicts in what was a large and busy practice indicating he was well advanced in rehabilitation.

In *Miller*, the member pleaded guilty to misconduct in a professional capacity and conduct unbecoming an accountant for retrospectively amending the accounting treatment of a transaction and providing false and misleading information to liquidators. The member was suspended for two years. There was no self-interest element and there were significant mitigating factors.

PCC's Submissions

The PCC submitted that in this case there was a mixture of serious conflict breaches, integrity breaches and competence matters. The thrust of its submissions was that the Member's conduct was so serious and sufficiently similar to the cases referred to above, to justify strike off. The less restrictive penalty of suspension was not appropriate because of the Member's lack of appreciation and insight about the nature of his conduct, and the fact that the Member was so conflicted.

As to the Member's lack of appreciation and insight into his conduct, the PCC referred to the Member's email to the Institute of 14 July 2017, being a part of his response to the Bell complaint, and his subsequent communications with the Institute. Further, following the making of the complaint the Member persisted in pursuing payment of an invoice which the Member now admits he was not entitled to charge. In August 2017 the Member advised the Institute that he *still has no idea of just what ethical standards he is supposed to have breached*. The PCC further submitted that even now, there is nothing in the Member's statutory declaration that amounts to any acknowledgment that the Member understands that his conduct was wrong or that he has learnt from it. There is simply a statement of extreme remorse and of disappointment that disciplinary action has been *deemed necessary* after over 40 years of practice.

The PCC submitted that an aggravating factor was that there were two separate complaints which included quite similar patterns of behaviour, one of which spans a considerable period of time.

The Member's Submissions

The Member's counsel submitted that:

- The Member and Mr Spruyt's intentions were not improper and the Member and he did not seek significant financial gain as a result of the investment in Company B. The actions were intended to give that company a chance of survival.

  In the Tribunal's view, although the Member's intentions regarding his involvement with Mr and Mrs Bell and Mr Roper may not have been improper initially, on the evidence before it that changed in both cases. There was clear evidence the Member intended to make financial gain at the expense of his clients – for example, claiming $20,000 for shares that had not been paid for, with no evidence of any attempt to value those shares, and the Member's dealings with Mr Roper in November 2016 and May 2017.

- Mr Roper and his company were legally represented during the relevant time – but on the evidence before the Tribunal it appears that was not always the case and independent advice is only one of a number of factors required to manage the types of conflict of interest which the Member had.

- The breaches of the Code in relation to the Roper complaint were inadvertent, as a result of poor management of potential conflicts, rather than anything more sinister.

  The Tribunal does not accept this submission. For example, little could be more sinister than the way in which the Member contrived to secure Mr Roper's resignation as a director of Company B.

- As to the breach of confidentiality, there was no significant loss caused to either Mr Bell or Mr Roper – but in the Tribunal's view that does not mitigate the Member's deliberate conduct.

The Member submitted that mitigating factors were [very late] substantial acceptance of the particulars, the Member's previously unblemished record over a career of nearly 40 years and his remorse. The Member's admission of most of the particulars represented a significant move in his appreciation of the implications of his failures from the position he took at his final determination. The Member's counsel advised the Tribunal that his instructions were that the Member understood the need to completely rearrange his practice and remove its intertwining with 10X so as to prevent the breaches of the Code which arose in these two matters – but as the PCC submitted, there is no evidence of this attitude in the Member's statutory declaration.

The Member's counsel submitted that a combination of punitive and rehabilitative sanctions would be most appropriate, including review of the Member's practice, completion of a professional development course or engaging a mentor, a censure and an order that the Member's practice not undertake specified assignments (e.g. business advisory) for a specified period. The level of offending was not to the extent that suspension is required. Any penalty should assist in the Member's rehabilitation, not detract from it.

The Member submitted that the level of offending in *Gormack* is in no way similar to this case. Although the Member had conflict issues, they were nowhere near as grave as those in *Gormack*, and deliberate non-disclosure and masking were not present.

The Member referred to the Tribunal's decision in *Watson* (21 December 2009). There the member was struck off following a finding of conduct unbecoming an accountant. He had deliberately under-reported by over half a million dollars in the accounts he prepared and then falsely asserted compliance. The Member's level of offending was nowhere near as serious. In *Moffatt*, *Lee* (19 July 2013) and *Miller*, suspension was ordered. Those cases included an element of dishonesty not present in the current case and the cases can also be distinguished on the basis that the conduct there related directly to the member's provision of accounting services or advice.

In *Hennessy* (suspension for two years) the member obtained a personal benefit and he had had a previous poor disciplinary record for conflicts of interest. The Member's counsel submitted that this case supported the proposition that something short of suspension was appropriate.

In *Power* (9 December 2013), the Tribunal found conduct in breach of the Code and the penalty was limited to rehabilitation measures and a censure – the Member submitted that that should also be the case here (in both cases the member had failed to appreciate a conflict of interest).

The Member also referred to *Spence* (27 February 2013) and *Re Member Y* in support of censure being the appropriate penalty. In *Member Y*, the member's medical condition was significant in limiting the penalty. The Member's counsel submitted that the impact of his injury and the aftermath of it was a legitimate factor for the Tribunal to take into consideration in mitigation of penalty.

Decision

In reaching its decision the Tribunal has had regard to the mitigating factors and character reference the Member put forward.

In light of the Appeals Council's decision in *Lee* (19 July 2013) and its statements in *Power* referred to above and having regard to the circumstances of this case, including deceit and self-interest, the Tribunal considers that the minimum penalty that could be imposed is a period of suspension.

However, the Tribunal has concluded that the Member is not a fit and proper person to continue in practice and that the penalty which is fair, reasonable and proportionate in the circumstances is the removal of the Member's name from the Register. It is also the most appropriate penalty that

reflects the first four factors referred to in *Roberts* above, which the Tribunal considers to be the more important and relevant factors in this case.

Although the Member's conduct is not at the most serious level, in the Tribunal's view it is such that protection of the public and maintenance of professional standards require removal of the Member's name. The Tribunal has held that the Member was hopelessly conflicted. The Member furthered his own interests at the expense of two clients, in the Tribunal's view taking advantage of them when they were vulnerable, and the Member was deceitful in some of his dealings with them. The Member's denigration of Mr Bell in an email to the Companies Office Integrity and Enforcement Team, when asserting ownership of shares in Company A without a proper basis, was unjustified, self-serving and totally unprofessional.

Despite statements made by the Member's counsel in his absence, the Tribunal is not satisfied that the Member has a clear insight and appreciation of the extent of his conflicts of interest or the action required to identify and manage them in future. It notes that the statement at paragraph [34] of the Member's declaration is difficult to reconcile with submissions about his appreciation of the implication of his failures. There is nothing in the Member's declaration or any other material before the Tribunal that gives it any confidence that the Member is conscientiously undertaking rehabilitation or will do so – rearranging his practice so as to remove its inter-twining with 10X which the Member's counsel stated he understood was required, if it occurs, is but one of a number of factors that would need to be addressed for the Member to identify and to properly manage conflicts of interest.

The Tribunal has also taken into account the fact that periods of suspension of 2 years imposed in the past for self-interest and deceit and failure to manage significant conflicts of interest do not appear to be having the deterrent effect the Tribunal envisaged. It does not consider a longer period of suspension would be any more effective a deterrent.

No two cases are identical. However, the Tribunal considers that its decision in this case is not inconsistent with its previous decisions which both parties have referred to. *Gormack* is a case not dissimilar to this – dishonesty or deceit, self-interest and little insight into the seriousness of the misconduct. Although the degree of dishonesty in *Gormack* may have been greater than in this case, in the Tribunal's view the Member's conduct is sufficiently serious, in context, as to warrant imposing the same penalty. In *Power*, the conduct did not involve dishonesty, self-interest or incompetence but there was strong evidence of the member's lack of insight and inability to properly recognise and deal with conflicts. He survived strike off only because he had put forward a comprehensive rehabilitation proposal involving monitoring and mentoring, backed by detailed undertakings. The Member's proposals fall well short of that and, unlike the member in *Power*, the Member has been found to be deceitful and self-serving. Breach of the Fundamental Principle of Integrity is a very serious matter.

In the Tribunal's view, the conduct in *Hennessy* was less serious than that here. That decision also records that the member cooperated fully with the PCC and pleaded guilty at an early stage. There appears to have been no denigration of a client to others, no misleading assertions to the client and no breach of confidentiality. The mitigating factors in *Moffatt* (early appreciation of wrongdoing and well advanced rehabilitation) are absent here.

The Tribunal does not accept the Member's counsel's analysis of *Moffatt* and *Miller*. There was dishonesty in this case (the fact that it was a different type of dishonesty is of little moment) and it does not consider there is anything in the point that unlike in those cases the Member is not providing accounting services or advice – what matters is that the Member was acting in a professional capacity and failing to supervise a non-member director of a business which formed part of his corporate chartered accountancy practice.

In *Y, a Member* (Tribunal decision on 31.3.16, Appeals Council 17.10.16) involving conduct unbecoming an accountant, the member changed already approved financial statements and provided them to a third party when the client had not approved the changes, and gave that third party the impression that the financial statements provided were the final and approved statements when they were not. In that the case the penalty was a censure, a $15,000 fine and the suspension

of the member's Certificate of Public Practice for 12 months. There was no self-serving purpose. Contrary to the Member's counsel's submission, there is no statement in the Tribunal's decision that the member's medical condition was significant in limiting the penalty. In the Appeals Council's decision, the member's medical condition was not referred to at all in relation to penalty – it was mentioned in relation to the decision on publication, a point to which the Tribunal will return.

Although a member's health issues and other personal circumstances may explain, in part, misconduct, they do not in any way excuse it. Given the nature, context and the timing of much of the Member's offending, it is not a factor to which the Tribunal gives much weight, and it and the other mitigating factors are insufficient to persuade the Tribunal that a lesser penalty is the appropriate response.

Pursuant to Rule 13.40(a) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member's name be removed from the Register of Members and that Chartered Accountants Australia New Zealand be promptly advised of that removal.

COSTS

The Professional Conduct Committee seeks full costs of $72,430.

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.

The PCC submitted that there should be no discount given because the PCC was unsuccessful in establishing two aspects of one particular – the length and nature of the investigation and the hearing would not have been impacted.

The Member's counsel noted that the original estimate of costs for a three day hearing was $59,000 and that the hearing was likely to be concluded within two days. The Member's partial success in challenging the particulars should also be taken into consideration.

The Tribunal has reviewed both the original estimated costs schedule and the final costs schedule, and notes that the original did not include any of the legal assessor's time, or any of the PCC counsel's time from 1 August.

There was also a subsequent, although brief, teleconference to deal with a matter footnoted below. The Tribunal has spent significantly more time than allowed for in finalising the Determination.

The Member produced some evidence of his financial position. The Member's counsel indicated that any fine, coupled with costs, may well cause hardship unless payment was staged. However there is no fine, and the staging of payment of a costs order is a matter for the Institute and the member to negotiate.

Taking all relevant matters into consideration, the Tribunal determines that a costs order of $70,000 is fair and reasonable in the circumstances.

Pursuant to Rule 13.42 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that the Member pay to the Institute the sum of $70,000 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.

SUPPRESSION ORDERS

Pursuant to Rule 13.62(b) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that details of the Member's financial, medical and other personal circumstances – other than those contained in this Determination – the

health details of any other person involved and the names of the Bells' company and Mr Roper's company in which the Member's entities became involved, be suppressed.

PUBLICATION

The Institute sought publication of its decision on the Chartered Accountants Australia and New Zealand's website, in *Acuity* magazine and in the *Otago Daily Times*, with mention of the Member's name and location. The Member submitted that in light of the medical evidence about the Member and because publication is not intended to be punitive, his name and location not be mentioned – the legitimate public interest could be met by anonymising the decision.

The starting point is that the public interest in open justice and transparency and the maintenance of confidence in the professional disciplinary process creates a presumption in favour of full publication. That presumption is strongly reflected in the Institute's Rules, including Rule 13.44(a). It is for the Member to persuade the Tribunal that the public interest is outweighed in this case by his private interests.

The Member has been found guilty of serious charges, and his conduct involved a breach of the Fundamental Principle of Integrity. It is in the public interest that members the subject of such findings are identified. There must be some special circumstances why that public interest should be overridden.

As noted in the Appeals Council's decision in *Qiu* (21 May 2018) there would need to be compelling evidence that publication would have a highly prejudicial effect on a member's health (physical or mental) before the Tribunal should make an assessment of whether protecting the member's health outweighed the public interest in identifying the member. The threshold is high.

Such evidence as there is about the Member's current health in the Tribunal's view falls far short of the required threshold. That evidence is not from an expert in the field and makes no direct reference to the effect of publication on the Member's health.

The medical evidence produced in *Member Y* appears similar to that produced here. The Appeals Council considered that that evidence was not sufficient in itself to justify a decision not to publish the member's name and locality. In that case there were a number of factors which when taken together did justify non-publication. There are no additional factors here.

In accordance with Rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on Chartered Accountants Australia and New Zealand's website and in the official publication *Acuity* and the *Otago Daily Times*, with mention of the Member's name and locality.

RIGHT OF APPEAL

Pursuant to Rule 13.47 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. No decision including the direction as to publicity shall take effect while the parties remain entitled to appeal, or while any such appeal by the parties awaits determination by the Appeals Council.

Footnotes

1. As noted earlier in this Determination, the Member did not attend the hearing, as had been expected, and provided a letter from his general practitioner stating he was not medically fit to attend. The Member's counsel said this extended to attendance by video conference and teleconference. The Member was offered through his counsel the opportunity to have the hearing rescheduled but that offer was declined.

2. Approximately a week after the hearing, before the Tribunal had finalised its Determination, the Member sought leave to submit new evidence in support of his earlier submissions that his name not be published. This was an email to the Member from Mr Bell, described as containing a threat to exploit the publication of the Tribunal's decision so that it inflicted as much reputational and other injury as possible to the Member. A teleconference was convened so that the parties could be heard on whether the email was material to the decision on publication or whether it was otherwise in the interests of justice to receive and consider the material. The PCC submitted that the email did not take the matter of publication any further. This was simply a reflection of what harm may occur to reputation when misconduct of this nature is publicised. The Member submitted that the potential for harm here was far and beyond the norm and that the Tribunal should not make decisions which facilitate the type of actions threatened. The potential consequences of publication here will seriously impact on the Member's health. The Tribunal's legal assessor's direction was that the Tribunal has no power now to prevent Mr Bell publicising its decision – the hearing was held in public and the findings of guilt were announced at that hearing. The Tribunal had not ordered interim name suppression.

   The Tribunal determined to receive the email but gives it little weight – harm to reputation is an inevitable consequence of publication and much more than personal and professional embarrassment is required to displace the open justice principle. The Member has other remedies if the threat is actionable or any public statements by Mr Bell are defamatory. The new evidence does not change the Tribunal's decision on publication.

MJ Whale FCA
Chairman
Disciplinary Tribunal