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 **Clifford Kean-Teik Chan,** Chartered Accountant, of **Christchurch**

DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS
AS TO LIABILITY - 5 February 2018
AS TO PENALTY, COSTS AND PUBLICATION - 28 March 2018

Hearing:	7-8 December 2017
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 JD Naylor FCA Mr DP Scott FCA Ms A Kinzett (Lay member)
Legal Assessor:	Mr Paul Radich QC
Counsel:	Mr Richard Moon for the prosecution Mr Joshua Shaw for the Member
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 and represented by counsel, the Member pleaded guilty to Charges 3, 4 and 5, not guilty to Charges 1 and 2 and:

- Admitted Particulars 1(a)(ii) & (iii) and 1(c)(i) & (iii) - except that he denied the relevant conduct breached the Fundamental Principle of Integrity in the relevant Code of Ethics, and denied Particulars 1(a)(i), 1(b), 1(c)(ii) and 1(d);
- Admitted Particular 2;
- Admitted Particular 3(a)-(d) and (f);
- Admitted Particular 3(e) in part;
- Admitted Particular 5 except that he denied the relevant conduct breaches the Fundamental Principle of Integrity; and
- Admitted Particulars 6 and 7.

The charges and amended 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 13.39 the Member is guilty of:

1. Misconduct in a professional capacity; and/or

2. Conduct unbecoming an accountant (rule 13.39(c)); and/or

3. Negligence or incompetence in a professional capacity, and that this has been of such a degree or so frequent as to reflect on the member's fitness to practice as an accountant or tends to bring the profession into disrepute (rule 13.39(d)); and/or

4. Breaching NZICA's Rules and/or Code of Ethics (rule 13.39(f)); and/or

5. Supplying information to the Institute that is false or misleading (rule 13.39(h)).

AMENDED PARTICULARS

IN THAT

In the Member's role as a Chartered Accountant in Public Practice, the Member:

(1) As accountant for Mr X and/or companies associated with him including ABC Limited and/or XYZ Limited and/or DEF Limited:

  (a) in respect of monies the Member was holding on behalf of ABC Limited after the company went into administration (on or about 21 June 2011):

    (i) retained fees of $21,940 from those monies without the consent and/or knowledge of the administrator; and/or

    (ii) made payments of at least $90,434 to other parties on Mr X's instruction, without the knowledge and/or consent of the administrator; and/or

    (iii) failed to make any proper inquiry, either of the Member's client or the administrator, regarding the status of ABC Limited administration,

in breach the Fundamental Principles of Integrity and/or Professional Behaviour and/or Rule 9 *Due Care and Diligence* of the Code of Ethics (2003)[1]; and/or

(b) on or about 9 February 2015, used a GST refund received on DEF Limited's behalf to make a payment of $20,000 to an unrelated person (Ms W), in breach of the Fundamental Principles of Professional Competence and Due Care of the Code of Ethics (2014)[2]; and/or

(c) between 2012 and 2016, deducted fees totalling $54,420.51 from GST refunds held on behalf of Mr X's companies without:

(i) obtaining written authority to do so; and/or

(ii) obtaining client consent to the basis upon which fees would be charged; and/or

(iii) submitting invoices on a timely basis setting out the basis for the fees charged,

in breach of the Fundamental Principles of Integrity and/or Quality Performance and/or Rule 9 *Due Care and Diligence* and/or paragraphs 136 and/or 137 of the Code of Ethics (2003) and/or the Fundamental Principles of Integrity and/or Professional Competence and Due Care and/or paragraph 240.2 of the Code of Ethics (2014); and/or

(d) charged fees which were excessive and/or unreasonable relative to the work undertaken, in that:

(i) for the years 2012 to 2016 the Member charged fees to XYZ Limited totalling $12,200 for the preparation of 5 GST returns and/or the submission of 5 nil returns; and/or

(ii) for the years 2014 to 2016 the Member charged fees totalling $11,200 for the preparation of 4 GST returns and/or 13 nil returns,

in breach of the Fundamental Principle of Professional Behaviour and/or paragraph 140 of the Code of Ethics (2003) and/or the Fundamental Principle of Professional Behaviour and/or paragraph 150.1 of the Code of Ethics (2014); and/or

(2) In relation to clients other than Mr X, retained client monies totalling $8,420.66 in respect 11 client tax refunds without justification and/or failed to repay them to clients in a timely manner, in that they were not repaid until after 29 May 2017 (after the PCC's investigator had contacted the Member), in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics (2014); and/or

(3) Failed to comply with PS-2 *Client Monies* (PS-2), in that the Member:

(a) failed to keep client monies separate from the Member's own and/or caused client monies to be paid into the Member's business and/or personal bank accounts instead of a properly constituted trust account in breach of paragraphs 11(c) and or 30 of PS-2; and/or

(b) deducted fees from client monies without prior written authority, in breach of paragraph 50 of PS-2; 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.

(c) failed to provide statements to clients at least annually, in breach of paragraph 61 of PS-2; and/or

(d) failed to maintain adequate systems of internal control over client monies, in breach of paragraph 63 of PS-2; and/or

(e) failed to keep client monies records which clearly disclose all transactions undertaken with regard to the Member's clients as required by paragraph 64 of PS-2, in particular how the balance $1.2million he has received on behalf of clients in his personal bank accounts has been accounted for; and/or

(f) failed to perform monthly client monies reconciliations, in breach of paragraph 67 of PS-2,

in breach of the Fundamental Principle Quality Performance and/or Rules 9 and/or 11 and/or the Fundamental Principle of Professional Behaviour of the Code of Ethics (2003) and/or the Fundamental Principles of Professional Competence and Due Care and/or paragraph 130.1 and/or the Fundamental Principle of Professional Behaviour and/or paragraph 150.1 of the Code of Ethics (2014); and/or

(4) (withdrawn)

(5) Failed to declare GST on fees the Member has retained from client refunds received in his personal bank accounts, in breach of the Fundamental Principles of Integrity and/or Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics (2014); and/or

(6) Failed to keep records required by the Goods and Services Tax Act 1985 in that the Member has not retained accounting records of invoices for the required period of seven years following the change in his accounting system, in breach of the Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour of the Code of Ethics (2014); and/or

(7) Provided false or misleading information to the Institute, in that:

(a) on or about 6 October 2016 stated in a Practice Information Questionnaire ("PIQ") that he had not deducted fees from any client's tax or other refund; and/or

(b) advised the PCC in a letter dated 20 February 2017 that his practice did not operate a Trust Account as he did not, other than in exceptional circumstances, retain client's tax refunds to deduct fees from, when

he had received significant client monies in personal and/or practice accounts and/or had deducted fees from such monies.

DECISION ON LIABILITY

Particular 1

The Tribunal finds that those parts of the Particular which the Member has admitted (or partially admitted, to the extent of that admission) are supported by the evidence before it. As to those parts of the Particular which the Member has denied, or admitted but denied that the conduct constituted a breach of the Fundamental Principle of Integrity:

(1)(a)(i) - *Retained fees of $21,940 from those monies without the consent and/or knowledge of the administrator.*

The Member denied this allegation. For the PCC to succeed it needs to establish on the balance of probabilities that the Member retained the fee about the time of or subsequent to ABC Limited being placed in voluntary administration. In the Tribunal's view, the PCC has not satisfied that onus.

The Tribunal finds on the evidence before it that it is probable that the GST refund from which the fees were retained was received by the Member at latest in September or October 2010, at least nine months before the voluntary administration. That refund related to six monthly GST returns for periods up to and including 30 September 2009. In light of the arrangements between the Member and Mr X about fees which the Tribunal has found to exist (referred to below), and Mr X's recollection of the Member issuing invoices 'maybe a few months before administration' it is likely that the fees were retained shortly after the GST refund was received, some time before the voluntary administration began.

In the Tribunal's view, the reconciliation of the GST refund contained in an email from the Member to Mr X dated 22 September 2011, on which the PCC relies, is inconclusive as to the time or times the fees were retained.

The Tribunal finds that this part of the Particular has not been made out.

(1)(a)(ii) & (iii) - *Made payments of at least $90,434 to other parties on Mr X's instruction, without the knowledge and/or consent of the administrator; and/or failed to make any proper inquiry, either of his client or the administrator, regarding the status of the ABC Limited administration.*

The Member admitted this conduct and the consequent breaches of the Code of Ethics, except that he denied that the conduct breached the Fundamental Principle of Integrity.

The Member said that he was acting on instructions from Mr X in all respects and his actions were not undertaken with any dishonest intent and were not motivated by personal gain. The Member believed that the Administrator was aware of the GST refund through the IRD, and also believed that Mr X would obtain additional funds to take the company out of Administration. The Member also asserted that Mr X had told the Member he had transferred funds into the Administrator's control to be used for the purchase of fuel and that Mr X wanted to negotiate with the Administrator to offset the GST refund against what he had transferred into the Administrator's account – this point is disputed by Mr X but the Tribunal's conclusion below does not require a factual finding on the point.

During the hearing the Member admitted that he knew in July 2011 that the Administrator was in charge of ABC Limited and the Member knew the money he held was ABC Limited's money. To apply the company's money at the direction of one of its directors without the knowledge or consent of the Administrator, irrespective of the reasons for that action, is a very serious matter. In the Member's case this was exacerbated – he failed to research or seek advice on his obligations before making the payments and when he sought advice some nine months after the administration began and as a result provided the company's financial records to the Administrator, the Member failed to advise him that the Member had applied substantial funds of the company without his knowledge or consent. In the Tribunal's view, there is no question that the Member's action in making the payments referred to and the Member's failure to make proper enquiry was a breach of the Fundamental Principle of Integrity – integrity implies not only

honesty but fair dealing and truthfulness. Therefore these parts of the Particular have been made out.

(1)(b) *–On or about 9 February 2015, used a GST refund received on DEF Limited's behalf to make a payment of $20,000 to an unrelated person.*

The Member denied this allegation. The Tribunal finds that the payment the Member made to an unrelated person was sourced from a GST refund received by the Member on DEF Limited's behalf. The Member's evidence was that in terms of undocumented but longstanding arrangements the Member had with Mr X, the Member was entitled to deduct outstanding fees (then $26,570) from that refund. That amount then became the Member's funds (or at least his practice's funds) and could be applied as the Member (or the practice) saw fit.

The issue is what were the terms of the (undocumented) agreement relating to fees. Mr X's evidence was that he had agreed with the Member that, because payments in the fishing industry are irregular, he (or his entities) would pay **outstanding invoices** when funds were received. Also, his recollection was that for many years the Member sent fees invoices and those were paid. It was agreed that the Member would send GST refunds through to him. He stated that the Member had no authority to bank refunds in the Member's or his practice's bank accounts or to deduct fees from those funds. He maintained that was the agreement under cross-examination.

The Member's evidence in support of his authority to (presumably) bank and then deduct fees from GST refunds was that Mr X would phone the Member when GST refunds were due wanting to know the quantum of the refund, and the Member would advise him of the figure that he could expect. When the amount sent to him wasn't that much, the Member said that he assumed that he would have known that the balance was the Member's fee deduction and he would have raised an objection if he felt that wasn't the right thing to do. The Member would provide him a reconciliation if he requested one.

Even given the Member's admitted failings in relation to reporting and invoicing, it is inherently unlikely that Mr X during the phone calls, if they occurred, would be interested in any other figure than the actual amount he or his entities would receive that could be applied to other liabilities. Further, the Tribunal finds the Member's explanations as to why he held onto the ABC Limited net GST refund of approximately $100,000 received some months before voluntary administration in circumstances where both the Member and Mr X acknowledged ABC Limited was struggling financially as lacking logic and credibility and is concerned this point was not put to Mr X in cross-examination.

The Tribunal accepts Mr X's evidence that his expectation (which we find to be consistent with the agreed fees arrangement) was that invoices would be issued before there was any question of fees being paid. As he and his entities were accounting for GST on an invoice basis, there would be an advantage to him in receiving an invoice well before it was paid in accordance with the fees arrangement. Given that this was Mr X's expectation, then, despite the Member's understanding, the Tribunal finds that no agreement was reached to the effect that fees could be deducted by the Member from GST refunds before invoices had been rendered.

There is some documentary evidence consistent with Mr X's version of events. Mr X authorised the Member in writing (on the GST Return Acknowledgement for XYZ Limited for the period ended 31 March 2012 (with refund cheque attached) addressed to the Member's practice) to deduct $6,900 for accountancy fees and [sic] refund the balance. The previous XYZ Limited

GST refund cheque received in November 2011 (the earliest information for XYZ Limited that the PCC's investigator was able to obtain) appears to have been sent to XYZ Limited.

The Tribunal prefers the evidence of Mr X about the terms of the (undocumented) fee arrangements.

It follows that the Tribunal finds that the Member had no authority to deduct the fees from the GST refund and that therefore technically the payment of $20,000 made to Ms W was made with XYZ Limited funds in breach of the Fundamental Principles of Professional Competence and Due Care of the Code of Ethics (2014). Although the Member may have had a genuine belief that he was entitled to do what he (or his practice) did, the Tribunal finds on the evidence that there was no agreement in place to that effect. In the Tribunal's view, this part of the Particular has been made out.

(1)(c) *Between 2012 and 2016, deducted fees totaling $54,420.51 from GST refunds held on behalf of Mr X's companies without:*

(1)(c)(i) *Obtaining written authority to do so;*

The Member accepts that he did not have any written authority but he denied that his conduct breached the Fundament Principle of Integrity. However, the Tribunal finds on the evidence of both the Member and Mr X (and to the extent that there is any inconsistency it prefers Mr X's evidence) that the Member's failure to invoice before making deductions and the way in which he went about dealing with the GST refunds does not exhibit the qualities of fair dealing and straightforwardness that the Fundamental Principle of Integrity requires. It finds this part of the Particular proved.

(1)(c))(ii) *Obtaining client consent to the basis upon which fees would be charged; and/or*

The Member denied this allegation. The PCC has the onus of proving this part of the Particular on the balance of probabilities (as is the case with the other Particulars). The Tribunal does not accept its submission that at some point an "evidential onus" shifted to the Member. The evidence before the Tribunal was that for more than 20 years fees and invoices the Member issued to Mr X or his entities were paid without dispute. There is no evidence that the basis of charging fees (that is, how a fee was calculated) changed in the latter years. The Tribunal finds this part of the Particular not made out.

(1)(c)(iii) *Submitting invoices on a timely basis setting out the basis for the fees charged.*

The Member denied that this conduct was a breach of the Fundamental Principle of Integrity. However, for the reasons set out under 1(c)(i), the Tribunal finds the Member's conduct to have breached that Principle (at the lower end of the scale) as well as the other provisions of the Codes of Ethics forming part of the Particular.

(1)(d) *Charged fees which were excessive and/or unreasonable relative to the work undertaken, in that:*

(i) *for the years 2012 to 2016 the Member charged fees to XYZ Limited totalling $12,200 for the preparation of 5 GST returns and/or the submission of 5 nil returns; and/or*

(ii) *for the years 2014 to 2016 the Member charged fees totalling $11,200 for the preparation of 4 GST returns and/or 13 nil returns…*

The Member denied this part of the Particular.

Mr Selwyn-Smith, the PCC's investigator and an experienced accountant and practice reviewer, formed the view on the documentation the Member provided to him that the fees the Member charged for the work disclosed by that documentation were excessive. The Member's counsel highlighted that the fees covered a three and a five year period. The Member's evidence was the work was time consuming due to the system that Mr X had of filing everything in a box and delivering to the Member for him to sort.

The Member's evidence was also that he had over the years provided other advice to Mr X - the Member generally communicated by text and phone but he did not have a practice of making file notes of key advice given. Mr X's evidence was that the Member gave little advice to him in the relevant years and performed few services other than in relation to GST.

The Tribunal has carefully reviewed all of the evidence and submissions of the parties. Although the Tribunal is not convinced that the Member provided significant other advice or services to Mr X or his entities, in its view, the PCC has not in any event established on the balance of probabilities that the fees were excessive – the Tribunal finds this part of the Particular not made out.

Particular 3

The Member admitted this Particular (and the Tribunal finds the parts of the Particular the Member has admitted are made out on the evidence before it) except, in relation to Particular 3(e), the Member claimed that a number of the people from or on behalf of which sums of money had been received were either not clients or were not clients at the time of the transactions, and the amount of client monies involved was significantly less than $1.2 million.

The Member's evidence was that the amount of client monies (including client monies provided to the Member for personal purposes which he says he didn't appreciate he was required to deal with in terms of PS-2 *Client Monies* but now accept he did) was just north of $100,000, not $1.2 million. Whilst PS-2 encourages Members to treat non-client monies that fall under their control in the same way as client monies, and that clearly is best practice, the Tribunal accepts the Member's submission that failure to do so is not a breach of PS-2. Taking into account the seriousness of this allegation, the Tribunal finds that the PCC has been unable to establish on the balance of probabilities that the amounts involved in the alleged breach of Particular 3(e), as it has been framed (reliance only on PS-2),_ were more than the Member admitted. It notes the admitted amount is still a significant sum in the circumstances.

Particular 5

The Member admitted this Particular except that he denied that his conduct was in breach of the Fundamental Principle of Integrity.

The Member categorised his conduct as sloppy – in the Tribunal's view it was grossly negligent. However, the Tribunal is not satisfied on the balance of probabilities that there was any dishonest intent or that the conduct constitutes a lack of straightforwardness or fair dealing and therefore

finds the allegation that the Member's conduct breached the Fundamental Principle of Integrity not made out.

Particulars 2, 6 and 7

The Tribunal finds these Particulars, which the Member has admitted, are made out on the evidence before it.

The Charges

The Member has pleaded guilty to Charges 3-5.

It follows from the Member's admission of Particular 7 and the Tribunal's assessment of the evidence that Charge 5 is proved. It also follows that in respect of the other Particulars the Member has admitted or which the Tribunal has found to be established, Charge 4 is proved.

The Tribunal also finds that all of the Particulars except Particular 7, to the extent that they have been made out, support Charge 3. The conduct amounts to be negligence and incompetence. The seriousness of the conduct, or its sustained nature, clearly reflects on the Member's fitness to practice as an accountant and, because much of it relates to the inappropriate way in which the Member dealt with client funds, the conduct also tends to bring the profession into disrepute.

In the context of the Member's acceptance of Charges 3 and 4, the issue in contention is whether some or all of the Member's conduct is sufficiently serious to also constitute misconduct in a professional capacity, or conduct unbecoming an accountant, the two Charges the Member has denied.

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.

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 PCC submitted that if one looks collectively at the extent and seriousness of the failings in dealing properly with client monies, dealing with ABC Limited's funds without reference to the Administrator and what the PCC says is the reckless or deliberate provision of false and misleading information to the Institute (Particular 7), the conduct constitutes professional misconduct.

The Member submitted:

- There has been no dishonesty, fraudulent behaviour or deliberate misappropriation of funds on the Member's part or any conduct motivated by personal gain or that involved deliberate concealment or deliberate misleading of any particular party.
- That the Member should not face double jeopardy or "double dipping" as a result of some of the Particulars or parts of the Particulars being interlinked or examples of the same conduct. For example, because Particular 7 and Charge 5 are two sides of the same coin, it would be improper to have regard to Particular 7 again in assessing whether that conduct either alone or together with other conduct constitutes professional misconduct.
- None of the conduct on its own or to the extent the Tribunal is entitled to consider it cumulatively constitutes either professional misconduct or conduct unbecoming an accountant.

We note that the Charges are laid in the cumulative as well as the alternative, as are the allegations made in the Particulars.

The Tribunal is conscious that there must not be double jeopardy. However, it does not accept the Member's submission that just because the conduct referred to in Particular 7 supports Charge 5, it could not, if found to be sufficiently serious, also support Charge 1 or Charge 2. By their very nature, all the Particulars except Particular 7 support Charge 4, but there cannot be any serious suggestion that the conduct the subject of those Particulars is unable to be considered to be conduct unbecoming or professional misconduct if it falls within the scope of those Charges. The Tribunal sees no distinction between the two situations. The way in which the Charges are pleaded and the Particulars are framed enables the Tribunal to find that one or more of the Particulars support (individually or collectively) one or more of the Charges. The Tribunal's legal assessor endorsed this view. In the Tribunal's view, the comments of the Appeals Council in *Member Y* (17 October 2016) at [1], [3] and [14] – [15] also support its approach.

In the Tribunal's view, the Member's conduct admitted or found in Particulars 1(a)(ii) & (iii), and Particulars 2, 3 and 7 collectively constitutes misconduct in a professional capacity.

As to Particular 1(a)(ii) & (iii) dealing with approximately $100,000 of client funds without the authority of the client is at the highest end of the scale of serious misconduct. The PCC referred to this conduct as wilful blindness. In the Tribunal's view, given the admissions the Member made during the hearing, it was more deliberate. The Member was aware that the Administrator was in charge of the company before the Member made those payments and, when later providing him with financial information the Member held, the Member failed to disclose to him the Member's payment of company funds to other parties.

In relation to Particular 2, although the amounts involved were not significant, we agree with the PCC's investigator that the Member held onto those funds for far longer than the Member should have and he was concerned that some were only repaid after his investigations into the Member's bank accounts and those of the Member's practices commenced.

In relation to Particular 3, the failings were of such a degree and involved significant client monies in the hundreds of thousands of dollars that the Member's conduct fell very significantly below the standards expected of a Chartered Accountant. Clients expect a Chartered Accountant to deal with client monies in accordance with the Rules of the Institute and to account for them in a timely manner.

In relation to Particular 7, the Tribunal accepts the PCC's submission that the evidence supports the conclusion that the false or misleading information was probably provided deliberately. In any event, against the background of what was actually happening in the practice, there was a very serious failure to communicate with the Institute in the appropriate way. The Tribunal found the Member's explanations about his conduct, and his responses to questions asked in cross-examination, less than convincing. The Member certainly did nothing to dispel the PCC's allegation, which appeared on the evidence to be well founded, that the Member knew that the information provided was false.

Accordingly, the Tribunal finds Charge 1 proved.

The Tribunal called for submissions from the Member and the PCC as to penalty, costs, suppression orders and publication.

PENALTY

The PCC sought the Member's suspension for a period of not less than two years, submitting that that penalty was consistent with the Tribunal's approach in prior cases. It described the Member's conduct as extremely serious, involving elements of dishonesty (in dealing with the ABC Limited's administrator and the Institute), some self-interest (in the provision of misleading information to the Institute and use of clients' tax refunds) and significant incompetence (in the grossly negligent handling of client monies). There were numerous instances of breach of the Fundamental Principle of Integrity, which the PCC submitted is the cornerstone of the designation "Chartered Accountant".

The Member submitted that his culpability could be characterised as follows:

- Negligence or incompetence in a number of different areas, which was sufficiently serious and extensive as to warrant the Tribunal's finding of misconduct;
- The integrity breaches involved a lack of fair dealing and straightforwardness but not more overt dishonesty and not fraudulent conduct or any misappropriation;
- He conduct was not motivated by self-interest or personal financial gain; and
- Although the Member did not admit professional misconduct, he did admit the large majority of the conduct underlying that finding.

The Member acknowledged that a penalty of at least a suspension was the appropriate response in this case to the finding of professional misconduct – a striking off would be disproportionate. The Member submitted that a suspension of no more than 18 months was warranted.

When reaching its decision, the Tribunal has had regard to the following mitigating factors:

- The Member's 25 year unblemished disciplinary record;
- The Member's cooperation with the Institute and his admission of a large majority of the relevant conduct at an early point; and
- The Member's remorse and regret for his professional failings.

It has also had regard to testimonials the Member submitted, two of which were from lawyers.

The Tribunal considers that there were elements of self-interest in relation to the Member's mishandling of ABC Limited's funds, which the Member acknowledged was motivated by a misplaced sense of loyalty to the person he continued to regard as his client, and in some of his dealings with the Institute. However, the Tribunal accepts, as does the PCC, that the conduct does not disclose the more overt self-interest found, for example, in *Gormack* (14 November 2016) or misappropriation for personal benefit such as that in *O'Reilly* (28 November 2017), where the members concerned were struck off.

In the Tribunal's view, a strike off in this case would be a disproportionate penalty. The Tribunal considers a period of suspension would be the least restrictive penalty which recognises the seriousness of the misconduct, facilitates the Tribunal's role in setting and maintaining professional standards, punishes the Member and most appropriately protects the public and deters others.

However, in the Tribunal's view, a period of 18 months' suspension is insufficient to achieve those objectives.

The Tribunal was referred to its decisions in *Moffatt* (18 December 2014) where the member, amongst other failings, accepted cash payments without declaring them to the IRD; *Hennessy* (29 July 2015) where the member repaid himself before, and to the detriment of, his clients; and *Landon* (employee theft of $437 with mitigating circumstances) – in the first two cases, the penalty was a two year suspension and in the third, 30 months suspension. The Tribunal accepts the PCC's analysis that the Member's conduct may be considered less egregious than in those three cases but, as the PCC has pointed out, it is also broader in scope than that dealt with in *Miller* (29 August 2017) - retrospectively amending the accounting treatment of a $740,000 loan and providing false/misleading information to a liquidator; and in the Appeal's Council's decision in *Lee* (19 July 2013) - falsely representing audit experience when self-registering to obtain a transitional auditor licence - where penalties of two years' suspension and 18 months' suspension respectively were imposed.

In the Tribunal's view, the Member's conduct overall, particularly in light of his mishandling of the ABC Limited's funds and the extent of his failures to deal with client monies in the manner required by PS-2, warrants a suspension of two years. Although no two cases are the same, the Tribunal considers such a penalty is broadly in line with those referred to above.

Pursuant to Rule 13.40(b) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that Clifford Kean-Teik Chan be suspended from membership of the Institute for a period of two years.

COSTS

The PCC sought full costs of $59,022 on the basis that all of the Charges were proved and with minor exceptions the Particulars, and the breaches of the Code that were alleged, had been established.

However, the Member submitted that he successfully defended serious allegations. The Member also acknowledged his failings from an early point. The Member asserted that the PCC had pursued a number of Particulars which occupied a significant amount of hearing time which were ultimately not proven (five of the ten contested points traversed at the hearing). The Member submitted that in the circumstances he should be required to pay no more than half the costs.

The Tribunal accepts that there is some force in the Member's submissions that costs should be reduced because the Member succeeded on five of ten contested aspects of the Particulars. However, to be weighed against this is that the PCC was put to the task of proving the most serious Charge, which it succeeded in doing.

Having regard to all the submissions and its Practice Note on Costs, the Tribunal considers that an award of $47,000 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 Clifford Kean-Teik Chan pay to the Institute the sum of $47,000 in respect of the costs and expenses of the hearing before the Tribunal, the investigation by the Professional Conduct Committee and the cost of publicity. No GST is payable.

PUBLICATION ORDER

The PCC sought publication of the Tribunal's decision on the Institute's website, in *Acuity* magazine and in the *Christchurch Press*. The Tribunal does not understand the Member to be objecting to that. In the Tribunal's view, given the nature of the Member's conduct, extending publication to the *Christchurch Press* is appropriate.

Pursuant to Rule 13.44 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, the official publication *Acuity* and in the *Christchurch Press*, with mention of the Member's name and locality.

SUPPRESSION ORDERS

The Member sought an order suppressing the names of the accounting practices in which the Member was involved, any other practitioners associated with those practices and the names of the clients involved. The PCC supported the suppression of details of clients and unrelated third parties. Disciplinary proceedings are initiated against a member, not firms, which, as in this case, often comprise more than one member. The Tribunal generally suppresses the names of firms and clients and sees no reason to depart from that practice in this case.

Pursuant to Rule 13.62(b) of the Rules of the New Zealand Institute of Chartered Accountants, the Disciplinary Tribunal orders that the names of the accounting practices connected with the Member, any other practitioners associated with those practices and the clients involved be suppressed.

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.

No decision other than 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.

MJ Whale FCA
Chairman
Disciplinary Tribunal