

IN THE MATTER OF

A Complaint made under section 34(1)(a) of the
Professional Accountants Ordinance (Cap. 50)

BETWEEN

The Registrar of the Hong Kong
Institute of Certified Public
Accountants

COMPLAINANT

AND

Leung Kent Ning, Louis (F00550)

RESPONDENT

Before a Disciplinary Committee of the Hong Kong Institute of Certified Public
Accountants (“Institute”)

Date of Hearing: 29 April 2015

Date of Written Decision: 13 July 2015

Members: Mr. CHAN, Yiu Chong, Christopher (Chairman)
Mr. HO, Man Tat
Ms. LAM, Po Ling, Pearl
Mr. CHAN, Siu Lun, Stephen
Mr. LO, Kai Ming, Charles

ORDER & REASONS FOR DECISION

1. On 29th April 2015, at a Disciplinary Committee (“DC”) hearing, the members of the DC reached an unanimous decision that the complaint against the Respondent was proved. The following are the reasons for decision and the orders for the penalty and costs imposed.

The Complaint

2. The complaint laid by the Complainant against the Respondent is set out in a letter dated 1 April 2014 (the “Complaint”) from the Registrar of the Institute to the Council of the Institute for consideration of referring the Complaint to the Disciplinary Panels:

Section 34(1)(a)(vi) of the Professional Accountants Ordinance ("PAO") applies to the Respondent in that he had failed or neglected to observe, maintain or otherwise apply paragraphs 290.4 and 290.6 of the Code of Ethics for Professional Accountants as he was the engagement director of Louis Leung & Partners CPA Limited who signed off the Audit Report of Wellmart Holding Limited ("WHL") for the financial year ended 31st December 2010 ("the Audit Report") even though he had been appointed and acted as the Chief Financial Officer ("CFO") of WHL during that period.

The particulars of the Complaint

3. The facts and evidence in support of the Complaint are as follows:-

The Respondent's appointment as the CFO of the Wellmart Group in the financial year covered by the Audit Report

- (a) On 12 January 2010, the Wellmart Group appointed the Respondent as its CFO. The Wellmart Group includes WHL. On the same day, the Wellmart Group issued an internal announcement stating that the Respondent, as the CFO, was responsible for the financial management of Wellmart Group and would visit the shops and restaurants under the Group to enquire about their operation. The Respondent attended the management meeting of the Wellmart Group on the same day. He was introduced by the Chairman as being responsible for introducing new revenue sources and costs cutting measures for the Wellmart Group. The Respondent's appointment as CFO of the Wellmart Group ended in February 2011. The Audit Report was for the year ended 31st December 2010. It is beyond dispute that the Respondent had served as CFO of the Wellmart Group during the period covered by the Audit Report.

The Respondent's attendance at management/board meetings of the Wellmart Group

- (b) The Respondent attended the management meeting of the Wellmart Group on 10 February 2010 and advised on the operational strategies in respect of, inter alia, (i) the business of the shops situated at housing estate; (ii) obtaining government subsidies for staff training; and (iii) the reaction to the market/competitors and improvement of efficiency of kitchen operation.
- (c) On 5 May 2010, the Respondent attended a board meeting. The minutes of the meeting recorded that the Respondent undertook to refer a candidate to fill the position of accountant for Wellmart Group and

discussed with the board the feasibility of changing the business of one shop.

- (d) On 30 December 2010, the Respondent attended another management meeting of Wellmart Group. The minutes of meeting stated that the Respondent was to follow up the registration of the two brands on Mainland China and to complete the warehouse operational cost calculation and discuss the matter with Oscar Lam ("Lam"), then chairman of Wellmart Group and Mr. Jose K.K. Tam ("Tam"), then vice chairman of Wellmart Group.

The Respondent's role as CFO of the Wellmart Group

- (e) In a letter by the Respondent to the Complainant dated 8th August 2012, the Respondent stated that he worked for the Wellmart Group upon the request from Tam, with whom he had a long standing professional relationship. The Respondent agreed to work for Wellmart Group as its CFO for three afternoons per week on a regular basis without limitation on the scope of his work. In response to Tam's request, the Respondent authorized his photograph to be included in the Wellmart Group organisational chart under the title of CFO and business cards of the same were prepared for him so as to facilitate carrying out his work. It is noted that in the said letter the Respondent stated that he had not asked those things to be done himself.
- (f) The Respondent also stated in the same letter dated 8th August 2012 that his work covered 3 key areas: (i) advisory and management support of the board of directors (including drafting of management meeting minutes, providing advice to the board, handling Wellmart Group's expansion plan, and setting up purchasing department for the Wellmart Group), (ii) financial planning and control; and (iii) operation. The Respondent also stated that he visited the shops within Wellmart Group from time to time to oversee the operation and give advice to shop managers as and when required.

The Respondent's involvement in financial management/control and operations of the Wellmart Group

- (g) As the CFO of the Wellmart Group, the Respondent was involved in the financial management and control of Wellmart Group. In an email dated 5 Oct 2010, the Respondent reported to Tam and Lam regarding the cashflow forecast of Wellmart Group for September to December 2010 which indicated that there would be a shortage of cash of around HK\$ 10 million by the year end. Notwithstanding a loan in the sum of HK\$ 7 million obtained by Wellmart Group, there would still be a shortage of HK\$ 3 million. The Respondent invited Tam and Lam for a meeting to discuss the matter as he saw it important that a direction

was required to be given to the staff to overcome the issue of shortage of cash.

- (h) In an email dated 19 November 2010, the Respondent repeated his concerns about Tam's handling of the financial situation and provided Tam with his view of the operations of Wellmart Group in respect of food price increment and personnel management. The Respondent also commented that in the circumstances, the business of Wellmart Group would likely fail unless there was a breakthrough in its management, operation and finance.

The Respondent's post financial year-end involvement in financial management/control and operations of the Wellmart Group

- (i) In an email dated 6 January 2011, the Respondent provided Lam with the cashflow statement prepared by an accounting staff of Wellmart Group for January 2011 and alerted Lam that there was a shortage of HK\$ 5.2 million for January and also a HK\$ 5.2 million in arrears not being included. The Respondent opined that the situation was very critical and Wellmart Group would collapse at any moment.
- (j) In addition to financial control and management, the Respondent was also involved in operations of Wellmart Group. In an email dated 4 May 2011, the Respondent brought to Tam's attention an obvious decrease in business in April 2011. The Respondent stated that various issues such as shortage of staff, supply of food and deterioration of food quality could have caused the decrease in business. The Respondent provided advice to Tam so as to deal with such issues.

The above facts and evidence concerning the Respondent's tenure as CFO of the Wellmart Group are supported by letters, emails and meeting minutes. They are largely not in dispute or not disputable.

The Code of Ethics

- 4. The Code of Ethics for Professional Accountants (revised June 2010 and February 2012, effective on 1 January 2011) ("**Code**") states:

"290.4 In the case of audit engagements, it is in the public interest and, therefore, required by this Code of Ethics, that members of audit teams, firms and network firms shall be independent of audit clients.

290.6 Independence comprises:

...

Independence in Appearance

The avoidance of facts and circumstances that are so significant that a reasonable and informed third party would be likely to conclude, weighing all the specific facts and circumstances, that a firm's, or a member of the audit team's, integrity, objectivity or professional skepticism has been compromised."

The Burden of proof

5. The DC is fully aware and accepts that the burden of proving the complaint rests with the Complainant.
6. As to the standard of proof, it has been settled authoritatively by the Court of Final Appeal in *Solicitor v Law Society of Hong Kong* (FACV 24/2007, 13 Mar 2008) that the standard of proof in disciplinary proceedings is the civil standard and civil standard alone. This meant (*per* Bokhary PJ at §116):-

"The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability."
7. The Court of Appeal has held that this approach would also apply in the case of professional misconduct of accountants – *Registrar of HKICPA v Chan Kin Hang Danvil*, CACV 246/12, 4 April 2014.

The Respondent's arguments

8. The Respondent made oral submissions before the DC at the hearing. Basically the Respondent has made the following major arguments through written and oral submissions as his defence which were not accepted by the DC:-
 - (a) The Respondent and/or his legal representatives argued that the Respondent was not a CFO in fact. The "CFO" was a mere title. The Respondent did not have any management power in the Wellmart Group. He did not involve himself in preparing and/or exerting any influence in preparing financial records and/or financial statements for the Group. He was a mere consultant in fact.

The DC does not agree. The DC is convinced by the facts and evidence and the submissions of the parties that the Respondent's appointment as CFO of Wellmart Group was not routine/mechanical or administrative in nature. The Respondent held a position of responsibility and was involved in the management and financial control of the Wellmart Group. As the CFO, the Respondent was a senior personnel of the organization within the meaning of paragraphs

290.143 to 290.145 of the Code.

Furthermore as the engagement director of Louis Leung & Partners CPA Limited who signed off the Audit Report, the Respondent should be independent of WHL. The independence requirement requires independence not just in fact, but also "in appearance". However, the Respondent's role as CFO of the Wellmart Group and his involvement in its operation, management/financial control was a fact and circumstance so significant that a reasonable and informed third party weighing all the specific facts and circumstances would be likely to conclude that his and his practice's objectivity and professional skepticism as the auditor had been compromised. The Respondent was therefore in breach of paragraphs 290.4 and 290.6 of the Code.

- (b) The Respondent has through his legal representatives made submissions that § 290.144 qualifies "directors", "officers" and "employees" (the 3 categories of persons) by "in a position to exert significant influence over the preparation of client's accounting records or the financial statements". They contended that the said §290.144 applies to all the said 3 categories of persons grouped together which have power "to exert significant influence over the preparation of the client's accounting records or the financial statements".

They went on to argue that since it was known to the whole world that the Respondent, though titled CFO, whose power had been emasculated so that he had become a mere nominal figure, a reasonable person informed of this piece of information would not have concluded that there would have been compromise of independence where the nominal figure of "CFO" also acting as the group's auditor audited the financial statements of WHL.

The DC does not accept this argument and considers that the Respondent and/or his legal representatives misunderstood paragraph 290.144 of the Code. The "qualification" as referred to only applied to "employees", but not the other 2 categories, so that the correct interpretation is that the 3 categories of persons referred to should be:-

- (i) directors; or
 - (ii) officers; or
 - (iii) employees in a position to exert significant influence over the preparation of the client's accounting records or financial statements.
- (c) The Respondent emphasized, time and again, that he was not a signatory of bank accounts and did not approve expenses. He had no

“functional responsibilities” as a CFO. The DC considers that this argument is irrelevant because the said limitations, namely, that the Respondent was not signatory of bank accounts and did not approve expenses were not known by third parties.

A third party may only be able to see the "appearance" of something and may not be seized with all the facts under the "surface" - in particular the internal arrangements between an office-holder and an entity not observable to the outside world; see §107 of the *Anthony Wu Ting Yuk's* case (Proceedings No.:D-03-1C16H).

A third party "weighing all the specific facts and circumstances" under the heading "Independence in Appearance", would consider those facts and circumstances which are observable to the outside world. Otherwise it makes no sense for this provision to refer to "Independence in Appearance", while referring to "facts and circumstances" which could only be known to an "insider". Accordingly, this argument of the Respondent is rejected.

- (d) The Respondent argued that his appointment as CFO had ended in February 2011 whereas the audit for the year 2010 only started in June 2011. Thus when he was acting as auditor he was no longer the CFO. He was not in breach of the Code.

Paragraphs 290.143 to 290.145 of the Code provide for the situation where a member of the audit team has recently served as a director, officer or employee of the audit client, under the heading “*Recent Service with an Audit Client*”. Paragraph 290.144 of the Code is directly relevant to the present case:-

“290.144 If, during the period covered by the audit report, a member of the audit team had served as a director or officer of the audit client, or was an employee in a position to exert significant influence over the preparation of the client’s accounting records or the financial statements on which the firm will express an opinion, the threat created would be so significant that no safeguards could reduce the threat to an acceptable level. Consequently, such individuals shall not be assigned to the audit team.”

Paragraph 290.144 of the Code can be contrasted with paragraph 290.145 of the Code which provides:-

“Self-interest, self-review or familiarity threats may be created if, before the period covered by the audit report, a member of the audit team has served as a director or officer of the audit client, or was an employee..... The

existence and significance of any threats will depend on factors such as:-

- The position the individual held with the client;
- The length of time since the individual left the client; and
- The role of the professional on the audit team.

The significance of any threat shall be evaluated and safeguards shall be applied when necessary to reduce the threat to an acceptable level “

It can be seen that the main differences between paragraphs 290.144 and 290.145 of the Code are that:-

- (a) the former applies when the auditor served as director or officer (etc.) of the audit client during the period covered by the audit, whereas the latter applies when the services occur before the period;
- (b) paragraph 290.144 contains an absolute prohibition by stating categorically that “the threat would be so significant that no safeguards could reduce the threat to an acceptable level”.

As the Respondent served as CFO of the audit client during the period covered by the audit, the prohibition is absolute. The Respondent’s arguments cannot stand.

- (e) The Respondent alleged that the Institute had messed up its own complaint with those of the original complaint. The case of LAW FEI SHING v. The Hong Kong Institute of Certified Public Accountants [HCAL 132/2014] gives an answer to the Respondent’s argument. Judge Zervos in the said case said at paragraphs 24 and 25 of the said Judgement:-

24. As the General Counsel rightly explained, the Registrar had the power to inquire into a matter and refer a complaint based upon the inquiry carried out. There was no substance to the contention by the applicant that the Registrar did not have the power to make a complaint on his own initiative under section 34(1A) when a complaint had been received under section 34(1) which he was obliged to submit to the Council. The Registrar had inquired into the original complaint which he was entitled to do under section 34(1A) and having done so, where he had reason to believe that subsection (1)(a) or

(b) applied, he was required to submit the facts to the Council which would determine whether or not to refer the complaint to the Disciplinary Panels.

25. The applicant complained that the Registrar expanded the original complaint and failed to submit the complaint in its original form. This is a non sequitor. If this was an expansion of the original complaint then the original complaint is contained in it. In addition, if it is being suggested that the Registrar is limited to submitting to the Council the original complaint then that is simply contrary to section 34(1A). It would appear that the Registrar in examining the subject matter of the complaint and the materials supplied in support of it or through further inquiry arising from the original complaint, identified other matters that caused him to invoke the power under section 34(1A). This in my view the Registrar was clearly entitled to do.”

In short, the Institute is entitled to bring the present complaint against the Respondent out of its own volition. The DC sees nothing wrong with it.

Penalty and costs

9. The Respondent has been a CPA since 1974 and is a senior member of the CPA profession. According to the Respondent, he has been the President of The Association of Chartered Certified Accountants and the President of The Society of Chinese Accountants and Auditors. He has given training lessons to the accounting associations of Dongguan and Huizhou of Mainland China and is very conversant with the rules relating to the independence requirement. This assertion of the Respondent flies in the face of his lack of sufficient and true introspection of the nature, extent and seriousness of the breaches that he had committed and how it would damage the reputation of the accountancy profession as a whole. During the hearing, the Respondent blatantly asserted that acting as CFO or director of audit client is “common practice” among smaller CPA firms. He even went so far to assert that if the smaller CPA firms refused to act as CFO or director of audit clients, they will lose the clients as well, suggesting that the smaller CPA firms may run out of business if they turn down the clients’ requests.
10. At the hearing and in the written submissions on sanctions, the Respondent made admission that he was also acting as CFO of another audit client. Although the DC has no intention to widen the sanction to be imposed due to the said admission (which may be the subject of another complaint), the DC considers the Respondent’s admission is consistent with a total lack of understanding about the nature or seriousness of the breach.

The Respondent's admission demonstrates his erroneous perception of the "common practice" among smaller CPA firms. This erroneous perception has caused the DC much concern.

11. It is noted that the Respondent has maintained a staunch defence of the complaint against him, as manifested by the contemptuous tone of his correspondence with the Institute and the lack of professional courtesy displayed in those letters. Even in the written submissions on sanctions, the Respondent continued to maintain that he was not in breach of the Code. Throughout the complaint proceedings, the Respondent has not shown a single sign of remorse. It is for this reason that the DC considers that an order for the cancellation of his practising certificate is necessary.
12. The DC holds the view that a strong message needs to be sent out to the accountancy profession that serious and flagrant breaches of the core principle of independence or apparent independence as required by the Code will be viewed seriously by the DC. The DC wishes to convey clear message to the profession that any such "common practice" among smaller CPA firms (as suggested by the Respondent) is clearly wrong.
13. The DC has taken into consideration the Respondent's age, the unfortunate death of his wife and his younger brother, his health and financial situation and his grave concern in the past three years in the course of bringing these disciplinary proceedings to a hearing and final determination.
14. In the Respondent's submissions on sanctions, the Respondent suggests that the Complaint should have been handled in Chinese, otherwise it might have led to injustice. We do not agree. English is still an official language in Hong Kong. Before the hearing, the Respondent has been notified that he has the right to get assistance of an interpreter. In any event, all the arguments of the Respondent have been carefully considered by the DC. The DC has no doubt that the use of language in the Complaint, whether it be English or Chinese, would not and could not affect the fairness of the outcome of the Complaint.
15. The DC recognises the general principle that costs should follow the event. The conduct of the defence by the Respondent necessitated costs to be incurred in the proceedings and none of the defences raised by the Respondent was accepted by the DC as they were unmeritorious. After considering all circumstances of the case, the DC makes the Order below.

Order

16. It is ordered that:-

- (1) the practising certificate issued to the Respondent in 2015 be cancelled under section 35(1)(da) of the PAO and it shall take effect on the 40th day from the date of the Order;
- (2) a practising certificate shall not be issued to the Respondent for the year 2016 under 35(1)(db) of the PAO;
- (3) the Respondent do pay a penalty of HK\$100,000.00 under section 35(1)(c) of the PAO; and
- (4) the Respondent do pay the costs and expenses of and incidental to the proceedings of the Complainant in the sum of HK\$100,000.00 under section 35(1)(iii) of the PAO.