

IN THE MATTER OF

Complaints made under section 34(1)(a) of
the Professional Accountants Ordinance
(Cap. 50) ("PAO")

BETWEEN

The Registrar of the Hong Kong Institute of COMPLAINANT
Certified Public Accountants

AND

The Respondent RESPONDENT

Members:

REASONS FOR DECISION

Introduction

1. These proceedings started with a letter from the Registrar of the Hong Kong Institute of Certified Public Accountants ("HKICPA") dated 1st April 2010 to the Council of the HKICPA setting out the background and complaints against the Respondent.
2. The gist of the complaints against the Respondent was that he was "involved" (the word is used in a broad sense here), in his capacity as an equity partner of

[a CPA practice], in a conspiracy to defraud committed by another member of the HKICPA, [Mr. X], on [Mr. X]'s then employer ["a client company"] and his subsequent conduct in attempting to mislead the ICAC officers investigating into this matter. The amount defrauded from [the client company], by means of a false debit note issued by [the CPA practice] dated 13th January 2005 (the "False Debit Note"), was HK\$432,000. On 14th June 2008, [Mr. X] was convicted, after trial, of the charge of conspiracy to defraud and sentenced to 18 months of imprisonment at the District Court and his appeal to the Court of Appeal was dismissed. The Respondent gave evidence at [the trial] under immunity. It may be pertinent to note that another partner of [the CPA practice] and a female friend of [Mr. X] were also defendants in [the trial]. They were acquitted after trial.

3. More details of the facts were set out in a document entitled "the Respondent's Admitted Facts" which is appended hereto and which was submitted by the Respondent to this Committee on 18th April 2011 for the purpose of these proceedings.

The Complaints

4. The original complaints against the Respondent as set out in the Registrar's letter (referred to in paragraph 1 above) are as follows:-

1st Complaint

Section 34(1)(a)(viii) of the PAO applies to the Respondent in that he was guilty of professional misconduct, namely, being involved, through his position as an equity partner of [the CPA practice], in a conspiracy with [Mr. X] as a result of which a [client company] of [the CPA practice], was deceived into paying \$432,000 for work which had never been rendered by [the CPA practice].

2nd Complaint

Alternatively, section 34(1)(a)(vi) of the PAO applies to The Respondent in that he failed or neglected to observe, maintain or otherwise apply a professional standard, namely Statement 1.200 "Professional Ethics – Explanatory Foreword" (*Revised April 1999 and September 2004 (name change)*) as a result of his failure to prevent the debit note from being issued.

3rd Complaint

Section 34(1)(a)(vi) of the PAO applies to The Respondent in that he failed or

neglected to observe, maintain or otherwise apply a professional standard namely Statement 1.200 "Professional Ethics – Explanatory Foreword" (*Revised April 1999 and September 2004 (name change)*) by giving a false statement in an attempt to mislead the Independent Commission Against Corruption ("ICAC") when being interviewed by ICAC officers.

Statement 1.200 "Professional Ethics – Explanatory Foreword" (*Revised April 1999 and September 2004 (name change)*) provides:

"4. A member should follow the ethical guidance of the HKICPA and in circumstances not provided for by that guidance should conduct himself in a manner consistent with the good reputation of the profession and the HKICPA."

The course of the proceedings

5. The Respondent initially pleaded not guilty to these complaints. Accordingly, the parties filed their respective cases and replies as well as checklists during the period from August to November 2010. There then followed a directions hearing held on 28th February 2011. The main issues dealt with at the directions hearing were whether and to what extent this Committee could rely on the transcript and ruling in [the trial] as evidence in these proceedings and whether live witnesses (e.g. [...] others involved in the case) should be called to testify at the disciplinary hearing.
6. The conclusion of the directions hearing was, in gist, that whilst this Committee could refer to the transcript and ruling in [the trial] as hearsay evidence, with proper weight to be given as appropriate, the Complainant was required to make efforts to locate and summon the relevant witnesses to testify at the hearing. This Committee would like to note here that in light of the contentiousness of the proceedings, the potentially complicated issues of law and evidence to be dealt with at the hearing and the fact that the Respondent had indicated all along that he would be represented by senior counsel at the hearing, this Committee then invited the Complainant to consider engaging senior counsel to advise and represent the Complainant in the forthcoming hearing.
7. Shortly after senior counsel for the Complainant [...] was engaged, the parties

came to an agreement on the disposal of these proceedings. By a letter dated 14th April 2011 to this Committee, the parties informed this Committee that they agreed to amend Complaints 2 and 3, to which the Respondent would plead guilty, on the basis of the Respondent's Admitted Facts which is appended hereto, whilst Complaint 1 was not to be proceeded with.

8. The amended Complaints 2 and 3 read as follows:-

Amended Complaint 2

Contrary to section 34(1)(a)(vi) of the Professional Accountants Ordinance, The Respondent failed or neglected to observe, maintain or otherwise apply a professional standard, namely Statement 1.200 "Professional Ethics – Explanatory Foreword" (*Revised April 1999 and September 2004 (name change)*) in that:

- a) he had failed to take sufficient steps to prevent the issuing of the debit note by [the CPA practice] and this failure was conduct which was inconsistent with the good reputation of the profession and the HKICPA; and
- b) as a result of his failure to prevent the debit note being issued, his failure to report the matter despite knowing that [the client company] had been defrauded was a conduct which was inconsistent with the good reputation of the profession and the HKICPA.

Amended Complaint 3

Contrary to section 34(1)(a)(vi) of the Professional Accountants Ordinance, The Respondent failed or neglected to observe, maintain or otherwise apply a professional standard, namely paragraph (e) of section 100.4 "Fundamental Principles" as elaborated in section 150.1 of the Code of Ethics for Professional Accountants (*issued December 2005, effective on 30th June 2006*) when he gave false statements to ICAC officers in an interview, with an attempt to mislead them, which position was corrected during and before the interview was concluded; which was conduct that was inconsistent with the good reputation of the profession and the HKICPA.

9. In response to queries raised by this Committee, the Complainant clarified that their proposal to dispose of these proceedings, which was agreed to by the Respondent, was that they would not withdraw Complaint 1, but would offer no further evidence thereon and that they invited this Committee to dismiss Complaint 1 on the basis that the Respondent plead guilty to the Amended

Complaints 2 and 3.

10. This Committee was not entirely satisfied with the agreed proposal of the parties. Independent opinion was sought by this Committee from another senior counsel [...], who advised that the proper way to dispose of these proceedings, in light of what had happened, should be for this Committee to accept the parties' joint application to amend both Complaints 2 and 3 and to dispose of these two Amended Complaints on the basis of the admission made by the Respondent, whilst Complaint 1 shall remain on the record and is not to be proceeded with without an order from either the Court of First Instance or the Court of Appeal.

Findings

11. This Committee will not set out the detailed reasoning of [its senior counsel]'s advice here. Suffice it to say that this Committee found [its senior counsel]'s proposed course for dealing with the complaints to be preferable. As regards the original joint application of the parties, this Committee did not feel entirely comfortable in dismissing Complaint 1 simply on the basis that the Complainant chose not to offer further evidence thereon, as there was already large amount of evidence produced, albeit mainly in the form of hearsay, relating to Complaint 1. Accordingly, this Committee proposed to adopt the advice of [its senior counsel]. His advice was disclosed to the parties and thereupon they also indicated their agreement thereto. Hence, the finding and order made by this Committee in respect of the complaints against the Respondent herein are that:-

1. this Committee found Amended Complaints 2 and 3 set out in paragraph 8 above proved upon the admission of the Respondent; and
2. Complaint 1, as set out in paragraph 4 above, is to remain on the record and is not to be proceeded with without an order from either the Court of First Instance or the Court of Appeal.

Sanction

12. At the hearing for Sanction and Costs held on 5th December 2011, there was discussion as to what factual basis this Committee should look at in considering the appropriate sanction. This Committee does not propose to set out details of the discussion and the authorities referred to by the parties on this issue. Suffice it to say that this Committee formed the view that it would be mainly basing on the Respondent's Admitted Facts, plus certain matters confirmed by the Respondent's counsel in response to questions from this Committee raised at the hearing.
13. Counsel for the Respondent, the Respondent's counsel, submitted, on the authority of Yuen Man Chiu v The Queen CACC 399/1980, para 84, that this Committee should, "*in assessing the seriousness of this offence, ... take, in favour of the accused, that reading of the evidence which is most favourable to him.*" Whilst this statement was not disputed by counsel for the Complainant, the legal counsel, the Committee does not take it to mean that the tribunal is required, where the facts are clear and undisputed, to impose any unnatural interpretation thereon in favour of the accused. In any event, this Committee will consider the seriousness of the proved complaints only in light of facts which are uncontroversial.
14. Apart from the Respondent's Admitted Facts, it was confirmed at the hearing the following facts:-
 1. the Respondent was one of the five equity partners of [the CPA practice] at the material times;
 2. apart from a junior partner whose share was 15%, the other four equity partners, including the Respondent and [the partner who was a defendant at the trial], each had a 21.25% share;
 3. whilst [the client company] was a client handled by the Respondent in [the CPA practice], he did not derive any additional benefits (such as commission) from revenue earned from this client.
15. The Respondent's counsel set out seven points in his submission for the Respondent in mitigation. In short, they are: first, the Respondent's admission to Amended Complaints 2 and 3; second, his clean record; the third factor will be discussed in more details below; fourth, the incidents complained of were one-off in nature; fifth, personal circumstances of the Respondent, mainly that

he was generally regarded as being of good character and participated in various community and voluntary services; sixth, he seems to still command considerable support from professional colleagues and friends; in support of this point, the Respondent produced no less than 17 letters from members of the society, including current and former legislative councilors, justices of peace and other professionals; seventh, the lapse of time between the incidents complained of and the disposal of this matter.

16. The Respondent also orally apologized in person to this Committee, to [the client company] and the HKICPA and expressed his remorse at the hearing.
17. The fact that the Committee does not set out and discuss all the seven matters at length here does not mean this Committee has not considered them fully and carefully. However, this Committee is of the view that the primary factors that this Committee should focus on are the seriousness of the proved complaints and their impact on the reputation and good name of the profession, unless there are truly exceptional mitigating factors.
18. It seems to this Committee that the thrust of the Respondent's counsel's submission in mitigation, and a point which this Committee found to be most pertinent, is in his third point, which we shall set out in more details:-

Third, for the reasons explained above, this is not a case of fraud or dishonesty on the Respondent. The complaints against the Respondent are in the nature of a professional misjudgment or the negligence on the part of the Respondent. Whilst the misjudgment or negligence in question may be said to be remarkable, it was done out of the Respondent's kindheartedness to assist his business partner, [...] The Respondent has derived no personal benefit from the incidents complained of.

19. In response to questions from this Committee at the hearing, the Respondent's counsel clarified that "... the Respondent's kindheartedness to assist his business partner [...]" referred to his assistance in not exposing [the partner]'s misdeed in issuing the False Debit Note to [the client company]. It seems to this Committee that this is a point which goes to the heart of the matter and therefore this Committee will make further comments thereon.

20. It must first be pointed out that [the partner] was not before this Committee and that though he was one of the accused in [the trial], he was acquitted after trial. It was not the function of this Committee to pass any judgment on [that partner]. However, it is equally inevitable that in forming a view on the Respondent's conduct, certain inferences would have to be drawn on [the partner]'s role. And the only inferences this Committee would draw are that both [the partner] and the Respondent were involved (again using the word in a broad sense) in the issuance of the False Debit Note, that they both had the power, if they had thought fit, to stop its issuance, and that they both could and should have reported the matter to [the client company].
21. Indeed, if one looks at the Amended Complaint 2 which was admitted by the Respondent, he admitted that *"he had failed to take sufficient steps to prevent the issuing of the debit note by [the CPA practice] ... and as a result of his failure to prevent the debit note being issued, his failure to report the matter despite knowing that [the client company] had been defrauded was a conduct which was inconsistent with the good reputation of the profession and the HKICPA."* It is a necessary inference from this admission that the Respondent had the power, which he failed to use, to stop the False Debit Note from being issued, and that he failed to report the matter despite his knowledge of the False Debit Note, irrespective of what [the partner] had or had not done.
22. Further, this Committee regards it as a safe inference that the purpose for issuing the False Debit Note at the behest of [Mr. X] was to keep him pleased in the hope that he, the finance director of [the client company], would continue to procure [the client company] to use the services of [the CPA practice]. As a 21.25% equity partner of [the CPA practice], the Respondent stood to gain from [the client company]'s continued patronage not so indirectly. This Committee does not speculate as to whether the Respondent committed or omitted to perform any acts deliberately or specifically for such purpose. But this Committee has difficulty in accepting that *"the Respondent has derived no personal benefit from the incidents complained of."*
23. The Respondent's counsel argued strongly that the conduct of the Respondent should not be characterized as fraud or dishonesty. He submitted that the complaints are in the nature of professional misjudgment or negligence. This Committee does not think it is helpful or practical to pigeon-hole the Respondent's conduct into a certain category and then impose sanction accordingly. After all, there are no fixed tariffs for each category of misconduct

in disciplinary matters and recent developments in both criminal and civil laws have suggested that all these words may have different meanings in different contexts. What this Committee will consider is the overall seriousness of the misconduct of the Respondent on the basis on the uncontroversial facts before this Committee.

24. In this regard, this Committee is of the view that the Amended Complaint 3 should be considered together with Amended Complaint 2. The facts of Amended Complaint 3 arose as a consequence of the Respondent's conduct in Amended Complaint 2. After the issuance of the False Debit Note, in or around September 2006, [Mr. X] became aware of the internal investigation conducted by [the client company] relating to the False Debit Note. [Mr. X] communicated this to the Respondent and asked the Respondent to use [another] audit as the explanation for the False Debit Note. (See section 3 of the Respondent's Admitted Facts.) This was exactly the explanation later given by the Respondent to the ICAC in an attempt to mislead them, though he subsequently recanted from it.
25. If the Respondent had not recanted from the misleading explanation, much more serious consequences would no doubt have befallen him. We would therefore not take this as a mitigating factor. Indeed it was also not the submission of the Respondent's counsel. On the other hand, the Respondent's initial attempt to mislead the ICAC showed the extent to which he was prepared to go to cover up the False Debit Note. The culpability of Amended Complaint 3 lies in the fact that the Respondent, when interviewed by the ICAC officers investigating into the matter, did not start by telling the truth, or, perhaps for fear of self-incrimination, keeping silent. Instead he gave them the explanation invented by [Mr. X]. And this was a continuous attempt from the misconduct under Amended Complaint 2. Accordingly, this Committee does not think it appropriate in this case to impose separate sanctions on the Respondent in respect of each of Amended Complaints 2 and 3. This Committee will impose sanctions collectively on the two complaints.
26. The misconduct of the Respondent is serious indeed. the Respondent's counsel himself used the word "remarkable". The legal counsel has helpfully referred this Committee to the case of Bolton v Law Society [1994] 1 WLR 512 at 518-519, suggesting, as this Committee agrees, that the same principles apply to solicitors as well as accountants:

Any solicitor who is shown to have discharged his professional duties with anything less than complete integrity, probity and trustworthiness must expect severe sanctions to be imposed upon him by the Solicitors Disciplinary Tribunal. Lapses from the required high standard may, of course, take different forms and be of varying degrees. The most serious involves proven dishonesty, whether or not leading to criminal proceedings and criminal penalties. In such cases the tribunal has almost invariably, no matter how strong the mitigation advanced for the solicitor, ordered that he be struck off the Roll of Solicitors. Only infrequently, particularly in recent years, has it been willing to order the restoration to the Roll of a solicitor against whom serious dishonesty had been established, even after a passage of years, and even where the solicitor had made every effort to re-establish himself and redeem his reputation. If a solicitor is not shown to have acted dishonestly, but is shown to have fallen below the required standards of integrity, probity and trustworthiness, his lapse is less serious but it remains very serious indeed in a member of a profession whose reputation depends upon trust. A striking off order will not necessarily follow in such a case, but it may well. The decision whether to strike off or to suspend will often involve a fine and difficult exercise of judgment, to be made by the tribunal as an informed and expert body on all the facts of the case. Only in a very unusual and venial case of this kind would the tribunal be likely to regard as appropriate any order less severe than one of suspension.

27. This Committee is of the view that the Respondent's conduct in this matter fell at least within the second category of misconduct described in the above judgment. Taking the matter in the round, this Committee is of the view that the appropriate sanctions, for Amended Complaints 2 and 3 together, are:-
1. the name of the Respondent be removed from the register of Certified Public Accountants for a period of 36 months;
 2. the current practising certificate issued to the Respondent be cancelled;
 3. a practising certificate shall not to be issued to the Respondent for a period of 36 months; and
 4. the Respondent do pay a penalty in the amount of HK\$500,000.
28. This Committee so orders accordingly, such orders to take effect on the 40th day of this order under section 35(1) of the PAO.

Costs

29. Pursuant to section 35(1)(iii) of the PAO, this Committee has a very wide discretion and *“may make such orders as [it] thinks fit with regards to the payment of costs and expenses of and incidental to the proceedings, whether of the Institute (including the costs and expenses of the Disciplinary Committee) or of any complainant or of the certified public accountant....”*

30. The legal counsel submitted that as the legal costs incurred by the HKICPA in disciplinary proceedings are financed by membership subscriptions and registration fees, and since it was the Respondent's conduct which has brought himself within the disciplinary process, it is only fair that he should pay the costs and expenses of the proceedings and not have them to be funded or subsidized by other members of the HKICPA. We agree to this principle. The legal counsel submitted a statement of costs which set out the respective hourly charging rates of the staff members of the HKICPA who had worked on this matter and the respective amount of time spent by them. For example, his own hourly charging rate is HK\$2,000. It is noted that the legal counsel, a barrister admitted in the year of 2000, is an in-house prosecutor under full-time employment of the HKICPA. The statement of costs also set out the hourly rates and costs incurred by other staff of the Complainant working on this case: [a Deputy Director], Compliance, an accountant qualified in 1988, was assigned an hourly rate of HK\$1,600; [an Associate Director], Compliance, an accountant qualified in 2002, was assigned an hourly rate of HK\$1,200.

31. The Respondent's Counsel pointed out that the costs calculated by reference to the notional hourly rates of the internal staff do not appear to be costs actually incurred by the Complainant out of its pocket. At the hearing, this Committee asked the legal counsel how his hourly rate of HK\$2,000, and that of [the Deputy Director] and [the Associate Director], were fixed for the purpose of assessing the costs payable by the Respondent, which should be a reflection of the costs actually incurred by the HKICPA. It is fair to say that the legal counsel was not able to give an entirely satisfactory answer at the hearing. In fairness to the legal counsel, this Committee notes that this does not seem to be a point which has been raised in previous disciplinary proceedings of the HKICPA. After the hearing, the Committee asked the Complainant to provide further information to justify the costs claimed and the Respondent was given opportunity to reply thereto.

32. The legal counsel duly filed further submissions and referred the Committee to the English case of Re Eastwood (deceased) [1975] Ch 112, which was followed by subsequent English and Commonwealth cases including Portman Building Society v Bevan Ashford (2000) 80 P&CR 239, Cole v British Telecommunications PLC [2000] 2 Costs LR 310, Commonwealth Bank of Australia v Hattersley (2001) 51 NSWLR 333 and the Hong Kong Court of Appeal case of Ling Yuk Sing v The Secretary for Civil Service [2010] 3 HKLRD 722.
33. These cases established the principle that where the winning/receiving party conducted the case by in-house lawyer, it is entitled to claim costs based on the notional hourly rate of that in-house lawyer as if she/he were a private lawyer. Cheung JA explained in Ling Yuk Sing, at para 25, as follows:-

I agree with the approach of In re Eastwood. The principle of indemnity must be applied flexibly and reasonably. Starting from the basis that the costs of government lawyer are to be taxed on the same basis of private lawyer, the uniform approach is one that commends simplicity. It has not been shown that this approach has caused any significant injustice in taxation of costs which is generally based on reasonable approximations only. Any contrary approach in terms of trying to calculate the actual costs by reference not only to a proportion of the government lawyer's salary but also to the overhead costs of his office and the supporting staff is unworkable in practice and may not necessarily produce a more accurate result. In my view Hong Kong has correctly adopted the uniform approach.

34. However, The Respondent's Counsel pointed out that in Re Eastwood (deceased), and in Ling Yuk Sing, the receiving party only sought to recover the costs of its employed solicitors. They did not seek to recover any costs other than "legal costs" of employed lawyers. As such, he took objection to the Complainant recovering the costs of [the Deputy Director] and [the Associate Director], who are not legally qualified.
35. Having considered the submissions of the legal counsel and The Respondent's Counsel on this issue, the Committee is of the view that, in light of the authorities referred to the Committee, the costs of the legal counsel based on

his notional hourly rate should be allowed but not that of [the Deputy Director] and [the Associate Director]. The Committee is aware that the hourly rate of a barrister of the legal counsel's standing, at the current market rate, may well be higher than HK\$2,000. But in the absence of any alternative figure suggested by the Complainant, it is not for the Committee to decide on another rate for the legal counsel.

36. This Committee notes that The Respondent's Counsel did not object to the costs incurred by the Clerk to the Committee even though she is not legally qualified. This Committee is of the view that the costs of the Clerk, who has provided valuable assistance to the Committee, could be treated as a disbursement item and The Respondent's Counsel has not argued that her hourly charging rate of HK\$1,200 is not reasonable. Further, this Committee is of the view that the costs incurred by this Committee in seeking advice from [its senior counsel] should be shared equally between the Complainant and the Respondent, as it was necessitated by their combined failure to put forward a satisfactory proposal to dispose of these proceedings.
37. Accordingly, the Committee's ruling on the issue of costs is as follows:-
- The legal counsel's costs be allowed for 117.5 hours x HK\$2,000/hour = HK\$235,000
(109.5 hours as per Breakdown of Complainant's Costs plus 8 hours for preparation of the supplemental submission on costs)
 - Costs of Robertsons incurred for instructing [senior counsel for the Complainant] = HK\$4,625
 - Costs of [senior counsel for the Complainant] = HK\$91,000
 - Half of the costs of [senior counsel for the Disciplinary Committee] = HK\$40,000
 - Costs of the Clerk to the Committee = HK\$67,020
 - Miscellaneous disbursements = HK\$4,782
- Total: HK\$442,427

Such costs are to be paid on or before the day the order in paragraph 27 takes effect.

38. This Committee thanks the assistance of counsel from both sides.

Dated the 9th day of February 2012