IN THE MATTER OF Complaints made under section 34(1)(a) of the Professional Accountants Ordinance, Cap.50 ("the Ordinance")

BETWEEN

THE REGISTRAR OF THE HONG KONG INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS — COMPLAINANT

AND

OU KA CHI — RESPONDENT

Dates of Submissions: 19 January 2010 (Complainant), 25 January 2010 (the Respondent)

Date of Decision: 29 January 2010

DECISION ON SANCTIONS AND COSTS

Sanctions

1. The background facts of this matter are set out in the Disciplinary Committee's Decision of 15 January 2009 and will not be repeated here.

2. The Disciplinary Committee has received and considered the submissions of the Complainant on the issues of sanctions and costs. The Respondent served his submissions on 25 January 2010. The Disciplinary Committee has considered the Respondent's submissions, as well as the mitigation presented to Recorder Ronny Wong SC and the reasons for sentence of the learned Recorder who sentenced the Respondent to 4 years and 7 months' imprisonment on 26 August 2005. The

Respondent has served that sentence of imprisonment.

3. The Respondent has been found guilty of a disciplinary offence that the Disciplinary Committee considers to be very serious in nature. As financial controller of a publicly listed company, the Respondent conspired with the then managing director to defraud various subsidiaries of the listed company of sums totalling HK$13,580,000. In considering the appropriate disciplinary orders to make, the Disciplinary Committee recognises that the objects of the Institute include the regulation of the practice of the accountancy profession and the preservation and maintenance of its integrity and status. To achieve these objects, it is necessary that proper disciplinary sanctions be imposed on persons guilty of offences of dishonesty. In addition, the present case involves a public interest element as subsidiaries of a publicly listed company were defrauded. The starting point of such a serious case as the present case must be permanent removal.

4. The Disciplinary Committee can also recommend that any application for readmission should not be approved during the period of 5 years from the date of conviction. Such a recommendation is unnecessary in the present case given the sanction we intend to impose. In any event, the period of 5 years from the date of conviction will expire on 19 August 2010.

5. The Disciplinary Committee can also make an order for a penalty in cases where the certified public accountant has benefited financially from his dishonesty. However, that is unnecessary in the present case as the Disciplinary Committee accepts that the Respondent did not benefit financially from his dishonesty but committed these acts out of a misguided sense of loyalty to the managing director.

6. The Disciplinary Committee considers that an order that the name of the Respondent be removed from the register of certified public accountants pursuant to Section 35(1)(a) of the Professional Accountants Ordinance is appropriate in

the present case, and as stated above, the Disciplinary Committee will adopt the starting point of permanent removal. The question we have to answer is whether there are special circumstances in the present case that justify temporary, as opposed to permanent, removal.

7. The Disciplinary Committee considers that there are special circumstances in the present case, in particular, the fact that the Respondent did not derive any monetary or material gain out of his dishonest conduct.

8. However, there is no merit in the Respondent's submissions that there had been a delay in the prosecution of the complaint; on the contrary, it was the Respondent who had applied unsuccessfully to postpone the proceedings.

9. The Disciplinary Committee also takes into account the fact that the Respondent is now 46 years of age and that permanent removal would have a substantial and adverse affect on his working capacity and would also affect his wife and 18 year old son. The Disciplinary Committee also takes into account the Respondent's previous good character and record, the consequence and impact of the convictions and his imprisonment, which he has served, on his professional career, and the consequence and impact of the present disciplinary findings on his professional career. The fact that a professional accountant has been found guilty of crimes and of disciplinary offences of the nature in the present case is itself a severe punishment.

10. However, even if temporary removal is proper in the present case, the very serious nature of the disciplinary offence demands that the period of removal be substantial.

11. In all the circumstances, the Disciplinary Committee has decided to order that the name of the Respondent be removed from the register of certified public

accountants for a period of 10 years, such removal to take effect at the beginning of the 30th day after the day on which this order is made. The Disciplinary Committee wishes to emphasise that the temporary (albeit lengthy) period of suspension, as opposed to permanent removal, imposed in the present case is not to be taken as setting a norm for those found guilty of disciplinary offences of the nature in the present case, but has been imposed only because of the special circumstances mentioned above.

Costs

12. On the question of costs, the Disciplinary Committee considers that the Respondent should, prima facie, pay the costs incurred by the Complainant and by the Clerk. The submissions of the Complainant in support of its application to vary the directions of the Chairman were not wasted; the submissions were relevant and were fully considered by the Disciplinary Committee before it arrived at its decision of 15 January 2010.

13. In assessing costs, the Disciplinary Committee has concluded that the costs should be assessed on a "party-to-party" basis instead of "indemnity" basis and that it is appropriate to make a lump sum assessment in this case.

14. The Disciplinary Committee has decided that the Respondent should be ordered to pay the total costs of HK$93,000, made up as follows:-
(1) HK$18,000 in relation to the costs of the Complainant; and
(2) HK$75,000 in relation to the costs of the Clerk.

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BETWEEN

THE REGISTRAR OF THE HONG KONG INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS	COMPLAINANT

AND

OU KA CHI	RESPONDENT

Dates of Decision : 15 January 2010

DECISION

The Charge

1. The Respondent, a certified public accountant, faces the following complaint, namely :-

"Section 34(l)(a)(ii) of the Ordinance applies to Mr. Ou in that he was convicted in Hong Kong of an offence involving dishonesty.

Particulars

1.1 On 19 August 2005, Mr. Ou was convicted of two counts of conspiracy to defraud, under section 159C(6) of the Crimes Ordinance (Cap 200).

1.2 Mr. Ou was the financial controller of [COMPANY S], a company listed on the Hong Kong Stock Exchange. Between 15 October 1999 and 5 February 2001, Mr. Ou was found to have conspired with the then managing director of [COMPANY S] to defraud various subsidiaries of [COMPANY S] of sums totalling HK$13,580,000.

1.3 On 26 August 2005, Mr. Ou was sentenced to 4 years and 7 months imprisonment.

1.4 Mr. Ou sought leave to appeal against his conviction and upon hearing on 25 October 2006, the application for leave to appeal was dismissed."

<u>Relevant provisions of the Ordinance</u>

2. Section 34(1) of the Ordinance, so far as material, provides as follows:-

"A complaint that -

(a) a certified public accountant -

(ii) has been convicted in Hong Kong or elsewhere of any offence involving dishonesty;

shall be made to the Registrar who shall submit the complaint to the Council which may, in its discretion ... refer the complaint to the Disciplinary Panels."

3. Section 35(2) of the Ordinance provides that nothing in this section shall be deemed to require a Disciplinary Committee to inquire into the question whether a professional accountant was properly convicted but the Committee may consider the record of a case in which such conviction was recorded and such other evidence as may show the nature and gravity of the offence.

The Convictions

4. The Respondent was convicted, after a trial before Mr. Recorder R. Wong S.C. and the jury, of two counts of conspiracy to defraud on 19 August 2005. The Respondent was the 2nd Defendant at the trial. The 1st Defendant was one [Mr. K], who had pleaded guilty to the charges he faced and who gave evidence at the trial of the Respondent. The case against the Respondent was summarised by the learned Recorder in his sentencing remarks when dealing with the 1st Defendant:

> "Between September 1992 and July 2001, the defendant [Dl] was the managing director of [COMPANY S], a listed company in Hong Kong. [COMPANY S] had a number of subsidiaries, including [SUBSIDIARY A], [SUBSIDIARY B], [SUBSIDIARY C], [SUBSIDIARY D] and [SUBSIDIARY E]. The 1st defendant was a director of each of these companies.
>
> [COMPANY S] became a listed company in 1992. As at 31 March 1999, the defendant and his father held about 25 per cent of the share capital of [COMPANY S]. The other substantial shareholders of [COMPANY S] were [COMPANY C], holding about 25 per cent, and [COMPAN Y], [COMPANY Y] holding about 15 per cent.
>
> [SUBSIDIARY A] was a nominated subcontractor of the Hong Kong Housing Authority (HKHA) in respect of electrical works, water supply and fire services installations in a number of building projects that HKHA was carrying out.

Between 15 October 1999 and 1 June 2000, the 1st defendant entered into a conspiracy with [D2], the financial controller of [COMPANY S], whereby they dishonestly approved for payment bogus invoices submitted by or in the name of [Company P].

During this period, 18 [COMPANY P] invoices were submitted, requesting payment of $13 million purportedly for consultancy services rendered in relation to HKHA water supply and fire maintenance projects in Wong Tai Sin, Kwai Chung and Tsing Yi areas, which were subcontracted to [SUBSIDIARY D] by [SUBSIDIARY A]. As a result, [SUBSIDIARY E] and [SUBSIDIARY D] made payments totalling $13 million to [COMPANY P] to settle all the said 18 invoices. In fact, such consultancy services were never in existence. These constitute the subject matter of the 1st count.

Out of the $13 million paid to [COMPANY P], a sum of $6.8 million was utilised to finance the acquisition of part of the portfolio of [COMPANY S] shares held by [COMPANY Y]. A total of $6 million went to [COMPANY H] which subsequently changed its name to [COMPANY V] for the acquisition, through a BVI company by the name of [COMPANY O], of 6 million shares in [COMPANY H] and [COMPANY V] .

Between 2 January 2001 and 5 February 2001, the 1st defendant agreed with Ou [D2] to approve payment of three bogus debit notes submitted by or in the name of [COMPANY P] to [SUBSIDIARY C], purportedly for consultancy services in relation to HKHA projects in Tin Shui Wai, Po Lam and Shatin areas. [SUBSIDIARY C] was the generator set supplier of [SUBSIDIARY A] and other HKHA contractors in relation to these projects. The debit notes amounted to $580,000 and were all paid by [SUBSIDIARY C]. There were in fact no consultancy services provided by [COMPANY P]. These constituted the subject matter of the 2nd count . The sum of $580,000 was used to bribe an official of the Housing Authority to turn a blind eye to the affairs of [SUBSIDIARY C]."

5. Although that summary was a summary of the facts agreed in relation to the 1st Defendant, the Court of Appeal, dealing with the matter on appeal from the Respondent's convictions, accepted that summary as a summary of the case against the Respondent, who was the financial controller of [COMPANY S]. At his trial, the Respondent was said to be fully complicit in the dishonest schemes to which the first two counts related, and put his signature on

cheques drawn in [COMPANY P's] favour.

6. On 25 October 2006, the Court of Appeal dismissed the Respondent's application for leave to appeal.

7. On 19 April 2007, the Appeal Committee of the Court of Final Appeal refused the Respondent's application for leave to appeal to the Court of Final Appeal.

Documents Received and Directions Given

8. The Disciplinary Committee has received the following documents:

   (a) The Complainant's Case dated 12 March 2009 which referred to the matters set out in the complaint letter to the Council of the Hong Kong Institute of Certified Public Accountants dated 10 May 2007 and to the Appendices to that complaint letter;

   (b) The Respondent's Case of 29 May 2009 together with the documents attached thereto;

   (c) The Complainant's Reply to the Respondent's Case dated 4 June 2009 together with a copy of the transcript of the trial judge's summing up and a copy of the Determination of the Court of Final Appeal dated 19 April 2007;

   (d) and the Respondent's Reply dated 22 June 2009.

9. The Chairman of the Disciplinary Committee then made directions, after having considered the parties' respective cases and checklists, giving liberty to the Respondent to give evidence at the substantive hearing and to file his witness statement setting out all matters he wished to give evidence upon within 28 days. It was further directed that such witness statement shall stand as evidence in chief, and that the Complainant be at liberty to cross-examine the Respondent at the hearing.

10. The Complainant made an application by letter dated 13 August 2009 to vary the said directions to the extent that the Respondent should not, without leave from the Disciplinary Committee, be permitted to challenge or adduce evidence for the purposes of challenging the correctness of his criminal convictions, or for the purpose of asserting that he was not in fact guilty of the offences of which he had been convicted.

11. On 18 August 2009, the Chairman of the Disciplinary Committee ruled that the application for variation of the directions was misconceived and that the Respondent ought to serve his witness statement, if he were minded to give evidence, and, further, that if the Respondent contended in his witness statement that his criminal convictions were erroneous, the Complainant could then make an application to object to such evidence based on the principles established in *Shepherd v Law Society* [1996] EWCA Civ. 977.

12. In the end, however, the Respondent did not avail himself of the leave granted to him, and he did not serve any witness statement in these proceedings.

13. In due course, a hearing was fixed for this matter on 18 November 2009. That hearing did not take place because it appeared from the correspondence exchanged between the parties and the Clerk to the Disciplinary Committee that the Respondent was unlikely to attend that hearing. Having referred to the correspondence exchanged on the matter, the Chairman of the Disciplinary Committee directed, on 10 November 2009, that the parties should address the Disciplinary Committee on their respective Cases by way of written submissions to be served on the Disciplinary Committee and on the other party no later than 18 November 2009, and with leave to the Respondent to serve a written reply to the written submissions of the Complainant, if he were minded so to do, no later than 27 November 2009. The hearing fixed on 18 November 2009 was vacated and liberty was granted to both parties to apply for an oral hearing and generally.

14. Pursuant to that direction, the Complainant and the Respondent served their respective written submissions on 17 November 2009. Notwithstanding an extension of time given to the Respondent to serve a Reply by 11 December 2009, to the Complainant's written submissions, the Respondent has not done so. Further, there has been no application from any party for an oral hearing. In the circumstances, the Disciplinary Committee decided to proceed to consider, on the documents served and relied upon by the parties, whether or not the Complainant has proved its case against the Respondent.

<u>The Burden and Standard of Proof</u>

15. The burden is on the Complainant to prove the complaints.

16. The standard of proof in disciplinary proceedings is the civil standard of a preponderance of probability under the *re H and others* [1996] 2 WLR 8 approach. The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is to be regarded, the more compelling would be the evidence needed to prove it on a preponderance on probability (see the recent decision of the Court of Final Appeal in *Solicitor* v Law *Society of Hong Kong* [2008] 2 HKLRD 576).

The Complainant's Case

17. In support of its case, the Complainant relied upon the following documents:

(1) The Indictment in Criminal Case No.356 of 2004 dated 8 August 2005 which contained the two counts of conspiracy to defraud brought against the Respondent;

(2) Copy of the transcript of the audio recording of the Verdict relating to the Respondent which was given on 19 August 2005 when the Respondent was convicted on the 1st and 2nd counts by a majority verdict of 6:1 and acquitted on a 3rd count he had faced by a unanimous decision;

(3) A copy of the transcript of the audio recording of the Reasons for Sentence given by Recorder R. Wong S.C. on 26 August 2005 when he sentenced the Respondent to 4 years and 7 months on the 1st count and 7 months on the 2nd count, to run concurrently;

(4) A copy of the Certificate of Conviction and Sentence issued by the High Court on 29 May 2006 certifying that the Respondent was tried before Recorder R. Wong S.C. and with the jury , and was on 19 August 2005 found guilty by the jury of two offences of conspiracy to defraud, and that he was on 26 August 2005 sentenced to 4 years 7 months imprisonment on the 1st charge and to 7 months imprisonment on the 2nd charge, both sentences to run concurrently; and

(5) A copy of the Judgment of the Court of Appeal dated 8 December 2006 dismissing the Respondent 's application for leave to appeal from those convictions.

18. In its Reply dated 4 June 2009 to the Respondent 's case, the Complainant relied on two further documents , namely:

(a) The transcript of the audio recording of the summing up delivered by Mr. Recorder R. Wong S.C. on 18 and 19 August 2005 at the trial of the Respondent; and

(b) A copy of the Determination of the Appeal Committee of the Court of Final Appeal dated 19 April 2007 dismissing the Respondent's application to appeal to the Court of Final Appeal.

19. Based on these documents and on the verdict of the jury, the Complainant contended that the Respondent, a certified public accountant , has been convicted in Hong Kong of two offences involving dishonesty, namely:

(a) Conspiracy to defraud [SUBSIDIARY E] and [Subsidiary D] by dishonestly and falsely representing that consultancy services had been provided to the two said companies by [COMPANY P], thereby inducing the two said companies to pay HK$13,000,000 to [COMPANY P]; and

(b) Conspiracy to defraud [SUBSIDIARY C] by dishonestly and falsely representing that consultancy services had been provided to it by [COMPANY P], thereby inducing the said company to pay HK$580,000 to [COMPANY P].

20. The Claimant directed the attention of the Disciplinary Committee to the provisions of section 35(2) of the Ordinance (quoted above) and submitted that the intention of the legislature was that someone facing disciplinary charges arising from criminal convictions should not be permitted to relitigate the issues which have been determined by criminal courts. The Claimant submitted, further, that the circumstances in which the Disciplinary Committee could permit the Respondent to challenge the propriety of his convictions must be rare and truly exceptional. The Claimant contended that someone convicted by a criminal court would have been convicted on the criminal standard of proof, which was proof beyond reasonable doubt, and after a full hearing in which a judge and/or jury would have had the opportunity to hear and consider all the evidence.

The Respondent's Case

21. In the Respondent's case filed on 29 May 2009, the Respondent denied that he had committed any dishonest actions and he denied that he had conspired with the 1st defendant to defraud [SUBSIDIARY E] and [SUBSIDIARY D] as alleged in the 1st count and to defraud [SUBSIDIARY C] as

alleged in the 2nd count by dishonestly falsely representing that [COMPANY P] had provided consultancy services to the said companies in relation to various Hong Kong Housing Authority projects, thereby causing the said companies to make payments of HK$13,000,000 and HK$580,000 to [COMPANY P] respectively.

22. By way of background information, the Respondent explained that there were originally 5 defendants in the case, including Dl, and himself as the 2nd defendant. Dl had made a bargain with the ICAC with the result that D3, a cousin of Dl , was no longer pursued.

23. The Respondent also stated by way of background information that Dl was the then managing director of [COMPANY S] and that he was the then financial controller and company secretary of [COMPANY S]. There was a dispute between the two substantial shareholders of [COMPANY S], namely, [COMPANY C] (holding about 25%), and Dl and his father (together holding about 25%) in the second half of 2001. Dl had assumed that the Respondent had joined the camp of [COMPANY C] in the said dispute and Dl initiated two civil actions against the Respondent and some other directors of [COMPANY S] in HCA 4344 of 2001 and in another action. After these two civil actions were settled, Dl was removed from the board of [COMPANY S] and DI and his father lost their control in [COMPANY S], which had been their family business for over 40 years.

24. The Respondent then proceeded , in his Written Case, to question the propriety of the convictions which depended mainly on the testimony of Dl who had pleaded guilty to 3 counts of conspiracy to defraud and 1 count of conspiracy to deal with the proceeds of an indictable offence, and who gave evidence against the Respondent under immunity from prosecution and in exchange for the prosecution not proceeding with the case against his

cousin, D3. In addition, D1 was already in a hostile position to the Respondent as a result of the fight between the two major shareholders which resulted in D1 and his family losing control of [COMPANY S].

25. On the other hand, the Respondent asserted that he was a person of no previous conviction who had given evidence before the jury, stating that he did not have any knowledge that no consultancy services had been provided and that he did not know that the invoices issued by [COMPANY P] were false and stating, further, that he had been told by Dl that [COMPANY P] had provided consultancy services to the [COMPANY S] group of subsidiaries and that the cheques in question were issued to pay those services.

26. The Respondent then proceeded to make detailed points in his Case in connection with a number of specific matters, including an investigation report compiled by [Mr. Z], who had succeeded D1 as managing director of [COMPANY S].

27. On 22 June 2009, the Respondent filed a Reply to the Complainant's Reply and raised a number of other matters to support his contention that the convictions were wrong.

28. Attached to the Respondent's Case of 29 May 2009 were a reference letter issued by [COMPANY S] dated 7 March 2004, the investigation report of [Mr. Z] dated 11 July 2003, the grounds of appeal filed with the Court of Final Appeal, and the reasons for decision dated 16 October 2001 of Madam Justice Yuen, as she then was, in HCA No.4344 of 2001.

29. We shall deal with and return to the detailed points raised in the Respondent's Case and in the Respondent's Reply later on.

The Complainant's Written Submissions

30. The Complainant sent Written Submissions by letter dated 17 November 2009 in which the Complainant stated that the convictions for conspiracy to defraud were convictions of offences involving dishonesty and that section 34(l)(a)(ii) of the Ordinance applied to the Respondent. The Complainant also relied on its Case and its Reply, and on its letter dated 13 August 2009.

31. In that letter, the Complainant referred to a number of authorities including *Shepherd v The Law Society,* cited above, which involved the Solicitors Disciplinary Tribunal. A solicitor was struck off the roll by the Tribunal when a complaint was made against him on the basis of conduct unbefitting a solicitor as a result of his convictions of 15 offences of dishonesty. The convictions were not in dispute and the Tribunal refused to allow the solicitor to adduce evidence in support of his assertion that he was not in fact guilty of the offences of which he had been convicted. The solicitor appealed against the Tribunal's decision to the Divisional Court, which dismissed his appeal. He then appealed to the Court of Appeal, which upheld the Divisional Court's decision. The Court of Appeal held that the practice of the Tribunal, not to go behind the conviction unless there were exceptional circumstances, was lawful and justified. In upholding the judgment of the Divisional Court, the Court of Appeal quoted from and adopted the guiding principle expressed by Lord Taylor CJ, who had delivered the judgment of the Divisional Court, in these terms:

> "Public policy requires that, save in exceptional circumstances, a challenge to a criminal conviction should not be entertained by a Disciplinary Tribunal for the reasons quoted above from the Master of the Rolls' judgment. If this appellant's argument were right, he should have been allowed to challenge his conviction before the

> Tribunal even if he had appealed unsuccessfully to the Court of Appeal Criminal Division. That could, in theory, have led, after a conviction by a jury on the criminal burden of proof, upheld by three Appeal Court Judges, to exoneration by a Disciplinary Tribunal on the civil burden of proof. Moreover, to achieve it, the witnesses from the criminal case would have had to undergo the trauma of a rehearing. In the absence of some significant fresh evidence or other exceptional circumstances such an outcome could not be in the public interest. Here the appellant had not even applied for leave to appeal. There were no exceptional circumstances. What he wished to do was to have a rehearing of the criminal trial in which he could conduct his own case, as he submitted to us, better than his leading counsel. We are in no doubt that the Tribunal were right to refuse an adjournment and to refuse the appellant an opportunity to mount such an operation."

32. The Court of Appeal in *Shepherd v The Law Society* also held that the principles in *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 and *Smith v Linskill* [1996] 2 ALL ER 253 applied equally to tribunals such as the Solicitors Disciplinary Tribunal. The Complainant submitted, in its letter of 13 August 2009, that the principles and considerations set out in those authorities applied equally to the present disciplinary proceedings. The Complainant accepted that the exceptional circumstances might well be found in cases where a material witness had subsequently admitted perjury in giving evidence in a trial, or where a defendant pleaded guilty under a misunderstanding of the charges and such misunderstanding was not properly cured through the appellate system. However, these exceptions had no application to the Respondent's case here.

33. The Complainant completed its written submissions by referring to section 35(2) of the Ordinance and submitted that finality of proceedings was clearly the legislative intent to be gathered from that provision.

The Respondent's Written Submissions

34. The Respondent's Written Submissions of 17 November 2009 was a document which repeated the points previously made by the Respondent in his Case dated 29 May 2009 and in his Reply dated 22 June 2009.

Discussion

35. In paragraphs 4 to 8, on page 3 of the Respondent 's Written Submissions, the Respondent made the point that the absence of reference in [Mr. Z's] report about the version he had given to [Mr. Z] did not in fact prove that he had not told [Mr.Z] that he had been told by Dl that genuine consultancy services had been provided by [COMPANY P] to the subsidiary companies.

36. The matter is better understood with reference to the judgment of Stock JA in the Court of Appeal, where he said at p.8 that:

> "15...D2's evidence at trial was that there came a time when he told [Mr. Z] what it was that [Mr. K] had told him, namely, that payments were for a general consultancy report, a review of the Group's overall subcontracting practice, with a view to improving efficiency and examining the question of corrupt practices. The report of the audit committee dated July 2003, and presented to the Board of Directors of which both [Mr. Z] and this applicant were members, made no such reference. It was a report first produced at trial in re-examination of this applicant. In the course of that re-examination, the applicant was taken through the report and it included reference to the various payments which were ultimately the subject of these counts. In that regard, what was said in the report was that: "The expenses incurred were probably in association with the completion of various work orders issued for two water supply and fire services term maintenance contracts," an explanation entirely at odds with what the applicant said he had previously told [Mr.Z] who prepared the audit report to the Board. It seems unlikely therefore that the testimony of the applicant that he had given quite a different explanation to [Mr. Z] was true."

37. Mr Justice Chan PJ, delivering the Determination of the Appeal Committee of the Court of Final Appeal, put the point this way:

> "7. The second matter relates to a report of an internal investigation conducted at the direction of the new management of the company in which one [Mr.Z] and the applicant were involved. The report contained an explanation which was said to have been given by the applicant to [Mr.Z] regarding the payment of the funds in question which was inconsistent with evidence given by the applicant as to what he told [Mr. Z]. It is submitted that there was a material irregularity in that the Recorder should not have admitted the report in evidence and should have directed the jury to ignore the findings made in the report and the prosecution 's submission on this aspect of the evidence. The truth of the matter is that it was the applicant who sought to adduce the report in evidence during his reexamination for the purpose of supporting his own case and this was not opposed to by the prosecution. Once the report was adduced in evidence, it could be used both for and against the applicant. It was quite legitimate to use the report to show any inconsistencies which appeared in the applicant's evidence. That was what in essence counsel for the prosecution said in his address to the jury on this point. We do not think this can be a valid complaint."

38. Clearly, the statement in the report that "the expenses incurred were probably in association with the completion of various work orders issued for two water supply and fire services term maintenance contracts" was inconsistent with the evidence that the Respondent had given to the jury, namely, that the payments were for a general consultancy report, a review of the group's overall subcontracting practice, with a view to improving efficiency and examining the question of corrupt practices. As Stock JA remarked in his judgment, "the report itself sat ill with [the Respondent's] testimony" (at p.9, paragraph 17).

39. We do not find any substance in the point made by the Respondent that as a matter of logic, the fact that the report did not contain the version he alleged he had given to [Mr.Z], did not prove that he never gave that version to [Mr. Z]. The matter was properly before the jury who had to

be satisfied beyond a reasonable doubt before they could convict the Respondent.

40. The next point being made by the Respondent, in paragraphs 9 and 10 of his Written Submissions on p.4 thereof, was that the trial judge had made an error in summarizing the defendant's case and that the [COMPANY Y] portfolio should have changed hands on or before 30 September 1999 and not as mentioned by the trial judge on 7 December 1999. The Respondent contended that this point was essential in demonstrating that Dl lied when giving his testimony.

41. This matter was dealt with by the Appeal Committee of the Court of Final Appeal in these terms:

> "6. In respect of the second ground, it is submitted that the Recorder was erroneous on a few factual matters and had made unwarranted and unfair comments to the jury on these matters. First, the Recorder is said to have wrongly directed the jury that there was no sufficient evidence to show that the shares held by [COMPANY Y]., which the conspirators wanted to acquire using the misappropriated funds, had "changed hands" prior to the conspiracy and that this comment had misled the jury. We do not think there is anything in this submission. The essence of the charges is the agreement to misappropriate the funds using bogus invoices. There is clear evidence that the relevant invoices were false and that funds had indeed been misappropriated by means of these bogus invoices. The jury were evidently sure that the applicant was involved in the conspiracies and it was not necessary to prove exactly for what purpose the misappropriated funds were to be applied and whether the conspirators had succeeded in achieving their purpose. The matter complained of was fully canvassed at the trial. The Recorder's comment, considered in this context, was merely a warning to the jury that they should be careful before coming to any conclusion on this matter."

42. We agree entirely with the observations and conclusions of the Court of Final Appeal and we do not see how this point could be used as a basis upon which we could conclude that the convictions were erroneous.

43. A further point is made by the Respondent, in paragraph 12 of his Written Submissions, that the fact that previous frauds had been committed by Dl reflected upon the honesty of D1. This matter was also considered by the Appeal Committee of the Court of Final Appeal who dealt with it in these terms :

> "8. The third matter complained of by the applicant is that the Recorder was wrong to have directed the jury to in effect ignore the previous frauds committed by PW4 which, it is submitted, must be relevant in deciding whether to accept his evidence. Even assuming that this is a valid criticism, we are not satisfied that this had resulted in any prejudice to the applicant. The jury knew that PW4 had pleaded guilty to these charges and were well aware of his involvement in the alleged conspiracies. The fact that PW4 had committed other conspiracies which did not concern the applicant would not have affected their assessment of his credibility."

44. We agree and we do not see how this matter could be used as a basis upon which we could rule that the verdict of the jury was erroneous.

45. Finally, the Respondent relied on the Reasons for Decision of Madam Justice Yuen, as she then was, dated 16 October 2001 in HCA 4344 of 2001, is demonstrating that Dl lied in giving his testimony before the jury and was doing so to take revenge against the Respondent for losing that civil case. As far as we can ascertain, this point was not raised as a ground of appeal before the Court of Appeal and the Court of Final Appeal and, rightly so, as that trial judge had very properly directed the jury to be careful about accepting the evidence of D1 and had specifically reminded them of the emphasis placed by counsel for [the Respondent] "on the

possible grudge arising from the board resolution of 16 July 2001 leading to the litigation in October 2001" (at p.230 of the transcript of the Summing Up).

46. In essence, the Respondent is asking us to conclude that the verdict of the jury was erroneous because they ejected his evidence, notwithstanding that he was a person of good character, and relied on the testimony of Dl who had pleaded guilty to 3 counts of conspiracy to defraud and 1 count of conspiracy to deal with the proceeds of an indictable offence, who had given evidence against the Respondent under immunity from prosecution and in exchange for the prosecution not proceeding with the case against his cousin, D3, and who was already hostile to the Respondent, as a result of the fight between the two major shareholders which resulted in Dl and his family losing control of [COMPANY S].

47. In this regard, we accept entirely the submissions of the Complainant that save in exceptional circumstances, a challenge to a criminal conviction should not be entertained by this Disciplinary Committee and, further, that no exceptional circumstances have been demonstrated in this case which would enable the Disciplinary Committee to consider whether or not he verdict of the jury was erroneous. As a matter of law, we conclude that the decision in *Shepherd v The Law Society* reflects not only the law in England on this point but also the law in Hong Kong.

48. Even if we were free to overturn the verdict of the jury, the matters raised by the Respondent do not provide any proper basis for us to do so.

Conclusion

49. We are satisfied that the Complainant has proved the Complaint against the Respondent under section 34(1)(a)(ii) of the Ordinance, namely, that, the Respondent, a certified public accountant, was convicted in Hong Kong of two offences involving dishonesty.

50. On the question of sentence and costs, we will invite the Complainant to make written submissions on or before 20 January 2010, to be followed by the Respondent on or before 25 January 2010. If the Respondent is out of Hong Kong, he may send his written submissions by email to the Clerk
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