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 **PAUL MATHEW WALTER YOVICH** of Whangarei, Chartered Accountant

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FINAL DETERMINATION OF THE DISCIPLINARY TRIBUNAL OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS

28 June 2021

Hearing:	16 – 17 March 2021
Location:	The offices of Chartered Accountants Australia and New Zealand, 12-16 Nicholls Lane, Parnell, Auckland
Tribunal:	Matthew Casey QC (Chair) Andree Atkinson FCA John Murray FCA Allan Newman FCA Bethia Gibson (Lay Member)
Counsel:	Richard Moon for PCC Andrea Challis for the Member
Tribunal Secretariat:	Janene Hick Email: janene.hick.nzica@charteredaccountantsnz.com

At a hearing of the Disciplinary Tribunal held in public at which the Member was in attendance and represented by counsel the Member admitted some of the particulars and denied the others; and pleaded guilty to breaching section 220 of the Code of Ethics and not guilty to the charge of conduct unbecoming an accountant. This determination deals with the issue of liability only and there will be a later determination on penalty, costs and publication.

The charges and 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 Rules 13.50,[1] the Member is guilty of:

1. Conduct unbecoming an accountant; and/or

2. Breaching the Rules and/or the Code of Ethics of the New Zealand Institute of Chartered Accountants.

PARTICULARS

IN THAT being a Chartered Accountant in public practice and in relation to a complaint by Mr X, he:

Particular 1

Failed to have and/or implement an effective conflict identification process within his firm when he and two of his then fellow directors of Yovich Hayward Pevats Johnston Limited (**YHPJL**) were each involved in advising potential purchasers of the property at 16 Rathbone Street, Whangarei (the **Property**) in or around June and July 2016 in breach of the Fundamental Principle of Objectivity and/or Section 220 of the Code of Ethics (2014)[2] (the **Code**) and/or PS-1 Quality Control;[3] and/or

Particular 2

Failed to identify actual and/or potential conflicts of interest and/or threats to his objectivity that arose by virtue of his differing roles in relation to the purchase of the Property, namely:

(a) his role as a director of YHPJL which was engaged by three separate bidders on the Property; and/or

(b) his role as the director of Rathbone Business Centre Limited, in the making of an offer to purchase the Property; and/or

(c) his role as a beneficiary of the N Trust, a trustee and beneficiary of M's Family Trust, and a trustee and primary beneficiary of J Family Trust, being the trusts that purchased the Property via Rathbone Business Centre Limited; and/or

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1 Formerly Rule 13.39 of NZICA's Rules effective 15 December 2014 to 29 May 2019.
2 Being the Code of Ethics in force at the relevant time.
3 As amended July 2013.

(d) his role as a director and shareholder of YOYO Nominees Limited, which purchased the Property in its role as a bare trustee for Rathbone Business Centre Limited on behalf of three trusts connected to him and his family;

in breach of the Fundamental Principles of Objectivity and/or Professional Behaviour and/or Sections 120 and/or 150 and/or 220 and/or 280 of the Code; and/or

Particular 3

Failed to appropriately manage actual and/or potential conflicts of interest and/or threats to his objectivity that arose by virtue of his differing roles in relation to the purchase of the Property, including:

(a) evaluating the nature of the conflict of interest and/or threat to his objectivity; and/or

(b) disclosing the nature of the conflict and the proposed safeguards, if any, to the trustees of the N Family Trust, M's Family Trust, and J Family Trust; and/or

(c) obtaining the informed consent of the trustees of the N Family Trust, M's Family Trust, and J Family Trust to be involved in their offer on the Property via Rathbone Business Centre Limited; and/or

(d) applying safeguards to eliminate the threats to his compliance with the Code of Ethics or reduce them to an acceptable level; and/or

(e) documenting his disclosure of the circumstances of the conflict, the safeguards applied, and the consent obtained;

in breach of the Fundamental Principles of Objectivity and/or Professional Behaviour and/or Sections 120 and/or 150 and/or 220 of the Code; and/or

Particular 4

His email to Mr A on 11 November 2016 was threatening and unprofessional in breach of the Fundamental Principle of Professional Behaviour and/or section 150 of the Code; and/or

Particular 5

Lacked transparency in his communications with the Professional Conduct Committee (the **PCC**) in that:

(a) his letter to the PCC of 6 March 2020 stated *"I ultimately purchased the property at 16 Rathbone St on behalf of my client"*; and/or

(b) his letter to the PCC of 15 September 2020 stated that YoYo Nominees Limited was *"set up for client interests to hold shares and other investments"* and, in the case of the Property, was authorised *"by the client"* to hold the shares of Rathbone Business Centre, when, at all material times, YOYO Nominees held the shares in Rathbone Business Centre Limited on behalf of three trusts associated with the Yovich family (and he was a trustee and/or beneficiary of those trusts);

in breach of the Fundamental Principles of Integrity and/or Professional Behaviour and/or Sections 100 and/or 110 and/or 150 of the Code and/or Rule 13.3.

BACKGROUND

1. The Member was at the relevant time a director of the accounting practice Yovich Hayward Pevats Johnson Ltd (**YHPJL**). Two other directors, Mark Pevats and Walter Yovich (the Member's father), also face charges over the same events. The charges against all three were heard together, but the Tribunal has considered the liability of each of them separately.

2. In or about August 2015 Walter Yovich noticed that the Property, diagonally opposite YHPJL's premises, was on the market and that XYZ held a sole agency. He approached Mr X at XYZ for information about the Property. He was interested in acquiring the Property, but at a price well below what was being asked. In early 2016 he reiterated his interest to Mr X but again said the price was too high. He had no further contact with Mr X.

3. After the XYZ sole agency expired the Property was listed with other agents. One of these agents approached the Member and provided information to him about the Property on 23 June 2016. By 30 June the Member had decided to make an offer and was told that all offers had to be submitted by 4 pm the following day. He made two offers, the second of which was accepted and the agreement signed on 2 July 2016. The property was purchased in the name of Rathbone Business Centre Ltd (**Rathbone**).

4. The Member was Rathbone's sole director and its sole shareholder was YoYo Nominees Ltd (**YoYo**), a company set up by YHPJL as a bare trustee to hold shares or other assets on behalf of clients of the firm. The three directors of YoYo were the Member, Walter Yovich and Mark Pevats. They, together with the other directors of YHPJL, were the shareholders of YoYo.

5. The Member's interest in purchasing the Property was on behalf of three family trusts that had been set up many years previously, for himself and his two sisters. The Member was a beneficiary of all three trusts, and the principal beneficiary and trustee of one of them. Walter Yovich was a trustee of one of the others, the N Family Trust.

6. In a deed dated January 2016 between YoYo and the trustees of the three trusts, YoYo declared that it held the shares in Rathbone beneficially for the trusts. This deed was not set up with any thought of buying the Property but because of changes in the shareholding of Rathbone.

7. Rathbone's agreement to buy the Property was unconditional as to finance. It emerged at the hearing that the purchase price was effectively funded by Walter Yovich through an arrangement he had with the ASB Bank by which it would advance monies against the security of shares he owned.

8. Neither Rathbone nor the trusts had the means, independently of Walter Yovich, to fund the purchase. The $4.9m purchase was a significant investment for them. The Member said he had a discussion with Walter Yovich about financing the purchase before the first offer was made.

9. Mr X was unaware of the above matters. After learning that the Property had been bought by Rathbone he searched the online company records and discovered that Walter Yovich was both a director and shareholder of YoYo, and the sole shareholder of Rathbone. Mr X believed that as he had introduced the Property to Walter Yovich, he and XYZ were entitled to a commission. XYZ made a claim against the vendor for commission.

10. Mr X also learned that two other prospective purchasers introduced by him, and who had submitted offers, were clients of YHPJL. One of these, ABC Ltd and its owner Mr Z, were clients of Mark Pevats. Mr Pevats and Mr Z had attended a meeting with the vendor arranged by Mr X on 29 June, and ABC Ltd submitted an offer on 1 July 2016. The other client was Mr W and his family trust, of which Walter Yovich was a trustee. Mr W met with Walter Yovich to sign an offer for the Property on 1 July 2016. The Tribunal has found in relation to the charges against Walter Yovich that he signed this in his professional capacity.

11. As the purchase of the Property was effectively by the Member and his fellow YHPJL directors, it appeared to Mr X that they were in a conflict of interest with those two clients of the firm.

12. Mr X spoke to a number of people in the course of his inquiries and probably also in expressing his views about his entitlement to a commission and the apparent conflict of interest. This came to the attention of the Member and on 11 November 2016 he sent an email to the local XYZ manager, Mr A. It was purportedly sent on behalf of YHPJL, although the other directors did not see it.

13. The email commenced by stating that one of XYZ' agents (clearly Mr X although not named) was *"making accusations and throwing dispersions [sic] around town"* about YHPJL, its directors and clients, and *"if this continues we will sue XYZ and the Agent for defamation"*.

14. In the email the Member stated that he was involved in a deal *"for a client"* in which he dealt with an LJ Hooker agent. He had not dealt with the XYZ agent but was aware that clients of the firm had.

15. The email stated that as Chartered Accountants *"we adhere to a strict code of Ethics and Principles"*, then:

> *"Amongst the accusations being made is that [Walter] Yovich is involved as a shareholder. He is not a Director or shareholder of my client that purchased the property. … This is only a Nominee company that holds shares on behalf of our clients. The shareholders and Directors of this entity therefore have no beneficial involvement in the company."*

16. The email concluded by referring to YHPJL and its clients having the biggest commercial portfolio in Whangarei and:

> *"We will have no hesitation in not dealing with XYZ and I won't be dealing direct with XYZ in the interim. Likewise I am fairly young in age compared to the many Professionals in town and question what effect this would have on your business given my/our influence"*.

17. Much of the email was expressed in the first-person plural (i.e. we/our) and purported to be written on behalf of the firm. The Member claimed that the email was from him alone and he had used the 'royal' we. This explanation is not accepted, as the email clearly differentiates between the Member and the firm in different places.

18. There are several concerning aspects to the email. These include the statements impugning Mr X's version of events, and the threats to sue for defamation and to withdraw business. The statement as to the shareholders and directors having no beneficial involvement in the purchase

was patently false. The statements to the effect that the purchase was on behalf of a 'client' were misleading.

19. The email was passed on to Mr X and he provided a detailed response to Mr A in January 2017. Mr A professed no recollection of having received the response and it seems he did nothing to follow it up. It was not sent to the Member or his fellow directors.

20. Following receipt of the Member's email, Mr A met with him and Walter Yovich to provide the assurances they sought. They did not correct the false and misleading statements in the email. XYZ's commission claim was dropped and Mr X's association with XYZ was terminated (while there were apparently other reasons, the email was clearly a factor). Mr A said in evidence that he was concerned for XYZ's reputation and ongoing business with the Yovichs.

21. Mr X sought to resolve his concerns directly with YHPJL but without success. He then complained to the Institute. The Institute referred the complaint to the Member and his co-accused and received a letter in response dated 6 March 2020, signed by all three. That letter, and a further response dated 15 September 2020, are the subject of Particular 5.

22. It is not known whether XYZ would have pursued or succeeded with its claim to a commission if a truthful account had been provided by YHPJL to Mr A. However, the failure to provide such an account, and instead to mislead XYZ, was a significant breach of the standards expected of a Chartered Accountant. An aggravating factor was the reference to the Code of Ethics by which the Member sought to add force to his statements in the email.

23. In the Member's email of 11 November 2016 and his letters to the PCC, he implied that the family trusts were 'clients' of YHPJL. No letters of engagement were put in evidence as between the family trusts and the firm. There was an engagement letter for Rathbone, dated 29 January 2016, well before these events. It covered routine accounting and administration services but did not extend to acting in property transactions. If there were any engagement letters for the family trusts they would probably have been no different in that respect.

24. Whether or not the trusts were clients of the firm in other respects, they were not, and the Member was not acting in a professional capacity for them (or Rathbone), in connection with the purchase of the Property. It was entirely a personal, family matter advancing the interests of his and his sisters' family trusts.

DECISION

Particulars 1 – 3: Conflicts of Interest

25. In the investigation of Mr X's complaint, it became apparent that YHPJL did not have in place, or implement, effective conflict identification and management processes. The evidence of the three members charged, and of another director Mr K, was that they each operated within their own silo and shared no information about their clients, either as to who they were or what work was being done for them. The exception was where one director might occasionally seek a second opinion, such as in relation to a tax planning matter. They regarded any issue of conflict of interest as confined to their own clients, not to other clients of the firm. Although the firm's database would have shown the names of the firm's clients, there was no system (or practice) of conflict checking. Nor did they follow any quality control system for managing conflicts once they might be identified, even within a director's own 'silo'.

26. The Member and his co-directors claimed that this was to protect the confidentiality of their clients' affairs, as they would not want anyone else knowing about their financial or other dealings. The approach was that by each director keeping his or her clients and their affairs to him (or her) self, there would be no opportunity for conflict as regards the clients of any other director. It was claimed that this is a common practice by accounting firms in provincial areas such as Whangarei. The Tribunal does not accept this claim, and even if it is correct, it is not acceptable practice.

27. The Member has admitted **Particular 1** to the extent that he failed to implement the conflict identification process within the firm but denies that there was no effective process. He admits that this was a breach of s 220 of the Code but denies breaching the Fundamental Principle of Objectivity and PS-1 Quality Control.

28. Since 2010 PS-1 has required an accounting firm to establish and maintain a system of quality control to give reasonable assurance that the firm and its personnel comply with professional standards and other requirements. It also requires a firm to implement quality control procedures.

29. YHPJL had in place a generic quality control manual (**QCM**) from July 2010. It stated that all directors (and others) must know where to locate a copy of the manual, were responsible for keeping themselves up to date with its contents and to follow its procedures to ensure maintenance of professional standards. A practice review in 2012 noted that the directors were unaware of the QCM's existence. A later practice review in 2020 noted that (with some exceptions including as to conflicts of interest) the firm's quality control documentation and processes were generally well maintained and followed.

30. The evidence shows that this was not the case in 2016 as no steps were taken either to identify or manage conflicts of interest or threats to objectivity. Whether or not the QCM was adequate in terms of PS-1, the directors adopted a completely ad hoc approach to the identification and management of conflicts, and then only as between clients within their own silo. They did not have any system for identifying whether any other director, or that director's client, might be acting on or have an interest in a matter that might give rise to a conflict of interest or threat to objectivity. Although the firm had a QCM to assist them in complying with PS-1, it was not effective as the relevant aspects were not incorporated into the day-to-day practice of the firm and were not followed. Accountancy firms should have in place and follow a proper system for identifying potential conflicts and a firm of any reasonable size should as a matter of good practice maintain a register for identifying possible conflicts of interest.

31. Particular 1 alleges that the Member and others were *"involved in advising"* potential purchasers. The Member has admitted that he (and the others) were *"involved with offers for the Property"*. The Member's involvement was in a personal, family capacity and that of Mr Pevats was in his professional capacity. Walter Yovich was involved both in a personal capacity and professionally in relation to the DEF Trust. Whether or not they 'advised' potential purchasers is not material to the need for there to be effective conflict identification and management processes.

32. The Member submits that while there may have been a breach of s 220, it does not necessarily, and did not in this case, amount to a breach of the Fundamental Principle of Objectivity in the Code. The PCC submits that any breach of s 220 must also breach the Fundamental Principle of Objectivity.

33. There may be circumstances where a breach of a particular section of the Code of Ethics would not also amount to a breach of the Fundamental Principle to which that section relates, such as where the breach was trivial or of a purely technical nature. The breaches in this case were not of that type and go directly to the Fundamental Principles which the particular sections of the Code relate to.

34. The Tribunal finds Particular 1 proved and that there has been a breach of the Fundamental Principle of Objectivity as well as s 220 of the Code, and of PS-1.

35. **Particular 2** concerns the failure to identify actual or potential conflicts of interest and threats to objectivity by virtue of the Member's various roles in relation to the purchase of the Property. The Member has admitted sub-particulars (a), (b) and (c), but denies (d). He admits that he breached s 220 in respect of the admitted sub-particulars, but denies breaching ss 120, 150 and 280 of the Code, and denies breaching the Fundamental Principles of Objectivity and Professional Behaviour.

36. The actual or potential conflicts of interest referred to in this Particular relate to the involvement of YHPJL on behalf of the various parties interested in purchasing the Property. The Member was directly interested as a trustee and principal beneficiary of the J Trust and a discretionary beneficiary of the two other trusts that were the ultimate purchasers of the Property, via Rathbone. Walter Yovich was a trustee of the N Family Trust and of the DEF Trust which made an offer for the Property. The Member denies that his role as a director and shareholder of YoYo gave rise to a conflict of interest or threat to his objectivity.

37. YoYo was a vehicle used by the directors of YHPJL to undertake transactions on behalf of their clients, seemingly at times without the knowledge or involvement of the other directors. The purpose of using a nominee company was to maintain confidentiality of the ultimate purchaser or beneficiary. While this might now be regarded as contrary to anti-money laundering legislation, that was not the case in 2016.

38. The issue in this case is not that the Property was purchased by Rathbone or YoYo as a bare trustee, but that it was purchased on behalf of the three trusts connected to the Member and his family. The conflict and threat arising from his direct and familial interest in the acquisition is addressed in sub-particular (c). Sub-particular (d) is an expansion of the involvement in (c), rather than a separate and distinct fourth ground of conflict.

39. In admitting sub-particular (a) the Member drew a distinction between the firm being 'engaged by' separate bidders and being 'involved with' those bidders. Clearly YHPJL was engaged by ABC Ltd (Mr Pevats' client). The Tribunal has found that Walter Yovich was acting in a professional capacity in relation to the DEF Trust's bid for the Property. The firm was not 'engaged by' the Yovich family trusts as they were not in the position of clients in relation to this transaction.

40. That gave rise to a conflict of interest between ABC Ltd, the DEF Trust and the Member's family interests, and potentially any other clients who had or might engage the firm in relation to acquiring the Property.

41. The Tribunal finds Particular 2 proved although acknowledging that sub-particulars (c) and (d) overlap. The Member admitted breaching s 220 of the Code, but denied breaching ss 120, 150 and 280, or the Fundamental Principles of Objectivity and Professional Behaviour.

42. The Fundamental Principle of Objectivity requires a member not to allow bias, conflict of interest or undue influence of others to override professional or business judgements. Section 120: Objectivity restates this principle and notes that a member may be exposed to situations that may impair objectivity. A member must not perform a professional service if a circumstance or relationship biases or unduly influences professional judgement with respect to that service.

43. Section 280 extends this to requiring members to determine whether there are threats resulting from interests in, or relationships with, clients. A threat to objectivity may arise from a familial or close personal or business relationship. The Member submits that his professional or business judgment was not actually affected, as he had no involvement on behalf of any of the firm's clients, and that his involvement in relation to his family's trusts did not involve any exercise of professional or business judgement.

44. The Member failed to assess the threat to compliance with the Fundamental Principle of Objectivity. While there may have been no threat applying to his family trusts, there were threats in relation to the other clients of the firm. The absence of a proper and effective means of identifying a threat, meaning the Member was unaware of it, does not excuse compliance with the Code. No matter how a threat to objectivity arises (here primarily because of a lack of judgement as to the potential conflict between his family's interests and those of the firm's clients, and the lack of adherence to policy and procedural systems), the need for objectivity at all times is paramount to the exercise of members' duties of care and professionalism, and observance of their ethical obligations under the Code of Ethics.

45. The Fundamental Principle of Professional Behaviour requires a member (inter alia) to avoid any action that discredits the profession. Section 150 extends this to include actions that a reasonable and informed third-party, weighing all the specific facts and circumstances available to the member, would be likely to conclude adversely affects the good reputation of the profession. The objective facts and circumstances in this case were that the Member was bidding to purchase the Property for his own family interests, potentially in competition with clients who had engaged the firm on their bids to purchase the same property. The fact that the Member was unaware of the involvement of the others is not an answer – especially when that lack of knowledge was due to the firm not having in place a process for identifying and managing such potential conflicts.

46. These circumstances and events would be regarded by a reasonable outsider as adversely affecting the good reputation of the profession. The Tribunal therefore finds that s 150 of the Code and the Fundamental Principle of Professional Behaviour were breached.

47. Counsel for the PCC directed our attention to clause NZ1.6 of the Code which requires members to be guided not merely by the words, but also by the spirit of the Code. Particular behaviour or conduct that does not receive a mention within the Code can still amount to a breach.

48. As well as the literal wording of the particular sections of the Code, there is also the question of perception. Questions of conflict of interest should be looked at holistically, as circumstances that can give rise to a conflict of interest should be identified whether or not a conflict actually occurs, or a member's professional or business judgement is actually impaired. The combination of matters in Particular 2, and the lack of any identification or management of them, would be regarded as reflecting adversely on the profession.

49. The Tribunal therefore finds the Member's conduct in Particular 2 breached sections 120, 150 and 280 of the Code, as well as the admitted breach of s 220, and breached the Fundamental Principles of Objectivity and Professional Behaviour.

50. **Particular 3** concerns the failure to manage the actual or potential conflicts of interest that arose by virtue of the Member's various roles. He has admitted failing to appropriately manage the conflicts as a result of not initially identifying them, and that this was in breach of s 220 of the Code.

51. Sub-particular 3(a) refers to the Member's failure to evaluate the nature of the conflict of interest and/or the threat to his objectivity. His failure to identify both the potential conflict and the threat to objectivity that existed once he was personally involved, meant he did not evaluate them. This sub-particular has clearly been made out.

52. Sub-particular 3(b) refers to his failure to disclose the nature of the conflict and any proposed safeguards to the trustees of his family's trusts. In view of the finding that the involvement of Rathbone was essentially on behalf of those family trusts, the Member was not required to disclose any conflict or safeguards to them. The involvement of the other YHPJL directors on behalf of their clients meant there were obligations of disclosure to those clients in relation to the Member's personal involvement, but no such obligation to his family trusts whom he was representing in a personal, not professional, capacity.

53. Sub-particular 3(c) refers to the failure to obtain informed consent from the family trusts to his involvement on their behalf to the purchase by Rathbone. In view of the findings that the Member was acting in a personal capacity for his family interests, and that the purchase by Rathbone was on their behalf, it was not a situation of conflict as between them and Rathbone and did not require their informed consent.

54. Sub-particular 3(d) alleges a failure to apply safeguards to eliminate or reduce threats to his compliance with the Code; and in 3(e) a failure to document the conflict, any safeguards applied, and any consent obtained. Because none of these things were done, the sub-particulars are made out. For the reasons explained above, these actions were required in relation to ABC Ltd and the DEF Trust, in which the firm was acting in a professional capacity, but not in relation to Rathbone or the family trusts where his role was as a family member.

55. The question is whether the matters in sub-particulars (a), (d) and (e) amounted to breaches of the Fundamental Principles of Objectivity and/or Professional Behaviour; and of ss 120 and 150 of the Code.

56. Particular 2 relates to the failure to identify the conflicts and threats to objectivity, and Particular 3 is that the Member failed to manage them. While the Member did not owe professional duties to the family trusts and to Rathbone in relation to the purchase of the Property on their behalf, his failure to identify and address the threat it presented in relation to other clients of the firm meant that it was not managed. The Member should have been aware of the involvement of his fellow directors on behalf of other clients, as they should have been of his involvement for his family trusts. He was therefore one of those responsible for the failure to manage the conflicts and threats.

57. The Tribunal's reasoning and findings in relation to Particular 2 also apply to the established facts in Particular 3. The Tribunal finds that Particular 3 is made out in relation to sub-particulars (a), (d) and (e) and that the Member's conduct breached ss 120 and 150 of the Code, as well

as the admitted breach of s 220, and breached the Fundamental Principles of Objectivity and Professional Behaviour.

58. **Particular 4** is that the Member's email to Mr A of 11 November 2016 was threatening and unprofessional, in breach of the Fundamental Principle of Professional Behaviour and/or s 150 of the Code.

59. Mr A said in evidence that he did not find he email threatening. Rather he saw it as a frank 'plain English' account of events and what the Member envisaged with any future business relationship with XYZ. As already noted, the email was not a correct (nor complete) account of the facts. It was expressed in threatening language, including as to suing for defamation and ceasing to do business with XYZ. Not only was the email threatening, it brought about the results the Member sought.

60. The email was unprofessional both in respect of its threatening tone and its false and misleading account of the circumstances of the purchase. Also, it referred to the Code of Ethics as adding force to the veracity of that account. It was a clear breach of s 150 of the Code and a serious breach of the Fundamental Principle of Professional Behaviour.

61. **Particular 5** is that the Member lacked transparency in his communications with the PCC in the letters of 6 March 2020 and 15 September 2020. These were the letters responding to the complaint and both were signed by the Member and his two co-accused fellow directors. The Member denies this Particular, and that he breached the Fundamental Principle of Professional Behaviour, ss 100, 110 and 150 of the Code and r 13.3 of the Institute's Rules.

62. The letter of 6 March 2020 was the Member's response both to Mr X's complaint and to a request by the PCC for information. In the part of the letter setting out his specific response, the Member said he *"ultimately purchased [the Property] on behalf of my client"* and that YoYo acted as a trustee for, and held investments on behalf of, 'clients'. He also said that the shareholders of YHPJL *"have no beneficial financial interest as individuals"*. The main part of the letter also repeated that the Member was acting *"for his client"*.

63. In the letter of 15 September 2020, the Member stated that YoYo was simply a trustee company set up for client interests to hold shares and other investments on behalf of clients and it was authorised by the client (i.e. Rathbone) to hold the shares on its shareholders' behalf.

64. These statements were incorrect and misleading, both factually and in the context of the complaint. The Member sought to shelter behind the pretence that the ultimate purchaser was a 'client' when it was his family interests. He clearly had a personal interest in relation to Rathbone's purchase of the Property. He also did not disclose that Walter Yovich had effectively funded the purchase. It would have been very apparent to the Member that the true extent of their and their family's personal involvement and interest was information essential to the PCC investigation.

65. The Member and Walter Yovich sought to justify their response on the ground that they did not wish Mr X to know this, as they believed he would share it with others in the community. They claimed that they intended to tell the PCC at some future point, in the absence of Mr X. This claim is simply not credible. The letters were written with the intention that the information provided should resolve the complaint. There was no suggestion in either letter of a wish to provide anything in confidence, whether by way of further information or to correct the

misinformation in the letters. The Member did not communicate separately to the PCC that he wished to disclose anything in confidence.

66. The complaint went to a meeting of the PCC on 24 September 2020. No correction or additional information was volunteered, and the true position only came out as the result of questioning by the PCC. Even then, there was no disclosure of Walter Yovich's financial interest as funder.

67. Rule 13.3 was introduced in the 2019 revision of the Institute's Rules and requires members to be open and honest in their dealings with the PCC and to provide information as required in connection with the investigation of a complaint. The information provided by the Member was not open or honest; it was incorrect, misleading and incomplete in material respects.

68. Section 110: Integrity requires all members to be straightforward and honest in their professional and business relationships and implies fair dealing and truthfulness. A member must not knowingly be associated with communications or information which he or she believes contains materially false or misleading statements. The Member was not straightforward or honest in his communications to the PCC, in either of the two letters. They included materially false and misleading statements, and the Member knew this.

69. Section 150: Professional Behaviour imposes an obligation on all members to avoid action that may discredit the profession. Any reasonable third party would regard the misinformation in the letters, sent by the Member to his professional body investigating a complaint against him, as discrediting the accounting profession.

70. The Member's conduct in relation to Particular 5 is a clear breach of both ss 110 and 150, as well as r 13.3. These were significant breaches and go directly to the Fundamental Principle of Professional Behaviour.

71. Particular 5 is therefore established.

72. As a result, the Tribunal finds the Member guilty of **Charge 2** of breaching the Rules (particularly r 13.3) and the Code of Ethics, not only s 220 of the Code as admitted, but also ss 110, 120, 150 and 280, and the Fundamental Principles of Objectivity and Professional Behaviour.

Charge 1: Conduct unbecoming an accountant.

73. Conduct unbecoming an accountant 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 his professional obligations, and the threshold is one of degree. The best guide to what is acceptable for professional conduct is the standards applied by competent, ethical and responsible practitioners.

74. In relation to Particular 1 the failure to have in place and to implement an effective conflict identification and management process within the firm was a serious matter. It is not an acceptable discharge of professional obligations for the principals in a public practice to maintain such a level of secrecy that there is no system for identifying actual or potential conflicts, nor for managing them. While the desire of clients for confidentiality should be respected, this does not mean that effective quality control measures should not include the identification and management of conflicts of interest.

75. The lack of such controls and processes was a major cause of the issues that arose in relation to Particulars 2 and 3. The Tribunal has found in respect of these particulars that there were breaches of the Code of Ethics including the Fundamental Principles of Objectivity and Professional Behaviour. We find that the Member's failure to have identified and addressed the conflicts of interest, when also bidding for the Property on behalf of his own and his family interests, fell below acceptable professional standards to such a degree as to constitute conduct unbecoming an accountant.

76. In relation to Particular 4, the threatening and unprofessional tone and content of the 11 November 2016 email, as well as its false and misleading narrative, reflect very badly on the profession, especially when backed up by a stated reliance on the Code of Ethics. It was most unprofessional to send such an email and would be so regarded by the Member's peers of good standing.

77. In relation to Particular 5, the false and misleading (and incomplete) information in the Member's responses to the PCC departed from acceptable professional standards to such a degree as to constitute conduct unbecoming an accountant. The Member was well aware of the significance, to the PCC's investigation, of the identity of the ultimate purchaser as that was a term he himself used. Professional standards required that his responses should be truthful and not misleading. It would be unacceptable to the profession and harmful to the public who rely on the upholding of professional standards, if members are untruthful and misleading when responding to a complaint made about them to their professional body. The claim that the Member intended to correct the misinformation at some later date is not accepted.

DETERMINATION

78. The Tribunal finds the particulars established in the respects set out in this decision and finds **PAUL MATHEW WALTER YOVICH** guilty of the charges of conduct unbecoming an accountant and of breaching the Rules and the Code of Ethics of the New Zealand Institute of Chartered Accountants.

PENALTY, COSTS AND PUBLICATION

79. Following its determination on liability as above, the Tribunal received submissions from the Member and the PCC on penalty, costs and publication. The PCC submitted that the appropriate penalty should be a censure, a fine of $15,000 and a practice review within 12 months, with a focus on conflict management systems. While the Member accepts that a censure is appropriate, he takes issue with the amount of the fine.

80. The Member also seeks that any publication of the decision does not include his name and location. He does not oppose the award of costs.

81. The Member has offered that in place of fines and publication for himself and the other two members charged, he will volunteer his time in an advocacy role as to the complaint process and training in conflicts of interest management, based on learnings from this complaint. While the Tribunal would not wish to dissuade any member from volunteering such service, there is no provision in the Rules, and no precedent, for this to be treated in lieu of penalty and publication in a disciplinary context. Where a member has made a positive contribution to the profession, this will be considered by way of mitigation, but prospective contributions are uncertain and speculative.

82. The questions of penalty and publication are somewhat complicated by the fact that the Rules of the Institute were revised and amended with effect from 30 May 2019. So far as is relevant to the present case, the amendments included:

- The inclusion of rule 13.3 as a new rule, requiring members to be open and honest in their dealings with the Institute. The Tribunal has found that the rule was breached by the Member in respect of conduct which post-dated the rule change.
- The maximum fine (now in rule 13.51(c)) was increased from $20,000 to $50,000.
- The rule as to publication (now in rule 13.55) introduced a threshold of 'exceptional circumstances' for suppression of the Member's name in any publication of the decision.

83. It is a general principle that a person should not be liable for any greater penalty than was in force at the time of the offending. Therefore, in relation to offending that took place prior to 30 May 2019, the maximum fine that could be imposed is $20,000. For offending after that date, the maximum fine is $50,000.

84. Although publication is not strictly speaking a penalty, it is more a matter of substance than of procedure and can be regarded in this context as in the nature of a penalty. The Tribunal therefore approaches the question of publication as if the former rule applies, which did not specify 'exceptional circumstances'.

PENALTY

85. Rule 13.51 sets out the penalties and other orders that may be imposed following a guilty finding. They include striking off, suspension, imposing a fine and/or censure and various orders affecting the Member's practice. The PCC does not contend that the more serious penalties of striking off or suspension are warranted. It seeks an order for censure, which is not opposed by the Member. It says this is consistent with other decisions of the Tribunal, in many cases accompanied by a fine and/or an order affecting the Member's practice.

86. In the exercise of its powers under rule 13.51, the Tribunal is to be guided by the decision of the High Court in *Roberts v Nursing Council* [2012] NZHC 3354. The Court held that the penalty that should be imposed is one that:

(a) most appropriately protects the public and deters others;

(b) facilitates the Tribunal's role in setting and maintaining professional standards;

(c) reflects the seriousness of the misconduct;

(d) punishes the practitioner (although subsequent Court decisions have taken the view that punishment is more a by-product of the other factors);

(e) allows for the rehabilitation of the practitioner;

(f) promotes consistency with penalties in similar cases;

(g) is the least restrictive penalty appropriate in the circumstances; and

(h) looked at overall, is fair, reasonable and proportionate in the circumstances.

87. In the Member's case the Tribunal has found that his involvement in the circumstances leading up to the purchase of the Property was of a personal, family nature and not on behalf of any client. However, the lack of a conflict identification and management system meant that he was unaware that there was a potential conflict between his interests and those of firm clients who might also be considered buying the Property. The firm had many clients with commercial property interests in Whangarei and it was reasonable to anticipate that others in the firm might be engaged by one or more clients.

88. The Tribunal accepts that no client of the firm was in fact prejudiced by the conflict of interest that arose in this case. Both clients stated that they would not have matched the price that was offered by the Member. But for the Member's subsequent conduct the Tribunal would have regarded this as an isolated episode, warranting the penalty of a censure mainly because of the failure to have in place and implement an effective conflicts system.

89. The subsequent conduct of the Member was of a different nature and calls for a more serious response. His email to XYZ of 11 November 2016 was particularly egregious, and as the Tribunal has found, a serious breach of professional standards. The Member's incorrect, misleading and incomplete responses to the PCC's investigation of the complaint were further aggravating features, which also warrant an additional penalty.

90. It has been submitted that as the latter episodes were not in a 'public facing' context a lesser penalty might be appropriate than in other cases where both a censure and monetary penalty have been imposed. The Tribunal does not agree. The Member's email was 'public facing' and was not an internal matter. Rule 13.3 was introduced so as to emphasise the importance of honesty in members' dealings with their professional body.

91. Both the PCC and the Member have drawn attention to previous Tribunal decisions with varying degrees of similarity to the present. The Member's conduct in this case was not limited to the mismanagement of conflicts of interest, but there were the aggravating features of his communication to XYZ and to the Institute. While cumulatively the offending could warrant a more serious penalty such as suspension, there are mitigating factors that mean that such a penalty is not called for. The misleading communications to the Institute were in the period after the new Rules took effect at which time the maximum fine had increased. Fines imposed under the previous cap are therefore of less relevance or require adjustment when considering the new maximum level of fine.

92. Factors put forward by the Member in mitigation include co-operation with the disciplinary process, insight and learnings, the lack of personal gain, previous unblemished record and his community involvement.

93. By way of mitigation, the Tribunal notes the Member's largely unblemished record and his extensive community involvement. Taking all matters into account and the fact that part of the offending pre-dated the increase in the maximum fine, the Tribunal considers it is appropriate to impose a fine of $15,000 in addition to the censure and the order below.

94. In light of the events surrounding this complaint and the Member remaining in practice, the Tribunal considers that he should undergo a practice review with a particular focus on the management of conflicts of interest. While it appears that the firm's performance improved after the complaint, there remains a concern about the approach to conflict management apparent from the evidence of the Member and his former co-directors.

The Disciplinary Tribunal orders that:

- **Pursuant to Rule 13.51(c) of the Rules of the New Zealand Institute of Chartered Accountants orders that PAUL MATHEW WALTER YOVICH pay to the Institute a fine of $15,000; and**

- **Pursuant to Rule 13.51(m) of the Rules of the New Zealand Institute of Chartered Accountants orders that PAUL MATHEW WALTER YOVICH be censured; and**

- **Pursuant to Rule 13.51(g) of the Rules of the New Zealand Institute of Chartered Accountants that within 12 months of this decision a review is undertaken by the Institute of the Member's practice with a focus on conflict management systems and processes and that the costs of such review be paid by the Member.**

COSTS

95. The PCC seeks full costs of $68,908.41, split equally among the three Members concerned. Counsel for the Members does not contest the overall amount or the suggested allocation.

Pursuant to Rule 13.53 of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that PAUL MATHEW WALTER YOVICH pay to the Institute the sum of $22,969.47 in respect of the costs and expenses of the hearing before the Disciplinary Tribunal, the investigation by the Professional Conduct Committee and the cost of publicity. No GST is payable.

PUBLICATION

96. The PCC seeks a direction that notice of the decision including the Member's name, location, the particulars of the charges and a summary of the reasons for the decision and the penalty imposed, be published in *Acuity* and on the CAANZ website. The PCC has no objection to the names of all third parties including the firm's clients and the family trusts being suppressed.

97. The Member seeks suppression of his name and location in any report of the decision.

98. Rule 13.44(a) of the former Rules provided that unless the Tribunal directs otherwise, decisions are to be published with mention of the Member's name and location. Former Rule 13.62(b) provided that if the Tribunal considers that it is 'appropriate' to do so, having regard to the interests of any person or to the public interest, it may make an order prohibiting the publication of the name of the person to whom any hearing relates, or any other person.

99. Both the PCC and counsel for the Member agree that, as a starting point, there is a presumption in favour of full publication in order to maintain public interest, open justice and the maintenance of confidence in the disciplinary process.

100. The leading authority on publication in relation to Tribunal decisions is *J v The Institute of Chartered Accountants Appeals Council* [2020] NZHC 1566, which was decided under the former rules. The Court held that:

    - Rule 13.44(a) establishes a strong presumption in favour of publication, which may be displaced under rule 13.62, although the threshold is high.

    - While there is no onus or burden on the person seeking suppression, there needs to be supporting evidence to depart from the presumption.

- The standard in the disciplinary context is high, and closer to the criminal than civil jurisdiction due to the public interest factors of transparency, accountability and public protection.

- Publication decisions in disciplinary cases require the weighing of the public interest with the particular interests of any person in the context of the facts of the particular case.

- There is not a single universally applicable threshold. The degree of impact on the interests of any person required to make non-publication appropriate will lessen as does the degree of public interest militating in favour of publication (for instance, where a practitioner is unlikely to repeat an isolated error).

- However, because of the public interest factors underpinning publication of professional disciplinary decisions, that standard will generally be high.

- The use of the word 'appropriate' in rule 13.62 does not add content to the test usually applied in the civil jurisdiction or set a threshold lower than that applying in the civil jurisdiction. The rule is broad and sets out neither a specific threshold nor mandatory specific considerations. The question will be, having regard to the public interest and the interests of the affected parties, what is appropriate in the particular circumstances.

101. There are a number of other cases supporting the view that the Member's name and location should be published unless there are very good reasons not to.

102. In *Daniels v Wellington District Law Society* [2011] NZLR 850 the Full Court held that:

> Harm to reputation is an inevitable consequence of publication if a professional is the subject of an adverse disciplinary finding but of itself cannot provide sufficient ground for there to be suppression of his name … It is more than a question of publication being required to protect the public. Rather it is to advance the public interest, namely to protect the profession's most valuable asset, being its collective reputation.

103. It also adopted a quote from *T v Director of Proceedings* (2006) that:

> Following an adverse disciplinary finding … The probability must be that public interest considerations will require that the name of the practitioner be published in a preponderance of cases.

104. In *Collier v Director of Proceedings* [2001] NZAAR 91 the High Court held that the public is entitled to know if a professional has engaged in practice deemed by others to be below standard and what, if any, restrictions have been put in place.

105. In *Hart v The Standards Committee (No. 1) of the NZLS* [2012] NZSC 4, the Supreme Court held that it is necessary to strike a balance between the principle of open justice and the interests of the party seeking suppression.

106. In *Erceg v Erceg* [2017] 1 NZLR 310 the Supreme Court held that a party seeking a suppression order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule, and that the standard is a high one.

107. Counsel for the Member referred to a number of previous decisions of the Tribunal and of the Appeals Council where suppression orders have been made. In *Name Not Published* (29 June 2012), the member was found guilty of conduct unbecoming an accountant and was struck off. The Appeals Council granted name suppression taking into account a combination of factors

including the member's previous unblemished record, the fact he was 70 years of age and would not be practising as a Chartered Accountant again. There were other factors, which in combination the Appeals Council held to constitute 'special circumstances'. They included that all of the clients, community organisations and companies with which he was involved had been or would be directly informed. He was also suffering a serious health condition. The Appeals Council emphasised that each case must be considered on its own facts and circumstances will differ. It is notable that there was no discussion in the decision of the caselaw on name suppression in the professional disciplinary context, as to which there is now a substantial body as discussed above.

108. In its recent decision of *Britton* (24 December 2020) the Tribunal noted that there needs to be special circumstances or a highly prejudicial effect (something more than the normal consequences) of the publication on a member or their family if their private interests are to displace the important public interest considerations. While *Britton* was a decision under the new rules (now requiring 'exceptional circumstances' to displace the presumption) the Tribunal's observations were based on decisions under the previous rules including earlier Appeals Council decisions and the *J* case.

109. The Member advances the following reasons as to why his name and location should not be published. The offending is not at the serious end of the spectrum, did not involve misappropriation or financial gain and was an isolated event. His interactions with the PCC were not public facing. The Member also refers to his previously unblemished record, as well as his distinguished community service.

110. These factors do not either alone or collectively meet the threshold for name suppression. Essentially, they come down to an argument about the harm to his reputation being disproportionate. The offending, while not the most serious, was not of a trivial nature and was not an isolated event. The reasons put forward would not be out of the ordinary in many mid-level disciplinary cases, and do not amount specific adverse consequences that would justify a departure from the strong public interest presumption in favour of publication.

111. While the Tribunal accepts that there will be adverse consequences, they are not significantly greater than those that inevitably follow in a professional disciplinary context. Harm to reputation is such a consequence of an adverse disciplinary finding and is not, of itself, a reason for suppressing the member's name.

112. In order not to prejudice the Member's right to appeal this decision (particularly in relation to publication) the Tribunal will order that there should be no publication of the Member's name and location prior to the expiry of the appeal period.

Pursuant to rule 13.44 of the Rules of the New Zealand Institute of Chartered Accountants effective from 26 June 2017, and rule 13.55 of the Rules effective from 30 May 2019, notice of this decision of the Disciplinary Tribunal shall be published on the website and in the official publication *Acuity* with mention of the Member's name and location.

Pursuant to rule 13.59(b) of the Rules of the New Zealand Institute of Chartered Accountants the Tribunal orders that prior to the expiry of the appeal period provided for in rule 13.63 there shall be no publication of the Member's name and location, or the name of his firm.

Pursuant to rule 13.78(b)(iii) of the Rules of the New Zealand Institute of Chartered Accountants the Tribunal orders that the names of the third parties including the complainant, witnesses and clients of Yovich Howard Pevats Johnston Ltd (but not the firm itself), and any information

or documents which might identify them, be suppressed.

APPEAL

113. Pursuant to rule 13.63 of the Rules, the Member or the PCC may, not later than 21 days after the notification to them of this decision, appeal in writing to the Appeals Council of the Institute against the decision.

114. Pursuant to rule 13.59 the Tribunal's decision as to penalty shall not take effect while the Member remains entitled to appeal, or while any such appeal awaits determination by the Appeals Council.

115. If an appeal is lodged then any further name suppression for the Member will be a matter for the Appeals Council under rule 13.78.

Matthew Casey QC
Chair, Disciplinary Tribunal