

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 **MICHAEL RAYMOND CURD** of Palmerston North, Chartered Accountant

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

23 August 2021

Hearing: 11 August 2021

Location: The offices of Chartered Accountants Australia and New Zealand, Chartered Accountants House, Level 7, 50 Customhouse Quay, Wellington

Tribunal: Matthew Casey QC (Chair and lay member)
Andrée Atkinson FCA
William Black CA

Counsel: Richard Moon for the prosecution
Lisa Hansen for the Member

Tribunal Secretariat: Janene Hick
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A hearing of the Disciplinary Tribunal into the charges against the Member was held in public on 11 August 2021 at Wellington. The Member was in attendance and represented by counsel. The Member pleaded guilty to the Charges and admitted the Particulars.

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 Rule 13.50, the Member is guilty of:

1. Conduct unbecoming an accountant; and/or
2. *Withdrawn*
3. Breaching the Rules and/or the Institute's Code of Ethics.

PARTICULARS

IN THAT in his role as a Chartered Accountant in public practice and in relation to a complaint by Allison Walker, the Member:

Particular 1

Failed to identify and/or put in place appropriate safeguards to manage conflicts of interest and/or threats to his objectivity that arose by virtue of his differing roles and interests as:

- (a) a trustee of the BVT Trust (as director of BVT Holdings Trustees Ltd);
- (b) accountant for the BVT Trust (through his firm Broadway Accounting Solutions Ltd (Broadway));
- (c) a debtor of the BVT Trust;
- (d) half owner of the Tokomaru hunting block, the other half of which is the principal asset of the BVT Trust;
- (e) a trustee of DT Holdings Trust (as director of BVT Holdings Trustees Ltd); and
- (f) accountant for the DT Holdings Trust (through Broadway); and/or
- (g) accountant for 2D Rentals Ltd (through Broadway), a business 100% owned by DT Holdings Trust

in breach of the Fundamental Principle of Objectivity and/or sections 120 and/or 220 and/or 280.1 of the Code of Ethics (2017).¹

¹ And, as applicable, the equivalent provisions of the Code of Ethics (2019).

Particular 2

Allowed monies belonging to BVT Trust and/or Trevor Douglas to be paid into a bank account belonging to the Member, which was not a trust account, in breach of paragraphs 18 and/or 21 and/or 24 and/or 30 and/or 31 of PS-2 *Client Monies*.

BACKGROUND

1. The complainant Mrs Walker is the sister of the late Trevor Douglas, who died on 30 July 2018. The Member (and his firm) was the accountant for Mr Douglas and for the two trusts and the company referred to in the particulars. These were set up by Mr Douglas to own and operate his property and rental interests. BVT Holdings Trustees Ltd was set up to be a trustee of both trusts. The directors were the Member and his business partner, so they were effectively trustees of the two trusts.
2. The principal asset of the BVT Trust was a half share of the hunting block at Tokomaru. The other half share was owned by the Member. The BVT Trust had lent money to the Member to assist in the purchase of his half share, and also for his share of the construction costs of a lodge on the property. The loans had not been formally documented, but were shown in the trust's annual financial statements, which were prepared (or at least signed off) by the Member. The other trust, the DT Holdings Trust, owned all the shares in 2D Rentals Ltd, a business concerned with commercial rental properties.
3. Following Mr Douglas' death Mrs Walker became the sole capital beneficiary of the BVT Trust and final beneficiary of the DT Holdings Trust. She was also appointed a director of 2D Rentals Ltd and subsequently became its sole director. She was an executor of Mr Douglas' estate.
4. During 2019 there was a falling out between the Member and Mrs Walker and her family. This concerned access to and use of the Tokomaru property and lodge, and the ownership and possession of a digger and other items situated on the property. Mrs Walker claimed these belonged either to 2D Rentals Ltd or Mr Douglas, and she wished to retrieve them in her capacity as director of the company and executor of the estate. Matters escalated to the stage of the Member making a complaint to the Police after Mrs Walker removed some of the items. The Police treated the matter as a civil dispute.
5. In June 2019 the law firm which had acted for Mr Douglas raised with the Member and his partner whether they ought to step down as directors of the trustee company. The Member's partner did but the Member did not.
6. Again, in October 2019 Mrs Walker asked the Member to step down from his role as trustee as his conflict of interest was affecting the operations of 2D Rentals Ltd. The Member declined to do so.
7. In December 2019 Mrs Walker sought to engage another firm to take over as the accountants for 2D Rentals Ltd. The Member replied to a professional clearance letter stating that there were "*significant professional and ethical reasons*" why that firm should not accept appointment; and that Mrs Walker "*was not capable of exercising the duties required of a director*".
8. In January 2020 Mrs Walker again requested the Member to pass over the files for 2D Rentals Ltd to the new accountants. He refused, stating that it was not within her power as a director to change accountants. Mrs Walker's complaint to the Institute followed soon after.

9. The difficulties between the Member and Mrs Walker continued, and she took action in the High Court *inter alia* to have the Member removed as trustee of the trusts. The High Court action was settled at mediation in November 2020. That settlement covered a range of matters including that the Member resigned as trustee.
10. The new firm of accountants engaged by Mrs Walker undertook a review of the banking and accounting records and identified that monies from the BVT Trust and/or Mr Douglas had been paid into a personal bank account in the Member's name, which was not a trust account. The payments into and out of this account related mainly to the purchase, upkeep and other expenses for the Tokomaru property.

DECISION

11. While there is no prohibition on an accountant having a personal, business or trustee association with a client, there is always the potential for these to cut across the accountant's professional obligations. He or she must therefore remain vigilant for any situation that might lead to a conflict of interest or otherwise impair their professional judgement and objectivity. The accountant must be alert to the need to identify and then manage the conflict whenever it arises. As happened in this case, personal differences can rapidly escalate into serious conflicts, particularly if not identified at an early stage and appropriately managed.
12. From early 2019 it would have been apparent to the Member that he had a direct conflict between his role as the accountant for all three entities and his various other roles in relation to the Tokomaru property, compounded by his being a debtor of the BVT Trust. It became very real once the dispute arose about access to and use of the property by Mrs Walker and her family, and their efforts to retrieve the digger and other items. The Member's conduct showed a lack of insight into the conflict between his roles as trustee, co-owner and debtor, with his professional role as accountant.
13. The Fundamental Principle of Objectivity in the Code of Ethics requires members not to allow bias, conflict of interest or undue influence to override their professional or business judgements. Members should avoid situations that may impair objectivity. The Member's objectivity and professional judgement were clearly impaired as shown by his responses to Mrs Walker's attempts to change accountants, and his declining to step aside as trustee.
14. 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.
15. The Member's failure to identify the conflict of interest is particularly concerning, given the number of roles he was in. This, together with his failure to take steps to manage the conflict, and the impairment of his professional judgement and objectivity that resulted, were unacceptable to such a degree as to constitute conduct unbecoming an accountant.
16. The Member has acknowledged his breaches of the Fundamental Principle and that his breaches amounted to unbecoming conduct. He has expressed his sincere remorse and apologized to the complainant and her family.

PENALTY

17. The PCC seeks that the Member be censured. Counsel for the Member did not oppose this.
18. The factors identified by the High Court in *Roberts v Professional Conduct Committee of the Nursing Council of New Zealand* [2012] NZHC 3354 apply to the determination of penalty by professional disciplinary bodies including the Tribunal. The Court held that the penalty that should be imposed is one that:
 - Most appropriately protects the public and deters others.
 - Facilitates the setting and maintaining of professional standards.
 - Reflects the seriousness of the misconduct.
 - Punishes the practitioner (although subsequent Court decisions have taken the view that punishment is more a by-product of the other factors).
 - Allows for the rehabilitation of the practitioner.
 - Promotes consistency with penalties in similar cases.
 - Is the least restrictive penalty appropriate in the circumstances.
 - Looked at overall, is fair, reasonable and proportionate in the circumstances.
19. The range of sanctions available to the Tribunal includes the power to strike-off or suspend a Member for particularly serious misconduct. Neither such penalty is called for on this occasion. In other cases of serious and poorly managed conflicts of interest, the more usual penalty imposed is that of censure. This has often been accompanied by a fine or other monetary penalty, and by orders as to the management or oversight of the Member's practice or relevant aspects of it.
20. The Tribunal has given careful consideration to whether in addition to a censure as the parties have agreed, it should also impose a fine and/or an order concerning the Member's practice. It has decided against these further sanctions. While the Member allowed his personal interests to override his professional judgement and objectivity, there was no suggestion of any financial motive or personal gain. The Member fully co-operated with the disciplinary process, he pleaded guilty and expressed his genuine remorse. A further mitigating circumstance is the Member's long and unblemished professional record.
21. The Tribunal is satisfied that the circumstances leading to the Member's conduct were out of character and not a reflection on his professional competence. It has also taken into account that the Member has surrendered his practice certificate and has no intention of continuing in public practice. But for this the Tribunal would be likely to have directed a review of his practice.
22. In considering the *Roberts* factors the Tribunal is satisfied that the penalty of censure most appropriately reflects the need to protect the public and maintain professional standards, is consistent with similar cases and is the least restrictive that it is reasonable to impose in the circumstances.

Pursuant to Rule 13.51(m) of the Rules of the New Zealand Institute of Chartered Accountants the Disciplinary Tribunal orders that MICHAEL RAYMOND CURD be censured.

COSTS

23. The PCC submitted that in line with the Tribunal's practice note the Member should pay in full the costs incurred by the Institute in relation to the investigation and hearing of the complaint and charges, which total \$13,072.43.
24. Costs are in the discretion of the Tribunal but in the absence of reasons to the contrary, it will usually require a Member who has been found guilty to reimburse the costs incurred, which would otherwise be a charge on the Institute's membership. The Member did not submit otherwise.

Pursuant to Rule 13.53 of the Rules of the New Zealand Institute of Chartered Accountants the Tribunal orders that MICHAEL RAYMOND CURD pay \$13,072.43 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 publication. No GST is payable.

PUBLICATION

25. The PCC seeks publication of this decision on the Institute's website and in the official CAANZ publication *Acuity*, with mention of the Member's name and location. Rule 13.55 requires the Tribunal to make such a direction unless in its view there are exceptional circumstances for not doing so. The Member accepted that there are no such circumstances.
26. There was no request for the names or identities of any of the other persons involved to be suppressed.

In accordance with Rule 13.55 of the Rules of the New Zealand Institute of Chartered Accountants the decision of the Disciplinary Tribunal shall be published on the Institute's website and in the official publication *Acuity* with mention of the Member's name and locality.

RIGHT OF APPEAL

27. Pursuant to Rule 13.63 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.
28. 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.



Matthew Casey QC
Chair, Disciplinary Tribunal