D-12-0758C

A Complaint made under Section 34(1)(a) and 34(1A) of the Professional Accountants Ordinance (Cap.50) and referred to the Disciplinary Committee under Section 33(3) of the Professional Accountants Ordinance

Registrar of the HKICPA — Complainant

And

The 1st Respondent — 1st Respondent

The 2nd Respondent — 2nd Respondent

The 3rd Respondent — 3rd Respondent

Date of hearing: 16 April 2015

REASONS FOR DECISION

Background

The Parties

1. The Complainant is the Registrar of the Hong Kong Institute of Certified Public Accountants.

2. , the 1st Respondent, was an executive director and company secretary of a Hong Kong listed company, Company B, formerly known as Company G at the material time until May 2011 and December 2011 respectively when he resigned from such roles.

3. At the material time in 2009, the 1st Respondent was an accountant having over 15 years of experience in auditing, taxation and provision of financial consultancy services to companies in Hong Kong and the PRC.

4. The 2nd Respondent, was an independent non-executive director of the Company at the material time until May 2011 when he resigned from such a role. He was primarily engaged in assisting the Company in pitching and negotiating business deals and was not involved in the day to day compliance work of the Company.

5. The 3rd Respondent **The 3rd Respondent** The 3rd Respondent, was an executive director of the company at the material time until 10 May 2013, when she retired from the board of directors. At all material times, she was an accountant by qualification and profession. At the material time in 2009, she had had over 10 years of experience in financial accounting, management accounting and auditing.

Undisputed facts

6. The case stems from a disciplinary decision made by the Stock Exchange of Hong Kong Limited ("SEHK"). The factual matrix of the present case is essentially adopted from the facts as found in the SEHK's disciplinary proceeding and the witness statements filed on behalf of the Respondents. The above undisputed facts would be analysed in the context of the points the Respondents raised as to law and their defence of reliance on legal advice stated herein below.

7. The Company B had up to July 2007 acquired 29% interest in Birmingham City PLC ("BCFC"), a United Kingdom company then listed on the Alternative Investment Market of London Stock Exchange, which then owned a UK premier football league club.

8. In or around May 2009, the Company started internal discussions concerning an offer to BCFC shareholders ("the General Offer") to acquire all interests in BCFC not already owned by the Company ("the Acquisition").

9. The Acquisition was considered a substantial acquisition and the Company B engaged professional advisors to assist in and advise on the consideration, negotiation, structure and proposed funding of the proposed Acquisition.

10. Since May 2009, all three Respondents were involved in, aware of, and/or responsible for the negotiation and consideration of the proposed Acquisition, the Deposit (as particularized below) and the Escrow Agreement (as particularized below).

11. The Company B received irrevocable undertakings from four BCFC shareholders to accept or procure the acceptance of the General Offer, in respect of a total of 40,757,026 BCFC shares representing, in aggregate, approximately 50% of BCFC's existing issued share capital.

12. On 30 July 2009, Ko of Messrs. Robertsons (the Respondent's legal advisor) and Kingston (the Respondent's financial advisor) met with the Listing Division of SEHK which advised the Company that the proposed acquisition would become a notifiable transaction when its terms were finalized and the Company committed to the obligations of the Acquisition.

13. In or about early August 2009, the Company B considered making a £3 million deposit payment ("the Deposit") into an escrow account in relation to the proposed Acquisition.

14. On 14 August 2009, the board of the Company B approved of and the Company signed the escrow agreement ("the Escrow Agreement") with BCFC and the lawyers acting for BCFC in relation to the proposed Acquisition. All three Respondents participated in the board approval of the Escrow Agreement and the Deposit on behalf of the Company.

15. The Escrow Agreement provided for the Company B's payment of the £3 million Deposit to an escrow agent and that the Deposit would be:

    (i) Applied towards a payment of consideration of the Acquisition if the Acquisition proceeded by way of the General Offer being made and being declared unconditional in all respects by 30 October 2009

(ii) Forfeited to BCFC if the Acquisition did not proceed subject to its repayment to the Company in very limited circumstances specified in the Escrow Agreement, inter alia, the following:

i. The providers of the Irrevocable Undertaking were in breach of the terms of the Irrevocable Undertaking; or

ii. Any member of the BCFC Board or its advisors indicate publically that such board will not or may not unanimously recommend acceptance of the General Offer.

16. Rule 14.04 (1)(b) of the Exchange Listing Rules ("the Listing Rules") states that any reference to a "transaction" by a listed issuer includes any transaction involving a listed issuer writing, accepting, transferring, exercising or terminating to acquire or dispose of assets or to subscribe for securities.

17. Under Rule 14.06(3) of the Listing Rules, a major transaction means a transaction or a series of transactions by a listed issuer (the Company) where any percentage ratio is 25% or more but less than 100% for an acquisition.

18. Rule 14.40 of the Listing Rules provides that a major transaction must be conditional on the approval by shareholders.

19. On the same day (i.e. 14 August 2009), Ko submitted a revised draft Announcement to SEHK and over the next few days, Ko and SEHK continued to discuss the draft announcement.

20. According to The 3rd Respondent the 3rd Respondent 's knowledge, it was around that time that Ko informed her that the issue of whether the Deposit was a notifiable transaction had come up in the discussions between him and the SEHK. The 3rd Respondent the 3rd Respondent was told by Ko that he was of the firm view that the Deposit in their particular case did not constitute a notifiable transaction.

21. On 19 August 2009, there were several correspondence exchanged between Robertsons and SEHK. The most pertinent was a letter sent by fax from SEHK to Robertsons. SEHK stated that:

"We put on record our view that, according to the current facts available to us, the making of Deposit is a notifiable transaction for the Company B under the Listing Rules. We will consider any necessary follow-up action in this regards"

22. This was the first time that SEHK informed the Company B that the Deposit was a notifiable transaction which should be subject to shareholders' prior approval.

23. Shortly afterwards, Ko told The 3rd Respondent the 3rd Respondent about the fax from SEHK. Ko reassured her that he would be able to persuade SEHK that the payment of the deposit was not a notifiable transaction. The 3rd Respondent the 3rd Respondent relayed this advice from Ko to both the 1st Respondent and the 2nd Respondent .

24. On 20 August 2009, at 9:43 am, SEHK sent another fax to Robertsons withdrawing the "no further comment" letter sent at 9:07 pm the previous day. The material contents of this fax are set out below:

"We are writing to withdraw the "no further comment" letter that we sent to you at 21:07 on 19 August 2009.

We would be happy to clear your draft announcement submitted to us at 17:44 on 18 August 2009 and subsequent revised pages submitted on 19 August 2009 subject to the inclusion of the following disclosure in the draft:

"with respect to the Deposit of £3 million, the Stock Exchange is looking into the matter of whether this payment should be subject to applicable requirements of Chapter 14 of the Listing Rules including, in particular, prior shareholder approval.""

25. Ko promptly informed the 3rd Respondent of the contents of the aforementioned fax. He continued to reassure the 3rd Respondent that the Announcement would be cleared and that no shareholders' approval would be required prior to the payment of the Deposit as it did not constitute a notifiable transaction. The 3rd Respondent also relayed this advice to Ip and Chang.

26. On 20 August 2009, a Board meeting of the Company was held at 5:00 pm and it was unanimously resolved that the form and content of the announcement and the open offer be approved. Ip and the 3rd Respondent attended this meeting, but Chang did not.

27. On the same day (20 August 2009), the BCFC and the escrow agent signed the Escrow Agreement and the Company confirmed that it had deposited the deposit into the Escrow Agreement, without the approval of shareholders.

28. The Escrow Agreement involved the Company's payment of the Deposit of a £3 million which represented approximately 31.13% of the total assets of the Company as at 20 August 2009.

29. On 21 August 2009, the Company published an announcement disclosing the Acquisitions, the Deposit and other details of the Escrow Agreement. The contents of the announcement included the following:

    (i) The Company owned 29.9% and had received irrevocable Undertaking from BCFC shareholders (holding 50%) to accept the General Offer in respect of an aggregate total of 79.9% of the existing issued share capital of BCFC.

    (ii) The BCFC Board had granted unanimous agreement for giving of the irrevocable undertaking by certain BCFC shareholders.

    (iii) The Acquisition, if made, would constitute a very substantial acquisition for the Company under the Listing Rules and would be subject to the

disclosure and shareholders' approval requirements under the Listing Rules.

30. Subsequent to the 21 August 2009 announcement, on 29 September 2009, the shareholders of the Company approved retrospectively at an extraordinary general meeting the acquisition of BCFC including the Escrow Agreement. The General Offer was made to acquire the issued share capital of BCFC. The Acquisition was completed on or about 12 October 2009.

Sanctions by the Stock Exchange's Listing Committee

31. On March 2012, Stock Exchange's Listing Committee ("the Listing Committee") conducted a hearing on the conduct of the Company. No witnesses were called and the SEHK took the view that the Deposit was a notifiable transaction.

32. The Listing Committee by way of an announcement dated 19 September 2012 announced that (i) the Company had breached Rule 14.40 of the Exchange Listing Rules for failure to make the Escrow Agreement/Deposit subject to shareholder's approval; and (ii) the Respondents had knowledge at all material times of negotiation, and the terms of the Deposit including its size and non-refundable aspects and failed to prevent the Company's breach of the Rule 14.40, which thereby constituted a breach of their Director's Undertaking for failing to use their best endeavours to procure the Company's compliance with the Listing Rules.

33. The Director's Undertaking can be found at Appendix 5, Form B of the Listing Rules Part 2(a), which states that:

"in exercise of my powers and duties as a director of the issuer I, the undersigned, shall:

(i) Comply to the best of my ability with the Rules Governing the Listing Securities on the Stock Exchange of Hong Kong Limited from time to time in force (the "Listing Rules");

(ii) Use my best endeavours to procure that the issuer and, in the case of depositary receipts, the depositary, shall so comply; and

(iii) Use my best endeavours to procure that any alternate of mine shall so comply;"

34. The Listing Committee imposed a public censure on the company and the Respondents as well as required the Respondents to undergo 24 hours of training provided by course providers approved by the Listing Division.

Complainant's allegation

35. The Respondents face a charge under section 34(1)(a)(vi) of the Professional Accountants Ordinance (Cap. 50) in that they had failed or neglected to observe, maintain or otherwise apply a professional standard, namely paragraph 100.4(e) of the Code of Ethics for Professional Accountants (effective on 30 June 2006) ("the Code") and elaborated in section 150 of the Code, as evidenced by their breach of their Director's Undertaking for failure to use their best endeavours to procure the Company's compliance with the Listing Rules.

36. The provisions mentioned in the previous paragraph are set out as follows:

Section 34(1)(a)(vi) Professional Accountancy Ordinance (Cap. 50):

(1) A complaint that-

(a) a certified public accountant-

(vi) failed or neglected to observe, maintain or otherwise apply a professional standard; shall be made to the Registrar who shall submit the complaint to the Council which may, in its discretion but subject to section 32D(7), refer the complaint to the Disciplinary Panels

Paragraph 100.4(e) of the Code of Ethics for Professional Accountants (effect on 30 June 2006) ("the Code"):

100.4 A professional accountant is required to comply with the following Fundamental principles:

(e) Professional Behaviour

A professional accountant should comply with relevant laws and regulations and should avoid any action that discredits the profession. Each of these fundamental principles is discussed in more detail in Sections 110 – 150.

Section 150 of the Code:

150.1 The principle of professional behaviour imposes an obligation on professional accountants to comply with relevant laws and regulations and avoid any action that may bring discredit to the profession. This includes actions which a reasonable and informed third party, having knowledge of all relevant information, would conclude negatively affects the good reputation of the profession

150.2 In marketing and promoting themselves and their work, professional accountants should not bring the profession into disrepute. Professional accountants should be honest and truthful and should not:

(a) Make exaggerated claims for the services they are able to offer, the qualifications they possess, or experience they have gained; or

(b) Make disparaging references or unsubstantiated comparisons to the work of others.

Burden and Standard of Proof

37. There is no dispute that the burden of proving the charge rests with the Complainant.

38. The standard for the current disciplinary proceedings is the civil standard: *Solicitor v Law Society of Hong Kong* (FACV 23/2007, 13 March 2008). It has been held by the Court of Appeal that this standard would also apply in the case of professional misconduct of accountants: *Registrar of HKICPA v Chan Kin Hang Danvil*, CACV 246/12, 4 April 2014, with the established principle that the more serious the charge, the more convincing the evidence in support would need to be. However, in the

current case, the charge is not serious since it does not allege any fraudulent intent or personal gain.

Issues

39. Upon reading and hearing the submissions of the parties, the Disciplinary Committee discerns the following issues:

(i) Whether or not the SEHK ruling concerning the Respondents' breach of Director's Undertaking in 2012 is admissible and if so what weight should be accorded;

(ii) Did the Respondents use their best endeavours pursuant to their Director's Undertaking to ensure that the Company complied with the Listing Rules;

(iii) Whether the Respondents' alleged reliance on the legal advice of Ko exonerates their duty;

(iv) Whether there was a breach of Director's Undertaking hence a breach of the Listing Rules;

(v) Is a breach of Director's Undertaking and a breach of Listing Rules a breach of the "relevant laws and regulations" as stipulated in paragraph 100.4(3) of the Code;

40. The Disciplinary Committee notes that originally there was a point concerning delay in the prosecution of the present proceedings. However, it was not seriously pressed by the Respondents at the full hearing. In any event, the Disciplinary Committee finds that there is no merit in the allegation of delay of the present disciplinary proceeding and further there is no prejudice whatsoever caused to the Respondents.

Issue (i) - Whether or not the SEHK ruling concerning the Respondents breach of Director's Undertaking in 2012 is admissible and if so what weight should be accorded

41. In their written submissions, the Complainant and Respondents spent considerable efforts in arguing whether or not the Listing Committee's decision should be

admissible as evidence, and if so, what weight this Disciplinary Committee should accord to it.

42. This issue can be disposed of briefly. The rules of evidence to be applied are explained in rule 14 of the Disciplinary Committee Rules which states that "the strict rules of evidence dot not apply; the Disciplinary Committee may receive any material, and attach such weight to that material, as it considers appropriate." Therefore, the Disciplinary Committee finds that the Listing Committee's decision is clearly admissible as background information and fact; but the Disciplinary Committee is in no way bound by that decision. As to the weight to be attached to the Listing Committee's decision, this Committee will rely only on it as background information. This Committee will make its own finding on whether section 34(1)(a)(vi) of the Professional Accountants Ordinance Cap. 50 was breached by the Respondents from the undisputed evidence and facts above agreed in light of the defences raised.

Issue (ii) – Did the Respondents use their best endeavours pursuant to their Director's Undertaking to ensure that the Company complied with the Listing Rules

43. The Complainant raised the following points under this issue:

(i) The Respondents were put on notice on 18 August 2009 about the Deposit being potentially a notifiable transaction. In fact, the Listing Division indicated that the Deposit was a notifiable transaction. At that particular time, a reasonable and prudent director would have at the very least drawn up a contingency plan and/or implement such a plan. Such a plan could include suspending or postponing the transaction pending either clarification with the Listing Division, making a formal appeal against the Listing Division's decision if the Company felt that it was aggrieved or determine whether it was necessary to hold a shareholders' meeting.

(ii) The bottom line being that the Respondents should have prepared for all reasonable eventualities, which they failed to do.

(iii) At the hearing, the Complainant further suggested that there was no evidence that the Respondents ever questioned whether the company could go ahead with the Deposit, in light of the open position the SEHK took. No evidence shows that such an issue was even raised by any of the Respondents.

(iv) The Respondents also failed to hold a meeting with the SEHK to determine definitively whether or not the Deposit was a notifiable transaction.

44. The Respondents however submitted that in the circumstances, they had indeed exercised best endeavours, and that they had a complete defence because they relied on Ko's legal advice. As to the main defence raised by the Respondents' reliance on legal advice, that issue will be addressed in the analysis of issue (iii) below.

45. Given the circumstances, particularly the fax exchanges with SEHK, it is obvious that the SEHK was still looking into the matter at the time of the material Board meeting and there was every possibility that the transaction could be classified as notifiable transaction which carried grave consequences. At this stage, without regard to defence of reliance on the legal advice (which will be dealt with hereinbelow), it is clear that the Respondents having done virtually nothing at the Board meeting to make any suggestion to make contingent plans or defer the decision to enter into the Escrow Agreement and/or to pay the Deposit as submitted by the Complainant, the Respondents clearly had not used their best endeavour.

46. This Disciplinary Committee therefore finds that the Respondents failed to use their best endeavours as required by their Director's Undertaking, subject to the Respondents' defence of reliance on legal advice.

Issue (iii) – Whether the Respondents alleged reliance on the legal advice of Ko exonerates their duty

47. The Respondents' main defence is that on the question of whether the transaction was a notifiable transaction they relied on the legal advice of Ko and therefore they need not forewarn the Board or suggest any contingent plan at the Board meeting.

48. Both sides accept that in the discharge of their director's duties, the Respondents may rely on legal advice if the circumstances justify.

49. However, in the circumstances, the Complainant argued that the Respondents had abrogated from their duties because reliance must be based on comprehensible and proper legal advice.

50. Ms. Choy, for the Respondents, argued that Ko's advice was sufficiently detailed and sufficiently explained to the Respondents so that they believed that it was safe to rely on his advice. Ms. Choy also invited the Disciplinary Committee to consider the position of the Respondents at the material time, and not be influenced by hindsight, especially in light of the subsequent decision of Listing Committee that the payment of the Deposit was a notifiable transaction.

51. The evidence presented by the Respondents in their witness statements, which were not disputed by the Complainant thus were received by the Committee without the need to have the witnesses called or examined, does not show that Ko's material advice at the time was reduced into writing. In essence, the oral advice given by Ko at the material time was merely an assurance that Ko would be able to persuade the SEHK that the transaction was not notifiable. No reasons were related to the Respondents.

52. From the witness statements, it also appears that the Respondents relied on Ko's advice based on two reasons – (1) Ko's experience in dealing with such transactions

and (2) his professed confidence in persuading the SEHK that the Deposit would not be a notifiable transaction.

53. Ko also further sought a legal opinion to buttress his own stance that the payment of the Deposit as a non-notifiable transaction. However, the Disciplinary Committee finds such legal opinion of no assistance as it was unavailable to the Respondents at the material time. It should be noted that in the present case, the Respondents do not dispute that the transaction was in fact a notifiable transaction as decided by the SEHK.

54. While the money for the Deposit was paid into an escrow account, the escrow agent would pay the full amount to the vendor upon the fulfillment of certain conditions. This would render any approval of shareholders redundant. Therefore it should have been clear to the Respondents at the material time that once payment was made, there would probably be no return and thus deprived the general meeting of the chance to vet the transaction.

55. There is a total absence of evidence as to how the Respondents responded to the blank oral advice other than blind acceptance. In the Respondents' witness statements, there is no suggestion of any discussion or questioning relating to the legal advice of Ko amongst the Respondents themselves or the seeking of any clarification or supporting reasoning from Ko.

56. The Complainant suggested that "best endeavours" would include and require the Respondents to seek reasoned legal advice if the same was to be relied upon. The Committee agrees that in light of the above circumstances and grave consequences of the possibility that the transaction might be ruled to be indeed a notifiable transaction, at the very least, what the Respondents as prudent directors in discharging their duties and their undertaking to the SEHK should have done was to request from Ko supporting reasons for his advice so that the Respondents could make independent assessment as to whether such reasons in support were on the face reasonable and sound.

57. The Respondents completely failed to fulfill the above minimum requirement. The Committee therefore finds that what the Respondents did amount to abrogation of their duty to Ko and did not exercise any independent judgment on the blank oral and unreasoned legal advice. That was not exercising best endeavours as required of the Respondents.

Issue (iv) – Whether there was a breach of Director's Undertaking hence a breach of the Listing Rules

58. Even if the Respondents breached the Director's Undertaking, there must be a connection between a breach of Director's Undertaking to a breach of Listing Rules, which in turn must be considered "relevant laws and regulations" as found in the paragraph 100.4(e) of the Code. The latter question is discussed in issue (v).

59. The Complainant's argument begins with Appendix 5, Form B of the Listing Rules, which are entitled "Declaration and Undertaking with regard to Directors". Part 2 of Form B is the undertaking of the Director as described in paragraph 33.

60. Note 1 at the end of Form B states:

> "The failure of any person required to lodge this Form B to complete Part 1 of this Form truthfully, completely and accurately, or the failure to execute Part 2 of this Form B or to observe any of the undertakings made under that Part, constitutes a breach of the Listing Rules." (emphasis added)

61. The Complainant then draws reference from rule 9.11(3b)(iii) of Chapter 9 of the Listing Rules entitled "Equity Securities: Application Procedures and Requirements":
"9.11 The following documents must be lodged with the Exchange by a new applicant in connection with its listing application:
Together with Form A1

9.11(3b) – a written confirmation and undertaking signed by each director/supervisor and proposed director/supervisor to the following effect:
(iii) – to lodge with the Exchange in accordance with rule 9.11(38) a declaration and undertaking, in Form B/H/I in Appendix 5, duly signed by each director/supervisor and proposed director/supervisor."

62. The Complainant therefore argues that since rule 9.11(3b)(iii) dictates the prescription of Form B in the Appendix, the prescribed form then becomes part and parcel of the Listing Rules. Further, Note 1 expressly states that the failure to executes this part constitutes a breach of the Listing Rules.

63. The Disciplinary Committee finds that the above submission is correct; there is a logical nexus between the Director's Undertaking and the Listing Rules, as expressly stated in the undertaking and the Listing Rules themselves which the Respondents must be taken to know and agree to comply with when they signed the undertaking.

64. At the hearing, Ms. Choy conceded that the Company did in fact breach the Listing Rules and that if the Respondents were found to have breached the undertaking in Form B, then there would also be a breach of the Listing Rules.

65. The Committee therefore rules that a breach of the Director's Undertaking is a breach of the Listing Rules.

Issue (v) – Is a breach of Director's Undertaking and a breach of Listing Rules a breach of the "relevant laws and regulations" as stipulated in paragraph 100.4(3) of the Code

66. In the Complainant's written submission, s.3 of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO") is relied upon to interpret the word "regulation" as provided in paragraph 100.4(3). S.3 of IGCO defines "regulation" as "[having] the same meaning as subsidiary legislation and subordinate legislation".

67. "Subsidiary legislation" and "subordinate legislation" in turn mean any proclamation, rule, regulation, order, resolution, notice, rule of court, by law or other instrument made under or by virtue of any Ordinance and having legislative effect.

68. The Listing Rules were made pursuant to s.23 of the Securities and Futures Ordinance (Cap. 571) ("SFO") by the SEHK, a recognized exchange company, which is empowered to make such rules under the same section.

69. However, the above argument originally relied by the Complainant met two difficulties. Firstly, s.24(8) of the SFO expressly provides that rules made pursuant to s.23 (i.e. the Listing Rules) are not subsidiary legislation. Secondly, in the Court of Final Appeal's decision of *Stock Exchange of Hong Kong Ltd v new World Development Co Ltd & Others* 2006) 9 HKCFAR 234, it was decided that the Listing Rules were "not themselves statutory", albeit made by the SEHK and expressly authorized by the SFO. Such decision is binding on the Committee and is clearly supported by the said s.24(8) of the SFO.

70. At the full hearing, Mr. Ng, counsel for the Complainant, abandoned the said argument. Instead, Mr. Ng argued that the word "regulation" simply carries its ordinary meaning and does not require to have any legislative force. In support, he made reference to the definition of "Listed Entity" found on page 170 of the Code. "Listed Entity" is there defined as "an entity whose shares, stock or debt are quoted or listed on a recognized stock exchange, or are marketed under the regulations of a recognized stock exchange or other equivalent body." Therefore, the Code anticipates the relevance of the Listing Rules in the work of accountants. It was then argued that "regulations" should simply mean rules, which may relate to the conduct of accountants in their exercise of duties which may be discharged with knowledge of accounting. Hence, Listing Rules fall within that class of regulations which govern the conduct of listed companies as well as their directors (who may often be accountants) on matters governing their conduct in conjunction with the SFO, although the Listing Rules themselves do not have any legislative force.

71. In reply, Ms. Choy advanced several arguments on behalf of the Respondents. Ms. Choy submitted that the word "relevant" precedes "laws and regulations" in the Code, and therefore the alleged breach must be of *relevant* laws and regulations. She argued that in discharging their duties as directors, the Respondents were not engaged as professional accountants in the practice of accountants. Hence such duties and governing rules related to their positions as directors are not "relevant" rules and regulations. Therefore, even if the Disciplinary Committee determined that the Listing Rules were regulations, they were not "relevant regulations", such that the condition for application of paragraph 100.4(3) of the Code is not fulfilled.

72. To further supplement this point, Ms. Choy made reference to s. 23(9) of the SFO, which states that:

> "for the purposes of subsections (7) and (8), a person shall be regarded as acting in the capacity of a solicitor or certified public accountant in private practice if in the course of private practice he provides legal or professional accountancy services to a client, but shall not be regarded as so acting where, in respect of a matter governed by rules made under this section, he is also connected with the matter in any other capacity."

73. Ms. Choy submitted that if accountants are acting in matters in their capacities other than as professional accountants in practice as acountants, they should not be caught by paragraph 100.4(3).

74. Having carefully considered the parties' submissions, the Committee is of the view that the approach in interpreting the meaning of "relevant regulations" must be a purposive approach and having regard to the context of the Code with the spirit and purpose thereof in mind. Section 150.1 of the Code expressly provides that:

> "The principle of professional behavior imposes an obligation on professional accountants to comply with relevant laws and regulations and avoid any action that may bring discredit to the profession. This includes actions which a

reasonable informed third party, having knowledge of all relevant information, would conclude negatively affects the good reputation of the profession".

75. Supported by the said section, the purpose and spirit of the Code, including paragraph 100.4(3), must be to regulate the conduct of accountants such that if the rules and regulations in question are breached it could adversely affect the good reputation of the profession of accountants. The above spirit and purpose is also reflected in the other limb of the same paragraph where an alternative breach would happen if any defendant fails to "avoid any action that discredits the profession".

76. The Listing Rules are a set of rules that are made pursuant to s.23 of the SFO in order to, *inter* alia, properly regulate and efficiently operate the market, its participants and protect the investing public. The Listing Rules have grave and serious regulatory effect on the conduct of listed companies and their directors. Further, an accountant who is appointed to act as a director, (whether executive or a non-executive) of a listed company would occupy the post so that in discharging their duties they would for sure make use of their expertise and knowledge of accounting such that any work could not be divorced from their profession and knowledge of accounting. To suggest otherwise is absurd and ignores commercial reality.

77. Further, no assistance can be derived from s.23(9) of the SFO, which is a specific provision to be applied in a specific situation where a certified public accountant provides professional accountancy services in the context of the matter set out in s.23(7) and (8). It has no bearing in the present issue.

78. Therefore, the Disciplinary Committee concludes that the Listing Rules are within the meaning of "relevant regulations" under paragraph 100.4.(3) of the Code.

79. Furthermore, Mr. Ng also referred the Disciplinary Committee to page 170 and 171 of the Code where "professional accountant" is defined as "an individual who is a member of the Hong Kong Institute of Certified Public Accountants"; and a "professional accountant in business" is "a professional accountant employed or

engaged in an executive or non-executive capacity in such areas as commerce, industry, service, the public sector, education, the not for profit sector, regulatory bodies or professional bodies, or a professional accountant contracted by such entities".

80. Mr. Ng therefore argues that the Respondents, being professional accountants, were professional accountants in business when they were engaged as directors of a listed company; and therefore the Code would apply to them. Further, Rule 3.10 states that at least one Independent Non-executive Director (i.e. Chang) must have the appropriate professional qualification or accounting expertise, of which the SEHK expects to be, *inter alia*, an accountant or auditor or someone with the relevant accounting experience.

81. The Disciplinary Committee agrees with the above Complainant's submissions of Mr. Ng, which renders further support to the Disciplinary Committee's said conclusion. The Disciplinary Committee therefore rules that while the Respondents were acting as directors of the Company, their capacity as professional accountants were nonetheless engaged in the context of the Code. As such, a breach of the Listing Rules would be considered a breach of the relevant laws and regulations as provided in paragraph 100.4(3) of the Code.

Conclusion

82. For the above reasons, the Disciplinary Committee finds that the Respondents did breach their Director's Undertaking for failing to use best endeavours to procure the Company to comply with the Listing Rules and thus they were in breach of the relevant Code as charged. Furthermore, the Disciplinary Committee provisionally intends to order costs against the Respondents, subject to considering written submissions of the parties on costs.

Sanctions

83. The Disciplinary Committee makes the following directions for parties to make written submissions concerning appropriate sanctions and on costs:

(i) The Respondents shall lodge with the Disciplinary Committee and serve on the Complainant a written submission on the appropriate sanction(s) to be imposed within 14 days of this Decision.

(ii) The Complainant shall lodge with the Disciplinary Committee and serve on the Respondents a written submission on sanctions (if the Complainant so desires) and on the appropriate order of costs together with a statement of costs relied on by the Complainant within 14 days of receipt of the Respondents' submission stated in direction (1) above.

(iii) The Respondents shall lodge with the Disciplinary Committee and serve on the Complainant a reply submission within 14 days of receipt of the Complainant's written submission stated in direction (2) above.

Dated the 10th day of September 2015