

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

BETWEEN

The Registrar of the
Hong Kong Institute of Certified
Public Accountants

Complainant

AND

Respondent

DECISION ON SANCTION AND COSTS

Background

1. On 29th June 2009, at a Disciplinary Committee hearing, the Respondent was found to have breached s.34(1)(a)(vi) of the Professional Accountants Ordinance, Cap. 50 ("PAO") for reasons set out in the Committee's Reasons. The remaining issues to be determined are the sanction to be imposed and costs.
2. At the hearing on 7th September 2009, [Mr. H] of [Messrs. J] appeared for the Complainant and [Ms. L], on the instructions of [Messrs. T] appeared for the Respondent.

3. Having heard submissions from both parties and considered the evidence and the circumstances of the case, the Committee orders that the Respondent:
 - a. Be reprimanded
 - b. Pay a penalty of HK\$50,000 to the Institute;
 - c. Pay the following sums as costs and expenses of these proceedings: a) HK\$85,000, being the costs and expenses of the Complainant; and b) HK\$55,000, being the costs and expenses of the Disciplinary Committee ("the Order").

Here are our short reasons for the Order.

Relevant Legislations, Case Law and Guidelines on Sanction and Costs

4. The relevant parts of Section 35 of the PAO read:

"(1) If a Disciplinary Committee is satisfied that a complaint referred to it under section 34 is proved, the Disciplinary Committee may, in Its discretion make any one or more of the following orders-

- (a) an order that the name of the certified public accountant be removed from the register, either permanently or for such period as it may think fit;*
- (b) an order that the certified public accountant be reprimanded;*
- (c) an order that the certified public accountant pay a penalty not exceeding \$500000 to the Institute;*
- (d) an order that the certified public accountant- (Amended 18 of 2006 s. 74)*
 - (i) pay the costs and expenses of and incidental to an investigation against him under Part VA; and*
...
and the Disciplinary Committee may in any case-
...
 - (iii) make such order as the Disciplinary Committee thinks fit with regard to the payment of costs and expenses of and incidental to the proceedings, whether of the Institute (Including the costs and expenses of the Disciplinary Committee) - or of any complainant or of the certified public accountant, and any costs and expenses or penalty ordered to be paid may be recovered as a civil debt."*

5. On the question of the sanction to be imposed, the Committee was referred to a number of previous decisions of other disciplinary committees:
- a. In a case that was heard on 14th June 1988, the Respondent accountant was retained to act as special adviser to a company in its financial reorganization. During the said engagement, the Respondent accountant agreed to take shares in the new group of companies that were to be formed under the reorganization. The Disciplinary Committee found that the relevant accountant had neglected to comply with Professional Ethics Statement 1.203 and was reprimanded for the breach.
 - b. In a case that was heard on 3rd February 1997, the Respondent accountant pledged a property that he was an owner of to a bank to secure general banking facilities granted by the bank to his client. For this act, the Respondent accountant admitted to have failed or neglected to observe, maintain or otherwise apply Professional Ethics Statement 1.203 and was accordingly reprimanded.
 - c. In a case heard on 19 November 2008, the Respondent accountant allowed a company that he beneficially owned to act as a nominee director of his audit client. The relevant accountant was found to have failed or neglected to observe, maintain or otherwise apply Professional Ethics Statement 1.203 and Statement 1.303 of "General Guidance - Restrictions on Appointments as Secretaries and Directors of Audit Clients". The relevant accountant was reprimanded, ordered to pay penalty of HK\$50,000 and to pay HK\$250,000 as costs of the disciplinary proceedings.
6. On the question of costs, the Committee notes the following paragraphs of the Guidelines for the Chairman and the Committee on Administering the Disciplinary Committee Proceedings Rules (March 2007 issue) ("Guidelines"):
- "69. It is evident from [s. 35 PAO] that any costs order made by the Committee may provide for payment of both another party's legal costs and the expenses of the Committee.*
- 70. With respect to payment of another party's legal costs, the Committee has a discretion to determine the extent to which costs should be recoverable. However, such discretion must be exercised reasonably. The following paragraphs describe how such discretion should be exercised:*
- (1) Save where there is good reason to do otherwise, the Committee should award costs to the successful party in the proceedings.*
 - (2) Where a number of charges have been brought and some have been successfully defended, it should ordinarily be appropriate to reduce the costs awarded in such proportion as to reflect the outcome of the proceedings.*

(3) *The starting point in any award of costs should be the actual costs (i.e. indemnity costs) incurred by the successful party, subject to the Committee being satisfied that the actual costs were reasonably and necessary incurred. The Committee may reduce the amount awarded to the extent it considers costs to have been incurred unnecessarily or extravagantly. In deciding what reduction is reasonable, the Committee may consider being guided by the practices of the courts in civil proceedings (which are complex). These are summarized in Annex 5.*

72. *With respect to payment of the costs and expenses of the Committee, the position is somewhat different. Unlike the legal costs of the parties, it is to be presumed that the entirety of the expenses incurred by the Committee (including expenses for items such as hiring, interpreters, paying for transcription services, and renting premises) are necessary and proper."*

7. In *A Solicitor and The Law Society of Hong Kong*, CACV 302 of 2002, Cheung JA held that the approach taken by the courts towards costs orders in both civil and criminal cases should be applicable to disciplinary proceedings; that it must be in rare and exceptional circumstances that an Indemnity costs order should be made. The circumstances must necessarily entail reprehensible, scandalous or outrageous conduct on the part of one of the parties.

Arguments of Parties, Analysis and Reasons for Decision

Sanction

8. The Complainant is neutral on the issue of sanction.
9. The Respondent submits that a reprimand is the most appropriate sanction. In support of a simple reprimand, the Respondent draws attention the following factual circumstances:
- a. There is no evidence to show that this was a deliberate breach of The Statement of Ethics;
 - b. That the professional fees received by the Respondent was only HK\$3,000;
 - c. The Respondent has been practicing under the name of the firm since 1988 and has an unblemished professional record;
 - d. The Respondent now takes up his entire firm's professional work and hence is unlikely to commit similar breach in the future.
10. The present breach is of a very serious nature. The Committee cannot stress how important it is for accountants such as the Respondent to respect the core values of independence and professionalism as set out in the Professional Ethics Statement. It may well be that the Respondent was not fully aware that he was in breach of the Professional Ethics Statement, but that was because of his lack of understanding of those statements, and not because of his ignorance in what [Mr. R] was doing as his part time employee. That ignorance, in our view, is no mitigation to his wrongdoing.

11. However, taking into account the Respondent's unblemished professional record, and that he has taken steps to avoid committing similar breaches of the Professional Ethics Statement, the Committee takes the view that a reprimand and a penalty of HK\$50,000 is an adequate penalty.

Costs

12. Both parties agree that the Respondent should bear the costs of the prosecution of the complaint. The question is how much of the Complainant and the Committee's costs should the Respondent bear?
13. On 17th August 2009, the Complainant produced a Statement of Costs setting out the costs incurred by the Complainant and those charged by the former clerk of the Committee totaling HK\$275,404.34.
14. By his revised bill of costs to the Committee dated 25th August 2009, the former clerk of the Committee agreed to reduce its fees from HK\$94,191.00 to HK\$68,824.00.
15. The Complainant argues that since the complaint was proved against the Respondent, the Complainant (and in turn other members) should not have to bear the costs of the proceedings. The Respondent should bear all the costs of the proceedings. Although the Complainant does not object to the Cheung JA's reasoning in *A Solicitor and The Law Society of Hong Kong*, CACV 302 of 2002, the Complainant says that since the costs of the prosecution of the complaint is not fully reflected in the present Statement of Costs, even if the Respondent is made to pay the whole of the sum set out therein, that is merely asking him to bear most of the costs and not indemnity costs.
16. The Respondent submits that:
 - a. Applying Cheung JA's reasoning in *A Solicitor and The Law Society of Hong Kong*, CACV 302 of 2002, the Respondent should not be made to pay the Complainant's costs on an indemnity basis as the Respondent's conduct in these proceedings was reasonable and does not in any way amount to reprehensible, scandalous or outrageous;
 - b. Both the Complainant's costs are dearly unreasonable and extravagant. Although the Complainant can choose to employ lawyers that charges extravagant rates (HK\$181,213.00), the present case could clearly have been dealt with by lawyers that charged more humble fees and the Respondent should not have to bear the Complainant's extravagance; and
 - c. The former clerk to the Committee could clearly have spent less time in carrying out the list of work that he carried out. In the premises, even at its reduced price, the Respondent should not be made to fully indemnify the Committee's costs in retaining the former clerk.
17. The Committee tends to agree with the Respondent's submissions that the Complainant's costs are unreasonable and extravagant and some of the charges of the former clerk should not have been incurred and the Respondent should not have to bear such costs.

18. At the outset, it was clear that this was a simple case. In fact, we were surprised to find the Complainant not prosecuting the present complaint with their in house legal team. Instead, the Complainant retained a team of solicitors (one partner, one associate solicitor and two trainees) that charged extravagant rates to handle this case. We consider that at most the Complainant should only have retained a single solicitor charging modest hourly rates (e.g. HK\$3,800) to deal with this complaint.
19. Applying the rationale of gross sum assessment, the Committee accordingly reduces the Complainant's costs recoverable from the Respondent from HK\$181,213.00 to HK\$85,000.
20. We also find that the clerk to the Committee could have spent less time in carrying out the services listed in his Skeleton Bill of Costs dated 25th August 2009. The costs recoverable from the Respondent for the costs of the clerk of the Committee are accordingly reduced to HK \$55,000.

Dated 24th December 2009

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