NEW ZEALAND
INSTITUTE OF
CHARTERED
ACCOUNTANTS

BEFORE THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS APPEALS COUNCIL

IN THE MATTER OF	an appeal against a decision of the Disciplinary Tribunal of the New Zealand Institute of Chartered Accountants dated 14 January 2019
BETWEEN	**SUSHEEL DUTT**
	Appellant
AND	**THE PROFESSIONAL CONDUCT COMMITTEE OF THE NEW ZEALAND INSTITUTE OF CHARTERED ACCOUNTANTS**

DECISION OF APPEALS COUNCIL

Dated 3 September 2019

Members of the Appeals Council:
Les Taylor QC (Chairman)
Gary Leech FCA
Aaron Walsh FCA

Counsel:
Richard Laurenson for the appellant
Terry Sissons for the Professional Conduct Committee

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The New Zealand Institute of Chartered Accountants regulates the conduct of members of Chartered Accountants Australia and New Zealand that reside in New Zealand in accordance with the New Zealand Institute of Chartered Accountants Act 1996 and other legislation regulating the profession of accountancy in New Zealand.

Introduction

1. This is an appeal from a decision of the Disciplinary Tribunal dated 14 January 2019. Mr Dutt appealed findings by the Disciplinary Tribunal that he was guilty of conduct unbecoming an accountant and of negligence or incompetence in a professional capacity of such a degree and/or so frequent as to reflect on his fitness to practise as an accountant and/or tends to bring the profession into disrepute. Mr Dutt also appealed the Tribunal's order suspending him from membership of the Institute for a period of 18 months and the Tribunal's order as to costs.

2. Mr Dutt subsequently applied for leave to amend his grounds of appeal to include an appeal of the Disciplinary Tribunal's order that the member's name, location and details of the decision be published in two local newspapers, the Marlborough Express and the Blenheim Sun with mention of the member's name and locality.

3. The PCC did not oppose the application to amend the grounds of appeal. Leave is granted accordingly.

Application to adduce further evidence

4. Mr Dutt made an application to adduce further evidence by way of an affidavit and related documents dated 8 July 2019. The application was opposed.

5. The proposed evidence was directed at:

    (i) Providing a more detailed background and curriculum vitae and describing the nature of Mr Dutt's practice.

    (ii) Providing evidence as to the effect of suspension on his firm's audit practice including the effect on his ability to retain staff.

    (iii) The alleged effect of publication arising from a 2011 prosecution on his consultancy practice.

    (iv) Details of the staff employed by the practice and training provided to staff.

    (v) Staff testimonials (adding two further staff testimonials from staff who were not engaged at the time of the Disciplinary Tribunal hearing).

    (vi) Concerns about the publicity arising from publication in the local newspapers and the likely detrimental impact.

6. Apart from the two additional references from staff (which we do not consider to be sufficiently material to justify further evidence) all of the evidence is evidence which

was available and could, with reasonable diligence, have been provided at the time of the Disciplinary Tribunal hearing.

7. The principles applicable to applications to adduce further evidence were discussed in the Appeal Council's recent decisions in *McPhedran*[1] and in *Gunaratne*.[2]

8. In *Gunaratne* the Appeals Council summarised its approach to such applications. The principles can be summarised as follows:

   (i) The purpose of the appeal procedure is not to give members an opportunity to improve on evidence which could have been put before the Disciplinary Tribunal.

   (ii) Where the evidence is not fresh and is directed at issues of guilt or penalty, it must be both credible and cogent such that not to allow the evidence may well result in a miscarriage of justice.

   (iii) Where the proposed further evidence relates to publication such evidence will not generally be allowed unless not to do so would likely result in serious injustice. Even then the Appeals Council would retain a discretion not to allow the evidence unless there are good reasons for failure to provide the evidence before the Disciplinary Tribunal.[3]

9. In our view the proposed evidence described in (i) to (iv) above is evidence which is little more than an attempt to improve on evidence which could have been obtained prior to the hearing before the Disciplinary Tribunal. Although directed at describing the nature of Mr Dutt's practice and the detrimental effects that suspension might have on his practice, we do not see anything in it which could amount to a miscarriage of justice if we were not to allow it.

10. We note, in particular, that the perceived effect on Mr Dutt's audit practice was mentioned in submissions before the Disciplinary Tribunal. The proposed evidence simply seeks to expand on that submission but there is no reason why the evidence could not have been provided at the time.

11. Detrimental effects arising from a member's suspension are a normal consequence of suspension. Although the proposed evidence addresses the particular effects on Mr Dutt's practice, we do not think it adds anything significant other than to confirm

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1 *McPhedran v PCC,* NZICA, AC, 15 February 2019.
2 *Gunaratne v PCC,* NZICA, AC, 12 July 2019.
3 *Gunaratne* at paras [18]-[30].

that the effects of suspension will vary depending on the particular nature of the practitioner's practice.

12. Insofar as publication is concerned, damage to reputation and possible impacts on the business of the practitioner are a normal consequence of publication. Although we accept that, because of the effect of the internet, publication in newspapers may have longer lasting effects than publication on the Institute's website and in its magazine *Acuity*, we do not see that as a reason for not ordering publication where the conduct of the practitioner is such that publication in local newspapers is desirable.

13. In short, we are not satisfied that any of the proposed evidence is such that failure to allow it might result in a miscarriage of justice (in the sense of a wrong finding of guilt or inappropriate penalty) or serious injustice as a result of publication. The application for leave to adduce further evidence is therefore dismissed.

Appeal against findings of conduct unbecoming

14. Mr Dutt, in his notice of appeal, appealed the Tribunal's findings in respect of Charge 2 (conduct unbecoming) and Charge 3 (negligence or incompetence of such a degree or so frequent as to reflect on Mr Dutt's fitness to practise and/or to bring the profession into disrepute).

15. Counsel's submissions in support of the appeal focused on challenging the finding by the Tribunal of conduct unbecoming. Mr Laurenson, on behalf of Mr Dutt, accepted in his submissions that there was sufficient evidence before the Disciplinary Tribunal to support its findings of guilt in respect of Charge 3. We agree. The real issue on appeal is whether the Disciplinary Tribunal's finding of conduct unbecoming is wrong and should be overturned on appeal.

16. The charges against Mr Dutt arise out of his conduct as voluntary administrator of company A (in liquidation), as liquidator of company B (in liquidation) and as liquidator of company C (in liquidation). In each instance the particulars allege that Mr Dutt accepted appointment as liquidator/voluntary administrator when he was not eligible to do so because he had, within two years immediately prior to the appointments, provided professional services to the companies. Acceptance of those roles in the circumstances was alleged to be in breach of the Fundamental Principles of Objectivity and/or Professional Competence and Due Care and/or Professional Behaviour.

17. In respect of companies B and C, allegations were made that Mr Dutt failed to state in the public notice of his appointment as liquidator that the names of the companies had been changed in the 12 months prior to the date of notice and that (in respect

of company B) he had failed to prepare a list of company B's known creditors and/or disclose them in his first report as liquidator and had failed, in his first liquidator's report, to provide an adequate statement of that company's affairs. In respect of company B, it was also alleged that Mr Dutt had failed to respond and/or respond in a timely manner to correspondence received by him from the Inland Revenue on 8 June 2017; and/or 4 July 2017; and/or an email of 14 July 2017 in breach of Fundamental Principles of Professional Competence and Due Care and/or Professional Behaviour.

18. In respect of company A, the particulars also allege that Mr Dutt had acted in an obstructive and/or untimely, and/or unprofessional manner in responding to requests from the liquidator of company A pursuant to s 261 of the Companies Act 1993 (**the Act**) in breach of the Fundamental Principles of Integrity and/or Professional Competence and Due Care, and/or Professional Behaviour.[4] In addition it was alleged that, in respect of company A, Mr Dutt provided information to company A's liquidator that he knew and/or ought to have known was false and/or misleading; and/or was furnished recklessly; and/or omitted; and/or obscured information, in that he:

    (i) In answer to the liquidator's queries, advised that he and/or his firm, did not hold any information pertaining to company A other than its end of year financials, when he and/or his firm held other relevant information; and/or[5]

    (ii) Advised the liquidator that company A's business was sold subsequent to his appointment as voluntary administrator on 24 August 2017, when in fact the sale had settled prior to his appointment on or about 24 June 2016; and/or[6]

    (iii) In response to the liquidator's request to provide details regarding how the proceeds of the sale of company A's business were applied after being received into his and/or his firm's trust account, provided documents which omitted and/or obscured relevant information.[7]

    (iv) In breach of the Fundamental Principles of Integrity, and/or Professional Behaviour.

19. All of the particulars of the charges alleged against Mr Dutt were admitted before the Disciplinary Tribunal. Notwithstanding those admissions Mr Dutt, through his counsel, submitted that the evidence did not support the charges before the Disciplinary Tribunal of (1) professional misconduct, (2) conduct unbecoming and

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4 Particular 1(f).
5 Particular 1 (g) (i).
6 Particular 1 (g) (ii).
7 Particular 1 (g) (iii).

(3) negligence or incompetence in a professional capacity. In particular, it was argued that the evidence was insufficient to establish "intentional dishonesty". Mr Dutt admitted charges that he had breached the Rules and/or the Institute's Code of Ethics.

20. Although the Disciplinary Tribunal did not make any express finding of "intentional dishonesty" it expressly found that the conduct referred to in Particulars 1(g)(i) and (ii) was deliberate and intending to mislead. It found that the conduct breached the Fundamental Principle of Integrity (the requirement for fair dealing, truthfulness and to be straightforward and honest). It found that, although the conduct did not amount to misconduct, it was conduct unbecoming.[8]

21. In respect of Particular 1(f), the Tribunal held that the evidence and the relevant documents disclosed that Mr Dutt acted in an unprofessional and deliberately obstructive way towards the liquidator of company A and her staff. It held that the conduct was in breach of the Fundamental Principle of Integrity and was of such a nature as to constitute conduct unbecoming.

22. Mr Laurenson in his submissions before us sought to persuade us that the findings of unbecoming conduct based on those particulars and the supporting evidence were wrong. We summarise his arguments as follows:

    (i) That the conduct of Mr Dutt was not "intentionally dishonest".

    (ii) That the onus of proof on an allegation of dishonesty is a high one (albeit on the balance of probabilities).

    (iii) The conduct was not dishonest because Mr Dutt would have known that both the statements in particulars 1(g)(i) and (ii) were wrong and they "could not have been made with the belief that the liquidator's enquiries would end"[9] and "could be explained by other factors such as illness, overseas travel, pressure at work, or by reason of an accumulation of factors, to get rid of an inquiry, but not with a dishonest intention".

    (iv) Rule 110.2 of the Institute's Code of Ethics provides that a member shall not knowingly be associated with reports, returns, communications or other information where the member believes that information contains a materially false or misleading statement. Mr Dutt relied on the proviso to Rule 110.2 which provides that a member will be deemed not to be in breach of paragraph 110.2 "if the member provides a modified report in respect of a matter

[8] Disciplinary Tribunal decision at para 8.
[9] Appellant's submissions at para 35.

contained in paragraph 110.2". It was argued that, because the information being requested by the liquidator was ultimately provided, the proviso contained in Rule 110.3 applied so that Mr Dutt was deemed not to be in breach of Rule 110.2.[10]

23. We have read the evidence of Ms Fatupaito who was one of two joint liquidators of company A. Ms Fatupaito, either directly or through staff of KPMG who assisted her, was involved in the correspondence between the liquidator and Mr Dutt which gave rise to the charges in respect of company A.

24. Ms Fatupaito was appointed as liquidator on 17 October 2017. On the same day Mr Dutt was requested by telephone to provide all information he held in relation to the company. That telephone conversation was followed by a letter requiring him to provide certain specified information in accordance with s 261 of the Companies Act Act 1993 (**the Companies Act**).

25. Mr Dutt did not respond to that letter. On 22 November the liquidator issued a Notice of Power to Obtain Documents and Information and Notice of Examination requiring Mr Dutt to attend an examination on oath or affirmation at KPMG's offices in Christchurch on 5 December 2017 and to provide various specified documents.

26. Mr Dutt responded by email on 24 November 2017.[11] He stated that:

> I will send as much Infor (sic) by end of day to you. But as explained we do not hold any information here apart from the end of year financials.

27. He advised that he would be overseas and would not be available until 15 January and that, although he may return before Christmas, he would be on holiday until the office opened on 15 January.

28. The liquidator responded on the same day requesting documentation in respect of Mr Dutt's international flights and, provided the information was satisfactory, advising that the liquidators would be prepared to reschedule the examination to a date when all parties were available in February 2018. The liquidator also offered to pay reasonable airfare costs for the proposed examination.

29. In an email dated 29 November 2017, and notwithstanding the offer by the liquidator to pay airfare costs, Mr Dutt claimed costs of attendance based on travel by bus of close to $8,000 and advised that he had asked his lawyer to have an application for costs filed "so we have an answer soon". That was in response to an email from the

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[10] We have not found it necessary to determine whether the proviso to Rule 110.2 might apply in this case. We doubt that it does but we note that breach of Rule 110.2 was admitted and that, in any event, the conduct as proved was in breach of Rule 110.1.

[11] PCC 047.

liquidator proposing attendance for the examination on 20 February 2018 with an offer to pay the cost of reasonable airfares.

30. On 5 December 2017 the liquidator wrote to Mr Dutt attaching a copy of the agreement for sale and purchase of the business of company A which settled on 24 June 2016 (before the appointment of Mr Dutt as voluntary administrator). The letter asserted that:

> We have been advised that you negotiated and handled all material aspects of the sale on behalf of the company's director … furthermore we have been advised the sum of $35,000 was deposited to Parkers Business Solutions Limited trust account …

31. The liquidator then specifically brought Mr Dutt's attention to the provisions of the Companies Act which provide that a person is disqualified from appointment as an administrator if that person is disqualified under s 280(1) from being appointed or acting as a liquidator of the company. Section 280(1)(ca) provides that a person may not be appointed to act as a liquidator of a company if that person or that person's firm has, within two years immediately before the commencement of the liquidation, provided professional services to the company.

32. The letter requested, pursuant to s 261 of the Companies Act, details of how the proceeds of the sale were applied and a copy of the Company's resolution enabling Mr Dutt to act as voluntary administrator. The letter went on to indicate that, if the proceeds of the business sale had been disposed of inappropriately further remedies would be sought under s 301(1) of the Act (requiring an order for an inquiry and for repayment of any misapplied proceeds). The letter also noted various provisions of the Chartered Accountants Australia and New Zealand (**CAANZ**) Code of Ethics "which we suspect you may be in breach of including the Principles of Integrity, Professional Competence and Due Care and Professional Behaviour."

33. Mr Dutt responded by email dated 18 December stating he was confused as to the letter from the liquidator and stating:

> Obviously you are a tax consultant and do not have experience in solvency matters, maybe you are clearly in breach of sections 110 and 130 and 150 of the Code of Ethics. It is clear evidence from your letter that you have or are unable to differentiate between administrator and liquidator.
>
> The business was sold while I was an administrator, so once again your comments don't seem to make sense saying I am disqualified.
>
> All information we hold will be sent to you in due course.
>
> Your comment about misapplied funds is noted, given that you do not have any facts and make such accusations is nothing but defamatory.
>
> Your threat as to member of the CAANZ (and breach of its Ethics) is noted as people who live in glass houses should not through (sic) stones.

> The books are open to you and we have no reason to withhold any information. We were very surprised at your letter and still like to know where did this come from?

34. The liquidator responded by email on 20 December reiterating that Mr Dutt appeared to have been disqualified from acting as a voluntary administrator and suggesting that he seek legal advice. The letter also requested that Mr Dutt provide all documents in his possession relating to company A including, but not limited to, the sale of the company's assets and the distribution of the sale proceeds, by no later than 20 January 2018.

35. The letter also advised that, if Mr Dutt could not confirm availability to attend on 20 February 2018 "then we ask that you propose a date which you can attend with certainty." That email was in response to an email from Mr Dutt, of 19 December 2017, in which he stated that a better time for him would be March as he would be in New Zealand but that, given the workload, he would be returning to Fiji for six weeks in January.

36. On Friday, 19 January, Mr Dutt provided some information to the liquidator but not the information requested as to how the proceeds of sale of the business had been dealt with. In an email on 22 January 2018 the liquidator requested that information together with further information as to Mr Dutt's remuneration as administrator. The email stated that:

> If you fail to provide the information requested above and provide a date on which Susheel is available for the section 261 examination we will have no alternative but to advise CAANZ.

37. Mr Dutt responded on 22 January stating that:

> We have not had time last week but will be done when the admin lady returns to send you the receipts and payments. It seems that our fees worries you, what a surprise, section 261 does not lay any timeframe, plus your request falls in the queue so when staff are free they will supply the information.
>
> Given Christmas and holiday one would think you will understand but it seems your threat keeps coming which is short of professionalism and I will seek legal advice and approach CAANZ myself.
>
> Black mailing (sic) and bulling (sic) is a breach of the Code of Ethics, why don't you check it out today as I did.
>
> I had clearly advised you that I will not be available until end of February, as I have commitment in Overseas office. Once that commitment is defined I will be available. But first I will need to check that as you don't have office in Blenheim and taken a job here it is your responsibility to travel to Blenheim not ours.

38. On 25 January, the liquidator wrote to Mr Dutt acknowledging receipt of some information but still not the information requested as to details of how the proceeds of sale had been applied and details of his fees and remuneration received through

the course of the administration. It requested that the information be provided by close of business on 2 February 2018:

> If we receive the information requested, we will not require you to attend our offices to be formally examined, however if the information requested is not received by tomorrow then we will lodge a complaint with the Institute of Accountants and look to take legal proceedings against you for various breaches of the Companies Act 1993.

39. Mr Dutt had previously, on 19 January 2018, provided a brief summary of receipts and payments from the voluntary administration but insufficient information to properly inform the liquidator of the dates and nature of the payments. That further information was requested in the email dated 25 January 2018.

40. On 30 January 2018 the liquidator again wrote to Mr Dutt requesting details of the payments made during the voluntary administration and also details of the creditors of company A, a full breakdown of the administration costs of $11,189.50 and a full breakdown of wages paid to a director of the company. The email requested provision of the information by no later than 5pm on 1 February 2018. Mr Dutt responded on 1 February 2018 stating that he was in the Fiji office and "have asked staff to send the information."

41. On the same day one of Mr Dutt's staff sent through the further information including a third revision of the schedule of receipts and payments, copies of the invoices for the $11,189.50 charged for his administration and a one-page summary of wages paid to company A's director.

42. The third revision of the receipts and payments schedule provided insufficient details and did not contain all of the information requested. There was no supporting evidence of payments made to the director of company A (such as wage slips or PAYE). In addition, it appeared from the schedule that Mr Dutt's firm had received payment of outstanding fees from 2014 (before the voluntary administration) and that the wages paid to the director had been paid in preference to other secured and preferential creditors. It also appeared that some of the fees relating to the administration may have been in relation to services provided prior to the date of Mr Dutt's appointment relating to the sale of company A's business.[12]

43. On 21 February 2018, the liquidator wrote to Mr Dutt setting out those and other concerns that were raised.

[12] The Disciplinary Tribunal found that this particular assertion was not made out on the evidence before it.

44. Mr Dutt did not respond to that email until 16 March 2018 purportedly because he was "out of the country in Sydney attending a family wedding". He provided brief responses to the concerns raised in red type and went on to state:

> I also note despite your email that you did not need me for examination you have complaint to NZICA. It seems you are after the money as there are no funds available. You were told this in the beginning. You have used five people in your office picking and dropping the job with each not knowing what they are doing. Your mismanagement has led to this. Do you want us to arrange payment of your fees. Please advise.

45. The liquidator had made a complaint to NZICA on 26 February 2018.

46. The liquidator responded to Mr Dutt by letter dated 28 March 2018. That letter, among other things, pointed out information which had been requested but had not been provided and pointed out why, based on the information which had been provided, the liquidator considered that payments made to the director as wages should not have been made in priority to a secured creditor and preferential amounts owed to the Inland Revenue.

47. At paragraphs 101-115 of her evidence, Ms Fatupaito sets out in detail the basis for the particulars 1(e)(i)-1(e)(ii) as to payments made by Mr Dutt, as voluntary administrator, in preference to company A's secured and preferential creditors. No evidence was called rebutting that evidence. Then counsel for Mr Dutt had confirmed to the Disciplinary Tribunal that Ms Fatupaito's affidavit could be regarded as an agreed statement of facts.[13]

48. On the basis of that evidence it appears that incorrect distributions, including outstanding fees paid to Mr Dutt and wages paid to the director of company A, were made in preference to a secured creditor and in preference to preferential debts owed to the IRD. In other words, payments made in the course of the administration were paid to Mr Dutt's firm and to a director of company A when those funds should have been used to repay the secured creditor and the IRD. This evidence was not challenged by Mr Dutt.

49. The Disciplinary Tribunal found that the conduct described above in relation to company A constituted conduct unbecoming. The Disciplinary Tribunal also held that delays in responding to enquiries from the Commissioner of Inland Revenue in relation to company B, while not by themselves constituting unbecoming conduct, was unbecoming because, when combined with the evidence in relation to company A, it demonstrated similar behaviour by Mr Dutt in responding to proper enquiries in relation to his conduct of the liquidation of company B.

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[13] Disciplinary Tribunal transcript at p. 30 and Disciplinary Decision at p. 7

50. In a costs judgment by Associate Judge Osborne[14] the High Court held that Mr Dutt's firm had:

(i) acted for company B as its tax agent;

(ii) prepared the company income tax return to 31 March 2016;

(iii) prepared the income tax return of the company's sole shareholder and director;

(iv) registered a change of name of the company from its previous name to its current name; and

(v) on 26 May 2017 had filed documents with the Companies Office placing the company into liquidation and appointing Mr Dutt as liquidator.

51. The High Court costs judgment related to an application by the Commissioner of Inland Revenue to have Mr Dutt removed as liquidator. In the end it was unnecessary for the Commissioner to proceed with the application. Mr Dutt resigned as liquidator and the High Court ordered costs of the application against Mr Dutt.

52. The High Court found that Mr Dutt was disqualified from acting as liquidator because he had previously provided professional services to the company. At paragraph 22 of his decision, the Associate Judge stated:

> It is clear on the evidence filed that Mr Dutt was in breach of a number of material requirements of the Act. Perhaps most significantly, his explanation as to the circumstances in which he provided professional services both to the company and to Mr X in the period before liquidation does not bring him within the qualification requirements under section 280(1)(cb) of the Act. Mr Dutt was caught by those requirements and should not have accepted appointment as liquidator in the absence of a court order. His position was then further undermined by breaches of a number of provisions of section 255 of the Act. The Commissioner's legitimate concerns in relation to those matters were then understandably heightened through Mr Dutt's failure to respond to correspondence from the Commissioner and her solicitor and the Commissioner's notice under section 286(2) of the Act.

53. Mr Laurenson, in his submissions to us, sought to persuade us (in much the same way as his counsel appeared to try and persuade Associate Judge Osborne) that Mr Dutt's prior dealings with the shareholder and director of company B did not disqualify him from acting as liquidator because it was a single or one-off instruction relating to liquidation of the company rather than professional services provided by Mr Dutt in the two years prior to the liquidation. Mr Dutt did not, however, give evidence himself before the Disciplinary Tribunal. He attempted to rely instead upon affidavits filed by him and the previous director and shareholder of company B in the

[14] *Commissioner of Inland Revenue v Susheel Dutt* [2018] NZHC 1221.

proceedings brought by the Commissioner of Inland Revenue.[15] That evidence did not satisfy the Associate Judge that Mr Dutt was not disqualified from acting as liquidator. Nor does it satisfy us.

54. Although it appears that the first dealing Mr Dutt had with Mr X as director of the company was on 15 March 2017, his actions in being appointed as tax agent, filing returns on behalf of both the company and Mr X and facilitating the change of name of the company prior to being placed into liquidation, cannot be explained away as being professional services provided in relation to the liquidation itself. Although Mr X may well have approached Mr Dutt with the intention of instructing him to take steps to liquidate the company, Mr Dutt clearly provided services to both Mr X and the company prior to the company being placed into liquidation. Mr Dutt was therefore disqualified from acting as liquidator without an order of the court.

55. As already noted, Mr Dutt had admitted the particulars of the charges against him including that he had accepted appointment when he was disqualified from doing so. It is too late to now challenge that particular, particularly in circumstances where Mr Dutt has not given evidence before the Disciplinary Tribunal or been subject to cross-examination.

Conclusion on finding of conduct unbecoming

56. Having reviewed the evidence we agree with the findings of the Disciplinary Tribunal that the conduct described in Particulars 1(a), (e)(ii), (f) and (g)(i) and (ii), and (d) and 3(a) constitute conduct unbecoming. In our view accepting appointment to act as voluntary administrator/liquidator in circumstances where he was disqualified from doing so and then acting to further his clients and/or his own interests in the liquidation of company A is properly described as conduct unbecoming.

57. Mr Dutt's delay and obfuscation when challenged or asked questions in relation to his conduct as voluntary administrator/liquidator goes well beyond mere incompetence and is properly described as conduct unbecoming. That is particularly so where, as in this case, Mr Dutt made false statements which he knew to be false in the course of responding to proper enquiries from the liquidator of company A. In respect of the correspondence with the liquidator of company A, Mr Dutt's allegations of breach of ethics by the liquidator and her staff, when there was no proper basis for those allegations at all, was unacceptable and wholly unprofessional.

58. In our view the evidence demonstrates a disturbing pattern of behaviour by Mr Dutt of accepting appointments under the Companies Act which he was disqualified from accepting and then, once appointed, failing properly to discharge his duties or

[15] See PCC 374-384 and PCC 386.

respond in a timeous and open manner to the liquidator of company A and to the CIR.

59. We have no doubt that there was deliberate obfuscation by Mr Dutt and that he deliberately lied to the liquidator of company A especially in respect of his assertion that the business of company A had been sold and the proceeds received during the voluntary administration. In addition, his behaviour in responding to the liquidator of company A by making baseless allegations of bullying, intimidation and breach of the Code of Ethics was highly unprofessional and was, in our view, conduct unbecoming.

60. We note that, in the two instances where the company had changed its name within 12 months of the liquidation, the failure to record that in the public notice required to be made as liquidator in respect of companies B and C is disturbing. That is particularly so where, in the case of company B (and, according to the Companies Office records, company C) Mr Dutt and/or his firm had been actively involved in changing the name of the company and advising the company prior to liquidation. No explanation for these failures was provided.

61. We are far from persuaded that the Disciplinary Tribunal's findings of conduct unbecoming are wrong. We agree with them. Although there was no express finding of "intentional dishonesty" (in the sense that Mr Dutt knowingly made false statements with the knowledge and intention that they would mislead the liquidator), such a finding, if it had been made, would likely have elevated the conduct to the more serious charge of professional misconduct.

62. We remain unclear as to what is meant by the terminology "intentional dishonesty". We explored this in the course of argument before us. Mr Laurenson accepted that the concept drew a distinction between conduct which was objectively dishonest (e.g. where a person knowingly makes false statements) as opposed to being subjectively dishonest (e.g. where the person subjectively knew and understood that the conduct was dishonest). [16]

63. Looked at objectively, however, the untruths were deliberate and intended to mislead the liquidator or, at least, further Mr Dutt's obfuscation and avoidance of providing truthful and timely responses to the liquidator's legitimate requests. His conduct fell well below that which would be expected of an open, truthful and honest professional in his position. Applying the test of the Court of Appeal in cases such as *Withers*[17] we consider that Mr Dutt's conduct can properly be described as dishonest.

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[16] See transcript at pp 67/68

[17] *Zurich Australian Insurance Ltd v Withers* [2017] 2 NZLR 745

64. Mr Dutt's conduct in deliberately making false statements when responding to questions from the liquidator of company A was in our view dishonest. Although he may not have been "intentionally dishonest" in the sense of him being consciously aware that what he was doing was dishonest[18] we do not see that as an answer to the charge of his conduct being unbecoming. We are not at all persuaded by the argument that the untruths were so obviously false that there cannot have been any such "intentional dishonesty".

65. In our view Mr Dutt's conduct, particularly his deliberate lies and his attacks on the integrity of the liquidator of company A was, in respect of the former, dishonest and, in respect of the latter, wholly unprofessional. It was also self-serving particularly in relation to the allegations by the liquidator that Mr Dutt was disqualified from acting as voluntary administrator of company A.

66. We therefore dismiss the appeal in respect of the findings by the Disciplinary Tribunal of guilt in respect of Charge 2 (conduct becoming) and Charge 3 (negligence or incompetence in a professional capacity).

Penalty

67. We approach the appeal as to penalty on the same *Austin, Nicholls* basis that we have approached the appeal as to guilt. The onus is on the appellant to persuade us that the decision of the Disciplinary Tribunal was wrong but, in approaching that issue, we must make our own assessment of the merits of the appeal as to penalty. If we are persuaded that the Disciplinary Tribunal decision is wrong, we should make our own decision as to the appropriate penalty.

68. Mr Laurenson in his submissions on penalty made it clear that, even if we found that the conduct was sufficient to constitute the more serious charge of conduct unbecoming, the penalty of suspension imposed by the Disciplinary Tribunal was disproportionate and unduly harsh.

69. Mr Laurenson argued that the misconduct in this case could be attributed in large part to Mr Dutt's unfamiliarity with the role of voluntary administrator/liquidator. Mr Laurenson argued that this unfamiliarity, combined with Mr Dutt's desire to further the interests of his clients, led him into serious errors of judgment.

70. One of the factors that the Disciplinary Tribunal took into account in deciding penalty was a previous finding of guilt in respect of a disciplinary charge in 2011 arising from

[18] In that regard we note that the finding by the Disciplinary Tribunal that the conduct was deliberate and intending to mislead was clearly open to it on the evidence. If Mr Dutt wished to argue that his conduct was not subjectively dishonest he would have needed to give evidence and be subject to cross examination.

Mr Dutt's conduct while representing his client in court. In that case Mr Dutt made serious and wholly unjustified allegations of criminal conduct on the part of the solicitor for the other party in the litigation alleging that she had deliberately concealed documents to pervert the course of justice.

71. The Judge in that case found that the allegation was unsupported by the evidence. The Judge noted that Mr Dutt was handling the matter but as a lay person was ill equipped to do so and that he failed to take the appropriate steps to protect his client's position.

72. At paragraph 13 of the decision the Judge stated that:

> If Mr Dutt was a lawyer I would be referring his affidavit to the Law Society as the allegation against Ms Potter is completely without foundation and would constitute a breach of the rules of professional conduct.[19]

73. The Disciplinary Tribunal in its decision in this case noted that:

> When you last appeared before the Tribunal you assured it that the type of conduct (false and misleading statements and undertaking roles without having the necessary competence) would not happen again, but it has.[20]

74. Mr Laurenson endeavoured to persuade us that the common denominator in both this case and the previous disciplinary case was Mr Dutt's unfamiliarity in the roles which he was undertaking. He suggested that Mr Dutt's conduct could be explained on that basis.

75. Mr Laurenson argued that the ban of five years on Mr Dutt undertaking any form of insolvency engagement was a sufficient protection against further repetition of this kind of conduct. Mr Laurenson also stated that Mr Dutt had no intention of practising in the area of insolvency and would not oppose an increase in the period of the ban to 15 years.

76. We do not accept that the common denominator in this case is the incompetence of Mr Dutt in the particular roles he was undertaking at the time of the conduct complained of. In both cases the reaction of Mr Dutt to express or implied criticism of his conduct was to make baseless allegations of misconduct by other parties and to cast blame for his own failures on professionals representing other parties.

77. In this case that conduct is aggravated by the deliberately false statements made by him to the liquidator of company A which, as we have found, was deliberate and dishonest. His conduct fell well below the standards of conduct required by the

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[19] *The Hire Company Ltd v Kenneth Contracting Ltd & Lester Kenneth George Lovell*, District Court Blenheim, CIV-2010-006-00046, 17 August 2010.

[20] Disciplinary Tribunal decision at p11.

Institute including, in particular, the Fundamental Principles of Integrity and Professional Behaviour.

78. In general terms the conduct of a practitioner in acting solely in the best interests of his clients is both admirable and a fundamental requirement of the practitioner's duties to his clients. We cannot accept, however, the suggestion that Mr Dutt's conduct in this case is mitigated by the claim that Mr Dutt was doing what he believed to be in the best interests of his clients.

79. The evidence suggests that Mr Dutt saw his clients as being the persons who were shareholders and/or directors of the companies for whom he was acting as voluntary administrator/liquidator. There is also evidence of self interest in defending his appointment and in paying an outstanding debt to his firm in preference to preferred creditors.

80. Mr Dutt seems to have had no appreciation that, in taking on the role of voluntary administrator/liquidator, his duties were to protect the interests of the creditors of the company rather than the interests of the shareholders or directors whose interests he was seeking to further. Accepting the roles in those circumstances was itself conduct unbecoming as was Mr Dutt's conduct in seeking to further the interests of his clients and, to some extent, his own interests. We reject, therefore, the suggestion that Mr Dutt's misplaced dedication or loyalty to his clients' interests is a mitigating factor when considering penalty.

81. Mr Laurenson also sought to persuade us that nobody had suffered any loss as a result of Mr Dutt's conduct. The uncontested evidence, however, was that Mr Dutt had paid monies to the widow of the deceased shareholder of company A which should not have been paid in preference to the IRD and a secured creditor. Similarly, it would appear that debts for services provided by Mr Dutt's accountancy firm had been paid to his firm which were most likely voidable preferences.

82. Mr Laurenson submitted that a longer period of prohibition from engaging in insolvency work, say 15 years, would meet the technical requirements of Rule 13.40(n) and would give effect to Mr Dutt's assurance that, so far as he was concerned, the ban was permanent and he was prepared to forego indefinitely any insolvency engagements. Mr Laurenson noted that Mr Dutt is currently 61 years of age.

83. Although we accept that the imposition of the ban on engaging in insolvency work is likely to protect the public against the kinds of serious conflict of interest which was exhibited by Mr Dutt in this case, we do not consider that to be a complete answer to his conduct or protection of the public. Whether engaged in an insolvency practice

or not, chartered accountants are from time to time required to respond to information requests.

84. The demonstrated tendency of Mr Dutt to respond to any real or perceived criticism of his conduct, or to respond to requests for information that may not be in the interests of his (perceived) clients, by attacking the conduct of the person making the request and obfuscating or delaying any response, could well arise regardless of whether Mr Dutt is engaged in insolvency work. Although defensiveness or obfuscation/delay may not always warrant imposition of suspension where, as here, they manifest themselves by attacks on the other person's integrity, ethics and character and by deliberately false statements it is no answer to say that Mr Dutt reacts badly when operating in an unfamiliar role or when he perceives that he is under attack.

85. We accept, as did the Disciplinary Tribunal, that there is no general concern about Mr Dutt's conduct of his chartered accountancy practice. He seems to be regarded well by his clients and staff who provided references. In our view, however, the evidence in this case demonstrates a serious lack of insight by Mr Dutt to his responsibilities and duties and a failure to learn from his previous experience in respect of the 2011 disciplinary charges against him.

86. Finally, Mr Laurenson sought to persuade us that Mr Dutt's conduct could be explained at least in part by health issues which he suffered in 2017 and his unavailability overseas through much of the period from October 2017 through to February 2018. We note, however, that apart from affidavit evidence provided from the Inland Revenue Department proceedings against him, Mr Dutt did not give evidence in support of those submissions.

87. We note that Mr Dutt maintains a chartered accountancy practice in Fiji but also has several staff in New Zealand who would have been able to collate the information required when Mr Dutt was overseas. The evidence relating to Mr Dutt's health issues, although perhaps explaining, in part, his failures to address the enquiries from the IRD, does not assist to any significant degree in explaining his failures to promptly, truthfully and professionally respond to the enquiries from the liquidator of company A.

88. Having considered all of the evidence and the careful and comprehensive submissions of Mr Laurenson, we are not persuaded that the imposition of a period of suspension was wrong. In our view, for the reasons discussed above, Mr Dutt's conduct was very much at the serious end of the scale. The deliberate falsehoods, the likely losses suffered by creditors as a result of his failure to recognise the conflict inherent in his accepting the roles of voluntary administrator/liquidator, the furthering of his clients'

interests and, to a lesser extent, his own interests at the expense of other creditors bring the conduct close to the standard required for a finding of professional misconduct. It is certainly at the higher end of the slightly less serious charge of conduct unbecoming.

89. In our view, a period of suspension is, taking into account all of the factors discussed in *Roberts*[21] and the decision of the Appeals Council in *Power*[22], the least restrictive penalty appropriate and is one which, when looked at overall, is fair, reasonable and proportionate.

90. We note that, before us and before the Disciplinary Tribunal, it was argued that the effect of suspension on Mr Dutt's audit practice meant that the effect of suspension was disproportionate. Whilst we accept that the effect on Mr Dutt's audit practice will be greater than suspension on a practitioner in a larger firm where other qualified persons could carry out the audit work, we do not consider that this outweighs the necessity for an order of suspension.

91. In reaching the conclusion that suspension is appropriate we have not considered in any detail the length of the period of suspension ordered by the Disciplinary Tribunal in this case. Neither Mr Laurenson nor the PCC addressed us as to whether the period of suspension (18 months) was appropriate. Ultimately, the length of the period of suspension is a matter of judgment upon which different persons may reach different conclusions having regard to all of the circumstances.

92. We are not persuaded that the Disciplinary Tribunal was wrong in imposing a suspension period of 18 months. The period of 18 months is generally consistent with other cases where a period of suspension has been imposed for conduct unbecoming although the facts in each case are different and the period of suspension therefore varies depending on the facts.

93. We dismiss the appeal against penalty.

Appeal against costs

94. Mr Dutt's appeal against the order of the Disciplinary Tribunal as to costs was not pressed before us. In approaching an appeal as to costs, we adopt the approach in *May v May.*[23] There is nothing to suggest that, in approaching costs, the Disciplinary Tribunal has acted on a wrong legal principle, has taken into account irrelevant

[21] *Roberts v PCC of the Medical Council of New Zealand* [2012] NZHC 3354
[22] *Power v NZICA*, AC, 2 December2016
[23] *May v May* [1982] 1 NZLR 165 at 170.

considerations, or failed to take into account relevant considerations, or that it is plainly wrong. The appeal against costs is therefore dismissed.

Publication

95. As noted earlier in this decision, Mr Dutt was granted leave to appeal that part of the order relating to publication of the decision and the member's name and location in the Marlborough Express and the Blenheim Sun. There is no appeal against the decision to order publication on the CAANZ website and in its official publication Acuity.

96. In the Disciplinary Tribunal there was little argument on the question of publication in the local newspapers. Then counsel for Mr Dutt simply submitted that such publication was "not required. It will be enough to publish in the Acuity magazine and CAANZ website."

97. For its part the PCC simply sought publication in the local newspapers. Mr Sissons pointed out that the Disciplinary Tribunal had a broad discretion to order publication in addition to the default publication in the CAANZ website and Acuity. He submitted that, in exercising that broad discretion, the Disciplinary Tribunal had an unfettered discretion both having regard to the interests of the public on the one hand, and to the interests of a member on the other.[24]

98. In submissions before us Mr Laurenson argued that publication in the local newspaper could result in the newspaper itself publishing an article in relation to the decision of the Tribunal. Were such an article to be published it was likely that, whenever Mr Dutt's name was searched on the internet an article would come up. He therefore argued that the effects of publication are much more long-lasting and potentially harmful as a result of the long-lasting and ready availability of such publications online.

99. We accept that there is a risk of such long-lasting publicity which is probably greater than the risk which might arise from publication only in the CAANZ website and in its professional publication *Acuity*. Whilst we consider that the risk of long-lasting publication of this nature arising from publication in local newspapers is a relevant factor in making a decision to order such publication, we do not consider that, in itself, that risk should be determinative of whether such publication is desirable.

100. Our review of previous decisions of the Disciplinary Tribunal and the Appeals Council as to the circumstances in which publication is ordered beyond the CAANZ website and Acuity indicates that little, if any, consideration has been given to any principles

[24] Disciplinary Tribunal transcript at p83.

which should govern the exercise of the discretion. The test under Rule 13.44 (b)[25] is simply that such publication may be ordered when the Disciplinary Tribunal considers it "appropriate" to do so.

101. We do not propose, in this decision, to endeavour to set any guidelines or principles which should be taken into account in exercising the discretion. We consider, however, that where the conduct in question is of a serious nature and, particularly where such publication is considered to be necessary or desirable in order to protect the public, then publication in newspapers and similar media may well be appropriate.

102. Given the serious nature of the conduct of Mr Dutt in this case, we consider that the order to publish the decision and the name and location of Mr Dutt in the local newspapers was justified and appropriate. That is particularly so in light of the quite similar conduct exhibited by Mr Dutt in the 2011 disciplinary proceeding which resulted in publication of an article in the local newspapers at that time. We consider that, given the nature of the conduct of Mr Dutt, there is a genuine public protection interest in ordering publication beyond the CAANZ website and *Acuity*.

103. We are not, therefore, persuaded that the decision of the Tribunal to order such publication in this case was plainly wrong.

104. We therefore dismiss the appeal against the order to order publication in the Marlborough Express and the Blenheim Sun.

Conclusion

For the reasons discussed above the appeal is dismissed.

Costs

105. Both the application to adduce further evidence and the appeal have been unsuccessful. Mr Dutt should therefore pay costs of both the application to adduce further evidence and the appeal.

106. We leave it to the parties to agree the quantum of costs. If they are unable to agree within 20 working days of the date of this Decision, the PCC should file submissions as to costs within a further 10 working days with Mr Dutt to file any reply within 10 working days of receipt of the PCC submissions.

[25] Rule 13.55 of the 2019 Rules

Dated this 3rd day of September 2019.

L J Taylor QC
Chairman
Appeals Council